

## **Improper statements in closing argument**

**by**

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A lawyer's closing argument is the chronological and psychological finale of a trial. It represents the last opportunity to directly address jurors and convince them why the client's position should prevail.

Because the final argument is the zenith of a lawyer's trial presentation, sometimes the desire to be persuasive can overwhelm a lawyer's judgment in following legal and ethical requirements during the summation.

Improper statements during closing argument can draw an objection and create a distraction from a client's legal position, subject the lawyer to court reprimand or sanction and in extreme cases result in a mistrial.

Rule 3.4(e) of the Minnesota Rules of Professional Conduct prohibits lawyer misconduct at trial and limits certain improper trial tactics. The rule states that a lawyer shall not: "[I]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."

In addition, a lawyer who makes improper statements in a closing argument can also violate Rule 8.4(d), which prohibits "conduct prejudicial to the administration of justice."

There are many examples of improper statements during closing argument, but here are some of the most common pitfalls:

### *Personal opinions about witness credibility*

Under Rule 3.4(e), a lawyer is prohibited from asserting a personal opinion about the credibility of a witness. A lawyer may not insinuate that a witness or party is a "liar" or that testimony constituted "perjury" when such a remark is purely the lawyer's personal impression of the evidence.

Courts regularly caution lawyers against portraying testimony as a "lie" because such categorical and conclusory opinions make the lawyer an unsworn witness and usurps the province of the jury to determine credibility. See *State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984) ("The credibility of a witness is to be determined by the jury. An advocate in a criminal case may point to circumstances which cast doubt on a witness's veracity or which corroborates his or her testimony, but he may not throw onto the scales of credibility the weight of his own personal opinion."); *State v. Mayhorn*, 720 N.W.2d 776, 786 (Minn. 2006); *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995); see also, *State v. Johnson*, 86 P.3d 551 (Kan. Ct. App. 2004) (improper for defense lawyer to call state's witness a liar in closing argument).

Similarly, a lawyer should not vouch for the credibility of a witness. It is not unusual for a lawyer to argue in effect that a jury should believe a witness because the lawyer does. This type of argument implicates knowledge of facts outside the record and again invites the jury to make a credibility determination based on the lawyer's opinion as to credibility.

#### *Improperly appealing to passion, sympathy and prejudice*

There is a fundamental tension between the law of summation and the art of summation. Lawyers may be tempted to appeal to a jury's emotion in order to elicit sympathy for the client or bias for the opponent. Clearly, it is improper to appeal to racial, ethnic, religious or gender prejudice in a closing statements. See e.g., *Toyota of Florence, Inc. v. Lynch*, 442 S.E.2d 611 (S.C. 1994) (closing argument had racial overtures).

Sometimes lawyers resort to using inflammatory language or make disparaging comments about the opposing party, counsel or witnesses. For example, in civil cases it is improper for a plaintiff to imply that a defendant is wealthy and can afford a judgment. Likewise, it is improper for a defendant to characterize a plaintiff or the plaintiff's attorney as "money hungry." See e.g., *Corwin v. Dickey*, 91 N.C.App. 725, 728, 373 S.E.2d 149, 151 (1988) (defense counsel attacked plaintiff's attorney by stating, among other things, "[a]ny money that you award will go to the lawyers; this is a lawyer's case, money, money, money.")

Inflammatory, biased and prejudiced statements can run afoul of multiple rules of professional conduct, including rules 3.4(e), 4.4(a) and 8.4(d),(g) and (h).

#### *Stating improper personal beliefs*

Generally, lawyers should not advocate their personal beliefs during closing statements.

Rule 3.4(e) of the MRPC prohibits lawyers from asserting personal opinions about the justness of a cause of action, the culpability of a defendant in civil litigation or the guilt or innocence of an accused in criminal matters. These types of arguments are easily identified by statements prefaced with "I believe" or "I think."

The statements are generally condemned because they permit the lawyer to manipulate the jury's assessment of the evidence. Moreover, a lawyer's personal belief on the soundness of a legal case has no bearing on the issue. See *Harris v. United States*, 402 F.2d 656, 658-659 (D.C. 1968) (Discussion by the late Chief Justice Warren Burger on the public policy reasoning behind condemning the use of lawyer's personal opinions in summation); ABA Standards for Criminal Justice sec. 3-5.8(b) comment (3d.ed. 1993).

While these statements in closing can be overlooked by courts, where the misconduct is cumulative or occurs in certain contexts, such as a prosecutor's personal commentary about an accused's guilt, lawyers have been subject to sanction and mistrials declared. See *U.S. v. Modica*, 663 F.2d 1173 (2d Cir. 1981) (prosecutor should exercise restraint to avoid needless personal references, without sacrificing the vigor of effectiveness of his argument).

The common denominator in all of these examples is that the argument creates a substantial risk that the jury will decide a case on an improper basis.

A good closing argument should be passionate and heartfelt but still within the limitations of a lawyer's legal and ethical obligations or else the client's position is put at risk for objection, sanction or, in the most serious instances, mistrial.