Blocking Improper Closing Arguments; and Objections and Challenges to Expert Opinion

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I. Closing Arguments

(1) Introduction: Wide license afforded lawyers in summation, but there are universally accepted limits.

(2) Golden rule arguments: “Members of the jury, put yourself in the carseat of the victim. See this terrible crash from his perspective, with the drunken defendant’s Buick bearing down on him!” See U.S. v. Palma, 473 F.2d 899 (8th Cir. 2007)(Golden rule argument is universally condemned because it encourages jury to depart from neutrality and decide case on the basis of personal interest and emotion rather than evidence); People vs. Mendoza, 171 P.3d 2 (Cal. 2007)(misconduct to urge jury to view the crime through the eyes of the victim); Jackson v. State, 651 S.E.2d 702 (Ga. 2007)(Golden rule argument which directly or indirectly tells the jurors they should render such verdict as they would wish if they were the injured party is impermissible).

(3) Assuming facts not in the record. Attorney can urge matters of common public knowledge or matters of ordinary human experience; however, improper to argue facts outside record. Ethical and legal prohibitions on this form of argument include “objection, improper argument,” ethical objection based upon standard 3-5.8, ABA Standards for Prosecutor and Defense Function (prosecutor should not misstate evidence), and confrontation clause violation under the 6th Amendment, U.S. Constitution. See Macias v. Makowski, 291 F.3d 447 (6th Cir. 2002)(improper for prosecutor’s closing to call jury’s attention to facts not in evidence which are prejudicial).

(4) Expressing personal belief in guilt of accused. Violation of proper trial procedure, as well as ethics. See ABA Model Code of Professional Responsibility, DR 7-106 (a lawyer shall not assert his personal opinion as to the credibility of a witness nor the guilt or innocence of an accused).

(5) Name calling.


Checklist of Objections

- Addressing jurors by name.
- Appeal to prejudice.
- Arguing matter outside the record.
- Comment on defendant’s failure to testify in a criminal case.
- Disparaging party in a prejudicial manner.
- Evidence misstated.
The network of guidelines surrounding closing argument provide objections capable of controlling the overzealous courtroom orator. The list of these must be readily at hand at the end of a case. Swiftness and accuracy must be the hallmarks of counsel’s challenges to improper argument.

II. Challenges to Opinion Testimony

1. Expert defined.

2. **Hearsay basis for expert opinion.** Federal Evidence Rule 703 allows an expert to base an opinion on facts made known to the expert before the hearing, including inadmissible hearsay, so long as the facts (reports by other experts, test results, etc.) are of a type reasonably relied upon by other experts in the field. Trial judges allow expert opinion based upon nonrecord material whenever the expert’s reliance upon the material is reasonable. The opinion in Peabody Coal v. Director, Office of Work. Comp., 165 F.3d 1126 (7th Cir. 1999) states: “Rule 703 of the Federal Rules of Evidence is explicit that the materials on which an expert witness bases an opinion need not be admissible, let alone admitted, in evidence, provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion.”

3. **Admission of exclusion of bases of expert opinion.** This problem comes up when the proponent of a witness tries to introduce the inadmissible supporting material. Authorities supporting exclusion are cited in Bright, Carlson, & Imwinkelried, Objections at Trial 70 (5th ed. 2008); R. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?*, 52 Fla. L. Rev. 715 (2000). Newly revised Federal Evidence Rule 703 provides as follows: “Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”

5. Cross-examination about fees earned by government experts. See U.S. v. Franco, 885 F.2d 1002, 1009-10 (2d. Cir. 1989) (cross of government expert asking whether expert received several thousand dollars each time he testified for prosecution was relevant to show potential bias). See also Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980).

6. Hypotheticals on cross-examination