Can They Say That?

A Guide to Limits in Closing Argument

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1. Introduction

For law students learning how to become effective trial advocates, mastering the art of closing argument can be daunting. Delivering a great closing at the end of a trial requires several skills. Just to name a few, delivery, tone, pace, having a thorough understanding of the evidence, and being responsive to your opponent are all important. One of the most important things to understand before giving a closing argument is what you are permitted and not permitted to say during your speech. This knowledge will not only assist you in making sure opposing counsel does not have a basis to object to your speech, but also to know when to object when the other advocate crosses the line.

This guide serves as an overview of what you need to avoid in a closing argument, as well as what is permissible within the rules. This guide will cover three general topics: **General Rules**, as well as specific rules for **Criminal** and **Civil** cases.

2. General Rules

A. Evidence Not in The Record

A lawyer must limit their closing arguments to facts that are in the record and reasonable inferences drawn from those facts. *State v. Allen*, 626 S.E.2d 271, 280 (N.C. 2006). This rule is often invoked in response to prosecutors' arguments in criminal cases, but it applies to both criminal and civil cases. Examples of facts outside the record include using demonstratives, like videos and images, that are not evidence in the case. See *Milton v. Texas*, No. 01-16-00434-CR, 2019 WL 2426299 (Tex. App. June 11, 2019) (The use of a YouTube video of a lion at a zoo trying to eat a human baby through protective glass in a non-violent robbery case was considered facts outside the record). Making unsubstantiated, generalized suggestions or assertions about the specifics of a case is also using facts outside the record. See *People v. Woods*, 53 Cal.Rptr.3d 7, 14 (Cal. Ct. App. 2006) (In drug case, prosecutor who claimed

"drugs may be obtained by driving up any street" created fact outside the record). References to witnesses who did not testify also create facts outside the record. *Fant-Caughman v. State*, 61 S.W.3d 25, 29 (Tex. App. 2001) (Prosecutor argued in closing: "I could have been here with witnesses for several more days, because there are a lot of people who know about these allegations").

However, a comment on evidence in the record that does not create a new fact will not be a fact outside the record. See *Kelley v. State*, 2021 WL 966964, *11 (Mo. Ct. App. 2021) (Prosecutor who referenced his 30 years of legal experience in calling defendant's "ridiculous poop story" did not argue facts outside the record by referencing his experience). In some jurisdictions, a prosecutor may also respond to a defense lawyer's argument that goes outside the record under the "invited argument rule." *Drew v. State*, 76 S.W.3d 436, 462-463 (Tex. App. 2002). The rule "permits prosecutorial argument outside the record in response to defense argument which goes outside the record," so long as the prosecutor does "not stray beyond the scope of the invitation." *Johnson v. State*, 611 S.W.2d 649, 650 (Tex. Crim. App. 1981).

B. Golden-Rule Violations

A "golden rule" closing argument is one in which the advocate "urges jurors to put themselves in a particular party's place or into a particular party's shoes." *State v. Devito*, 124 A.3d 14, 26-27 (Conn. App. Sept. 8, 2015) These arguments are "improper because they encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Id*. Sometimes, violations of the "golden rule" are clear, such as explicitly asking the jury to put themselves in the position of the defendant or another witness. *State v. Bell*, 931 A.2d 198, 214-215 (Conn. Sept. 11, 2007). But other apparent violations approach the line and aren't so clear, and sometimes what might seem to be a "golden rule" violation isn't a violation at all.

For example, in a murder case the prosecutor repeatedly asked the jury how they would feel if someone pointed a loaded shotgun in their face. *Holliman v. State*, 79 So.3d 496, 499 (Miss. 2011). While the prosecutor did not specifically ask the jury to put themselves in the shoes of the victim of that case, he "essentially requested that each juror put himself or herself in the place of Laura during the fatal altercation, which was an egregious display of prosecutorial misconduct." *Id*. at 500.

However, asking the jury to use their own personal experience in judging the facts will not necessarily constitute a golden-rule argument. The defense counsel in an accident case told the jury they knew how certain safety mechanisms like brake lights and their own vision help them be safe drivers. *Shaffer v. Ward* 510 So.2d 602 (Fla. Dist. Ct. App. 1987). The court held it was not improper to "to ask the jury to use their common, everyday experience in deciding the case." Id. at 603. The distinction is difficult but important: general, common experience is fine, but putting the jury in the specific factual circumstances of a party or witness is not.

It's also important to remember that "not all arguments that ask jurors to place themselves in a particular party's situation implicate the prohibition on golden rule argument." *Devito*, 124 A.3d at 27. The principle that guides the rule is that "jurors should be encouraged to decide cases on the basis of the facts as they find them, and reasonable inferences drawn from those facts, rather than by any incitement to act out of passion or sympathy for or against any party." *State v. Long*, 975 A.2d 660, 667 (Conn. 2009). So, asking the jury to put themselves in someone's shoes to "assess the reasonableness of certain conduct reflected in the evidence" will not constitute a golden-rule violation. *State v. Danovan T.,* 170 A.3d 722, 730 (Conn. App. Ct. 2017). In other words, if you're thinking about asking the jury to look at things through the perspective of a witness or party, determine *why* you are asking it.

C. "Inflammatory Rhetoric" – Generally

While an attorney giving a closing argument "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. U.S.*, 295 U.S. 78 (1935). The line for what is and isn't "inflammatory rhetoric" in a closing argument may be the grayest amongst all of the categories of impermissible closing argument tactics. Finding a universal definition of inflammatory rhetoric is difficult and often attempts at defining it will appear conclusory. See *Hiter v. State*, 660 So.2d 961, 966 (Miss. 1995) (While "[a]ttorneys are given wide latitude in arguing their cases to the jury," they are "not permitted to use tactics which are inflammatory, highly prejudicial and reasonably calculated to unduly influence the jury"). However, it is still important to understand the "critical difference between a lawyer who hits hard and a lawyer who hits below the belt." *Muniz v. Rovira*, 373 F.3d 1, 6 (1st Cir. 2004) (Holding that counsel's comments that plaintiff was "little boy" while referring to plaintiff's injuries did not use inflammatory rhetoric).

