

1-15-2002

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Recommended Citation

Craig Lee Montz *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 Pepp. L. Rev. Iss. 2 (2002)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol29/iss2/1>

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Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials

Craig Lee Montz*

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I. INTRODUCTION

The defense lawyer pauses during his direct examination. He wants the jury to tortuously anticipate his next question. Seated on the witness stand in a white lab coat, an orthopedic surgeon stares intently back at the lawyer. The jury focuses upon the doctor. The judge leans forward and slightly over the bench. No one moves. Silence cuts through the courtroom. Finally, the question is posed to the witness, "Doctor, based upon your education, background, and years of medical experience as an orthopedic surgeon, is it your opinion that the plaintiff did not possibly suffer an acute herniation of their cervical disc at C5-C6, as a proximate result of the automobile accident on the date in question?" Plaintiff's counsel hesitates rising from her chair. She has about one eighth of a second to recognize and determine whether any, or all, portions of the question are objectionable.¹ Is the question leading; does it call for speculation; or is it compound? If she determines the question is objectionable, she has another one eighth of a second to evaluate those objections for their legal viability.² Next, she has the luxury of yet another one eighth of a second to decide whether she will object or not, weighing how bad she will look before the jury if she is overruled.³

1. See MAUET, TRIAL TECHNIQUES 465 (2000) ("Every trial involves numerous situations in which objections can be made. When to make objections, however, involves more than simply having proper situations in which to make them. It also involves the most instantaneous decisions on whether to make objections at all."); see also James P. Fleissner, *Mastering Trial Objections: The Spin Control Method*, 20 AM. J. TRIAL ADVOC. 591 (1997) ("Learning to identify the proper objection in a split second is an intimidating task. It is the quick-draw nature of many trial objections that beginning trial lawyers find most daunting."); STEVEN LUBET, MODERN TRIAL ADVOCACY 265-266 (2d ed. 2000). The author observes:

In the heat of trial the decision on whether to object to some item of evidence must usually be made literally on a split-second basis. A question on either direct or cross-examination typically lasts less than ten seconds; a long question will go on for no more than twenty seconds. Yet within that time counsel must recognize, formulate, and evaluate all possible objections. The concentration required is enormous, and there is no opportunity for letup; counsel must pay exquisite attention to every question and every answer, lest some devastating bit of inadmissible evidence sneak its way into the record. There is no room for even the slightest lapse.

Id.

2. *Id.* at 266 ("Following [objection] recognition, the next task is to formulate a valid objection. Does the question truly call for speculation, or is it an acceptable lay opinion?").

3. See Steven Lubet, *Trial Technique*, 16 AM. J. TRIAL ADVOC. 213, 218 (1992) ("In the heat of trial, the decision on whether to object to some item of evidence must usually be made literally on a split second basis."); LUBET, *supra* note 1, at 266 ("Finally, counsel must evaluate the tactical situation in order to determine whether the objection is worth making. . . . There is little point in to objecting if opposing counsel will be able to rectify the problem simply by rephrasing the question or if the information is not ultimately harmful to your case."); see also MAUET, *supra* note 1, at 466 ("If you do make an objection, be reasonably sure you will be sustained. . . . Making an objection

Finally, she has her last one eighth of a second to rise, speak, and articulate her objection, because in this eternal one half-second of direct examination during trial, the doctor has just begun to move his lips and respond to the question. If the lawyer takes any more than one half of a second to state her objection, the witness will have likely answered the question and the objection would be, even if valid, an act of futility in the minds of the jurors.⁴ This is the reality of the burden a lawyer faces when objecting to evidence during trials.⁵

"Objections can be made to questions, answers, exhibits, and virtually anything else that occurs during a trial."⁶ This article will identify, analyze, and explain the most essential objections that would be made in a civil or criminal trial in the order in which they would appear.

II. THE PURPOSE OF TRIAL OBJECTIONS

During, or before trial, "the purpose of objecting is to prevent the introduction or consideration of inadmissible information."⁷ Attorneys are not solely attempting to prevent the admission of unfavorable evidence from the jury, which many lawyers rightfully assume is a typical juror's perception, but rather lawyers are attempting to prevent the admission of inadmissible evidence. By objecting to evidence, lawyers are attempting to participate in the legal process in which the jury should only become privy to admissible evidence when reaching their verdict.

and having it overruled is often worse than not making it at all, since the objection merely draws the juror's attention to the question and eventual answer.").

4. See, e.g., Leonard I. Frieling, *Courtroom Etiquette: How To Set Yourself Apart*, 27 COLO. LAW. 77, 78 (1998) ("When the improper question has been completed, you are already on your feet, and everyone, including the judge (and the witness) will be watching you, as they should be. Do not pause, since you do not want the witness to answer before the judge rules on the objection."); see also LUBET, *supra* note 1, at 267 ("Jurors understand the need for lawyers to object and see it as part of counsel's job, so long as it is not overdone. Juror reaction, then, becomes a reason to utilize objections wisely . . ."); see also *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 799 n. 5 (W. Va. 1986) (observing that in the "seconds available to counsel to make the strategic decision whether to object, it probably dawned on counsel that an objection and 'curative' instruction would serve only to reinforce plaintiff's counsel's point.").

5. With complicated evidential matters, the court in *United States v. Atehortua*, 875 F.2d 149, 152 (7th Cir. 1989), noted "counsel's failure to object within five seconds to an esoteric evidentiary problem may surrender the point . . ." Currently, interactive computer programs are available which "require [counsel] to interact by pressing keys to accept or object to questions asked by opposing counsel in a matter of seconds during a simulated trial." See Lisa A. Grigg, *The Mandatory Continuing Legal Education (MCLE) Debate: Is It Improving Lawyer Competence Or Just Busy Work?*, 12 BYU J. PUB. L. 417, 428 (1998).

6. See MAUET, *supra* note 1, at 262.

7. See LUBET, *supra* note 1, at 262.

An additional purpose in objecting is to allow the trial judge to instruct the jury to disregard any information it received prior to the court's ruling on the sustaining of the objection.⁸

Further, although a proper objection preserves the issue for appeal, it may commensurately prevent an appeal. The Supreme Court of Kansas stated that "[t]he purpose of requiring parties to object in the trial court is to provide the trial court with an opportunity to correct defects in its findings or, if necessary, change its mind about the outcome before the case is appealed."⁹

Equally as important in determining whether it is advantageous to object is determining whether it is advantageous not to object. There are many recognized legal reasons not to object, such as whether the objection is viable or whether the information will eventually be admitted.¹⁰ For example, technical objections to the foundation of a question can prove to be counterproductive. "If the attorney knows that the opposing party can lay the foundation, then the objection should ordinarily be withheld. Otherwise, the attorney appears to be obstructing the trial for no reason."¹¹ Moreover, the attorney may appear to be hiding the truth from the jury.¹²

8. *Shelton v. State*, 445 So. 2d 844, 846 (Miss. 1984) (stating that it is incumbent on counsel to object contemporaneously when objectionable statements are given during the trial so the trial judge can correct any error with proper instructions to the jury); *see also, e.g., Metzger v. State*, 4 P.3d 901, 911 (Wyo. 2000) ("Counsel for the defense objected to that argument, the objection was sustained, and the jury was instructed by the trial court to disregard it.").

9. *In re Marriage of Bradley*, 899 P.2d 471, 478 (Kan. 1995); *see also Marts v. State*, 968 S.W.2d 41, 44 (Ark. 1998).

It is well settled that a party who does not object to the introduction of evidence at the first opportunity waives such an argument on appeal. The policy reason for this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs.

Id. (citation omitted); *Basoff v. State*, 119 A.2d 917, 921 (Md. 1956).

When a party has the option either to object or not to object, his failure to exercise the option while it is still within the power of the trial court to correct the error is regarded as a waiver of it estopping him from obtaining a review of the point or question on appeal.

Id.

10. *See also* Stephen B. Nebeker, *Trial Objections*, 8 UTAH B. J. 25 (1995) ("Good reasons for not objecting are: Danger of alienating the trier of fact; danger of highlighting harmful evidence; where the harm threatened by the evidence is negligible; and where reversal on appeal is unlikely.").

11. *See* ROGER C. PARK, *TRIAL OBJECTIONS HANDBOOK* 20 (1991); *see also* Fred Warren Bennett, *Preserving Issues For Appeal: How To Make A Record At Trial*, 18 AM. J. TRIAL ADVOC. 87, 87 (1994) (observing that the "opponent's evidence may turn out to be more persuasive if an objection based on 'lack of foundation' is sustained and the opponent then proceeds to lay a more complete foundation Often the rephrased question, after a sustained objection, will elicit testimony that is more persuasive than what the witness would have given after the original question.").

12. *See* MAUET, *supra* note 1, at 465 ("Jurors see lawyers who make constant objections as lawyers who are trying to keep the real truth from them.").

III. TIMELINESS, SPECIFICITY, AND WAIVER OF OBJECTIONS

It is impossible to overstate the significance of understanding the rules governing timeliness, specificity, and waivers of trial objections; failure to conform to these rules renders virtually every single trial objection moot. These rules must be simultaneously viewed from both the trial and appellate court perspective.

An appellate court corrects the legal errors of the court below.¹³ “The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.”¹⁴ Therefore, the rule generally provides that, except with regard to plain error, objections to evidence must be made either before, or contemporaneously with the evidence sought to be received.¹⁵ Generally, no action by a trial judge is error in the absence of an objection.¹⁶ This is because counsel’s “[f]ailure to

13. See e.g., *State v. Thompson*, 781 P.2d 501 (Wash. Ct. App. 1989); *Wenzel v. Wenzel*, 469 N.W.2d 156, 158 (N.D. 1991); *Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986); see also *PARK*, *supra* note 11, at 1-2 (“On appeal, only objections which appear in the record below will be grounds for review. The written record must clearly show that counsel did object, that evidence was objected to, the grounds for the objection, and the court’s ruling on the objection.”).

14. See *Smith v. Shannon*, 666 P.2d 351, 358 (Wash. 1983); see also *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173 (2d Cir. 1970) (stating that “the purpose of the rule requiring objections is to prevent reversals and consequent new trials because of errors the judge might well have corrected if the point had been brought to his attention.”); *Morton Gitelman, The Plain Error Rule In Arkansas—Plainly Time For A Change*, 53 ARK. L. REV. 205, 217-18 n. 66 (2000). Gitelman observes that:

The requirement of a timely specific objection on the other hand insures that: (1) Appellate courts will not be required to expend time and energy where no trial ruling has been made. (2) The trial court may promptly correct the asserted error. With the issue properly presented, the trial court is more likely to reach a satisfactory result thus, obviating the need for appellate review on this issue. Or if a new trial is necessary, it may be granted by the trial court without subjecting both the litigants and the courts to the expense and delay inherent in appellate review. (3) Appellate courts will be free to more expeditiously dispose of the issues properly preserved for appeal.

Id. at 229; see also *Debra J. Moore, Trying Your Case To Win On Appeal*, 11 UTAH B.J. 12, 13 (1998) (“[C]ounsel must timely state the specific ground of objection asserted on appeal. Again, to satisfy the specificity requirement, an objection must provide the trial court the ‘opportunity to consider and rule on’ the issue.”).

15. FED. R. EVID. 103; see also *PARK*, *supra* note 11, at 2 (“Trial objections must be made at the earliest practicable time after an intent to offer objectionable testimony becomes apparent.”); see also, e.g., *United States v. David*, 83 F.3d 638, 644-45 (4th Cir. 1996) (“[O]ne of the fundamental purposes of the contemporaneous objection rule is to protect judicial resources, in particular by ensuring that the trial courts will have an opportunity to avoid errors that might otherwise necessitate time-consuming retrial.”); see also *In re Adjudication of Existing Rights*, 984 P.2d 151, 155 (Mont. 1999) (“It is axiomatic that ‘[e]rror may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection’”) (quoting MONT. R. EVID. 103 (a)).

16. See, e.g., *Cofield v. State*, 274 S.E.2d 530 (Ga. 1981) (disapproving the trial court action, the appellate court found no error, especially in the absence of a timely objection or motion for a mistrial); see also *United States v. Lookretis*, 422 F.2d 647, 651 (7th Cir. 1970) (“[A]llegation on appeal that the trial judge improperly conducted the voir dire . . . will not be heard . . . where no objection was made below, in the absence of a showing of plain error.”); *Young v. State*, 431 A.2d 1252, 1255 (Del. 1981); *Julie M. Williamson & Scott S. Evans, Preserving The Record For Appeal*, 28 COLO. LAW 63, 64 (1999) (“The failure to object in the trial court on the grounds asserted on

make a timely objection will result in waiver of the alleged error.”¹⁷ Consequently, counsel is required to make both timely and specific objections and motions to strike the evidence in order to preserve the objection for appellate review,¹⁸ where the ground for objection is not apparent from the context of the discussion contained in the record.¹⁹ A loosely formulated and imprecise objection, such as only stating, “Objection,” will not preserve error.²⁰ Illustrative of this rule is *United*

appeal is deemed a waiver of the objection.”).

17. See *PARK*, *supra* note 11, at 2; see also *Hampton v. Dillard Dep’t Stores Inc.*, 247 F.3d 1091, 1113 (10th Cir. 2001) (“A party must make a timely and proper objection to preserve an alleged error for appeal. Failure to so object ‘constitutes waiver of the issue unless there is plain error resulting in manifest injustice.’”) (quoting *United States v. Herndon*, 982 F.2d 1411, 1414-15 (10th Cir. 1992)).

18. FED. R. EVID. 103(a) advisory committee’s note (stating that objections to the introduction of evidence must be timely and specific “so as to alert [the judge] to the proper course of action and enable opposing counsel to take proper corrective measures.”); *Deyo v. Kinley*, 565 A.2d 1286, 1289 (Vt. 1989) (“[W]here the aggrieved party fails to make a ‘specific objection, including a clear statement of the matter to which he objects and the grounds of the objection’ at trial, the issue is not preserved for consideration on appeal.”) (quoting *State v. Lettieri*, 543 A.2d 683, 685 (Vt. 1988)); *Jacquín v. Stenzil*, 886 F.2d 506, 508 (2d Cir. 1989) (“Specificity in an evidentiary objection is also required in federal courts to preserve an issue for appeal.”); see also Kenneth Melilli, *Objecting And Responding Effectively*, 23 AM. J. TRIAL ADVOC. 559, 576 (2000). Melilli writes:

The first word out of the objecting lawyer’s mouth must be “Objection.” This must be followed immediately by a word or phrase that states a legal ground for the objection, such as “hearsay,” “relevance” or “violation of spousal privilege.” If there are multiple grounds for an objection, they should all be stated. General complaints unattached to specific legal grounds for an objection are doomed to failure.

Id. (footnotes omitted); see also *PARK*, *supra* note 11, at 464 (“To preserve an error for appeal, counsel generally must make a timely and specific objection, obtain a ruling from the court, and make certain that the objection and ruling appear in the record.”).

19. See, e.g., Fred Warren Bennett, *Preserving Issues For Appeal: How To Make A Record At Trial*, 18 AM. J. TRIAL ADVOC. 87 (1994), where the author observes:

Rule 103(a)(1) does provide, as an exception to the requirement of specificity, that a specific ground is not required to preserve error if the ground is obvious from the context. Thus, if the proponent repeats the same question, if a question clearly calls for a hearsay answer, or if a rephrased question is asking for the same hearsay, a general objection will suffice if the grounds for the objection are obvious on the record.

Id. at 100 (footnotes omitted).

20. *United States v. Arteaga-Limones*, 529 F.2d 1183, 1190 (5th Cir. 1976) (holding that when counsel stated an objection which “was too loosely formulated and imprecise to apprise the court of the legal grounds for his complaint . . . [counsel did not] preserve error” for appellate review); *United States v. Fendley*, 522 F.2d 181, 185 (5th Cir. 1975) (holding that objection to an exhibit based upon hearsay was too “loosely formulated and imprecise” to inform the trial judge that the specific objection related to the business records exception); see also *LUBET*, *supra* note 1, at 272 (“In most jurisdictions, simply stating ‘objection’ is understood only to raise the ground of relevance. If such a ‘general objection’ is made and overruled, all other possible grounds are waived for appeal.”); *MAUET*, *supra* note 1, at 469 (“Under FRE 103, stating a specific ground for your objection is necessary only if it is not apparent from the context of the question or answer.”). *Faigin v. Kelly*, 184 F.3d 67, 82 (1st Cir. 1999) (“[Plaintiff] contends generally that this evidence was

States v. Hatcher, where counsel objected by stating, “I will object to that.”²¹ The Second Circuit Court of Appeals held that the objection did not comport with the specificity requirements of Federal Rule of Evidence 103(a) because the attorney’s objection “obviously did not state a specific ground,” and the ground for the objection “was not apparent from the context.”²² Similarly, the objection to an opening statement as “wholly improper” equally lacked the required specificity.²³ Federal Rule of Evidence 103(d) provides the only caveat to this rule.²⁴ This subsection provides that plain errors that affect the substantial rights of a party, even though not brought to the attention of the court, may be noticed for appellate review.²⁵

Demonstrating a less than exacting standard governing the specificity of trial objections is *United States v. Boney*.²⁶ In *Boney*, counsel objected by stating, “You really don’t need an expert. There is nothing complicated in this case.”²⁷ The appellate court found counsel’s objection “sufficiently specific to alert the district court and opposing counsel that appellant’s counsel considered expert testimony unhelpful to the jury and thus barred by Rule 702.”²⁸ Similarly, counsel is not required to cite to a specific rule in order to meet the specificity requirements of Federal Rule of Evidence 103(a).²⁹ Exemplifying this principle is *Feddersen v. Feddersen*.³⁰ In *Feddersen*, the court held that when,

erroneously admitted. However, he failed to make sufficiently specific contemporaneous objections when the witnesses were called to testify, thus negating the contention that he seeks to advance here.”).

21. 622 F.2d 1083, 1086 (2d Cir. 1983).

22. *Id.* at 1087; see also Mark S. Brodin, *The Demise Of Circumstantial Proof In Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, And The “Personality” Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 211 n.143 (1997) (“The basic requirement for a timely objection stating the specific ground therefor set out in FRE 103(a) is similarly designed to ‘enable opposing counsel to take proper corrective measures.’”) (quoting FED. R. EVID. 103 advisory committee’s note).

23. *Najera v. State*, 955 S.W.2d 698, 702 (Tex. Ct. App. 1997) (“Appellant’s objection that the prosecutor’s opening statement was ‘wholly improper’ was not sufficiently specific to preserve for review the contention he now makes.”)

24. FED. R. EVID. 103(d).

25. *Id.*

26. 977 F.2d 624 (D.C. Cir. 1992).

27. *Id.* at 628 n. 1.

28. *Id.*; see also *State v. Millet*, 356 So. 2d 1380, 1385 (La. 1978). The court wrote:

The defense counsel did not object on that occasion but, a few moments later, when that testimony was highlighted by the prosecutor and repeated by the witness, counsel did object and, by that objection, informed the judge of the error and allowed him to take curative steps. That objection with its stated legal basis satisfied the purpose of the contemporary objection requirement

Id.

29. FED. R. EVID. 103(a).

30. 68 F. Supp. 2d 585 (D. V.I. 1999).

[D]efense counsel did not identify Rule 403 in her objection, but she expressly objected to the evidence as prejudicial, "[s]uch an objection was sufficiently specific to meet the requirements of Fed. R. Evid. 103(a) and to confer on the . . . court the responsibility of articulating the grounds for denying the objection."³¹

The line demarcating what constitutes a timely objection in order to become preserved for appeal is not a bright one. Generally, courts agree that "[t]he objection must have been made at the time the evidence was offered or the question was asked."³² Therefore, it is well settled that "[i]f an objection to a question [posed] to a witness or to introduction of other evidence is not raised at a time when the error in allowing the question or admitting the evidence can be corrected, the objection is waived."³³ Ordinarily the objection must be made when the grounds become apparent or the objection will be waived.³⁴

For example, in *United States v. Farrell*,³⁵ the defendant did not raise a hearsay objection until days later during the trial. The Second Circuit Court of Appeals affirmed the trial judge's refusal to "go through the record and determine what's hearsay," and ruled the objection was therefore not timely.³⁶ Similarly, courts have held that an objection to the admission of evidence may not be considered a contemporaneous objection "even if made within a few minutes of the objected-to admission."³⁷ However, "when the basis for the objection does not become clear until after the answer, or when

31. *Id.* at 593 (quoting *Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 186 n.7 (3d Cir. 1993)). Similarly, the court in *People v. Wood*, No. 213417, 2001 WL 753918 at *1 (Mich. Ct. App. Feb. 6, 2001) observed:

[W]hen the prosecution moved for admission of the cocaine, defense counsel stated that he had an objection to the admission of the evidence that he would present later. Defense counsel did not present a further objection to the admission of the cocaine. Because defendant failed to state a specific and timely objection to the admission of the cocaine, this issue was not properly preserved for appellate review.

Id. at *7.

32. *State v. Fisher*, 702 A.2d 41, 45 (Vt. 1997); *see also* *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982) (holding it is also the rule that objections must be made with sufficient specificity to apprise the trial court of the potential error and to preserve the point for appellate review).

33. *Airline Constr. Co. v. Ascension Parish Sch. Bd.*, 568 So. 2d 1029, 1035 n.8 (La. 1990).

34. *See Terrell v. Poland*, 744 F.2d 637, 638-39 (8th Cir. 1984) ("The rule is well settled in this circuit that for an objection to be timely it must be made at the earliest possible opportunity after the ground of objection becomes apparent, or it will be considered waived.").

35. No. 00-1253, 2001 WL 735766 at *1 (2d Cir. June 27, 2001) (unpublished opinion).

36. *Id.* at *1.

37. *Small Business in Telecomms. v. FCC*, 251 F.3d 1015, 1022 n.9 (D.C. Cir. 2001) (citing *Henry v. Mississippi*, 379 U.S. 443 (1965)); *Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988)).

a rambling witness makes an objectionable, non-responsive statement, objection after the answer combined with a motion to strike will be adequate to preserve error.”³⁸ Demonstrating this principle is *Government of Virgin Islands v. Archibald*.³⁹ In *Archibald*, the Third Circuit Court of Appeals held an objection stated after an answer was given was not deemed waived as untimely when it reasoned as follows:

In the context of the present case, counsel for Archibald reasonably could not have anticipated that Williams would offer evidence of a prior crime in response to the government’s question, “How do you happen to know Alan Archibald?” Accordingly, the first time that the grounds for objection became apparent was after Williams responded to the question. At this point, the damage to Archibald already had been done, and defense counsel’s rather brief postponement of his objection neither prejudiced the government nor in any way impaired the court’s ability to remedy the asserted error. Because the delay was minimal and caused no demonstrable prejudice, Archibald’s objection was timely.⁴⁰

The policy underlying *Archibald* is that the primary focus in determining timeliness is whether the objection affords the trial court with an opportunity to address the objection and provide any necessary remedy in order to avoid prejudice.⁴¹ This standard is explained in *Jones v. Lincoln Electric*.⁴² In *Lincoln Electric*, the court found that counsel’s objection to an expert’s testimony at the close of his examination was not untimely stating,

[W]e do not believe it to always be the case that an objection has to be perfectly contemporaneous with the challenged testimony in

38. PARK, *supra* note 11, at 3; *see also, e.g.*, *State v. Childs*, 422 P.2d 898 (Kan. 1967) (holding that the State properly objected to a police officer’s answer that was non-responsive and clearly unforeseeable to a proper question and it was incumbent upon counsel to move to strike the objectionable portion of the answer).

39. 987 F.2d 180 (3d Cir. 1993).

40. *Id.* at 184; *see also Benjamin v. Peter’s Farm Condominium Owners Ass’n*, 820 F.2d 640, 642 n.5 (3d Cir. 1987). The court concluded:

Not until cross-examination was complete did PFCA know that Chasen’s testimony as to diminished earning capacity was based primarily on Benjamin’s personal feelings rather than on a professional opinion. Although [counsel] did not object immediately following cross-examination, we conclude that, in the absence of any demonstrable prejudice, the motion was nevertheless timely.

Id.

41. *See Koutoufaris v. Dick*, 604 A.2d 390, 400 (Del. Super. Ct. 1992); *see also James Harris, Appealing Evidence*, 206 N.J. LAW. 54, 54 (2000) (“Why do appellate courts strictly enforce the requirement that counsel provide the trial court with the specific basis for an objection? There are several reasons, but perhaps the most important is to provide the trial court with an opportunity to correct the error at the time it occurs.”).

42. 188 F.3d 709 (7th Cir. 1999).

order to satisfy Rule 103(a) and be considered “timely.” Instead, an objection can still be deemed “timely” if it is raised within a sufficient time after the proffer of testimony so as to allow the district court an adequate opportunity to correct any error [because] . . . challenged testimony in order to be considered “timely” under Rule 103(a) is a question of degree.⁴³

Finally, when ensuring an objection is timely, courts recognize that objecting to the admission of evidence on one basis does not preserve a separate and different basis for exclusion of the evidence on appeal.⁴⁴ Applying this rule is *United States v. Gomez-Norena*, where the court held that a Federal Rule of Evidence 403 objection was not preserved for appeal when the defendant solely objected to the evidence in the district court on grounds of hearsay and improper character evidence.⁴⁵ Similarly, a party is required to object to evidence, even on the same grounds, each time it is proffered for admission to the trial court.⁴⁶ Illustrative of this principle is the court’s decision in *Bailey v. Southern Pacific Transportation Co.*, where the court held that a party’s failure to object to the challenged evidence on four of the five occasions on which it was offered meant that the issue was waived on appeal.⁴⁷

43. *Id.* at 727.

44. *State v. Higgins*, 836 P.2d 536, 542 (Idaho 1992); *State v. Benton*, 526 S.E.2d 228 (S.C. 2000) (recognizing that an issue is not preserved if a party argues one ground for an objection at trial and then a different ground on appeal); *see also* *Ballard v. State*, 767 So. 2d 1123, 1137 (Ala. Civ. App. 1999).

In her brief to this court, Ballard argues that the trial court erred in allowing the prosecutor to ask questions concerning defense counsel’s opening statement. However, because defense counsel objected to those questions only on the ground that they were “argumentative” and “confusing,” this issue was not properly preserved for appeal. A specific objection by defense counsel is necessary to preserve error for appellate review.

Id.; *see also, e.g.*, *ESCO Corp. v. United States*, 750 F.2d 1466, 1469-70 (9th Cir. 1985) (objecting to testimony on basis of Rule 802 precludes appellant from challenging it on basis of Rule 408).

