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Sexual Harassment and Retaliation
A Practical Handbook for Plaintiff and Defense

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CHAPTER 23

Closing Argument and Jury Instructions: Plaintiff's Perspective

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I. INTRODUCTION

Closing arguments and jury instructions are critical phases of trial proceedings. A successful plaintiff's advocate should know how best to draft instructions that will clearly explain the law to the jury, and how to craft a closing argument that will persuade the jury to reach a verdict for her client. Moreover, a plaintiff's advocate should know how to use the jury instructions to guide her closing argument, so that the jurors will understand why her client should prevail under the law as instructed. This chapter will offer a plaintiff's perspective on how to draft jury instructions and closing arguments, and on potential objections that may be raised by either side during those phases of trial.

II. JURY INSTRUCTIONS

Jury instructions direct the jurors to reach a verdict by applying the law of that jurisdiction to the facts proven at trial. In addition to outlining the controlling law, jury instructions generally explain what constitutes "evidence," how to evaluate a witness's credibility, and how to calculate or determine damages. As a practical matter, the plaintiff should draft the instructions in a manner that the average juror understands.[2] The instructions "should be concise, concrete, and simple, be in the active voice, avoid negatives and double-negatives, and be organized in logical sequence."[3] In other words, the jury instructions should offer a clear and compact "roadmap" to the jurors of what must be proven at trial for the plaintiff to prevail.

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2. *See* Fed. Judicial Ctr., Manual for Complex Litigation, Fourth, § 12.431 (2004).

3. *Id.*

Rule 51 of the Federal Rules of Civil Procedure (FRCP) governs when counsel must submit proposed jury instructions,[4] how the court must decide on jury instructions,[5] how and when counsel must object to the instructions to preserve the objection,[6] and how a party may assign error based either on an instruction given over a timely objection[7] or on an instruction not given despite a timely request.[8] If a party does not preserve an objection, a court may still consider "plain error" in the instructions if the error affects "substantial rights."[9] Moreover, many federal courts and individual judges publish local rules on jury instructions and objections.

A. Timing

1. Preliminary Instructions

FRCP Rule 51 authorizes the court to give preliminary instructions at the outset of the case, so long as the jury is again instructed at the end.[10] Preliminary instructions can be both substantive and procedural.[11] They generally include a concise statement of the legal principles and key factual issues relevant to the case; an explanation of courtroom procedures; an outline of the trial schedule; warnings to the jurors to avoid a mistrial, such as an instruction not to communicate with the parties involved and not to conduct Internet searches related to the case; a summary of pretrial procedures and of how evidence obtained through discovery may be utilized during trial; and an explanation of the jury's role at trial.[12]

Preliminary instructions offer several advantages to a plaintiff. They provide the jury with "ground rules" for understanding the case and the court's procedures, and are usually issued before the plaintiff's counsel gives her opening statement, which allows her to situate her opening arguments into the framework of the preliminary instructions. Justice Sandra Day O'Connor has commented on the additional benefits of preliminary instructions:

> [J]urors should be given general instructions on the applicable law before the case begins. How are they to make sense of the evidence and the mass of

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4. FED. R. CIV. P. 51(a).

5. FED. R. CIV. P. 51(b).

6. FED. R. CIV. P. 51(c).

7. FED. R. CIV. P. 51(d)(1)(A).

8. FED. R. CIV. P. 51(d)(1)(B).

9. FED. R. CIV. P. 51(d)(2).

10. FED. R. CIV. P. 51.; *see also* Elecs. Corp. v. Westcoast Broad. Co., 341 F.2d 653, 665 (9th Cir. 1965).

11. *See* William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 584 (1991) ("[S]ubstantive instructions provide a framework which will help the jury understand the issues in the case and organize and recall the evidence; procedural instructions will help jurors deal with questions of credibility and inference as they come up, rather than retrospectively.").

12. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, FOURTH, § 12.432 (2004).

> information that the parties will put before them, unless they know in advance what they are looking for? Jurors are not mere receptacles in which information can be stored, to be retrieved intact when the jurors finally are told what to do with it. Jurors are people, and people organize information as they receive it, according to their existing frames of reference. Unless they are given proper frames of reference at the beginning of a case, jurors are likely either to be overwhelmed by a mass of information they are incapable of organizing, or to devise their own frames of reference, which may well be inconsistent with those that the law requires.[13]

As William W. Schwarzer, former district judge for the Northern District of California, explained in more colloquial terms: "[N]ot giving preinstructions is like telling jurors to watch a baseball game and decide who won without telling them the rules until the end of the game."[14]

2. Final Instructions

Rule 51 also gives the court discretion to issue final instructions before or after closing argument, or at both times.[15] As a strategic matter, there are several advantages to instructing the jury prior to closing arguments. Importantly, instructions on the applicable law help jurors to better understand the legal arguments made by counsel and to provide context for understanding the evidence in the record. Moreover, they allow counsel to refer to the instructions in their closing arguments, and to explain to the jury how to apply the facts to the law as instructed. However, final instructions should always be reserved for after closing arguments, to "remind[ ] the jury of the instructions previously given and instruct[ ] them about the procedures to follow in deliberations."[16]

B. Pattern Instructions

The use of "pattern" (or "standard") jury instructions is becoming increasingly common, and offers a number of practical advantages for both the court and the parties. Of primary importance, pattern instructions provide a clear and concise statement of the law for the layperson, which avoids confusing the jury with instructions that include difficult legal terminology and complex syntax.[17] Pattern instructions are also,

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13. Justice Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice 221 (2003).

14. Schwarzer, *supra* note 11, at 583.

15. Fed. R. Civ. P. 51.

16. Fed. Judicial Ctr., Manual for Complex Litigation, Fourth, § 12.434 (2004).

17. *See* Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 Tenn. L. Rev. 701, 701–05 (2000) ("The exact syntactic and semantic bars to juror comprehension of instructions are now well-documented by linguists and psycholinguists.").

theoretically, crafted to be neutral and nonslanted, so as not to favor either party.[18] For the courts, pattern instructions are often preferred because of their uniformity, which provides for an easier review on appeal.[19]

A majority of federal circuits have pattern instructions for employment cases on their websites, including the First,[20] Third,[21] Fifth,[22] Seventh,[23] Eighth,[24] Ninth,[25] and Eleventh Circuits.[26] Many state courts and bar associations also publish pattern jury instructions on their websites.[27] Additionally, the American Bar Association's (ABA's) Litigation Committee has published model jury instructions for employment cases.[28] However, plaintiffs' advocates should tread carefully when using the ABA's instructions, for two reasons: (1) jury instructions produced by the ABA's Litigation Committee tend to be slanted in favor of employers; and (2) these instructions have not been updated since 2005, and are therefore outdated. Federal courts have also reached different holdings as to whether the ABA's model instructions are appropriate for specific claims or defenses in employment cases.[29]

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18. *See* William R. Amlong, American Law Institute, *Closing Arguments and Jury Instructions for Sexual Harassment Cases: The Plaintiff's Perspective (With Forms)*, 21:2 Prac. Litigator 43, 44 (2010) ("There are specific benefits to using court-approved pattern instructions. For the advocate, they provide an accurate explanation of the law that is as brief and concise as possible, understandable to the average jury, and completely neutral, unslanted, and free of argument.").

19. *See id.* ("For appellate courts, [pattern instructions] provide a measure of uniformity that makes appellate review easier and quicker.").

20. Pattern Jury Instructions for Cases of Employment Discrimination (Disparate Treatment) for the District Courts of the United States Court of Appeals for the First Circuit, http://www.med.uscourts.gov/pdf/empl_discr_pi.pdf (last visited Nov. 5, 2018).

21. Model Civil Jury Table of Contents and Instructions, http://www.ca3.uscourts.gov/model-civil-jury-table-contents-and-instructions (last visited Nov. 5, 2018).

22. Pattern Jury Instructions (Civil Cases), http://www.lb5.uscourts.gov/juryinstructions/Fifth/2014civil.pdf (last visited Nov. 5, 2018).

23. Federal Civil Jury Instructions of the Seventh Circuit, http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf (last visited Nov. 5, 2018).

24. Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, http://www.juryinstructions.ca8.uscourts.gov/2018-REV_3.0_Jury_Instructions.pdf (last visited Nov. 5, 2018).

25. Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit, http://www3.ce9.uscourts.gov/jury-instructions/model-civil (last visited Nov. 5, 2018).

26. Eleventh Circuit Pattern Jury Instructions (Civil Cases), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstruction.pdf (last visited Nov. 5, 2018).