Sometimes, a lawyer's statement will appear so ridiculous in its face that the statement's "inflammatory" nature will be apparent. See *Schleunes v. American Cas. Co. of Reading, Pa.*, 528 F.2d 634, 638 (5th Cir. 1976) (Counsel who "placed upon the jury's shoulders the divine responsibility of determining whether [his client] was going to heaven or hell" made improper closing argument). Other times, inflammatory rhetoric won't appear as obvious, but you should still be on the alert for statements that cross the line. Take, for example, *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534 (2nd Cir. 1992). The plaintiff, a New Jersey resident, sued a Vermont ski resort for a slip and fall caused by an icy parking lot. *Id*. at 535. Because of diversity jurisdiction, the jury trial was held before the United States District Court for the District of Vermont. *Id*. During closing arguments, the defense attorney appealed to the jury's regional bias, to which the plaintiff's attorney objected to for inflammatory rhetoric but was overruled:

> **DEFENDANTS' COUNSEL:** … There's no question there's a legitimate injury here. And we didn't even ask Dr. Abrams any question, and that's why. We do not dispute that, yes, there was an injury here. But isn't what they're really asking is that they can come up from New Jersey—
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> **PLAINTIFF'S COUNSEL**: Objection

THE COURT: What's the basis of your objection?

PLAINTIFF'S COUNSEL: I think that's really getting inflammatory. It's appealing to regionalism rather than the facts of the case.

THE COURT: Objection overruled. You may proceed.

Id. at 536. [1] The defense attorney continued to appeal to the jury's regional bias, at one point asking, "Would we go to New Jersey and walk on a tugboat without looking where we were going?" Id. at 537. The Second Circuit held a comment that "appeals to the regional bias of a jury are completely out of place in a federal courtroom," as it tends to "create feelings of hostility against out-of-state parties." *Id*. at 539. Therefore, the comments were improper.

Sometimes, comments that are inflammatory are permitted and excusable if the other party invites the comment in their own argument. For example, in a murder case a prosecutor's comment that the defendant was a "representative of Satan" was deemed permissible because the defense counsel invited the comment when he remarked when he remarked the real perpetrator – purportedly not his client - was "'some representative of Lucifer or Satan,' a 'reprobate' and a 'profligate.'" *Fahy v. Horn*, 516 F.3d 169, 201 (3rd Cir. 2008).

The term "inflammatory rhetoric," as noted, is vague and undefined. However, there are more specific types of comments that are often also referred to as "inflammatory." Those specific categories of comments are discussed below.

[1] More from the defense attorney's closing argument: "—if they can come up here from New Jersey to Vermont to enjoy what we experience every year, for those of us who are here originally for most of our lives, for most of us who come here for our own reasons, for the rest of the time that we're here, and without a care in the world for their own safety when they encounter what we, ourselves do not take for granted, and they can injure themselves, and they can sit back and say, 'Well, yes. I'm on long-term disability, and I sit around and I watch golf on TV, but I'd like you to retire me. Retire me now. Pay me now what I would get or what I claim I would get until I work for age 65,' regardless of the fact that there are no employees over the mid–40's in the very job for Texaco, which we learned was a very large company." *Id*. at 536-537.

D. Misstatements of the Law

This may seem obvious, but a lawyer may not misstate what the applicable law is for any given case during closing argument. While this may seem like an easy rule to follow, it can be tricky. In practice, advocates will often attempt to summarize the law in a way that makes sense to jurors. However, in summarizing or explaining the law, lawyers will sometimes step over the line.

The general rule is simple: An advocate "may not misstate the law during closing arguments." *People v. Moody*, 54 N.E.3d 183, 203 (Ill. App. Ct. 2015). First, you need to understand what isn't misstating the law. In a civil case, pointing out that a party failed to produce a piece of evidence, such as a witness, is not improperly characterizing the law or shifting the burden, but is instead permissible argument based on the record. *Hemann v. Camolaur, Inc.*, 127 S.W.3d 706, 711 (Mo. Ct. App. 2004). [2] It also is not a misstatement of law to characterize the evidence in a way that supports a party's theory, such as arguing that a witness or party did not possess the required *mens rea* for a crime or affirmative defense. *Johnson v. Com.*, 2007 WL 2742735, *2 (Ky., Sept. 20, 2007). [3]

Advocates step over the line not when they try and fit the evidence within the applicable law but when they plainly misstate it. While this is true in all cases, the issue often arises during prosecutors' comments in criminal cases. Adding an element to an offense that is not within it, such as adding a non-existent "reasonable person" standard, is misstating the law. *Owens v. State*, 261 So.3d 585, 589 (Fla. Dist. Ct. App. 2018). Improperly defining a term within a statute will also be considered a misstatement of the law. *State v. Basham*, 319 P.3d 1105, 1116-1117 (Haw. 2014).

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[2] In medical malpractice case, plaintiff's counsel did not improperly shift the burden when he remarked that the "defendant's inability to get a doctor to come here and endorse their views about the medical evidence speaks volumes about the weakness of their case." *Id*. at 710.

[3] Prosecutor's statement that defendant "did not have the requisite state-of-mind to justify self-defense" was proper. *Id*.

Even the slightest word choice can amount to a misstatement of law. In an armed robbery case the prosecutor, when describing the defendant's presumption of innocence, told the jury, "that cloak of innocence *is* gone." *People v. Brooks*, 803 N.E.2d 626, 630 (Ill. App. Ct. 2004) (Emphasis added). On appeal, the government argued that the prosecutor "'was not telling the jury that the presumption of innocence was presently gone[;] rather[,] he told them that when they returned to the jury room and looked at the evidence, the cloak of innocence would be gone because defendant had been proven guilty.'" *Id*. The Appellate Court of Illinois disagreed. Finding that the comment was a misstatement of law, the court emphasized that the prosecutor did not state that the presumption of evidence "would" be gone but is presently gone. *Id*. Compare that holding with the Supreme Court of Illinois' decision in another criminal case finding no error in a prosecutor asking the jury "to remove the cloak of innocence from this defendant." *People v. Cisewski*, 514 N.E.2d 970, 977 (Ill. 1987). Notice the critical distinction. It is acceptable to ask the jury to do something, but it is not acceptable to misstate the question they're deciding.

