Evidence and Closing: Admitting Evidence, Conducting Examinations at Trial and What not to say in Closing (or what to say for a mistrial)

I. Impeachment of Witnesses

1. Impeach the witness with a prior inconsistent statement. Re-establish the statement you are about to impeach the witness on. Cement the witness into the position the exact way that it was said in their prior statement.. If they change their testimony back to what they said in the deposition, you stop and are done.
   Example: "Ms. Jones, didn't you just say that you were going 40 miles per hour at the time of impact?"
   Remember that you have to say this question the exact way it was asked in the prior testimony to be truly effective.
   The witness may not cooperate, but nevertheless, once they're cemented into that position, identifying that inconsistent statement becomes simpler.

2. Identify the inconsistent statement to the witness.
   1. **Did you testify in this case on (date)? And you were sworn to tell the truth like you are here today. And you did tell the truth in that deposition, is that correct?**
   2. **Here's your deposition transcript from your testimony on ____. Is that correct?**
   3. **Please turn to page __, line ____. (You are telling opposing counsel this at the same time).**
   4. **Did I ask you (were you asked) "How fast were you going at the time of the impact?"**
   5. **And what was your answer? (A: 10 miles an hour)**

3. **You are done impeaching for that question. Ask the next question.**
   There's a method to the madness; remember that you know that the question you are about to read the witness was just stated verbatim by the witness when you reestablished it.
   The witness may not cooperate, but nevertheless, once they're cemented into that position, identifying that inconsistent statement becomes simpler.

1. Federal Rules of Evidence: Rule 607, 608, 609
2. FRCP: Rule 32(a)(2)
3. R.S.Mo § 491.050 - can use prior convictions to impeach witnesses (both civ/crim)
4. 735 ILCS 5/2-1102 – party calling for examination may impeach the witness by proof of prior inconsistent statements
5. Ill. S. Ct. R. 238 – credibility of witness may be attacked by any party, including the party calling the witness
6. Ill. S. Ct. R. 212(b) – discovery depositions may be used for the purpose of impeaching the testimony of the deponent as a witness in the same

manner and to the same extent as any inconsistent statement made by the witness

7. Ill. R. Evid. 607 – credibility of witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage
8. 725 ILCS 5/115-10.1 – admissibility of prior inconsistent statements in criminal cases
9. Cases: *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423 (Mo. 1985) - party may impeach their own witness w/ prior inconsistent statements when that witness is available for cross
10. *People v. Michaels*, 335 Ill. 590, 592 (1929) – a witness who unexpectedly gives testimony against the party calling him inconsistent with prior statements may be examined by that party concerning the prior inconsistent statements for the purpose of refreshing the witness' recollection

4. Nuances of Impeachment
    1. After each cross-examination question in your outline, write down the page and line number, or place in medical records, or the police report or witness statement that it comes from. That way you can instantly go to that location to impeach if the witness does not agree with you.
    2. If you have a recalcitrant witness or one who argues with you, usually you impeach well a couple times, and then they will agree with you. So, keep your questions where you are pushing the envelope or departing from exactly what they said in the past to later questions.
    3. Typically, after the first impeachment I typically signal or tell opposing counsel where I am going in the transcript.
    4. Don't overdo using the transcript or prior statements – only use where truly inconsistent.
    5. Depositions
        a) Establish statements they've adopted in the deposition before trial.
        b) Have a clean copy of the depo ready to give to the witness and yours marked up. Have a copy for opposing counsel if they need it.
    6. Reading from the Transcript
        a) If the witness is slow or not cooperating or mumbling responses – you can read the question and answer. E.g., I asked you ___ and you said 10 mph, is that correct?
        b) You can "jump" around the transcript and don't need to go in sequential order.
        c) If your question is a bit different than the transcript, stop yourself and clarify the question to the witness.
        d) Do this right the first few times to "curb" the witness.

e) Ask about a sworn statement and show the witness you've done your homework. If they've stated something inconsistent, they're cornered.

