DIGEST OF CASES ON THE PROPRIETY OF CLOSING ARGUMENTS

A. IN GENERAL

Living Centers of Texas, Inc. v. Penalver, 217 S.W.3d 44
Tex.App.San.Antonio,2006.
Requirement that trial counsel confine their argument strictly to the evidence and to the arguments of opposing counsel does not mean that jury arguments must be sterile or nondescript; instead, counsel has great latitude in discussing the facts and issues, and may discuss the environments or circumstances of the case, the reasonableness or unreasonableness of the evidence, and the probative effect, or lack thereof, of the evidence. In jury argument the facts of the case may be related to history, fiction, personal experience, anecdotes, Bible stories, or jokes.

Green v. Charleston Area Medical Center, Inc., 600 S.E.2d 340
W.Va.,2004
Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice, or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice, or mislead the jury.

Bender v. Adelson, 901 A.2d 907
N.J.,2006
As a general matter, counsel is allowed broad latitude in summation and counsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd.

Whirlpool Corp. v. Camacho, 251 S.W.3d 88
Tex.App.Corpus.Christi,2008
Plaintiffs' attorney did not improperly seek to inflame the passions and prejudices of jury during products liability trial arising from fatal home fire that originated with defectively-designed clothes dryer, by accusing dryer manufacturer of blaming family in response to manufacturer's contributory negligence defense, by accusing manufacturer of refusing to take responsibility for its products, by asking jury if it should be open season on people who used extension cords, by referring to manufacturer's suggestion that the fire was caused by fire bomb thrown under home by a terrorist or gang, by referring to manufacturer's product as the “Easy Burn 100,” and by claiming that Consumer Product Safety Commission's Report on Lint Fires disclaimer was result of people in the dryer industry trying “to cover their butts.”

Cassim v. Allstate Ins. Co., 94 P.3d 513
Cal.,2004
The right of counsel to discuss the merits of a case in argument to the jury, both as to the law and

facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom; adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.

B. ARGUMENTS ABOUT FACTS AND EVIDENCE

1) Argument must generally be confined to facts in the record

Hoskins v. Business Men's Assurance, 116 S.W.3d 557
Mo.App.W.Dist.,2003
Though the law indulges a liberal attitude toward argument, particularly where the comment complained of responds to prior argument of opposing counsel, the Court of Appeals will not condone knowingly false statements to a jury in closing argument.

McConnell v. Akins, 586 S.E.2d 688
Ga.App.,2003
The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair.

Tsoukas v. Lapid, 733 N.E.2d 823
Ill.App.1.Dist.,2000
Trial court properly prohibited patient from stating during closing argument of medical malpractice action that no one had testified they treated him after the shift-change in the hospital's emergency room, where evidence revealed that patient was examined, evaluated, and instructed regarding his condition following the shift-change.

Winschel v. Jain, 925 A.2d 782
Pa.Super.,2007
Cardiologist's counsel could not reply to testimony of forensic pathologist by arguing alternate theories of death for which there was no evidence.

Enterprise Leasing Co. v. Sosa, 907 So.2d 1239
Fla.App.3.Dist.,2005
Trial court did not abuse its discretion in wrongful death action against automobile rental company by sustaining objections to statements made by rental company's counsel during closing argument as to other possible causes of accident, where counsel was making argument based on facts not in evidence.

Cler v. Providence Health System-Oregon, 2008 WL 4058571
Or.App.,2008
Trial court abused its discretion in allowing improper closing argument based on facts not in evidence by defense counsel in nursing malpractice case; counsel referred to facts outside the record by explaining to jury that the reason that an expert witness failed to testify was because of scheduling problems.

Lisowski v. MacNeal Memorial Hosp. Ass'n, 2008 WL 795104
Ill.App.1.Dist.,2008
Defense counsel's misstatement in closing argument in medical malpractice case that patient died of one type of heart problem when in fact he died of a different heart problem was minor and harmless to plaintiff. A minor misstatement in a closing argument should not be regarded as error

Bodkin v. 5401 S.P., Inc., 768 N.E.2d 194
Ill.App.1.Dist.,2002
Closing argument regarding intoxication is impermissible in negligence case absent supporting evidence of intoxication. Counsel may not raise a suggestion of intoxication by innuendo during argument absent supporting evidence of intoxication, in a negligence case.

Santos v. Chrysler Corp., 715 N.E.2d 47
Mass.,1999
Improper statements by plaintiff's counsel during closing argument in products liability action against vehicle manufacturer which implied that manufacturer's vehicles were involved in an excessive number of accidents were improper.

Powderly v. South County Anesthesia Associates, Ltd., 245 S.W.3d 267
Mo.App.E.Dist.,2008
Trial court did not abuse its discretion by permitting defendants to play entire videotape of patient's brain surgery during its closing argument of medical malpractice action brought by patient and his wife against anesthesiologist and anesthesia company, which resulted after patient suffered a stroke and injury to his right brain during the surgery following anesthesiologist's act of giving patient six different medications to lower his blood pressure; parties' pre-trial discussion regarding use of the videotape during expert testimony did not rise to level of a stipulation or an objection that may have restricted admission of the videotape into evidence, record was clear that both parties offered the entire videotape into evidence without reference to any limitations, and trial court admitted the entire videotape into evidence.

Alderson v. Bonner, 132 P.3d 1261
Idaho.App.,2006
Counsel's statement in argument that videotaper had told the jury that he had spent tens of

thousands of dollars in attorney fees prior to trial was untrue and constituted error, as videotaper had been prevented from mentioning those fees by a pretrial order.

