



1970

The Scope of Permissible Comment in a Civil Action in Kentucky

Jerry Lee Foster
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Legal Profession Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Foster, Jerry Lee (1970) "The Scope of Permissible Comment in a Civil Action in Kentucky," *Kentucky Law Journal*: Vol. 58 : Iss. 3 , Article 10.

Available at: <https://uknowledge.uky.edu/klj/vol58/iss3/10>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

THE SCOPE OF PERMISSIBLE COMMENT IN A CIVIL ACTION IN KENTUCKY

It is good to be zealously affected always in a good thing, says the Apostle Paul (Gal. iv, 18). Passionate ardor for a client's cause, eagerness for victory, the enthusiasm and interest that comes to one imbued with the justness and righteousness of his side in a lawsuit, will oftentimes lead an attorney in argument to overstep the law and the evidence, get outside the record, and bring to the attention of the jury matters having no bearing upon the questions involved.¹

I. INTRODUCTION

Persuasive eloquence has long been the forte of the trial lawyer, and tomes have been compiled of landmark, motivating summations. The psychology of persuasion has also been a favored subject of latter day writers. Many successful trial lawyers feel that they have made discoveries which they should share with the profession, and books and articles explaining methods of conducting *voir dire*, opening statements, direct and cross examinations, and summations are numerous.

The foregoing has been mentioned only to have the reader recall the materials he has encountered in his readings on trial tactics and practice. It appears to the author that most writers have neglected a basic link in the chain between the substantive law of the case and methods of persuasion, and that link is the law governing comments by counsel during the course of the trial.² The persuasiveness of an argument is academic if the argument itself would constitute reversible error. This fact must be kept in mind when reading an article or participating in a seminar unless the law of all jurisdictions is expressly considered.

As the title of this note indicates, we shall be concerned here with the right to comment, the scope of permissible comments, and remedies for infractions in civil actions in Kentucky. It is not the author's intent to compare Kentucky law with that of other jurisdictions, rather the intent is to present and attempt to interpret the many judicial pronouncements that make up Kentucky's common law in this area. In order to simplify the task as much as possible, the material has been organized as follows:

¹ Pullman Co. v. Pulliam, 187 Ky. 213, 220, 218 S.W. 1005, 1007 (1920).

² The only articles of this type to be found are: Note, *Final Argument in Iowa*, 15 DRAKE L. REV. 115 (1966); Comment, 19 ALA. L. REV. 75 (1966).

RIGHT TO COUNSEL AND RIGHTS OF COUNSEL

- A. *Voir Dire*
- B. *Opening Statement*
- C. *Summation*

PROBLEMS PECULIAR TO SPECIFIC STAGES OF TRIAL

- A. *Scope of Voir Dire*
- B. *Opening Statement*
- C. *Problems Relating to Presentation of Evidence*
- D. *Scope of Summation*

THE BASIC OBJECTIONS TO COMMENTS

SPECIFIC PROBLEM AREAS

- A. *Affidavits For Continuance*
- B. *Per Diem Calculations*
- C. *Race, Religion and National Origin*
- D. *Settlement Offers*
- E. *Insurance*
- F. *Arguing the "Golden Rule"*
- G. *Prejudice Against Corporations*
- H. *Financial Status of a Party*
- I. *Punitive Damages*

THE REPLY DOCTRINE.

II. RIGHT TO COUNSEL AND RIGHT OF COUNSEL

In Kentucky, a party to litigation has a right to act as his own counsel³ or the "right" to be represented by counsel.⁴ He may also have as many lawyers as are reasonably necessary to argue his case fully and fairly and to present it to the jury.⁵ This "right" to counsel is not an absolute right in the sense of Constitutional guarantees to those accused of crimes,⁶ however, but merely means that a party has a right to retain his own lawyer and to have him appear in the action.⁷ There are a few instances in which it is appropriate for counsel to be appointed in civil actions, pursuant to statute.⁸ In the vast majority of

³ *Sodousky v. McGee*, 27 Ky. (4 J. J. Marsh) 267 (1830).

⁴ *Id.*

⁵ *Fennell v. Frisch's Adm'r*, 192 Ky. 535, 234 S.W. 198 (1921).

⁶ *Parsley v. Knuckles*, 346 S.W.2d 1 (Ky. 1961).

⁷ *Sodousky v. McGee*, 27 Ky. (4 J. J. Marsh) 267 (1830).

⁸ KY. REV. STAT. § 453.190 provides for counsel for indigents in civil actions but the Court of Appeals has not accepted the literal interpretation and has held that this statute merely allows court costs and a trial record in the event of

(Continued on next page)

civil cases, the right to retain counsel will be exercised.

Once the basic right is established, the question becomes one of valuation of the right. Of course, the right can be of little more value than that of the attorney retained, but our concern here is with what action the retained counsel may take. We will examine this topic on the basic of actions during *voir dire*, opening statement, presentation of evidence, and summation. Clearly, there are other functions which counsel may perform before the court for his client, such as motions, submission of instructions, objections, etc.; but it is those aspects of the trial during which counsel is seen and heard by the jury which will be considered.

A. *Voir Dire*

The first question concerning the right of counsel to participate in the trial will arise at the time of selection of the jury. This phase of the trial is controlled by the Kentucky Rules of Civil Procedure.⁹ Civil Rule 47.01(1) provides that the method of conducting *voir dire* examinations is left to the discretion of the trial judge.¹⁰ There appears to be three possible methods of conducting the *voir dire*: exclusively by the court; exclusively by counsel; or by both the court and counsel.¹¹

What then is the minimum of representation which a party is allowed at this stage of the trial? It appears to be clear that the trial judge may require counsel to remain completely silent at this stage of the proceedings and may himself conduct the examination.¹² This is not to say, however, that counsel may be rendered *ineffectual* at this stage, as Civil Rule 47.01(1) provides that the court "shall itself submit to the prospective jurors such additional questions of the parties or their attorneys *as it deems proper*." (Emphasis added.) Thus, if the trial judge should follow the locally unorthodox practice¹³ of con-

(Footnote continued from preceding page)

an *in forma pauperis* appeal. *Brummett v. Knuckles*, 409 S.W.2d 807 (1966); *Livingston Co. v. Crossland*, 229 Ky. 733, 17 S.W.2d 1018 (1929); *Black Mountain Corp. v. Thomas*, 218 Ky. 497, 291 S.W. 737 (1927).

An absolute right to counsel in a civil case has been found where the defendant pleaded indigency and the civil action was one under which the defendant could be imprisoned. *Wright v. Crawford*, 401 S.W.2d 47 (Ky. 1966).

⁹ The Rules of Civil Procedure were promulgated by the Court of Appeals to take effect July 1, 1953, pursuant to An Act Relating to Rules of Pleading, Practice, and Procedure, and the Forms Thereof in Civil Actions and with Limited Applications, in Criminal Proceedings, ch. 18, [1952] Ky. Acts 29, KY. REV. STAT. §§ 447.151-57 (1952).

¹⁰ *Brumfield v. Consolidated Coach Corp.*, 240 Ky. 1, 40 S.W.2d 356 (1931).

¹¹ W. CLAY, 7 KENTUCKY PRACTICE 58-59 (1963).

¹² *London & Lancashire Fire Ins. Co. v. Ruffer's Adm'r*, 89 Ky. 525, 12 S.W. 948 (1890).

¹³ This practice is common in the federal district courts but not in the state courts.

ducting the *voir dire* exclusively by himself and forbid counsel from examining the jurors, a set of prepared questions should be submitted to the court, and once these have been asked and answered it should be possible to submit supplemental questions. Where all submitted questions are deemed proper and asked, counsel will have no significant basis for disgruntlement.

Where an individual question is refused, counsel would have a ruling upon his motion to which no exception would be necessary.¹⁴ Where some or all questions submitted are refused (or, if submitted by opposing counsel, accepted over objection), then counsel should, even though Civil Rule 46 does not require it,¹⁵ point out the law and other basis upon which he relies. This will more adequately protect against the trial judge's decision being upheld where he was correct for one reason yet wrong for another and where the action sought should have been granted. Similarly, grounds for submission (or grounds for objection) should be shown specifically for *each* question which is brought into issue, for as to mixed offers and general objections the judge can do no wrong.

B. Opening Statement

Civil Rule 43.02,¹⁶ as did Civil Code section 517¹⁷ before it, provides for a brief statement of the claim (or defense) and the evidence to be submitted to support the contention. Again we are faced with the discretion of the court, but the rule states that opening statements shall be given except for "special reasons" for which the trial judge may depart from the usual procedure. Apparently these "special reasons" have never been found, or if found have never been employed, for no cases have appeared in which denial of an opening statement has been assigned as error. This is understandable since judges have the same basic interests and needs as jurors for understanding what issues are going to be tried. Where there has been no pre-trial hearing, as is often the case, the trial judge will rely on opening statements to familiarize himself with the case; where there has been a pre-trial hearing, the case will probably be too important and too involved to justify dispensing with the opening statements.

¹⁴ Ky. R. Civ. P. 46 makes exceptions unnecessary, it being sufficient that the litigant make known to the court the course of action he desires to be taken, whether by motion or objection.

¹⁵ Ky. R. Civ. P. 46 differs from FED. R. CIV. P. 46 on this point, the latter requiring a statement of the law relied upon for the action sought in all cases.

¹⁶ For authority for the Ky. R. Civ. P. see note 9 *supra*.

¹⁷ Code of Civil Practice § 517 was repealed by An Act Relating to Pleading, Practice, and Procedure in Civil Actions and Criminal Proceedings, ch. 84, § 5, [1952] Ky. Acts 214, 216.