7. Opening Statement at Deposition
    a) Clarify that they need to tell you if they don't understand a question to avoid impeachment at trial. Literally say, I do not want you saying anything different at trial than today, so its important to let me know if you do not understand. Very effective a year later at trial when you are crossing, and the witness says did not understand prior depo question, to be able to read that.
8. Police Reports, investigation reports, medical records, etc.
    a) When impeaching a police report, remember that they didn't have to tell the truth like they are here and a police officer may have gotten it wrong (1/4 of the time)
    b) Keep in mind that it's not a deposition. So, establish the statement in a police report or medical record in the deposition if you can. But maybe strategy wise, don't do that and cross at trial. Judgment call.
    c) Remember prior statements made that weren't under oath for impeachment. Medical records, police report, insurance application, investigation, rog answers – can use that effectively too.

II. Using Statements in Medical Records to Cross-Examine and/or Impeach a Witness

1. Do this to try to show the witness is inconsistent. Can be effective as medical people get stuff wrong and witnesses do not remember exact timing of the history of their illness.
2. Did you tell your doctor on (date) that you had no more neck problems and were feeling fine?
    1. I don't know – then show the medical record, admit it in evidence and refresh recollection. Show them the line in the med record and say – does this refresh your recollection? No reason to disagree with it.
    2. If disagree then cross with it and move to the next one.
    3. If agree then you have established it. And go to the next one.
    4. Move to admit the record into evidence. Then if you want or should show to the jury, ask the court for permission to publish just that page or line to the jury to show the jury the inconsistent statement.
    5. If you are admitting the medical records into evidence, you need to redact personal information such as references to insurance, bank account numbers, social security numbers, home addresses, etc., so redact the records before trial.
3. Address Consistencies in Medical Record when Redirecting Your Client or do it in direct a bit too

1. Show the next record where he or she was in pain, or the next finding in the same record where it says neuro exam abnormal, or the next MRI finding of a herniated disk.
2. If defense not playing fair or inappropriately cherry-picking med record entries then point that out. Defense lawyers – don't do this as it takes away the effectiveness of your cross.

III. Getting Business Records into Evidence

1. Remember that records need to be authenticated.
2. In Missouri, per R.S.Mo § 490.692, records reproduced in the ordinary course of business are admissible as a business record in form of affidavit. Produce them to the other side and file a notice in the court 7 days before trial under that statute; *see also*, R.S.Mo § 490.680, record may be competent evidence if the custodian testifies to its identity and it was made in the regular course of business. Note that if you do not file this notice or have an affidavit, you will need to present testimony that the document is authentic, that it was kept in the ordinary course of business, part of the business is to record such information and that the matters in the document were entered in it at or near the time of the occurrence.
3. In Illinois, per Ill. Sup. Ct. R. 236, business records may be admitted as evidence if they were (1) made in the regular course of business and (2) if that record was made at, or in a reasonable amount of time after, the time of occurrence; *see also,* Il. Rule Ev. 803(6), *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 414 (2005) (holding that business records are admissible due to their accuracy as their purpose is to aid businesses), *City of Chi. v. Old Colony Partners., L.P.,* 364 Ill. App. 3d 819 (2006). So, you need to take a records evidence deposition to establish the business record exception to the hearsay rule or do it at trial.
4. Note that you can get the other side to stipulate to authenticity and business record exception to the hearsay rule before trial, but do not assume the other side will do so. Ask early enough before trial to make sure you have time to get that done if the other side is going to refuse.
5. Note that there may be other problems with the document coming into evidence or being published to the jury, such as relevance, probative value outweighing any prejudicial content, collateral source, insurance information and hearsay within hearsay.

IV. Getting Photographs into Evidence

1. When admitting pictures into evidence, you have to make sure the photographs are a fair and accurate depiction of what is intended to be fairly and accurately depicted. In a car wreck case, they should depict the damage that you can see and make sure it's identifiable.
2. When admitting photographs you took of a scene and you want to use them at trial, make sure they fairly and accurately portray the scene at or near the time of the occurrence. Aim for familiarity so they can identify what you're showing.

3. In Illinois you have an obligation to produce to the other side. In Missouri, if the photo was not taken the day of the car wreck or a few days after, you do not have to produce. But good practice is to produce any pictures you are going to use at trial to the other side before trial.
4. Asking Witness to Assume
    1. Prep your witness to positively identify the photographs, otherwise those photographs aren't coming into evidence.
    2. If they agree with you, ask yourself if you should present all of the pictures and then admit them or do it picture by picture with the witness. It may depend on what you're showing them, and if you have follow-up questions you want to ask about a particular picture, doing it one at a time may be best.
5. Publishing at the Jury
    1. You can't just hand stuff to the jury; you have to ask the court for permission to publish or present evidence to the jury. Otherwise, you risk showing things to the jury that you should not.
    2. To properly publish to the jury, you have to ask the judge for permission and once the court agrees, state how many pictures you're handing to the jury to view. More often than not, you have to ask the bailiff to hand the pictures to them.
    3. Let the jury sit there and digest the pictures. They will notice what you do not notice. Be careful.
    4. I usually tell jurors in closing that they can ask for admitted evidence in the jury deliberation room.