2) Evidence admitted for limited purposes may only be argued for those purposes

Rios v. City of Chicago, 771 N.E.2d 1030
Ill.App.1.Dist.,2002
Counsel for city in pedestrian's slip and fall action against city improperly argued hearsay information included in eyewitness's description of contemporaneous weather conditions that was not admissible as substantive evidence but that only formed basis of city's expert's opinion; counsel improperly stated that eyewitness's description of weather conditions established the fact that at the time of pedestrian's accident the conditions were icy and sleeting.

3) Counsel may also argue facts of common knowledge

Irwin County v. Owens, 568 S.E.2d 578
Ga.App.,2002
It is not error to refer during closing argument to matters within common knowledge.

4) Any evidence admitted without objection may be argued regardless of whether it was otherwise admissible

Alderson v. Bonner, 132 P.3d 1261
Idaho.App.,2006
Videotaper's use of a stepladder to surreptitiously look through windows where young women resided was relevant to their claims for invasion of privacy and emotional distress such that attorney's referral to stepladder, which was visible on videotape of women's mother, was not misconduct.

Schmidt v. Shearer, 995 P.2d 381 (Kan.App.,1999)
Defense counsel's comments referring to evidence of widow's settlement with other defendants did not constitute misconduct where widow's counsel failed to object to testimony regarding settlement.

5) Counsel may draw inferences from the facts but may not ask the jury to speculate

Hoffman v. Oakley, 647 S.E.2d 117
N.C.App.,2007
Van owners' attorney could argue the issue of speed in his closing argument in negligence action arising out of collision between van and automobile, in light of accident reconstruction expert's testimony about skid tests he performed at accident scene and stopping distances at various

speeds, which would allow jury to infer driver was exceeding the speed limit.

Burrows v. Union Pacific R. Co., 218 S.W.3d 527
Mo.App.E.Dist.,2007
Argument by plaintiff's counsel that railroad had not accepted "corporate responsibility in the chain of command up at the top," was proper; the argument was within counsel's wide latitude, in light of evidence that employer knew one week before the accident about the problem with the tamper, due to the defective tamper employee was required to exit the tamper's cab and stand between the track under repair and the live track to do his work, and employer had the right to control the speed at which trains traveled, and it did not control the speed of train company's train, which traveled through employee's work area at 70 miles per hour (mph).

Desselle v. Complete Home Concepts, Inc., 211 S.W.3d 168
Mo.App.W.Dist.,2007
Given the evidence in negligence action brought against company, which installed fireplace in homeowners' home, by homeowners, whose house was damaged by fire, the jury was entitled to draw the inference that the pipes were locked together, that no heated gases could have leaked from the flue, and the manner in which the flue was installed did not contribute to causing the fire, and company's counsel's invitation in closing argument to draw that inference could not be said to have produced reversible error; company's expert testified that discoloration patterns on flue pipe and etchings on those pipes indicated likelihood that those pipes were "locked" and that no gases were leaking from flue at time of fire.

Eskin v. Carden, 842 A.2d 1222
Del.,2004
Absent facts that are supported by competent expert testimony, counsel may not directly argue to the finder of fact that there is a correlation between the extent of damage to vehicles visible in photographs and the cause or severity of personal injuries alleged from that accident.

Bodkin v. 5401 S.P., Inc., 768 N.E.2d 194
Ill.App.1.Dist.,2002
Counsel may not raise a suggestion of intoxication by innuendo during argument absent supporting evidence of intoxication.

6) Drawing adverse inference from missing evidence -- civil cases

Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 2007 WL 2301644
N.J.Super.App.,2007
Plaintiff's counsel's comment in closing argument in medical malpractice action that nurse did not call any expert witnesses to testify was not improper, where nurse could have, but chose not to call two different experts that had been retained.

Hoffman v. Houghton Chemical Corp., 751 N.E.2d 848
Mass.,2001
An instruction and comment by counsel on an absent witness are proper only when, without reasonable explanation, a party fails to call a person of whom the party is aware, can bring to trial, and who is friendly to, or at least not hostilely disposed toward the party, and who can be expected to give testimony of distinct importance to the case.

Ramirez v. City of Chicago, 740 N.E.2d 1190
Ill.App.1.Dist.,2000
References by pedestrian's counsel, during closing argument and rebuttal in negligence action against city arising from fall on sidewalk, to city's failure to call as witnesses the police officers to whom pedestrian's husband gave report were improper; those witnesses were equally available to both parties.

Bender v. Adelson, 901 A.2d 907
N.J.,2006
a) Missing-witness doctrine, which provides that when a party fails to call a witness who would serve to elucidate the facts in issue, opposing counsel may ask the court to give a missing-witness instruction to the jury or draw the adverse inference him or herself, did not apply to negligence action in which widow's counsel inferred during closing argument that doctors failed to call expert cardiologists because no independent cardiologists were willing to testify on their behalf, and thus inference was not proper in light of the doctrine, as procedural order barred doctors' three experts and thus the experts were not within the doctors' power to produce.
b) The “missing-witness doctrine” provides that when a party fails to call a witness who would serve to elucidate the facts in issue, opposing counsel may ask the court to give a missing-witness instruction to the jury or draw the adverse inference him or herself.

Campise v. Borcherding, 224 S.W.3d 91
Mo.App.E.Dist.,2007
a) It is reversible error to allow reference in closing argument to a party's failure to produce a witness equally available to both parties.
b) The question of whether there is “equal availability” of a witness to both parties at trial, as would disallow a closing argument reference to the failure to produce such a witness, depends on several factors: (1) one party's superior means of knowledge of the existence and identity of the witness; (2) the nature of the testimony that the witness would be expected to give in the light of his previous statements or declarations, if any, about the facts of the case; and (3) the relationship borne by the witness to a particular party as the same would reasonably be expected to affect his personal interest in the outcome of the litigation and make it natural that he would be expected to testify in favor of the one party against the other.