45. 908 F.2d 497, 499-500 (9th Cir. 1990).

46. *Bailey v. S. Pac. Trans. Co.*, 613 F.2d 1385, 1389 (5th Cir. 1980).

47. *Id.* A more harsh result can be seen in *Shpak v. Schertle*, 629 A.2d 763 (Md. Ct. Spec. App. 1993). The court explained:

Shpak asserts that the trial court committed reversible error in permitting Dr. Spodak to testify that Schertle was a victim of child abuse. Shpak, however, did not object to the question eliciting this testimony when it was made. . . . Shpak’s counsel objected to the first and unobjectionable question, asking if Dr. Spodak had an opinion; the circuit court properly overruled that objection. Shpak’s counsel never objected to the second and crucial question, “What is that opinion?” Nor did Shpak’s counsel ever lodge a “continuing objection.” Accordingly, any argument with regard to this testimony has not been preserved for appellate review.

Id. at 769-70 (citation omitted).

Analogously, an objection must be entered, at the very least, each time a new witness testifies, even if the objection is on the same grounds as a continuing objection to the testimony of a prior witness or witnesses.⁴⁸ The Vermont Supreme Court observed that the purpose of requiring a timely objection is to bring the error to the attention of the trial court so that the court may have “an opportunity to rule.”⁴⁹

IV. PRE-TRIAL MOTIONS AND OBJECTIONS

For trial purposes, the first significant objections made by counsel will be in the form of a motion in limine or a motion to strike, immediately prior to the selection of the jury.⁵⁰ “A motion in limine is simply a motion made before trial starts, during a recess, or just before a witness testifies.”⁵¹ Motions in limine are utilized in a variety of contexts to address the exclusion of evidence ranging from relevancy and hearsay, to the propriety of the insanity defense.⁵² The significance of the motion is that it requests the judge to rule that particular evidence is inadmissible and that it “[can]not be offered or introduced at trial.”⁵³ Certainly, “the purpose of a motion in limine is to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial.”⁵⁴ Hence, the motion in limine does not request the trial judge to rule upon each and every possible matter of evidence that may be inadmissible during the trial.⁵⁵ Instead, the motion is

48. See *State v. Chambers*, 477 A.2d 110, 114 (Vt. 1984).

49. See *id.*

50. PARK, *supra* note 11, at 4 n.11 (“Motions in limine can be made at any time before the evidence is offered, but they are most often made after discovery is completed, but before the trial begins.”).

51. See MAUET, *supra* note 1, at 464; see also *State v. Bennett*, 405 A.2d 1181, 1186 (R.I. 1979) (“The phrase ‘in limine’ means ‘at the threshold.’”) (citing BLACK’S LAW DICTIONARY 896 (4th ed. 1968)).

52. See Mathew S. Rosengart, *The Motion In Limine: The Hidden Arrow In The Federal Litigator’s Quiver*, 48 FED. LAW. 24, 27 (2001).

53. See LUBET, *supra* note 1, at 264; see also PARK, *supra* note 11, at 4 (“Counsel should request a ruling from the judge on the motion in limine and make certain that the motion and the ruling are entered into the trial record.”); Melvyn C. Bruder, *Pretrial Motions in Texas Criminal Cases*, 9 HOUS. L. REV. 641, 653 (1971-72). See generally Tom H. Davis, *Motions in Limine*, 15 CLEV. MAR. L. REV. 255 (1966); Henry B. Rothblatt & David H. Leroy, *The Motion in Limine [sic] in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence*, 60 KY. L. J. 611 (1971-72).

54. *Saunders v. Alois*, 604 So. 2d 18, 20 (Fla. Dist. Ct. App. 1992) (quoting *Dailey v. Multicon Dev. Inc.*, 417 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1982); see also *State v. Albanese*, 9 S.W.3d 39 (Mo. Ct. App. 1999) “Although one purpose of a pretrial motion in limine is obviously to exclude inadmissible evidence at trial,” it also serves the second purpose of prohibiting a party from placing an improper and prejudicial issue before the jury through *voir dire*, opening statement, or questions during trial, which are not evidence. *Id.* at 52 (citing *Martin v. Durham*, 933 S.W.2d 921, 925 n.3 (Mo. Ct. App. 1996)).

55. See Douglas L. Colbert, *The Motion In Limine In Politically Sensitive Cases: Silencing The Defendant At Trial*, 39 STAN. L. REV. 1271, 1277 (1987).

designed to exclude "evidence [which] is so damaging that once it is mentioned a sustained objection at trial will not be sufficient to undue its prejudicial impact."⁵⁶ This serves two purposes. First, the judge may strike the evidence and the matter is conclusively barred from the trial.⁵⁷ Second, the judge may reserve ruling on the objection or outright deny the motion.⁵⁸ Even in the latter circumstance, the pre-trial ruling is neither necessarily the same, nor determinative of the trial ruling.⁵⁹ The judge may deny the motion in limine prior to trial and then sustain the identical objection during trial. Consequently, counsel must never fail to make an objection at trial that a judge denied during the pre-trial motions once the trial commences.⁶⁰ For example, the court in *In re Craig's Stores of Texas*,⁶¹ held that, "[a]n over-

[A]s the motion *in limine* was popularized and used more creatively, judges and commentators united around one important admonition: The *in limine* procedure must be limited to specific, individual items of prejudicial evidence, and must not be so overly broad as to restrict an opposing party's presentation of its case.

Id.

56. See *id.* at 1275 ("The motion in limine reduces the likelihood that a jury will be irrevocably prejudiced by hearing such evidence."); see also LUBET, *supra* note 1, at 264; Laurence M. Rose, *Effective Motions In Limine*, 35 TRIAL 50, 51 (1999), available at 1999 WL 17784120 (stating that a motion in limine is "best applied when premature mention of the evidence that may or may not later be introduced would 'ring a bell that cannot be unring.'").

57. See Albanese, 9 S.W.3d at 52.

[I]f a party seeks to admit evidence at trial which was previously excluded by an order in limine, it runs the risk of a mistrial should the trial or appellate court find that, despite the fact the inadmissible evidence was ultimately excluded at trial, the damage was done in that the manner in which the party sought to introduce the evidence had the same prejudicial effect as if the evidence had, in fact, been admitted.

Id.; see also LUBET, *supra* note 1, at 264 ("[O]nce granted, a motion in limine excludes all references to the subject evidence.").

58. See PARK, *supra* note 11, at 5.

59. See LUBET, *supra* note 1, at 265 ("The denial of a motion in limine does not necessarily mean that the subject evidence is absolutely admissible.").

60. See PARK, *supra* note 11, at 4 ("If the court denies the motion in limine, then the objecting counsel ought to reassert the objection when the evidence is offered at trial in order to be sure to preserve the appeal point."); see also Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996) ("[W]hen a party's *in limine* motion to exclude evidence is denied, she cannot rely on her objection to the *in limine* ruling to preserve the right to appeal the admission of the contested evidence. [C]ounsel must renew her objection at trial" to preserve right to appeal admission of the contested evidence) (citing Fusco v. Gen. Motors Corp., 11 F.3d 259, 262 (1st Cir. 1993)); Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263 (8th Cir. 1993) (recognizing that alleged error was not preserved for appellate review where plaintiffs failed to renew objections made in connection with their motion in limine); McEwen v. City of Norman, 926 F.2d 1539 (10th Cir. 1991) (noting that objection raised at hearing on motion to exclude testimony was insufficient to preserve issue absent contemporaneous objection at trial); Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985) ("A party whose motion in limine is overruled must renew his objection . . . at trial."). See generally James Joseph Duane, *Appellate Review Of In Limine Rulings*, 182 F.R.D. 666 (1999).

61. 247 B.R. 652 (S.D. Tex. 2000).

ruled pre-trial motion in limine to exclude expert testimony does not preserve error on appeal.”⁶² The generally recognized exception, as articulated in *Palmerin v. City of Riverside*,⁶³ is that “where the substance of the objection has been thoroughly explored during the hearing on the motion in limine, and the trial court’s ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence.”⁶⁴

Finally, although the motion in limine is used to object to the admission of potentially harmful evidence, it may not be used as a substitute for a motion for summary judgment. Exemplifying this principle in *Saunders v. Alois*,⁶⁵ the court pointed to the error of “disposing of the claim by way of a motion in limine.”⁶⁶ The court held that when counsel requests the court to enter a judgment by excluding evidence, counsel is in essence filing a motion for summary judgment, which typically requires twenty days notice, and therefore the motion in limine is improper.⁶⁷

V. OBJECTIONS DURING JURY SELECTION

Social science research has demonstrated that jurors can be less than candid in responding to questions about their beliefs and attitudes.⁶⁸

62. *Id.* at 655 (citing *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th Cir. 1994); *see also* *Rojas v. Richardson*, 703 F.2d 186, 189 (5th Cir. 1983) (“An overruled motion in limine does not preserve error on appeal”); *Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980).

63. 794 F.2d 1409 (9th Cir. 1986).

64. *Id.* at 1413; *see also* *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) (noting that trial court conducted a hearing on a motion in limine on the admissibility of evidence and rendered a definitive ruling thereon, making it clear that the ruling would not be reconsidered, no contemporaneous objection to the evidence at trial was required to preserve the issue under Rule 103(a) of the Federal Rules of Evidence).

65. 604 So. 2d 18 (Fla. Dist. Ct. App. 1992).

66. *Id.* at 20.

67. *Id.* at 19-20; *see also* *Dailey v. Multicon Dev.*, 417 So. 2d 1106 (Fla. Dist. Ct. App. 1982). The court in *Dailey* stated:

Notice is not absolutely required where the oral motion [in limine] is akin to an evidentiary objection at trial. The problem here is that the motion in limine was used for more than its purpose of merely excluding irrelevant or improper prejudicial evidence. Appellee, by way of its motion in limine, attempted to summarily dismiss a portion of appellant’s case. The trial court was asked to rule that as a matter of law appellee was not liable to appellant for damages to the wall. Appellee’s action is comparable to a motion for summary judgment but without the notice provisions . . .

Id. at 1107.

68. *See* MAUET, *supra* note 1, at 43. Mauet writes:

Social science research has also demonstrated that many people are less than candid when asked directly about their beliefs and attitudes, particularly in front of strangers in a group setting. The desire to fit in and be accepted by others is strong, and people frequently tell others what they think and others what they want to hear.

Id.; *see also* *State v. Tucker*, 629 A.2d 1067, 1077-78 (Conn. 1993).

A juror is not likely to admit being a prejudiced person, against African-Americans or Asian-Americans or Hispanics, as the case may be, and indeed might not recognize the

Therefore, the purpose of voir dire⁶⁹ is to select a fair and impartial jury, devoid of bias⁷⁰ or prejudice, who will decide the case based upon the evidence admitted during trial and upon the law as instructed by the judge.⁷¹ If a juror fails to meet any of these criteria or others, there are two objections during jury selection that may be used to excuse a member of the jury. Jurors can be excused for sitting on a jury for cause, or by use of the lawyer's peremptory challenge. Recent state and federal cases have redefined the peremptory challenge to the extent that there is considerable support for the contention that the difference between it and a challenge for cause is now only academic.⁷²

extent to which unconscious racial stereotypes might affect his or her evaluation of a defendant of a different race, or of the witnesses produced on that defendant's behalf.

Id.

69. See LUBET, *supra* note 1, at 506 (defining voir dire as "the process of questioning venire members, by either the court or the attorneys (or both) in order to select those who will serve on a jury."); see also *People v. O'Neill*, 803 P.2d 164, 169 (Colo. 1990) (stating voir dire is a tool that the parties use for the purpose of revealing and addressing bias in potential jurors).

70. See LUBET, *supra* note 1, at 519 (defining "bias" as "mean[ing] something more than simple bent or inclination; rather it refers to an inability to serve as an impartial juror.").

For example, a potential juror may be biased against the law. This is true where he or she refuses to consider or apply the relevant law. Bias exists when a venire-person's beliefs or opinions "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

Garza v. State, 18 S.W.3d 813, 820 n.3 (Tex. Crim. App. 2000) (quoting *Riley v. State*, 889 S.W.2d 290, 295 (Tex. Crim. App. 1993)) (citations omitted). Moreover, "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936).

71. See, e.g., *Palm v. State*, 748 So. 2d 135, 138 (Miss. 1999) (holding that the very purpose of voir dire is to select a fair and impartial jury and to determine whether the "potential jurors understood their function and how they were to evaluate the evidence"); see also Judge James F. Mehaffy, *A Few Tips On Jury Selection*, 63 TEX. B. J. 878, 879 (2000). Judge Mehaffy writes:

There is probably no greater waste of energy and opportunity in the entire trial process than that which routinely occurs in those scarce and precious moments allocated to jury selection. Most mistakes in voir dire are made, in my opinion, because of failure to consider and understand the nature of the process. . . . The central and salient fact is that jury selection should be an information-gathering process.

Id.; see also *Stallings v. State*, 47 S.W.3d 170, 174 (Tex. Crim. App. 1996) ("The purpose of the voir dire examination is to determine whether the prospective jurors have any biases or prejudices that would prevent them from applying the law to the facts of the case.").

72. See, e.g., Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure To Meet The Challenge Of Discrimination In Jury Selection*, 1999 WIS. L. REV. 501, 551 (1999) ("[T]he peremptory would be transformed into a challenge for 'quasi-cause.' In other words, trial judges would be required to do with peremptories just as they have been doing with challenges for cause, but simply lower the standard for the challenge to allow some exercise of the intuitive.").

A. Questions That Misstate The Law

Questions to jurors that apprise them of the incorrect state of the law or facts are objectionable. Demonstrating the application of this principle is *Goldman v. Ridenour*.⁷³ In *Goldman*, the court examined the question posed to the jury: "If the plaintiff herself was at fault in part she would not be entitled to recover?"⁷⁴ In disapproving this question, the Missouri Supreme Court noted, "The proper procedure was not here used by the defendant to inquire of the jury panel whether they had opinions upon the law of contributory negligence which were so 'unyielding as to preclude them from following the law under the court's instructions.'"⁷⁵ Hence, counsel objectionably misstated the law.

Similarly in *State v. Hart*, a prosecutor's statement "under the law, a person, all of us are presumed to intend the natural and probable consequences of our act or failure to act.... If you do something ... you must have intended for whatever happens when you did it to happen," was found to be an objectionable misstatement of the law regarding the elements of specific intent.⁷⁶

By contrast, in *Stiles v. State*, the prosecutor "asked a potential juror 'if the evidence requires as a matter of law [could you] consider then the death penalty for this Defendant....'"⁷⁷ Defense counsel objected that this question misstated the law as it "indicated that the death penalty was automatic."⁷⁸ Although the court rejected this argument it did observe, "The correct procedure is for counsel to ask the members of the panel whether, if the court later instructs them in a specified manner, they have any opinion or conscientious scruples such as would prevent them from returning a verdict accordingly."⁷⁹ Similarly, the prosecutor's statement in *Palm v. State*,

73. 383 S.W.2d 539 (Mo. 1964).

74. *Id.* at 540.

75. *Id.* at 541 (quoting *State v. Mosier*, 102 S.W.2d 620, 624 (Mo. 1937)); see also James H. Gold, *Voir Dire: Questioning Prospective Jurors On Their Willingness To Follow The Law*, 60 IND. L. J. 163, 173 (1984-85) ("Those voir dire questions concerning matters of law which do constitute improper efforts to indoctrinate or mislead prospective jurors can easily be controlled by the trial judge. One way an attorney can abuse the voir dire process is to pose questions which slant or misstate the law.").

76. 691 So. 2d 651, 659 (La. 1997).

77. 829 P.2d 984, 988 (Okla. Crim. App. 1992).

78. *Id.*

79. *Goldman*, 383 S.W.2d at 541 (quoting *State v. Mosier*, Mo. 102 S.W.2d 620, 624). For excellent examples of this principle, see John A. Hlafter, *Prosecutorial Misconduct*, 89 GEO. L. J. 1579, 1598 n.1758 (2001). Hlafter cites:

Barrientes v. Johnson, 221 F.3d 741, 776-77 (5th Cir. 2000) (prosecutor's comments during voir dire that jurors do not assess death penalty were not reversible error because prosecutor accurately summarized state law which indicated that sentencing court imposed death sentence); *U.S. v. Bond*, 22 F.3d 662, 668-69 (6th Cir. 1994) (prosecutor's inaccurate definition of reasonable doubt was not reversible error because immediate curative instructions were given); *Rodden v. Delo*, 143 F.3d 441, 445-46 (8th Cir. 1998)

"[b]ut, do you understand that a mere conflict in the evidence does not necessarily create a reasonable doubt?" did not misstate the law by suggesting that they "do away with the consideration of reasonable doubt."⁸⁰

Finally, it should be noted that even if an attorney misstates the law during voir dire, the error could generally be cured if the trial court properly instructs the jury as to the appropriate law during the court's instructions of the law to the jury.⁸¹

B. Questions That May Embarrass Jurors

Questions that may embarrass prospective jurors before the entire panel are objectionable.⁸² Jurors may be instructed of this right by the court. In *United States v. McDade*, the court stated:

To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the

(prosecutor's remarks during voir dire and closing arguments that jury only recommends sentence to judge and that sentence of death would send a message to judge were not reversible error because jury understood significance of its role because of defense counsel's closing arguments and instructions from judge); *Tillman v. Cook*, 215 F.3d 1116, 1129-30 (10th Cir. 2000) (prosecutor's intimation that capital defendant would be free to commit more violent acts in 15 years if not executed, which misstated law and represented facts not in evidence, was not reversible error because prosecutor is permitted to instruct jury to consider defendant's future dangerousness and was responding to defense argument).

Id.

80. 748 So. 2d 135, 138 (Miss. 1999).

81. See, e.g., *State v. Belgard*, 410 So. 2d 710, 725 (La. 1982) (commenting that district attorney's erroneous statement of the law on intent at voir dire was cured by requested admonition and correct instruction); see also Judge David Hittner & Eric J.R. Nichols, *Jury Selection In Federal Civil Litigation: General Procedures, New Rules, and The Arrival Of Batson*, 3 TEX. TECH L. REV. 407, 434 (1992) ("Attorneys must be very careful not to misstate the law, however; to do so risks raising the ire of the judge and giving the opposing side ammunition for rebuttal once the court's charge is produced.").

82. *Davis v. State*, 633 A.2d 867, 871 (Md. 1992). The court observed that:

Under common law rules of *voir dire*, jurors need not answer any questions likely to humiliate or embarrass them. The determination of which questions needed to be answered, however, rested within the trial judge's discretion. Today, even where the scope of the proposed *voir dire* questioning is otherwise permissible but potentially embarrassing or humiliating, the trial judge should exercise discretion in structuring the questions in a manner which would avoid unnecessarily embarrassing the venire panel. Such questions should be worded in a way that potentially embarrassing responses should be given at the bench, rather than before open court.

Id. at 871 n.1 (citing J. Alexander Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 627, 638-39 (1986)).

general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record. Jurors have a right to know that they have a right to object and to have their privacy concerns treated with appropriate sensitivity.⁸³

The court in *McDade* held that inquiring into a juror's economic status is offensive and improper.⁸⁴ The court reasoned that a party does not get "any greater or lesser quality of justice from a juror according to that juror's economic worth."⁸⁵ The court added that such questions regarding what books or magazines jurors read, as well as what television shows they watch, would be equally objectionable and prohibited.⁸⁶ Additionally, in *People v. Motton*, the Supreme Court of California found that although questions as to a juror's racial ethnicity may be germane for the purposes of challenging the propriety of a peremptory strike, such questions "may be offensive to some jurors and thus are not ordinarily asked on voir dire."⁸⁷

83. 929 F. Supp 815, 820 (E.D. Pa. 1996) (citation omitted).

84. *Id.*

85. *Id.* at 818.

86. *Id.* at 819. The court expanded upon embarrassing and objectionable questions during voir dire:

I happen to believe that the United States Department of Justice, and defense counsel, have no business knowing what book a juror is currently reading, presumably within the quiet confines of his or her own home—or wherever, for that matter. Neither may they properly inventory the jurors' bookshelves and magazine racks, nor scrutinize their library cards. Whatever marginal insights trial lawyers and their jury consultants may gain from this information is markedly outweighed by concerns Orwellian. When one comes into court to serve as a juror, one gives up plenty: time, freedom, and the usual right to read, hear, and see the news—to name but a few of the sacrifices. But to be subjected to such inquiries as those here would be to give up more than is necessary for the proper and fair administration of justice. The lawyers may certainly ask whether jurors have read or heard about the defendant or any lawyer or witness involved in the case, or anything about the case. Should the answer be 'yes,' they shall be permitted full follow-up questioning with individual voir dire. But whether they watch *Sixty Minutes*, or *Dateline*, or *Nightline*, or *Baywatch*, for that matter, as fascinating as some might find these snippets of information to be, sheds no real light on whether they have formed a fixed opinion as to what the verdict in this yet-untried case would be, or whether they would approach it with even a hint of bias.

Id.; see also *United States v. Phibbs*, 999 F.2d 1053, 1071 (6th Cir. 1993) (holding that questions "directed at the personal habits and activities of the panel members (e.g., what books they read, what television shows they watched, etc.) [are objectionable]. While such information might have aided defendants in identifying sympathetic jurors, it was not needed to compose a fair-minded jury.").

87. 704 P.2d 176, 180 (Cal. 1985) (en banc).

C. Hypothetical Questions

Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts, and therefore, such questions are objectionable.⁸⁸ In the first place, such questions are confusing to the average juror who, at that stage of the trial, has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to improperly "stake out" the juror and cause him to pledge himself to a future course of action or verdict.⁸⁹

Typifying this prohibition is a prosecutor's question seeking an opinion from jurors as to the guilt or innocence of the defendant based on the facts of his case, which courts agree is forbidden on voir dire.⁹⁰ For example, in *State v. Rancourt*, the defense counsel presented expected testimony from the defendant and then asked if the jurors "could find the Defendant not guilty on the basis of self-defense."⁹¹ In ruling that the trial court properly sustained counsel's objection to this question, the Supreme Court of Maine held, "The defendant is not entitled to 'obtain a pre-judgment by the prospective juror as to what his verdict would be on facts hypothesized by

88. See, e.g., *White v. State*, 629 S.W.2d 701, 706 (Tex. Crim. App. 1981) (observing that a voir dire question based on a hypothetical situation that includes extensive facts of the case is improper); *State v. Parks*, 378 S.E.2d 785, 787 (N.C. 1989) (holding that hypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are similarly impermissible); *Waters v. State*, 283 S.E.2d 238, 247 (Ga. 1981) ("Hypothetical voir dire questions are not per se improper, but a trial judge should be cautious in allowing counsel to propound questions which ask the juror to assume that certain facts will be proven [because] such questions tend to improperly influence jurors."); *Commonwealth v. Paoello*, 665 A.2d 439 (Pa. 1995) (holding that "the purpose of voir dire is . . . not to empanel a jury sympathetic to the positions or beliefs of either party."). See generally, John T. Bibb, *Voir Dire: What Constitutes An Impermissible Attempt To Commit A Prospective Juror To A Particular Result*, 48 BAYLOR L. REV. 857 (1996).

89. See, e.g., *State v. Moeller*, 616 N.W.2d 424, 442, (N.D. 2000).

90. *Pinion v. State*, 165 S.E.2d 708, 710 (Ga. 1969); see also *Stell v. State*, 436 S.E.2d 806, 807 (Ga. Ct. App. 1993) (holding that "a hypothetical question . . . requiring a response which might amount to prejudgment of the case is improper"); *State v. Anthony*, 374 A.2d 156, 158 (Conn. 1976) (eliciting from prospective juror in advance what decision would be under particular set of facts not permitted); *State v. Jones*, 491 S.E.2d 641, 647 (N.C. 1997) (holding the "court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts."). See generally Janeen Kerper, *The Art And Ethics Of Jury Selection*, 24 AM. J. TRIAL ADVOC. 1, 8 (2000) ("The posing of hypothetical questions that ask potential jurors how they would react in a given situation, or how they might decide a given issue, is usually objectionable as an improper attempt to precondition the jurors.").

91. 435 A.2d 1095, 1099 n.2 (Me. 1981).

the question.”⁹² Analogously, in *Thornsbury v. Thornsbury*, plaintiff’s counsel asked the jurors: “Should the evidence disclose to you and you should be of the opinion that the plaintiffs are entitled to win, entitled to recover, do you feel that \$25,000 is too much for the death of a sixteen-year old-girl?”⁹³ The West Virginia Supreme Court affirmed the trial court’s finding that the question was an objectionable and improper hypothetical question.⁹⁴ The court stated, “It would be about as logical to permit counsel for the defendant to inquire of the jurors whether in the opinion of each of them the sum of \$10,000 would be adequate.”⁹⁵ Yet courts have found when the hypothetical question does not include specific facts of the case and when it incorporates assumptions based upon admissible evidence, the hypothetical question may be permissible. In *Greenman v. City of Fort Worth*, the plaintiff’s attorney asked members of the jury, “If the evidence is that the land taken has a fair market value of approximately \$87,000.00, and that the damage to the property not taken is \$230,000.00, will you have any objection to render a verdict for those amounts merely because of the large amounts of money involved?”⁹⁶ The Texas appellate court found the hypothetical question to the jurors permissible.⁹⁷

Along these lines, courts generally agree that “[q]uestions designed to measure a prospective juror’s ability to follow the law are proper within the context of jury selection *voir dire*.”⁹⁸ Similarly, the court in *Robinson v. State*, held that an attorney is entitled to ask a prospective juror whether he or she will require evidence the law does not require for a verdict of guilty.⁹⁹ However, courts agree that *voir dire* may not be used to pry into prospective jurors’ opinions concerning the weight of, or opinions concerning the

92. *Id.* (quoting *State v. Abney*, 347 So. 2d 498, 501 (La. 1977)).

93. 131 S.E.2d 713, 721 (W. Va. 1963).

94. *Id.*

95. *Id.*; see also *Bibb*, *supra* note 88.

96. 308 S.W.2d 553, 554 (Tex. Civ. App. 1957).

97. *Id.*

98. *State v. Jones*, 491 S.E.2d 641, 647 (N.C. 1997); see also Emily M. De Falla, *Voir Dire For California’s Civil Trials: Applying the Williams Standard*, 39 HASTINGS L. J. 517, 533 n.65 (1988). De Falla writes:

[T]he classic example of a close-ended question is: ‘Will you follow the law as the judge gives it to you?’ Such a question suggests to the respondent that the correct answer is yes. For most people, telling the judge they would refuse to follow her instructions would be unthinkable. That tendency is exaggerated in a situation when, as in *Williams*, the jurors have no idea what the instructions might be and therefore have no reason to suspect they would be disinclined to follow them.