27. *See, e.g.*, Judicial Council of California Civil Jury Instructions, http://www.courts.ca.gov/partners/317.htm (last visited, Nov. 5, 2018); Washington Civil Jury Instructions, https://govt.westlaw.com/wciji/Index?transitionType=Default&contextData=(sc.Default) (last visited Sept. 24, 2018); Illinois Pattern Jury Instructions-Civil, http://www.illinoiscourts.gov/CircuitCourt/CivilJuryInstructions/default.asp (last visited Nov. 5, 2018).

28. American Bar Association, Employment Litigation: Model Jury Instructions (2d ed. 2005).

29. *Compare* Woodson v. Scott Paper Co., 109 F.3d 913, 935 n. 29 (3d. Cir. 1997) (citing ABA instructions as informative to the issue of whether § 107(a) of the Civil Rights Act of 1991 is limited to mixed motive cases), *with* McClurg v. Santa Rosa Golf & Beach Club, Inc., 46 F. Supp. 2d 1244, 1246 (N.D. Fla. 1999) ("This difficulty in instructing the jury is evident in the American Bar Association Litigation Section's

Although pattern instructions provide clear, uniform statements of the law, advocates who consider borrowing pattern instructions from other states or circuits should be mindful of whether those jurisdictions have ruled differently on any legal issues involved. Moreover, since"[p]attern jury instructions are crafted to address the most-typical factual scenario," they "might not be suitable for all cases."[30] Therefore, while appellate courts generally prefer the use of pattern instructions, district courts maintain discretion to modify them where appropriate,[31] and counsel should carefully consider whether pattern instructions are suitable for the case at bar. For example, if a plaintiff is seeking a change in the law, such as by bringing a Title VII claim for discrimination on the basis of sexual orientation in a circuit that has not held that sexual orientation falls under Title VII's protected classes, the plaintiff's counsel should request an instruction in accordance with that new legal theory. Otherwise, any change in the law could be held to apply only prospectively.[32]

Advocates often face an uphill battle in objecting to pattern jury instructions.[33] To strengthen such an objection, counsel should be prepared to cite case law from other jurisdictions, treatises, or other authority to support their theory.[34] Counsel should also check the date of the last update to the instructions, for, as noted above, they may be outdated and not reflective of recent changes in the law. Moreover, counsel should always check the notes to the pattern instructions, which may raise red flags or provide further information about additional instructions that should be given to the jury for context.[35]

C. Nonstandard Instructions

As discussed *supra*, it is best practice to consider modifying any applicable pattern instructions to accommodate unique fact patterns in one's case. Modified instructions may also be helpful in cases involving developing areas of law. For example, in *Bruno*

Model Jury Instructions—Employment Litigation (ABA 1994) . . . The multiple instructions on the use of indirect evidence require the jury to perform a *McDonnell Douglas-Burdine* analysis, which also seems inappropriate. For reasons discussed below, I do not believe these forms of instruction are desirable or necessary.") (citations omitted).

30. Burzlaff v. Thoroughbred Motorsports, Inc., No. 12-CV-92, 2013 WL 3148413, at *3–5 (E.D. Wis. June 19, 2013) ("It is clear that this was not a pattern case and the pattern jury instructions were not wholly appropriate.").

31. *See* Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756, 765 (7th Cir. 2003) (noting that state pattern instructions "are not law," and that "there are many circumstances which justify modifying" them); *see also* Keltner v. Ford Motor Co., 748 F.2d 1265, 1267 (8th Cir. 1984) ("In states with pattern instructions, the district court may, but need not, use such instructions.").

32. *See* Maiz v. Virani, 253 F.3d 641, 677 (11th Cir. 2001).

33. *See* Sylvia Walbot & Cristina Alonso, *Jury Instructions: A Road Map for Trial Counsel*, 30:2 LITIGATION 31, 32 (2004).

34. *See id.*

35. *See id.*

v. Monroe County, involving a Title VII of the Civil Rights Act of 1964 (Title VII) sexual harassment claim,[36] the district court modified the Eleventh Circuit's pattern instructions to incorporate the subsequent holding of *Miller v. Kenworth of Dothan, Inc.*, that an "on paper" policy against sexual harassment "must be found ineffective when company practice indicates a tolerance towards harassment or discrimination."[37] Accordingly, the court in *Bruno* instructed the jury as follows:

> In determining whether the employer exercised reasonable care, you should also consider the level of the employer's demonstrated commitment to adhere to its policy. For example, an employer does not exercise reasonable care when its practice indicates tolerance towards harassment or discrimination, despite the fact that the policy itself states otherwise.[38]

Additionally, in employment cases, the plaintiff's counsel should consider requesting other nonstandard instructions such as instructions on the law of the case doctrine and instructions on implicit bias. Under the law of the case doctrine, "when a court rules on an issue of law, the ruling 'should continue to govern the same issues in subsequent stages in the same case.'"[39] Consequently, counsel may request jury instructions on issues of law already decided by the court during earlier stages of litigation, such as on summary judgment, and a district court's failure to give such instructions may constitute an abuse of discretion.[40]

Moreover, although pattern instructions often generally instruct the jury to "not let 'bias, sympathy, prejudice, or public opinion influence [their] decision,'"[41] where appropriate, plaintiff's counsel should consider requesting more specific instructions on implicit jury bias. For example, in *State v. Plain*, the Supreme Court of Iowa reversed the conviction of a black man, Plain, by an all-white jury for harassment in the first degree.[42] At the trial level, the district court refused to give to the jury the following cautionary instruction requested by Plain:

> Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or

36. Bruno v. Monroe Cty., 383 Fed. App'x 845, 846 (11th Cir. 2010).

37. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1280 (11th Cir. 2002).

38. Bruno v. Monroe Cty., Case No. 07-10117-Civ-Moore (S.D. Fla. 2008), Instructions to the Jury, Dkt. Entry 58, at 9, inserting into 11th Circuit Pattern Jury Instruction § 1.2.2 language to reflect the holding in *Miller*.

39. Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc., 839 F.3d 1251, 1256 (10th Cir. 2016) (citations omitted).

40. *See* Gulliford v. Thrash, 8 Fed. App'x 766, 767–68 (9th Cir. 2001) ("We therefore find that the district judge in the second trial abused his discretion by formulating jury instructions in violation of the law of the case.").

41. Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 Ct. Rev. 116, 117 (2015).

42. State v. Plain, 898 N.W.2d 801, 809–11 (Iowa 2017).

> sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious belief, national origin, or sex.[43]

In holding that the district court abused its discretion in refusing to give that instruction, the Supreme Court of Iowa stated:

> While there is general agreement that courts should address the problem of implicit bias in the courtroom, courts have broad discretion about how to do so. One of the ways courts have addressed implicit bias is by giving jury instructions similar to the one proposed by Plain in this case. We strongly encourage district courts to be proactive about addressing implicit bias; however, we do not mandate a singular method of doing so.[44]

Counsel should be creative in crafting their suggested implicit-bias instructions; however, it is recommended that such instructions "be couched in accurate, evidence-based, and scientific terms," to avoid putting jurors "on the defensive."[45] For example, Judge Mark Bennett, of the US District Court for the Northern District of Iowa, generally issues the following implicit-bias instruction before opening statements:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[46]

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43. *Id.* at 816.

44. *Id.* at 817. However, the Supreme Court of Kansas recently rejected an attempt to use *Plain* to argue for a similar jury instruction that would have highlighted potential racial prejudice. State v. Nesbitt, 417 P.3d 1258, 1068–69 (Kan. 2018).

45. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1183 (2012).

46. Jury Instructions from Judge Mark Bennett (N.D. Iowa), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2017_sac/written_materials/2_instruction.authcheckdam.pdf (last visited Nov. 5, 2018).

D. Objections to Jury Instructions

The US Supreme Court has recognized "the almost invariable assumption of the law that jurors follow their instructions."[47] Across the board, federal courts adhere to this presumption.[48] Therefore, it is paramount that counsel raise any and all objections to the jury instructions before the judge instructs the jury. Otherwise, the objection will be waived.[49]

A jury instruction may be found erroneous "if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law."[50] FRCP Rule 51(d) governs objections to jury instructions:

> (d) ASSIGNING ERROR; PLAIN ERROR.
> (1) Assigning Error. A party may assign as error:
> (A) an error in an instruction actually given, if that party properly objected; or
> (B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.
> (2) Plain Error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.[51]

Under Rule 51, appellate courts review timely objections to jury instructions de novo.[52] However, absent a timely objection, appellate courts may only conduct plain error review, an "extremely stringent" form of review that will be met only in "rare cases":

> [R]eversal for plain error in the jury instructions or verdict form will occur only in exceptional cases where the error is so fundamental as to result in a

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47. Richardson v. Marsh, 481 U.S. 200, 206 (1987) (citing Francis v. Franklin, 471 U.S. 307, 325 n. 9 (1985)); *see also* Weeks v. Angelone, 528 U.S. 225, 234 (2000).