A problem arises when we consider the converse of this problem and that is whether a party has the right *not* to make an opening statement. In the case of *Cincinnati, N.O. & T.P. Ry. Co. v. Evans' Administrator*,¹⁸ the Court reasoned that the length or brevity of the opening statement is primarily in the discretion of the attorney making the statement and that he might be allowed to make a statement so brief as to be no statement at all.¹⁹ There, the trial judge had allowed the plaintiff's attorney not to make an opening statement and it was his discretion in allowing this which was upheld. But the Court went on to say that the trial judge *could* have required an opening statement, and if an opening statement were deemed by the court to be insufficient, a fuller statement could be required.²⁰ While the latter is technically *dicta*, this author believes it to state the correct rule that the sufficiency of opening statements is within the discretion of the trial judge. Counsel should honor the decision of the trial judge until one of two extremes is reached: he is being required to state much more than would be necessary to establish a claim for relief (or defense); or, he is denied the right to state his case at all, and he can offer some legitimate basis for the need for an opening statement. He should then turn his attention toward preserving the record.

C. Summation

Although argument to the jury is controlled by the same Civil Rule as opening statement,²¹ the Court of Appeals has differed in its interpretation of the discretion of the trial judge. It is reversible error to deny a party the right to have his case argued to the jury,²² but we must not overlook certain obvious "special reasons" for the denial of this right. Thus, arguments may properly be denied where there is no question of fact,²³ or where a directed verdict is appropriate,²⁴ or where the case was tried without a jury.²⁵

A problem which frequently arises is the sufficiency of the time allotted by the trial judge for the summations. The general rule here is that the time to be allowed is within the discretion of the trial judge²⁶

¹⁸ 129 Ky. 152, 110 S.W. 844 (1908).

¹⁹ *Id.* at 154, 110 S.W. at 846.

²⁰ *Id.*

²¹ Ky. R. Civ. P. 43.02.

²² Wilken v. Exterkamp, 102 Ky. 143, 42 S.W. 1140 (1897).

²³ Harrison v. Parke, 24 Ky. (1 J. J. Marsh) 170 (1829).

²⁴ Deering v. Halbert, 12 Ky. (2 Litt.) 290 (1822).

²⁵ Pozitzer v. W. R. Martin Co., 374 S.W.2d 194 (Ky. 1964).

²⁶ Reed v. Craig, 244 S.W.2d 733 (1952); Asher v. Golden, 244 Ky. 56, 50 S.W.2d 3 (1932); Southern Express Co. v. Southard, 182 Ky. 492, 206 S.W. 773 (1918).

and his decision will be upheld in the absence of palpable abuse.²⁷ Clearly, to limit counsel to an inadequate time to argue his case differs only in degree from a denial of argument altogether.²⁸ In deciding the time limits to be placed on summations, the court should refer to the importance of the case,²⁹ the complexity of the legal issues, the records, the number of witnesses,³⁰ the degree of inconsistency of the testimony,³¹ and the number and complexity of the instructions.³² Since cases differ greatly in these respects, it would be futile to attempt to suggest actual time limitations which are either adequate or inadequate, and each case should be considered separately.

Despite the emphasis generally placed on *voir dire* and opening statement in the "race to disclosure," summation remains as one of the most important functions of counsel, and the real problem which arises in connection with summations is not that of the basic right, but that of the right to *close* the arguments. The right to close is important because the party making the closing argument has the benefit of attacking the previous argument, his argument will not be rebutted, and he will have the benefit of "recency" of the "holy trinity." The rule governing the right to close is that it is possessed by the party having the burden of proof in the whole case,³³ and failure to so award the closing argument is reversible error.³⁴ (It is not our purpose here to review the vast body of law distinguishing between "burden of proof" and "burden of going forward with the evidence"³⁵ or of the types of actions in which a styled defendant can obtain the closing argument.)³⁶

Another problem to be encountered concerns the order of argu-

²⁷ *Asher v. Golden*, 244 Ky. 56, 50 S.W.2d 3 (1932).

²⁸ *Louis P. Hyman & Co. v. H. H. Snyder Co.*, 159 Ky. 354, 167 S.W. 146 (1914).

²⁹ *Asher v. Golden*, 244 Ky. 56, 50 S.W.2d 3 (1932); *Southern Express Co. v. Southard*, 182 Ky. 492, 206 S.W. 773 (1918); *Miller v. Barnes*, 181 Ky. 473, 205 S.W. 549 (1918).

³⁰ *Southern Express Co. v. Southard*, 182 Ky. 492, 206 S.W. 773 (1918); *Miller v. Barnes*, 181 Ky. 473, 205 S.W. 549 (1918); *Moses v. Proctor Coal Co.*, 166 Ky. 805, 179 S.W. 1043 (1915); *Murphy v. Ray*, 161 Ky. 384, 170 S.W. 946 (1914).

³¹ *Asher v. Golden*, 244 Ky. 56, 50 S.W.2d 3 (1932); *Southern Express Co. v. Southard*, 182 Ky. 492, 206 S.W. 773 (1918); *Louisville & N. R.R. Co. v. Earl's Adm'x*, 94 Ky. 368, 22 S.W. 607 (1893).

³² *Miller v. Barnes*, 181 Ky. 473, 205 S.W. 549 (1918); *Moses v. Proctor Coal Co.*, 166 Ky. 805, 179 S.W. 1043 (1915); *Louisville & N. R.R. Co. v. Earl's Adm'x*, 94 Ky. 368, 22 S.W. 607 (1893).

³³ Ky. R. Civ. P. 43.02(5).

³⁴ *Kentucky Wagon Mfg. Co. v. City of Louisville*, 97 Ky. 548, 31 S.W. 130 (1895). *But see O'Connor v. Henderson Bridge Co.*, 95 Ky. 633, 27 S.W. 251 (1894).

³⁵ For general distinctions see *Lawson, The Law of Presumptions: A Look at Confusion, Kentucky Style*, 68 Ky. L.J. 7 (1968); *Lawson, The Order of Presentation as a Factor in Jury Persuasion*, 56 Ky. L.J. 523 (1967).

³⁶ See 18 KENTUCKY DIGEST 271-82 [Trial Key 25].

ment when there are multiple parties. Here it is necessary to look to pleadings in order to determine the burden of proof.³⁷ If all parties on a side appear to have equal rights to close, then the matter of order is probably within the discretion of the trial judge.³⁸

III. PROBLEMS PECULIAR TO SPECIFIC STAGES OF TRIAL

A. *Scope of Voir Dire*

As stated in *Sizemore v. Commonwealth*,³⁹

The purpose of *voir dire* is to determine whether a juror possesses necessary qualifications, whether he has prejudged the case, and whether his mind is free from prejudice or bias so as to enable a party to ascertain whether a cause for challenge exists, and to ascertain whether it is expedient to exercise the right of peremptory challenge.⁴⁰

In order to discover any incapacity or prejudice it is necessary to familiarize the veniremen with the nature of the case and the parties concerned. This has led to the practice of making *voir dire* one of the most important phases of any trial, as it is here that claims and defenses may first be stated and the mental "set" of jurors first established. It is here that "primacy," the race to disclosure, really begins, and for this reason it is important to consider the latitude allowed counsel in conducting the *voir dire*.

Counsel will be allowed to state, in general terms, the transaction out of which the claim arose.⁴¹ This is necessary to test a venireman's knowledge of the case⁴² and any conclusions which he may have formed as to its merits.

Voir dire is the proper time to test the jurors' acquaintances with parties,⁴³ attorneys,⁴⁴ and witnesses⁴⁵ to the action, and this is usually done mechanically at the beginning.

³⁷ *Blackburn v. Beverly*, 272 Ky. 346, 114 S.W.2d 98 (1938).

³⁸ *Connecticut Indem. Co. v. Kelley*, 301 S.W.2d 584 (Ky. 1957); *Martin v. Ackman*, 270 Ky. 640, 110 S.W.2d 437 (1938).

³⁹ 306 S.W.2d 833 (Ky. 1957).

⁴⁰ *Id.* at 834 [quoting from 50 C.J.S. *Juries* § 273 (1947).]

⁴¹ Apparently denial of this privilege has never been assigned as error in Kentucky. See *Gossett v. Commonwealth*, 426 S.W.2d 485 (Ky. 1968), where a statement of the nature of the cause by the trial judge went unquestioned.

⁴² *Gossett v. Commonwealth*, 426 S.W.2d 485 (Ky. 1968); *Messer v. Commonwealth*, 297 Ky. 772, 181 S.W.2d 438 (1944); *Schreiber v. Roser*, 258 Ky. 340, 80 S.W.2d 1 (1935).

⁴³ *Horton v. Commonwealth*, 240 S.W.2d 612 (Ky. 1951); *Olympic Realty Co. v. Kamer*, 283 Ky. 432, 141 S.W.2d 293 (1940); *Schreiber v. Roser*, 258 Ky. 340, 80 S.W.2d 1 (1935); *Stone v. Monticello Const. Co.*, 135 Ky. 659, 117 S.W. 369 (1909).

⁴⁴ *Seiler v. Lawrence*, 312 Ky. 857, 230 S.W.2d 70 (1950).

⁴⁵ *Baker v. Commonwealth*, 322 S.W.2d 119 (Ky. 1959); *Olympic Realty Co. v. Kamer*, 283 Ky. 432, 141 S.W.2d 293 (1940).

Ordinarily, knowledge of the backgrounds of jurors will be desired and, within reasonable limits, these questions may be asked⁴⁶ of the jurors individually.⁴⁷ It should be remembered that questions need not seek only answers which would constitute cause for striking, but may call for any information pertinent to an informed exercise of peremptory challenges.⁴⁸

Most text writers recommend testing the jurors' reception of a party's case through hypothetical questions which assume facts to be proved. An affirmative response to a question such as, "Will you follow the law of the case as given to you in the instructions?" will be almost automatic, and probably as meaningless as the question appeared to the juror. But questions such as, "The law of this state is that one whose negligence contributed to the accident, no matter how slightly, may not recover. If the evidence should show that the plaintiff was but one percent at fault here, are you willing to turn this plaintiff away without any recovery whatsoever, no matter how badly he may have been injured?" will more accurately test the jurors' capacity to sit. Here he is forced to respond to a realistic situation which is expected to arise. If the juror answers that he could not totally deny the plaintiff, then he is saying in essence that he will not honor his oath and apply the law of the case. If he replies that he would follow the instructions, even in so difficult a situation, then counsel has elicited a valuable promise which he will call upon the jurors, in closing statement, to keep.