Edwards v. Allied Home Mortg. Capital Corp., 962 So.2d 194
Ala.,2007
a) Counsel for mortgage-brokerage company's former branch manager could not, during closing argument in trial on former branch manager's counterclaims alleging conversion and trespass, comment on the alleged significance of the company's failure to call the company's president as a witness, even though the company's president was not equally accessible to the former branch manager, where there was no showing that the company's president had knowledge of matters that were material to the tort claims at issue at the time of the closing argument.
b) The fact that either party can subpoena a potential witness does not automatically make that witness "equally accessible," which would bar one party from commenting on his opponent's failure to call the witness; when the testimony of the witness would favor one party over the other, the witness is not "equally accessible."

Hawkey v. Peirsel, 869 A.2d 983
Pa.Super.,2005
Patient bringing medical malpractice action against doctor and medical center was not entitled to urge jury in closing argument to draw adverse inference on basis of defendants' failure to produce at trial certain nurses who may have witnessed portions of doctor's treatment of patient; patient failed to show that defendants exercised exclusive control over nurses, and nurses were equally available to both parties.

Bereano v. State Ethics Com'n, 944 A.2d 538
Md.,2008
The missing witness inference in a court proceeding takes the form either of an instruction to the jury permitting it to make such an inference, or in permitting the parties to argue the inference to the fact-finder; in either case, the desired inference is noticed in advance of a final decision, and both parties are permitted to argue regarding it.

Mead v. Papa Razzi, 899 A.2d 437
R.I.,2006
Issue of whether or not a jury should find spoliation of evidence (where party destroys or alters it) in a particular case is ordinarily "fair game" for closing argument by the attorneys for the parties.

Target Stores v. Detje, 833 So.2d 844
Fla.App.4.Dist.,2002
It was improper for customer's attorney during closing argument in slip and fall action against store to call jury's attention to fact store had submitted into evidence only one of several photographs attached to incident report, thereby raising adverse inference about store's failure to introduce other photographs into evidence, where customer's attorney had seen other photographs and knew that they were merely cumulative of photograph in evidence.

Beard v. Wal-Mart Stores, Inc., 2002 WL 399506
Cal.App.4.Dist.,2002
Misconduct by store's attorney during closing argument of shopper's negligence action warranted mistrial, where, based on nothing but speculation, attorney made arguments suggesting that jury could draw adverse inference from failure to shopper's sister to testify whether shopper had back problems prior to accident complained of and shopper's failure to call physician to testify regarding injection administered to shopper.

7) Drawing adverse inference from missing evidence in criminal cases.

8) Drawing adverse inference from the exercise of a privilege

In re Quinn, 763 N.E.2d 573
Mass.App.,2002
Witness may assert his self-incrimination privilege if called upon to testify in a care and protection proceeding or in any other civil case; however, that assertion does not prevent opposing counsel from commenting on the defendant's choice not to testify or the factfinder from drawing a negative inference therefrom, both of which protections attach in a criminal case.

9) Drawing inference that a third party is at fault

10) Arguing the credibility of witnesses

Rosario-Paredes v. J.C. Wrecker Service, 975 So.2d 1205
Fla.App.5.Dist.,2008
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. 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.

Pollard v. Hunt, 842 N.E.2d 547
Ohio.App.2.Dist.Montgomery.Co.,2005
Suggestion by legal malpractice carrier's counsel that insured attorney's financial interest in former clients' bad faith litigation against carrier could have affected his credibility as a witness was proper closing argument; although attorney testified that he had no financial stake in outcome of litigation, he subsequently acknowledged on re-cross examination that he had been exposed financially prior to signing agreement.

Rodd v. Raritan Radiologic Associates, P.A., 860 A.2d 1003
N.J.Super.App.,2004
Summation remarks made by attorney for patient's estate suggesting that doctor missed the evidence of cancer because he cared more about “making money” and living “the good life,” spending only thirty-six seconds looking at each mammogram film, were improper in medical malpractice action; attorney's comments in summation were unduly harsh and amounted to an attack on doctor's character and his witness' integrity, and they occupied no rightful place in proper commentary on the evidence and the credibility of testimony.

Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382
Tex.App.El.Paso,2004
Plaintiff's characterization of defense witnesses as “not truthful” in products liability action did not constitute improper jury argument; statements were appropriate challenges to credibility of defense witnesses, which were supported by evidence.

11) Arguing weight of evidence

Hemann v. Camolaur, Inc., 127 S.W.3d 706
Mo.App.W.Dist.,2004
Closing argument by attorney for restaurant patron to effect that restaurant corporation presented no medical evidence to support claim that back injury was attributed to preexisting degenerative back condition and not to slip and fall was proper; patron's attorney never misstated law by asserting that restaurant had right to, or was obligated to, present such evidence, argument was permissible comment on fact that patron's medical evidence was uncontroverted.

Dhillon v. Bryant Associates, 809 N.Y.S.2d 25
N.Y.App.Div.1.Dept.,2006
Summation by personal injury plaintiff's counsel, mentioning that plaintiff had presented evidence of his injury and that defendants had not, was not improper comment on burden of proof; rather, it was fair comment on medical evidence in case, or lack thereof.

Gianos v. Baum, 941 So.2d 581
Fla.App.4.Dist.,2006
Trial court's refusal to allow counsel for patient's estate to comment during closing argument on the physician's failure to call a pathologist constituted reversible error; the comment was appropriate because it was a comment on physician's lack of evidence to rebut administrator's evidence.