48. *See, e.g.*, Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 383 (3d Cir. 2002); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 794 (6th Cir. 2002); Johnson v. Breeden, 280 F.3d 1308, 1319–20 (11th Cir. 2002); Nichols v. Ashland Hosp. Corp., 251 F.3d 496, 501 (4th Cir. 2001); Loehr v. Walton, 242 F.3d 834, 836 (8th Cir. 2001); Ramos v. Davis & Geck, Inc., 224 F.3d 30, 32 (1st Cir. 2000); Caudle v. Bristow Optical Co., 224 F.3d 1014, 1023 (9th Cir. 2000); Jones v. Lincoln Elec. Co., 188 F.3d 709, 732 (7th Cir. 1999); Townsend v. Daniel, Mann, Johnson & Mendenhall, 196 F.3d 1140, 1150 (10th Cir. 1999); Gierlinger v. Gleason, 160 F.3d 858, 874 (2d Cir. 1998); Russell v. Piano Bank & Trust, 130 F.3d 715, 721 (5th Cir. 1997); Williams v. U.S. Elevator Corp., 920 F.2d 1019, 1024 (D.C. Cir. 1990).

49. *See* Lewis v. City of Chicago, 563 F. Supp. 2d 905, 911–12 (N.D. Ill. 2008) ("Failure to object to a jury instruction at trial results in a waiver . . . In the absence of a proper objection, the Court can consider whether there was plain error in the instruction that affected the plaintiff's substantial rights.").

50. Anderson v. Branen, 17 F.3d 552, 556 (2d Cir. 1994).

51. Fed. R. Civ. P. 51(d).

52. Stanczyk v. City of New York, 752 F.3d 273, 278 n. 3 (2d Cir. 2014) ("We review jury instructions de novo and will grant a new trial if, viewing the charge as a whole, we find that it was erroneous and prejudicial.").

> miscarriage of justice. To meet this stringent standard, a party must prove that the "challenged instruction was an incorrect statement of the law and [that] it was probably responsible for an incorrect verdict, leading to substantial injustice." This element is satisfied if a party proves that the instruction will "mislead the jury or leave the jury to speculate as to an *essential* point of law."[53]

In other words, to prevail under plain error review, the appellant must prove: "(1) that there was an error; (2) that the error was clear or obvious; (3) that it affected the appellant's substantial rights; and (4) that it seriously affected the fairness, integrity, or public reputation of the judicial proceedings."[54] To avoid this strict standard of review, counsel must raise any objections to the jury instructions before they are given. It is especially important for the plaintiff's counsel to preserve these objections at the trial level, as verdicts against plaintiffs are rarely overturned on appeal.[55]

Further, failure to object to jury instructions may preclude the losing party from seeking post-trial relief (or relief on appeal). The Second Circuit has held that the losing party could not use FRCP Rule 59(e) (a posttrial motion to alter or amend a judgment) where the party "fail[ed] to comply with the carefully crafted structure and standards of Rules 50 and 51."[56] The rationale is that "Rule 51 requires parties to articulate and lodge their objections to jury charges before they are delivered so that 'the trial court will have an opportunity to cure any defects in the instructions before sending the jurors to deliberate.'"[57] Thus, it is necessary for a party to object to the jury instructions in a timely manner, or to renew the objection in a Rule 50(b) motion for judgment as a matter of law. The Sixth Circuit, in an insurance fraud case, noted that, although the parties disputed whether the insurance company had objected to a jury instruction, "Rule 51 does not prevent normal appellate review, since Zurich made all necessary arguments to preserve the issues raised in its appeal in its Rule 56 motion for summary judgment and in its Rule 50(b) motion for judgment as a matter of law or alternatively for a new trial."[58] As the Supreme Court has remarked, "the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict."[59] Nonetheless, the safer course is to object to a jury instruction in a timely manner at least once if not twice—first through a Rule 51 objection, and second through a Rule 50 posttrial motion.

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53. Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329–30 (11th Cir. 1999) (emphasis in original) (citations omitted).

54. Coleman-Lee v. Govt. of the Dist. of Columbia, 788 F.3d 296, 299 (D.C. Cir. 2015) (citations omitted).

55. *See* Theodore Eisenberg & Henry S. Farber, *Why do Plaintiffs Lose Appeals? Biased Trial Courts, Litigious Losers, or Low Trial Win Rates?*, 15:1 Am. Law & Econ. Rev. 73, 73 (2013).

56. ING Global v. United Parcel Service Oasis Supply Corp., 757 F.3d 92, 96 (2d Cir. 2014).

57. *Id.* at 97.

58. K&T Enterprises, Inc. v. Zurich Ins. Co., 97 F.3d 171, 174–75 (6th Cir. 1996).

59. City of St. Louis v. Praprotnik, 485 U.S. 112, 120 (1988).

Even if counsel succeeds in demonstrating that the erroneous instruction created a "substantial and eradicable doubt about whether the jury has been properly guided in its deliberations,"[60] appellate courts will order a new trial only if they determine that the challenged instruction could have affected the outcome of the case.[61] One such example is *Woods v. START Treatment & Recovery Centers, Inc.*, in which the Second Circuit vacated and remanded the decision of the district court below based on reversible error in the jury instructions.[62] The plaintiff, Cassandra Woods, sued her former employer for retaliation and interference under the Family and Medical Leave Act (FMLA).[63] In her deposition taken during discovery, Ms. Woods invoked the Fifth Amendment and refused to answer questions from her employer about her alleged prior criminal conduct, which the employer argued evidenced performance issues.[64] Before trial, the district court granted the employer's motion *in limine*, which sought an adverse inference instruction that the jurors should "presume that Woods would have answered the deposition questions in the affirmative."[65] Moreover, on Ms. Woods's retaliation claim, the district court instructed the jury on the "but for" standard of causation, rather than on the "motivating factor" standard.[66] On appeal, the Second Circuit found that the district court committed reversible error by giving the adverse inference instruction,[67] as well as by instructing the jury on a higher standard of causation than Ms. Woods was actually required to prove under her retaliation claim.[68]

Potential objections to jury instructions may be more easily resolved in advance of trial through rulings on motions *in limine*. For example, in *U.S. ex rel. Scutellaro v. Capitol Supply, Inc.*, brought under the False Claims Act (FCA), the plaintiff filed a motion in limine to prevent the defendant from telling the jury that the plaintiff could be awarded treble damages by the judge under the FCA.[69] In granting the plaintiff's

60. Jowers v. Lincoln Elec. Co., 617 F.3d 346, 352 (5th Cir. 2010) (citations omitted).

61. *See* Bender v. Brumley, 1 F.3d 271, 276–77 (5th Cir. 1993) ("Assessing whether the jury was properly guided, however, is only one-half of the inquiry. Even though error may have occurred, we will not reverse if we find, based upon the record, that the challenged instruction could not have affected the outcome of the case.") (citations and internal quotation marks omitted).

62. Woods v. START Treatment & Recovery Ctrs., Inc., 864 F.3d 158, 162, 171 (2d Cir. 2017) ("If a jury finds against Woods, but it was wrongly instructed on the law, can its verdict still stand? In this case, our answer is no.").

63. *Id.* at 164.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 170–71 ("Such adverse inferences are appropriately admitted . . . only if they are relevant, reliable, and not unduly prejudicial. We conclude that the district court exceeded the bounds of its discretion in admitting and permitting the adverse inferences to be drawn here.") (citations omitted).

68. *Id.* at 170 ("Although there is evidence from which a reasonable jury could conclude that Woods's deficient performance served as the sole basis for her termination, we are unable to conclude that that evidence is so overwhelming as to render the erroneous instruction harmless. That error, coupled with the erroneous admission of the adverse inferences . . . resulted in impermissible prejudice.").