E. Advocate's Personal Belief

While jurisdictions vary, generally "it is not good practice for counsel to inject their personal beliefs into the closing arguments." *Neff v. State*, 696 S.W.2d 736, 740 (Ark. 1985). While there is a specific rule against prosecutors announcing their personal belief on a criminal defendant's guilt, which we will discuss later, this section will briefly address the topic of "personal belief" generally. This is a relatively straightforward rule, and you should be on the lookout for any "I" or "to me" statements. A plaintiff's lawyer who stated "I strongly believe" that her client was injured made an improper statement of personal belief. *Albertson's, Inc. v. Brady*, 475 So.2d 986, 989 (Fla. Dist. Ct. App., 1985). Similarly, an attorney's statement that he "' knew that [testimony] wasn't true" was also improper. *Grant v. Arizona Public Service Co.*, 652 P.2d 507, 524 (Ariz. 1982). A prosecutor's statement that he doesn't "believe the

story of self-defense" from the defendant was improper. *State v. Foster*, 942 N.W.2d 829, 835 (N.D. 2020).

A statement of personal belief can also be a lawyer's comments about their own personal experience. Take for example one civil case in which counsel improperly opined on everything from how all chiropractors give a certain type of treatment to whether or not he personally thought it was difficult to do the job of a housekeeper. *Silva v. Nightingale*, 619 So.2d 4, 4 (Fla. Dist. Ct. App. 1993). Or another in which counsel commented on the "manner in which bus drivers generally drive and purpose of 'no stopping' signs, interjected his opinion of evidence at trial." *Reynolds v Burghezi*, 227 A.D.2d 941, 942 (N.Y. App. Div. 1996). Think of this like the anti "me, myself and I" rule – keep your personal beliefs out of closing argument.

F. Attacks on Opposing Counsel or Parties

It is "unprofessional for counsel to make personal attacks on opposing counsel." *U.S. v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996). Much like the rule against statements of personal belief, this rule prohibits you from making it personal during closing arguments. A prosecutor's comments accusing the "defense counsel of further victimizing the victim," for example, constituted a "personal attack on opposing counsel and are clearly improper." *Jenkins v. State*, 563 So.2d 791 (Fla. Dist. Ct. App. 1990). Attacks on opposing counsel can also be more implicit than explicit. For example, in a civil case against a tobacco company, plaintiff's counsel stated during arguments that "the defense in these cases consistently tries to recast the jury instructions and the questions on the verdict form." *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So.3d 53, 56 (Fla. Dist. Ct. App. 2016). The defense counsel objected, claiming opposing counsel was "attempting to link the defense attorneys to a scheme to conceal the truth about the harmful effects of smoking, which amounted to an attack on appellants' conduct of their

defense in the suit." *Id*. The appellate court agreed, calling the comments "totally irrelevant to the issue of appellants' liability" and "wholly beyond the pale." *Id*. at 59.

It's important to distinguish what constitutes an impermissible attack on opposing counsel and a permissible rebuttal of opposing counsel's theory. In a drug possession case, the prosecutor in rebuttal claimed that defense counsel had misstated the law and was "'blowing smoke today to try to divert you from what's going on in this case.'" *People v. Perea*, 126 P.3d 241, 247-248 (Colo. App. 2005). The appellate court held these comments were not "denigrating defense counsel before the jury," but instead was an "attempt to refocus the jury's attention" to the applicable legal standard and relevant facts. *Id*.

You also should not personally go after an opposing party. It was improper for defense counsel in a medical malpractice case to categorize the plaintiff and his witnesses as "greedy, empty-hearted people without souls who were manipulating the lawsuit and 'branding' a good doctor all for the sake of money." *Roetenberger v. Christ Hosp.*, 839 N.E.2d 441, 446 (Ohio Ct. App. 2005). An improper attack on an opposing party need not be direct; attorneys should "not to mount a personal attack on the opposing party even by insinuation." *Martinez v. Department of Transportation*, 189 Cal.Rptr.3d 325, 331 (Cal. Ct. App. 2015). In Martinez, a personal injury case regarding a motorcycle accident, defense counsel didn't *directly* call the plaintiff a Nazi in closing argument because of the type of helmet he was wearing. *Id*. at 330. However, the attorney did "psychologically link [the plaintiff] to Nazis by paraleptically using the word 'Nazi' six times in rapid succession." *Id*. This implicit attack on the plaintiff was an "obvious" instance of misconduct. *Id*. at 331.

G. Asking the Jury to "Send a Message"

Generally, it is improper to ask the jury to "send a message" to the defendant with their verdict. However, there are important exceptions in both civil and criminal trials, which we will address separately.

In civil cases, it is improper to ask the jury to "send a message" by "'delivering a substantial verdict.'" *Nishihama v. City and County of San Francisco*, 112 Cal.Rptr.2d 861, 864-865 (Cal. Ct. App. 2001). This applies almost universally when the plaintiff is only seeking compensatory damages. That's because asking to send a message to a civil defendant with a larger verdict when only compensatory damages are sought goes "beyond the message of requesting that the responsible defendants make the plaintiff whole ..." *Spinnenweber v. Laducer*, 2019 WL 2591017, *2 (N.D. Ind., June 24, 2019). In cases dealing with damages purely to make the plaintiff whole, these types of comments ask the jury to determine a question they don't need to answer since the case is focused on "whether or not the plaintiffs [were] entitled to compensation for damages that were proximately caused" by the defendant. *Jackowitz v. Lang*, 975 A.2d 531, 534 (N.J. Super. Ct. App. Div. 2009).

