

**THE VINCENT A BIFFERATO SUPERIOR COURT TRIAL PRACTICE FORUM**  
**ETHICAL CONSIDERATIONS FOR EFFECTIVE OPENING STATEMENTS AND PERSUASIVE**  
**CLOSING ARGUMENTS**

**March 15, 2019**

Handout

**The Golden Rule**

Sullivan v. State, 636 A.2d 931, 941 (Del. 1994):

The “golden rule” doctrine precludes an attorney from asking the jurors to put themselves in the place of a victim.

Swan v. State, 820 A.2d 342, 355 (Del. 2003):

In the first challenged remark, Swan claims the prosecution violated the “golden rule” by asking the jury place themselves in the place of the victim. “Think about home. What is home? Come back from vacation, you want to sit there.” Defense counsel immediately objected on the grounds that, “the prosecutor is asking the jury to place themselves in the place of the victim.” The trial judge sustained this objection and the prosecutor rephrased the comment by referring specifically to the victim's home.<sup>31</sup>

The trial judge correctly and promptly sustained defense counsel's objection to the prosecutor's invocation of the “golden rule” argument. The prosecutor's reference to the sanctity of the home effectively asked the jury to place themselves in the place of the victim.

Delaware Olds, Inc. v. Dixon, 367 A.2d 178, 179 (Del. 1976)

In a civil action for assault and battery, “golden rule argument,” asking jurors to place themselves in position of plaintiff who had lost the sight of one eye, was improper, and new trial would be ordered as to liability as well as damages where comments were inextricably intertwined with evidence on the issue of liability.

Jurors are expected to apply common sense and experience in making the findings essential to justice, but justice is not done if a juror simply places himself in the position of an injured party. Our system demands of jurors a prudent, disinterested evaluation of the evidence, not an emotional identification with a party.

Witt v. Vogt, 909 A.2d 595 (Del. 2006):

Sutton next argues that Vogt violated the so-called “golden rule” prohibition during closing argument. It is settled law that a party may not ask the jurors to put themselves in the plaintiff's shoes and then render a verdict that they would want for themselves. In discussing comparative negligence, Vogt made the following argument to the jury: Now, defendant has the burden of proof on this. And, again, I ask you: What did Marie do wrong? She drove that day like each and every one of us drive. When we stop at a red light and it turns green, we start forward. We assume that cross traffic now facing us, a red light, will stop. We keep a lookout, but we don't go stop and-everybody, traffic moves-and that's what Marie did.

...

This Court has repeatedly held that even when prejudicial error is committed, it will usually be cured by the trial judge's instruction to the jury to disregard the remarks.” Here, where the trial court gave a curative instruction, and Sutton never asked for additional relief, we find that the trial court acted well within its discretion in denying Sutton's motion for a new trial.

### **DLRPC - 3.4(e) vouching**

Clayton v. State, 765 A.2d 940, (Del. 2001), holding modified by Baker v. State, 906 A.2d 139 (Del. 2006):

As a general rule, prosecutors may not express their personal opinions or beliefs about the credibility of witnesses or about the truth of testimony. As a corollary to this rule, we have held that prosecutors may refer to statements or testimony as a “lie” only (1) if one may legitimately infer from the evidence that the statement is a lie and (2) if the “prosecutor relates his argument to specific evidence which tends to show that the testimony or statement is a lie.” As officers of the court and as representatives of the State, prosecutors have a special duty to ensure that any convictions are based on the evidence presented at trial, rather than on the basis of the prosecutor's personal opinions. Where prosecutors fail to provide an evidentiary foundation for their conclusions about the truthfulness of a witness, they impermissibly tip the scales against the defense.

...

The Saunders Court held that the jury must be able to infer “logically” from the evidence that the prosecutor's comment is accurate. The use of the modifier “logically” indicates that the inference must be the product of some form of deductive reasoning and not merely a permissible inference. For example, the prosecutor's assertion that the State's

witnesses had been “consistent” can be deduced from the evidence: If the witnesses have not contradicted themselves in their testimony or in their prior statements, they have arguably been “consistent.” But the prosecutor's assertion that its witnesses had not “manipulated the truth” has no such logical basis in the evidence. Although the jury is free to infer that the State's witnesses testified truthfully, nothing in the evidence necessarily or logically leads to this conclusion. By asserting that the State's witnesses had not “manipulated the truth,” the prosecutor improperly endorsed the testimony of these witnesses. Consequently, the prosecutor's comments constituted impermissible vouching.

### **Additional case law**

Cox v. Artesian Water Co., No. C.A. 91C-09-221, 1993 WL 542563, (Del. Super. Ct. Dec. 2, 1993), aff'd, 650 A.2d 1305 (Del. 1994).

[The Plaintiff] motions this Court for a new trial on damages ... [because the] defense counsel made improper closing arguments.

...

The language Plaintiff found objectionable is underscored and is as follows:

“[I]et me just illustrate this point using some numbers for the sake of argument. *Awarding somebody a thousand dollars for something for someone who makes six dollars an hour is a lot different than awarding a thousand dollars to someone who makes fifty dollars an hour.*”

...

Plaintiff argues that defense counsel in the instant case argued a variation of McNally by improperly relating the amount of damages to be awarded by the jury to the earnings of the Plaintiff. Plaintiff contends that defense counsel argued in essence that “a wealthy person who sustained the identical injuries as Mrs. Cox should receive a greater amount of compensation than a person of lesser means.” Defense counsel contends that the language used in its closing arguments was permissible and if the language was not permissible, then the curative instruction by the Court rendered a new trial on damages unnecessary.

The Court finds that any improper arguments made by defense Counsel during closing arguments regarding the Plaintiff's wages were cured by the Court's instruction which was as follows:

“A statement was made during the defendant's closing arguments where he made a statement with respect to wages made by one person versus wages made by another. I'm instructing you at this point that the wages that the plaintiff, Mrs. Cox, makes should not be considered by you in determining damages.”

Further, the Court finds that the remarks made by defense counsel, when considered in the context of the entire argument were not unfairly prejudicial as to require a new trial. The Court finds there was no “studied purpose” by defense counsel to inflame the jury or improperly prejudice the jury.

DeAngelis v. Harrison, 628 A.2d 77, 80 (Del. 1993)

In Delaware, counsel do not address the jury without knowledge of the law which will control the jury's deliberations. That law is supplied by the judge through instructions. ... Although counsel, in the course of summations, are permitted to refer to the law which the court will propound, this right is subject to limitations. Those limitations are pertinent here. Just as it is improper for counsel to misstate the law, *Shively v. Klein*, 551 A.2d at 44–45, so too is it objectionable for counsel to state inapplicable law. This is simply a corollary of the rule that “evidence which is not relevant is not admissible.

**Further Resources:**

The Committee on Professional Ethics is a Standing Committee of the Delaware State Bar Association – [deethicsinquiries@dsba.org](mailto:deethicsinquiries@dsba.org)

The Committee has compiled an index of ethics opinions that can be found at <http://www.dsba.org/publications/ethics-opinions-index/>

Office of Disciplinary Counsel: <https://courts.delaware.gov/odc/>