69. Scutellaro v. Capitol Supply, Inc., C.A. No. 10-1094 (BAH), 2017 WL 9889370 (D.D.C. Sept. 20, 2017) (Howell, J.).

motion, the district court stated that "there is a risk that a jury could use knowledge of the trebling of damages and statutory penalties 'as an intimation to keep the damages at a low level, in view of the fact that the amount allowed by the jury would be multiplied by three.'"[70] The district court also broadened its holding by noting that "the weight of authority in other contexts strongly establishes a general rule that a jury should not be instructed as to trebling of damages, attorneys' fees, or other court-determined awards that might alter a jury's damages finding."[71] Therefore, plaintiffs' attorneys should consider filing similar motions *in limine* when bringing to trial statutory claims involving the trebling of damages, such as claims under state wage and hour statutes.

E. Interim and Limiting Instructions

The need for "interim" or "limiting" instructions may arise during the course of trial proceedings. For example, under Rule 105 of the Federal Rules of Evidence:

> If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.[72]

The trial judge may issue interim or limiting instructions at any time during trial when they could be helpful to the jury, as "[a]n explanation of applicable legal principles may be more helpful when the issue arises than if deferred until the close of trial."[73] However, when the need for interim instructions arises, "counsel should be permitted to comment or object before an instruction is given," and "the judge should caution the jury that these are only interim explanations, and that the final, complete instructions on which they will base their verdict will come at the close of trial."[74]

For example, in *Howard University v. Roberts-Williams*, a common-law breach of contract case brought by a professor denied tenure by Howard University, the trial judge issued an interim instruction regarding the biennial evaluations that the university was contractually obligated to provide to the professor.[75] During cross-examination of the plaintiff, defense counsel asked a question that implied that the plaintiff received the required evaluations during her application process for promotion to assistant professor, and her counsel objected "on the ground that Howard's counsel was 'equating' the promotion application evaluation with the required handbook evaluations; that 'the

70. *Id.* at *1.

71. *Id.* at *2.

72. Fed. R. Evid. 105.

73. Fed. Judicial Ctr., Manual for Complex Litigation, Fourth, § 12.431 (2004).

74. *Id.* at § 12.433.

75. Howard Univ. v. Roberts-Williams, 37 A.3d 896, 903–04 (D.C. 2012).

question implies they're the same thing, and they're not.'"[76] To remedy this confusing line of questioning, the trial judge gave the following interim instruction at the close of her testimony:

> [T]he gist [of the faculty handbook provision] is that the university undertakes to give biennial evaluations, to evaluate the faculty member every two years, and it explicitly mentions tenure being benefitted by the biennial evaluations for those on the tenure track, as was the plaintiff . . . That is part of the contract that the plaintiff had with the defendant . . .
>
> Now, you're further instructed . . . that although a candidate for tenure may have available[ ] colleagues to reach out [to] for advice and counsel with respect to tenure and the applications for tenure, that doesn't relieve the university of its contractual duty to biennially evaluate the candidate . . .[77]

Prior to issuing this instruction, the trial judge allowed defense counsel to explain his objection to the instruction, in that "it would 'unduly influence the jury,'" who "would 'begin to believe that the [c]ourt is favoring the plaintiff.'"[78] On appeal, the D.C. Court of Appeals held that the interim instruction was not prejudicial because it "accurately reflected the fact that Howard's faculty handbook's provisions regarding tenure constituted part of an employee's contract," and the trial court "properly informed the jury as to their meaning."[79] As in *Roberts-Williams*, plaintiffs' advocates should consider requesting interim or limiting instructions where such instructions might aid the jury in understanding legal issues as they arise during trial proceedings.

F. Curative Instructions

A curative jury instruction "is one that is designed to correct a trial error," and "is usually given at a party's request after there has been a sustained objection, although a trial judge may give such an instruction *sua sponte* to protect the record on appeal."[80] Curative instructions may be given at any stage during trial, and, most commonly, instruct the jurors to ignore an inadmissible exhibit or an erroneous or prejudicial remark, "and not allow such statement or exhibit to influence their verdict."[81] Although curative instructions are generally given immediately following a timely objection, they may be reserved for the end of trial, to be given with the final instructions.[82] However, it is good practice to ask for the curative instruction immediately following the objection,

76. *Id.* at 903.
77. *Id.* at 904.
78. *Id.*
79. *Id.* at 907.
80. Robert E. Larsen, Navigating the Federal Trial, 2017 ed. § 2:30 (2017).
81. *Id.*
82. *See id.*

so as to promptly cure any error as it arises.[83] A trial judge's refusal to give a curative instruction may constitute an abuse of discretion and result in a mistrial.[84]

G. Readbacks, Jury Questions, and Supplemental Instructions

Often, juries will request readbacks of testimony during their deliberations.[85] The Federal Judicial Center (FJC) advises that "[r]eadbacks should never be authorized absent counsel's consent, or, at least, absent an opportunity to be heard," as "[r]eadbacks should not unduly emphasize any part of the evidence."[86] The FJC also advises that "[t]he court should instruct the jury to make requests as specific and narrow as possible to avoid excessively long readbacks, then should confer with the attorneys to seek agreement on the portions of the testimony to be read. Counsel should state any objections on the record."[87] The Second Circuit has explained the rationale for such advisements:

> [A] court's response to a jury request for a readback should balance the jurors' need to review the evidence before reaching their verdict against the difficulty involved in locating the testimony to be read back, the possibility of undue emphasis on a particular portion of testimony read out of context, and the possibility of undue delay in the trial.[88]

Additionally, during the course of their deliberations, juries will often ask follow-up questions to the court about particular instructions. Although trial judges maintain discretion over whether to reinstruct the jury to address their question(s), the US Supreme Court has stated that, "[w]hen a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy."[89] If a reinstruction is given, counsel should ask the court to read back all of the instructions on that particular legal issue to provide jurors with the appropriate context.[90] As the Seventh Circuit has noted: "Instructions must be read as a whole with due regard for the artificiality of assuming that isolated passages in a lengthy set of instructions are apt to spell the difference between victory and defeat."[91] Additionally, in some cases:

> Referral to the original instruction cannot be adopted as a reflexive response (even if the original instruction was proper) because a jury's question that comes after instruction suggests that—at least in the jurors' estimation—the

83. *See id.*
84. *See* Wilson v. NHB Indus., Inc., 219 Fed. App'x 851, 852–54 (11th Cir. 2007).
85. Fed. Judicial Ctr., Manual for Complex Litigation, Fourth, § 12.436 (2004).
86. *Id.* (citations omitted).
87. *Id.*
88. U.S. v. Criollo, 962 F.2d 241, 243 (2d Cir. 1992).
89. Bollenbach v. U.S., 326 U.S. 607, 612–13 (1946).
90. *See* Walbot & Alonso, *supra* note 33, at 37.
91. W.T. Rogers Co. v. Keene, 778 F.2d 334, 342 (7th Cir. 1985).

original instructions have not provided sufficient guidance on the law the jury is to apply to the evidence presented at trial.[92]

If the judge elects to provide supplemental instructions to the jury, counsel should timely raise any appropriate objections, as such additional instructions or responses to questions from the jury could result in a reversal on appeal.[93] The Second Circuit suggests the following four-step response to jury questions:

> (1) The jury's question should be submitted in writing, (2) the question should be marked as a court exhibit and read into the record, (3) counsel should be afforded an opportunity to suggest appropriate responses, and (4) once the jurors are recalled, the question, if substantive, should be read into the record in their presence.[94]

H. Verdict Forms

Similar to jury instructions, verdict forms must be clear and understandable to the average juror. Logically, "[t]he verdict form should conform to the [jury] instructions or it may be deemed a waiver of an issue."[95] Verdict forms should be "reasonably capable of an interpretation that would allow the jury to address all factual issues essential to judgment."[96] If the verdict form "creates an erroneous impression of the law in the minds of the jurors that affects the outcome of a case," its usage could be held reversible error.[97] For example, in *McNely v. Ocala Star-Banner Corp.*, involving claims of retaliation under the Americans with Disabilities Act (ADA), the special interrogatory verdict form stated *inter alia* the following questions:

> 5. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because of his alleged disability?
>
> . . .
>
> 6. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because he engaged in a statutorily protected expression?[98]

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92. Ivey v. Dist. of Columbia, 46 A.3d 1101, 1108 (D.C. 2012).

93. *See* Chu v. Am. Airlines, 285 F.3d 756, 758 (8th Cir. 2002); *see also Hoard v. Hartman*, 904 F.3d 780, 786 n.7 (9th Cir. 2018) ("The standard of review is identical for jury instructions and supplemental jury instructions given in response to a jury's questions.") (citations omitted).