However, "send a message" comments *might* be proper in civil cases when the jury has to determine potential punitive damages. Jurisdictions are split as to whether this is appropriate, but some jurisdictions have concluded "that arguments by the complaining party's counsel which suggest to the jury that the verdict will deter others and/or punish the defendant are, in effect, arguments requesting that the jury award punitive damages." *Harris v. Steelweld Equipment Co., Inc.*, 869 F.2d 396, n. 13 (8th Cir. 1989). Note, however, that allowing "send a message" arguments in closing for punitive damages is not a "universal" doctrine, so always check the jurisdiction you're in. *Moore v. Hartman*, 102 F.Supp.3d 35, 161 (D.C. 2015) (Judge's instruction to jury that they should not be trying to send a message to the defendant was proper after plaintiff's counsel asked them to make a "big statement," despite fact that plaintiff was seeking punitive damages).

In criminal cases, a "send a message" argument is "one that encourages juries to use their verdict to send-a-message to the public or to other potential criminals, instead of render[ing] a verdict based solely on the evidence introduced at the trial of that case." *McCarty v. State*, 262 So.3d 553, 559 (Mo. Ct. App. 2018) (Internal citations omitted). Read the following example from a prosecutor's closing in a case in which the defendant was accused of supplying alcohol to a minor:

> Whatever you do with regard to punishment sends a message not only to—[objection]—not only to the Defendant who needs a message about this type of conduct, but it lets other folks within the community know what you are going to condone with regard to children of this community. It is imperative that adults act like adults, and that includes not supplying alcohol to minors. And it is an important decision that you are about to make. And on behalf of the prosecution and the Commonwealth I'm asking that you give a year in the penitentiary to send the message.

McMahan v. Com, 242 S.W.3d 348, 350 (Ky. Ct. App. 2007). The court of appeals said they "simply can find no justification for the prosecutor's comments." *Id*. at 351. In another case in which the prosecutor was seeking the death penalty for murder, the prosecutor asked the jury to send "message on the street saying, look at that, he got death, you see that, honey, that's why you live by the rules, so you don't end up like that." *Com. v. DeJesus*, 860 A.2d 102, 113 (PA. 2004). The Supreme Court of Pennsylvania held this was "injecting an improper external element in favor of death." *Id*. at 119.

However, some jurisdictions recognize an exception when the prosecutor simply asks the jury to send a message to the defendant themselves, and the message being sent is that the defendant can't get away with the crime they've been charged with. In another case out of Pennsylvania, the prosecutor in a murder case told the jury the "message I want to send to [appellant] is to tell him he can't get away with murder." *Com. v. Patton*, 985 A.2d 1283, 1285 (Pa. 2009). The Supreme Court held: "Prosecutorial remarks encouraging a jury to 'send a message' to the defendant, rather than the community or criminal justice system, do not invite consideration of extraneous matters and are not misconduct." *Id*. at 1288. While that comment was permissible, the court warned that "send a message" arguments are "unwise at best, and prosecutors would do well to put 'send a message' on the taboo list." *Id*. at 1289.

H. References to a Party's Wealth, Poverty, or Size of Corporation

In closing arguments, "references to the size, wealth, and corporate status of a party are improper when intended to arouse prejudice and are not within the scope of legitimate argument." *Porter v. Toys 'R' Us-Delaware, Inc.*, 152 S.W.3d 310, 324 (Mo. Ct. App. 2004). This is different of course from determining, for example, a civil plaintiff's earning power "in connection with the claim of damages." *Burke v. Reiter*, 42 N.W.2d 907, 912 (Iowa 1950). However, the party's financial situation "has no place in the process of determining which, if either, party is *entitled* to recover." *Id*. (Emphasis added). Similarly, "any *comparison* of respective earning powers or financial or economic conditions is entirely improper." *Id*. (Emphasis in original). The reason for this rule, as the Third Circuit has explained, is that "justice is not dependent upon the wealth or poverty of the parties and a jury should not be urged to predicate its verdict on a prejudice against bigness or wealth." *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3rd Cir. 1978).

References to a party's wealth or size can be obvious. In an asbestos case it was improper for the plaintiff's attorney to comment that the defendant chose to "spend exorbitant sums of money defending asbestos actions instead of compensating innocent victims" because such comments were "deliberate references to [the defendant]'s expenditures defending this suit and others." *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018). Other references can be more subtle. Describing a defendant corporation's executives as sitting in "'plush paneled corporate offices'" and at "'at the country club or something having lunch,'" while asking for a big verdict against that defendant because "'money talks,'" are all improper comments on the "on the defendant's corporate nature and wealth." *Duke v. American Olean Tile Co.*, 400 N.W.2d 677, 681 (Mich. Ct. App. 1986). Additionally, remember

that the rule includes "poverty." Generally, that means you can't "to contrast [a defendant]'s wealth with plaintiffs' poverty." *Garcia v. Sam Tanksley Trucking, Inc.*, 708 F.2d 519, 522 (10th Cir. 1983). [4]

I. Racial Remarks and Racist Dog Whistles

During closing arguments, "racial remarks are not permissible if they appeal to racial prejudice and are not relevant either to prove the elements of the crime or to explain a relevant fact." *State v. Wilson*, 404 So.2d 968, 971 (La. 1981) (holding that prosecutor's "repeated references to 'whitey' and 'white honkies' in connection with the defendants' supposed characterization of whites, and 'animals' as a description of the defendants" were improper racial remarks). Sometimes, an attorney's statement is obviously racist and abhorrent on its face. Take this statement from a prosecutor in a sexual assault case:

> Don't you know and I argue if that (i. e. consent) was the case she could not come in this courtroom and relate the story that she has from this stand to you good people, because I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us…

*Miller v. State of N.*C, 583 F.2d 701, 704 (4th Cir. 1978). The Fourth Circuit properly held the prosecutor, "by deliberately injecting the issue of race into what was necessarily a racially sensitive prosecution, so infected the trial with unfairness as to deny appellants due process of law." *Id*. at 703. Note, however, this rule not only include comments denigrating members of a certain race, but also attempting to appeal to members of a certain race. In an accident case, the plaintiff's attorney improperly attempted to appeal to the jury on racial grounds by noting there were "no 'brothers' or

[4] Plaintiff's counsel in *Garcia* "clearly overstepped the bounds of proper argument" when she argued the following: "First of all, let's look at the contending forces here, who are the plaintiffs and who are the defendants. On the plaintiffs' side, we have a poor family who works here in Albuquerque. They make a meager living. They have children and they were in an automobile, minding their own business, and going on a trip and coming back. On the other side, you have a giant corporation, a trucking company, that has three hundred trucks on the road through thirty-six states." Id.