C. ARGUMENTS ABOUT DAMAGES

1) In general

Miller v. Owen, 709 N.Y.S.2d 378
N.Y.Sup.,2000
During summation in personal injury action, plaintiff's counsel may ask for specific amount for pain and suffering in form of lump-sum figure as stated in the ad damnum clause of complaint, or figure based on evidence as matter of fair comment.

Copeland v. Stebco Products Corp., 738 N.E.2d 199
Ill.App.1.Dist.,2000
Counsel for plaintiff improperly referred during closing argument to highly publicized recent personal injury case which had resulted in $29.6 million verdict for plaintiff, about which no evidence had been introduced during trial; sustaining of defense objections was insufficient to cure prejudice, as repetition of argument served to undermine fairness of trial process.

2) Golden rule arguments

A.C. ex rel. Cooper v. Bellingham School Dist., 105 P.3d 400
Wash.App.Div.1,2004
Urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position constitutes a “golden rule argument,” which is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.

Clarke v. Medley Moving and Storage, Inc., 2008 WL 642599 -- Golden Rule
Ill.App.1.Dist.,2008
In wrongful death and survival action brought by estate of pedestrian, who was fatally injured when he was struck by truck, estate's counsel's remark during closing argument asking who would trade spots with pedestrian was not inappropriate because it did not refer to the jurors.

D. ARGUMENTS CONCERNING THE LAW

1) Arguments must be based on the jury instructions

Lawson v. National Steel Erectors Corp., 8 P.3d 171
Okla.Civ.App.Div.4,2000
Where counsel believes that instructions are inadequate, the proper course is to request additional instruction by the court and not for counsel to undertake such additional instruction by way of

argument to the jury.

Olfice, Inc. v. Wilkey, 173 S.W.3d 226
Ky.,2005
"Bare bones" jury instructions must be given with the understanding that they are merely a framework for the applicable legal principles; it becomes the role of counsel, then, to flesh out during closing argument the legal nuances that are not included within the language of the instruction.

Munoz v. City of Union City, 16 Cal.Rptr.3d 521
Cal.App.1.Dist.,2004
In an action against a police officer arising out of an incident in which a disturbed woman brandishing two knives was shot and killed by the officer, recitation by defense in closing argument of instruction on test of reasonableness, rejected as argumentative, but which correctly stated the law, was proper.

2) Counsel must discuss the law accurately

Rice v. Bol, 116 S.W.3d 599
Mo.App.W.Dist.,2003
While as a general rule, counsel is prohibited from instructing the jury on the law, the rule not only does not prohibit counsel from discussing the law as set forth in the court's instructions, but encourages it, as long as the discussion states the law fairly and accurately.

3) Improper to bring up irrelevant or inappropriate laws

Abadie v. Metropolitan Life Ins. Co., 784 So.2d 46
La.App.5.Cir.,2001
It is the judge's responsibility to reduce the possibility of confusing the jury, and he may exercise the right to decide what law is applicable to prevent counsel from arguing law that the trial judge deems inappropriate.

4) Improper to criticize law, argue policy, or ask jury to nullify a law in the interests of justice

Boruch v. Morawiec, 857 N.Y.S.2d 103
N.Y.App.Div.1.Dept.,2008
Improper for defense counsel to comment, during summation, that Industrial Code section governing guarding of power-driven saws was a "stupid law."

Liggett Group Inc. v. Engle, 853 So.2d 434
Fla.App.3.Dist.,2003
Arguments of plaintiffs' counsel in cigarette smokers' class action against tobacco companies that urged predominantly African-American jury panel to emulate civil rights heroes by fighting "unjust laws" protecting the right to sell cigarettes were improper. Arguments for nullification of the law have absolutely no place in a trial and violate state and federal due process by exposing defendants to liability and punishment based upon lawful conduct.

5) Biblical law

6) Reading statutes, cases, treatises, etc.

7) Generally improper to refer to rules of procedure, legal maneuvering during litigation, or pretrial decisions of the court

Casas v. Paradez, 2008 WL 2517135
Tex.App.San.Antonio,2008
Implication by counsel that plaintiff's relative was unable to testify because nursing home defendants' counsel had invoked rule allowing them to keep the family members out of the courtroom was improper.

Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc., 921 So.2d 43
Fla.App.3.Dist.,2006
Defendant sued by apparel company for allegedly misrepresenting the financial health of textile company could not disclose to jury, at trial for breach of fiduciary duty and negligent misrepresentation action, that apparel company had voluntarily dismissed its claims against textile company and two of its principals; dismissal of such parties was irrelevant.

De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates, 114 Cal.Rptr.2d 708, Cal.App.6.Dist.,2001
In action by mobile home homeowners' association against owners of mobile home park for illegal water charges, association's closing argument condemning owners for "filing motions and doing appeals," "reprehensible" and "strong-arm" conduct during litigation, and running to the Public Service Commission when owners lost in courts, and suggesting that if owners were not stopped owners would "file more motions against these folks to seek more remedies" strayed into areas improper for jury determination.

Federated Mut. Ins. Co. v. Anderson, 991 P.2d 915
Mont.,1999
Comments upon the trial court's exclusionary rulings are improper in closing arguments.

8) Comment on role of the jury

Freeman v. Blue Ridge Paper Products, Inc., 229 S.W.3d 694
Tenn.App.,2007
An appeal to the jury to act as the community's conscience is not necessarily improper closing argument. That is their role.

9) Comment on verdict form

Clark v. Bres, 217 S.W.3d 501
Tex.App.Houston.14.Dist.,2006
As long as closing arguments are based on the evidence, attorneys may suggest the correct way to fill out the verdict form.