V. Judicial Notice

1. What is it and why use it?
    1. Certain things the court knows are well accepted in the community (e.g., deceleration and acceleration speeds or the stopping distances between different speeds), so they can simply identify that fact as fact, whether that be through statute or the courts own pleadings, records, and orders. In using a judicial notice, you don't have to hire a separate expert just to say that.
    2. Per R.S.Mo § 490.110, "Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."; *see also,* Mo. Sup. Ct. R. 55.21, R.S.Mo § 479.250, § 536.070, and § 490.080.
    3. Note, just because the court takes judicial notice about an order, doesn't mean they'll let you give the whole thing to the jury. Conclusions of law are inappropriate as well as motions in a limited area, amongst other things.
    4. Stopping distance, driver reaction time, life expectancy tables, etc.

5. *Nelms v. Bright*, 299 S.W.2d 483, 490 (Mo. 1957) (judicial notice may be taken of the limits, although not the precise distance, within which a car can be stopped under given conditions)
6. *Vietmeier v. Voss*, 246 S.W.2d 785, 788 (Mo. 1952) (in the absence of evidence on reaction time, courts take judicial notice that three-fourths of a second is required to react)
7. *Thomas v. Price*, 81 Ill. App. 3d 542, 545 (3d Dist. 1980) ("This court may properly take judicial notice of the time required to travel 60 feet at 50 miles per hour.")
8. *Jackson v. Cherokee Drug Co.*, 434 S.W.2d 257, 264 (Mo. Ct. App. 1968) ("Mortality tables are included in those facts required to be judicially noticed because they are considered of universal common knowledge.")
9. *Muhlke v. Tiedemann*, 280 Ill. 534 (1917) (Court took judicial notice of mortality table).

WHAT NOT TO SAY IN CLOSING

Rules on what you can't say in closing arguments are designed to keep out unfair, but really effective arguments.

1. *Per diem* Argument

The trial technique of appealing to the jury to follow a mathematical formula in measuring damages for pain and suffering is unfair. *Faught v. Washam,* 329 S.W.2d 588, 601-04 (Mo. 1959). See also *Huxoll v. Nickell,* 205 Kan. 718, 726-27, 473 P.2d 90, 96-97 (1970) *(per diem* argument not permissible but permissible to tell the jury what counsel considers a fair compensation for the injuries received); *Timmerman v. Schroeder,* 203 Kan. 397, 402-03, 454 P.2d 522, 526-27 (1969) (not inappropriate to display a chart showing the number of months (492) and weeks (2,312) of pain and suffering).

In Illinois, it is also error for counsel to suggest to the jury that it calculate damages for pain and suffering based on a mathematical formula by which a specific sum is awarded per day or other fixed unit of time. *Caley v. Manicke*, 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

2. The Adverse Inference Rule

The trial court is accorded broad discretion in ruling on the propriety of closing arguments and will suffer reversal only for an abuse of discretion. *Simpson v. Johnson's Amoco Food Shop, Inc.,* 36 S.W.3d 775, 777 (Mo. App. 2001). However, when counsel for one side undertakes to comment on the failure of his opponent to call a witness, review has been stricter. *Simpson,* 36 S.W.3d at 777. The failure of a party to call a witness who has knowledge of facts and circumstances "vital to the case" generally raises the presumption that the testimony will be unfavorable to the party failing to offer the testimony. *Simpson,* 36 S.W.3d at 777-78; *see generally*, 1 Ill. Non-Pattern Jury Inst. Civil § 5.01.

Where such a witness is not equally available to both parties, it is prejudicial error for the trial court to prevent the party to whom the witness is not equally available from requesting the jury to draw an adverse inference from the failure of the opposing party to produce the witness. *Simpson,* 36 S.W.3d 778. It is improper, however, for a party to argue the negative inference resulting from his opponent's failure to produce such a witness if the witness is equally available to both parties. *Elliot v. Koch*, 558 N.E.2d 493 (3d Dist. 1990).