African–Americans representing" the defendant and claiming her client was mistreated because she was a "Latino from North Philadelphia." *Mirabel v. Morales*, 57 A.3d 144, 147-148 (Pa. Super. Ct. 2012).

While the above cases deal with explicit references to race, sometimes attorneys will implicitly make racial or racists remarks, otherwise known as "racist dog whistles." In *Bennett v. Stirling*, the prosecutor was found to have made improper racial remarks by referring to the defendant, a black man, as "King Kong" and a "caveman," among other derogatory terms. 842 F.3d 319, 321 (4th Cir. 2016). More recently, the North Carolina Court of Appeals held that a prosecutor made an improper connection between the defendant's use of the word "hoodlum" and the defendant's race, when the defendant made no such connection in his testimony. *State v. Copley*, 828 S.E.2d 35, 41 (N.C. Ct. App. 2019) (Overturned on other grounds). See also *State v. Marlowe*, 81 So.3d 944, 986 (La. Ct. App. 2011) (Prosecutor's reference to fire hoses "could not have been anything other than a reference to the use of fire hoses by authorities to control and/or disperse primarily black Americans peacefully protesting the continued systemic deprivation of their civil rights in the segregated South").

J. Quoting or Citing the Bible

Jurisdictions vary on whether an advocate may quote or cite the bible in closing argument and, if it is permitted, how much leeway is given for such religious references. For example, Pennsylvania courts have "narrowly tolerated references to the Bible and have characterized such references as on the limits of 'oratorical flair' and have cautioned that such references are a dangerous practice which we strongly discourage." *Com. v. Chambers*, 599 A.2d 630, 644 (Pa. 1991). However, Pennsylvania also bars prosecutors from relying in "any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death." *Id*. [5]

[5] It was improper for prosecutor to argue in death penalty case that "As the Bible says, 'and the murderer shall be put to death.'"

Other jurisdictions similarly will not necessarily bar any reference to the bible but restrict the way the bible can be used in closing arguments. In California, advocates are not barred "per se, with quoting from the Bible in final argument, or with arguing that [criminal] conduct occurred even in biblical times." *People v. Pitts*, 273 Cal.Rptr. 757, 814 (Cal. Ct. App. 1990). But it is inappropriate for a prosecutor to suggest a criminal defendant, because of their conduct, "will not inherit the kingdom of God." Id. The Court of Criminal Appeals of Alabama has articulated the standard that is replicated at least in part in many jurisdictions:

> Argument of counsel should not be so restricted as to prevent reference, by way of illustration, to historical facts and public characters, or to principles of divine law or biblical teachings. Generally, a prosecutor's reference to religion, God, or the Bible is improper if that reference urges the jury to abandon its duty to follow the law or to decide the case on an improper basis.

Mitchell v. State, 84 So.3d 968, 984 (Ala. Crim. App. 2010) (Internal Citations Omitted). So, a prosecutor describing the day murders occurred as "'a day that we should be giving thanks for God's bountiful blessings'… merely illustrated the day the murders occurred and thus was not improper." *Id*. While Alabama's standard for biblical references is used in some form in many states, that state's courts clearly apply this standard in a relaxed fashion. For example, a prosecutor who rebutted a defendant's good character testimony by stating "'Judas was a man of good reputation immediately before betraying Christ,'" was found not to have made an improper comment. *Poole v. State*, 298 So.2d 89, 90 (Ala. 1974). Such a comment on its face may appear to urge the jury to decide the case on an improper opinion, *i.e.* their opinion of one of the bible's biggest villains. Yet the Supreme Court of Alabama did not think so, which reinforces a key point about biblical references in closing arguments: make sure to check the standard, and how it is applied, in your jurisdiction.

3. <u>Rule Specific to Criminal Cases</u>

A. Prosecution's Personal Belief on Defendant's Guilt

We already discussed how, generally, advocates should not state their personal belief in closing arguments. Prosecutors in criminal cases are also explicitly barred from stating their personal belief on a defendant's guilt or innocence. One of the reasons for this rule is courts have reasoned these comments "carry with them the clear import that counsel knows something which the jury doesn't and this is an additional reason to condemn them." *U.S. v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979). This is a relatively hardline rule; prosecutors can't get around it by using qualifiers, such as saying their belief on innocent or guilt is based on the evidence. *Id*. A prosecutor also need not explicitly use the words "I believe" or "I think" to break the rule. In a bank robbery case, the prosecutor stated "'The defendant is clearly guilty of robbery that happened that day.'" *Morales v. State*, 133 A.3d 527, 531 (Del. 2015). The state argued without a phrase like "I believe" the statement can't be one of personal belief, but the court rejected this argument, holding the comment was improper and noting "we continue to disapprove of expressions of personal opinion by prosecutors on credibility and guilt." *Id*. at 530-532.

A prosecutor also may not make generalized comments about guilt or innocence that imply the guilt of the defendant in a specific case. In a manslaughter case, the prosecutor said during argument that he was commanded as a "District Attorney to prosecute the guilty and protect the innocent." *Quinlivan v. State*, 579 So.2d 1386, 1387 (Ala. Crim. App. 1991). While the prosecutor did not directly speak to the guilt of the defendant in that case, the court held his statement was improper and a statement of personal belief. *Id*. at 1389. As the court explained, his "comments expressly state that he tries only the cases that he wants to try and, consequently, chooses to prosecute only those defendants who are, as a matter of fact, guilty." *Id*.