White v. Stevens, 704 N.E.2d 882
Ill.App.2.Dist.,1998
Counsel may not explicitly tell jury that it must harmonize its answer to special interrogatory with the general verdict.

Hudson v. City of Chicago, 881 N.E.2d 430
Ill.App.1.Dist.,2007
Statement by plaintiff's counsel to jury, that if it was for plaintiff on negligence count, it should answer special interrogatory that asked whether affirmative defense was applicable to defendant in the negative, was permissible; counsel did not solicit jury to harmonize its answer to be consistent with the verdict, nor did he delineate or emphasize the need to answer the interrogatory with a “no” if jury wanted to award plaintiff damages, but, rather, thrust of counsel's argument centered upon the weight of the evidence favoring that answer wherein counsel emphasized to jury that based upon the evidence presented and in the light of defendant's burden of proof, an answer of “no” was required.

Welch v. McLean, 191 S.W.3d 147
Tex.App.Fort.Worth,2005
Closing argument of physician's counsel, telling jury that there would be “dancing out in the hall” if jury put less than 50-51 percent of the blame on physician and to “put more than half” on physician, did not improperly inform jury of effect of its answer to jury question asking jury to apportion percentage of negligence between physician and other physician in medical malpractice action; argument did not inform jury that a finding of less than 50% negligence would result in his being either exonerated completely or at least not jointly and severally liable for the entire damages award.

E. EMOTIONS

1) Being emotional

Watkins v. Cleveland Clinic Found., 719 N.E.2d 1052
Ohio.App.8.Dist.Cuyahoga.Co.,1998
Medical malpractice plaintiffs' rebuttal closing argument, stating, “If you are inflamed, it's because the facts inflame you. It inflamed me. But I'm not here asking you to punish these people,” was a fair comment on the evidence; to prohibit jurors, and counsel, from having strong feelings in the case was asking the impossible, considering the uncomplicated nature of the medical procedure that led up to the patient's injury, and the tragically severe injuries that followed, leaving the patient in a persistent vegetative state.

2) Inherently emotional cases

3) Appealing to sympathy

Tentoni v. Slayden, 968 So.2d 492
Miss.App.,2006
Statements made by defendant's attorney during closing argument of personal injury lawsuit, that lawsuit had been going for six years and that driver had been carrying this burden and all the uncertainty and insecurity and stress that had been going along with the case, that driver had survived two heart attacks and was taking heart medicine, and that driver had been the object of plaintiff's fixation and her obsession for six years, were neither relevant nor based on the evidence, and, on their face, appeared to have been intended to ignite the jury's passions in favor of motorist.

Fehrenbach v. O'Malley, 841 N.E.2d 350
Ohio.App.1.Dist.Hamilton.Co.,2005
Improper for defense counsel to appeal to sympathy for pediatrician, e.g., 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.

4) Appeals to prejudice and other negative emotions

Tierco Maryland, Inc. v. Williams, 849 A.2d 504
Md.,2004
When the purpose of a reference to race, nationality, or religion by trial counsel is to inflame the passions of the jury, the reference is improper and prejudicial.

USAA Cas. Ins. Co. v. Howell, 901 So.2d 876
Fla.App.4.Dist.,2005
Insured's closing argument associating automobile insurer with the Iraqi Minister of Information during United States invasion was improper in suit to recover uninsured motorist (UM) benefits; the argument bore no relation to the evidence introduced during the trial.

Seltzer v. Morton, 154 P.3d 561
Mont.,2007
a) Closing argument of counsel for local plaintiff against out-of-state defendants that plaintiff was "born and raised here in Great Falls" and had "[m]ade this his home," was not improper attempt to appeal to jurors' local sympathies but part of counsel's argument that plaintiff had suffered reputational harm in Great Falls community.
b) Reference to defendant as a "great law firm from Los Angeles" was not improper attempt to appeal to jurors' local sympathies because it was related to plaintiffs' claim for punitive damages in which evidence of the firm's size and wealth was in the record.

McArdle v. Hurley, 858 N.Y.S.2d 690
N.Y.App.Div.2.Dept.,2008
Inflammatory conduct of defense counsel in personal injury action of pedestrian who was struck by car while in crosswalk, including counsel's use of disability retirement of pedestrian's husband as evidence that her entire family was seeking to "max out in the civil justice system," so contaminated proceedings as to deprive pedestrian of fair trial, warranting new trial on issue of damages.

Liggett Group Inc. v. Engle, 853 So.2d 434
Fla.App.3.Dist.,2003
Arguments of plaintiffs' counsel in cigarette smokers' class action against tobacco companies seeking damages for injuries allegedly caused by smoking, which inflamed the predominantly African-American jury panel with racial pandering and pleas for nullification of the law, were improper; counsel juxtaposed companies' conduct with genocide and slavery, and counsel repeatedly urged jury to emulate civil rights heroes by fighting "unjust laws" protecting the right to sell cigarettes.

General Motors Acceptance Corp. v. Baymon, 732 So.2d 262
Miss.,1999
Closing argument by borrower's attorney that African-Americans were the targets of collateral protection insurance purchased by lender after lapse of automobile policy and that lender discriminated against African-American employee by keeping her in clerical job was improper in borrower's suit alleging breach of contract and fraud by lender.

5) Wealth, poverty, size of corporations

LID Associates v. Dolan, 756 N.E.2d 866
Ill.App.1.Dist.,2001
Conduct of counsel for limited partnership investors, in telling jury during closing arguments that general partner was a "billionaire," was impermissible, prejudicial, and violated an order in limine barring statements involving general partner's wealth.

