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)