B. Defendant's Failure to Testify

The Fifth Amendment of the U.S. Constitution states an individual shall not "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Therefore, "the Fifth Amendment…

forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). This rule applies "to direct and indirect comments on the failure to testify." *State v. McMurry*, 143 P.3d 400, 402 (Idaho Ct. App. 2006). An example of a clear violation of this rule is from a sexual assault case in which the prosecutor stated "You've got to look at the credibility of the defendant as well. I mean, he didn't testify." *State v. A. M.*, 152 A.3d 49, 54 (Conn. 2016). The prosecutor made another statement in closing commenting on the defendant testifying, but the court noted they "could not condone even one violation of such an extreme nature." *Id*. 62.

Indirect comments are also impermissible if they implicate a defendant's right to remain silent. In a rape case in which the defendant did not testify, the prosecutor made several comments that the court took issue with:

> … the prosecutor made three comments in closing argument that [the defendant] "knows [not knew] what happened." The prosecutor also pointed out that [the defendant] admitted some things, and then the prosecutor asked the rhetorical question "what's true John?" The prosecutor concluded by conceding that although there was no physical evidence of trauma, [the defendant] "knows what happened, but he's not talking. He's not telling us what happened."

State v. Ball, 675 N.W.2d 192, 195 (S.D. 2004). The problem with the prosecutor's comments was the use of present tense. This implied that the defendant has relevant information regarding his guilt but is choosing not to give that testimony at trial, and therefore these "comments were improper comment on Ball's constitutional right to remain silent." *Id*. at 202.

However, prosecutors are given some leeway in rebuttal if the defense comments on why their client did not testify. In a fraud case, the defense attorney claimed in closing that "that the Government had not allowed respondent to explain his side of the story." *U.S. v. Robinson*, 485 U.S. 25, 26 (1988). During rebuttal, the prosecutor responded to this allegation by stating to the jury "' could have taken the stand and explained it to you.'" Id. This comment was not improper, noting it is a violation of the

Fifth Amendment to comment on a defendant's choice not to testify, the rule does not prohibit "the prosecutor from fairly responding to an argument of the defendant by adverting to that silence." *Id*. at 34.

A related concern arises when the defense has presented no witnesses and the prosecution argues that its case is "unrebutted." Courts have found such comments to impermissibly tread upon an accused's right to remain silent, at least where the only person who could challenge the prosecution evidence is the defendant. *See, e.g.*, *United States v. Tanner*, 628 F.3d 890, 899 (7th Cir. 2010) ("A prosecutor's comment that the government's evidence is ... unrebutted will violate [the Fifth Amendment] if *the only person* who could have rebutted the evidence was the defendant."). *See also*, *People v. D'Amico*, 2018 IL App (2d) 180157-U, P28, 2020 Ill. App. Unpub. LEXIS 1185, *15 (saying "no one" rebutted the prosecution case pointed directly at the defendant, as the crime occurred with no other persons present). Yet not all such comments are deemed improper, especially if they can be seen as addressing the failure to discredit prosecution evidence. *State v. Collins*, 2008-Ohio-2590, P23, 2008 Ohio App. LEXIS 2184, *10 (finding no error where the prosecutor argued that "[h]e no longer enjoys that presumption because now you have heard more than sufficient evidence, credible evidence from all the witnesses that the State presented that have not been disputed in any way, shape or form.").

Finally, concerns about impermissible shifting of the burden of proof may arise if the prosecutor argues the defendant's failure to call witnesses. *People v. Santana*, 255 P.3d 1126, 1131 (Colo. 2011)("A prosecutor's burden-shifting actions fall on a spectrum. On one side of the spectrum are those actions that are most likely to shift the burden of proof, which often occurs when a prosecutor explicitly argues that a defendant needs to prove his innocence."). However, some courts have tolerated this. *See,.e.g.,* State v. Seager, 2001 Iowa App. LEXIS 671, *5, 2001 WL 1451139 ("Prosecutorial statements regarding the defendant's failure to present evidence are permissible under both Iowa and Federal case law provided the statements are 'not phrased to call attention to the defendant's own failure to testify.'").

C. Defendant's Courtroom Behavior

During closing argument, "courtroom demeanor of a non-testifying criminal defendant is an improper subject for comment by a prosecuting attorney." *U.S. v. Mendoza*, 522 F.3d 482, 491 (5th Cir. 2008). While connected to the Defendant's Fifth Amendment rights, it is also connected to Federal Rule of Evidence 404(a) which does not permit improper character evidence at trial. In a case against a non-testifying defendant accused of threatening the life of the President of the United States, the prosecutor in closing reminded the jury that during testimony "a number of you saw [the defendant] laugh and saw him laugh as they were repeated." *U.S. v. Schuler*, 813 F.2d 978, 979 (8th Cir. 1987). The prosecutor's comments amounted to improper character evidence because they were made "apparently for the purpose of showing that he was of bad character because he considered the charges of threatening the life of the President to be a joke." 980. Therefore, the comments were improper. *Id*. at 981.

Put another way, the defendant's courtroom behavior is not evidence. The prosecutor in a federal firearms violation trial commented during closing arguments that the defendant was "nervous," noting that his leg was going up and down. *U.S. v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984). The Eleventh Circuit held that the prosecutor's comments "introduced character evidence for the sole purpose of proving guilt, and violated his right not to be convicted except on the basis of the evidence admitted at trial." *Id*. See also *State v. Stull*, 438 P.3d 471, (Or. Ct. App. 2019) (Prosecutor's comments that defendant's courtroom behavior was "aggressive" and attention-seeking were not evidence and improper).

D. "Lawyered Up" Comments

Generally, prosecutors cannot raise a "negative inference of guilt in connection with a criminal defendant's desire to consult with an attorney." *Riddley v. State*, 777 So.2d 31, 34 (Miss. Ct. App. 2000). In other words, the prosecutor can't suggest the defendant is guilty for lawyering up. Some courts have

found these comments violate the defendant's Sixth Amendment right to counsel. One of the earliest cases addressing this issue involved a habitus corpus petitioner arguing the following prosecutorial statement in closing describing the defendant's alleged post-manslaughter behavior violated his constitutional rights:

> "He goes home and puts the shirt down in the chest, a torn shirt. Then he goes to bed. He says he had trouble sleeping. He gets up the next morning and lo and behold, what does he do? He calls his lawyer. These are acts of innocence?