Werneck v. Worrall, 918 So.2d 383
Fla.App.5.Dist.,2006
References during argument to sales generated by the defendant's furniture store and to number of truck trailers owned by furniture delivery service were improper comments on defendant's wealth.

Carnival Corp. v. Pajares, 972 So.2d 973
Fla.App.3.Dist.,2007
In negligence action brought by crew member against cruise ship, alleging that ship was negligent for failing to diagnose and treat his hypertension, comments made by crew member's counsel during closing argument regarding the economic disparity between member and cruise ship were improper as ship's resources were not relevant in determining the issues before the jury, and could only have served to prejudice the members of the jury, who learned through member's presentation of the evidence that member was relatively poor and that his family had to borrow money and sell a house to provide him with some of the care he received.

Olson v. Richard, 89 P.3d 31
Nev.,2004
The remarks of counsel for defendant stucco-finish subcontractor, informing the jury that his clients were not wealthy people, were improper, in plaintiff homeowners' construction defect action.

Burrows v. Union Pacific R. Co., 218 S.W.3d 527
Mo.App.E.Dist.,2007
Denial of employer and railroad's motion for a mistrial or a new trial, based on argument of employee's counsel that employer and railroad were "more concerned about their profits than they were about safety," was not an abuse of discretion; the argument was within counsel's latitude and discretion to argue, given evidence that railroad's engineer, whose train was 30 minutes behind schedule, accelerated his train speed from 66 to 73 miles per hour after he saw employee on the track, and employer failed to provide employee with a properly functioning tamper machine.

Target Stores v. Detje, 833 So.2d 844
Fla.App.4.Dist.,2002
Reference by customer's attorney in slip and fall action against store to store as “big corporation” was not improper as, taken in context, comments were not invitation to decide case on improper basis of financial status of parties.

6) Insurance

7) Vengeance, sending messages, and preventing crime

Kloster Cruise Ltd. v. Grubbs, 762 So.2d 552
Fla.App.3.Dist.,2000
Injured cruise ship passenger's closing argument that the jury should “tell them [cruise line] by your verdict in this case to do something about this....Tell them by the verdict that it is significant. They need to anticipate...accidents before they happen” was a “send a message” argument that was clearly improper,

Ocwen Financial Corp. v. Kidder, 950 So.2d 480
Fla.App.4.Dist.,2007
Closing argument made by two former employees in their action against employer alleging sexual harassment and other claims, in which they urged jury to send a message to employer, was not improper, where claims for punitive damages were submitted to the jury.

Nishihama v. City and County of San Francisco, 112 Cal.Rptr.2d 861
Cal.App.1.Dist.,2001
Any suggestion in counsel's argument that the jury should send a message by inflating its award of damages would be improper where punitive damages may not be awarded.

Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392
Tex.App.Houston.14.Dist.,2001
Counsel's rebuttal argument, regarding the need for the jury to send a message to the escalator industry, was based on the evidence, and as such was not improper and incurable, in parents' negligence action against escalator contractor arising when minor son's foot was entrapped in escalator; evidence showed industry-wide entrapments of children in escalators and refusal of escalator companies to adopt safety measures.

8) Suggesting that verdict will have a personal impact on the jurors

Schoon v. Looby, 670 N.W.2d 885
S.D.,2003
Doctor's counsel's final argument statement in trial for malpractice that hospital was a nonprofit

corporation owned “by all of us” was a misstatement of fact in that hospital was owned by health care entity and an attempt to persuade by improper means in that it could only be interpreted as an attempt to convince jurors that if hospital had to pay, jurors as “owners” would in some way have to pay.

Thibodeau v. Slaney, 755 A.2d 1051
Me.,2000
Injured guest's closing argument that if jury did not award guest damages the burden for payment of his medical expenses would fall upon the public and the taxpayers was improper.

9) Arguing the consequences of a verdict

Lacy v. CSX Transp. Inc., 520 S.E.2d 418
W.Va.,1999
In a civil trial it is generally an abuse of discretion for the trial court to permit argument by counsel regarding the operation of the doctrine of joint and several liability, where the purpose thereof is to communicate to the jury the potential post-judgment effect of their assignment of fault.

Myers v. Heritage Enterprises, Inc., 820 N.E.2d 604
Ill.App.4.Dist.,2004
Closing argument in which nursing home operator's lawyer stated that any award in negligence action against nursing home operator would be payable to executor of estate of deceased resident of nursing home facility and that executor was not related to decedent, was unfairly prejudicial to executor and deprived him of a fair trial.

F. PERSONALIZATION

1) Prohibition against attorneys injecting their own personal experiences, knowledge and opinions

Lingle v. Dion, 776 So.2d 1073
Fla.App.4.Dist.,2001
Attorney's expression of his personal opinion as to the credibility of a witness, or his personal knowledge of facts, is entirely improper; while an attorney is given broad latitude in closing argument, his remarks must be confined to the evidence, the issues and inferences that can be drawn from the evidence.

Schoon v. Looby, 670 N.W.2d 885
S.D.,2003
Counsel's statements that doctor “delivered my second child” and that doctor was “a quiet,

professional person" improperly injected his knowledge of doctor and his own personal experience with doctor in closing argument of trial for malpractice and intentional infliction of emotional distress. An attorney cannot turn his final argument into testimony by comparing his own personal experience with facts of case or to vouch for a witness.

Liggett Group Inc. v. Engle, 853 So.2d 434
Fla.App.3.Dist.,2003
Plaintiffs' counsel's conduct in cigarette smokers' class action suit arguing to jury that punitive damages payments could be made in installments, and personally vouching to jury that defendants would not go bankrupt, was improper.