94. U.S. v. Ulloa, 882 F.3d 41, 45 (2d Cir. 1989).

95. *See* Walbot & Alonso, *supra* note 33, at 36.

96. Rooney v. Sprague Energy Corp., 554 F. Supp. 2d 39, 43 (D. Me. 2008) (citations omitted).

97. Francis C. Amendola et al., corpus juris secundum, 89 C.J.S. Trial § 1012 (Sept. 2017).

98. McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1071 (11th Cir. 1996).

The jury found that the plaintiff, McNely, proved that he was "an individual with a disability" under the ADA; he was able to perform the essential functions of his position; his employer failed to prove that it reasonably accommodated his condition; and that McNely's proposed reasonable accommodation would not impose an undue hardship on his employer.[99] Despite these findings, the jury returned a verdict for the employer, answering "yes" to Question 6, but "no" to Question 5.[100] On appeal, McNely's counsel argued that the verdict form was "fatally flawed," in that (1) "inclusion of the term 'solely' in questions five and six erroneously prevented the jury from returning a verdict for the plaintiff if the jury found that impermissible discrimination or retaliation had a determinative effect on the defendants' decisionmaking process, but was not the sole reason for the employment decision," and (2) "questions five and six erroneously narrowed the jury's inquiry to whether McNely was 'terminated' because of discrimination or retaliation, even though the ADA authorizes recovery for adverse employment actions that fall short of termination and even though McNely had put on evidence of such actions in this case."[101] The Eleventh Circuit agreed with McNely's counsel that these errors merited reversal:

> The verdict form submitted to the jury in this case did not accurately reflect the law or the evidence presented at trial. First, the verdict form required a finding of sole causation in order for [Plaintiff] to recover, while the ADA requires only a finding of "but-for" causation. Second, the verdict form barred recovery for adverse employment actions short of termination, when the ADA permits recovery for those less drastic forms of discrimination and when evidence of such lesser discrimination was presented at trial. Under these circumstances, we cannot conclude that the jurors understood the issues and were not misled by the verdict form.[102]

III. CLOSING ARGUMENT

Closing argument is the advocate's last opportunity to persuade the jury that his or her client should prevail. The purpose of closing arguments is to "assist the jury in analyzing the evidence" presented at trial.[103] However, as discussed *infra*, there are limits to what counsel may discuss during closing. Specifically, closing argument must involve "a fair presentation of a party's case and claims from [that party's] point of view; it must be confined to the evidence and must not appeal to passion or prejudice or sympathy in an unfair way."[104]

99. *See id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1078.

103. U.S. v. Iglesias, 915 F.2d 1524, 1529 (11th Cir. 1990) (citations omitted).

104. Tashjian v. Boston & M.R.R., 80 F.2d 320, 322 (1st Cir. 1935).

A. Scope and Strategy

An advocate's main objective during closing argument is "to provide jurors sympathetic to [her] side with points that will enable them to persuade other, undecided or doubting jurors" by explaining how the promises she made during the opening statement were met during trial, and, conversely, how the promises made by opposing counsel were not fulfilled by the evidence presented at trial.[105] To accomplish this objective, it is helpful to use the jury instructions as a roadmap for the jury, by clearly demonstrating during closing how each piece of evidence proven at trial, collectively, satisfies the burden of proof required for the jury to issue the desired verdict.[106] For this reason, as discussed *supra*, it is often helpful for the plaintiff's counsel to request that final jury instructions be issued prior to closing arguments. If so, counsel may use the instructions as a demonstrative aid for the jury, to illustrate how the evidence presented by the plaintiff satisfies each element of her claim.

Also during closing, the plaintiff's counsel should carefully highlight the weaknesses of the defendant's case, but only based on the evidence presented at trial, as the "cardinal rule of closing argument" is "that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence."[107] The Seventh Circuit has explained that:

> Closing arguments are the time in the trial process when counsel is given the opportunity to discuss more freely the weaknesses in his opponent's case and to highlight the strength of his own. Indeed . . . a significant part of the lawyer's role during closing arguments is to bolster the strength of his case by calling the jury's attention to certain facts or inferences that might otherwise escape the jury's attention. It is perfectly reasonable for defense counsel to discuss the weaknesses of an opponent's case during closing argument so long as counsel's argument is based on evidence admitted at trial.[108]

Moreover, closing arguments are an opportunity for counsel to use visual aids and demonstratives based on record evidence to appeal to the jurors through multiple senses. Such aids are critical persuasive tools, "since communicating through multiple channels and repeating key information enhances retention—to as much as 60 per cent over three days, as opposed to only 10 per cent if merely heard or 20 per cent if only seen."[109] To enhance juror retention of the information presented during closing argument, advocates can enlarge important trial exhibits, summarize critical testimony, and use charts, graphs, or other visual aids to emphasize their point, if such aids are

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105. Tucker Ronzetti & Janet L. Humphreys, *Avoiding Pitfalls in Closing Arguments*, 74 The Florida Bar. J. 36, 36 (2003).

106. *See* Amlong, *supra* note 18, at 54.

107. Whittenburg v. Werner Enters. Inc., 561 F.3d 1122, 1128–29 (10th Cir. 2009).

108. Jones v. Lincoln Elec. Co., 188 F.3d 709, 731 (7th Cir. 1999) (citations omitted).

109. Thomas A. Mauet, Trials: Strategy, Skills, and the New Power of Persuasion 4 (2005).

created based on the evidence presented at trial.[110] Additionally, counsel can enlarge the verdict form for use as a demonstrative aid and explain how to complete it to reach a verdict in favor of the plaintiff.[111]

Though counsel should be careful not to make inflammatory statements that will invite objections, "closing argument need not, nor should, be a sterile exercise devoid of passion,"[112] as "some degree of emotionally charged language during closing argument in a civil case is a well-accepted tactic in American courtrooms."[113] Unlike the dramatic closing arguments often depicted in television dramas, counsel should maintain professionalism and make logical arguments based upon the record. The key for a plaintiff's advocate, therefore, is to present a compelling argument by persuading the jury to view the facts presented at trial in the light most favorable to the plaintiff, without inviting objections from the opponent.

B. Objections to Closing Arguments

There are numerous bases on which to object to closing arguments. Such objections are grounded in precedent, as well as in Rule 3.4(e) of the Model Rules of Professional Conduct:

> A lawyer shall not: . . . in 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 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.[114]

FRCP Rule 51 governs objections to closing arguments.[115] Similar to jury instructions, objections to closing arguments will be waived if not timely made on the record,[116] and, if not preserved, may only be reviewed on appeal for plain error.[117] However, as a strategic matter, it is not always wise to object during closing argument, as juries tend to look negatively on such objections:

> [O]bjecting is risky because of its effect on jurors' perceptions. The jury may consider the objection an effort by counsel to obfuscate, and the objection itself

110. *See* Jacob A. Stein, Closing Arguments §1:66 (2016).
111. *See* Amlong, *supra* note 18, at 54.
112. Whittenburg, 561 F.3d at 1133.
113. Settlegoode v. Portland Pub. Schs., 371 F.3d 503, 518 (9th Cir. 2004).
114. Model Rules of Prof'l Conduct R. 3.4(e) (Am. Bar Ass'n 1983).
115. Fed. R. Civ. P 51.
116. Fed. R. Civ. P 51(d)(1).
117. Fed. R. Civ. P 51(d)(2).

> is likely to highlight the point at issue, especially if the objection is overruled. In lieu of an objection, counsel can point out the misstating of evidence in the defendant's closing or the plaintiff's rebuttal. In doing so, counsel should carefully provide a clear and correct recitation of the evidence, and remind the jurors that their own collective memory is controlling.[118]

Moreover, "improper comments made during closing argument rarely rise to the level of reversible error,"[119] and "warrant reversal only if they 'influenced the jury in such a way that substantial prejudice resulted to' the opposing party."[120] Therefore, counsel should carefully weigh the pros and cons of objecting during closing argument prior to doing so.

The following is a list of common instructions to arguments made during closing, with examples of cases in which such objections were raised.

