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# Outrageous Opponents: How to Stop Them in Closing Argument

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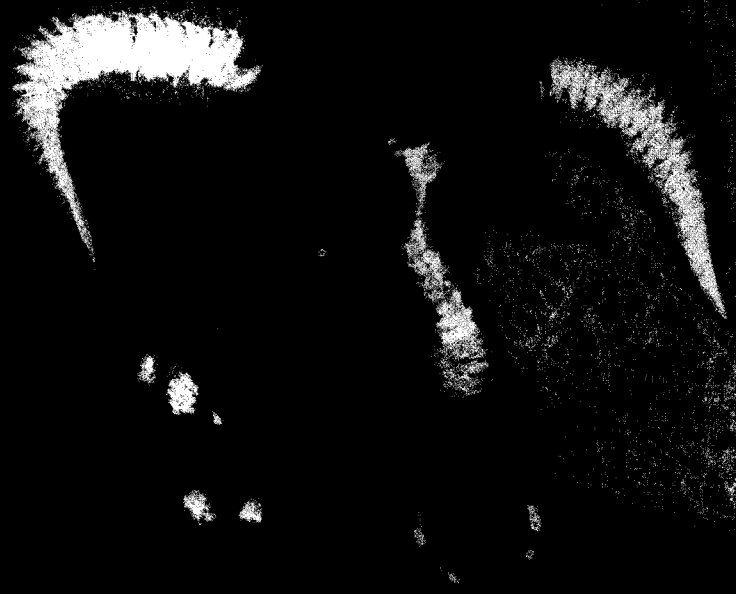
# Outrageous Opponents: How to Stop Them in Closing Argument

By Ronald L. Carlson and Michael S. Carlson



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Most attorneys try to sum up their cases in a fashion that comports with accepted law and local practice. All too frequently, however, one has the misfortune of running into Rambo, the over-the-top opponent. Before his peroration is concluded, Rambo has trampled on the law of trial practice by making half a dozen improper arguments. He urges evidence that never came up at trial. He injects hearsay into the proceedings. He adds his own opinions about which witnesses were lying and the legal fault of your client. And, this is just the beginning. Adding insult to injury, the unjust tactics often inure to Rambo's benefit. He wins the case.

Applying antidotes to this sort of poison requires a checklist of argument "do's" and "don'ts." Unless counsel has the rules and perhaps some citations readily at hand, it is impossible to forge an effective objection strategy. Yet, only such a strategy has the potential to break an opponent's stream of improprieties. In addition to interrupting the outrageous opponent in a legally appropriate way, there is another advantage: The well-placed contemporaneous objection usually provides the single avenue for a successful appeal.

This article supplies the tools for the foregoing job. Common objections have been isolated for treatment and analysis. It is hoped that their inclusion will provide the needed ammunition the next time an overly dramatic opponent resorts to an improper tactic.

## Objection Responsibilities

Before an attorney can complain about an improper argument, countless Georgia cases underline the need for the lawyer to make an objection and obtain a ruling from the trial court.[1] A similar rule applies in Georgia's federal courts. Many arguments are subject to being stricken upon challenge by opposing counsel. A highly practical question centers on the role and the obligation of the complaining attorney. Is a timely objection necessary to ensure protection? Will the judge police the proceedings on her own by interrupting or stopping the offending counsel?

A 1993 case answers these questions. In *Neal v. Toyota Motor Corp.*,[2] counsel for the injured plaintiffs in a products liability action used his closing argument to render what the court viewed as a "send the message" argument. The court found the argument to be improper in the context of the case, citing what it described as counsel's effort "to incite the jury into a xenophobic rage."[3] However, defense counsel lodged no objection to that part of the summation at trial. Defendant's lawyers explained that they did not want to object and risk raising the ire of the jury. The court held that this inaction was fatal, preventing the trial court from granting the defense motion for a new trial.