Palkimas v. Lavine, 803 A.2d 329
Conn.App.,2002
Closing argument comments by counsel for defendant in personal injury action arising from rear-end collision, in which counsel rendered opinion as to his client's credibility and recounted a conversation between counsel and defendant that took place outside courtroom, were improper.

DeJesus v. Flick, 7 P.3d 459
Nev.,2000
Closing argument of passenger's counsel in personal injury action against driver of other vehicle, in which counsel accused defendant's medical expert of committing perjury and personally attacked the expert's credibility, told the jury how much he personally disliked defendant because defendant nearly killed two people and because counsel had acquired some sense of plaintiff's suffering, and gave his personal opinion that defense counsel was trying to get the jury to shortchange plaintiff's damages claim, violated the rule prohibiting a lawyer from stating a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant.

Santos v. Chrysler Corp., 715 N.E.2d 47
Mass.,1999
Statements by counsel for plaintiff during closing argument in products liability action against vehicle manufacturer that former braking engineer for manufacturer, who testified on plaintiff's behalf, was courageous, and that other witnesses who testified regarding incidents involving same model of vehicle were brave and conscientious, did not constitute argument regarding credibility of witnesses from counsel's personal knowledge, and thus were permissible comments on character of witnesses.

Koonce ex rel. Koonce v. Pacilio, 718 N.E.2d 628
Ill.App.1.Dist.,1999
Defense counsel's closing remarks in premises liability action improperly attested to the honesty and character of the defendants; counsel gave his personal opinion that he "believe[d the

defendants] are basically honest people," and that he "believe[d] the [defendants] are not responsible for this accident." Counsel may not express his own personal belief on issues or vouch for the credibility of witnesses.

Mercury Ins. Co. of Florida v. Moreta, 957 So.2d 1242
Fla.App.2.Dist.,2007
Remarks by insured's attorney during closing argument that concerned what attorney's 14-year-old son would have thought about insurer's defense of the case were improper.

2) Personal attacks on the opposing party and counsel

SDG Dadeland Associates, Inc. v. Anthony, 979 So.2d 997
Fla.App.3.Dist.,2008
Argument of plaintiff's counsel at jury trial in slip-and-fall case that implied that defense counsel was hiding evidence was egregious and prejudicial to defendant shopping mall, given absence of any evidence showing that shopping mall or defense counsel hid evidence or acted improperly.

Jones v. Republic Waste Services of Texas, Ltd., 236 S.W.3d 390
Tex.App.Houston.1.Dist.,2007
Counsel's argument to jury that testimony of garbage hauling subcontractor's principal changed after his deposition because he met his lawyers who told him that he was entitled to $5 million under their theory and that the "case is a lawyer's construct," was error.

Roetenberger v. Christ Hosp., 839 N.E.2d 441
Ohio.App.1.Dist.Hamilton.Co.,2005
Remarks during closing argument by counsel for physician in medical malpractice and wrongful death action, attacking husband who had brought action after his wife died, and also attacking husband's counsel and his witnesses, were inexcusable, unprincipled, and clearly outside scope of closing argument; remarks were clearly designed to arouse jury's passion and prejudice, counsel made various assertions and drew inferences that were not supported by evidence, and he painted husband, his counsel, and his witnesses as greedy, empty-hearted people without souls who were manipulating the lawsuit and "branding" a good doctor all for sake of money.

Vazquez v. Costco Companies, Inc., 792 N.Y.S.2d 593
N.Y.App.Div.2.Dept.,2005
Defense counsel stepped over bounds of legitimate advocacy in suggesting to jury that plaintiff's stepson had been "coached," thus implying that plaintiff, or his attorney, or someone under direction of either plaintiff or his attorney had improperly attempted to induce stepson to lie; there was no proof that stepson's decision not to testify was product of guilty conscience rather than of simple shyness, and counsel's comments improperly diverted attention of jury from evidence and improperly invited jury to speculate.

Johnnides v. Amoco Oil Co., Inc., 778 So.2d 443
Fla.App.3.Dist.,2001
Gas station owner's counsel's closing argument, boldly and unashamedly accusing counsel for neighboring property owner of conspiring with neighboring owner's expert to commit a fraud on the jury, warranted reversal of judgment for gas station owner in neighboring owner's action for ground contamination and remand for new trial.

Fehrenbach v. O'Malley, 841 N.E.2d 350
Ohio.App.1.Dist.Hamilton.Co.,2005
Defense counsel's improper and inflammatory comments in closing argument created substantial likelihood that jury was misled and that verdict was improperly influenced, and thus, new trial was warranted, in medical malpractice action where defense counsel repeatedly called plaintiffs "shameful" parents who were using their child's illness and medical complications to "collect a $2,000,000 paycheck" by lying and, with their counsel's help, "trucking" in "alleged" experts paid "$8,000 apiece to say what [they] wanted them to say," defense counsel further stated parents had spent seven years reading up on medical journals and books and learning symptoms of meningitis to "piece together the case."

Schoon v. Looby, 670 N.W.2d 885
S.D.,2003
Doctor's counsel's accusation in closing argument of trial for malpractice and intentional infliction of emotional distress that patient's lawsuit was nothing more than playing the lottery was only meant to inflame jury and were beyond bounds of proper final argument.

G. USE OF RHETORIC

1) Epithets and colorful characterizations

People v. Parson, 79 Cal.Rptr.3d 269
Cal.,2008
Although prosecutorial arguments may not denigrate opposing counsel's integrity, harsh and colorful attacks on the credibility of opposing witnesses are permissible.

State v. Outlaw, 748 N.W.2d 349
Minn.App.,2008
Prosecutor is free to make legitimate arguments on the basis of all proper inferences from the evidence introduced, and is not constrained to deliver a "colorless" argument.