Having stated that hypothetical questions are the desired manner of testing the jurors' subjective capacity to sit, we are now in the unenviable position of being unable to cite any authority which expressly approves hypothetical questions. The principal cases on the subject indicate that the Kentucky Court does *not* approve of explicit hypotheticals, preferring more formal *voir dire* questions.⁴⁹

In the case of *Harrell v. Commonwealth*⁵⁰ the Court stated:

Without detailing the questions propounded it is sufficient to say that each of the controversial questions propounded either attempted to state the case, to instruct on the law peculiar to the case or inquire into the jurors' knowledge of that law. We have con-

⁴⁶ *Lightfoot v. Commonwealth*, 310 Ky. 151, 219 S.W.2d 984 (1949).

⁴⁷ *Alexander v. Jones*, 249 S.W.2d 35 (Ky. 1952); *Apkins v. Commonwealth*, 148 Ky. 662, 147 S.W. 376 (1912).

⁴⁸ *Olympic Realty Co. v. Kamer*, 283 Ky. 432, 141 S.W.2d 293 (1940); *Drury v. Franke*, 247 Ky. 758, 57 S.W.2d 969 (1933).

⁴⁹ *Mercer v. Commonwealth*, 330 S.W.2d 734 (Ky. 1959); *Elliott v. Commonwealth*, 290 Ky. 502, 161 S.W.2d 633 (1941); *Jones v. Commonwealth*, 14 Ky. L. Rptr. 223, 19 S.W. 844 (1892).

⁵⁰ 328 S.W.2d 531 (Ky. 1959).

cluded that the questions were improper and that the court did not err in his ruling.⁵¹

The questions propounded and denied by the trial court were in fact quite confusing and seldom "pure" in the sense that each could be definitely categorized.⁵² For its general statement of law, the Court cited *Corpus Juris Secundum* for the following:

[I]t is not proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted, regardless of whether or not they correctly epitomize the testimony. Thus it is not competent to examine jurors as to how they would act or decide in certain contingencies, or in case the court should give certain instructions, or in case certain evidence or a certain state of evidence should be developed on the trial, but there are decisions in which it has been held proper to ask a juror whether he will follow the instructions of the court, where no attempt is made to state in advance what the instructions or the facts will be, so as to pledge the juror in advance to render a certain verdict on a given state of law and fact

. . . It has been held improper to inform prospective jurors of the law applicable to the case, as a basis for questioning, or generally to propound questions which call for the opinion of the juror on questions of law, or his understanding of the meaning of legal terms and expressions. . . .⁵³

It is indeed difficult to reconcile the judicial pronouncements with what is believed to be the general practice of the profession, as it is difficult to conceptualize hypothetical questions which deal with neither the law nor facts of the case, and which do not attempt to anticipate the instructions of the court. Perhaps there is an implicit distinction between "general hypotheticals" such as the preceding examples, and hypotheticals which are peculiar to the case, the emphasis in practice being placed upon the effect of the questions rather than the form chosen.⁵⁴ We simply point out that this is an area requiring development by the Court of Appeals, and shall look to the profession to frame the issues for the Court.

B. Opening Statement

Civil Rule 43.02(1) states, "The plaintiff must briefly state his claim and the evidence by which he expects to sustain it." Rule 43.02(2) states that "The defendant must then briefly state his de-

⁵¹ *Id.* at 532-33.

⁵² Brief for Appellant at 20-22, *Harrell v. Commonwealth*, 328 S.W.2d 531 (Ky. 1959).

⁵³ 50 C.J.S. *Juries* § 275(2), at 1142-43 (1947).

⁵⁴ See *Commonwealth v. Gelfi*, 282 Pa. 434, 128 A. 77 (1925).

fense and the evidence he expects to offer in support of it.”

These rules deserve to be read carefully because they contain within themselves the established interpretation. First there is the statement of the claim or defense. A claim or defense is an ultimate fact or fact pattern to be governed by the legal theory of the case which is given to the jury in the instructions. In most cases the claim will be *based upon* the theory of negligence, and the defense will be *based upon* the theory of contributory negligence. Opening statements are not an occasion for a discourse on the legal theory of the case,⁵⁵ although it is frequently desirable to state the nature of the claim or defense and its elements.

The second aspect of these rules is that the statement shall include the evidence which the party expects to submit to sustain his contention. Evidence will be testimony of witnesses and physical exhibits which will be probatively factual in nature. Thus, counsel must make his statement of the ultimate facts he will prove by stating the probative facts he will submit for the jury's consideration.

We must always keep in mind the distinction between ultimate facts and probative facts and that there is a theoretical, and frequently actual, gap between them. This is because even though both may be stated, one as the claim and the other as the evidence, *the gap cannot be bridged in opening statement*. This is argument of the case, a function of counsel reserved solely for summation.⁵⁶

Where counsel attempts to argue the law of the case and to apply it to the facts he will be vulnerable to an objection. It does not appear, however, that argument of the case in opening statement can be the basis for reversal. In *Colston's Administrator v. Cincinnati, N.O. & T.P. Ry. Co.*⁵⁷ an argument was considered which evidently would have been proper had it been made in summation. The Court refused to reverse on this basis, holding that it was at most harmless error.

Problems which arise in making an opening statement are analogous to those which arise upon presentation of evidence. If evidence will not be accepted when offered it is not a legitimate topic for discussion in the opening statement.⁵⁸ An objection may be made at the time counsel states that he will introduce the evidence,⁵⁹ and such an

⁵⁵ *Colston's Adm'r v. Cincinnati, N.O. & T.P. Ry. Co.*, 253 Ky. 512, 69 S.W.2d 1072 (1934).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Turpin v. Scrivner*, 297 Ky. 365, 178 S.W.2d 971 (1944); *Star Furniture Co. v. Holland*, 273 Ky. 617, 117 S.W.2d 603 (1938); *Louisville Gas Co. v. Kentucky Heating Co.*, 132 Ky. 435, 111 S.W. 374 (1908).

⁵⁹ *Mutual Life Ins. Co. v. Green*, 37 F. Supp. 949 (E.D. Ky. 1941); *Standard Oil Co. v. Leach*, 138 Ky. 594, 128 S.W. 885 (1910).

objection, if sustained, should have at least two effects upon the course of the trial. First, it will serve the immediate purpose of cutting off statement on an improper subject. Secondly, it should force the proponent of the evidence to offer it by merely calling the witness and making an offer, thus cutting off a second, and possibly more damaging, opportunity to "ring the bell."⁶⁰

Another problem of opening statement is avoiding a directed verdict as a result of fatal admissions. A directed verdict may be entered at the close of an opening statement if it is clear that a party will be unable to prove facts essential to recovery, or to disprove facts fatal to recovery.⁶¹ Before making such a decision the trial judge should allow counsel to make a fuller statement or to explain any statement made. A verdict should not be directed based upon misunderstanding or inadvertence of counsel.⁶² Nor should a verdict be directed based upon mere insufficiency of the opening statements, but only upon admissions.⁶³ Statements are to be considered in the same manner as pleadings upon a motion for dismissal for failure to state a claim for relief: the statement should be construed in favor of the maker,⁶⁴ and the statement of the opposing party should not be taken as true.⁶⁵

Occasionally a trial judge will indicate to counsel that if the evidence to be presented was correctly and fully stated, he will be forced to direct a verdict. Instances where this should be done are where the trial promises to be lengthy and the claim or defense, or the admissibility of necessary evidence, is based upon uncertain law. In such an instance counsel have often agreed that opening statements may be taken as evidence and the verdict directed.⁶⁶ This is to avoid the

⁶⁰ The reference to "bell ringing" is a reference to asking leading questions to vitiate the effect of the inevitable objection and admonition. Thus it is said that "you cannot unring a bell" or that "you can pull out the nail but you can't pull out the hole." An admonition to disregard a leading question is frequently no more effective than an admonition to "count to ten without thinking of a rabbit."

This type of conduct is condemned by the new ABA CANONS OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-25 (1970), and by case law. *Louisville & N. R.R. Co. v. Payne*, 133 Ky. 539, 118 S.W. 352 (1909); *Marcum v. Hargis*, 104 Ky. L. Rptr. 1117, 104 S.W. 693 (1907).

⁶¹ *Baker v. Case Plumbing Mfg. Co.*, 423 S.W.2d 258 (Ky. 1968); *Hill v. Kisselring*, 310 Ky. 483, 220 S.W.2d 858 (1949); *Payne v. Louisville Ry. Co.*, 294 Ky. 160, 171 S.W.2d 253 (1943).

⁶² *Tinsley v. Majorana*, 240 S.W.2d 539 (Ky. 1951); *Carter v. Aetna Life Ins. Co.*, 272 Ky. 392, 114 S.W.2d 496 (1938).

⁶³ *Baker v. Case Plumbing Mfg. Co.*, 423 S.W.2d 258 (Ky. 1968); *Riley v. Hornbuckle*, 366 S.W.2d 304 (Ky. 1963).

⁶⁴ *Hill v. Kisselring*, 310 Ky. 483, 220 S.W.2d 858 (1949); *c.f. Raco Corp. v. Edwards*, 272 S.W.2d 345 (Ky. 1954).

⁶⁵ *Payne v. Louisville & N. R.R. Co.*, 294 Ky. 160, 171 S.W.2d 253 (1943).

⁶⁶ *Co-De Coal Co. v. Combs*, 325 S.W.2d 78 (Ky. 1959); *Payne v. Louisville & N. R.R. Co.*, 294 Ky. 160, 171 S.W.2d 253 (1943).

expense and time required to actually present the evidence, yet preserves a record upon which to base an appeal.