1. Improper Statements of Law

A misstatement of law made during closing argument could be grounds for a new trial, as counsel should refer only to the law as instructed by the court in the case at bar.[121] For example, in *Wilson v. NHB Industries, Inc.*, involving alleged FMLA violations, one of the central issues at trial concerned whether the plaintiff's employer was put on notice of his health condition.[122] During closing argument, defense counsel stated that the plaintiff "failed to establish that he had a serious health condition because he failed to put on testimony from any medical provider . . . or any emergency room employee who could corroborate [Plaintiff's] own testimony regarding his condition."[123] In response, the plaintiff's counsel suggested during closing argument that the employer should have contacted the plaintiff's doctor directly to learn about his health condition: "Ask yourself, what did [the employer] do to find out what was going on with his condition? . . . [The employer] never tried to call Dr. Hakim to see what was going on to see what they could do."[124] Defense counsel timely objected, noting, correctly, that such action would have violated the FMLA.[125] On appeal, the Eleventh Circuit vacated and remanded the case for new trial, holding:

> Given that the jury heard the parties' closing arguments after they had already been instructed on the law, and where the improper comments

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118. Ronzetti & Humphreys, *supra* note 105, at 39.

119. Probus v. K-Mart, 794 F.2d 1207, 1210 (7th Cir. 1986).

120. Arcor, Inc. v. Textron, Inc., 960 F.2d 710, 713 (7th Cir. 1992); *see also Smith v. Rosebud Farm, Inc.*, 898 F.3d 747, 753 (7th Cir. 2018) ("Improper statements made during closing arguments seldom warrant a new trial . . .") (citations omitted).

121. Ronzetti & Humphreys, *supra* note 105, at 36.

122. Wilson v. NHB Indus., Inc., 219 Fed. App'x 851, 852 (11th Cir. 2007).

123. *Id.*

124. *Id.* at 853.

125. *Id.*

> occurred during [Plaintiff's] counsel's rebuttal when [Defendant] had no further opportunity to speak to the jury, and where the comments constituted a misstatement of the law which went directly to the very issues contested in the case, the Court finds that counsel's improper comments, especially without a curative instruction, cast an impermissible taint over the jury's verdict.[126]

2. Evidence Not in the Record

In addition to misstatements of law, misstatements of fact are also grounds for objecting. Although asking the jury to draw inferences based on record evidence is proper, creating evidence without factual support is not, and counsel must tread this line carefully.[127] In *Schandelmeier-Bartels v. Chicago Park District*, a discriminatory termination case, the plaintiff's counsel improperly suggested during closing that the defendant employer fabricated an email allegedly sent prior to terminating the plaintiff, which discussed her performance issues.[128] Specifically, the plaintiff's counsel stated:

> I would suggest to you that they put that e-mail up there that supposedly got written by Rowland. And I would suggest to you that you should think about, not conclude but think about the possibility that that document didn't get created till after Cathleen Schandelmeier got fired . . . Even if it is a legit document, which I strongly suggest to you that it's not, they didn't do anything about it.[129]

On appeal, the Seventh Circuit held that these comments were improper:

> No evidence put before the jury supported that inference. A suggestion that an opposing party—and, by extension, its counsel—has put forth falsified evidence is very different from (and much more serious than) a contention that one witness's version of events has a better factual foundation and thus is more likely to be true than another witness's version of the same events, or that one document is inconsistent with another.[130]

However, the court declined to order a new trial, holding that a curative instruction issued to the jury that "[t]he lawyers' opening statements and closing arguments to you are not evidence" properly mitigated the prejudice caused by the comments.[131]

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126. *Id.* at 854.
127. Ronzetti & Humphreys, *supra* note 105, at 36.
128. Schandelmeier-Bartels v. Chicago Park Dist., 634 F.3d 372, 387–88 (7th Cir. 2011).
129. *Id.* at 387.
130. *Id.* at 388.
131. *Id.* ("We presume that curative instructions to the jury mitigate harm that may otherwise result from improper comments during sometimes heated closing argument.").

3. "Golden Rule" Arguments

"Golden Rule" arguments ask the jurors to "do unto others as you would have them do unto you,"[132] to "place themselves in the position of a party,"[133] or "to grant a party the recovery they would wish themselves if they were in the same position."[134] Such arguments are "universally condemned 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 evidence."[135]

In *Caudle v. District of Columbia*, involving Title VII claims of retaliation brought by African-American police officers against the District of Columbia, the D.C. Circuit held that the following statements were impermissible "Golden Rule" arguments: (1) "would *you* hesitate to speak up if *you* knew that speaking up would mean that *your* boss would call a meeting with *your* entire office . . . ;" (2) "[w]ouldn't *you* think twice about complaining about workplace discrimination . . . ;" and (3) "we ask yourselves [sic] to *put yourselves in the plaintiffs' shoes.* What would it do to *you* to have *your* complaint broadcast to *your* entire office, to be the only one excluded . . ."[136] In so holding, the court noted that the third statement was a "quintessential invocation of the golden rule," and that the first two, while "closer question[s]," also constituted improper "Golden Rule" arguments.[137] The D.C. Circuit granted a new trial, holding that, given the closeness of the case, these improper arguments were not harmless error, and that the district court's curative instruction to the jury "to decide the case without prejudice, sympathy, fear, favor or public opinion" did not eliminate the prejudice caused by the improper arguments.[138]

4. "Send a Message" Statements

"Send a message" statements ask the jury to "punish the defendant rather than compensate the plaintiff," and are improper in cases where punitive damages are unavailable.[139] For example, in *Caudle*, in addition to the three improper "Golden Rule" arguments, plaintiffs' counsel made the following "send a message" statement during closing:

> By protecting plaintiffs' right to complain about unlawful conduct without reprisal, you preserve the rights *not just of plaintiffs but of everyone.* By ensuring that plaintiffs are made whole for what they have endured, you ensure that *others will*

132. Klotz v. Sears, Roebuck & Co., 267 F.2d 53, 54 (7th Cir. 1959).

133. Ins. Co. of N. Am. v. U.S. Gypsum Co., 870 F.2d 148, 154 (4th Cir. 1989).

134. Stein, *supra* note 110, at §1:80.

135. Granfield v. CSX Transp., Inc., 597 F.3d 474, 491 (1st Cir. 2010); *see also* Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705, 714 (5th Cir. 1967) ("The real danger is that the sympathy and the feelings of the jury will be encouraged and aroused so that the jury will decide the case and award damages out of relation to actual fault and actual damage.").

136. Caudle v. Dist. of Columbia, 707 F.3d 354, 358–61 (D.C. Cir. 2013) (emphasis in original).

137. *Id.* at 360.

138. *Id.* at 361–63. On remand, the jury again returned verdicts in favor of Plaintiffs. *See* Caudle v. Dist. of Columbia, C.A. No. 08-205 (BJR) (ECF No. 426) (D.D.C. Dec. 19, 2013) (Rothstein, J.).

139. Ronzetti & Humphreys, *supra* note 105, at 37.

> *be free to exercise their rights without fear.* Yours is an important job and we trust that you will *[do what] is right and ensure that justice is done.*[140]

On appeal, the D.C. Circuit noted that, while this "send a message" statement might not be grounds for reversal on its own:

> [G]iven the fact that [Plaintiffs'] counsel made this argument after the district court had sustained *three* objections to golden rule arguments—her send a message argument was also inappropriate because, like the golden rule arguments, it diverted the jury's attention from its duty to decide the case based on the facts and the law instead of emotion, personal interest or bias.[141]

5. "Conscience of the Community" Statements

"Conscience of the community" statements ask the jury to act as the "conscience of the community" when reaching a verdict.[142] Such statements are not error per se: "Unless calculated to inflame, an appeal to the jury to act as the conscience of the community is not impermissible."[143] However, "conscience of the community" statements are problematic when they ask the jury to "abandon its traditional role as the fact finder in the case and, instead, use its verdict to correct some larger societal problem."[144] Such statements are most commonly made during criminal cases, although similar statements in civil cases may be objectionable. For example, in *Gilster v. Primebank*, involving Title VII claims of sexual harassment and retaliation, the plaintiff's counsel made a number of improper statements during closing argument, and ended her argument "by 'giving' to the jury 'the power and responsibility for correcting injustice.'"[145] On appeal, the Eighth Circuit stated that "[t]his was no different than a prosecutor urging the jury at the end of a criminal case 'to be the conscience of the community,' an improper argument that, in a close case, may warrant a new trial."[146] The court held that this statement, in combination with the "timing and emotional nature of counsel's improper and repeated personal vouching for her client [and] using direct references to facts not in evidence," warranted a new trial.[147]

6. Appeals to Sympathy

Appeals to sympathy are also not necessarily improper, if firmly grounded in the facts of the case.[148] On the other hand, appeals to sympathy based on matters not in evidence

140. Caudle, 707 F.3d at 358 (emphasis in original).

141. *Id.* at 361.