U. S. ex rel. Macon v. Yeager, 3476 F.2d 613, 614 (3rd Cir. 1973). The Third Circuit upheld the District Court's determination that this comment violated the defendant's Sixth Amendment rights, noting that prosecutor's comment about the defendant's "consultation with counsel the day after the shooting incident would appear to have been directed to, and may have had the effect of, raising in the jurors' minds the inference that petitioner was, or at least believed himself to be, guilty." *Id*. at 616. Similarly, in a case against a defendant for burglary and various other crimes, the prosecutor commented in closing that prior to talking to police, the defendant "already consulted with two attorneys… He had lots of time to figure out what story he was going to tell the police." *State v. Espey*, 336 P.3d 1178, 1180 (Wash. Ct. App. 2014). On appeal, the court held the prosecutor violated the defendant's "right to counsel by urging the jury to conclude that [the defendant] was lying because he had met with an attorney." *Id*. at 1182.

E. Arguing for Jury Nullification

Jury nullification is loosely defined as when a jury decides guilt or innocence by deliberately ignoring the evidence presented or refusing to apply the law to a case. And "while a jury has the power of nullification, a defendant does not have the right to argue or instruct a jury on nullification, nor does he have the right to have a jury ignore the law or undisputed evidence in a case." *People v. Griffith*, 777 N.E.2d 459, 474 (Ill. App. Ct. 2002). A defendant has "no constitutional right to jury nullification" and

"there is no constitutional requirement that the jury be instructed on nullification." Lumsden v. State, 564 S.W.3d 858, 900 (Tex. App. 2018).

In a case for possession of marijuana, the defendant appealed his conviction on the grounds that the trial court should have allowed his attorney to argue for jury nullification. *State v. Chambers*, 343 P.3d 562; 2015 WL 967595, *1 (Kan. Ct. App., Feb. 17, 2015). The appellate court noted that "a balance must be struck between encouraging jury nullification and forbidding a jury from exercising its power of nullification. *Id*. at *7. A defense attorney is free to "present evidence in compliance with the rules that plays on the jurors' sympathies or notions of right and wrong" and that therefore *might* encourage jury nullification. *Id*. However, the court can't allows explicitly allow counsel to argue for jury nullification or instruct them on it as it would be "inconsistent for a district court to instruct a jury that it must follow the law and then to allow an attorney to argue that the jury should not follow the law." *Id*. at *8. See Also U.S. v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) ("Though jury nullification has a long and sometimes storied past, the case law makes plain that a judge may not instruct the jury anent its history, vitality, or use") (Internal citations omitted).

F. "Re-Victimizing" Arguments

It is improper for a prosecutor to argue to the jury that that the victim of a crime is being "re-victimized," or about the potential affect on hypothetical, future victims. These types of arguments can take many forms. An obvious example of an improper "re-victimizing" argument is in a rape case where the prosecutor in closing arguments told the jury if they did not believe the victim's account of the attack, "then you've probably perpetrated a worse assault on her." *Moore v. Morton*, 255 F.3d 95, 101 (3rd Cir. 2001). The prosecutor's statement was improper, because it was made "likely to improperly influence the jury's decision by implying that a not-guilty verdict would compound [the victim]'s suffering." *Id*. at 117.

The principle extends not only to the alleged victim of the crime in question, but other individuals involved in the case. A prosecutor, trying a case against individuals for allegedly retaliating against witnesses to another crime by beating them up, argued the following:

> Collectively you can go back there and stop them. You can make sure that [one of the victims] isn't going to get beat up again. Heaven forbid, for the witnesses that came in this courtroom the last couple days if these guys are found not guilty. Heaven forbid. Don't let that happen.

U.S. v. Cunningham, 54 F.3d 295, 300 (7th Cir. 1995). The Seventh Circuit Court of Appeals rejected the government's argument that the prosecutor here was "merely illustrating the 'seriousness of the crime and its threat to society.'" *Id*. at 301. The court concluded the prosecutor was "not illustrating the threat that the charged crime had posed to society, but rather was conjuring up a specter of future harm resulting from a new crime, a different matter entirely." *Id*. Therefore, the prosecutor's argument was improper for "appealing to jurors to prevent future crimes by finding present guilt." *Id*. at 300.

The principle also extends to future victims that the perpetrator allegedly *could* harm in the future. In a murder case, the prosecutor argued the jury should give the defendant the death penalty because by "'permitting' [the defendant] to live they would 'become an accomplice' to the murder and an accomplice to future crimes, because [the defendant] is a 'rabid dog' to whom they will be issuing a 'warrant of execution for someone else.'" *Bates v. Bell*, 402 F.3d 635, 637 (6th Cir. 2005). The prosecution's statements were "without question" improper for inciting "the passions and prejudices of the jury." *Id*. at 641.

4. <u>Rules Specific to Civil Cases</u>

A. Per Diem Damages Arguments

A "per diem" argument for damages, otherwise known as a "mathematical formula argument," is "designed so that the jury will assess damages on a daily basis, or some other finite measure such as minutes or hours." Jacob A. Stein, <u>Per diem or mathematical formula for damages</u>, The Law of Closing

Argument (2002). This is a jurisdiction-specific doctrine; some outright ban these arguments, some limit them, some permit them entirely. To understand what a per diem argument might look like, look at the below per diem argument from a plaintiff's lawyer in a case out of Illinois, where such arguments are banned and where defense counsel properly objected:

> **[Plaintiff's Counsel]**: If you will look back at what we said, you'd spend for being pain free at the dentist office is $10 for an hour. Remember [the plaintiff] has had pain for every day. If you'd multiply that times every day and you run that through for four and a half years, that's a number -
>
> **[Defense Counsel]**: Objection, your Honor.
>
> **[Court]**: He can argue about pain between the date of the accident and today.
>
> **[Plaintiff's Counsel]**: Let's say with one hour worth of pain to be pain free for $10, maybe a $100 to be pain free for a day. For four and a half years [the plaintiff] has had that pain. I would suggest to you a number of $145,000 for those four years that [the plaintiff] has had the pain in her knee. The pain has not gone away. The pain that a doctor has said they can do nothing for."