In the recent case of *Samuels v. Spangler*,⁶⁷ counsel for plaintiff made an opening statement which showed the plaintiff to be contributorily negligent. The trial judge deemed the statement insufficient and called the parties into chambers where counsel for plaintiff was asked whether he was able to state facts constituting a claim for relief. When the plaintiff's counsel stated that he had fully stated the case, a verdict was directed for the defendant. On appeal plaintiff argued that he had made no fatal admission upon which a verdict could have been directed. The Court declined to consider the statements as showing contributory negligence as a matter of law since the statements were not unequivocal.⁶⁸ The Court proceeded, however, to consider the direction of the verdict as the granting of summary judgment (the conference in chambers revealed that there was no fact in dispute) and affirmed the lower court's action.⁶⁹

C. Problems Relating to Presentation of Evidence

Soliloquies and asides are, of course, improper when evidence is being presented and are a signal of improper comment. Objections to this type of misconduct will usually be well taken and little analysis would be of value. Aside from intentional misconduct, objection may also be made to the subject matter of the comment in many cases.

Counsel is frequently faced with the dilemma of preserving the record for appeal without creating a ground for reversal. This problem is presented where a party has evidence which he would like to introduce but which he believes the trial judge will rule (or has ruled) inadmissible. To fail to pursue the line at all would be dereliction, for his fears may be unfounded⁷⁰ or the opposing party may fail to object.⁷¹ But to persist after an adverse ruling would be misconduct⁷² and cost any verdict thereby gained.⁷³ There is little need to involve ourselves with theoretical distinctions on this point for the proper practice is clearly established.

If a proponent has some reasonable belief that his evidence should

⁶⁷ 441 S.W.2d 129 (Ky. 1969).

⁶⁸ *Id.* at 131.

⁶⁹ *Id.*

⁷⁰ *Standard Oil Co. v. Leach*, 138 Ky. 594, 128 S.W. 885 (1910).

⁷¹ *Phillips v. Green*, 194 Ky. 254, 238 S.W. 742 (1922).

⁷² *Bergman v. Solomon*, 143 Ky. 581, 136 S.W. 1010 (1911); *Standard Oil Co. v. Leach*, 138 Ky. 594, 128 S.W. 885 (1910); *Louisville & N. R.R. Co. v. Payne*, 133 Ky. 539, 118 S.W. 352 (1909).

⁷³ Note the omnipresent requirement of causation. *Louisville & N. R.R. Co. v. Payne*, 133 Ky. 539, 118 S.W. 352 (1909).

be admissible,⁷⁴ he should proceed upon that theory and treat it no differently from clearly admissible evidence. If no objection is raised or if an objection is overruled, then no problem will arise, except perhaps on a motion for a new trial or on an appeal. If the objection is sustained, then counsel should have his witness make an offer of his answer out of hearing of the jury in order to preserve the error. Thereafter, he should proceed to call his other witnesses, state that he wishes to ask the same questions, and have his witnesses make the same offers of answers. This is in conformity with the literal interpretation of Civil Rule 43.10, as the Rule specifies that the *witness* is to make a specific offer of his answer to the court and makes no provision for avowals by counsel. There appear to be no recent cases holding that an avowal by counsel is insufficient, and recent cases intimate that either a specific offer by the witness *or* an avowal by the attorney would suffice,⁷⁵ but it would be far wiser for counsel to conform to the interpretation of the official comments⁷⁶ on the Civil Rules and to have his witness make the offer. This procedure should afford the offeror the most protection possible under the adverse circumstances of a sustained objection. To do less may cost a new trial; to do more may cost a favorable verdict.

A common problem of examination of witnesses is "unringing the bell," or removing the prejudicial effect of improper questions, or questions calling for improper testimony. Ordinarily these questions cannot be anticipated and the objection must come after the jury has heard the reference. In most cases the sustaining of the objection and an admonition to the jury will be the only relief to which the objector will be entitled.⁷⁷ There are, however, instances in which such questions will necessitate a mistrial. Examples of these are where there are *repeated* references⁷⁸ to those matters upon which comment will usually result in irradicable error, such as insurance,⁷⁹ settlement offers,⁸⁰ etc. Our previous discussion of introduction of legally

⁷⁴ *Bergman v. Solomon*, 143 Ky. 581, 136 S.W. 1010 (1911), and *Louisville & N. R.R. Co. v. Payne*, 133 Ky. 539, 118 S.W. 352 (1909), indicate that the offeror of clearly inadmissible and prejudicial evidence is not even entitled to a "first bite."

⁷⁵ *Eilers v. Eilers*, 412 S.W.2d 871 (Ky. 1967); *Commonwealth v. Jewell*, 405 S.W.2d 678 (Ky. 1966); *Kentucky Stone Co. v. Gaddie*, 396 S.W.2d 337 (1965).

⁷⁶ W. CLAY, 7 KENTUCKY PRACTICE 29 (1963).

⁷⁷ *Burdon v. Burdon's Adm'r*, 225 Ky. 480, 9 S.W.2d 220 (1928); *Standard Sanitary Mfg. Co. v. Brian's Adm'r*, 224 Ky. 419, 6 S.W.2d 491 (1928).

⁷⁸ *Dale v. Peden*, 252 S.W.2d 687 (Ky. 1952); *Stearns Coal & Lumber Co. v. Williams*, 177 Ky. 698, 198 S.W. 54 (1917).

⁷⁹ *Helton v. Prater's Adm'r*, 272 Ky. 574, 114 S.W.2d 1120 (1938).

⁸⁰ *Wolf Creek Collieries Co. v. Davis*, 441 S.W.2d 401 (Ky. 1969).

questionable evidence applies equally to this problem, and it appears that the offeror is entitled to his "first bite."

A closely related problem is the nonresponsive answer which reveals irrelevant matters. Here the courts have often looked to who made the statement in an effort to determine whether it was given innocently or maliciously.⁸¹ Thus, a plaintiff who discloses that he "made a statement to the defendant's insurance man" is more likely to cause a mistrial than a mere witness who makes the same answer.⁸² Ordinarily, it should not be error for a defendant to make the same disclosure, this logically being within his discretion,⁸³ but the converse should be true where counsel for plaintiff has discreetly elicited the answer.⁸⁴

Improper questions and answers may be considered by the court with regard to other misconduct on the same subject in order to discover a design or plan to inject improper considerations into the trial. Thus, in *Helton v. Prater's Administrator*,⁸⁵ what was probably a permissible *voir dire* question on interests in an insurance company was considered in relation to a later comment on the same topic in finding a concerted plan to introduce improper considerations into the trial.

D. Scope of Summation

Counsel is given wide latitude in arguing his case to the jury, and in doing so he may argue facts as they appear in the record, common knowledge, and reasonable deductions therefrom.⁸⁶ The first element

⁸¹ *Terminal Transport Co. v. Berry*, 217 F.2d 32 (6th Cir. 1954).

⁸² *Compare Kaufman-Straus Co. v. Short*, 311 Ky. 78, 223 S.W.2d 367 (1949), and *Turpin v. Scrivner*, 297 Ky. 365, 178 S.W.2d 971 (1944), with *Marsee v. Johnson*, 260 Ky. 615, 86 S.W.2d 299 (1935), and *Chambers v. Hawkins*, 233 Ky. 211, 25 S.W.2d 363 (1930).

⁸³ One locally prominent defense attorney has stated that when he goes to a rural area to try a case he assumes that the jury will associate him with an insurance company. This has led him on occasion to announce the fact and appeal to the jurors for a fair trial.

⁸⁴ *Hall v. Ratliff*, 312 S.W.2d 473 (Ky. 1958); *Stott v. Hinkle*, 286 Ky. 143, 150 S.W.2d 655 (1941); *Wilson v. Deegan's Adm'r*, 282 Ky. 547, 139 S.W.2d 58 (1940).

⁸⁵ 272 Ky. 574, 114 S.W.2d 1120 (1938).

⁸⁶ *Commonwealth v. Reppert*, 421 S.W.2d 527 (Ky. 1967); *City of Newport v. Maytum*, 342 S.W.2d 703 (Ky. 1961); *Bruner v. Gordon*, 309 Ky. 29, 214 S.W.2d 703 (1948); *Coomb's Adm'r v. Vibbert*, 289 Ky. 463, 158 S.W.2d 957 (1942); *Monohan v. Grayson Co. Sup. Co.*, 245 Ky. 781, 54 S.W.2d 311 (1932); *Shelley v. Chilton's Adm'r*, 236 Ky. 221, 32 S.W.2d 974 (1931); *City of Providence v. Young*, 227 Ky. 690, 13 S.W.2d 1022 (1929); *Wells v. King*, 219 Ky. 201, 292 S.W. 777 (1927); *Louisville & N. R.R. Co. v. Vaughn's Adm'r*, 183 Ky. 829, 210 S.W. 938 (1919); *Louisville & N. R.R. Co. v. Baker's Adm'r*, 183 Ky. 785, 210 S.W. 674 (1919); *Ross v. Kohler*, 163 Ky. 583, 174 S.W. 36 (1915); *Cincinnati, N.O. & T.P. Ry. Co. v. Martin*, 154 Ky. 348, 157 S.W. 710 (1913); *Louisville Gas Co. v. Kentucky Heating Co.*, 132 Ky. 435, 11 S.W. 374 (1908); *Hurst v. Williams*, 31 Ky. L. Rptr. 658, 102 S.W. 1176 (1907); *Warren v. Nash*, 24 Ky. L. Rptr. 479, 68 S.W. 658 (1902).

in the rule stated is argument on the record. This includes the testimony of witnesses and physical evidence actually introduced. Counsel must never forget that *his statements* in opening statement, while examining witnesses, or during summation, are *not* evidence and can support neither argument nor a verdict.⁸⁷ Similarly, he must remember that the best evidence in the world is useless unless produced at trial,⁸⁸ and this means the trial which is then being held.⁸⁹ It is surprising how frequently these simple axioms are forgotten, and a lawyer finds himself in summation unable to argue his best evidence simply because he forgot to offer it.