While a few arguments will indelibly taint a verdict even in the absence of an objection, they are rare. A timely objection to the closing argument is necessary, and this rule applies even when the argument is inflammatory and prejudicial. The United States District Court for the Northern District of Georgia provided a helpful formula when it suggested that the prudent course of action for the complaining counsel "would have been for Defendant to object at the first mention of improper argument and again raise the objection after [plaintiff's counsel] finished his closing if he continued utilizing his improper remarks, as he did here."[4]

The case of *Haygood v. Auto-Owners Insurance Co.*[5] further underlines the need for an objection. The defense complained that the plaintiff's summation improperly suggested misconduct by the insurer, and urged reversible error. The United States Court of Appeals for the Eleventh Circuit ruled that it was misleading for the plaintiff's attorney to suggest that Auto-Owners was hiding something. However, "at no time during or after the closing arguments did Auto-Owners object on this ground, nor did it ask for a limiting instruction, so the objection to the closing argument is waived."[6]

The bottom line is clear: When an opponent errs in his manner of argument and it injures your case, object. Object vigorously.[7] Spotting the objectionable argument is what the rest of this article is about.

## Personal Beliefs of Counsel

What if counsel discredits opposing witnesses by telling the jury his belief that they lied when they testified? It might come out something like this: "Ladies and gentlemen, don't follow the path laid out by plaintiff's expert on damages. I have investigated this case, and I know things about him. He is a prostitute for hire. I believe that this 'expert' was lying when he swore there were permanent injuries here." Such an argument merits objection on more than a single ground, but certainly one of them should be: "Objection, improper opinion by counsel."

While a few "I believe" statements mark the arguments of most attorneys, they become inappropriate when they refer to the guilt or fault of an opposing party or the credibility of witnesses, as illustrated in the foregoing paragraph. A prosecutor can neither announce to the jury that she believes in the truthfulness of a specific prosecution witness in the case and not the defendant[8] nor proclaim her belief that the accused is guilty.[9] However, in



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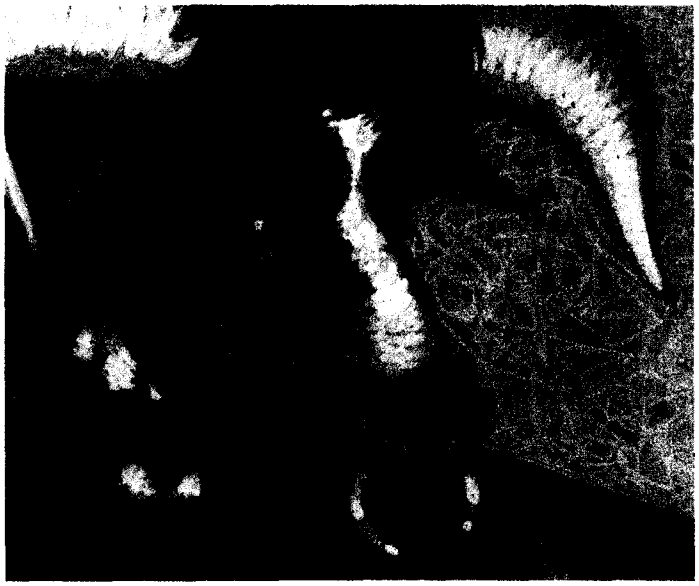
order to make out a violation of the personal opinion rule, objecting counsel needs to establish that there was a clear expression of personal belief by one's opponent on a prohibited topic.[10] This generally requires a showing that one's adversary referenced the guilt or fault of the objecting party, or slandered the credibility of a witness by offering counsel's personal expression of disbelief.



## Vouching

This impropriety is a variant of the "no personal opinion" rule. An objection can be made when counsel improperly bolsters her own witness by personally vouching for the witness' truthfulness. The Supreme Court of Georgia has made it clear that a prosecutor may not vouch for the character of a witness.[11] Promising or assuring the jury that counsel knows that a witness testified truthfully does this, and abridges the rule. However, it is again the case that some fine line-drawing occurs. To be improper, the endorsement of a witness' truthfulness must be clearly evident. More modest statements of witness support simply fall into the category of appropriately arguing inferences from the evidence.[12]

## Argument Outside the Record

In closing argument, counsel is allowed to draw reasonable inferences from the testimony. In doing so, the attorney may enrich the argument with references and illustrations regarding matters of common public knowledge. It is here that verbal techniques such as quotations from the Bible[13] or lines from well-known literary works play a role. While care must be exercised in employing Biblical passages,[14] appellate courts have approved such references.[15] One federal court even adjudicated the propriety of quoting columnist Ann Landers: "There is nothing improper in a civil case with a lawyer's citing widely recognized authorities during a closing statement (though Shakespeare and the Bible come more readily to mind than Ann Landers); on the contrary, this is sometimes an effective, and certainly a time-honored method of argument."[16] The concurring opinion added: "[C]ounsel should be given wide latitude in closing argument and should be able to use allegory or resort to metaphor borrowed from literature, current events and the like."[17]