Id.; see also *State v. Clark*, 981 S.W.2d 143, 146-47 (Mo. 1998) (holding that it is improper to seek a commitment from prospective jurors or to require them to speculate as to how they would react to a hypothetical situation, but that this does not mean counsel is limited to general fairness and “follow-the-law” questions); *State v. Pollitt*, 530 A.2d 155, 163 (Conn. 1987) (finding questions regarding witness credibility proper in hypothetical format to determine whether prejudice existed in prospective jurors).

99. 985 S.W.2d 584, 587-88 (Tex. Crim. App. 1998).

evidence to be offered at trial.¹⁰⁰ In *Anderson v. State*, the trial court refused to allow the prosecutor to ask jurors whether they expected the defendant to testify as to his innocence when it was the State's burden to prove his guilt.¹⁰¹ The appellate court affirmed and held that the question improperly "sought to have the jurors prejudge how they might view the defendant's failure to testify."¹⁰²

D. Excuses For Cause

A challenge for cause generally includes a finding that the prospective juror "does not meet the statutory qualifications for jury service or that the juror cannot be fair and impartial in [the] particular case, usually because of a close relationship to one of the parties or because the juror has a fixed opinion of how the case should [be resolved]."¹⁰³ The most extraordinary aspect of a challenge for cause is that there is *no limitation* as to the number afforded counsel during voir dire.¹⁰⁴ Generally, the test for determining juror

100. *State v. Gabriel*, 542 So. 2d 528, 533 (La. Ct. App. 1989); see also Judge Michael P. Toomin, *Jury Selection In Criminal Cases: Illinois Supreme Court Rule 431—A Journey Back To the Future and What It Portends*, 48 DEPAUL L. REV. 83, 108-09 (1998) (stating that with hypothetical questions, "[t]he same rationale applies where counsel focuses upon a single piece of evidence such as descriptions, handguns, or the like with the aim of getting some prior commitment as to how the juror will view the assumed evidence.").

101. 289 S.E.2d 22 (Ga. Ct. App. 1982).

102. See *id.* at 22.

103. See MAUET, *supra* note 1, at 20; see also William S. Neilson & Harold Winter, *The Economics of Jury Selection*, 20 INT'L REV. L. & ECON. 223 (2000), where the authors note:

Upon completion of the voir dire examination, the first type of challenging is conducted—challenges for cause. There is an extensive set of permissible grounds to challenge for cause, and these grounds vary between jurisdictions. Some grounds are specific in nature. For example, a juror may be challenged for cause if the prospective juror served on a jury formerly sworn to try the defendant on the same charge. Some grounds are more open-ended. For example, a challenge may be made "if the juror has a state of mind . . . which will prevent him from acting with impartiality."

Id. at 226 (quoting AMERICAN BAR ASSOCIATION (ABA), STANDARDS RELATING TO TRIAL BY JURY (1968) (citations omitted)); see also *Jeffries v. Loftin*, 358 So. 2d 755, 757 (Ala. Civ. App. 1978) ("To justify a challenge for cause there must be a statutory ground, or some matter which imports absolute bias or favor [on the part of a prospective juror], and leaves nothing to the discretion of the court."); Susan L. McCoin, Note, *Sex Discrimination In the Voir Dire Process: The Rights of the Prospective Female Jurors*, 58 S. CAL. L. REV. 1225, 1226 ("Challenges for cause are statutorily defined and involve the exclusion of jurors who are found to have actual bias (subjective state of mind) or implied bias (presumed by law from the existence of relationships or interests of the juror).") (citing Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1499 n.29 (1975)).

104. See, e.g., Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure For the Selection of Impartial Juries?* 40 AM. U. L. REV. 703, 704 (1991) ("Typically, each side may exercise an unlimited number of challenges for cause, but a limited amount of peremptory challenges."); see also MAUET, *supra* note 1, at 38 ("No limit is placed on the number of challenges

competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence.¹⁰⁵ Therefore, a juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses the state of mind necessary to render an impartial verdict.¹⁰⁶ Under such circumstances, counsel may object to an opposing attorney's challenge for cause.¹⁰⁷ When objecting, the grounds for a cause challenge must be specifically articulated based upon responses provided by the juror, which appear on the record.¹⁰⁸ Finally, the standard of review on appeal is whether the trial court abused its discretion to grant or deny a challenge for cause.¹⁰⁹ This is because "not every erroneous denial of a challenge for cause is recognized as reversible error."¹¹⁰

Embodying these standards is *Farias v. State*.¹¹¹ In *Farias*, during voir dire, a juror commented to the prosecutor, "I've lived in Dade County thirty-three years, before . . . a lot of Latin people, more or less, came and took over the area. . . . I grew up in this town . . . I watched it Latinized."¹¹² When the defendant's counsel asked the juror if he could change the formation of that opinion, the juror replied, "Probably not."¹¹³ On this record, the appellate court held that "the doubts about this juror were not adequately resolved by the trial court and we find it was error not to excuse him for cause."¹¹⁴ Similarly, in *Kimbrough v. State*, the Florida Supreme Court affirmed the trial court's excusal for cause of a juror who responded

for cause.").

105. See *Farina v. State*, 679 So. 2d 1151 (Fla. 1996).

106. See, e.g., *Moore v. State*, 525 So. 2d 870 (Fla. 1988).

107. See LUBET, *supra* note 1, at 506.

108. David Baker, *Civil Case Voir Dire And Jury Selection*, FED. CTS. L. REV. 3, 1.3 (1998) ("Deciding whether to excuse a juror or allow a challenge for cause requires specific information and grounds for exclusion.").

109. See, e.g., *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992) (holding that in reviewing a decision to sustain a challenge for cause, the standard is "whether the totality of the voir dire testimony supports the trial judge's implied finding of fact that the prospective juror is unable to take the requisite oath and follow the law as given by the trial judge."); *State v. Thompson*, 654 P.2d 453, 456 (Kan. 1982) ("Our review of the record indicates that these jurors should have been excused for cause. However, we have consistently held that in the absence of a showing of prejudice there is no reversible error so long as the disqualified jurors do not actually sit on the jury."); *Johnson v. State*, 773 S.W.2d 322, 327-28 (Tex. Crim. App. 1989) (recognizing that the standard of review of a denial of a challenge for cause is whether the trial court abused its discretion. This is determined by an examination of the voir dire of the venire members as a whole to decide whether the record shows that the prospective juror had a bias or prejudice that could have interfered with his ability to serve as a juror and uphold his oath.). Courts have various standards for defining an abuse of discretion for denying a cause challenge.

110. *Longshore v. Fronrath Chevrolet, Inc.*, 527 So. 2d 922, 923 (Fla. Dist. Ct. App. 1988); see also *State v. Baker*, 935 P.2d 503 (Utah 1997) (stating that neither the United States Constitution nor the Utah Constitution guarantee a defendant the "most favorable" jury).

111. 540 So. 2d 201 (Fla. Dist. Ct. App. 1989).

112. See *id.* at 202.

113. *Id.*

114. *Id.*

that she could follow the oath and the law given to her by the court.¹¹⁵ Nonetheless, the court found she was properly excused for cause because she expressed "uncertainty" and "expressed strong reservations about her ability to be impartial," during voir dire.¹¹⁶

Finding no abuse of discretion in the trial court's failure to excuse a juror for cause is *Samples v. State*.¹¹⁷ In *Samples*, one juror's daughter worked in the hot check division of the prosecutor's office and another juror's two sons were deputy prosecutors in Louisiana.¹¹⁸ Yet, both "jurors testified that there was nothing about these relationships that would cause them to favor the prosecution."¹¹⁹ The appellate court found no abuse of discretion in denying the defendant's challenge for cause.¹²⁰ Similarly, in *Boyd v. State*, the defendant was charged with the rape of a minor girl.¹²¹ During voir dire, a juror stated that his daughter had been subjected to an attempted sexual assault.¹²² Nonetheless, the Arkansas Supreme Court affirmed the trial court's denial of the defendant's motion to strike the juror for cause.¹²³ The court placed emphasis upon the fact the juror stated, "that he could decide the case on the evidence and would not hesitate to return a verdict of not guilty if there were any reasonable doubt of the defendant's guilt."¹²⁴

E. Jurors' Conflicting Answers

It is not unusual for a juror to demonstrate a predilection toward bias and then to subsequently state that they can be fair and impartial.¹²⁵ Jurisdictions

115. 700 So. 2d 634 (Fla. 1997).

116. *See id.* at 639.

117. 902 S.W.2d 257 (Ark. Ct. App. 1995).

118. *Id.*

119. *See id.* at 261.

120. *Id.* But see *Peanut Growers' Exch. v. Bobbitt*, 124 S.E. 625, 625 (N.C. 1924) (holding trial court erred in refusing to strike for cause a juror who was a member of the plaintiff association, notwithstanding juror's assertion that he could be fair and impartial, because as a member, juror was "necessarily interested in the litigation.").

121. 889 S.W.2d 20, 22 (Ark. 1994).

122. *Id.* at 23.

123. *Id.*

124. *See id.* at 22.

125. *See, e.g.,* Timothy Patton, *The Discriminatory Use of Peremptory Challenges In Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH L. REV. 921, 971-72 (1988) ("Juror questionnaires with illegible responses, incomprehensible answers or responses directly conflicting with a juror's oral responses have been viewed as providing an objective non-discriminatory basis for counsel to decide that a particular juror is unsuitable and should be stricken.") (footnotes omitted).

are not in accord when addressing the issue of whether to automatically excuse a juror for cause who gives conflicting answers during voir dire. However, an objection should be posed when a juror gives conflicting answers regarding their ability to be impartial. For example, in *Tizon v. Royal Caribbean Cruise Line*, the plaintiff sued for permanent injuries to his back, which were not cured by surgery.¹²⁶ During voir dire by plaintiff's counsel, a prospective juror revealed that her husband had an identical back injury with a "very good result."¹²⁷ Consequently, she said, "I think it would be tough" to put that aside [in deciding the case].¹²⁸ A second juror stated that her husband had been sued for medical malpractice and that she would "definitely" be influenced by that fact.¹²⁹ Subsequently, the trial court examined these potential jurors and they both agreed they could be "fair and impartial," and therefore the trial court denied plaintiff's request to strike both jurors for cause.¹³⁰ On appellate review, the court reversed, holding both jurors should have been excused for cause. The court stated, "Where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion . . . is properly viewed with some skepticism."¹³¹ Consequently, counsel's objection to the jurors should have been sustained because their conflicting statements created a reasonable doubt as to whether they could render an impartial verdict.¹³²

By contrast, in *Hunt v. State*, the Maryland Supreme Court held the fact that a juror gives conflicting answers is not dispositive of the issue in determining whether they should be excused for cause.¹³³ The court found a prospective juror might be rehabilitated through additional questioning.¹³⁴ Similarly, in *People v. Lefebre*, the Colorado Supreme Court held that a prospective juror who makes a statement suggesting actual bias may nonetheless "sit on the jury if she or he agrees to set aside any preconceived notions and make a decision based on the evidence and the court's

126. 645 So. 2d 504 (Fla. Dist. Ct. App. 1994).

127. *Id.*

128. *Id.* at 505.

129. *Id.*

130. *Id.* at 506.

131. *Id.*

132. *Id.* at 507; *see also* *Henry v. State*, 828 S.W.2d 346 (Ark. 1992) (holding that the decision to excuse for cause a venire-person who had gone to school with defendant's daughter, and who indicated that her embarrassment on encountering defendant's daughter in future would make it difficult for her to sit as impartial juror, was not abuse of discretion, though venire-person later indicated that she could act impartially in her consideration of evidence and apply law to facts and evidence); *United States v. Ray*, 238 F.3d 828 (7th Cir. 2001) (holding the trial court's refusal to excuse for cause a juror who initially appeared to have given answers on his juror questionnaire about his contacts with law enforcement and his job history that conflicted with his answers during voir dire was not abuse of discretion).

133. 583 A.2d 218, 232 (Md. 1990).

134. *Id.*

instructions.”¹³⁵ The court reasoned, “[A] potential juror can sometimes set aside her actual bias because of what the juror learns during the voir dire process about such concepts as burden of proof or presumption of innocence.”¹³⁶

F. Peremptory Challenges

Historically and by definition, a peremptory challenge allows counsel to excuse a juror without the necessity of vocalizing the reason.¹³⁷ The number of peremptory challenges afforded each party is usually governed by statute or court rule.¹³⁸ Finally, both parties must be afforded the same amount of peremptory challenges.¹³⁹ Therefore, if counsel appears to exercise a peremptory challenge improperly, opposing counsel must object.

135. 5 P.3d 295, 301 (Colo. 2000) (citing *People v. Fuller*, 791 P.2d 702, 706 (Colo. 1990)); see also *State v. Singleton*, 311 So. 2d 881, 885-86 (La. 1975).

The two prospective jurors, Hicks and Albritton, in the course of initial questioning on their voir dire, expressed the reaction of the average layman when asked how they would feel about the failure of the defendant to take the stand and testify. They were being perfectly honest in stating that this would cause them to wonder about her reluctance to testify if she were innocent. However, upon being interrogated by this Court, they stated that they would follow the law and that the defendant's failure to take the stand would raise no presumption of her guilt in their minds. We conclude that the trial court did not err in refusing to excuse these prospective jurors for cause and that these assignments of errors have no merit.

Id.

136. *Lefebvre*, 5 P.3d at 301; see also *North Carolina v. McKinnon*, 403 S.E.2d 474, 479 (N.C. 1991) (holding that the trial court did not abuse its discretion in refusing to excuse a juror for cause even though the juror gave conflicting and ambiguous answers during voir dire).

137. LUBET, *supra* note 1, at 506 (stating with a peremptory challenge the “parties are typically allowed to excuse a certain number of potential jurors without stating their reasons.”); Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest For Reasoned Peremptory Strikes In the Jury Selection Process*, 46 BAYLOR L. REV. 947, 953 (1994). Carlson explains:

In other words, the peremptory challenge may be exercised on presumed bias, while the challenge for cause requires objective bias or other statutory grounds. A peremptory strike, by its nature, is discriminatory and reflects a preconceived notion or negative intuition as to how a prospective juror will evaluate one's client and case.

Id.; see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring):

Indeed, often a reason for [a peremptory challenge] cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's “bare looks and gestures.” . . . That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous.

Id. (footnote omitted).

138. See LUBET, *supra* note 1, at 506.

139. The function of peremptory challenges in a criminal proceeding is to allow both the prosecution and the defense to secure a more fair and impartial jury by enabling them to remove

The definition and application of the peremptory challenge changed dramatically in 1985 when the United States Supreme Court decided *Batson v. Kentucky*.¹⁴⁰ In *Batson*, the prosecutor used his peremptory challenges to strike all four African-American persons on the venire.¹⁴¹ The Court held that the peremptory challenge cannot be used to discriminate against a juror merely because of race.¹⁴² In order to determine if the strike was discriminatory, the Court crafted a three-step inquiry to establish the nondiscriminatory use of the challenged strike.¹⁴³ First, the defendant has the burden of proof to show that he is a member of a “cognizable racial group” and that the prosecutor exercised his challenges on account of race.¹⁴⁴ The burden then shifts to the prosecution to state a racially neutral explanation for striking the juror in question.¹⁴⁵ Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.¹⁴⁶ Therefore, if opposing counsel strikes a juror for what appears to be race-based reasons, an objection must be made, and the court must make the appropriate *Batson* inquiry to determine if the strike was merely a pretext for discrimination.

In *J.E.B. v. Alabama*, the State used nine of its ten peremptory strikes to exclude male jurors, resulting in an all-female jury in a paternity suit.¹⁴⁷ On this record, the Court extended a juror’s equal protection rights based upon a juror’s gender.¹⁴⁸ Subsequently, in *Hernandez v. New York*, the Court extended the protection of a juror’s equal protection rights based upon ethnicity, when counsel used peremptory strikes against two Hispanic jurors.¹⁴⁹ Therefore, an objection must be made if a peremptory strike appears to be based solely upon the juror’s gender or ethnicity.

Federal and state courts have continued to expand the definition of a “cognizable racial group” to include both race and ethnic affiliation, such as Italian-Americans,¹⁵⁰ Native-Americans,¹⁵¹ and Asian-Americans.¹⁵² However,

jurors whom they perceive as biased, even if the jurors are not subject to a challenge for cause. A defendant must be afforded the same number of peremptory challenges and the same capacity to shape the composition of the jury as that possessed by the prosecution. See *People v. Lefebvre*, 5 P.3d 295 (Colo. 2000).

140. 476 U.S. 79 (1986); see also, e.g., Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451 (2000).

141. *Batson*, 476 U.S. at 79.

142. *Id.* at 96-98.

143. *Id.* at 96.

144. *Id.*

145. *Id.* at 98.

146. *Id.*

147. 511 U.S. 127, 128-29 (1994).

148. *Id.* at 146.

149. 500 U.S. 352, 371 (1991).

150. *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988) (explaining that Italian Americans “share a common experience and culture, often share the same religious and culinary practices, often

federal courts have rejected certain groups as being cognizable and distinct, such as city residents,¹⁵³ "less-educated persons,"¹⁵⁴ young adults,¹⁵⁵ non-registered voters,¹⁵⁶ blue-collar workers,¹⁵⁷ and college students.¹⁵⁸

As a result, virtually all peremptory strikes have the ability to be viewed as pretextual, and would likely warrant an objection.¹⁵⁹ Consequently, in practice, the peremptory challenge no longer exists.¹⁶⁰

G. Final Objections To the Composition of the Jury

In order to preserve objections during jury selection for appeal, most courts hold that counsel must additionally object to the final composition of the jury panel.¹⁶¹ Failure to make such an objection is deemed a waiver to the composition of the jury and all prior objections.¹⁶²

Applying this principle is *Ter Keurst v. Miami Elevator Company*.¹⁶³ In *Ter Keurst*, the court erroneously required the attorneys to secretly write and

have commonly identifiable surnames, and have been subject to stereotyping."); see also *United States v. Bucci*, 839 F.2d 825, 833 (1st Cir. 1988) (holding that the ethnic group in question must be subject to discriminatory treatment before it can qualify as a "cognizable group").

151. *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).

152. *United States v. Sneed*, 34 F.3d 1570 (10th Cir. 1994); see also *Montz & Montz*, *supra* note 140, at 462.

153. *United States v. Canfield*, 879 F.2d 446 (8th Cir. 1989).

154. *Anaya v. Hansen*, 781 F.2d 1, 3 (1st Cir. 1986).

155. *Id.* at 3.

156. *United States v. Afflerbach*, 754 F.2d 866 (10th Cir. 1985).

157. *Anaya*, 781 F.2d at 3.

158. *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988).

159. It has, however, been observed that "an intelligent attorney can defeat a *Batson* challenge by dreaming up any excuse that is not based on racial, religious, or other prohibited modes of discrimination." Greg B. Enos, *Discriminatory Peremptory Strikes In Civil Trials*, 58 TEX. B. J. 228, 232 (1995).

160. See *Montz & Montz*, *supra* note 140, at 494 ("The historical peremptory challenge has vanished and its current version, the nondiscriminatory challenge, has become increasingly complex, resulting in an increasing amount of criticism."); see also *Franqui v. State*, 699 So. 2d 1332, 1341 n.12 (Fla. 1997) ("Personally I think that the entire body of law in this area is outrageous, but it is clear that peremptory challenges no longer exist.") (Harding, J., dissenting) (quoting Sorondo, J.). See generally Lisa Lee Mancini Hayden, *Recent Decision, The End Of the Peremptory Challenge? The Implications of J.E.B. v. Alabama ex rel T.B. for Jury Selection in Alabama*, 47 ALA. L. REV. 243 (1995).

161. See *Smith v. State*, 724 So. 2d 280, 328 (Miss. 1998).

162. *Id.* at 328; see also *United States v. Diaz-Albertini*, 772 F.2d 654, 657 (10th Cir. 1985) (holding that "a defendant, by accepting a jury, waives his right to object to the panel."); *State v. Williams*, 524 So. 2d 746 (La. 1988) (holding that the defendant waived all objections to the composition of the jury by waiting to object until after the jury was impaneled and sworn).

163. 486 So. 2d 547 (Fla. 1986).

submit their jury strikes to the court.¹⁶⁴ The Florida Supreme Court held counsel correctly objected to the jury selection method employed by the trial court.¹⁶⁵ However, the court affirmed the trial court's result because "counsel did not object to the jury as finally composed; he evinced no dissatisfaction with the jurors who sat, even though obviously dissatisfied with the method of selection."¹⁶⁶ Therefore, any objection to the trial court's jury selection process, even though valid, was waived by counsel's failure to object to the jury panel finally composed.

VI. OBJECTIONS DURING OPENING STATEMENT

It has long been the rule that the primary purpose or function of an opening statement is "to inform the court and the jury in a general way of the nature of the case, the outline of the anticipated proof, and the significance of the evidence as it is presented."¹⁶⁷ It is not, however, an opportunity to argue the case,¹⁶⁸ although this rule seems arguably nebulous because many courts refer to the opening statement as the "opening argument."¹⁶⁹

164. *Id.*

165. *Id.* at 550.

166. *Id.*

167. *State v. Fleming*, 523 S.W.2d 849, 852 (Mo. App. 1975); *see also, e.g.*, Peter B. Carlisle, *In Cold Blood and the Fine Art of Opening Statement*, 34 PROSECUTOR 37 (2000); Roxanne Barton Conlin, *Win Your Case at Opening Statement*, 33 TRIAL 77 (1997); *see also State v. Burruehl*, 401 P.2d 733, 735 (Ariz. 1965) (stating the purpose of an opening statement is to advise the jury of the questions and issues involved in the case so that it will have a general idea of the evidence and testimony to be introduced during the trial.); *Miller v. Braun*, 411 P.2d 621, 625 (Kan. 1966). The court in *Miller* stated:

The opening statements of counsel are generally no more than outlines of anticipated proof and are not intended as a complete recital of the facts to be produced on contested issues. Their purpose is to inform the jury in a general way of the nature of the action and defense; to advise it of the facts relied upon by the party to make up his cause of action or defense, and to define the nature of the issues to be tried and the facts intended to be proved, so as to better enable it to understand the case.

Id.; *see also United States v. Dinitz*, 424 U.S. 600, 612 (1976) ("The function of an opening statement is merely to state what evidence will be presented . . .").

168. *See, e.g., People v. Bustos*, 725 P.2d 1174, 1177 (Colo. Ct. App. 1986) ("The primary purpose of an opening statement is to provide the jury with a brief introductory outline, without argument, of what counsel expects the evidence will show."); *see also PARK, supra* note 11, at 379 (noting that the opening statement is "supposed to assist the trier in drawing inferences from facts, but the facts themselves must come from testimony or judicial notice, not from the assertions of counsel."). Moreover, improper opening statement may violate a jurisdiction's codes of ethics. For example, Rule 4-3.4(E) of the RULES REGULATING THE FLORIDA BAR, provides:

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 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.

169. *See, e.g., Richardson v. People*, 25 P.3d 54, 56 (Colo. 2001) ("As defense counsel stated in opening arguments, and reiterated in closing arguments . . ."); *In re Welfare of M.P.Y.*, 630 N.W.2d 411, 418 (Minn. 2001) (stating that "alibi testimony was apparent as early as the opening

Additionally, no statement may be made "which counsel does not intend to prove or cannot prove."¹⁷⁰ Because there are no "rigid requirements on the content of an opening statement," the judgment of the trial court as to what will be allowed will not be overturned absent an abuse of discretion.¹⁷¹ Moreover, most improper remarks during opening statement can be cured with a curative instruction.¹⁷²

A. Statements Ultimately Unsupported By the Evidence

Generally, courts agree that it cannot be error in opening statement to outline the case that counsel anticipates proving through the evidence and witnesses, even though counsel ultimately fails to have the evidence admitted before the end of the trial.¹⁷³ The reason for this rule is that counsel

argument."); *United States v. Ruiz*, 253 F.3d 634, 640 (11th Cir. 2001) ("In opening arguments, defense counsel portrayed . . ."); *Commonwealth v. Rosado*, 747 N.E.2d 156, 161 (Mass. 2001), *cert. denied*, 122 S. Ct. 372 (2001) ("Although counsel hired a forensic expert, he admitted to the judge that, at the time of opening argument . . ."); *State v. Scott*, 21 P.3d 516, 527 (Kan. 2001), *cert. denied*, 122 S. Ct. 630 (2001) ("The jury, having sat through the opening arguments, the introduction of evidence, and the closing arguments . . ."); *Hess v. State*, 20 P.3d 1121, 1129 (Alaska 2001) ("In its opening argument the state asserted . . ."); *State v. Billedeaux*, 18 P.3d 990, 994 (Mont. 2001) ("During the State's opening argument . . ."); *Leonard v. State*, 17 P.3d 397, 410 n.13 (Nev. 2001) ("We note that defense counsel stated in opening argument that the defense would reveal . . .").

170. *Gillson v. Gulf, Mobile & Ohio R.R. Co.* 246 N.E.2d 269, 272 (Ill. 1969).

171. *People v. Barron*, 578 P.2d 649 (Colo. 1978). See generally James R. Lucas, *Opening Statement*, 13 U. HAW. L. REV. 349 (1991) (stating that the opening statement is a "short, concise outline of what an attorney intends or expects to prove in the trial through evidence.").

172. See, e.g., *Testa v. Village of Mundelein, Ill.*, 89 F.3d 443, 446 (7th Cir. 1996). The *Testa* court noted:

Both before and after the opening statements, the magistrate judge gave curative instructions to reduce the potential prejudice of the defense's improper references. The district court cautioned the jury that "an opening statement is not evidence nor argument, it is simply an outline of what the lawyer expects will be proven." Moreover, the court instructed the jury to disregard any comment that defense counsel made about statements by *Testa* to his doctors, thereby reducing the likelihood of any prejudice. Additionally, it has been held that, "under certain circumstances . . . [such as inflammatory remarks], failure to object to statements in an opening argument might not constitute a waiver of the objection.

Id.; see also, e.g., *State v. Sharp*, 616 P.2d 1034, 1039 (Idaho 1980).