The converse is also true. If one does not wish opposing counsel to argue incompetent evidence then he must make timely objection to its admission into the record.⁹⁰

It is upon this basis that we should test what might be called unsworn testimony which is not in the record but which may nonetheless be true. An excellent example of this is found in *Berger v. Standard Oil Company*,⁹¹ in which counsel stated in summation his thoughts and what he had done in getting oil samples tested. Of course, none of this was in evidence.

Going but one step further, lawyers occasionally make such statements as rank hearsay. The 1969 case of *Adams v. Flora*⁹² is an excellent example of this technique. The attorney there stated:

. . . I have had no less than 6 people who have no interest in this case whatsoever, who have told me that if Lillie Howard's will is broken—

. . . .

Who have told me that if you break this will every will that has been written by any person 65 years old that doesn't suit some of the kinfolks—

. . . .

. . . [A]nd some of you are about 65 years old . . . [T]hen you were willing for a jury to come in and say you didn't like the way that was written we are going to give it to the legal heirs. (*Italics omitted*).⁹³

⁸⁷ *Co-De Coal Co. v. Combs*, 325 S.W.2d 78 (1958).

⁸⁸ *Wilson v. Little*, 293 S.W.2d 715 (Ky. 1956). An interesting example is *Stacy v. Williams*, 253 Ky. 353, 69 S.W.2d 697 (1934), in which the plaintiff sat with his injured leg exposed as counsel referred to it in argument. This was improper as the leg itself was not in evidence and counsel had failed to offer photographs.

⁸⁹ *Triplett v. Napier*, 286 S.W.2d 87 (1956).

⁹⁰ *Norton v. Winstead*, 218 Ky. 26, 290 S.W. 1034 (1927).

⁹¹ 126 Ky. 155, 103 S.W. 245 (1907).

⁹² 445 S.W.2d 420 (Ky. 1969).

⁹³ *Id.* at 421.

This statement of hearsay opinion not in the record was condemned and, largely due to the lack of an admonition, the Court felt compelled to reverse.

The second element of the rule is "common knowledge." Common knowledge includes matters of learning, experience, history and facts of which judicial notice may be taken.⁹⁴ In *Shelley v. Chilton's Administrator*,⁹⁵ it was held that this included current history and facts concerning public figures. The key to common knowledge appears to be "facts of which judicial knowledge may be taken." In *Commonwealth v. Gabhart*,⁹⁶ an appeal to test the sufficiency of an indictment, the Court of Appeals quoted approvingly from Newman's *Pleading and Practice*⁹⁷ that:

"The judicial notice here referred to not only embraces the general laws or principles of jurisprudence, which of course need not be stated or argued in a pleading, but also includes facts of public notoriety. It will frequently be difficult to distinguish those things the notoriety of which will justify the court in knowing them judicially from those of which proof will be required. No general rule can be laid down on the subject; but it may perhaps with propriety be said that the courts will judicially know all facts affecting the public at large which are known or should be known by the generality of the people of the state. If the memory of the judge is at fault, he will refer to such documents as may be deemed worthy of confidence. To this may be added such facts as are referred to in the general statutes of the State; all of which are presumed to be known to the people and judges of the Commonwealth."⁹⁸

All that need be added to the language of the Court and of Judge Newman is that the attorney who finds himself estopped from arguing outside the record *may* be able to justify his comments as mere statements of facts of common knowledge.⁹⁹

The third element of the rule governing the scope of argument to the jury is that of "reasonable deductions from the evidence." It is permissible, and expected, that counsel will argue to the jury an interpretation of the evidence most favorable to his client.¹⁰⁰ Here it is necessary to carefully distinguish between stating the evidence (as

⁹⁴ *Shelley v. Chilton's Adm'r*, 236 Ky. 221, 32 S.W.2d 974 (1930).

⁹⁵ *Id.*

⁹⁶ 160 Ky. 32, 169 S.W. 514 (1914).

⁹⁷ J. NEWMAN, PLEADING & PRACTICE § 210 (1908).

⁹⁸ *Commonwealth v. Gabhart*, 160 Ky. 32, 34-35, 169 S.W. 514, 515 (1914).

⁹⁹ Note the attempt to do this in *Louisville Ry. Co. v. Farmer*, 182 Ky. 368, 206 S.W. 619 (1918).

¹⁰⁰ *Rakestraw v. Sebree Deposit Bank*, 189 Ky. 668, 225 S.W. 506 (1920); *Kimbrough v. Lexington City Nat'l Bank*, 150 Ky. 336, 150 S.W. 325 (1912); *Worthington v. Miller's Adm'r*, 4 Ky. L. Rptr. 252, 11 Ky. Opin. 708 (1882).

it appears in the record) and stating an interpretation of the same evidence. If counsel purports to state the evidence and misstates it, he is subject to rebuke from the trial judge,¹⁰¹ even in the absence of an objection.¹⁰² But if he correctly states the evidence and then goes on to state its significance, he will be immune from reprimand. This will be true even though the logical connection is unsound,¹⁰³ for this is a decision for the jury to make.

As the reader must realize, it is impossible to state what will or will not be an acceptable or logical deduction from the evidence. It is the infinite combinations of evidence that make law so complicated and profitable. Each argument must be examined in the context of the particular case.

IV. THE BASIC OBJECTIONS TO COMMENTS

The objections to comments made by counsel in the course of a trial are as difficult to categorize and rationalize as objections to the admission of evidence in general. Indeed, in most instances which have arisen, they are the same. Probably the most common objection is irrelevancy, here including immateriality, and it is this standard which dictates that we ordinarily exclude evidence of: insurance; settlement offers; religion or race of a party; character of parties, witnesses, and, especially, attorneys; rights of a party to appeal a judgment; prior litigation; and class affiliations. Of course, any of these topics may become an issue in a particular case and thereby become relevant and the subject of legitimate comment, but most often they will not.

Occasionally the objection to evidence is that it is incompetent, and the ground for exclusion should control any comment by counsel. The same analysis should apply no matter what the particular grounds for objection to admissibility of evidence of the same subject should be.

There are instances in which evidence of the subject of a comment would be admissible but where a comment is not. The most obvious example of this is where evidence was available but not introduced at trial and therefore not made a part of the record.¹⁰⁴ This leads us

¹⁰¹ *Moss v. Mittel*, 253 Ky. 504, 69 S.W.2d 1046 (1934); *Brandenburg v. Addison*, 221 Ky. 442, 298 S.W. 1091 (1927).

¹⁰² *Owensboro Shovel & Tool Co. v. Moore*, 154 Ky. 431, 157 S.W. 1121 (1913).

¹⁰³ *Kentucky & I.T. R.R. Co. v. Becker's Adm'r*, 185 Ky. 169, 214 S.W. 900 (1919).

¹⁰⁴ *See, e.g., Wilson v. Little*, 293 S.W.2d 715 (Ky. 1956); *Louisville & N. R.R. Co. v. Hull*, 113 Ky. 561, 68 S.W. 433 (1902).

to the reason for impropriety of a comment most often given by the Court, that the comment is not upon matters shown by the record or that it goes outside the record.¹⁰⁵ This is a broad ground for objection because it covers evidence whether admissible or not, but it should not be preferred if other grounds for objection are available. The reason for this, especially where evidence of the subject of the comment is inadmissible, is that it requires the court to divert its attention from fairly well settled rules of evidence to considerations of the particular record before it and the propriety of inferences drawn from that record, a much more nebulous and difficult area. This is simply to say that counsel should choose the most concrete objection available whenever an objection is to be made.

A third situation in which comment will be deemed improper is where the subject of the comment was admitted into the record yet is of no probative value to the issues of the case, *e.g.*, the number of children left by the deceased in a wrongful death action. Testimony regarding children, or a widow, is technically irrelevant but will be admitted.¹⁰⁶ But to overemphasize the fact by redundant testimony and argument to the jury is improper and may require reversal, *e.g.*, to suggest that the needs of the widow and children is the correct measure of damages is an attack on the instructions.

A similar problem is where evidence is admitted for one particular purpose and is thereafter attempted to be used for another and improper purpose. An example of this is *Croley v. Huddleston*¹⁰⁷ where evidence was admitted to impeach a witness, and by admonition restricted to this purpose, but which counsel attempted to argue as substantive evidence.

V. SPECIFIC PROBLEM AREAS

A. Affidavits For Continuance

Rule 43.03 of our Rules of Civil Procedure as did its predecessor, Civil Code section 315, allows a party to a civil action a continuance where material evidence cannot be produced. Ordinarily, the evidence sought will be the testimony of a witness. In order to obtain such a continuance, the moving party must submit an affidavit showing the facts the affiant believes the witness will prove, the materiality of the facts, that the affiant believes the facts to be true,¹⁰⁸ and that a sub-

¹⁰⁵ See *Scope of Summation* section III D, *supra*.

¹⁰⁶ *McCoy v. Carter*, 323 S.W.2d 210 (Ky. 1959).

¹⁰⁷ 301 Ky. 58, 192 S.W.2d 717 (1946).

¹⁰⁸ *Harlan-Central Coal Co. v. Gross*, 298 Ky. 540, 183 S.W.2d 550 (1944).

poena was issued and placed in the hands of the sheriff a reasonable time prior to trial.¹⁰⁹

This same rule permits the opposing party a voice in the decision whether to grant the continuance sought, and, except for unusual circumstances,¹¹⁰ he may force the moving party to trial by agreeing that the affidavit may be read into evidence as the deposition of the missing witness,¹¹¹ subject to objections to relevancy, materiality, and competency. Naturally, this will encourage the party seeking the continuance to make the affidavit as favorable to his position as propriety will allow.