Georgia courts give lawyers wide latitude in their closing arguments and allow them to draw upon well-established historical and commonly known facts to illustrate points. When counsel takes the limited license to embellish an argument to extremes, however, an objection based upon "matters outside the record" should be sustained.[18] Prohibited are references to factual data never produced at trial or argument of excluded matter that was stricken by the court. Reversal is required where the prejudicial statements of an attorney reflect a studied purpose to deflect the jury's attention from the issues. Where an argument is not supported by the evidence, such an argument can inject a false issue into the case and amount to reversible error.[19]

## Golden Rule Arguments

When a trial lawyer invites the jury to step into the shoes of the party she represents, the lawyer may have violated the "Golden Rule" prohibition.[20] In a products liability or personal injury case, a plaintiff's attorney might tell the jury: "Remember my client's pain as he sits next to me. Award a substantial money verdict in this case. Please do unto my client as you would have him do unto you, if you were in his chair as the plaintiff and he were in yours, sitting in judgment." Similarly, a defense attorney might tell the jury to "imagine if you were in the defendant's position. Would you want to be bankrupted by a big judgment, like the one the plaintiff has requested? Don't do to the defendant what you would not want done to yourself!"

Encouraging juror self-identification with one of the parties has drawn appellate court criticism. Most decisions condemn such arguments as improper distractions from the jury's sworn duty to decide cases based on logic and reason rather than emotion. A 1996 Georgia case defines as prohibited Golden Rule rhetoric any argument that "urges the jurors to place themselves in the position of plaintiff or to allow such recovery as they would wish if in the same position. It is improper because it asks the jurors to consider the case, not objectively as fair and impartial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jurors, but rather from the biased, subjective standpoint of a litigant."[21]

Golden Rule objections are not within the exclusive province of civil cases. In criminal practice, another 1996 Georgia case adverts to the principle that prosecution arguments inviting the jury to identify with the complaining witness will be carefully scrutinized.[22] A summation that importunes the jury to place itself in the position of the victim can violate the Golden Rule prohibition.

Perhaps the major exception to the Golden Rule restriction occurs when a defense attorney in a criminal assault case is defending on self-defense grounds. An instruction frequently allows the jury in such cases to assess whether the accused reasonably defended himself against injury when the situation is viewed from the defendant's standpoint at the time.[23]

As with many forms of objectionable argument, counsel for the party against whom the Golden Rule argument is used must object. In most cases, the right to effectively complain that opposing counsel made a Golden Rule argument is all but lost if an objection is not made.[24]

## Name Calling

Trial counsel might be jarred in her chair when an opponent starts his closing something like this: "Members of the jury, the defendant is a liar and his lawyer is nothing but his mouthpiece." In all segments of society, use of caustic personal canards seems to be on the rise. As incivility at trial increases, so does the incidence of personal attacks.

An objection that counsel's argument partakes of name-calling will sometimes lie when unduly colorful characterizations are employed. However, this is a field where fine lines divide the proper from the improper. In one closing argument, counsel remarked that the opposing party was "a cheapskate, a scheming low-down pup, cheating and swindling, stealing and waiting like a snake in the grass."[25] While reversal may be required when appellations become overzealous, the court held that the line was not crossed in this case. Nor was reversible error found in another case where a prosecutor described the defendant as an "animal" and "snake," although the court found the characterizations to be undesirable.[26]

When it is not the accused but an ordinary witness in a civil or criminal case who is the target of remarks, inflammatory descriptions are to be avoided. On the other hand, it is legitimate to discuss the character of a witness and to characterize his testimony.

What if it is not a witness upon whom the calumny is heaped, but rather opposing counsel? Georgia courts have ruled that a personal reference during closing argument is particularly objectionable if it refers to the opponent's lawyer. Again, however, while unflattering characterizations are often disapproved, it is rare that such a situation rises to the level of reversible error.[27]

## Ethnic References

It has long been the rule in Georgia and other jurisdictions that appeals to racial or religious prejudice in closing arguments will be condemned.[28] The Supreme Court of Michigan reviewed an appeal wherein a prosecutor and a witness had repeatedly commented regarding a party's ethnic heritage. At trial, several references were made to Arab ethnicity, the first occurring during the prosecutor's opening statement.[29] The court was asked to decide whether use of the terms "Arab" and "Iraqi" at a trial conducted during the Persian Gulf War deprived defendant of a fair trial.