173. See, e.g., *Travieso v. State*, 480 So. 2d 100, 103 (Fla. Dist. Ct. App. 1985); Michael J. Ahlen, *Opening Statements In Jury Trials: What Are the Legal Limits?*, 71 N.D. L. REV. 701, 709 (1995). Ahlen writes:

If a party promises evidence in opening statement, but fails to produce it, there is a potential danger that the jury will reach a decision based on the lawyer's words. Failure to call an important witness who had been referred to in opening statement, however, is not error so long as other evidence supports the matters discussed in the prosecutor's opening, and so long as there is no showing of bad faith, or any deliberate attempt to misstate the facts.

is not guaranteed her witnesses will conform to the testimony anticipated by counsel.¹⁷⁴ Moreover, counsel is not certain what evidence the court will admit or reject. Typifying this objection is *Travieso v. State*.¹⁷⁵ In *Travieso*, the defendant objected to the prosecutor's opening statement because he told the jury a particular witness would testify during the case.¹⁷⁶ "[A]s it turned out, no one called [the particular witness]."¹⁷⁷ The appellate court stated that it found "no fault with the reference made by counsel during opening statement while outlining the case as counsel anticipated it would unfold through the various witnesses. There is no showing that it was known [the particular witness] would not testify."¹⁷⁸ Similarly, in *State v. Brooks*, the Missouri Supreme Court observed that the scope and manner of opening statement is largely within the discretion of the court as to the good faith of counsel in making opening statements to the jury as to material facts they intend to prove.¹⁷⁹ Nonetheless, reversible error occurs when an attorney deliberately includes matters in her opening statement that are not proven and which result in substantial prejudice to the opposing party.¹⁸⁰ Reversible error is demonstrated in *Maggio v. City of Cleveland*, where the Ohio Supreme Court held that when counsel for the plaintiff deliberately injected a known inadmissible domestic situation of the plaintiff into his opening statement, the trial court properly sustained the objection and granted a mistrial.¹⁸¹

B. Statements That Are Argumentative

A proper opening statement informs the jury of the evidence they expect to be presented during the trial. "Accordingly, it is improper to make the opening statement argumentative, such as arguing the credibility of witnesses . . . or arguing inferences and deductions from that evidence. These are appropriate only during closing arguments."¹⁸² An objection that

Id.

174. LUBET, *supra* note 1, at 438 ("A lawyer is entitled to take a chance that her evidence will be admitted, and most judges will not rule on evidentiary objections during the opening statements.").

175. 480 So. 2d 100 (Fla. Dist. Ct. App. 1985).

176. *Id.* at 103.

177. *Id.*

178. *Id.* at 103; *see also* MAUET, *supra* note 1, at 494 ("A lawyer can include in his opening statements only evidence that he in good faith believes is both available and admissible at trial.").

179. 618 S.W.2d 22, 24 (Mo. 1981).

180. *See, e.g.,* *People v. Trass*, 483 N.E.2d 567 (Ill. App. Ct. 1985); *see also* *State v. Horn*, 498 S.W.2d 771, 774 (Mo. 1973) (observing that the mere fact that no evidence is adduced as to some of the precise facts related to the jury in the opening statement is not sufficient to constitute error so prejudicial as to require the reversal of a conviction, except where it can be established, directly or by inference, that counsel making said statement had not intended to, or knew that he could not, produce testimony to support said statement when made). *See generally* Ahlen, *supra* note 173.

181. 84 N.E.2d, 912, 914-15 (Ohio 1949).

182. MAUET, *supra* note 1, at 494. In *State v. Williams*, 656 P.2d 450 (Ohio 1982), the Ohio

an opening statement is argumentative may be the most frequent objection at the trial court level, but it rarely receives appellate court scrutiny.¹⁸³ This is because an "argumentative sentence or two will be unlikely to draw an objection, and even more unlikely to see one sustained."¹⁸⁴ A North Carolina appellate court observed, "[I]t is clear that 'asking the jury to resolve disputes, make inferences, or interpret facts favorable to the speaker . . . ' are argumentative remarks and therefore prohibited."¹⁸⁵ When counsel strays from a description of the evidence, the statements move closer to those that are deemed argumentative. In *State v. Reynolds*, the prosecutor referred to the defendant's story as "this cock-and-bull story about"¹⁸⁶ Although denying a motion for mistrial, the court held that, "The district court properly could have found that the prosecutor's comment was too argumentative for opening statement."¹⁸⁷ Similarly, counsel's statement that "there [are] significant areas of doubt about what [the victim] says," was found to have been properly objected to and sustained as argumentative during opening statement.¹⁸⁸

Although counsel's purpose is to illuminate the jury with evidence he intends to show, describing evidence to be revealed through cross-

Supreme Court observed:

The purpose of an opening statement is to apprise the jury of what counsel intends to prove in his own case in chief by way of providing the jury an overview of, and general familiarity with, the facts the party intends to prove. It is generally accepted that an opening statement should not be argumentative. It is not proper to engage in anticipatory rebuttal or to argue credibility by referring to impeachment evidence the other side may adduce. Whether an improper statement on opening argument constitutes reversible error depends on whether the prosecutor was guilty of bad faith and the prejudicial effect of the statement on defendant's case.

Id. at 451-52 (citations omitted). In *State v. Lafferty*, 749 P.2d 1239, 1254 (Utah 1988), the Utah Supreme Court found the prosecutor's description of the defendant's murder that he "first slit Brenda's throat and then grabbed her hair and pulled her head back so that her blood would flow freely to the floor," to be argumentative during opening statement.

183. See Ahlen, *supra* note 173, at 708-09 ("Courts in North Dakota, and most other jurisdictions, do sustain objections to argumentative opening comments. This objection appears raised more than any other with regard to opening statements, and yet American courts have not provided clear guidance on what constitutes improper argument.") (footnotes omitted); see also L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 EMORY L. J. 107, 108 (1999) ("[O]ne would be hard-pressed to find any opening statement that perfectly complied with the rule.").

184. See LUBET, *supra* note 1, at 437.

185. See *State v. Freeman*, 378 S.E.2d 545, 551 (N.C. Ct. App. 1989) (quoting J. TANFORD, *THE TRIAL PROCESS* 271 (1983)); see also *People v. Reed*, 164 N.E. 847, 856 (Ill. 1928) ("The object of an opening statement is to advise the jury concerning the questions of fact involved so as to prepare their minds for the evidence to be heard, and it should not be permitted to become an argument.")

186. 804 P.2d 1082, 1085 (N.M. Ct. App. 1991).

187. *Id.*

188. *State v. Belcher*, 805 S.W.2d 245, 253 (Mo. Ct. App. 1991).

examination does not constitute an argumentative opening statement.¹⁸⁹ Illustrating the application of this principle is *Wright v. United States*.¹⁹⁰ In *Wright*, appellant's counsel proposed to inform the jury of the testimonial evidence she intended to elicit through cross-examination of witnesses the government had announced it would produce.¹⁹¹ The government objected that such a statement was argumentative.¹⁹² In rejecting counsel's objection, the court in *Wright* observed that when:

[T]he defense [attorney] intends to rely solely upon evidence that will be adduced or highlighted through cross-examination, its opening statement inherently will sound contradictory. Nonetheless, as long as the opening statement is confined to what the defense "hopes to show" at trial, through cross-examination or otherwise, the trial court should permit counsel to continue—provided, of course, that the court may curtail an opening statement that becomes argumentative or inflammatory.¹⁹³

Similarly, comparing and contrasting evidence is not necessarily impermissible argument during opening statement. For example, in *State v. Harris*, defense counsel made a statement of what defendant's evidence would be as contrasted with the state's evidence.¹⁹⁴ The court observed, "Where as here the only issue in the case is the identification or misidentification of the defendant, defense counsel is free to point out the significance of the difference between the state's evidence and the defendant's, thus framing the issue."¹⁹⁵ The court added, "Here an opening statement about the evidence of defendant's true description would have been totally meaningless without reference to the contrasting evidence she could fairly anticipate the state would put on"¹⁹⁶ Similarly, in *Selby v. Danville Pepsi-Cola Bottling Co.*, the "defendant's counsel said there are two sides to every story and she believed the evidence would show

189. *State v. Paige*, 343 S.E.2d 848, 858 (N.C. 1986) (holding that when a party "does not intend to offer evidence, he nonetheless may in his opening statement point out to the jury facts which he reasonably expects to bring out on cross-examination.").

190. 508 A.2d 915, 921 (D.C. Cir. 1986).

191. *Id.* at 921-22.

192. *Id.* at 922.

193. *Id.* at 921; see also Perrin, *supra* note 183, at 132 (stating that since the purpose of opening statements is to allow both sides to outline the anticipated proof and the significance of the evidence presented, an absolute prohibition against mentioning in opening statement any facts elicited in cross-examination operates to penalize a defendant whose witnesses will be called first by the State. In that situation, the defendant is effectively denied the opportunity to make an opening statement).

194. 731 S.W.2d 846, 850 (Mo. Ct. App. 1987).

195. *Id.*

196. *Id.*

defendant was not responsible for plaintiff's injuries."¹⁹⁷ On this record, the appellate court held, "These statements are not argumentative in nature."¹⁹⁸

C. Improper Personal Beliefs

Personal belief comments in opening statement are objectionable because they are not evidence and they violate the lawyer's professional code of conduct.¹⁹⁹ Moreover, personal opinions directly inject the credibility of the trial attorney into the trial.²⁰⁰ The United States Supreme Court addressed this issue in *United States v. Young*.²⁰¹ In *Young*, the prosecutor's opening statement improperly injected a personal belief when he stated,

I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was If we are allowed to give our personal impressions *since it was asked of me* I don't know what you call that, I call it fraud.²⁰²

Similarly, in *Walker v. State*, the court held that a comment by a district attorney in his opening statement that, "I really and truly believe that you are going to find that [the accused] was not justified in blowing a man's hand off or the lower part of his arm off . . ." was objectionable as constituting a personal belief.²⁰³

However, in *United States v. Lacayo*, the Eleventh Circuit Court of Appeals held that the statement, "What you are about to hear is a true story," coupled with the statement, "The evidence will show," did not improperly express a personal belief during opening statement.²⁰⁴

197. 523 N.E.2d 697, 703 (Ill. App. Ct. 1988).

198. *Id.* However, a Missouri appellate court held that it was objectionable during opening statement for counsel to solely outline her opponent's case. See *State v. Flemming*, 523 S.W.2d 849, 852-53 (Mo. Ct. App. 1975).

199. See MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2001); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106 (C)(3)-(4) (1980).

200. See MAUET, *supra* note 1, at 494.

201. 470 U.S. 1 (1985).

202. *Id.* at 5.

203. 208 S.E.2d 5, 6 (Ga. Ct. App. 1974). The court found that any prejudice from the personal belief statement was cured by the court's curative instruction. *Id.*

204. *United States v. Lacayo*, 758 F.2d 1559, 1564-65. The Supreme Court of Nebraska reached a similar result when examining the propriety of the following portion of a prosecutor's opening statement, which partially included the following:

At the close of the case, the State of Nebraska expects that you will receive instructions

D. Misstatements of Law

It is clearly objectionable for counsel to misstate the appropriate governing law during opening statement.²⁰⁵ Demonstrating this rule is counsel's opening statement in *Freeman v. Kansas City Power & Light Co.*, where the defendant's attorney said to the jury, "There will be evidence that these lines were built to substantially exceed the minimum requirements of what is called the National Electrical Safety Code which has been accepted as the standard of Missouri."²⁰⁶ The "[p]laintiff's objection to this statement was overruled."²⁰⁷ On appeal, the Supreme Court of Missouri held that the "trial court should have sustained the objection and directed the jury to disregard the statement. An industry code is an admission of what the industry considers it should do, but the defendant's duty is and continues to be to exercise the highest degree of care in its operations."²⁰⁸ Therefore, defense counsel misstated the law in his opening statement.

In contrast is the Arkansas Supreme Court's decision in *Berry v. St. Paul Fire & Marine Insurance Co.*, where counsel allegedly misstated the law in opening statement by stating:

from this Court concerning the essential elements that are necessary to find the defendant guilty of the offense charged. The state expects that the testimony of the various witnesses that we will call - and as I've said earlier, we expect to call seven witnesses. We expect that those witnesses' testimony, in conjunction with the exhibits that we will offer into evidence, coupled with the instructions that you will receive at the conclusion of the case, will prove that every essential element of the crime being prosecuted was committed by this defendant. The state accepts and is prepared to meet in this case its burden of proving a case beyond a reasonable doubt, and that is why this case is being tried at this time. The state *expects that the evidence will show* the defendant did forcibly sexually assault [the victim] on the day in question.

State v. Wounded Arrow, 300 N.W.2d 19, 22 (Neb. 1980) (emphasis added).

205. It should be noted that, "Counsel have escaped reversal when a comment on the law was correct." Ahlen, *supra* note 173, at 715. It should also be noted that although misstatements of law are objectionable, it is not always tactically advantageous to object to them. One author noted:

An area where you might object is if the prosecutor attempts to tell the jury what the law is and does so by paraphrasing. This rarely works and is almost always wrong or misleading. If the prosecutor tells the jury the law during his or her opening—a tactic you should avoid since it is inconsistent with storytelling—you may object if the explanation is wrong. However, consider that objecting may cause the prosecutor to cease this "law talk" that is boring to the jury. Would you rather win this objection or just let the other side bore the jury to death? If the prosecutor misstates the law, come back in closing and tell the jury the prosecutor was trying to mislead them. Both tactically and strategically, that is the best use of such a mistake.

William Allison, *Tell Your Story Through Opening Statement*, 34 TRIAL 78, 84 (Sept. 1998). However, the Virginia Supreme Court has held that failure to object during opening statement waives any claim of error on appeal. See *Beavers v. Commonwealth*, 427 S.E.2d 411, 419 (Va. 1993) (holding that a complainant's failure to object and move for a mistrial until the conclusion of an opening statement constituted a waiver of its arguments on appeal).

206. 502 S.W.2d 277, 283 (Mo. 1973).

207. *Id.*

208. *Id.*

[N]ursing is not an exact science. There are a lot of unknowns about what happens to a human body during and after surgery. And the medicinal trial in this case is that of several different people, human beings, nurses, who were exercising their professional medical judgment in taking care of a patient after surgery.²⁰⁹

The appellants contended that the aforementioned comment misstated the law regarding the nurses' use of their professional medical judgment in caring for patients.²¹⁰ The Arkansas Supreme Court rejected this contention stating, "Given the context in which the term was used, we are not persuaded that such remarks amounted to an improper instruction as to the relevant standard of care."²¹¹

E. Improper Anticipating Objections

Courts have discretion in prohibiting counsel, during opening statement, to anticipate and present to the jury the defenses it anticipates its opposition will embrace. The prohibition is based upon the principle that counsel is generally limited to state what evidence they intend to prove during opening statement as opposed to what evidence opposing counsel intends to prove. For example, in *Ottis v. Stevenson-Carson School District No. 303*, the court stated, "[W]hile it is not error to allow a plaintiff to anticipate a defense, neither is it necessarily prejudicial to preclude a plaintiff from doing so."²¹² Similarly, in *Ross v. Aryan International, Inc.*, the defendant argued that the trial court should have granted its motion for mistrial "after plaintiff's counsel, in his opening statement, read aloud a 'hold harmless' clause from a construction contract" with the post office that was not admitted into evidence as an exhibit.²¹³ The plaintiff argued that "it mentioned the contract because it knew defendant intended to lay blame on the post office during trial."²¹⁴ The appellate court found that "in making reference to the contract provisions plaintiff was anticipating a likely defense expected to be posed by defendants. The trial court [properly] found the reference to the contract to be [objectionable]."²¹⁵

209. 944 S.W.2d 838, 844 (Ark. 1997).

210. *Id.*

211. *Id.*

212. 812 P.2d 133, 141 (Wash. Ct. App. 1991).

213. 580 N.E.2d 937, 942 (Ill. App. Ct. 1991).

214. *Id.* at 943.

215. *Id.*

F. Statements Referring To Inadmissible Evidence

It is certainly objectionable, during opening statement, for counsel to argue "evidence that is inadmissible."²¹⁶ This is because "opening statement . . . should be confined to statements based on facts which can be proved"²¹⁷ Illustrating this rule is *United States v. Brassard*.²¹⁸ In *Brassard*, the prosecutor stated during opening statement, "Defendant asked the informant if he knew where the Defendant could purchase a large quantity of cocaine."²¹⁹ The defendant objected to this remark based upon the prosecution's assertion that it did not intend to call the informant as a witness and the statement constituted inadmissible hearsay.²²⁰ The trial court sustained the defendant's objection.²²¹ Notably on appeal, the government conceded that the prosecutor's opening statement remark was objectionable and improper.²²² Similarly, in *State v. Browner*, the prosecutor's opening statement included the remark that it "was a fact" that the defendant "had admitted to the crime" in spite of knowledge that the defendant's confession was inadmissible.²²³ Accordingly, the appellate court held that such a remark during opening statement was objectionable and improper.²²⁴

216. See MAUET, *supra* note 1, at 494. Mauet itemizes common forms of inadmissible evidence, which partially includes:

1. evidence that has been suppressed by pretrial motions or motions in limine.
2. privileged matters, such as attorney-client or husband-wife conversations, inadmissible under FRE 501.
3. evidence of settlement negotiations in civil cases and plea negotiations in criminal cases, inadmissible at any time under FRE 408 and 410.

Id.; see also *State v. Distefano*, 262 P. 113, 114 (Utah 1927) ("In the opening statement to the jury counsel may properly fully state all of the material facts which the evidence will establish, but not facts which the party is not able to prove and none that cannot be supported by legal evidence."); John J. Eannace, *An Art—Not a Science: A Prosecutor's Perspective On Opening Statements*, 31 PROSECUTOR 32, 37 (1997) ("A lawyer cannot refer to inadmissible evidence in his opening statement. If this occurs, the prosecutor may either ask for a sidebar or, if the evidence is overly prejudicial, request a mistrial.").

217. *State v. Fleming*, 523 S.W. 2d 849, 853 (Mo. Ct. App. 1975); see also *State v. Allred*, 505 S.E.2d 153 (N.C. Ct. App. 1998) ("Counsel may not, in opening statements: (1) refer to inadmissible evidence; (2) exaggerate or overstate the evidence; or (3) discuss evidence they expect the other party to introduce.").

218. 212 F.3d 54 (1st Cir. 2000).

219. *Id.* at 57.

220. *Id.*

221. *Id.*

222. *Id.* The court did find the prosecutor's remark constituted harmless error when it reasoned, "The offending remark was brief, the judge had told the jury that counsel's statement was not evidence, the judge offered a curative instruction, and it was likely that, coming when it did, the remark had no effect." *Id.*; see also *Hossman v. State*, 473 N.E.2d 1059, 1062 (Ind. Ct. App. 1985) (holding that that "the prosecutor's comments [during opening statement as to his personal dealings with the] witnesses [and that they] were 'burglars and thieves', 'courtroom regulars', [and they] 'had been witnesses prior in Circuit Court'" were totally irrelevant because such comments referred to inadmissible evidence and the prosecutor's personal dealings with them.).

223. 587 S.W.2d 948, 954 (Mo. Ct. App. 1979).

224. *Id.* at 955; see also *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J.,

A reference to inadmissible evidence during opening statement does not open the door to its admission during trial. Demonstrating this rule is *Bynum v. Commonwealth*, where a statement by the defendant was suppressed prior to trial.²²⁵ During trial, however, "counsel for [the defendant] referred to a portion of the suppressed statement in his opening statement to the jury."²²⁶ Following defense counsel's use of the statement in his opening statement, the trial court stated that counsel had "opened the door" to its use and allowed the Commonwealth to introduce it during its case-in-chief.²²⁷ On appellate review, the court disagreed, holding that "statements made during an opening statement are not evidence; therefore, opening statements may not 'open the door' to otherwise inadmissible evidence."²²⁸

VII. OBJECTIONS TO THE PRESENTATION OF THE CASE IN GENERAL

Objections to the presentation of the case do not address the technical form of the question. Instead, the objections address the propriety of the scope of the interrogator's examination as proscribed by the state or federal rules.²²⁹

concurring). Chief Justice Burger observed:

An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

Id.; see also *Arizona v. Washington*, 434 U.S. 497, 514, n.34, 515 (1978) (holding defense counsel in opening statement during second trial improperly commented that, during the first trial "the prosecutor deliberately withheld exculpatory evidence from the defense" necessitating the second trial granted by the Supreme Court of Arizona, because such evidence was inadmissible to prove the innocence or guilt of the defendant); *Commonwealth v. Delaney*, 682 N.E.2d 611, 619 (Mass. 1997) ("The judge acted properly because the evidence from the note regarding the victim's arm was inadmissible hearsay and therefore improper to discuss as evidence during opening statements.").

225. 506 S.E.2d 30, 34 (Va. Ct. App. 1998).

226. *Id.* at 32.

227. *Id.* at 34.

228. *Id.*

229. Federal Rule of Evidence 611 provides in pertinent part:

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. (b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in

A. *Questions Beyond the Scope of Direct or Cross-examination*

Cross-examination of a witness is limited to the subject matter on direct examination and matters affecting the credibility of the witness.²³⁰ Thus, as a general rule, it is objectionable for questions on cross-examination to be more broad in scope than those on direct.²³¹ The rule “prevents the opponent from interrupting the proponent’s proof with testimony on unrelated issues.”²³² In *McCrae v. State*, the Florida Supreme Court recognized that:

[T]he rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross-examination. One of these objects is to elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the

the exercise of discretion, permit inquiry into additional matters as if on direct examination.

FED. R. EVID. 611.

230. *People v. Johnson*, 743 N.E.2d 150, 156 (Ill. Ct. App. 2000). The court in *United States v. Caudle*, 606 F.2d 451 (4th Cir. 1979), observed the importance of cross-examination:

The theory of cross-examination supports what has been learned from years of practical experience. On direct examination, a witness, even if completely unbiased, only discloses part of the necessary facts, chiefly because his testimony is given only by way of answers to specific questions, and the attorney producing him will usually ask only for the facts favorable to his side of the case. Someone must probe for the remaining facts and qualifying circumstances, and ensure that the testimony is accurate, complete, and clearly understood. The best person to do this is the one most vitally interested, namely the opponent.

Id. at 457 (citing 5 WIGMORE, EVIDENCE § 1368 (Chadbourn rev. 1974)). The Supreme Court of Kansas observed,

Cross-examination may be permitted into matters which were the subject of direct examination. Where general subject matter has been opened up on direct, cross-examination may go to any phase of the subject matter and is not restricted to identical details developed or specific facts gone into on direct examination.

State v. Canaan, 964 P.2d 681, 695 (Kan. 1998). The court added, “Questions asked on cross-examination must be responsive to testimony given on direct examination, or material and relevant thereto.” *Id.*

231. See, e.g., *State v. Bjorklund*, 604 N.W.2d 169 (Neb. 2000); see also *Cuellar v. Hout*, 522 N.E.2d 322 (Ill. App. Ct. 1988) (observing that cross-examination which is beyond the scope of the direct examination of the witness, in which a party attempts to put its theory of a case before the jury, is improper); *Fremont Nat’l Bank & Trust Co., v. Beerbohm*, 392 N.W.2d 767, 771 (Neb. 1986) (“Since the bank’s questioning exceeded the scope of the direct examination in the sense that it dealt with Beerbohm’s general relationship with Clara Shaffer while the cross-examination dealt with the specifics of particular financial transactions, it cannot be said that the trial court abused its discretion in sustaining the objection.”); *State v. Cuevas*, 288 N.W.2d 525, 530 (Iowa 1980) (holding that when “a police officer, on direct examination had testified as to his role in the investigation of the [murder]” and then on “cross-examination defense counsel attempted to question the witness about hair extraction and analysis, a subject matter not broached in the direct examination,” that the “State’s objection that the inquiry was beyond the scope of the direct examination [and] was [properly] sustained.”).

232. See *PARK*, *supra* note 11, at 276.

witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.²³³

Demonstrating the application of this principle is *Green v. State*.²³⁴ In *Green*, the Florida Supreme Court held that asking a defense witness about her alcohol use at times other than the night of the murder, presumably to attack her credibility, went beyond the permissible scope of cross-examination, where the question on direct was limited to the eyewitness' drinking on the night of the murder.²³⁵

Similarly, in *Preston v. Simmons*, the defendant contended the trial court erred in prohibiting cross-examination of the plaintiff's father concerning his marital relations with his wife when he lived with another woman in another state.²³⁶ Defendant contended that inquiry into this matter was permissible and invited by the plaintiff's intimations that he and his wife enjoyed a "traditional marital relationship."²³⁷ On appellate review, the court held that "because the plaintiff's marital relationship had no relevance to the issues in the case, the trial court did not err in prohibiting this cross-examination" which was accordingly beyond the scope of plaintiff's direct.²³⁸

Additionally, a party's failure to object to questions on direct does not allow unbridled inquiry during cross-examination. As explained by the Rhode Island Supreme Court in *State v. Toole*, "The right to cross-examination does not imply an absolute right to ask any question regardless

233. 395 So. 2d 1145, 1152 (Fla. 1980) (quoting 4 JONES ON EVIDENCE, CROSS EXAMINATION OF WITNESSES § 25:3 (6th ed. 1972) (footnote omitted)).

234. 688 So. 2d 301 (Fla. 1996).

235. *Id.* at 305.

236. 747 N.E.2d 1059, 1072 (Ill. App. Ct. 2001).

237. *Id.*

238. *Id.*; see also *People v. Johnson*, 743 N.E.2d 150, 156 (Ill. App. Ct. 2000) (holding that "the trial court did not abuse its discretion in limiting the scope of cross-examination of [a witness] . . . [because the questions] were beyond the scope of the direct exam."); *Richardson v. McGriff*, 762 A.2d 48, 67 n.7 (Md. 2000) (observing that "the trial judge's evidentiary ruling at this point in the trial was correct for at least one of the reasons given, i.e., the questions went beyond the scope of Respondent's direct examination . . ."); FED. R. EVID. 611(b) ("Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."). In *People v. Terrell*, 708 N.E.2d 309, 325 (Ill. 1998), the Supreme Court of Illinois observed:

James Sullivan testified on direct examination that he witnessed defendant make an inculpatory statement. During cross-examination, the trial court sustained the State's objections to defendant's questions regarding whether defendant had been in contact with his family prior to making the statement. We cannot say that the trial court erred in determining that such questions were beyond the scope of direct examination.

of how objectionable.”²³⁹ Stated alternatively “simply because defense counsel failed to object to an inappropriate question posed by the prosecutor on direct examination, that failure did not transmogrify that improper question or its line of inquiry into a proper one for purposes of defense counsel’s cross-examination.”²⁴⁰

However, impeachment of a witness, so long as it is not collateral,²⁴¹ is permitted even if it goes beyond the scope of direct examination as exemplified in *Yolman v. State*.²⁴² In *Yolman*, the court held it was reversible error not to allow the defendant to cross-examine a witness about the substance of a telephone conversation “because the evidence may have shown [the witness’s] bias, prejudice or improper motive for testifying against appellant.”²⁴³

B. Questions On Redirect Examination

As a general rule, a party may re-examine a witness about matters brought out on cross-examination.²⁴⁴ However, if the subject matter was not brought out on direct or cross-examination, it is objectionable for it to be brought out for the first time on redirect.²⁴⁵ By contrast, where the questions

239. 640 A.2d 965, 977 (R.I. 1994).