Where a party has successfully resisted a motion for a continuance by agreeing that an affidavit may be read as a deposition, the moving party will offer it into evidence and have it read. Thereafter, it may be considered as no different than any other evidence and may be commented upon in the same manner.¹¹² Frequently, however, counsel have been moved to attack not only the truth of the "testimony" therein, but the good faith of the affiant as well. An example of this type of comment is found in the 1913 case of *Madisonville, H. & E. R.R. Co. v. Allen*,¹¹³ where counsel who had agreed that the affidavit be read stated in summation that,

Mr. Browder is an expert in writing affidavits, and he goes out and writes a long affidavit to be read as the deposition of the absent witnesses, and he puts so much in that affidavit and so much that is ridiculous that we are forced to admit it in order to get a trial.¹¹⁴

Where such remarks have been made, and the instances have been numerous, the courts have consistently held them to be error.¹¹⁵ This seems only fair since the party forcing the unwilling litigant to trial should not also be able to deny him his evidence, and the Court has recognized that such comments have this effect.¹¹⁶ The objection that

¹⁰⁹ *North River Ins. Co. v. Dyche*, 163 Ky. 271, 173 S.W. 784 (1915).

¹¹⁰ *Vincennes Bridge Co. v. Poulos*, 228 Ky. 446, 15 S.W.2d 271 (1929); *Madisonville, H. & E. R.R. Co. v. Allen*, 152 Ky. 706, 154 S.W. 5 (1913); *Troendle Coal Co. v. Morgan Coal, Coke & Mining Co.*, 114 S.W. 312 (Ky. 1908); *Langdon-Creasy Co. v. Rouse*, 139 Ky. 647, 72 S.W. 1113 (1903).

¹¹¹ *Farris v. Evans*, 289 Ky. 418, 158 S.W.2d 941 (1942).

¹¹² *Service Fire Ins. Co. v. Roundtree*, 292 Ky. 59, 165 S.W.2d 973 (1942); *Provident Life & Acc. Ins. Co. v. Diehlman*, 259 Ky. 320, 82 S.W.2d 350 (1935).

¹¹³ 152 Ky. 706, 154 S.W. 5 (1913).

¹¹⁴ *Id.* at 710, 154 S.W. at 7.

¹¹⁵ *Wagner v. Emmett*, 280 S.W.2d 210 (Ky. 1955); *National Surety Marine Ins. Corp. v. Wheeler*, 257 S.W.2d 573 (Ky. 1953); *Boden v. Rogers*, 249 S.W.2d 707 (Ky. 1952); *Gunterman v. Cleaver*, 204 Ky. 62, 263 S.W. 683 (1924); *Madisonville, H. & E. R.R. Co. v. Allen*, 152 Ky. 706, 154 S.W. 5 (1913).

¹¹⁶ *Boden v. Rogers*, 249 S.W.2d 707 (Ky. 1952); *Whittaker v. Thornberry*, 306 Ky. 830, 209 S.W.2d 448 (1948).

the affidavit is that of the counsel for the opposing side and not that of the witness is one that is waived in resisting the motion for continuance.

This is not to say that no comment may be made concerning the affidavit. It becomes a part of the record¹¹⁷ and is subject to the same comments as other evidence, and inconsistencies between the affidavit and other evidence may be argued.¹¹⁸ It should be permissible to show through other witnesses that the missing witness would be biased or that he had no opportunity to observe, or to impeach him in some other manner.¹¹⁹

This brings us to an important practical consideration: May the acceptance of the affidavit as a deposition be conditioned upon the stipulation of other facts which would tend to impeach? For example, may the party resisting the motion for continuance insist upon the inclusion in the affidavit that the missing witness is a friend, relative, or employee of the party making the motion where the fact is indisputable? One's sense of fairness says "yes," but the answer should be "no." This is a consideration which the opposing party must take into account when deciding whether or not to accept the affidavit. If it is necessary that he impeach the witness and he has no other means of doing so, he should agree to the continuance. The only situation in which a case such as this could reach the Court of Appeals would be where the trial judge forced the moving party to amend his affidavit to include such facts, and the moving party lost in the trial court. Such a situation has not arisen in Kentucky.

*B. Per Diem Calculations*¹²⁰

Courts of various jurisdictions have reached different conclusions on whether counsel should be allowed to suggest a value for daily pain and suffering and to compute therefrom the total value of future pain and suffering of the plaintiff. Courts which have rejected this type of argument have reasoned that this practice might deceive jurors into believing that pain and suffering, inherently immeasurable,

¹¹⁷ The affidavit must be offered and read into the record and is not automatically a part of the record. *Wilson v. Little*, 293 S.W.2d 715 (Ky. 1956).

¹¹⁸ *Provident Life & Acc. Ins. Co. v. Diehlman*, 259 Ky. 320, 82 S.W.2d 350 (1935).

¹¹⁹ *Boden v. Rogers*, 249 S.W.2d 707 (1952).

¹²⁰ The brevity of this section is no reflection upon the importance of the topic, but is due to the fact that this topic is extensively treated in Comment, 49 Ky. L. J. 592 (1961).

might be reduced to mathematical certainty.¹²¹ In *Louisville & N. R.R. Co. v. Mattingly*¹²² the Kentucky Court of Appeals approved this practice, reasoning that it would be no more speculative for counsel to suggest a daily amount than it would be to confine suggestions to total amounts for damages for pain and suffering.¹²³

The first test of any such argument will be the foundation to be derived from the evidence introduced. In order to argue for damages for pain and suffering on a *per diem* basis it is necessary that evidence be introduced that the claimant will, for some ascertainable future period, suffer each and every day and in roughly the same quantum. Where it cannot be shown that the plaintiff will suffer daily, or where the pain will be variable, it may be necessary for counsel to base his argument upon some longer interval of time, such as weekly, monthly, or annually. Thus, where counsel embarks upon such an argument not having laid a proper foundation he is assuming facts not shown by the record and misstating the evidence by innuendo. Thus, an objection that the argument is outside the record would be appropriate.

C. Race, Religion and National Origin

Considering the monumental advances which have been made in racial relations in the past fifteen years, it would be surprising today to find an attorney who would make an overt allusion to either race, religion or nationality where it was not an issue in the case. Kentuckians have not always been so enlightened, however, and cases are to be found on the subject.

In *Kammer-Friedman Company v. Casky*,¹²⁴ counsel for plaintiff had characterized his clients as "high-class American citizens and not Jews, and that plaintiffs had more character than defendants and their counsel combined."¹²⁵ In affirming the verdict for plaintiff, the court stated that, "[t]he reference by counsel to the nationality of defendants was, perhaps in bad taste, but we find nothing in the record to indicate that such reference, did or could, have aroused the prejudices of the jury."¹²⁶

In *Colker v. Connecticut Fire Insurance Company*,¹²⁷ counsel for defendant made the statement that:

¹²¹ See, e.g., *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958).

¹²² 339 S.W.2d 155 (Ky. 1960).

¹²³ *Id.* at 161. Approval had previously been given to arguing the total value of pain and suffering. *Aetna Oil Co. v. Metcalf*, 298 Ky. 706, 183 S.W.2d 637 (1944).

¹²⁴ 216 Ky. 504, 287 S.W. 977 (1926).

¹²⁵ *Id.* at 507, 287 S.W. at 978.

¹²⁶ *Id.*

¹²⁷ 224 Ky. 837, 7 S.W.2d 502 (1928).

'He planned the whole thing. It's a dirty nasty Jewish trick that this criminal, convicted in the United States court, did; a criminal who tried to cheat the government, and now trying to cheat the fire insurance companies by a dirty Jew trick. The evidence shows beyond a doubt that Martin was only a subterfuge, and that there never was any Martin. Just a Jew trick of Colker and his lawyer to cheat the government and the insurance companies . . .'¹²⁸

Here the appeal was taken on grounds in addition to the remarks quoted, and a reversal obtained, so it is not clear what weight the remarks were given in granting the reversals. The Court merely noted that,

It was very improper for counsel in his concluding argument to appeal to race prejudice, and while there was no exception to this at the time, counsel did immediately move to discharge the jury, which sufficiently raised the question. The case should have been argued simply on the evidence before the jury.¹²⁹

No definite rule based upon these cases can be advanced, and no similar civil authority¹³⁰ is to be found. Despite the decision in *Colker*, the existence of other grounds for reversal makes it impossible to say that the case has overruled *Kammer-Friedman*. It is submitted that the *Kammer-Friedman* opinion was not carefully worded and that the true rule is that references to race, religion or national origin are improper when employed to arouse the prejudices of the jurors, but that such references will not constitute reversible error unless prejudice is manifested in the verdict. Thus, what the Court was probably saying was simply that they agreed with the verdict and that the reference had not prejudiced the defendant in that particular case.

D. Settlement Offers

It has long been an evidentiary rule that the fact that a defendant has offered to settle the case is inadmissible.¹³¹ While the authorities make convincing arguments that the basis for the rule is policy and privilege, thus making the evidence incompetent,¹³² the courts

¹²⁸ *Id.* at 845, 7 S.W.2d at 505.

¹²⁹ *Id.*

¹³⁰ For cases from the criminal field, see *Dotye v. Commonwealth*, 289 S.W.2d 206 (Ky. 1956); *Quarles v. Commonwealth*, 245 S.W.2d 947 (Ky. 1951); *Lickliter v. Commonwealth*, 249 Ky. 95, 60 S.W.2d 355 (1933); *Hoskins v. Commonwealth*, 152 Ky. 805, 154 S.W. 919 (1913); *Norman v. Commonwealth*, 31 Ky. L. Rptr. 1283, 104 S.W. 1024 (1907).

¹³¹ *T. C. Young Const. Co. v. Brown*, 372 S.W.2d 670 (Ky. 1963); *Elam v. Woolery*, 258 S.W.2d 452 (Ky. 1953); *Whitney v. Penick*, 281 Ky. 474, 136 S.W.2d 570 (1940); *Power's Adm'r v. Wiley*, 241 Ky. 645, 44 S.W.2d 591 (1931); *Ayer & Lord Tie Co. v. O'Bannon & Co.*, 146 Ky. 34, 174 S.W. 783 (1915); *Hurst v. Williams*, 31 Ky. L. Rptr. 658, 102 S.W. 1176 (1907).