Ramirez v. City of Chicago, 740 N.E.2d 1190, 1197-1198 (Ill. App. Ct. 2000). The Appellate Court of Illinois held this was an improper per diem argument. *Id*. at 1198. Jurisdictions that have banned such arguments, such as Illinois, have reasoned there is "no commercial value to which a jury can refer in determining what monetary allowance should be given to a plaintiff for the pain and suffering he has experienced and is reasonably certain to experience in the future." *Caley v. Manicke*, 182 N.E.2d 206, 208 (Ill. 1962). In other words, jurors can't measure pain and suffering to a specific dollar amount the same way they can measure "feet into inches," and therefore these jurisdictions have banned these arguments. *Id*.

Jurisdictions that do allow per diem arguments, such as California, have determined that denying counsel the ability to make per diem arguments "deprives counsel of the full fruits of effective advocacy on the issue of damages, which is not infrequently the crucial conflict in the trial of an action for personal injuries." *Beagle v. Vasold*, 417 P.2d 673, 681 (Cal. 1966). Further, per diem arguments are not exclusively a plaintiff's tool, but instead a "double-edged sword with equal availability and utility in

argument to defendant's counsel who may employ the technique of dividing plaintiff's total demand into time segments in order to illustrate how exaggerated or ludicrous the claim may be." *Id*. [6]

Other jurisdictions, such as Missouri, do not permit lawyers to make straight per diem arguments where they are breaking damages down day by day, but do allow for arguing "lump sum" amounts for specific categories of damages, such as "specific periods of hospitalization, the time in the cast, the pain and suffering for the period from injury to trial, and for future life expectancy." *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291, 304 (Mo. 1978). This is another rule where its important to check what your jurisdiction says about these types of arguments and write your closing argument accordingly.

B. References to Insurance Coverage

Lawyers may not reference the opposing party's insurance coverage during closing arguments. The Florida Supreme Court succinctly articulated the reasoning for this rule: if presented with such evidence, the jury "might be influenced thereby to fix liability where none exists, or to arrive at an excessive amount through sympathy for the injured party and the thought that the burden would not have to be met by the defendant." *Carls Markets, Inc. v. Meyer*, 69 So.2d 789, 793 (Fla. 1953). An obvious example of a lawyer violating this rule is a plaintiff's attorney who improperly states in closing argument that the defendant's insurance company, and not the defendant himself, will have to pay any potential verdict. *Skislak v. Wilson*, 472 So.2d 776, 777-778 (Fla. Dist. Ct. App., 1985).

Other examples of improper references to insurance can be more subtle. For example, simply stating that a party will not be personally responsible, while not explicitly mentioning they are covered by insurance, is can still be an improper implicit reference to that party's insurance. *Ceartin v. Ochs*, 516 N.W.2d 651, 653 (N.D. 1994). Other improper arguments can In an automobile accident case, the

[6] While California permits per diem arguments, the state Supreme Court noted the argument "is not available as a matter of right but, rather, the entire question should be subject to the discretion of the trial court." *Id*. at 682.

plaintiff was being cross examined and gave an answer to a question that was "nonresponsive" and seemed "to have been deliberately made for the purpose of informing the jury that the defendant was protected by indemnifying insurance." *Nickell v. Stewart*, 163 S.W.2d 39, 40 (Ky. Ct. App. 1942). Then, in closing argument, the plaintiff's lawyer stated:

> "The defendant right after the accident occurred had a kind heart and wanted the child compensated, but apparently she has now had a change of heart, although, if the truth were known, she wants this child compensated, *but they don't*."

Id. The lawyer's "covert argument" implying that the defendant's insurance company did not want to compensate the plaintiff was an improper reference to insurance coverage. *Id*. See also *Nicaise v. Gagnon*, 597 So.2d 305, 306 (Fla. 4th DCA 1992) (It was improper for plaintiff to tell jury they should "not to worry whether the defendant [would] contribute a dime of money").

C. Putting Dollar Value on a Life in Damages

When determining damages for a deceased party, "lay persons should be precluded from giving a dollar figure for the value of the deceased's life." *Tom v. S.B. Inc.*, 2013 WL 12098247, *1 (D.N.M., March 19, 2013). That includes lawyers in closing arguments. A plaintiff's lawyer who told the jury they "should place a monetary value on the life of the plaintiff's decedent, just as a monetary value is placed on an eighteen million dollar Boeing 747 or an eight million dollar SCUD missile—was improper, highly inflammatory, and deprived" the defendant of a fair trial. *Public Health Trust of Dade County v. Geter*, 613 So.2d 126, 127 (Fla. Dist. Ct. App. 1993).

Compare that to the plaintiff's counsel in another Florida case, who when arguing damages stated "In this day and age where inanimate objects like paintings are sold at auctions for ten million dollars, a living, breathing person has died, [the decedant]." *Wilbur v. Hightower*, 778 So.2d 381, 382 (Fla. Dist. Ct. App. 2001). The defense objected and was overruled, at which point counsel continued by asking, "What is the value of that loss?" *Id*. On appeal, the defense cited the *Geter* decision argued this was an "an

improper ‘value of human life’ argument.” *Id*. at 383. The court disagreed, distinguishing the argument made in each case, saying here “it is clear that the plaintiff's counsel was not arguing that the jury should place a monetary value on the decedent's life but, rather, on her surviving spouse's loss.” *Id*.

Another distinction between “value of human life” arguments are arguments about the “value of human life in general,” which are proper, and arguments about the “the value of a particular life,” which are improper. *Atkins v. Lee*, 603 So.2d 937, 942 (Ala. 1992) (Holding that plaintiff’s argument about cost to rescue person at sea in general was proper because it spoke to “intrinsic value of life”); See also *Lance, Inc. v. Ramanauskas*, 731 So.2d 1204, 1215-1216 (Ala. 1999) (Opening statement that referenced value of specific boy who died was improper argument).