OPENING STATEMENTS AND CLOSING ARGUMENTS

(HOW FAR CAN YOU GO?)

*HOW TO USE **PRIMACY** AND **RECENCY***
TO TELL AND CONFIRM THE STORY

PLUS

MILLENNIALS . . . ENGAGING THE FIVE SENSES . . .
THE GOLDEN RULE . . .
AND MORE . . .

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I. INTRODUCTION

"By the way, TMI is such an outdated concept.
There's no such thing as too much information.
This is the information age!"
Lena Dunham, *Girls*

We have immediate and constant access to information. We are constantly bombarded with news about bad things happening to people around the world. The unintended consequence of this labyrinth of information is that we are becoming a desensitized society. As effective trial lawyers, we always strive to shock the conscience in order to cause jurors to want to effectuate change. Shocking the conscience and convincing desensitized people to empathize with the hard times suffered by others is harder. Getting people to set aside their lives and care about your client is harder. These people, however, are the types of jurors that will be sitting in the jury box. They are the ones that will decide your client's fate. How do you deal with a desensitized jury? How do you deal with a jury that only cares about their own problems? How do you make a jury empathize with your client enough to render a verdict in your client's favor?

You violate the Golden Rule.

II. THE GOLDEN RULE

"Do to others what you want them to do to you.
This is the meaning of the law of Moses
and the teaching of the prophets." (Matthew 7:12
NCV, see also Luke 6:31).

Simply stated, a Golden Rule argument refers to an argument put forth by an attorney in a jury trial, whereby the jurors are persuaded to put themselves in the place of one of the parties when considering the evidence and reaching a verdict. Because jurors are required by their oath to consider a case objectively, counsel is not allowed to explicitly ask or urge the jurors to follow the Golden Rule as it pertains to their client. But isn't this exactly what we as lawyers are trying to do? Isn't our ultimate goal to convince the jurors to step into the shoes of our client and identify with their position so that victory is certain?

Because this paper was originally written for an Arkansas audience, the case law on the issue set forth below is from Arkansas. An attorney may, and should, encourage jurors to use their own experience in evaluating harm. *Smith v. Pettit*, 300 Ark. 245, 778 S.W.2d 616 (1989). Arkansas law places a limit on forcing empathy. "However, a so-called Golden Rule argument, coming from Matthew 7:12, by which the advocate asks the jurors to put themselves into the place of the victim and award damages on that basis, is not permitted in Arkansas courts. *Midwest Buslines, Inc. v. Johnson*, 291 Ark. 304, 724 S.W.2d 453 (1987); *Missouri Pac. R. Co. v. McDaniel*, 252 Ark. 586, 483 S.W.2d 569 (1972)… Such an argument is impermissible in that it undermines the objectivity of the jury. *King v. State*, 317 Ark. 293, 877 S.W. 2d 583 (1994)." (A)[1]

A quick search of any state, to include Texas, confirms that the rule that prevents these types of arguments is uniformly followed. *See Chin v. Caiaffa*, 42 So. 3d 300 (Fla. 3d DCA 2010) (reversing and remanding based on statement during closing argument that "we can't feel [plaintiff's] pain," inviting jury to "guess, only imagine" plaintiff's pain, "[s]cars are only tiny on somebody else's face," and by admitting liability, "[t]he defendant wrote a blank check"); *SDG Dadeland Assocs. Inc. v. Anthony*, 979 So. 2d 997 (Fla. 3d DCA 2008) ("Even when an attorney does not explicitly ask the jurors how much money they would wish to receive in the plaintiff's position, comments may violate the Golden Rule if they implicitly suggest that the jury place itself in the plaintiff's position."); *Bocher v. Glass*, 874 So. 2d 701 (Fla. 1st DCA 2004) (reversing and remanding for a new trial where counsel argued during closing in wrongful death suit that, if plaintiffs were given the choice between millions of dollars and a "magic button" that could bring their child back, the plaintiffs would quickly push the button); *Metro. Dade County v. Zapata*, 601 So. 2d 239 (Fla. 3d DCA 1992) (stating that by asking the jury to "imagine" what life is like