¹³² *Elam v. Woolery*, 258 S.W.2d 452 (Ky. 1953); *Simpson v. Simpson*, 145 Ky. 45, 139 S.W. 1100 (1911).

ordinarily label the reason for exclusion as irrelevancy.¹³³ Since the fact is inadmissible, it follows that comment upon the fact is improper. The problem most often faced with regard to settlement offers is not the "black-letter" law, but its application to the particular comment.

Perhaps one of the most interesting cases on the subject is *T. C. Young Construction Company v. Brown*.¹³⁴ There, counsel for the plaintiff disclosed to the jury that he had been "negotiating" with counsel for defendant for several months. After recognizing the evidentiary rule, the court stated:

The word 'negotiating' as used by counsel in this case certainly bore a connotation that falls within the proscription, and the remark was improper. However, we are not persuaded that it was prejudicial. Though often confounded by their decisions, we cannot assume that jurors are simpletons. It is common knowledge that efforts are made to settle practically all sizeable lawsuits. This does not make it a proper subject of discussion, but it does minimize the possibility of prejudice from its mere mention without disclosure of any harmful details. We do not believe that the statement was so damaging as not to be correctable by admonition.¹³⁵

This appears to be a realistic approach to the substantiality of the error and is not difficult to reconcile with earlier decisions which indicated that any mention whatsoever might require reversal. Thus, even though the Court stated in *Elam v. Woolery*¹³⁶ that "[t]he rule is a salutary one and should not be whittled away by qualifications or exceptions,"¹³⁷ the facts shown by the opinion indicate that the *quantum* of the settlement offer was indicated, thus making the broad statement quoted technically dicta.

Another such case is *Whitney v. Penick*,¹³⁸ where the propriety of a direct question to the plaintiff and a comment in argument was passed upon *after* reversing on other grounds. While the court indicated that the evidence was inadmissible and the comment improper, it never reached the question of whether it would have been reversible error in itself.

In the recent case of *Wolf Creek Collieries Company v. Davis*,¹³⁹ the injection of settlement offers was held to be reversible error. Here there was a factor of "culpability," which is frequently found but

¹³³ 4 J. WIGMORE, EVIDENCE § 1061(c) (1940). *Contra* C. McCORMICK, EVIDENCE § 76 (1954).

¹³⁴ 372 S.W.2d 670 (Ky. 1963).

¹³⁵ *Id.* at 674.

¹³⁶ 258 S.W.2d 452 (Ky. 1953).

¹³⁷ *Id.* at 454.

¹³⁸ 281 Ky. 474, 136 S.W.2d 570 (1940).

¹³⁹ 441 S.W.2d 401 (Ky. 1969).

always difficult to treat. While the subjective intent of the person making the improper statement does not appear to be relevant, the objective manifestation of prejudice being the ultimate question, it nevertheless appears that culpability is considered in conjunction with objective evidence, the record, and the verdict. In *Wolf Creek Collieries*, attempts to introduce the settlement offers were made no less than five times and there can be little doubt that this was a factor which induced the Court to reverse.¹⁴⁰

The rule appears to be clear, therefore, that evidence of attempted compromise, or actual compromise with a third party,¹⁴¹ is not admissible, and that no such comment should be made by counsel. One who defies the rule, ordinarily a plaintiff, will thereby lose his opportunity to recover a truly adequate award, for a large award will be excellent evidence that the impermissible introduction was indeed prejudicial.

E. Insurance

That a defendant to an action is protected by liability insurance may be improperly injected into a trial in several ways: during *voir dire*; in opening statement; through examination of a witness; and, in summation. Ordinarily, whether or not the defendant is insured is irrelevant¹⁴² or incompetent,¹⁴³ and, as a result, the general rule has evolved that it is improper for counsel to comment¹⁴⁴ or to elicit comment¹⁴⁵ that the defendant is insured, and it may be reversible error for him to do so.¹⁴⁶

There are, however, many circumstances under which an injection of insurance into the case will not be irrelevant or improper. The most obvious cases are where the insurance company is named as a party¹⁴⁷ or where counsel for the insurance company elects to make the disclosure.¹⁴⁸ Other circumstances require more consideration.

A plaintiff will generally find it in his best interests to discover and to strike from the jury any veniremen who have an interest in an insurance company and who would be affected by a verdict adverse to the defendant's insurer. This is deemed by the courts to be a justifiable

¹⁴⁰ *Id.* at 402.

¹⁴¹ *Ferry's Adm'r v. Louisville Ry. Co.*, 165 Ky. 747, 178 S.W. 1087 (1915).

¹⁴² *Trevillian v. Boswell*, 241 Ky. 237, 43 S.W.2d 715 (1931).

¹⁴³ *Danville Light, Power & Traction Co. v. Baldwin*, 178 Ky. 184, 198 S.W. 713 (1917).

¹⁴⁴ *Turpin v. Scrivner*, 297 Ky. 365, 178 S.W.2d 971 (1944).

¹⁴⁵ *Hall v. Ratliff*, 312 S.W.2d 473 (Ky. 1958).

¹⁴⁶ *Kentucky Wagon Mfg. Co. v. Duganics*, 113 S.W. 128 (Ky. 1908).

¹⁴⁷ *Dunaway v. Darnell*, 302 S.W.2d 122 (Ky. 1957).

¹⁴⁸ See note 83 *supra*.

interest¹⁴⁹ and has given rise to the first exception to the general rule. Thus, plaintiff's counsel may inquire into a juror's interest in insurance companies where he in good faith believes that the juror may have an interest in the defendant's insurer.¹⁵⁰ Good faith may be founded upon answers of the veniremen¹⁵¹ or upon other information held by counsel.¹⁵² An example of questions becoming permissible upon an answer of a venireman is the case of *Bourland v. Mitchell*¹⁵³ where the potential juror gave his occupation as an insurance agent. It was held permissible for counsel to then inquire as to whether the juror had written insurance policies for the defendant. The answer that he had written only fire insurance for the defendant was held not to erroneously prejudice the defendant.¹⁵⁴

An example of the second basis for good faith is found in the case of *Hoagland v. Dolan*¹⁵⁵ where counsel for plaintiff asked, "Are any of you gentlemen at the present time employed by, or interested in, any insurance company whose business is to insure automobiles against personal injury of the owner?"¹⁵⁶ Here the trial court overruled objections to the question and motions to dismiss, and apparently no avowal was made. The Court of Appeals relied upon *Dow Wire Works Company v. Morgan*¹⁵⁷ in holding that the absence of a showing of good faith was to be construed in favor of the propounder of the question and assumed.

Another example is found in *Helton v. Prater's Administrator*¹⁵⁸ where counsel for plaintiff asked the following question:

'Gentlemen of the jury, are any of you at the present time employed by, or interested in, or have any policy of insurance in, or stockholder in, the State Farm Mutual Automobile Insurance Com-

¹⁴⁹ *Bourland v. Mitchell*, 335 S.W.2d 567 (Ky. 1960); *Ewing-Von Allmen Dairy Co. v. Godwin*, 304 Ky. 161, 200 S.W.2d 103 (1947); *Abell v. Whitehead*, 266 Ky. 764, 99 S.W.2d 770 (1937).

¹⁵⁰ *Potter v. Trent*, 262 S.W.2d 186 (Ky. 1953); *Helton v. Prater's Adm'r*, 272 Ky. 574, 114 S.W.2d 1120 (1938); *Abell v. Whitehead*, 266 Ky. 764, 99 S.W.2d 770 (1937); *Hoagland v. Dolan*, 259 Ky. 1, 81 S.W.2d 869 (1935); *Hedger v. Davis*, 236 Ky. 432, 33 S.W.2d 310 (1930); *Ashland Sanitary Milk Co. v. Messersmith's Adm'r*, 236 Ky. 91, 32 S.W.2d 727 (1930); *W. G. Duncan Coal Co. v. Thompson's Adm'r*, 157 Ky. 304, 162 S.W. 1139 (1914).

¹⁵¹ *Insko v. Cummins*, 423 S.W.2d 261 (Ky. 1968); *Bourland v. Mitchell*, 335 S.W.2d 567 (Ky. 1960); *Ashland Sanitary Milk Co. v. Messersmith's Adm'r*, 236 Ky. 91, 32 S.W.2d 727 (1930).

¹⁵² *Ewing-Von Allman Dairy Co. v. Godwin*, 304 Ky. 161, 200 S.W.2d 103 (1947); *Helton v. Prater's Adm'r*, 272 Ky. 574, 114 S.W.2d 1120 (1938).

¹⁵³ 335 S.W.2d 567 (Ky. 1960).

¹⁵⁴ *Id.* at 569.

¹⁵⁵ 259 Ky. 1, 81 S.W.2d 869 (1935).

¹⁵⁶ *Id.* at 870.

¹⁵⁷ 29 Ky. L. Rptr. 854, 96 S.W. 530 (1906).

¹⁵⁸ 272 Ky. 574, 114 S.W.2d 1120 (1938).

pany of Bloomington, Illinois, whose business is to insure automobile against personal injury by the owner?¹⁵⁹

It is difficult to conceive a question more likely to put before the jury the fact that the defendant was insured by a foreign insurance company. When plaintiff's counsel was called upon to show his good faith in propounding the question, he avowed that the insurance company named was conducting the defense for the defendant, that he believed that there were jurors on the panel who had insurance policies of the same character in the company, that the company was a mutual insurance company, and that all policy holders had a right to vote at stockholders meeting.¹⁶⁰ Here was a question quite similar to that in *Hoagland v. Dolan*,¹⁶¹ and an avowal more pervasive than that stated to be required by that case,¹⁶² but one in which an additional factor dictated a contrary result. Here counsel for plaintiff made the mistake of also referring to insurance in his summation,¹⁶³ and the court found this sufficient to impute to his prior question the stigma of bad faith. This enabled the Court to avoid ever reaching the question whether the *voir dire* alone would have been improper.

