IN THE COUNTY COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA
JUDGE NINA ASHENAFI-RICHARDSON

STANDING ORDER ON CLOSING ARGUMENTS IN CIVIL CASES

In all cases that come on for Trial before Judge Nina Ashenafi-Richardson, this court hereby orders all counsel to abide by the following restrictions during their closing arguments, absent any order to the contrary by this Court. If counsel is uncertain whether a particular argument may violate this Order, (or might otherwise be improper under existing case law), counsel should seek the guidance of the Court prior to presenting the argument to the jury. This Order is not intended as an exhaustive list, but as an illustration of the most frequent subjects of improper closing arguments.

Counsel should keep in mind that the Court has an independent and affirmative obligation to protect jurors from improper closing argument, even if unobjected to, see D'Auria v. Allstate Insurance Co., 673 So.2d 147 (Fla. 5th DCA 1996); Borden v. Young, 479 So.2d 850 (Fla. 3d DCA 1985). "Harmfulness" required to obtain a new trial based on improper, but unobjected-to closing argument carries the requirement that comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of case by jury." *Murphy v. Int'l. Robotic Sys. Inc.*, 766 So.2d 1010, 1029-30 (Fla. 2000). If necessary to preserve the fundamental fairness of the proceeding, the Court may intercede—even absent an objection—if egregiously improper arguments are made in closing. *Border v. Young*, 479 So.2d 850, 851 (Fla. 3d DCA 1985).

Counsel should not refrain from objecting to an improper argument by opposing counsel under the belief that this Court will then be obligated to permit counsel to offer equally improper argument under the concept of "fair reply."

IMPROPER CLOSING ARGUMENTS

1. Counsel shall not express their personal opinion or beliefs regarding any aspect of the evidence or testimony, or personally vouch for any witness or party in this case. *Liggett*

Group Inc., v. Engle, 853 So. 2d 434, 465-466 (Fla. 3rd DCA 2003) (finding that the "improper comments of plaintiffs" counsel deprived the defendants of due process and a fair trial requiring reversal); Florida Rules of Professional Conduct 4-3. 4(e).

2. Counsel shall not denigrate or impugn the integrity of opposing counsel. Examples of this are accusing counsel of "trickery,""hiding the ball," filing a frivolous lawsuit, fabricating evidence, using "smoke and mirrors", or creating a "work of fiction." *Sanchez v. Nerys,* 954 So. 2d 630, 632 (Fla. 3rd DCA 2007) (finding that "plaintiff's counsel's improper and inflammatory closing argument, prejudiced the defendants, depriving them of a fair trial and warranting a new trial").

3. Counsel shall avoid using derogatory terms when referring to the defendant, a witness, or opposing counsel and shall not make any disparaging comments about counsel's occupation or performance in court. Florida courts have held the following terms as improperly denigrating and/or impugning the testimony or integrity of another party or witness: Referring to an expert as "*the best money could buy,*" a "*hired gun.*" Having a "*special relationship*" with counsel, giving "*magic testimony*," using "*smoke and mirrors*," throwing "*pixie dust*," or referring to a party as *"lawsuit pain."* See also, *Carnival Corp. v. Jiminez*, 38 Fla. L. Weekly D. 455 (Fla. 2nd DCA 2013) (finding that defense counsel's insinuations that an expert witness's testimony was "*scripted*" were "highly improper and impermissible").

4. Counsel shall not argue that a party or a witness fabricated evidence or has lied, absent record evidence to support such as argument. Counsel is strongly cautioned in this regard and should seek guidance from the Court before making any such argument to the jury. *Lingle v. Dion*, 776 So. 2d 1073, 1078 (Fla. 4th DCA 2001) (finding that counsel's *"repeated use of the term "B.S."* [in reference to the defendant] was not only clearly improper, but also highly unprofessional.")

5. If there is record evidence to support the argument that a witness lied in testimony, such argument shall be restricted to characterizing the witness' testimony, and counsel shall

not engage in character assassination nor argue or imply that the witness is a chronic, habitual or pathological liar. *City of Orlando v. Pineiro*, 66 So. 3d 1064, 1070-1071 (Fla. 5th DCA 2011) (noting that counsel's closing argument suggesting that a "*significant verdict will send a message*" was improper, but ultimately finding that review was inappropriate because the issue was not preserved).

6. Counsel shall not attempt to sway the jury by playing upon jurors' sympathy, fears, biases or prejudices. *Cascanet v. Allen,* 83 So. 3d 759, 764 (Fla. 5th DCA 2011) (finding that counsel for appellee's improper closing arguments, including a successful attempt to "*[curry] sympathy from the jury*" deprived the appellant of a fair trial and warranted reversal.")

7. Counsel shall not attempt to evoke images of "*runaway verdicts,*" assert that a claim or defense is "frivolous," characterize plaintiff's case as "*cashing in a lottery ticket*" or argue that the judicial system is "*out of control.*" *Chin v. Caiaffa*, 42 So. 3d 300, 309-312 (Fla. 3rd DCA 2010) (finding that counsel's comments, which included "*paint[ing] the entire defense as frivolous*" and "*an attack on the character of every person associated with the defense*" were improper and warranted a new trial).

8. Counsel shall not argue in closing argument that it is common for a plaintiff to ask for more money than they think they are entitled to, or to ask for much more money than they think a jury would actually award. *Pezo v. Miami Herald Media Co.*, 2012 WL 6755873 (Fla.Cir.Ct.) (Trial Court Order).