240. *State v. Barrett*, 768 A.2d 929, 943 (R.I. 2001).

241. See discussion *infra* Part VII.C.

242. 469 So. 2d 842 (Fla. Dist. Ct. App. 1985).

243. *Id.* at 843; see also *PARK*, *supra* note 11, at 278 (observing that, “The rule that cross-examination is limited to the scope of direct does not apply to cross-examination going to the credibility of the witness.”).

244. *Noeling v. State*, 40 So. 2d 120 (Fla. 1949).

245. See *MAUET*, *supra* note 1, at 490 (observing that when redirect examination “attempts to pursue matters not covered by the preceeding examination, an objection is proper.”); see also, e.g., *Gray v. State*, 769 A.2d 192, 204 (Md. Ct. Spec. App. 2001). The court in *Gray* observed:

At no time during its cross-examination of Evelyn did the State inquire about her reluctance or failure to speak to the police about what she knew immediately after Bonnie’s death. Accordingly, the trial court did not abuse its discretion in ruling that defense counsel’s question on re-direct was beyond the scope of the State’s cross-examination.

Id.; see also, e.g., *State v. Jones*, 534 A.2d 1199, 1214 (Conn. 1987) (“The basic purpose of redirect examination is to enable a witness to explain and clarify relevant matters in his testimony which have been weakened or obscured by his cross-examination. . . . The scope of redirect examination, however, is limited by the subject matter of cross-examination.”) (citations omitted). Determining what constitutes “new matter” during cross-examination is often a nebulous standard. One court observed, “Although the general rule is widely espoused, the case law contains little if any analysis of what does (and does not) comprise a ‘new matter.’” *O’Brien v. Dubois*, 145 F.3d 16, 27 (1st Cir. 1998). Definitional guidance is found in *United States v. Baker*, 10 F.3d 1374 (9th Cir. 1993) *rev’d sub nom on other grounds*, *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). The court in *Baker* observed,

If “new matter” is defined broadly, then any question asked on redirect that had not already been asked and answered would conceivably introduce “new matter” requiring the opportunity for recross insofar as it expanded or elaborated on the witness’ previous testimony. Such an approach would conflict with the trial court’s discretion to impose

on redirect amplify the statements made in response to questions asked on cross-examination, the questions are appropriate.²⁴⁶ Similarly, "[t]he litigant who initially elicits testimony on a certain issue [during cross-examination] is said to have 'opened the door' to rebuttal by the opposing party."²⁴⁷ Moreover, as observed by the Massachusetts Supreme Court, one purpose of redirect examination is to allow a witness "to explain, correct or modify the evidence elicited from . . . [him] on cross-examination by the defendants."²⁴⁸

On cross-examination in *Griffin v. State*,

Defense counsel attempted to impeach the detective by suggesting he did not adequately investigate [the defendant's accident] defense. During redirect examination, in response to at least three questions by the State, the detective testified that he believed "Griffin was not telling the truth" when he claimed the shooting was an accident.²⁴⁹

The Georgia Supreme Court held, that, "Although the State is allowed some latitude in rehabilitating its witness, under these facts the State's repeated questions specifically pertaining to Griffin's credibility were improper," since questions regarding the defendant's credibility were not raised during cross-examination.²⁵⁰

C. Questions On Recross-examination

Recross-examination is within the discretion of the court.²⁵¹ Unlike cross-examination, a defendant has no right to recross-examination unless the examination addresses a new matter brought out for the first time on redirect examination.²⁵² Illustrative is *Commonwealth v. Wilson*, where the

reasonable limits on cross-examination.

Baker, 10 F.3d at 1405 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *United States v. Tarentino*, 846 F.2d 1384, 1405 (D.C. Cir. 1988)).

246. *Hinton v. State*, 347 So. 2d 1079, 1081 (Fla. Dist. Ct. App. 1979) (holding that "the prosecutor properly pursued [a] line of inquiry on redirect examination of the [witness], where the questions amplified the statements made in response to questions asked on cross-examination by defense counsel to elicit answers favorable to the defense.").

247. *State v. Jones*, 534 A.2d 1199, 1214 (Conn. 1987).

248. See *Commonwealth v. Galvin*, 39 N.E.2d 656, 663 (Mass. 1942); see also *Tampa Elec. Co. v. Charles*, 67 So. 572 (Fla. 1915).

249. 481 S.E.2d 223 (Ga. 1997).

250. *Id.*

251. See, e.g., *Commonwealth v. Berth*, 434 N.E.2d 192 (Mass. 1982).

252. See, e.g., *Commonwealth v. Wilson*, 407 N.E.2d 1229, 1247 (Mass. 1980); see also *United States v. Dana*, 457 F.2d 205 (7th Cir. 1972) (holding there was no undue limitation by the trial court confining recross-examination to the scope of redirect examination).

defendants claimed the judge erred in restricting their recross-examination of a witness regarding what time the defendants were first seen by her on the night of the crimes.²⁵³ The Supreme Court of Massachusetts disagreed, holding that, “[t]he judge could properly have concluded that the question disallowed on re-cross adverted to new matter not raised on redirect examination.”²⁵⁴

The court in *United States v. Caudle*²⁵⁵ articulated the exception to this prohibition. The court stated,

Where . . . new matter is brought out on redirect examination, the defendant’s first opportunity to test the truthfulness, accuracy, and completeness of that testimony is on recross-examination. To deny recross-examination on matters first drawn out on redirect is to deny the defendant the right of any cross-examination to that new matter.²⁵⁶

During recross-examination in *Caudle*, counsel sought to take a witness through a “page-by-page examination” of a study, which had just been executed, for the first time, on redirect by the government.²⁵⁷ The court held that even though the information may have appeared repetitive, the reasons “in support of the right of cross-examination apply with equal strength to recross-examination where new matter is brought out on redirect examination.”²⁵⁸

VIII. OBJECTIONS TO THE FORM OF QUESTIONS

Typically, objections will assert that the form of the question, asked by counsel, is improper.²⁵⁹ Rarely does an objection to the form of a question raise the sole issue for appellate review. Nonetheless, attorneys are required to make seasonable objections to the form of questions that are asked, or else they are waived. Some of the most frequent grounds for objecting to the form of a question are:

253. 407 N.E.2d 1229 (Mass. 1980).

254. *Id.* at 1247.

255. 606 F.2d 451, 458 (4th Cir. 1979).

256. *Id.* (citing 6 WIGMORE, EVIDENCE § 1896 (Chadbourn rev. 1976)).

257. *Id.* at 456.

258. *Id.* at 457-58; *see also* *United States v. Baker*, 10 F.3d 1374, 1404-05 (9th Cir. 1993) *rev’d sub nom on other grounds*, *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (holding if the recross examination proposes to enter new territory not raised on redirect, the trial judge has discretion in determining whether to allow the examination.).

259. *See, e.g.*, Richard E. Hall & Stephen J. Hippler, *Getting Back To Basics—How To Be Prepared For Trial*, 40 ADVOC. 9, 12 (1997) (stating that, “[o]bjections to the form of the question include objections such as foundation, leading, compound questions, vagueness, speculative, and the like.”).

(1) [T]he question is too broad or calls for a narrative answer, (2) the question is compound, (3) the question is repetitive; asked and answered, (4) the question calls for conjecture, speculation or judgment of veracity, (5) the question is ambiguous, imprecise, unintelligible or calls for a vague answer, (6) the question is argumentative, abusive or contains improper characterization²⁶⁰

A. Leading Questions

The prohibition of interrogating a party's own witness by the use of leading questions is probably one of the most misunderstood objections during a trial.²⁶¹ Although leading questions are ordinarily not permitted on direct,²⁶² except for varied exceptions,²⁶³ most lawyers embrace the belief that because a question asks for a "Yes" or "No" response, the question is conclusively leading.²⁶⁴ In *State v. Abbot*, the New Jersey Supreme Court

260. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 611.15-611.22 (4th ed. 1996); see also *St. Luke's Episcopal Hosp. v. Garcia*, 928 S.W.2d 307 (Tex. Ct. App. 1996), observing that: [O]bjections to the form of a question usually involve the following objections: (1) assumes facts in dispute or not in evidence; (2) is argumentative; (3) misquotes a deponent; (4) is leading; (5) calls for speculation; (6) is ambiguous or unintelligible; (7) is compound; (8) is too general; (9) calls for a narrative answer; or (10) has been asked and answered.

Id. at 309.

261. Leading questions are "generally undesirable on direct-examination, that they are usually permissible on cross-examination, and that there are exceptions to both these statements." *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979) (quoting 3 WEINSTEIN'S EVIDENCE § 611 [05] at 611-54 (1978)). Federal Rule of Evidence 611(c) provides in pertinent part:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

FED. R. EVID. 611(C).

262. See, e.g., *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979); see also Charles W. Ehrhardt & Stephanie J. Young, *Using Leading Questions During Direct Examination*, 23 FLA. ST. U. L. REV. 401 (1995) (observing that, "[h]istorically, limitations upon a party's impeaching its own witness and upon using leading questions during direct examination have been intertwined.") (footnote omitted); Paul W. Grimm, *Impeachment And Rehabilitation Under The Maryland Rules Of Evidence: An Attorney's Guide*, 24 U. BALT. L. REV. 95, 109 (1994) (observing that "[o]rdinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony.").

263. The exceptions to asking leading questions on direct generally include "when the witness appears to be hostile or where an omission in testimony is evidently caused by a want of recollection which a suggestion may assist." *State v. Girouard*, 561 A.2d 882, 888 (R.I. 1989) (quoting *Wilson v. New York, New Haven & Hartford R.R. Co.*, 601, 29 A. 300, 301 (R.I. 1894)).

264. See, e.g., 3 WIGMORE EVIDENCE § 772 (Chadbourn rev. 1970).

observed, “[I]n a sense every question is ‘leading.’”²⁶⁵ The court added, “If interrogation did not lead, a trial would get nowhere.”²⁶⁶ Clarification is found in *Porter v. State*, where the court defined a leading question by stating,

The real meaning of this definition is that a question which suggests only the answer yes is leading; a question which suggests only the answer no is leading; but a question which may be answered either yes or no, and suggests neither answer as the correct one, is not leading.²⁶⁷

The court added, “The proper signification of the expression is a suggestive question, one which suggests or puts the desired answer into the mouth of the witness”²⁶⁸ Accordingly, the court in *Porter* held that the question, “Did you ever sell heroin to Sandra Tavanis?” was not leading.²⁶⁹ In like form, the New Jersey Supreme Court in *Abbot* determined that the direct examination question, “At any time did you intentionally strike anybody with this ax?” put to a defendant accused of an atrocious assault and battery, was not leading.²⁷⁰ Neither of these questions suggested the answer.

However, the question, “Did you at that time feel that Biggins in his state and with his build was capable of doing you serious physical harm?” in

265. 174 A.2d 881, 889 (N.J. 1961). The court added,

Indeed one vice of a question such as, “What is your position in this case?”, is that it does not lead enough, and thus would deny the opposing party an opportunity to guard against the rankest kind of improper proof. A question must invite the witness’s attention to something.

Id.; see also Fred R. Simpson & Deborah J. Selden, *Objection: Leading Question!*, 61 TEX. B.J. 1123 (1998) (stating, “[e]very question is leading in the sense that it causes the witness to focus attention on a particular event or topic.”).

266. *Abbot*, 174 A.2d at 889.

267. 386 So. 2d 1209, 1210-11 (Fla. Dist. Ct. App. 1980); see also *United States v. Durham*, 319 F.2d 590 (4th Cir. 1963) (stating, “The essential test of a leading question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory.”); *Urbani v. Razza*, 238 A.2d 383, 385 (R.I. 1968) (stating, “A leading question is most generally defined as a question that suggests the desired answer.”); see also, e.g., RICHARD GARDNER, *TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE* 351 (1992) (defining a leading question in child abuse cases as “refer[ring] to questions that engender in the mind of the listener a specific visual image that is not likely to have been produced had the question not been asked.”).

268. *Porter*, 386 So. 2d at 1211 (quoting *Coogler v. Rhodes*, 21 So. 109, 110 (1897)).

269. *Id.* The court added,

In general, no objections are more frivolous than those which are made to questions as leading ones. Objections to questions as leading are generally captious and not intended to subvert the ends of justice. Surely the ends of justice are not subverted by objecting to the defendant denying the crime with which he is charged.

Id. at 1211 n.4; see also PARK, *supra* note 11, at 268 (observing, “The objection should never prevent the attorney from getting facts into evidence.”).

270. *Abbot*, 174 A.2d at 889.

State v. Allison,²⁷¹ was affirmed as leading because it suggested the answer. Similarly, in *Cecil v. T.M.E. Investments, Inc.*, the question, "If you're standing on the [top step] and you're in about an inch of water and so you don't have any problems stepping out of [the pool], do you?" was found to have been a question that the trial court should have sustained as leading.²⁷²

B. Questions Asked and Answered

Questions that have been asked and answered are objectionable.²⁷³ Questions and answers cannot be repeated because the evidence is needlessly cumulative.²⁷⁴ It is properly within the trial judge's discretion to prevent one party from repeating a question already asked by that party.²⁷⁵

271. 845 S.W.2d 642, 647 (Mo. Ct. App. 1992).

272. 893 S.W.2d 38, 48 (Tex. App. 1994).

273. See LUBET, *supra* note 1, at 301. In *Johnson v. State*, 442 N.E.2d 1065 (Ind. 1982), the Indiana Supreme Court expressly affirmed the trial court's ruling sustaining an objection to a question that had been asked and answered:

It is Appellant's argument that he was prevented from a thorough probing of the witness' evasive and contradictory testimony. The record shows, however, that Appellant was permitted to fully question the witness about which of his statements at trial were true and which were not. Defense counsel fully examined this witness on cross-examination. The rulings of the trial court do not confirm Appellant's claim that he was deprived of the right of cross-examination. The trial court properly sustained the State's objection to a question which had already been asked and answered by the witness. It is proper for the trial court to prohibit repetitious questions and answers in either direct or cross-examination.

Id. at 1069; see also *Bowyer v. State*, 235 A.2d 317, 319 (Md. Ct. Spec. App. 1967). The court in *Bowyer* wrote:

The first error alleged was the refusal of the trial court to permit Bowyer, the appellant, to answer a question from his counsel: "What was your state of mind at this time?" The record discloses, however, that the same identical question had been asked and answered by the same witness immediately prior to the time objection was sustained to the question.

Id.

274. See FED. R. EVID. 403; see also MAUET, *supra* note 1, at 484 (stating that the additional reason prohibiting the repetition of questions because "it places undue emphasis on those questions answered and repeated."); Honorable Edward Rafeedie, *The Conduct Of Trials, The Neglected Area Of Judicial Reform*, 23 SW. U. L. REV. 205, 221 (1994). Rafeedie states that when questions have been asked and answered,

This should be stopped as soon as it becomes apparent, by telling counsel that the witness has already answered the question. Soon, counsel begins to understand that these paraphrased questions have been asked and answered, and will make appropriate objections. There is no need to hear the testimony of the witness two or three times. Often these questions are rhetorical and purely argumentative. Most importantly, they use up necessary time.

Id.

275. See, e.g., *United States v. Caudle*, 606 F.2d 451 (4th Cir. 1979).

One caveat to this objection is where there is more than one defendant or defense attorney, it may also be proper to prevent one defense attorney from repeating a question already asked by another defense attorney.²⁷⁶ However, as illustrated in *United States v. Caudle*,²⁷⁷ preventing the defense from asking a question on the grounds that the opposing party has already asked it may constitute error. In *Caudle*, the court held that,

Repeating the same testimonial matter of the direct examination, by questioning the witness anew on cross-examination, is a process which often becomes desirable in order to test the witness' capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsification.²⁷⁸

The Nevada Supreme Court in *Leonard v. State*,²⁷⁹ sustained the trial court's restriction of counsel's inquiry because a question "had been essentially asked and answered."²⁸⁰ Therefore, slight alterations in the question do not insulate it from the objection of "asked and answered."²⁸¹ In *People v. Abrams*, the trial court properly exercised its discretion by sustaining the State's objection to a repetitive question asking whether an officer had included in her report that the State's occurrence witness informed her that she saw the offender.²⁸² In *Abrams*, immediately prior to posing the question, the defendant asked the officer if she had stated in her report that the occurrence witness had told her that she saw the offender.²⁸³ When counsel "next asked the same question in a slightly different way, the [trial] court sustained the State's objection on the ground that the posed question had been already answered."²⁸⁴ The appellate court affirmed this ruling stating, "Since it had been, the court was correct to prohibit defendant's repetitious inquiry."²⁸⁵

276. See, e.g., *United States v. Miller*, 463 F.2d 600, 601 (1st Cir. 1972); see also 3 WIGMORE, EVIDENCE § 782(4) (Chadbourn rev. 1970).

277. 606 F.2d 451 (4th Cir. 1979).

278. *Id.* at 456 (quoting 3 WIGMORE, EVIDENCE § 782(3) 182 (Chadbourn rev. 1970)).

279. 17 P.3d 397, 408 (Nev. 2001).

280. *Id.* (emphasis added).

281. *Id.*

282. 631 N.E.2d 1312, 1321 (Ill. App. Ct. 1994).

283. *Id.*

284. *Id.*

285. *Id.*; see also LUBET, *supra* note 1, at 301 (stating, "Variations on a theme, however, are permissible, so long as the identical information is not endlessly repeated.").

C. Compound Questions

"A compound question is one that brings up two separate facts within a single question. It is objectionable because any simple answer to the question will be unclear."²⁸⁶ As the court observed in *State v. Sanchez*,

A compound question simultaneously poses more than one inquiry and calls for more than one answer. Such a question presents two problems. First, the question may be ambiguous because of its multiple facets and complexity. Second, any answer may be confusing because of uncertainty as to which part of the compound question the witness intended to address.²⁸⁷

In *Metro Atlanta Trucking Co. v. Kyzer*, counsel asked, "[D]o you have an opinion as to whether [the plaintiff] experienced anticipatory pain or pre-impact fright, shock or terror even before the infliction of the injuries that you saw at autopsy?"²⁸⁸ On appellate review, the court affirmed the ruling of the trial court sustaining the objection and held that the question should have been broken down "into various components rather than into a compound question."²⁸⁹ The question improperly asked the witness whether the plaintiff experienced (a) anticipatory pain, (b) pre-impact fright, (c) shock, (d) terror, (e) before the infliction of the injuries (f) seen at autopsy, thus compounding numerous facts into one question.²⁹⁰

286. MAUET, *supra* note 1, at 487; *see also* Lubet, *supra* note 3, at 214 (stating, "Compound questions . . . are also objectionable as to form.").

287. 923 P.2d 934, 948 (Haw. Ct. App. 1996). The court added:

The confusion caused by a compound question may be easily solved: Where a compound question has been posed, the court may require that its component questions be posed separately. Where a compound question has been posed and answered, the court may require that the answer be clarified so as to eliminate confusion. However, where the answer's content or context makes its meaning clear, no such clarification is needed. Further, even where there is confusion, the court has discretion under [Federal] Rule 611(a) to deny objections on the ground the objecting party has the opportunity to clarify matters on cross-examination.

Id. at 949 n.18 (citing 28 C. WRIGHT & V. GOLD, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 6164, at 354)).

288. 458 S.E.2d 416, 418 (Ga. Ct. App. 1995).

289. *Id.*; *see also* United States v. Cohen, 583 F.2d 1030, 1044 (8th Cir. 1978) (holding that, viewing the record as a whole, the compound questions asked were not prejudicial when the appellant "was given full opportunity" to "clarify" the points).

290. *Kyzer*, 458 S.E.2d at 418.

D. Ambiguous Questions

Ambiguous questions are vague and do not lend towards intelligible answers.²⁹¹ A court's "ruling on whether an ambiguous question calls for an inadmissible answer should not be reversed as clear error when its ruling has a reasonable basis."²⁹² For example, in *Reagan v. Brock*, the First Circuit Court of Appeals reviewed the question, "What was the result of the conversation?" as to whether it was ambiguous.²⁹³ In affirming the trial court's ruling that the question was properly sustained as ambiguous, the court observed,

[O]ur ability to comprehend how this question was understood in the courtroom is vastly inferior to the district judge's. He hears the question with counsel's inflection, perceives the length and character of the pause between question and answer, and rules on the party's objection within the context of prior questioning and strategies.²⁹⁴

E. Questions Calling For Speculative Testimony

Any question that asks a witness to speculate is improper and therefore objectionable.²⁹⁵ The rule's prohibition is founded upon the principle that when testimony is speculative, the witness lacks personal knowledge about matters with which they speculate rendering their testimony irrelevant.²⁹⁶ In *Drackett Products Co. v. Blue*, the Florida Supreme Court observed:

The law seems well established that testimony consisting of guesses, conjecture or speculation—suppositions without a premise of fact—are clearly inadmissible in the trial of causes in the courts

291. See, e.g., LUBET, *supra* note 1, at 300 (observing, "A question is vague if it is incomprehensible, or incomplete, or if any answer will necessarily be ambiguous."); see also R. Collin Mangrum, *Nebraska's Evidentiary Rules Regarding Witnesses*, 28 CREIGHTON L. REV. 55, 127 (1994) ("Although this general objection is often abused as a tactical weapon to signal to the witness to be careful in answering the question or to break the cadence of the examination, it can be the appropriate objection to an inartful or intentionally deceptive question.").

292. *Sweeney v. Bd. of Trs. of Keene State Coll.*, 604 F.2d 106, 109 n.2 (1st Cir. 1979).

293. 628 F.2d 721, 723 (1st Cir. 1980).

294. *Id.* The question was clearly ambiguous and vague as to what specific information counsel sought from the witness. Moreover, it may also have requested a narrative response or requested a hearsay response. See, e.g., MAUET, *supra* note 1, at 486 ("A question must be posed in a reasonably clear and specific manner so that the witness can reasonably know what information the examiner is eliciting.").

295. *Id.* (stating, "Any question that asks the witness to speculate or guess is improper.").

296. See, e.g., FED. R. EVID. 401; see also PARK, *supra* note 11, at 275 (observing, "Objecting to 'speculation' is another way of objecting to either (a) a lack of personal knowledge or (b) expressing an opinion.").

of this country. A statement by a witness as to what action he *would have taken* if something had occurred which did not occur—particularly in those instances where such testimony is offered for the purpose of supporting a claim for relief or damages—or what course of action a person would have pursued under certain circumstances which the witness says did not exist will ordinarily be rejected as inadmissible and as proving nothing.²⁹⁷

In *Blue*, the mother of a seven-year-old boy sued for personal injuries when a can of drain solvent exploded after the boy placed water in the can and recapped it.²⁹⁸ During cross-examination, the mother was asked “if she knew that day what she knew after the accident, that this would explode with water in it, *would* she have kept it on the shelf?”²⁹⁹ The Florida Supreme Court affirmed the ruling of the trial court sustaining the objection and instructing the jury to disregard the answer on the basis that the question improperly called for a speculative answer.³⁰⁰

F. Answer Not Responsive To the Question

When the witness does not directly answer the question asked, the answer given may be irrelevant, prejudicial, and therefore stricken as non-responsive.³⁰¹ Exemplifying this rule is *United States v. Scott*.³⁰² In *Scott*, during cross-examination a witness was asked a question as to the type of

297. 152 So. 2d 463, 465 (Fla. 1963) (emphasis added); see also *Hamilton v. Hardy*, 549 P.2d 1099, 1109 (Colo. Ct. App. 1976) (“What the doctor might or might not have done had he been adequately warned is not an element plaintiff must prove as a part of her case.”).

298. *Blue*, 152 So. 2d at 464.

299. *Id.* (emphasis added).

300. *Id.* at 464-65.

301. See, e.g., FED. R. EVID. 401, 403; see also MAUET, *supra* note 1, at 488 (stating, “An answer that does not directly respond to a question is objectionable as unresponsive.”); *State v. Gray*, 39 P. 1050, 1052 (Kan. 1895). The court in *Gray* writes:

Where a proper question is asked, and an improper answer given, the only remedy of the aggrieved party is by motion to strike [it] out. It is impossible for the court to answer in advance to exclude an improper answer to a proper question. The propriety of the answer cannot, in the nature of things, be determined before it is given.

Id.; see also R. Collin Mangrum, *Nebraska's Evidentiary Rules Regarding Witnesses*, 28 CREIGHTON L. REV. 55, 128 (1994). Mangrum states:

This objection is appropriate only for the examiner, although it is most often raised by the non-examiner. If a witness gives a nonresponsive answer then the examining counsel may properly move to strike the nonresponsive portion of the answer, and perhaps asked for an instruction for the jury to disregard the nonresponsive answer.

Id.

302. 511 F.2d 15 (8th Cir. 1975).

felony he was incarcerated for.³⁰³ The witness responded it “was for chemicals that I bought from the defendant.”³⁰⁴ Consequently, since the answer did not describe the type of felony for incarceration, the Eighth Circuit Court of Appeals held that, “The answer was not responsive to the question asked.”³⁰⁵ A similar result is seen in *Smith v. State*.³⁰⁶ In *Smith*, the court examined a witnesses’ response to the prosecutor’s question, “Now, at that time did you know Jody?” where the witness responded, “Yes, sir,” and then elaborated “by writing him when he was in prison.”³⁰⁷ The court held, “[T]he question asked by the prosecutor did not call for evidence that Smith had a prior record. The question called for a yes or no answer—the witness, on her own volition, elaborated on that answer; thus, her answer was nonresponsive to the prosecutor’s question.”³⁰⁸

However, in *State v. Moss*, after the witness was asked whether it was unusual for people to get watery eyes when accused of a crime, the witness testified, “Yes.”³⁰⁹ Defense counsel then pursued with an inexplicable open-ended follow-up question, “You’re telling me it never happened before?”³¹⁰ The witness explained, “[W]hat he meant was that, in his experience, it is unusual for wrongly accused people to cry, but not those dealing with guilt.”³¹¹ The court held that the witness’ answer “to defendant’s question was directly responsive,” because, “Defendant received no more than an answer to the question he posed.”³¹²

303. *Id.* at 20.