142. Ronzetti & Humphreys, *supra* note 105, at 38.

143. U.S. v. Lewis, 547 F.2d 1030, 1037 (8th Cir. 1976).

144. Larsen, *supra* note 80, at § 14:47.

145. Gilster v. Primebank, 747 F.3d 1007, 1011 (8th Cir. 2014).

146. *Id.*

147. *Id.* at 1013.

148. *See* Amendola et al., *supra* note 97, at § 321.

and that cannot, in any legitimate way, be brought to the attention of the jury are highly improper."[149] For example, contrasting a defendant's wealth with a plaintiff's poverty is an impermissible appeal to sympathy, as it would have no bearing on the facts or legal claims at issue.[150] In *Gilster*, discussed *supra*, the Eighth Circuit found that, in addition to making improper "conscience of the community" statements, the plaintiff's counsel also made improper appeals to sympathy by discussing her personal experiences with sexual harassment:

> Mindy Gilster had the strength to make that complaint back on July 2, 2009. I sure didn't. Back in 2006 I was sexually harassed by a professor at Drake, but I was on my way out. I was a third-year law student, and I had been a student bar association president for the last year, and I was well respected and liked by my peers. I had a great relationship with the dean of the law school because of my role as president . . . And I refused to stand up for myself. It takes great strength and fearlessness to make a complaint against your supervisor.[151]

In granting a new trial, the Eighth Circuit stated:

> Counsel made a deliberate strategic choice to make emotionally-charged comments at the end of rebuttal closing argument, when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond. Referring to an experience in her own life was "plainly calculated to arouse [the jury's] sympathy."[152]

Therefore, while appeals to sympathy can be useful rhetorical tools for an advocate, counsel should exercise caution when injecting pathos into a closing argument.

7. Appeals to Bias

Arguments made during closing that are "designed to tap into jurors' biases or prejudices" are improper.[153] Such arguments present concerns similar to those posed by improper appeals to sympathy: "Fairness to the parties and our system of justice dictates that 'there must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice.'"[154] Common examples of appeals to

149. *Id.*

150. *See* Koufakis v. Carvel, 425 F.2d 892, 902 (2d Cir. 1970) ("Remarks such as these, which can be taken as suggesting that the defendant should respond in damages because he is rich and the plaintiff is poor, are grounds for a new trial.").

151. Gilster, 747 F.3d at 1010.

152. *Id.* at 1011.

153. Larsen, *supra* note 80, at. § 14:38.

154. Whittenburg, 561 F.3d at 1128 (citations omitted).

jurors' biases include appeals to regional bias,[155] racial bias,[156] and religious beliefs.[157] In *Pappas v. Middle Earth Condominium Ass'n*, a "slip and fall" case brought by New Jersey natives who were injured during a ski trip in Vermont, the plaintiffs appealed a judgment in favor of the defendants, arguing that defense counsel improperly appealed to the jurors' regional biases.[158] During closing, defense counsel stated the following:

> But isn't what they're really asking is that they can come up from New Jersey—[objection overruled]—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," . . .
>
> Would we go to New Jersey and walk on a tugboat without looking where we were going?[159]

On appeal, the Second Circuit ruled that these statements constituted improper appeals to the jury's regional bias:

> What counsel appears to be suggesting in this argument is that plaintiff and his party were in Vermont to enjoy the snow that people in Vermont are forced to "experience" every year. Counsel continues in like vein later, when he asks would "we"—apparently including himself and the Vermont-resident members of the jury as one group—"go to New Jersey and walk on a tugboat without looking where we were going?" In that way defense counsel made a blatant "us-against-them" appeal to the jury . . .[160]

Accordingly, the Second Circuit ordered a new trial, holding that:

> There is no doubt whatever that appeals to the regional bias of a jury are completely out of place in a federal courtroom. Appeals tending to create feelings of hostility against out-of-state parties are so plainly repugnant that the Supreme

155. *See* Whitehead v. Food Max of Mississippi, 163 F.3d 265, 276–78 (4th Cir. 1998); Pappas v. Middle Earth Condo. Ass'n, 963 F.2d 534, 541 (2d Cir. 1992).

156. *See* Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1150–51 (9th Cir. 2001).

157. *See* Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991).

158. *See* Pappas, 963 F.2d at 535–36.

159. *Id.* at 536–37.

160. *Id.* at 539.

> Court long ago stated their condemnation "require[d] no comment." This sort of argument improperly distracts the jury from its sworn duty to hand down a just verdict based on the evidence presented to it.[161]

8. Counsel's Personal Opinion

It is also improper for attorneys to state their personal opinions or beliefs during closing argument, as "[c]ourts have long recognized that statements of counsel's opinions or personal beliefs have no place in a closing argument of a criminal or civil trial."[162] The rationale underlying this rule is to "prevent putting relative credibility of counsel at issue or allowing counsel to imply that he possesses knowledge not shared with the jury."[163] In *Polansky v. CNA Insurance Co.*, the plaintiff brought suit for breach of contract against his insurance company for its failure to reimburse him for damage caused by an apartment building fire.[164] On appeal, the First Circuit vacated and remanded a verdict for the plaintiff, holding that it was error for the district court to fail to cure objections to statements made during closing argument by the plaintiff's counsel, including, "[w]ell, it wasn't convincing to me. I hope it wasn't convincing to you," referring to the credibility of the defendant's testimony regarding a key piece of evidence, and, "I say to you there is absolutely no way, in my opinion, that they would have agreed," referring to the possibility that the plaintiff could have used insurance money to repair the apartment building.[165] To avoid this outcome, it is recommended that counsel carefully scrutinize their language, and avoid using personal references such as "I think" or "I believe."[166]

9. Vouching for Witnesses

Counsel should also take care to avoid vouching for witnesses, as "[i]t is unprofessional conduct, meriting discipline by the court, for counsel either to vouch for his own witnesses or to categorize opposing witnesses as 'liars;' that issue is for the jury."[167] Generally, "comments that a witness was honest, truthful, or worthy of belief" invite objections on grounds of improper vouching,[168] because, "[b]y presenting purported first-hand knowledge of a witness's character, a lawyer would effectively become a witness who has never been subjected to cross examination," which is improper.[169]

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161. *Id.* (citations omitted).

162. Polansky v. CNA Ins. Co., 852 F.2d 626, 628 (1st Cir. 1988) (citations omitted).

163. *Id.*

164. *Id.* at 627.

165. *Id.* at 627–28.

166. Ronzetti & Humphreys, *supra* note 105, at 37.

167. Olenin v. Curtin & Johnson, Inc., 424 F.2d 769, 769 (D.C. Cir. 1968); *see also Morris v. Pruitt*, 308 F. Supp. 3d 153, 166–67 (D.D.C. 2018) (finding plaintiff's counsel's statement that a witness "seemed to me to be very believable" to constitute error because "'it is for the jury, and not the lawyers, to say which witnesses are telling the truth.'") (citations omitted).

168. William B. Johnson, *Proprietary and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witnesses – Federal Cases §2[a]*, 78 A.L.R. 23 (1986).

169. Ronzetti & Humphreys, *supra* note 105, at 37.

However, there is a difference between asking the jury to find a witness credible based on record evidence, which is proper, and personally opining on the witness's character, which is improper.[170] When discussing a witness's credibility, therefore, counsel should refer only to evidence on the record.

Additionally, it is improper for counsel to "express his belief regarding *opposing counsel's* opinion of honesty."[171] In *Spicer v. Rossetti*, a civil rights action based on an injury suffered by an inmate, the Seventh Circuit found that "defense counsel's closing argument went beyond the range of acceptable advocacy" by "improperly comment[ing] . . . that plaintiff's counsel did not believe his client."[172] Specifically, defense counsel stated:

> His own lawyer tells you we will never know. What does that tell you about the case. It tells you his own lawyer doesn't believe his client . . .
>
> Ladies and gentlemen, he just stood up here and said we will never know how Mr. Spicer got injured. He's had conversations with his client and he's not even sure. He's not even convinced.[173]

These comments were held to be reversible error.[174]

10. Attacking Opposing Counsel

Likewise, it is improper for counsel to make personal attacks on opposing counsel, or to accuse opposing counsel of committing fraud on the court.[175] In general, "[c]ourts find it objectionable for counsel to refer to the personal peculiarities and idiosyncrasies of opposing counsel during closing argument."[176]

As the Fifth Circuit explained in *Bufford v. Rowan Cos., Inc.*,:

> What is not permitted is an unsupported, irresponsible attack on the integrity of opposing counsel. When such unprofessional conduct rears its unethical head in a courtroom, it is the duty of the trial court to suppress same, quickly and unqualifiedly, and to instruct the offending counsel to cease and desist. The court must take great care not to exacerbate the situation or to give the impression to the jury that it approves or condones any unjustified impugning of the ethical standards or integrity of an officer of the court practicing before it.[177]

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170. *Id.* at 36–37.