9. Counsel shall not attempt to argue facts not in evidence or imply that counsel is aware of the existence of evidence or testimony not introduced at trial. *Ramirez v. State*, 38 Fla. L. Weekly D 148 (Fla. 4th DCA 2013) (noting that counsel's "representation to the jury of additional corroborating evidence [not presented] was highly improper and prejudicial", but ultimately finding that the improper comments in this case were not fundamental error.) Quoting *Thompson v. State*, 318 So. 2d 549, 552 (Fla. 4th DCA 1975).

10. Counsel shall not argue what lawyers, parties, witnesses or juries have done on other cases, if such evidence has not been properly introduced at trial. *Health First, Inc. v. Cataldo,* 92 So. 3d 859, 868 (Fla. 5th DCA 2012)(finding that plaintiff's counsel's comments on the compensation of defense counsel's medical witness over the course of three years working with various cases and attorneys with defense counsel's firm was improper, but did not warrant a reversal).

11. Counsel shall not make any comments regarding a prior settlement with a former party to the case. *Rubrecht v. Crone Distrib.,* 95 So. 3d 950, 954, 956 (Fla. 5th DCA 2012) (Finding that admission of the parties' negotiations in a settlement offer constituted reversible error).

12. Counsel shall not make reference to any settlement offers made to an opposing party or the existence or nature of any settlement discussion. *Rubrecht v. Crone Distrib.,* 95 So. 3d 950, 954, 956 (Fla. 5th DCA 2012) (Finding that admission of the parties' negotiations in a settlement offer constituted reversible error). *See also* Fla. Stat. §90.408 (2012).

13. Counsel shall not ask the jury to consider the relative wealth or financial conditions of the parties, or ask the jury to consider how a verdict might impact a party's economic, employment or professional status. *Samuels v. Torres*, 29 So. 3d 1193, 1196 (Fla. 5th DCA 2010) (finding that counsel's improper attempt to "curry sympathy from the jury" by *mentioning a party's financial status* was highly prejudicial and grounds for reversal).

14. Counsel shall not ask the jury to consider how a verdict might impact the jurors themselves or the community in general. *Birren v. State*, 750 So. 2d 168, 169-170 (Fla. 3rd DCA 2000)(finding that the prosecutor's improper comments appealing to the "*community sensibilities and civic conscience*" prejudiced the defendant, carried the potential of substantial injustice, and warranted a new trial).

15. Counsel shall not urge the jury to draw an adverse inference from the failure of the opposing party to call a non-party witness unless the proper showing has first been made

with the Court. *Barkett v. Gomez*, 908 So. 2d 1084, 1087-1088 (Fla. 3rd DCA 2005) (Noting that "it is improper to comment upon one party's failure to call a witness when the witness is equally available to both parties," but ultimately finding that the objection of the improper comment was not properly preserved in the lower tribunal); *See also Lasprilla v. State*, 826 So. 2d 396 (Fla. 2002) ("[A]ny argument which stated, or implied, that an adverse inference should be drawn . . . *for failure to call*. . . witnesses [is prohibited].")

16. Counsel shall not comment upon the presence or absence of insurance coverage, or comment on whether a party would or would not be responsible for paying for paying any amount awarded. *Hollenbeck v. Hooks,* 993 So. 2d 50, 51 (Fla. 1st DCA 2008) (finding counsel's "egregious" comments implying that the "*appellee did not have insurance coverage and . . . would unduly suffer from an award of damages*" caused a miscarriage of justice and constituted reversible error).

17. Counsel shall not ask jurors to place themselves in the shoes of the party or ask jurors to view evidence from a party's perspective, especially on the issue of financial responsibility or in determining the amount of damages which ought to be awarded. *SDG Dadeland Assocs. v. Anthony,* 979 So. 2d 997, 1003 (Fla. 3rd DCA 2008) (finding that asking the jury "*to place themselves in the plaintiffs' position* and urg[ing] them to award an amount of money they would desire if they had been the victims" constitutes an improper Golden Rule argument and is tantamount to reversible error).

18. Counsel shall not make any arguments that misstate the law or that mislead the jury. *Saunders v. Dickens,* 103 So. 3d 871, 877 (Fla. 4th DCA 2012) (noting that "a party may not make comments that mislead the jury as to the burden of proof[,]" and that it is "improper for counsel to misstate the law during closing argument[,]" but ultimately finding that counsel did not make any of these improper arguments in trial).

19. Counsel shall not suggest to the jury that they should place a monetary value on a human life in the same manner as a monetary value is placed on a 10 million dollar work of art

or an 18 million dollar jetliner. *Chin v. Caiaffa,* 42 So. 3d 300, 305, 309-310 (Fla. 3rd DCA 2010) (finding that counsel's comparison between a human life to a $10 million Picasso painting was highly improper and grounds for reversal). *See also Carnival Corp. v. Pajares*, 972 So. 2d 973, 979 (Fla. 3rd DCA 2007) (finding that counsel's comparison between a human life to a $20 million Van Gogh painting was highly improper, but was not timely objected to by opposing counsel).

20. Counsel shall not suggest to the jury that the Court can reduce or increase any damage award the jury returns. *Pezo v. Miami Herald Media Co.*, 2012 WL 6755873 (Fla. Cir. Ct.) (Trial Court Order).

DONE AND ORDERED in chambers at Leon County, Tallahassee, Florida, this 30 day of Sept., 2013.

Nina Ashenafi Richardson

NINA ASHENAFI-RICHARDSON
Leon County Court Judge

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