304. *Id.*

305. *Id.*

306. 795 So.2d 788 (Ala. Crim. App. 2000).

307. *Id.* at 822.

308. *Id.*; see also *Esposito v. Winn Mgmt. Corp.*, No. 9482, 1998 WL 439665, at *2 (Mass. App. Ct. July 27, 1998) (observing that the question, “Do you know what it was that caused you to fall?” and the answer, “I believe it was the sloping on the step,” was “the subject of a motion to strike,” and that, “The answer was, at minimum, nonresponsive . . .”). Counsel’s failure to object is typically illustrated when a question calls for a “yes” or a “no,” response. For example, in *Commonwealth v. Santiago*, 670 N.E.2d 199 (Mass. App. Ct. 1996) the prosecutor asked, “Now, do you have an opinion . . . to whether or not this amount of heroin packaged in this manner was intended for distribution or for personal use?” and the witness answered, “Distribution.” The court observed, “The foregoing answers were nonresponsive, but they were not objected to on that ground or any other. . . .” *Id.* at 199.

309. 938 P.2d 215, 219 (Or. Ct. App. 1997).

310. *Id.*

311. *Id.*

312. *Id.*

G. Argumentative Questions

A question that is argumentative "asks the witness to accept the examiner's summary, inference, or conclusion rather than to agree with the existence . . . of a fact."³¹³

Typifying such argumentative questions include, "Dr. Grigson, you're kind of the hatchet man down here for the District Attorney's Office, aren't you?" and "Did you ever meet a person you didn't think was a sociopath?"³¹⁴ Similarly, in *United States v. Micklus*, the question, "It wouldn't bother you any, to come in here and lie from the time you started to the time you stopped, would it?" was sustained as argumentative.³¹⁵ Notably, the Arkansas Supreme Court, in *Dillard v. State*, held the question asking a witness "how far away normal people heard," was argumentative.³¹⁶ The Arkansas Supreme Court examined a similar question in *Self v. Dye*.³¹⁷ In *Self*, the attorney cross-examined a police officer asking, "He stated he didn't know what happened?" to which the officer replied, "Yes."³¹⁸ The attorney then asked, "Is that statement unusual when a man is driving down the highway

313. LUBET, *supra* note 1, at 300; *see also* PARK, *supra* note 11, at 271-72 ("The essential feature of the [argumentative] objection is that counsel is making an argument that should be saved for the summation."). One court observed:

An argumentative question is a faulty form of examination of [a] witness by propounding a question which suggests [the] answer in a manner favorable to the party who advances the question or which contains a statement in place of a question. A question is argumentative if its purpose, rather than to seek relevant fact, is to argue with the witness or to persuade the trier of fact to accept the examiner's inferences. The argumentative question . . . employs the witness as a springboard for assertions that are more appropriate in summation. There is a good deal of discretion here because the line between argumentativeness and legitimate cross-examination is not a bright one.

State v. Sanchez, 923 P.2d 934, 948 (Haw. Ct. App. 1996).

314. *Smith v. Estelle*, 602 F.2d 694, 700 n. 7 (5th Cir. 1979), *aff'd*, *Estelle v. Smith*, 451 U.S. 454 (1981).

315. 581 F.2d 612, 617 n. 3 (7th Cir. 1978); *see also* *Christian v. State*, 639 S.W.2d 78, 81 (Ark. Ct. App. 1982) (holding that the question which asked "the police officer, who took appellant's written statement, if he believed appellant when he said he didn't receive anything" . . . was argumentative and called for the witness to state a conclusion as to appellant's belief."); *Williams v. State*, 188 A.2d 543, 544 (Md. App. 1963) (holding that when the "appellant had pleaded 'not guilty' at a preliminary hearing, but that he had previously admitted using heroin" and subsequently, "The question put to the officer was: 'what made him change his mind when he got before the Judge and told the Judge he was not guilty?'" that, "[t]he question was argumentative . . ."); *Rosenthal v. Farmers Store Co.*, 102 N.W.2d 222, 225 (Wis. 1960) (holding that question to defendant with respect to removing accumulations of gum on the floor: "There is a problem that would warrant more attention than you give it?" was argumentative).

316. 543 S.W.2d 925, 932 (Ark. 1976).

317. 516 S.W.2d 397 (Ark. 1974).

318. *Id.* at 400.

when the light is green and somebody runs into them?”³¹⁹ The court held the question was argumentative.³²⁰ Finally, the Missouri Supreme Court has found that after impeaching a witnesses’ inconsistent answer, it is argumentative to ask her “which is right.”³²¹

H. Questions Calling For Narrative Answers

A narrative question calls for an answer that is usually more than a few sentences long.³²² Consequently, it typically allows the witness to stray into matters that are non-responsive and inadmissible.³²³ The Indiana Supreme Court found no error in the trial court sustaining an objection to the question, “What did you hear Mr. Crooks say?” as narrative in *Newson v. State*.³²⁴ Similarly, the question, “Do you have anything else you desire to say?” was also held to be a narrative question in *State v. Knowles*.³²⁵ Finally in *United States v. Manzano-Excelente*, the question, “[W]ould you please tell us from the time you got to New York until you were arrested, what you heard, what you did?” prompted the court to state, “This question called for the sort of ‘narrative’ answer that is usually disfavored in trial testimony.”³²⁶ Yet in *People v. Kline*, the question as to “why” a defendant brought a gun and fired shots did not call for a narrative answer.³²⁷ Instead, the court stated that when it was posed to a defendant it was directed at “eliciting highly relevant information regarding the defendant’s state of mind at or near the time of the shootings.”³²⁸

I. Questions That Are Collateral As Impeachment or Other Matters

During cross-examination, a matter is collateral if it does not help establish a fact material to the issues in litigation.³²⁹ In *State v. Oswalt*, the Washington Supreme Court observed, “The purpose of the rule is basically

319. *Id.*

320. *Id.*

321. *Lonnecker v. Borris*, 245 S.W.2d 53, 56 (Mo. 1951).

322. *See LUBET, supra* note 1, at 300-01.

323. *See PARK, supra* note 11, at 279 (“If the direct examiner does not provide the witness with direction, the witness may stray into a description of inadmissible matters before counsel has an opportunity to object.”); *see also Mangrum, supra* note 291, at 128 (“Both questions and answers may be appropriately objected to as unnecessarily narrative. The main point is that counsel does not have the opportunity to object to information if a specific question does not precede the answer.”).

324. 721 N.E.2d 237, 239 (Ind. 1999).

325. 946 S.W.2d 791, 795 (Mo. Ct. App. 1997).

326. 934 F. Supp. 617, 624 (S.D.N.Y. 1996).

327. 414 N.E.2d 141, 146 (Ill. App. Ct. 1980).

328. *Id.*

329. *See, e.g., State v. Winters*, 344 P.2d 526, 527 (Wash. 1959) (“The test as to whether a matter is collateral or not is: Could the fact, as to which error is predicated, have been shown in evidence for any purpose independent of the contradiction?”).

two-fold: (1) avoidance of undue confusion of issues, and (2) prevention of unfair advantage over a witness unprepared to answer concerning matters unrelated or remote to the issues at hand.³³⁰ In *United States v. Williamson*, the Seventh Circuit Court of Appeals stated that if the item or statement could not be introduced into evidence for any purpose other than impeachment, it is collateral.³³¹ Therefore, the question is objectionable. Furthermore, in *State v. Larson*, the North Dakota Supreme Court recognized that an additional purpose of this rule is to prevent the creation of mini-trials that invoke confusion and undue consumption of time.³³² Illustrating the application of these principles is *Dempsey v. Shell Oil Co.*, where the plaintiff testified during a personal injury claim, that he had never been terminated from his employment.³³³ The plaintiff made no claim for lost wages or earning capacity.³³⁴ However, the defense sought to introduce impeachment witnesses to testify the plaintiff had been terminated from employment.³³⁵ The court held, "On cross-examination of a witness on collateral or irrelevant matters the answer given by the witness is conclusive and it is error to permit opposing counsel to introduce evidence contradicting the witness's answer."³³⁶ The court reasoned, "[E]vidence of [the plaintiff's] past employment and his departure therefrom was collateral and immaterial to the issues presented in this case since he made no claim for lost earnings or impaired earning capacity."³³⁷ Consequently, the objection to the cross-examination of plaintiff's prior employment was sustained as being collateral.³³⁸

330. 381 P.2d 617, 619 (Wash. 1963).

331. 202 F.3d 974, 979 (7th Cir. 2000); *see also* *State v. Roberts*, 778 S.W.2d 763, 765 (Mo. Ct. App. 1989); *State v. Jackson*, 794 S.W.2d 344, 347 (Mo. Ct. App. 1990) ("A collateral matter is one of no material significance in the case or is not pertinent to the issues as developed."). Indeed, in *State v. Fowler*, 248 N.W.2d 511, 520 (Iowa 1976), defense counsel asked a witness whether he had struck any children, which the witness denied. Counsel then sought to present contradictory evidence which the trial court prohibited. *Id.* The Illinois Supreme Court affirmed the trial court's ruling stating, "[I]t is well settled, however, the right to impeach by prior inconsistent statements is not without limit. The subject of the inconsistent statement, if it is to be admissible, must be material and not collateral to the facts of the case." *Id.* (quoting *State v. Hill*, 243 N.W.2d 567, 571 (Iowa 1976)). Consequently, the court held the impeachment was collateral because "the fact as to which error is predicated could not, over appropriate objection, have been shown in evidence for any purpose independent of the contradiction." *Id.*

332. 253 N.W.2d 433, 436 (N.D. 1977).

333. 589 So. 2d 373, 375 (Fla. Dist. Ct. App. 1991).

334. *Id.*

335. *Id.*

336. *Id.* at 377.

337. *Id.*

338. *Id.* at 379.

J. Questions Asking a Witness If Other Witnesses Are Lying

Generally, it is improper to ask a witness if another witness is lying.³³⁹ Demonstrating the application of this rule is *United States v. Fernandez*.³⁴⁰ In *Fernandez*, the prosecutor asked the defendant “So, Officer Rivera who testified yesterday, he’s lying?”³⁴¹ The First Circuit Court of Appeals stated, “We have recently emphasized that ‘counsel should not ask one witness to comment on the veracity of the testimony of another witness.’”³⁴² The court reasoned that this “rule reserves to the jury questions of credibility and thus makes it improper to induce a witness to say another witness lied on the stand.”³⁴³ Analogously, in *State v. Manning*,³⁴⁴ the prosecutor’s questions

339. See, e.g., *Scott v. United States*, 619 A.2d 917, 924-25 (D.C. 1993) (“We have repeatedly condemned questioning by counsel which prompts one witness to suggest that he or she is telling the truth and that contrary witnesses are lying.”); *State v. Emmett*, 839 P.2d 781, 787 (Utah 1992) (stating:

The question is improper because it is argumentative and seeks information beyond the witness’s competence. The prejudicial effect of such a question lies in the fact that it suggests to the jury that a witness is committing perjury even though there [may be] other explanations for the inconsistency. In addition, it puts the defendant in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury.);

People v. Riley, 379 N.E.2d 746, 752 (Ill. App. Ct. 1978) (holding that asking the defendant on cross-examination whether the State’s witnesses had told “a bunch of lies” was improper); *United States v. Richter*, 826 F.2d 206, 208 (2d Cir. 1987) (“Prosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper.”); *State v. Casteneda-Perez*, 810 P.2d 74, 79 (Wash. Ct. App. 1991) (stating that the prosecutor’s use of “were they lying” questions during cross-examination of defendant invaded the province of the jury and was misleading and unfair in that the practice made it appear that acquittal required the jury to conclude that police officers lied and failed to account for the fact that testimony could have differed even though witnesses were all endeavoring in good faith to tell the truth); *State v. Flanagan*, 801 P.2d 675, 679 (N.M. Ct. App. 1990) (imposing a strict prohibition upon asking a defendant whether another witness was mistaken or was lying); see also *United States v. Akitoye*, 923 F.2d 221 (1st Cir. 1991) (recognizing that “were they lying” questions are improper).

340. 145 F.3d 59 (1st Cir. 1998).

341. *Id.* at 64 n.1.

342. *Id.* (quoting *United States v. Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996)).

343. *Id.*; see also *Commonwealth v. Martinez*, 726 N.E.2d 913, 923 n.10 (Mass. 2000) (noting that it was “improper” to ask the defendant to testify as to the credibility of other witnesses when the prosecutor asked the defendant whether a witness, “Are you saying Melissa was lying?”); *Commonwealth v. Ward*, 446 N.E.2d 89, 90 (Mass. App. Ct. 1983) (finding that asking a defendant whether a witness lied during his or her testimony is improper and indicating that the error is heightened when a defendant is asked to comment on the testimony of a police officer was “lying in his testimony.”); *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (noting that it is the general rule that asking “were they lying” questions of the defendant has no probative value and is improper and argumentative); *State v. Flanagan*, 801 P.2d 675, 679 (N.M. 1990) (holding that it “will impose a strict prohibition upon asking the defendant if another witness is ‘mistaken’ or ‘lying.’”); *People v. Adams*, 148 A.D.2d 964 (N.Y. Sup. Ct. 1989) (requiring defendant to characterize police testimony as a “lie” during cross-examination is improper and a tactic to be condemned); *State v. Emmett*, 839 P.2d 781, 786-87 (Utah 1992) (holding that asking the defendant to comment on the truthfulness of another witness’ testimony is improper and prejudicial and that the “question is improper because it is argumentative and seeks information beyond the witness’s competence.”); *State v. Casteneda-Perez*, 810 P.2d 74, 78 (Wash. Ct. App. 1991) (noting that the practice of asking the defendant whether another witness had lied during his or her testimony has been “generally condemned”);

such as, “You don’t want to call anybody a liar but your mom is probably lying?” and “Everybody is lying in this case except you, Mr. Manning?” were found to be similarly objectionable by the Kansas Supreme Court.³⁴⁵

However, the Minnesota Supreme Court, for example, has recognized that an exception to this prohibition occurs when a witness has opened the door by testifying about the veracity of other witnesses on direct examination.³⁴⁶ Illustrative of this rule is *People v. Overlee*.³⁴⁷ Defense counsel asked the defendant to explain the discrepancies between his own testimony and the testimony of a police officer.³⁴⁸ The defendant responded, “Officer Santana is a liar.”³⁴⁹ As a result, on cross-examination and again on re-cross, the prosecutor asked the defendant whether it was in fact his position that the officer was lying.³⁵⁰ On appellate review, the court recognized that when the defendant himself places the credibility of other witnesses at issue, the prosecutor properly questioned the defendant as to the veracity of other witnesses.³⁵¹ Consequently, the court held that “were they lying” questions are not always improper, entrusting to the trial court discretion to determine the propriety of such questions.³⁵²

IX. ATTORNEY SPEAKING OBJECTIONS

When objecting, counsel need only briefly state their objection and the grounds that support it. A speaking objection is one which goes beyond “the simple state-the-grounds formula . . .”³⁵³ Therefore, opposing counsel’s speaking objections are objectionable.³⁵⁴ In *Michaels v. State*,³⁵⁵ the court observed:

State v. Skipper, 446 S.E.2d 252, 273 (N.C. 1994) (holding it is improper to ask a witness, “Are you telling this jury the truth?” because the credibility of a witness is for the jury to decide).

344. 19 P.3d 84, 102 (Kan. 2001).

345. *Id.* Questions that ask a witness if another witness is lying have also been characterized as argumentative. See *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (“As a general rule, ‘were they lying’ questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence.”); *State v. Morales*, 10 P.3d 630, 633 (Ariz. Ct. App. 2000) (recognizing that “were they lying” questions are sometimes viewed as argumentative).

346. See, e.g., *Pilot*, 595 N.W.2d at 518.

347. 236 A.D.2d 133 (N.Y. App. Div. 1997).

348. *Id.* at 137.

349. *Id.*

350. *Id.*

351. *Id.* at 137-38.

352. *Id.* at 137.

353. See LUBET, *supra* note 1, at 273.

354. CHARLES E. JOERN JR., & ROBERT W. VYVERBERG, PROTECTING THE RECORD AND

[A]ll trial lawyers know that so-called speaking objections are improper, as they constitute nothing less than unauthorized communications with the jury. Such objections characteristically consist of impermissible editorials or comments, strategically made by unscrupulous lawyers to influence the jury. They are distinguishable from legitimate objections which simply state legal grounds that arguably preclude the introduction of the evidence at issue. Where an objection requires more than a simple statement of such legal grounds, experienced trial lawyers know they need to seek a side bar conference or ask the court to excuse the jury so that more thorough arguments can be made.³⁵⁶

Exemplifying the impropriety of speaking objections in *Michaels*, the defense attorney objected in the presence of the jury by stating, "Well, Judge, I am going to strongly object to this procedure . . . I feel that I am being sandbagged here and I don't appreciate it."³⁵⁷ Based upon repeated examples of similar speaking objections, the trial court was found to have properly held counsel in criminal contempt.³⁵⁸

Similarly in *Tanner v. State*,³⁵⁹ the Mississippi Supreme Court recognized the objection, "Your honor, it doesn't matter what the answer is. He just wants to make a statement. He doesn't care what this witness says," as an improper speaking objection, but not sufficient to warrant reversal.³⁶⁰

Finally, one appellate court has condoned a trial court's blanketed prohibition from either counsel making a speaking objection at any time during the trial.³⁶¹ Hence, in *Gonzalez v. State*, the trial judge admonished counsel by stating, "Please no more speaking objections either side. I want to hear objection and both sides be quiet."³⁶² Subsequently, even when a

PERFECTING THE APPEAL 96 (2000) ("[In] order to preserve the record, trial counsel should object . . . if speaking objections are made while objecting to counsel's proffer of evidence . . .").

355. 773 So. 2d 1230 (Fla. Dist. Ct. App. 2000).

356. *Id.* at 1231; see also MAUET, *supra* note 1, at 468 ("If you wish to argue the matter, or your opponent attempts to make a long-winded, argumentative speech before the jury, ask for a side-bar conference. In that way the arguments on the objection can, as they should, be made without the jury hearing them.").

357. *Michaels*, 773 So. 2d at 1231.

358. *Id.*; see also, e.g., Burton Young & Mitchell K. Karph, *Winning Trial Prep*, 21 FAM. ADVOC. 9 (1998). Young and Karph write:

If the judge has a reputation for low tolerance, don't plan to test it. For example, if you find out that the judge prefers short evidentiary objections, complain when opposing counsel makes speaking objections that go on and on. If the judge is upset by your opponent's behavior, he may love your company.

Id. at 9.

359. 764 So. 2d 385 (Miss. 2000).

360. *Id.* at 404.

361. See *Gonzalez v. State*, 777 So. 2d 1068 (Fla. Dist. Ct. App. 2001).

362. *Id.* at 1070.

party stated the grounds for their objection as briefly as, "Objection, hearsay," the court responded, "Counsel, just about two minutes ago I advised you all an objection is one word. I heard several from you [defense counsel] and I heard several from you [prosecutor]. No more. One word only."³⁶³ On appellate review, the actions of the trial court were found proper.³⁶⁴

X. OBJECTIONS TO THE CONDUCT OF THE JUDGE

Primarily by inadvertence, a judge may do or say something "in the presence of the jury which may prejudice the client's case."³⁶⁵ In such a circumstance, the behavior of the trial judge is objectionable.³⁶⁶ As observed by the Iowa Supreme Court, "This is important because jurors are particularly sensitive to a judge's views. Any indication that a judge feels one way or another toward the parties, counsel, and witnesses might influence the jury more than the evidence."³⁶⁷ Consequently, in *United States v. Brown*, the Fifth Circuit Court of Appeals stated that lawyers "should be free to challenge . . . a court's perceived partiality without the

363. *Id.*

364. *Id.* at 1071-72.

365. PARK, *supra* note 11, at 19.

366. It can be difficult to make a record on the basis of this objection because:

A transcript merely reflects the words that were spoken at trial. It does not record how the words were spoken, or what, if any, reaction there was to those words. A transcript does not reflect the volume of the judge's voice, the tone of the voice, or the judge's facial expressions. Moreover, the transcript does not reflect the jury's reaction to the judge's comments or questions. Did some jurors, in response to the judge's questions, nod their heads in approval? Did some roll their eyes upon hearing the witness' answer to the judge's questions? Did some jurors sit more erect when the judge asked questions or made comments? Lastly, the transcript does not reflect the witness' reactions to the judge's questioning. Did the witness become shaken? Did the witness' demeanor change?

Michael Pinard, *Limitations On Judicial Activism In Criminal Trials*, 33 CONN. L. REV. 243, 293-94 (2000).

367. *State v. Gentile*, 515 N.W.2d 16, 18 (Iowa 1994); *see also* *Spear v. Commonwealth*, 194 S.E.2d 751, 753 (Va. 1973) (stating:

We have repeatedly said that a judge, in the trial of a case before a jury, should abstain from expressing or indicating by word, deed or otherwise his personal views upon the weight or quality of the evidence. Expressions of opinion, or remarks, or comments upon the evidence which have a tendency to indicate bias on the part of the trial judge, especially in criminal cases, are regarded as an invasion of the province of the jury and prejudicial to an accused.)

(citations omitted); LaDoris H. Cordell & Florence O. Keller, *Pay No Attention to the Woman Behind the Bench: Musings of a Trial Court Judge*, 68 IND. L. J. 1199, 1204 (1993) ("My regal trappings and my control of the courtroom may be perceived as evidence that I am all knowing and above reproach.").

court misconstruing such a challenge as an assault on the integrity of the court.”³⁶⁸ Hence, counsel must state a timely objection, on the record, to the behavior of the judge as to what has allegedly transpired.³⁶⁹

A. Judge Facial Expressions

In *Brown v. State*, trial counsel claimed, “[T]he trial judge rolled his eyes and put his hands over his face—actions the trial attorney interpreted as expressions of disbelief of the testimony or dissatisfaction with counsel’s abilities.”³⁷⁰ The court ruled that where “a trial judge inadvertently indicates, through his or her facial expressions or body language, a personal opinion on the evidence to those present in the courtroom . . . it is incumbent on the party who feels aggrieved to object and request curative instruction.”³⁷¹

Applying this principle is *State v. Larmond*.³⁷² In *Larmond*, the witnesses agreed that during the testimony of State’s witnesses the judge often smiled, “nodding his head up and down in agreement, muttering or

368. 72 F.3d 25, 29 (5th Cir. 1995). The court in *State v. Jenkins*, 445 S.E.2d 622 (N.C. Ct. App. 1994), exemplifies a judge’s reaction to this type of objection:

MR. AUS: Your Honor, I would also like to have it put on the record that during about forty-five minutes of Mr. Jenkins’ testimony that you were staring at the wall and you had your back turned to the jury.

THE COURT: Yes, I sure did And I may do it again during the cross-examination. I mean, I can look anywhere I want to look but if you want to tell me something different, we can discuss that now. Where would you like for me to look? Mr. Aus, where would you like me to look during anybody’s examination . . . ?

MR. AUS: Well, Judge, you didn’t have your back—Let me put it this way, your back was to the wall.

THE COURT: You may note that it was forty-five minutes, I believe it was. So how many minutes did I look at the other witnesses when they were testifying? Did you keep a record of that?

Id. at 624-25; see also Rochelle L. Shoretz, *Let the Record Show: Modifying Appellate Procedures For Errors of Prejudicial Nonverbal Communication By Trial Judges*, 95 COLUMN. L. REV. 1273, 1284 (1995).

369. See *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950). The court outlined the objection procedure:

[I]f the intonations and gestures of a trial judge are erroneously detrimental to a defendant in a criminal case it is the duty of counsel to record fully and accurately, at the time and on the record, although not in the hearing of the jury, what has transpired. In such a situation it is as much his duty to make that record as it is his duty to record his objections to the charge, as the Rules require, before the jury leaves the room. If the representations then made by counsel are not accurate, the court may say so. But if there is a serious question as to whether the jury may have derived some unintended meaning or have been likely to infer erroneously from the gestures and intonations of the judge, he should emphatically instruct them so as to remove any possible erroneous impression from their minds.

Id. at 402.

370. 706 So. 2d 74, 75 (Fla. Dist. Ct. App. 1998).

371. *Id.* The appellate court observed, “We are not comforted by the trial judge’s defense that: ‘I’ve been a trial judge for 24 years, and I think I have pretty well learned to look like I’m asleep during most of the time, even though I’m listening.’” *Id.* at 75 n.1.

372. 244 N.W.2d 233 (Iowa 1976).

murmuring like 'Uh-hum.'"³⁷³ The record also revealed that "[t]he judge frequently expressed disapproval or disbelief of defense witnesses by 'a shaking, a negative indication of the head' and an audible sound 'Hump!' and 'Hu!' and 'No.'"³⁷⁴ The Iowa Supreme Court found such judicial behavior objectionable and, combined with other similar egregious acts, sufficient to warrant reversal.³⁷⁵

Notably, in *United States v. White*, defense counsel objected to the judge falling asleep during counsel's opening statement and he accordingly claimed the judge's behavior prejudiced the defendant.³⁷⁶ The Fifth Circuit Court of Appeals responded, "Although a judge falling asleep is unfortunate, we believe that any possible prejudice was so attenuated as to be nonexistent."³⁷⁷ The court added, "We find it difficult to believe that the jury would infer from this judicial somnolence any judgment concerning the validity of counsel's arguments."³⁷⁸

B. Judge Commenting On the Credibility of Witnesses or Evidence

The North Carolina Supreme Court has observed that, as a general rule, "a remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial."³⁷⁹ For example, while ruling on an objection in *State v. Bideaux*, the trial court stated, "I think the evidence does reflect it, counsel."³⁸⁰ The Nebraska Supreme Court held the statement by the trial court to be tantamount to merely saying, "Overruled," and therefore it was not prejudicial to the defendant.³⁸¹

373. *Id.* at 235.

374. *Id.*

375. *Id.* at 235-36.

376. 589 F.2d 1283 (5th Cir. 1979).

377. *Id.* at 1289.