"Equal availability" depends on several factors including: (1) one party's superior knowledge of the existence of the witness; (2) the nature of the testimony that the witness would be expected to give in light of his previous statements or declarations, if any, about the facts of the case; and (3) the relationship of the witness to the party. *Simpson,* 36 S.W.3d 778.

Where a party asserts that an adverse inference could be drawn from the circumstance that the opposing party's wife was not called to testify, the opposing party's counsel's intimation that the wife might be upset if required to testify about her husband's agonizing injuries was an appropriate response. See *Ballinger v. Gascosage Elec. Co-op.,* 788 S.W.2d 506, 513 (Mo. 1990). See also *Skelly Oil,* 211 Kan. at 807, 508 P.2d at 957 (the failure of either party to a civil action to examine a witness equally available to both offers no foundation for prejudicial inference and is not a proper basis for argument).

3. Reading or Arguing the Law

Reading a statute to the jury is improper and, if in reading the statute, counsel misstates the law or misleads the jury, it is reversible error. *Lasky v. Union Elec. Co.,* 936 S.W.3d 797, 802 (Mo. App. 1997).

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. *Rice v. Bol,* 116 S.W.3d 599,612 (Mo. App. 2003); See also *Tamplin v. Star Lumber.* & *Supply Co.,* 251 Kan. 300,311, 836 P.2d 1102, 1110 (1992) (with respect to cap on damages, inappropriate to argue in closing argument that the jury should award $250,000 "for reasons I can't explain" and "for reasons I'm not permitted to tell you," but it is proper for an attorney to tell the jury that the plaintiff is only asking for $250,000 for noneconomic loss or that plaintiffs claim for such loss is limited to $250,000).

In Illinois, "Although it is the function of the trial court to instruct the jury as to the law, attorneys can, and necessarily must, state what they believe the law to be and base their factual arguments on that interpretation. Nevertheless, an attorney may not mislead the jury with such remarks." *Stennis v. Rekkas*, 233 Ill. App. 3d 813, 829, 599 N.E.2d 1059, 1069 (1992).

4. "Golden Rule" Argument/Personalization

Counsel personalizes to the jury by asking them to place themselves in the place of the tort victim or other party to the action. *Henderson,* 68 S.W.3d at 473. Such arguments are condemned and uniformly branded improper, the rationale of rejection being that a juror

doing that would be no fairer judge of the case than the party or victim herself. *Henderson,* 68 S.W.3d at 473, n. 5. See also *Walters v. Hitchcock,* 237 Kan. 31, 33, 697 P.2d 847, 849 (1985) (not violation of the golden rule prohibition to argue "Who would sell their esophagus for $4 million?" but improper personal opinion to add "I would not sell mine.").

Likewise, in Illinois, "one line of argument that the court has repeatedly found to improperly elicit passion, prejudice, or sympathy from the jury is asking it to place itself in the position of either the plaintiff or the defendant." *Sikora v. Parikh*, 2018 Ill. App. (1st) 172473, 122 N.E. 3d 327, 339; *Koonce v. Pacilio*, 307 Ill. App. 3d 449, 457, 241 Ill. Dec. 57, 718 N.E.2d 628 (1999).

5. Referencing Dismissed or Abandoned Pleadings

Counsel's reference to dismissed or abandoned pleadings is improper because the pleadings are irrelevant and are used for the purpose of prejudicing the jury. *Liberty Hills Dev. Inc. v. Stocksdale,* 742 S.W.2d 209, 213-14 (Mo. App. 1987).

6. "Send a Message"

Missouri courts have long shown displeasure with "send a message" arguments in which punitive damages are not sought. *Beis v. Dias,* 859 S.W.2d 835, 840 (Mo. App. 1993). When the message argument becomes the theme of the entire closing, it constitutes reversible error. *Beis,* 859 S.W.2d at 840. Yet, from long experience, appellate courts recognize that trial courts are better positioned to assess the amount of prejudice injected by admittedly improper arguments. *Beis,* 859 S.W.2d at 840. Having only the cold record on appeal, appellate courts of this state uniformly uphold trial court's determinations of the prejudice injected by "send a message" arguments. *Beis,* 859 S.W.2d at 840. Illinois courts also prohibit "send a message" arguments. *See, e.g. Spyrka v. County of Cook*, 366 Ill. App. 3d 156, 170, 303 Ill.Dec. 5613, 851 N.E.2d 800 (2006) ("Counsel's improper opening and closing arguments appealed to emotion rather than evidence by asking the jury to tap into its moral outrage and send a message with its verdict.")