Burrows v. Union Pacific R. Co., 218 S.W.3d 527
Mo.App.E.Dist.,2007
Denial of railroad's motion for a mistrial based on argument of employee's counsel that employer

and railroad were “more concerned about their profits than they were about safety,” was not an abuse of discretion; the argument was within counsel's latitude and discretion to argue.

Wiley v. Henry Ford Cottage Hosp., 668 N.W.2d 402
Mich.App.,2003
Reference by patient's counsel to hospital's expert witness as “Mr. Vascular doctor guy” was not improper in medical malpractice action and did not rise to level of belittling witness.

Becht v. Palac, 740 N.E.2d 1131
Ill.App.1.Dist.,2000
Statement by patient's counsel during closing argument in medical negligence action, that physician handed out steroidal medication which allegedly caused patient to develop bone disease like “candy,” though inflammatory, was a fair comment on the evidence and thus statement was not improper.

Clark v. Bres, 217 S.W.3d 501
Tex.App.Houston.14.Dist.,2006
Homeowners' closing argument that referred to contractor as a liar, a thief, and a fraud did not constitute an improper jury argument; the argument discussed matters in evidence that supported the argument that contractor was a liar, thief, and a fraud and during contractor's closing argument his attorney denied that contractor was a liar, thief, or a fraud.

State v. Jones, 558 S.E.2d 97
N.C.,2002
In closing arguments to the jury in a civil case, an attorney may not become abusive.

Roetenberger v. Christ Hosp., 839 N.E.2d 441
Ohio.App.1.Dist.Hamilton.Co.,2005
Remarks during closing argument by counsel for physician who painted plaintiff, his counsel, and his witnesses as greedy, empty-hearted people without souls who were manipulating the lawsuit and “branding” a good doctor all for sake of money were inexcusable, unprincipled, and clearly outside scope of closing argument.

Fehrenbach v. O'Malley, 841 N.E.2d 350
Ohio.App.1.Dist.Hamilton.Co.,2005
Defense counsel's comments in closing argument were improper when he repeatedly called plaintiffs “shameful” parents who were using their child's illness and medical complications to “collect a $2,000,000 paycheck” by lying and, with their counsel's help, “trucking” in “alleged” experts paid “$8,000 apiece to say what [they] wanted them to say.”

2) Visual aids

Haggerty v. Foster, 838 So.2d 948
Miss.,2002
Allowing defendant driver's counsel to utilize paper cups during closing argument to reconstruct automobile accident, in support of argument that accident was not driver's fault, was not abuse of discretion; counsel for injured motorist was also allowed to give his version of how accident occurred.

Moran v. City of Detroit, 2006 WL 1083554
Mich.App.,2006
Trial court did not abuse its discretion in allowing city to use demonstrative aid during closing argument showing "stream of chronology" during closing argument in sexual harassment action brought by female firefighter; plaintiff did not dispute accuracy of dates or details and aid was only used during argument.

Edwards v. Sabat, 589 S.E.2d 618
Ga.App.,2003
Introduction of alleged "new evidence" by home daycare provider during closing arguments, which consisted of certain statements which were set forth on a demonstrative aid, merely re-capped evidence which was supported by witnesses' testimony, and thus did not constitute improper argument, in mother's action against provider alleging that child suffered injuries while in provider's care.

Shoaf v. Geiling, 960 So.2d 41
Fla.App.5.Dist.,2007
Allowing a party to play during closing argument any videotaped deposition testimony that has not previously been admitted into evidence in that form is error.

Coffey v. Minwax Co., Inc., 764 A.2d 616
Pa.Super.,2000
In products liability action, woodwork refinisher manufacturer was properly permitted during closing argument to display to jury hairspray and paint which, in manufacturer's opinion, were highly flammable and still safe, despite fact that such products were not introduced into evidence or listed as exhibits on manufacturer's pre-trial memorandum; manufacturer's expert had testified that, if refinisher product was defective on basis provided by customer's expert, namely that it was flammable, then common products, such as hairspray, should be taken off the market because they are extremely flammable.

Rieker v. Kaiser Foundation Hospitals, 96 P.3d 833
Or.App.,2004
Defense counsel was not permitted to read excerpts of medical literature to jury in closing argument in medical malpractice case; although the quoted excerpts were consistent with opinions expressed by defendants' witnesses, the challenged excerpts had not been received in evidence for any purpose, and therefore could not be referred to in closing argument.

3) Analogies, metaphors and examples

Living Centers of Texas, Inc. v. Penalver, 217 S.W.3d 44
Tex.App.San.Antonio,2006
In jury argument the facts of the case may be related to history, fiction, personal experience, anecdotes, Bible stories, or jokes

Moller v. Lipov, 856 N.E.2d 664
Ill.App.1.Dist.,2006
Closing argument by attorney for executor of patient's estate, which analogized physician's negligent conduct to driver who ignores stop sign, waves pedestrian into intersection, runs pedestrian over, and then comes back and drives over her again, did not deprive physician and medical group of fair trial, in context of entire trial in wrongful death and survivor action.

Gorman v. McMahon, 792 So.2d 307 (emotion in case)
Miss.App.,2001
Former husband's counsel's comment that in cases of long ago the remedy for alienation of affection or adultery was that defendant would be tied to a whipping post was not so detrimental as to result in an unfair trial, but rather was an acceptable argument used to inject awareness of effects that an extra-marital affair could have on offended spouse.

4) Jurors' common sense and experience

Van Kirk v. O'Toole, 857 A.2d 183
Pa.Super.,2004
Proper for driver's counsel to ask jury to use its own experience and common sense to recognize there are certain car accidents where only minor injuries are sustained.