[1] The letter references throughout the paper correspond to endnotes identifying the cited materials listed in the "Sources" Addendum.

for plaintiff, counsel makes it impossible for "a calm and dispassionate consideration of the evidence and the merits"); *Cf. McNally v. Eckman*, 466 A.2d 363 (Del. 1983), *overruled on other grounds by Wright v. State*, 953 A.2d 144 (Del. 2008) (stating that while phrases such as "suppose you had just one of the elements," "suppose that was all you had to deal with," and "suppose all you had to do was" are ill-advised, the remarks were *de minimis* and the trial court's instruction cured any possible prejudice); *Cf. Simmonds v. Lowery*, 563 So. 2d 183 (Fla. 4th DCA 1990) (reversing order granting new trial where plaintiff's counsel properly asked jury "to think about what you would pay someone for one day of what you will hear she has to go through and for the rest of her life.").

Over the years, I have heard countless attorneys voice repeated frustrations, "if the jury were to put themselves in our client's shoes, this case will be worth a fortune!" These comments caused me to take a closer look at the way jurors think, and convinced me to always formulate a plan to make sure that the jury always puts themselves "in the shoes" of my client, without me specifically telling them to do so. A clever advocate will find and use other tools to persuade a juror to search for deeper justice and to make the juror feel like this case is really about what could happen to them. In fact, to convince a juror that case is about causing them to do something to your opponent to make sure that this never happens to them. This paper discusses the mindset required of an advocate to find ways to make jurors step into the shoes of your client. It discusses ways to help advocates make the jurors violate the Golden Rule.

III. LAWYER VERSUS JURY MINDSET

"Think about it. The jury system is bizarre. Where else in our society would you invite disparate laypeople, novices with absolutely no experience or previous information in a given field, to deliver ultimate judgments on issues in that field with almost no restrictions on their qualifications except direct, personal bias, willingly admitted? …And then this motley crew, this questionable "board of directors" is given ultimate authority to judge crime and punishment, life and death, right and wrong – and give you a win or a loss." https://www.amazon.com/What-Makes-Juries-Listen-Today/dp/1888075651; Sonya Hamlin, What Makes Juries Listen Today (1998).

The jury system's intended objective nature is an inevitable component of trial law. The question to consider is: How do we transform this into an advantage for our respective clients?[2]

"Everything should be made as simple as possible,
but no simpler."
Albert Einstein

As an attorney, putting yourself in your client's shoes is a breeze; you have completed months of discovery, analyzed countless exhibits, and have seen firsthand the impact that the incident in question has affected the lives of your clients and those around them. Knowledge is power, and confidence in your case is a winning attitude in trial preparation. On the other hand, constant exposure to your side of the case can give you metaphorical horse blinders and a potentially ungrounded bias that your argument is infallible. We must constantly remind ourselves that a jury will experience this story starting with a blank slate. Do not make the mistake of presenting your story as riddled with complexities as you have become comfortable with- start from the beginning.

This is not to say that you should talk down to the jury by any means, just carefully choose what you are going to present to the jury. A successful test that I run, when deciding which components are key to telling my client's story, is to teach the case to a fresh mind within my firm. I also try my themes with my grandmother. You require the insight of someone not completely immersed in a case will assist you in

[2] While historians continue to author countless studies debating the first appearance of trial by jury, Alfred the Great is generally regarded as the innovator of this system. His Legal Code reads, "Doom very evenly! Do not doom one doom to the rich; another to the poor! Nor doom one doom to your friend; another to your foe!" and is reminiscent of Leviticus 19:15 "You shall not render an unjust judgment; you shall not be partial to the poor or defer to the great: with justice you shall judge your neighbor."

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