378. *Id.* at 1288.

379. *State v. Cox*, 169 S.E.2d 134,138 (N.C. Ct. App. 1969); *see also, e.g., Liteky v. United States*, 510 U.S. 540 (1994). The court in *Liteky* stated:

[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge [But] they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 555.

380. 365 N.W.2d 830, 834 (Neb. 1985).

381. *Id.* at 835.

However, in *State v. Rodriguez*, the trial court judge did make an objectionable comment.³⁸² During cross-examination of the only witness who could connect the defendant to the crime, defense counsel objected that a detective seated at the prosecution table was coaching the witness.³⁸³ The trial judge responded by stating, “No, he wasn’t. I was watching him.”³⁸⁴ The Nebraska Supreme Court observed that this statement was objectionable because “the trial judge’s comment prejudiced [the defendant’s] case [and] because the comment bolstered the credibility of the key prosecution witness, enhanced the witness’ credibility, [and] it also had the effect of making the judge a witness in the trial.”³⁸⁵

XI. OBJECTIONS DURING CLOSING ARGUMENT

The Wyoming Supreme Court has observed, “The purpose of closing arguments is to allow counsel to offer ways of viewing the significance of the evidence.”³⁸⁶ Because closing arguments are not evidence, juries are instructed to that effect.³⁸⁷ “Yet, modern advocacy has tended to lean toward the increased necessity and frequency of interrupting counsel’s closing argument by posing objections to improper argument.”³⁸⁸ The most common reason for an objection during closing argument is an attorney argues matters outside the evidence of the case. Such remarks amount to unsworn testimony by counsel, which is not subject to cross-examination,³⁸⁹ and

382. 509 N.W.2d 1 (Neb. 1993).

383. *Id.* at 3.

384. *Id.*

385. *Id.*; see also *State v. Robinson*, 165 N.W.2d 802, 806 (Iowa 1969) (holding that a court presiding in a jury trial “cannot comment on the facts”) (quoting *State v. Fiedler*, 152 N.W.2d 236, 240 (Iowa 1967)).

386. *Browder v. State*, 639 P.2d 889, 893 (Wyo. 1982); see also *Hopkinson v. Shillinger*, 645 F. Supp. 374, 395 (D.Wyo. 1986); *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. 1980); Rosemary Nidiry, *Restraining Adversarial Excess In Closing Argument*, 96 COLUM. L. REV. 1299, 1304 (1996) (“[In] closing argument . . . counsel is released from the highly-regulated process of fact-finding and permitted to use evidence combined with rhetorical skills to convince the [jury] that her inferences are correct.”); LUBET, *supra* note 1, at 496; *Virgilio v. State*, 834 P.2d 1125, 1127 (Wyo. 1992) (“The purpose of closing argument is to allow counsel to offer ways of viewing the significance of the evidence.”); *Pearson v. State*, 811 P.2d 704, 708 (Wyo. 1991); see also, e.g., *Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992) (holding that proper jury argument consists of: “(1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to argument of opposing counsel.”); MAUET, *supra* note 1, at 401 (2000) (observing objections in closing argument parallel the objections available during opening statement).

387. See, e.g., *Lee v. State*, 11 S.W.3d 553, 561 (Ark. 2000); see also *Lovett v. Union Pac. R.R. Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000) (“Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any arguments, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you.”).

388. Craig Lee Montz, *Why Lawyers Continue To Cross the Line In Closing Argument: An Examination of Federal and State Cases*, __ OHIO N.U. L. REV. __ (2001) (forthcoming).

389. See, e.g., Marc R. Kantrowitz, Kevin Connelly & Jennifer Bush, *Closing Arguments: What*

therefore, the argument is unethical. Consequently, during closing argument, it is objectionable for counsel to argue any facts or evidence outside the record, unless it is a common fact, well known by the jury.³⁹⁰

A. Golden Rule Arguments

A Golden Rule argument "suggests to jurors that they put themselves in the shoes of one of the parties, and is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence."³⁹¹ In a civil case, it is objectionable when the argument strikes "at the sensitive area of financial responsibility and hypothetically requests the jury to consider how much they would wish to receive in a similar situation."³⁹² Golden rule violations and objections apply in civil and criminal cases.³⁹³

An objectionable "golden rule" argument was examined in *World Wide Tire Co. v. Brown*.³⁹⁴ In *Brown*, the plaintiff's counsel argued to the jury, "We are instructed that we should do unto others as we would have them do unto us" and asked the jurors to consider what amount of damages they would regard as sufficient if they had suffered similar injuries.³⁹⁵ The appellate court ruled the argument was objectionable because the jurors were asked "to give the plaintiff what they would want if they were injured, rather than what the evidence showed plaintiff was entitled to receive as

Can and Cannot Be Said, 81 MASS. L. REV. 95 (1996).

390. See, e.g., Nidiry, *supra* note 386.

391. *Simmonds v. Lowery*, 563 So. 2d 183, 184 (Fla. Dist. Ct. App. 1990) (quoting *Cummins Alabama Inc. v. Allbritten*, 548 So. 2d 258, 263 (Fla. Dist. Ct. App. 1989)); *Puckett v. State*, 918 S.W.2d 707 (Ark. 1996); *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir. 1982) (observing that a Golden Rule argument asks the jury to place itself in the plaintiff's position); *Dole v. USA Waste Servs. Inc.*, 100 F.3d 1384, 1388 (8th Cir. 1996) (holding Golden Rule urges departure from neutrality); *Metro. Dade County v. Zapata*, 601 So. 2d 239, 241 (Fla. Dist. Ct. App. 1992) (stating that a "golden rule" argument is "impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence."); *Opatut v. Guest Pond Club Inc.*, 373 S.E.2d 372, 376 (Ga. Ct. App. 1988) (stating the "Golden Rule" argument urges "the jurors to place themselves in the position of [the plaintiff] or to allow such recovery as they would wish if in the same position.") (quoting *Earl v. Edwards*, 161 S.E.2d 438, 440 (Ga. Ct. App. 1968)).

392. *Shaffer v. Ward*, 510 So. 2d 602, 603 (Fla. Dist. Ct. App. 1987); see also LUBET, *supra* note 1, at 496 ("It is improper to ask the jury to put itself in the shoes of any of the parties, since this is really a direct appeal to the juror's emotions and hence violates what is called the 'golden rule.'").

393. See, e.g., Dale Alan Bruschi, *Evidence: 1992 Survey of Florida Law*, 17 NOVA L. REV. 255 (1992); see also James D. Kirk & Laura N. Sylvester, *Traversing the Slopes of Closing Argument*, LA. B. J., at 327 (Dec. 1997) (noting an exception to the "golden rule" that, "it is proper to ask the jury to place itself in a party's shoes with respect to liability.").

394. 644 S.W.2d 144 (Tex. Ct. App. 1982).

395. See *id.* at 145.

compensation.”³⁹⁶ Similarly, in *Dejesus v. Flick*,³⁹⁷ the Nevada Supreme Court held counsel’s argument was objectionable when he asked them to “tap into feelings” about the plaintiff’s fears, in light of her physical condition, and to “send a message” to law firms that try to prevent injured persons from recovering stating, “that’s what the power brokers of the world do to people like you.”³⁹⁸ The court observed, “We have previously held that such ‘golden rule’ arguments are forbidden because they interfere with the jury’s objectivity.”³⁹⁹

Exemplifying the criminal application of this prohibition, a prosecutor made an objectionable “golden rule” argument stating, “It’s a gun. It’s a real gun. It’s a gun with a laser on it. Just imagine how terrifying this laser would be *if it was on your chest?*”⁴⁰⁰

B. Attacks On Opposing Counsel

Courts find it objectionable for counsel to refer to the personal peculiarities and idiosyncrasies of opposing counsel during closing argument.⁴⁰¹ Aside from numerous unethical reasons, it is simply not a proper comment upon the evidence to attack opposing counsel.⁴⁰² Typically,

396. *Id.* at 146.

397. 7 P.3d 459 (Nev. 2000).

398. *Id.* at 463.

399. *Id.* at 464; *see also* *Boyd v. Pernicano*, 385 P.2d 342, 343 (Nev. 1963) (finding it improper to ask the jurors to place themselves in the shoes of the victim because such argument interferes with the objectivity of the jury); *DuBois v. Grant*, 835 P.2d 14, 16 (Nev. 1992) (recognizing the golden rule argument as the impermissible suggestion that the jurors trade places with the victim); *McGuire v. State*, 677 P.2d 1060, 1064 (Nev. 1984).

400. *DeFreitas v. State*, 701 So. 2d 593, 601 n.7 (Fla. Dist. Ct. App. 1997).

401. *See, e.g., United States v. Young*, 470 U.S. 1, 8-9 (1985) (stating that a personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal); *see also* Michael J. Ahlen, *The Need For Closing Argument Guidelines In Jury Trials*, 70 N.D. L. REV. 95, 107 (1994) (stating that in closing argument to the jury, the lawyer may not “make personal attacks on other attorneys.”); *Amelia’s Auto., Inc. v. Rodriguez*, 921 S.W.2d 767, 773-74 (Tex. Ct. App. 1996) (noting that lawyer’s criticism of opposing counsel during cross-examination of opposing party was prohibited, as it violated state ethical rules and was incurably prejudicial to jury; case remanded for new trial); *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753, 758 (Tex. Ct. App. 1992) (recognizing that attacks upon the integrity of opposing counsel are categorically prohibited); *State v. Boetti*, 699 A.2d 585, 589 (N.H. 1997) (“Personal attacks directed to the ethics and integrity of opposing counsel are unquestionably inappropriate.”); *United States v. Mealy*, 851 F.2d 890, 904 (7th Cir. 1988) (noting that attorneys “have an ethical obligation to refrain from personal attacks on opposing counsel.”); *Eizerman v. Behn*, 132 N.E.2d 788, 799 (Ill. App. Ct. 1956) (recognizing that abusive or insulting language directed toward opposing counsel at trial constitutes contemptuous conduct).

402. *Compare* *Redish v. State*, 525 So. 2d 928, 931 (Fla. Dist. Ct. App. 1988) (finding prosecutor’s reference to defense counsel’s alleged “cheap tricks” constituted an improper personal attack on defense counsel), *with* *United States v. Mireles*, 673 F.2d 756, 758-59 (5th Cir. 1982) (*per curiam*) (showing that prosecutor’s closing comment about defense counsel’s ingenious use of overwhelmingly unfavorable evidence was not reversible error given strength of that evidence against defendant), *and* *United States v. Van Scoy*, 654 F.2d 257, 267 n.10 (3d Cir. 1981) (showing that prosecutor’s closing comment on defense counsel’s objections to cross examination of

counsel refers to opposing counsel in an improper attempt to demonstrate she is not credible. This action is objectionable, improper, and can warrant a new trial.⁴⁰³ However, in the criminal context, it has been found that a prosecutor does have the right to comment on the defense counsel's argument during summation in limited circumstances without impermissibly attacking defense counsel.⁴⁰⁴

Exemplifying an objectionable attack upon opposing counsel is *State v. Lyles*.⁴⁰⁵ The prosecutor in *Lyles* attacked opposing counsel during closing argument stating, "How do you explain the keys were in his pockets? Police Officer Yates didn't lie. Defense counsel is either confused or she's lying or trying to mislead you."⁴⁰⁶ Equally objectionable is suggesting that an attorney's case is based upon "trickery."⁴⁰⁷ Analogously, the prosecutor's statement, "See this man here who claims to be a lawyer in good standing . . . [t]hat is the same guy who is going to get up when I sit down and try to tell you what the evidence showed,"⁴⁰⁸ has been recognized as an objectionable and improper attack upon opposing counsel.

defendant was not reversible error because judge criticized comment). See also Lawrence Delaney, *Prosecutorial Misconduct*, 71 GEO. L.J. 589, 654 n.2201 (1982); Candice D. Tobin, *Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law*, 24 NOVA L. REV. 35, 60 (1999) ("Courts do not condone personal attacks on defense counsel because they are an improper trial tactic that can poison the minds of the jury.").

403. See, e.g., *Fryer v. State*, 693 So. 2d 1046, 1051 (Fla. Dist. Ct. App. 1997) (finding prosecutor's statement that "he knows that his client is guilty," which was made shortly after defense counsel concluded arguing that the evidence had failed to prove his client guilty, "constituted a direct attack on the defense attorney's character, essentially calling him a liar."); cf. *Lewis v. State*, 711 So. 2d 205, 207 (Fla. Dist. Ct. App. 1998) (finding prosecutor's statement that manner in which defense questioned the evidence was "lame," constituted an improper attack on defense counsel).

404. See *United States v. Caputo*, 808 F.2d 963, 968 (2d Cir. 1987) (holding that the government's characterizations of the "misrepresentations and sheer inventions" of defense counsel were appropriate responses because the defense counsel made numerous statements during closing argument requiring the judge to reprimand him for statements comparing the government's investigatory tactics to "Hitler's Germany"); *United States v. Praetorius*, 622 F.2d 1054, 1060-61 (2d Cir. 1979) (holding that the defense attorney's claims of a "frame up" or attempt to "dupe" the jury "rendered quite proper the relatively mild response of the Assistant United States Attorney" in criticizing the defense counsel's attacks on the integrity of the government's case and the good faith of the government's agents, witnesses, and prosecutorial staff); *United States v. Marrale*, 695 F.2d 658, 667 (2d Cir. 1982) (stating that the prosecution's statements in response to defense counsel's arguments were provoked by a "permissible desire to dispute defense histrionics."); see also LUBET, *supra* note 1, at 496 ("It is always improper to engage in personal attacks on opposing counsel or the other parties in the trial. This should never be done for both legal and persuasive reasons.").

405. 996 S.W.2d 713 (Mo. Ct. App. 1999).

406. *Id.* at 716; see also *State v. Baruth*, 691 P.2d 1266, 1271 (Idaho Ct. App. 1984) (recognizing that it is misconduct for a prosecutor to disparage a defense attorney in closing argument).

407. See *Tabor v. O'Grady*, 157 A.2d 701 (N.J. Super. Div. 1960); see also Jeffery A. Peck, *Closing Argument*, 194 N.J. LAW 38, 41 (1998).

408. *Del Rio v. State*, 732 So. 2d 1100, 1102 (Fla. Dist. Ct. App. 1999).

C. Personal Opinions and Beliefs

It is objectionable for an attorney to “assert personal knowledge of facts in issue . . . 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.”⁴⁰⁹ A statement of personal belief inevitably suggests that the lawyer has access to off-the-record information, and therefore invites the jury to decide the case on the basis of non-record evidence.⁴¹⁰ Typifying such objectionable comments are the expressions “I think” and “I believe,” which unless clearly and directly linked to the evidence, are generally improper.⁴¹¹

In *Dejesus v. Flick*,⁴¹² counsel’s closing argument included:

I guarantee you if I’d have hired Oliveri, you’d have heard that [the plaintiff] had all these problems. I guarantee you that. If I’d have given him fifteen hundred bucks (\$1500.00), he’d have come in and he would have been able to concur with Ford [plaintiff’s expert]. That’s the way it works. That’s the real world. See, you folks don’t know that. But I’ve been doing this for twenty years and that’s the way it’s done⁴¹³

In sustaining counsel’s objection on appellate review, the Nevada Supreme Court recognized that the argument “blatantly violated SCR 173, which provides, “A lawyer shall not . . . state a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil

409. See LUBET, *supra* note 1, at 496 (quoting Rule 3.4(e), MODEL RULES OF PROFESSIONAL CONDUCT); see also *United States v. Young*, 470 U.S. 1, 8-9 (1985) (“Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case.”); *Michael v. State*, 529 A.2d 752 (Del. 1987) (stating a lawyer is prohibited from asserting personal knowledge or opinion regarding facts at issue, except when testifying as a witness); *Miami Coin-O-Wash, Inc., v. McGough*, 195 So. 2d 227, 229 (Fla. Dist. Ct. App. 1967) (“An attorney should not assert in argument his personal belief in his client nor in the justice of his cause. By doing so, an attorney . . . becomes an additional witness for his client, not subject to cross-examination.”); *Bradley R. Johnson, Closing Argument: Boom To The Skilled, Bust To The Overzealous*, 69 FLA. B.J. 12, at 12 (1995) (“It seems axiomatic that remarks by trial counsel which place the lawyer in the role of witness [or] commentator . . . are improper.”); see e.g., *Patrick Furman, Avoiding Error In Closing Argument*, 24 COLO. LAW. 33, 33 (“Counsel may not express personal opinions concerning the evidence or witnesses.”).

410. See LUBET, *supra* note 1, at 496; see also *PARK*, *supra* note 11, at 383 (“The attorney is not supposed to confuse the role of advocate with that of witness.”).

411. MAUET, *supra* note 1, at 494 (stating, such phrases “such as *I think* or *I believe* are best left out of your trial vocabulary.”); F. LEE BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 25:16 (2d ed. 1985) (“If the opinion is expressly or inferentially based on facts not shown by the evidence produced at trial,” the jury may give it weight which is not deserving). See generally James W. Gunson, *Prosecutorial Summation: Where Is the Line Between “Personal Opinion” and Proper Argument?*, 46 ME. L. REV. 241 (1994).

412. 7 P.3d 459 (Nev. 2000).

413. *Id.* at 462.

litigant.”⁴¹⁴ Accordingly, the court found the argument constituted an objectionable personal opinion by counsel.

Numerous courts, however, have declined to find such phrases such as “I believe” and “I feel,” as objectionable personal beliefs warranting reversal. Demonstrating this disinclination is the Alabama Supreme Court’s ruling in *Ex parte Rieber*:⁴¹⁵

Furthermore, we view those comments that the prosecutor prefaced with “I think,” “I believe,” “I feel,” “I am satisfied,” and “I have no doubt,” as expressing his reasonable impressions from the evidence. . . . We note, however, that even if these comments were to be viewed as expressions of the prosecutor’s personal opinions and, thus, as “crossing the line” as permissible argument, they nonetheless, would not constitute reversible error.⁴¹⁶

414. *Id.* Compare *Yates v. State*, 734 P.2d 1252, 1255 (Nev. 1987) (asserting that it was improper to characterize a doctor’s testimony as “melarky,” “outright fraud,” or to accuse the doctor of “crawl[ing] up on the witness stand.”); *Sipsas v. State*, 716 P.2d 231, 234 (Nev. 1986) (finding it improper to call a medical expert a “hired gun from Hot Tub Country” and “a living example of Lincoln’s law; [y]ou can fool all of the people enough of the time.”); *Owens v. State*, 620 P.2d 1236, 1239 (Nev. 1980) (holding that it was improper to argue “I was brought up to believe that there is some good in all of us. For the life of me, on the evidence presented to me, I can’t see the good in [this defendant].”), and *Dejesus*, 7 P.3d at 464, with *United States v. McCaghren*, 666 F.2d 1227, 1232 (8th Cir. 1981) (holding that a prosecutor’s comment that defendant was “guilty as sin” was not a statement of personal belief because it was preceded and followed by references to the government’s overwhelming evidence); *United States v. Barbosa*, 666 F.2d 704, 709 (1st Cir. 1981) (resolving that the prosecutor’s closing argument statement “[t]he government told you” was not a personal endorsement of the defendant’s guilt because it was meant as a summary of evidence); *United States v. Singer*, 660 F.2d 1295, 1303-04 (8th Cir. 1981) (reasoning that the prosecutor’s opening statement did not express personal belief about defendant’s guilt because it was merely related to the government’s theory of the case); *United States v. Van Scoy*, 654 F.2d 257, 267 (3d Cir. 1981) (holding that the prosecutor’s argument did not suggest outside personal knowledge of incriminating information because it was based on evidence); *United States v. Segal*, 649 F.2d 599, 604 (8th Cir. 1981) (concluding that the prosecutor’s opinion on the merits of the case was not personal opinion because it was properly based on evidence in the record). Cf. *United States v. Flaherty*, 668 F.2d 566, 597 (1st Cir. 1981) (holding that the prosecutor’s statement that “United States does not shrink from” burden of proof was not reversible error because it did not suggest the prosecutor’s personal knowledge was the basis for the guilty verdict); *United States v. Sherer*, 653 F.2d 334, 337 n.2 (8th Cir. 1981) (reasoning that the prosecutor’s statement about the “honesty and diligence of his office” was a fair reply to the defense argument and not a statement of personal belief); see also *Delaney*, *supra* note 402, at 649 n.2197.

415. 663 So. 2d 999, 1014 (Ala. 1995).

416. *Id.*; see also Gary D. Fox, *Objectionable Closing Argument: Causes and Solutions*, 70 FLA. B.J. 43, 46 (1996) (“Can it reasonably be said that a jury would react differently . . . if the lawyer, instead of saying ‘I don’t believe there is any question she was at fault,’ says, ‘the evidence shows she was at fault.’”).

Similarly in *Mintun v. State*,⁴¹⁷ the Wyoming Supreme Court stated, “We have recognized that ‘I believe’ and ‘I think’ are commonly used colloquial phrases; a prosecutor’s inadvertent and infrequent use of these phrases is not prejudicial.”⁴¹⁸ In the civil context, counsel in *Lowder v. Economic Opportunity Family Health Center Inc.*,⁴¹⁹ objected to the defendant’s use of such phrases as “I think,” “I believe,” and “I disagree.”⁴²⁰ On appellate review, the court stated, “[I]t is clear these phrases were used as figures of speech, and did not constitute prohibited vouching or expressions of personal opinion.”⁴²¹

D. Misstatements Of Law

The Iowa Supreme Court has observed that “counsel has no right to create evidence or to misstate the facts,” during closing argument.⁴²² Analogously, although counsel has a right to explain the law, by the use of jury instructions, she has a duty to do so correctly.⁴²³ The Missouri Supreme Court has held, “It is improper for counsel to inform the jury as to the substantive law of the case . . . or to read statutes to the jury, or to argue questions of law *inconsistent* with the jury instructions.”⁴²⁴ Although it is “improper for the prosecution to misstate the law in its closing argument,”⁴²⁵

417. 966 P.2d 954, 960 (Wyo. 1998).

418. *Id.*; see also *United States v. Moore*, 129 F.3d 989, 993 (8th Cir. 1997) (rejecting the defendant’s claim that the prosecutor improperly stated a personal opinion into final summation when he stated, “I believe in what I do,” and “my responsibility . . . is to show you [Moore’s] guilt,” on the basis that they were innocuous and isolated).

419. 680 So. 2d 1133, 1137 (Fla. Dist. Ct. App. 1996); see also *Murphy v. Int’l Robotics Sys., Inc.*, 766 So. 2d 1010, 1029 (Fla. 2000) (approving the use of the phrases “I believe” and “I think” during closing argument).

420. *Lowder*, 680 So. 2d at 1136.

421. *Id.*; see also LUBET, *supra* note 1, at 497 (“It is difficult to purge your speech entirely of terms such as ‘I think’ or ‘I believe.’ While good lawyers will strive to avoid these terms, it is not unethical to fall occasionally into first person references.”).

422. *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993).

423. See generally *Johnson*, *supra* note 409, at 18 (“As an adjunct to counsel acting as a witness is counsel acting as judge . . . and being wrong.”); see also MAUET, *supra* note 1, at 452 (“[T]he paraphrasing or other reference to the instructions must be fair and accurate.”); *Kantrowitz et al.*, *supra* note 389, at 100 (“[I]t is improper to misstate the law in closing argument.”); *Ahlen*, *supra* note 401, at 106 (stating that in closing argument to the jury, the lawyer may not “[m]isstate the law.”).

424. *State v. Jordan*, 646 S.W.2d 747, 751 (Mo. 1983) (en banc) (emphasis added); see also LUBET, *supra* note 1, at 499 (“Counsel may not, however, misstate the law or argue for legal interpretations that are contrary to the court’s decisions and instructions.”); *Alexander Tanford, Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 52 (1986) (“[A]n attorney may not argue, about what the law is, as in an appellate court, but must accept the law as it is contained in the judge’s instructions.”).

425. Compare *United States v. Hollis*, 971 F.2d 1441, 1455 (10th Cir. 1992), and *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), with *United States v. Jones*, 663 F.2d 567, 570 (5th Cir. 1981) (prosecutor’s incorrect use of term “presumption” against defendant harmless error because prosecutor actually suggested permissible inference not burden-shifting proposition of law), and

courts “presume that the jury followed the court’s legal instructions, not the prosecutor’s.”⁴²⁶ Consequently, jury instructions commonly cure the prejudice of an attorney’s misstatement of law when, for example, the instructions identify the correct standard of proof and then define that standard.⁴²⁷

Illustrative of this prohibition is *State v. Oates*.⁴²⁸ In *Oates*, the defendant claimed error when the trial court prohibited his attorney from telling the jury “you can pursue your assailant until you secure yourself from danger.”⁴²⁹ The Missouri Supreme Court rejected this claim finding that such a comment would be a misstatement of the applicable law.⁴³⁰

Likewise, in *Kellogg v. Skon*, the prosecutor stated that the presumption of innocence had been “removed,” and was no longer “protecting and shielding” the defendant.⁴³¹ The Eighth Circuit Court of Appeals recognized that this statement was an objectionable misstatement of law because the defendant retained the presumption of innocence throughout the trial.⁴³²

United States v. Sedigh, 658 F.2d 1010, 1014-15 (5th Cir. 1981) (noting that prosecutor’s erroneous remark that defendants had admitted committing crime by pleading entrapment not prejudicial because law not seriously misstated and jury given immediate instruction); United States v. Pimentel, 654 F.2d 538, 542-43 (9th Cir. 1981) (recognizing that prosecutor’s statement that jury has right to ask for evidence from defense not prejudicial error because trial judge found that statement did not appear to shift burden to defendant to testify given its context); United States v. McCaghren, 666 F.2d 1227, 1232 (8th Cir. 1981) (stating that prosecutor’s commentary during closing argument about purpose and policy of federal drug conspiracy law neither relevant nor probative but also not unduly prejudicial given evidence of guilt). See also Delaney, *supra* note 402, at 649 n.2199.

426. *Hollis*, 971 F.2d at 1455.

427. See *Commonwealth v. Pagano*, 710 N.E.2d 1034, 1040 (Mass. App. Ct. 1999) (“The prosecutor’s worst trespass in closing was a misstatement of the law, but it is the judge who instructs the jury on the law, not counsel in argument.”); *Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir. 1985) (en banc), *vacated*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (1987); *Allen v. State*, 716 N.E.2d 449, 454 (Ind. 1999). The court in *Allen* stated:

Even if this apparently inadvertent error can be characterized as misconduct, it had no probable persuasive effect on the jury’s decision. The misstatement was promptly corrected, the jury was admonished that the prosecutor’s comment was not evidence, and the jury was later correctly instructed on the law.