After remarking that it abhorred the injection of racial or ethnic remarks into any trial because it may arouse prejudice, the court pointed out that not all references fall into this category.[30] "In the instant case, most of the comments were improper and possibly irrelevant. Nonetheless, we find the comments, viewed in context, to be innocuous, unintended, and not of a degree that prejudiced defendant's right to a fair trial."[31] Thus, no intent to inflame was found. The court, however, sounded an alarm for future cases wherein prejudicial intent is manifest, stating that "[w]hen an attempt is made to arouse ethnic prejudices, the rule of reversal appears universal."[32]

## Wealth of Party

Comments upon the wealth of a party are often disapproved.[33] When a plaintiff suggests to the jury that the defendant can afford to pay and this alone justifies a verdict against him, the argument can be stopped by objection. Conversely, a corporate or other plaintiff with resources cannot be denied recovery on a just claim on the ground that "they don't need the money, so why give them an award."

There are exceptions. Punitive damage cases often provide an

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example. In a case, or during the phase of a case, wherein information regarding the defendant's resources is relevant to a judgment that will adequately punish and deter, counsel may appropriately refer to those resources in closing.[34]

## War on Crime

Sometimes a lawyer urges the jury to make war on some societal ill by holding it against a party in the instant case. In a federal criminal case in Georgia, the prosecutor urged the jury to view the defendants as enemies in the war on drugs.[35] In part, the argument observed that the community was involved in a war that is fought in the streets, in the schools, "and it has been fought in this Courtroom for the past week."[36] The prosecutor urged that: "unless we win the war, we will all be doomed. These people, as well as everyone listed in that indictment, are the enemy and they are the enemies of every man, woman, and child in this country because they don't care what they do. They don't care [sic] the pain and the misery and the hurt and the death that they cause because they only want one thing, and that's money for themselves."[37]

The United States Court of Appeals for the Eleventh Circuit did not condone the argument. In a note to the opinion, the court found that "the remarks at issue here clearly were intended to make the jury angry at [defendants] Boyd and Clowers. Prosecutors have a responsibility not only to prosecute cases diligently, but also to refrain from improper methods in doing so."[38] In the end, however, the court employed a harmless error analysis to prevent the argument from overturning the convictions.

## Send a Message

Courts around the country have debated the propriety of "send a message" arguments. The rhetoric might come out like this, in a case involving a slip and fall on a stairway: "Members of the jury, send a message to the landlords of this city that steps and stairs for tenants cannot be maintained in the slipshod fashion that Joe Defendant maintained the stairway in this case."

In Georgia, "send a message" arguments are not warmly received in civil cases.[39] Recent case law suggests, however, that criminal cases are different. In 1997, the Georgia Supreme Court held that "[I]t is not improper for a prosecutor to appeal to a jury to convict in order to 'send a message' to the community."[40] The Georgia Court of Appeals has followed suit.[41]

## Other Objections

The foregoing nonexhaustive list highlights numerous practical objections. There are others: Addressing jurors by name,[42] improper references to insurance,[43] inflammatory appeals,[44] and inspiring apprehension on the part of the jury in a noncapital criminal case by describing the dangerous nature of the defendant are all improper.[45] These tactics can be resisted by prompt objections. While a few argument violations are so serious that they will be reviewed in the absence of a timely challenge, appellate relief from an alleged argument error almost invariably requires that an objection appear in the record. Other remedies can also be considered depending upon the violation, like a jury instruction to disregard counsel's remark or a request for a mistrial.

## Checklist of Objections

The foregoing sections have pinpointed numerous objections to improper summations. A list of relevant objections to final argument may be helpful at this point.

- 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
- Excluded matter argued
- Golden Rule
- Insurance
- Misstating the law
- Name calling
- Personal attack on counsel, party or witness
- Personal opinion on merits of case
- Racial, religious, ethnic or regional bias
- Vouching personally for witness
- Wealth of party pilloried[46]

## Conclusion

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.[47]

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