171. Spicer v. Rossetti, 150 F.3d 642, 644 (7th Cir. 1998) (emphasis added).

172. *Id.* at 643.

173. *Id.* at 644.

174. *Id.*

175. *See* United States v. Young, 470 U.S. 1, 9 (1985) ("Defense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate.").

176. Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29:2 Pepperdine L. Rev. 243, 304–05 (2002) (citations omitted).

177. Bufford v. Rowan Cos., Inc., 994 F.2d 155, 157–58 (5th Cir. 1993).

Throughout the trial proceedings in *Bufford*, a personal injury case, defense counsel had remarked that plaintiff's counsel was bringing a baseless case, as a "copycat" to *Pearson v. Rowman Cos., Inc.*,[178] which the plaintiff's counsel previously litigated:

> Defendants' theory was that the Bufford case was a "copycat" lawsuit. Specifically, defendants contended that the Buffords got the idea of staging an accident, or exaggerating a minor mishap, from a former co-worker, Ray Pearson. Pearson previously had settled a suit against Rowan for on-the-job injuries. One of the ways in which Bufford purportedly "copied" Pearson was by using the same lawyers. Defendants repeatedly referred to this fact.[179]

In reversing a verdict in favor of the defendants, the Fifth Circuit held that "[r]elying on the identity of counsel as the basis for contending that the Buffords' claim was fraudulent . . . went beyond the pale of appropriate trial advocacy," and that such an "unwarranted inference may not be drawn."[180]

11. Mentioning Statutory Caps to Damages

Mentioning statutory caps to damages is also improper during closing argument, as it could encourage the jury to award up to the statutory limit, or, conversely, to award higher amounts on other claims not subject to statutory caps.[181] In *Sasaki v. Class*, involving sexual harassment claims under the Civil Rights Act of 1991 and common law claims of assault and battery, the jury returned a verdict in favor of the plaintiff, awarding $50,000 for pain and suffering caused by the sexual harassment and $150,000 for pain and suffering caused by the assaults and batteries.[182] Prior to this decision, during closing, the plaintiff's counsel explicitly mentioned the $50,000 statutory cap imposed by the Civil Rights Act of 1991 based upon the employer's size, and defense counsel timely objected.[183] On appeal, the Fourth Circuit explained that:

> The § 1981a caps were enacted in apparent response to a concern about runaway verdicts, in which juries purportedly awarded plaintiffs excessive damages. As previously noted, the statute prohibits the court from informing the jury of the caps to ensure that the jury does not feel pressure to structure or adjust verdicts "upward or downward" to account for the caps. Restrictions on informing the jury of caps are enacted because "[l]egislators likely fear that juries would award the maximum or would otherwise adjust their awards if told of the statutory limit."[184]

178. 674 F. Supp. 558 (E.D. La. 1987).
179. Bufford, 994 F.2d at 157–58.
180. *Id.* at 158.
181. *See* Sasaki v. Class, 92 F.3d 232, 236–38 (4th Cir. 1996).
182. *Id.* at 237.
183. *Id.* at 235–36.
184. *Id.* at 236–38 (citations omitted).

Accordingly, in remanding the case for a new trial on the issue of damages, the Fourth Circuit held:

> The jury . . . appears to have faithfully followed Sasaki's counsel's directions with regard to the award. In awarding a significantly larger amount of damages for the "lesser included" state conduct and injury, the jury almost undoubtedly adjusted its award to account for the federal cap. Although the basis for the jury's decision can, of course, never be known to a certainty, when a jury's damages award itself indicates so strongly that the error substantially influenced the jury's verdict, the error cannot be dismissed as harmless.[185]

To avoid similar outcomes, the better strategy for a plaintiff's counsel is to ask the jury to award the plaintiff an amount that will fully compensate her for her losses and correct the injustice she suffered, without actually providing a dollar amount or range of amounts for compensatory and punitive damages.

12. Mentioning Prior Litigation Involving Either Party or Opposing Counsel

Counsel should also refrain from mentioning prior litigation involving either party or opposing counsel. For example, in *Hemmings v. Tidyman's, Inc.*, a Title VII sex discrimination case, the plaintiffs' counsel made the following comments during closing:

> [Tidyman's has] not corrected any of these [discriminatory] policies and they knew that they should because this is not the first time they have been sued. *I have sued them before in 1994*, so they had subjective policies which had disparate impact on all women, including plaintiffs, and that proves our case because they did not have a business necessity for doing it, and there were ways to fix it.[186]

Although defense counsel failed to timely object to this comment, the defendant cited it, among other grounds, in its motion for a new trial, which was denied by the district court.[187] On appeal, the Ninth Circuit "readily conclude[d]" that this statement constituted plain error because counsel "inappropriately referred to other cases that she herself had litigated," which "had no relevance to the lawsuit."[188] However, the Court declined to order a new trial based on the strength of the plaintiffs' case, and "[t]he fact that [defense] counsel did not object before the jury," which "strongly suggests that counsel made a strategic decision to gamble on the verdict and suspected that the comments would not sway the jury."[189]

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185. *Id.* at 237.
186. Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1192 (9th Cir. 2002) (emphasis in original).
187. *Id.* at 1192–93.
188. *Id.* at 1193.
189. *Id.* at 1193–95.

13. Attacking Other Court Rulings

It is also improper to attack other court rulings during closing argument. The rationale here is clear:

> It should be obvious that it is improper to attack any court ruling before the jury, including the court's rulings on evidence. Beyond reversible error, this is simply a strategic gaffe that pits the lawyer against the credibility of the court.[190]

14. Asking for "Comparative Verdicts"

Counsel is further prohibited from mentioning a jury's reward in a different case as a means of encouraging the jury to make a similar award.[191] Such comments are considered irrelevant to the case at bar, and can merit a new trial.[192]

15. Mentioning Judicial Remittitur

It is also improper to mention the possibility of judicial remittitur during closing argument "to persuade a jury to increase an award based on the possibility that the court may reduce it later," as this improperly shifts responsibility for the final verdict from the jury to the judge.[193] Importantly, in many employment cases brought under federal anti-discrimination statutes, the judge is ultimately responsible for awarding front pay damages where front pay is considered an equitable remedy in lieu of reinstatement.[194] However, the court may still call upon the jury to issue an advisory verdict with recommendations on equitable issues that the court may draw upon in making its ultimate decision.[195] In such cases, responsibility for instructing the jury as to their authority should fall with the judge, not with counsel, but counsel should request instructions that will adequately explain the difference between front pay, which the judge will be responsible for awarding, and compensatory damages that the jury will award.[196]

IV. CONCLUSION

Counsel should not underestimate the importance of a carefully crafted closing argument, and of clear and balanced jury instructions. Closing argument is the last opportunity for an advocate to persuade the jurors to side with her client prior to their

190. Ronzetti & Humphreys, *supra* note 105, at 36.

191. *Id.* at 38.

192. *Id.* at 38 (citing Wright & Ford Millworks, Inc. v. Long, 412 So. 2d 892 (Fla. 5th DCA 1982)).

193. *Id.* at 38 (citing City Provisioners, Inc. v. Anderson, 578 So. 2d 855 (Fla. 5th DCA 1990)).

194. *See* Excel Corp. v. Bosley, 165 F.3d 635, 639 (8th Cir. 1999) ("The issue of front pay [under Title VII] is not an issue for the jury to decide, rather it is a form of equitable relief which must be determined by the district court after considering all aspects of the case. Front pay may be granted in lieu of reinstatement in situations where reinstatement would be impracticable or impossible.") (citations omitted).

195. Mota v. Univ. of Tex. Houston Health Science Ctr., 261 F.3d 512, 526–27 (5th Cir. 2001).

196. *See* Russell Penzer & Maryam Franzella, *Importance of Effective Jury Instructions on Front Pay*, N.Y. LAW J. (Jan. 3, 2013), http://www.larypc.com/wp-content/uploads/2014/05/jury_instructions.pdf.

deliberations, and jury instructions will guide the jurors during those deliberations. By using the guidance in this chapter, and by recognizing opportunities to object during these phases of trial, a plaintiff's advocate can make strategic decisions on how best to present her client's case to the jury.