7. Appealing to Juror's Self-Interests

It is generally held improper for counsel to make an argument appealing to self-interests of the jurors. *Williams v. North River Ins. Co.,* 579 S.W.2d 410,413 (Mo. App. 1979). See also *Dent v. Jefferson County Com'rs,* 118 Kan. 519, 235 P. 873, 874 (1925) (improper to suggest that if the jury allowed damages, the taxpayers of the county would have to pay out of their pockets).

8. Plea of Poverty and Presence or Absence of Insurance

It is improper to suggest, by one means or another, that the real defendant is an insurance carrier. *Collins v. Nelson,* 410 S.W.2d 570, 577 (Mo. App. 1965); *Guardado v. Navarro,* 47 Ill. App. 2d 92 (1st Dist. 1964).

It is just as improper to appeal to the jury's sympathy because of the litigant's poverty or lack of insurance coverage. Either kind of argument may result in prejudicial error. *Collins,*

410 S.W.2d at 577; *Lid Assocs. v. Dolan*, 324 Ill. App. 3d 1047 (1st Dist. 2001).

See also *McKissick v. Frye,* 255 Kan. 566,577,876 P.2d 1371, 1381 (1994) (a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case).

9. Remarks Tending to Create Bias or Prejudice

See *Delaporte v. Robey Bldg. Supply, Inc.,* 812 S.W.2d 526, 537 (Mo. App. 1991). (Appellant also asserts error in respondent's counsel's references to "St. Louis Lawyers." We caution counsel on retrial that remarks intended to arouse prejudice, not made within the scope of legitimate argument, are improper.)

> Trials before juries ought to be conducted with dignity and in such manner as to bring about a verdict based solely on the law and the facts. Hence reckless assertions unwarranted by the proof and intended to arouse hatred or prejudice against a litigant or the witnesses are condemned as tending to cause a miscarriage of justice... Due administration of justice demands that the jury in passing on such grave questions should not be allowed to have injected in a case, either by evidence, remarks of counsel, or even by the conduct of the judge, any extrinsic matter that tends to create bias or prejudice. The evil effect of such matters is not always cured by the ruling of the court withdrawing them from consideration or even by rebuking counsel. The red hot iron of prejudice has been thrust into the case; merely withdrawing it still leaves a festering wound. When there is no evidence to justify it is always improper for counsel to indulge in argument to the jury which tends towards the prejudice of one party or to the undue sympathy for the other.

Yingling v. Hartwig, 925 S.W.2d 952, 958 (Mo. App. 1996). See also *Henderson v. Hassur,* 225 Kan. 678, 693, 594 P.2d 650, 663 (1979) (there can be little doubt as to the impropriety of an attorney referring to the opposing party as a criminal).

10. Using Graphic Aids – What and What Not to Do

The use in argument by counsel of graphic aids such as charts or diagrams or plats which have not been put into evidence is permissible, provided they are used merely to illustrate a point in counsel's argument based on the evidence, and provided they are not used in such a manner as to tend to confuse or mislead the jury into considering them as evidence. *Friend v. Yokohama Tire Corp.,* 904 S.W.2d 575,579 (Mo. App. 1995).

In Illinois, "The use of exhibits to illustrate a closing argument is proper as long as the exhibits are not misleading to the jury. The exhibits, like closing argument itself, cannot be based on facts not in evidence." *Martin v. Zucker*, 133 Ill. App. 3d 982, 989, 479 N.E.2d 1000, 1005 (1985); 3A Nichols' Illinois Civil Practice § 3579.1 (1977 rev. ed.), at 283.

11. Arguing the Evidence - All the Evidence

A trial court commits no error by permitting counsel to review admissible evidence in argument before the jury after the evidence is in the record. *Powderly,* 245 S.W.3d at 272 (replaying a videotape admitted into evidence).

12. Fair Retort is Allowed

The law indulges a liberal attitude toward argument, particularly where the comment complained of is fair retort or responds to prior argument of counsel. *Boshears v. Saint-Gobain Calmar, Inc.,* No. 67443, 2008 WL 3286950 (Mo. App. Aug. 12, 2008)