Id.; see also *State v. Cavazos*, 610 So. 2d 127, 128-29 (La. 1992) (“[P]rosecutor’s misstatements of law during . . . closing remarks, do not require reversal of [d]efendant’s conviction if the court properly charges the jury at the close of the case.”).

428. 12 S.W.3d 307 (Mo. 2000) (en banc).

429. *Id.* at 312.

430. *Id.*

431. 176 F.3d 447, 450-51 (8th Cir. 1999).

432. *Id.* at 451.

E. Comments On the Credibility of Witnesses

The Supreme Court of Michigan has observed, "Counsel may, acting on their own judgment as to propriety and good taste, discuss the character or witnesses, the probability of the truth of testimony given on the stand, and may, when there is any reasonable basis for it, characterize testimony."⁴³³ Therefore, attorneys may question the credibility of a witness if they have legitimate grounds, but they may not use inflammatory language to invoke unfair prejudice.⁴³⁴

Typically, courts have found objectionable inflammatory language when counsel refers to a witness as a "liar." Illustrative of a bright-line disapproval of calling a witness a "liar" is *Olenin v. Curtin & Johnson, Inc.*,⁴³⁵ where the court stated, "It 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."⁴³⁶ Analogously, The North Dakota Supreme Court stated,

Counsel in his argument ha[s] the right to analyze the testimony and the exhibits and to point to the jury any reason or reasons why he thought the witness was not worthy of belief; however . . . he should [not] be permitted, in so many words, to state the opposing party is a "liar," a "pathological liar," and a "crook."⁴³⁷

433. *Firchau v. Foster*, 123 N.W.2d 151, 152 (Mich. 1963) (internal citations omitted); *see also*, e.g., ABA CODE OF PROF'L RESPONSIBILITY DR 7-106(c)(3)-(4) (2001); ABA MODEL RULES OF PROF'L CONDUCT R. 3.4 (e) (1983) (stating a lawyer shall not "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."); *see also* James A. Secklinger, *Closing Argument*, 19 AM. J. TRIAL ADVOC. 51, 60 (1995) ("An assertion that your witnesses were credible is of little help to the fact finder. The judge or jury will apply their common sense and knowledge of human nature to make that assessment."). *See generally* Silas Crawford, Comment, *May an Attorney Assert His or Her Opinion As to the Credibility of Witnesses or the Guilt or Innocence of Defendants?*, 22 J. LEGAL PROF. 243 (1998) (discussing manner in which courts deal with improper statements of opinion by prosecutors). *Cf. TANFORD, supra* note 185, at 245 (discussing ethical considerations and standards for evaluating cross-examining lawyer's conduct).

434. *See* Jeffery J. Kroll, *Closing Arguments In Civil Trials: How Far Can Lawyers Go?*, 86 ILL. B.J. 666, (1998); *see also*, e.g., *United States v. Morgan*, 113 F.3d 85, 89 (7th Cir. 1997) ("[T]he government is allowed to comment on the credibility of a witness . . . as long as the comment reflects reasonable inferences from the evidence adduced at trial rather than personal opinion.") (quoting *United States v. Goodapple*, 958 F.2d 1402, 1409-10 (7th Cir. 1992)); *see also* *United States v. Catalfo*, 64 F.3d 1070, 1080 (7th Cir. 1995) (stating that where a defendant's version of the facts conflicts with that of the government witnesses, a prosecutor may argue that the jury should believe the government witness and not the defendant).

435. 424 F.2d 769 (D.C. Cir. 1968).

436. *Id.* at 769.

437. *Fox v. Bellon*, 136 N.W. 2d 134, 141 (N.D. 1965).

However, calling a witness “a liar” has been found proper when the characterization is supported by record evidence.⁴³⁸ For example, an Illinois appellate court observed, “It is not improper to call the defendant or a witness a ‘liar’ if conflicts in evidence make such an assertion a fair inference.”⁴³⁹ To this end, the court in *Chandler v. Moore* held that a prosecutor properly referred to a witness as “the biggest liar in Indian River County” because “the witness told four different stories.”⁴⁴⁰ Analogously, The Florida Supreme Court observed, “Counsel *may*, in closing argument in a civil case, refer to opposing party as a ‘liar’ if there is basis in the evidence to do so.”⁴⁴¹ The court reasoned, “If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence.”⁴⁴² It should be

438. See *Manson v. Mitchell*, 95 F. Supp. 2d 744, 781 (N.D. Ohio 2000), providing the following examples:

United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999) (not improper for prosecutor to assert that defendant is lying); *United States v. Shoff*, 151 F.3d 889, 893 (8th Cir. 1998) (not improper for prosecutor to call defendant a “con man” and “liar”); *Williams v. Borg*, 139 F.3d 737, 744-45 (9th Cir. 1998) (not improper for prosecutor to call defendant “stupid” and to refer to defense counsel’s argument as “trash”); *United States v. Reliford*, 58 F.3d 247, 250 (6th Cir. 1995) (not improper for prosecutor to characterize defendant’s testimony as “unbelievable,” “ridiculous,” and “a fairy tale”); *United States v. Davis*, 15 F.3d 1393, 1402-03 (7th Cir. 1994) (not improper for prosecutor to refer to defendant’s case as “trash,” “hogwash,” and “garbage”); *Kellogg v. Skon*, 176 F.3d 447, 451-52 (8th Cir. 1999) (improper for prosecutor to call defendant “monster,” “sexual deviant,” and “liar,” but no prejudice shown where weight of evidence against defendant was heavy); *United States v. Collins*, 78 F.3d 1021, 1039-40 (6th Cir. 1996) (improper for prosecutor to state that defense counsel deserved an Academy Award for keeping a straight face when he made his arguments, but no prejudice shown where weight of evidence against defendant was heavy); *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999) (use of the word “preposterous” not inflammatory); *United States v. Catalfo*, 64 F.3d at 1080 (holding that a prosecutor’s description of the defendant as a liar was not improper).

Id.; see also *Furman*, *supra* note 409, at 33 (“[A] witness statement that a witness ‘lied’ during his or her testimony has been held inappropriate as has a statement that a witness was ‘honest.’”).

439. See *People v. Thomas*, 558 N.E.2d 656, 662 (Ill. App. Ct. 1990); *cf.* *United States v. Laurins*, 857 F.2d 529, 539 (9th Cir. 1988) (recognizing statement that defendant was a liar could be construed as a comment on the evidence); see also *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987) (finding that even though intemperate, prosecutor’s closing argument remarks characterizing defendant’s testimony as untruthful and the defendant himself as being a “liar” did not exceed the bounds of proper argument in view of the record evidence).

440. *Chandler v. Moore*, 240 F.3d 907, 914 (11th Cir. 2001).

441. *Murphy v. Int’l Robotics Sys.*, 766 So. 2d 1010, 1028 (Fla. 2000); see also *MAUET*, *supra* note 1, at 496 (“[S]uch comments as *I think* and *I believe*, unless clearly and directly linked to the evidence, are improper.”).

442. *Murphy*, 766 So. 2d at 1028; see also *Fox*, *supra* note 416, at 46 (“[H]ow can it reasonably be said that a lawyer shouldn’t be able to call a witness a liar if there exists an evidentiary basis for

noted that “merely because a witness may be called a ‘liar’ does not mean it is always tactically desirable for counsel to do so . . . some jurors may find characterizing a witness as a ‘liar’ both harsh and offensive.”⁴⁴³

F. *Per Diem Arguments*

In *Wilson v. Williams*, the Supreme Court of Kansas described per diem arguments as, “A formula argument [in which] time units of life [are] multiplied by [a] price of pain per unit.”⁴⁴⁴ The court added:

A formula argument is made when the plaintiff requests a lump sum amount for future pain and suffering damages, and this lump sum is divided by the number of time units expected in a plaintiff’s life to equal a price of pain per unit. Whether the argument is made forward or backward (lump sum divided by time units or time units multiplied by price per pain unit), it is still prohibited.⁴⁴⁵

In *Botta v. Brunner*,⁴⁴⁶ the New Jersey Supreme Court found the plaintiff’s per diem argument objectionable when he argued, “Would fifty cents an hour for that kind of suffering be too high?”⁴⁴⁷ Similarly in *Crum v. Ward*, the West Virginia Supreme Court held that, if before the jury, counsel advances a damages sum that was derived from a “mathematical formula or fixed-time basis,” that is not based on facts, he has committed reversible error.⁴⁴⁸

Courts often find per diem arguments objectionable on the basis that such arguments do not draw reasonable inferences from the evidence produced at trial.⁴⁴⁹ For example, in *Caley v. Manicke*, the Illinois Supreme

it?”).

443. Craig Lee Montz, *Calling The Witness a Liar During Closing Argument: The Florida Supreme Court’s Final Approval*, 75 FLA. BAR J. 49 (2001).

444. *Wilson v. Williams*, 933 P.2d 757, 758 (Kan. 1997); see also Thomas L. Cooper, *The Role of the Per Diem Argument in Personal Injury Suits*, 5 DUQ. L. REV. 393 (1966-67); see also MAUET, *supra* note 1, at 495 (stating that per diem arguments usually lead to “astronomical figures (e.g., asking for \$25 per day for pain and suffering will yield \$365,000 over a 40-year life expectancy.”)); Kirk & Sylvester, *supra* note 393, at 327 (noting that per diem arguments include arguing that “pain and suffering is worth a certain sum for a given unit of time and then . . . multiplying that figure by the number of units of time for the anticipated pain and suffering.”).

445. *Wilson*, 933 P.2d at 758.

446. 138 A.2d 713, 718 (N.J. 1958).

447. *Id.*

448. *Crum v. Ward*, 122 S.E.2d 18, 20 (W. Va. 1961); see also *Christy v. Saliterman*, 179 N.W.2d 288 (Minn. 1970) (approving per diem arguments in closing arguments); *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974) (approving the use of per diem arguments and recognizing that defendants have an equal right to advance their suggestions of a fair verdict in reply to such arguments in their closing).

449. See *PARK*, *supra* note 11, at 408 (“[O]pponents of the argument have pointed out that the per diem argument gives false credibility to the calculation of damages . . .”).

Court found plaintiff's per diem argument objectionable and improper when he argued:

Now, let's put in [sic] into hours in the last two years. Let's confine it to a per diem type of situation. Is it logical to say that he is entitled to ten dollars a day up to today? That isn't one dollar an hour for suffering. It is less than one dollar an hour, and is that unreasonable? If we said that, that would be fifty-one hundred dollars, which would bring us up to today. Future pain and suffering was handled thusly, based on a life expectancy of 24.52 years: that would be 8760 days and at \$1.00 a day instead of \$10.00 a day, figuring at 8760 days, you would have the figure for future pain. So we would give him eight thousand seven hundred and sixty dollars for future pain.⁴⁵⁰

The court stated, "While a jury cannot translate pain and suffering into monetary units with the precision that it would in converting feet into inches, we do not believe that its determination of reasonable compensation for pain and suffering can be characterized as a 'blind guess.'"⁴⁵¹ The court added, "To reduce the aggregate into hours and minutes, and then multiply by the number of time units involved produces an illusion of certainty, but it is only an illusion, for there is no more precision in the one case than in the other."⁴⁵²

Finally, some courts have failed to find mathematical per diem arguments for damages objectionable, but only when they are done so on a limited basis, and comprise only a small part of the closing argument.⁴⁵³ Additionally, some courts have viewed the objectionable nature of per diem arguments as a matter of discretion with the trial court.⁴⁵⁴ At the other end of

450. *Caley v. Manicke*, 173 N.E.2d 209, 214 (Ill. Ct. App. 1961), *rev'd*, *Caley v. Manicke*, 182 N.E.2d 206 (Ill. 1962).

451. *Id.* at 208.

452. *Id.*; *see also* Kroll, *supra* note 434, at 670.

453. *See, e.g., Johnson v. Chicago Transit Auth.*, 295 N.E.2d 573, 576 (Ill. Ct. App. 1973) (holding that because the attorney gave no undue emphasis to his per diem argument and because the jury received an instruction that the amount of damages for pain and suffering was for its determination, there was no error on behalf of the trial court); *Friedland v. Allis Chalmers Co. of Canada*, 511 N.E.2d 1199, 1205 (Ill. Ct. App. 1987) (holding that counsel's suggestion, when qualified by his own view, of an annual sum multiplied by life expectancy was proper); *Watson v. City of Chicago*, 464 N.E.2d 1100, 1102 (Ill. Ct. App. 1984) (holding that a request for \$49,000 for forty-nine years of pain and suffering did not suggest a mathematical formula, but was merely a proper suggestion of "a lump-sum figure for pain and suffering.").

454. *See, e.g., Gilbert v. Wash. Metro. Area Transit Auth.*, No. 90-1462, 1991 WL 221151 at *1 (D.D.C. October 9, 1991); *Evening Star Newspaper Co. v. Gray*, 179 A.2d 377, 383 (D.C. Mun.

the spectrum, many state and federal courts refuse to recognize objections to per diem arguments.⁴⁵⁵

G. References To Insurance Coverage

Counsel's reference to insurance coverage is objectionable in order to preclude jurors from "affixing liability where none [otherwise] exists, or to arrive at an excessive amount through sympathy for the injured party and the thought that the burden would not have to be [borne] by the defendant."⁴⁵⁶ Statements during closing argument suggesting "the absence of insurance are seen as attempts to create sympathy [and] numerous other courts have found that a counsel's statement that his client must personally pay a judgment is improper."⁴⁵⁷

For example, in *Koonce v. Pacil*, counsel stated, "Everything [the defendant's] gotten is threatened because of a possible verdict," and that there could be a potential "tragedy to the [defendants] depending on how this case goes."⁴⁵⁸

However, when a reference to insurance is rare, isolated, and unique, courts are less likely to sustain objections which would warrant reversal.⁴⁵⁹

App. 1962) (stating that the propriety of per diem argument considered on a case-by-case basis); *Young v. Wash. Metro. Area Transit Auth.*, No. 87-170, 1988 WL 59657 at *2 (D.D.C. May 31, 1988) (Lamberth, J.) (precluding use of per diem argument of pain and suffering damages).

455. See, e.g., *Clark v. Hudson*, 93 So. 2d 138 (Ala. 1956); *McLaney v. Turner*, 104 So. 2d 315 (Al. 1958); *Aetna Oil Co. v. Metcalf*, 183 S.W.2d 637 (Ky. 1944); *Four-County Elec. Power Ass'n v. Clardy*, 73 So. 2d 144 (Miss. 1944); *Arnold v. Ellis*, 97 So. 2d 744 (Miss. 1957); see also *Worsely v. Corcelli*, 377 A.2d 215, 219 (R.I. 1977) (adopting the use of per diem arguments in closing arguments); *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974) (approving the use of per diem arguments and recognizing that defendants have an equal right to advance their suggestions of a fair verdict).

456. *Carls Mkts., Inc. v. Meyer*, 69 So. 2d 789, 793 (Fla. 1953) (citing *Ryan v. Noble*, 116 So. 766 (Fla. 1928)); see also *Kroll*, *supra* note 434, at 668 ("As a general rule, it is highly improper to deliberately state in closing argument, either directly or through insinuation, that the defendant carries insurance or that a party is not insured."). See generally Comment, *Evidence: Revealing the Existence of Defendant's Liability Insurance to the Jury*, 6 CUMB. L. REV. 123 (1975).

457. *Cook Inv. Co. v. Seven-Eleven Coffee Shop, Inc.*, 841 P.2d 333, 334 (Colo. Ct. App. 1992); see also, e.g., *Mobile Cab & Baggage Co. v. Busby*, 169 So. 2d 314 (Ala. 1964); *Laguna v. Prouty*, 300 N.W.2d 98 (Iowa 1981); *Priel v. R.E.D., Inc.*, 392 N.W.2d 65 (N.D. 1986); *Miller v. Staton*, 394 P.2d 799 (Wash. 1964); *St. Pierre v. Houde*, 269 A.2d 538 (Me. 1970) (determining that defense counsel's statement that his client would have to pay damages "out of her own pocket" not only created an improper inference that defendant lacked insurance, but also violated the rule that prohibits reference to the financial status of a party); *McKin v. Gilbert*, 432 S.E.2d 233, 235 (Ga. Ct. App. 1993) ("In an ordinary negligence case, not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to the jury of the mere existence of such contract is ground for a mistrial."); *Partridge v. Miller*, 553 So. 2d 585, 589 (Ala. 1989) ("It is the general rule in Alabama that it is prejudicial and reversible error to allow testimony that shows or tends to show that a party is indemnified in any degree or fashion by an insurance company.").

458. 718 N.E.2d 628, 628 (Ill. Ct. App. 1999).

459. One Florida District Court of Appeals suggests a comparison:

Compare Johnson v. Canteen Corp., 528 So. 2d 1364, 1365 (Fla. Dist. Ct. App. 1988) (no reversal for new trial for two references alluding to workers' compensation insurance

The application of this principle is seen in *Melara v. Cicione*.⁴⁶⁰ In *Melara*, the appellant's objected to "an unsolicited reference to an insurance adjuster made by one of the appellee's treating physicians."⁴⁶¹ On appellate review, the court held that the "isolated and oblique reference to an insurance adjuster is harmless error."⁴⁶²

XII. OBJECTIONS TO JURY INSTRUCTIONS

Jury instructions should state the governing law fairly, adequately, and correctly, and the charge should not be inflammatory, unfair, or prejudicial to either side.⁴⁶³ The instructions should be objective and not phrased in an argumentative vein favorable to either party.⁴⁶⁴ The Eighth Circuit Court of Appeals in *Halladay v. Verschoor* recognized, "A court should go as far as possible to avoid giving undue prominence to a particular theory."⁴⁶⁵ These are the principles from which most objections to jury instructions arise.

where there was no disclosure to jury that plaintiff had been compensated for her injury) . . . and *Knowles v. Silasavage*, 266 So. 2d 67, 68 (Fla. Dist. Ct. App. 1972) (plaintiff counsel's voir dire on the subject of insurance did not constitute prejudice for reversible error) . . . with *South Motor Co. of Dade County v. Accountable Constr. Co.*, 707 So. 2d 909, 911 (Fla. Dist. Ct. App. 1998) (reversed for new trial where over the defendant's standing objection, the plaintiff was permitted to introduce pervasive and extensive evidence of the existence and amount of the defendant's insurance coverage in a breach of contract action) and *Auto-Owners Ins. Co. v. Dewberry*, 383 So. 2d 1109, 1109 (Fla. Dist. Ct. App. 1980) (repeated references by the insured's counsel as to the amount of the policy limits during voir dire, opening argument and closing argument constituted reversible error) and *Levin v. Hanks*, 356 So. 2d 21, 22 (Fla. Dist. Ct. App. 1978) (repeated argument to jury that insurance company was in effect trying to recover for second time was improper and required reversal).

Melara v. Cicione, 712 So. 2d 429, 431 (Fla. Dist. Ct. App. 1998).

460. *See id.*

461. *Id.*

462. *Id.*

463. *Robinson v. Monsanto Co.*, 758 F.2d 331, 335 (8th Cir. 1985); *see also Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985) (noting the trial court must "instruct the jurors, fully and correctly, on the applicable law of the case, and . . . guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth.") (quoting 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2556 (1971)).

464. *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 201 (8th Cir. 1981); *State v. Rambo*, 699 P.2d 542, 549 (Kan. Ct. App. 1985) ("Instructions should be general in nature insofar as possible and should not be argumentative or unduly emphasize one particular phase of the case.") (quoting *Timsah v. General Motors Corp.*, 591 P.2d 154 (1979)). "Pattern jury instructions were designed in part to eliminate argumentative instructions and promote uniform expressions of law. Pattern instructions, however, have been criticized as failing to meet these objectives." *See Dorothy E. Bolinsky, New Jersey's Medical Malpractice Jury Instruction: Comprehensible to the Jury?* 28 RUTGERS L.J. 261, 277 (1996).

465. 381 F.2d 100, 113 (8th Cir. 1967).

A. Objections To Argumentative Instructions

An instruction is “argumentative if it unduly highlights certain features of a case.”⁴⁶⁶ In *Perovich v. United States*,⁴⁶⁷ the United States Supreme Court has held, “Singling out evidentiary features and emphasizing them by special instruction often tends to mislead a jury.”⁴⁶⁸ For example in *Spesco v. General Electric*,⁴⁶⁹ the defendant requested a jury instruction regarding an evidentiary feature which read, “If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.”⁴⁷⁰ The Seventh Circuit Court of Appeals observed that the proposed jury instruction “if read to the jury, would have suggested that [the plaintiff] failed to produce at trial relevant but harmful evidence under its exclusive control,” when the controlling law additionally required an intentional act by a party to destroy evidence.⁴⁷¹ Accordingly, the court held, “In the absence of such evidence [of intent], instruction number [twenty-three], if read to the jury, would have been unduly argumentative.”⁴⁷² Therefore, the objection to the instruction was affirmed.⁴⁷³ Analogously, in *Sierra v. Winn Dixie Stores, Inc.*,⁴⁷⁴ the defendant’s requested jury instruction read, “Owners of a store owe a duty of maintaining the premises in a reasonably safe condition, but are not required to maintain them in such a condition that accidents could not happen.”⁴⁷⁵ The Florida appellate court held the instruction was argumentative because the jury was told “that the defendant Winn Dixie had no duty to maintain accident-free premises which, by implication, would exonerate it for an unavoidable accident.”⁴⁷⁶

466. *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981).

467. 205 U.S. 86 (1907); *see also* *Mount v. Dusing*, 111 N.E.2d 502 (Ill. 1953) (holding that instructions singling out particular facts or evidence and giving them undue prominence are erroneous).

468. *Perovich*, 205 U.S. at 92.

469. 719 F.2d 233 (7th Cir. 1983).

470. *Id.* at 239. The court added, “Jury instructions are designed to clarify issues for the jury and to educate the jury about what factors are probative on those issues. . . . The district court, in its discretion, may reject argumentative instructions.” *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. 646 So. 2d 264 (Fla. Dist. Ct. App. 1994).

475. *Id.* at 265.

476. *Id.* The court added, “Although this is a proper argument for the defendant to make to the jury, it is not a proper subject for a jury charge because it tends to endorse an argumentative position of the defendant and is otherwise unnecessary and potentially confusing.” *Id.*

B. Objections To Technical Imperfections

On appeal, reviewing courts read jury instructions as a whole when considering challenges to the charge.⁴⁷⁷ Therefore, technical imperfections or lack of perfect clarity will not render the instructions erroneous.⁴⁷⁸ However, the Fifth Circuit Court of Appeals added in *Igloo Products Corporation v. Brantex, Inc.*, “The trial court must instruct the jurors, fully and correctly, on the applicable law of the case, and guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth.”⁴⁷⁹ Consequently, the court noted, “Reversal is therefore appropriate whenever the charge as a whole leaves [the reviewing court] with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations,” and that the challenged instruction has “affected the outcome of the case.”⁴⁸⁰ This standard for reversal was met in *Banc One Capital Partners Corporation v. Kneipper*.⁴⁸¹ In *Kneipper*, a jury instruction defined a securities violation without defining “any other unlawful acts.”⁴⁸² The court observed, “Accordingly, the jury was left without a definition of ‘unlawful acts’ and may have based their civil conspiracy finding on acts with which they disagreed, whether unlawful or not.”⁴⁸³ Consequently, the court held, “For these reasons, we believe that

477. See *Robinson v. Monsanto*, 758 F.2d 331 (8th Cir. 1985); *Martini v. Beaverton Ins. Agency, Inc.*, 838 P.2d 1061 (Or. 1992) (holding for an instruction to constitute reversible error, it must have prejudiced the aggrieved party when the instructions are considered as a whole).

478. See *Waterway Terminals Co. v. P.S. Lord Mech. Contractors*, 474 P.2d 309, 313 (Or. 1970) (“[C]ases should not be reversed upon instructions, despite technical imperfections, unless the appellate court can fairly say that the instruction probably created an erroneous impression of the law in the minds of the jurors which affected the outcome of the case”); *Lackawanna Leather Co. v. Martin & Stewart Ltd.*, 730 F.2d 1197 (8th Cir. 1984); *DeKalb County v. McFarland*, 203 S.E.2d 495 (Ga. 1974) (holding it is not error to refuse requests to charge, or to fail to give a charge in the exact language of the request, where the request is argumentative or when the request adequately is covered in the general charge); *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993) (“We afford trial judges wide latitude in fashioning jury instructions and ignore technical imperfections . . .”); see also, e.g., *Delancey v. Motichek Towing Serv.*, 427 F.2d 897, 902 (5th Cir. 1970) (“The court is not required to give instructions in the language and form a litigant’s lawyer fancies.”); see also *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1227 (5th Cir. 1984) (“[T]he court is not compelled to give even every correct instruction offered by the parties.”); *State v. Morris*, 435 P.2d 1018, 1019 (Or. 1967) (holding that “surplusage language” which does not mislead the jury in view of other instructions is not reversible error).

479. 202 F.3d 814, 816 (5th Cir. 2000).

480. *Id.*; see also *Bass v. USDA*, 737 F.2d 1408, 1414 (5th Cir. 1984) (holding the court will not reverse unless “we find, based upon the record, that the challenged instruction could not have affected the outcome of the case.”).

481. 67 F.3d 1187 (5th Cir. 1995).

482. *Id.* at 1196.

483. *Id.*

there is a 'substantial and ineradicable doubt whether the jury has been properly guided in its deliberations' on this issue as well."⁴⁸⁴

XIII. CONCLUSION

Lawyers have only a fraction of a second to formulate and decide whether to make objections during a trial. In that time, the rules provide that the objection must be timely and specific or otherwise it is deemed waived. The opportunity to object to evidence, questions, answers, statements, the behavior of the judge and counsel, argument, and virtually any other event or object in the courtroom exists each and every second of the trial. "The concentration required is enormous, and there is no opportunity for letup There is no room for even the slightest lapse."⁴⁸⁵ Consequently, a thorough comprehension of essential trial objections, from the beginning of the trial to the end, is an inflexible prerequisite for lawyers before they enter the dynamics of a courtroom.

484. *Id.* (quoting *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994) (quoting *Bender v. Brumley*, 1 F.3d 271, 276-77 (5th Cir. 1993))); *see also* *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 189 (5th Cir. 1991).

485. LUBET, *supra* note 1, at 266.