The next stage in which insurance may be mentioned without creating error is in the opening statement, where evidence to be presented necessitates a showing of insurance. Examples of this are where insurance may be evidence of ownership of property,¹⁶⁴ employment,¹⁶⁵ or business connection.¹⁶⁶ Here the evidence should be treated as any other, and counsel must take care not to indicate that he is introducing it for any purpose other than that stated.¹⁶⁷ Thus, while it is permissible to mention insurance as evidence of a fact in issue, it would be improper to comment upon its indemnification features.

In addition to the same principles just stated with respect to opening statement, insurance may be injected into the trial at the time of presentation of evidence by means of cross-examination of witnesses. This would be true where it is necessary to impeach a witness

¹⁵⁹ *Id.* at 1122.

¹⁶⁰ *Id.*

¹⁶¹ 259 Ky. 1, 81 S.W.2d 869 (1935).

¹⁶² *Id.* at 871.

¹⁶³ 272 Ky. 574, 576, 114 S.W.2d 1120, 1122 (1938).

¹⁶⁴ *Cayheart v. Smith*, 240 Ky. 596, 42 S.W.2d 877 (1931).

¹⁶⁵ *Triplett v. Napier*, 286 S.W.2d 87 (Ky. 1956); *Silver Fleet Motor Express v. Gilbert*, 291 Ky. 696, 165 S.W.2d 541 (1942); *Hedger v. Davis*, 236 Ky. 432, 33 S.W.2d 310 (1930); *Coral Ridge Clay Products Co. v. Collins*, 181 Ky. 818, 205 S.W. 958 (1918).

¹⁶⁶ *Trevillian v. Boswell*, 241 Ky. 237, 43 S.W.2d 715 (1931).

¹⁶⁷ *Croley v. Huddleston*, 301 Ky. 582, 192 S.W.2d 717 (1946); *Silver Fleet Motor Express v. Gilbert*, 291 Ky. 696, 165 S.W.2d 541 (1942); *Helton v. Prater's Adm'r*, 272 Ky. 574, 114 S.W.2d 1120 (1938).

by showing that he is an employee¹⁶⁸ of an insurance company having an interest in the litigation or that he is aware that he has some other interest in such a company.¹⁶⁹

Where insurance has become an issue for evidentiary or impeachment purposes, it becomes a legitimate subject for comment in summation for *the purpose for which it was introduced*.¹⁷⁰ One could not, for example, introduce insurance into the case for impeachment purposes and then make the illogical argument that people admit a propensity toward negligence by insuring themselves. It is the rejection of this very argument which makes the fact that a party is insured irrelevant.

F. Arguing the "Golden Rule"

"Golden Rule" arguments are those in which counsel requests of the jurors that they do for his client what they would like done for them under similar circumstances. It is an attempt to get the jurors to associate and sympathize with the party. These arguments are improper because they suggest to the jurors improper criteria for finding liability¹⁷¹ and are especially improper as offering the criteria for measurement of damages.¹⁷²

An example of this type of argument is found in the 1931 case of *Southern-Harlan Coal Company v. Gallaiet*¹⁷³ where the plaintiff's counsel asked the jurors to return a verdict for the plaintiff as if he were their son.¹⁷⁴ Here the argument of counsel consisted of several other improper references and it appears that the Court leaned more heavily upon references to wealth and poverty than upon the "Golden Rule" in condemning the argument.

Another example is found in *J. J. Newberry Company v. Judd*,¹⁷⁵ a false imprisonment case, in which "counsel for plaintiff stated the jury 'in fixing the amount of damages should endeavor to contemplate their wife or sister or daughter being in a similar situation.'"¹⁷⁶

¹⁶⁸ See cases cited at note 165, *supra*.

¹⁶⁹ *Trevillian v. Boswell*, 241 Ky. 237, 43 S.W.2d 715 (1932).

¹⁷⁰ See cases cited at note 167, *supra*.

¹⁷¹ The "Golden Rule" should be less effective here than as an influence on the quantum of damages. Passion and prejudice are less likely to be aroused to influence the finding of liability.

¹⁷² Applying the "Golden Rule" to arguments on damages is likely to be effective. This is because some degree of introspection will take place in any deliberation where pain and suffering are considered. "Golden Rule" arguments urge jurors to directly apply the product of the introspection, while the law dictates that it should only be used as a guide to finding the *plaintiff's* damages.

¹⁷³ 240 Ky. 106, 41 S.W.2d 661 (1931).

¹⁷⁴ *Id.* at 111, 41 S.W.2d at 663.

¹⁷⁵ 259 Ky. 309, 82 S.W.2d 359 (1935).

¹⁷⁶ *Id.* at 319, 82 S.W.2d at 364.

Here the Court held such argument improper but found it not to be prejudicial "upon a consideration of the whole case."¹⁷⁷ Here the court cited the *Southern Harlan Coal Company*¹⁷⁸ case for the proposition that "Golden Rule" arguments are improper, but again it is not possible to say that such argument could be ground for reversal in itself.

In *Murphy v. Cordle*,¹⁷⁹ counsel for plaintiff called upon the jury to make the "rich defendants pay" and called upon them to render such a verdict as they would be willing to take to have scars on their child or on themselves through life.¹⁸⁰ Again the improper comment contained other grounds of impropriety¹⁸¹ and it is not clear whether the "Golden Rule" argument alone would have been sufficient for reversal.

Another type of "Golden Rule" argument that has been deemed improper is exemplified by the case of *Lanning v. Brown*¹⁸² in which counsel for the plaintiff stated that ". . . I wouldn't suffer the pain she's going through for fifty dollars a day," that ". . . I don't think (counsel for defendant) would go through this for fifty dollars a day," and that "I don't think anybody would take any money to go through the suffering she's got."¹⁸³ Here the comment was ruled to be improper but not prejudicial in view of the reasonableness of the verdict.

In the 1964 case of *Stanley v. Ellegood*,¹⁸⁴ the impropriety of such an argument was faced where it was not merely incidental to other improper argument. There counsel for plaintiff asked of the jurors, "What would you take for ten days of that?" He went on to state that he believed "that you will treat him like you would want to be treated."¹⁸⁵

Granted that an argument was improper, the difficult question nearly always is whether the probability of real prejudice from it is sufficient to warrant a reversal, and in this respect each case must be judged on its own unique facts. An isolated instance of improper argument, for example, will seldom be found prejudicial. [Citations omitted.] But when it is repeated and reiterated in colorful variety by an accomplished orator its deadly effect cannot be ignored.

In some cases the court has declined to find that improper remarks were prejudicial in view of the modest or conservative

¹⁷⁷ *Id.*

¹⁷⁸ 240 Ky. 106, 41 S.W.2d 661 (1931).

¹⁷⁹ 303 Ky. 229, 197 S.W.2d 242 (1946).

¹⁸⁰ *Id.* at 231, 197 S.W.2d at 243.

¹⁸¹ *Id.*, *et seq.*

¹⁸² 377 S.W.2d 590 (Ky. 1964).

¹⁸³ *Id.* at 595.

¹⁸⁴ 382 S.W.2d 572 (Ky. 1964).

¹⁸⁵ *Id.* at 574-75.

amount of the verdict. [Citations omitted.] In this case, it is not suggested that the verdict was 'excessive.' Yet it was quite substantial in comparison with the verdicts in the examples just cited, and certainly we are unable to say that it negates the probability of prejudicial influence by the improper argument.

On the whole, it is our judgment that the remarks above quoted were improper and prejudicial, requiring reversal for a new trial¹⁸⁶

G. Prejudice Against Corporations

Appeals to prejudice against corporations are basically of two types: references to the wealth of the corporation, and references to the soullessness of corporations. The first of these is no different from a reference to the wealth of a party who is an individual. This type of argument is considered elsewhere¹⁸⁷ and it will suffice here to state that it is improper to inject into the trial that the corporation is large and successful.

The only comment which will apply purely to corporations is a comment upon its soullessness. An excellent example of this type of argument is found in the case of *Carter Coal Company v. Hill*¹⁸⁸ where counsel for plaintiff stated, "Go out and bring in a verdict here against this wicked, soulless corporation—this thing that's got no life, that you can't hurt and that can't feel."¹⁸⁹ The corporation felt the sting of a verdict for the plaintiff but its "painless" wound was healed by the ultimate reversal.

Normally, all veniremen who have an interest in a corporation which is a party will be struck.¹⁹⁰ For some unexplainable reason, those jurors remaining apparently will never consider that the corporation is owned by "souled," and not necessarily "heeled," individuals.¹⁹¹ Perhaps we are underestimating jurors' intelligence and integrity. Nevertheless, it has long been established that it is improper to refer to this aspect of Corporation existence.¹⁹² It must be agreed, however, that whether a party is or is not a corporation is most often totally

¹⁸⁶ *Id.* at 575.

¹⁸⁷ See the discussion under *Financial Status of a Party, infra*.

¹⁸⁸ 166 Ky. 213, 179 S.W. 2 (1915).

¹⁸⁹ *Id.* at 218, 179 S.W. at 4.

¹⁹⁰ *Hess' Adm'r v. Louisville & N. R.R. Co.*, 249 Ky. 624, 61 S.W.2d 299 (1933); *McLaughlin v. Louisville Elec. Light Co.*, 100 Ky. 173, 37 S.W. 851 (1896).

¹⁹¹ *But see Louisville & N. R.R. Co. v. Crow*, 32 Ky. L. Rptr. 1145, 107 S.W. 807 (1908), where the wealth of the *shareholders* was argued.

¹⁹² *Southern-Harlan Coal Co. v. Gallaier*, 240 Ky. 106, 41 S.W.2d 661 (1931); *Consolidated Coach Corp. v. Carmon*, 233 Ky. 464, 26 S.W.2d 20 (1930); *Carter Coal Co. v. Hill*, 166 Ky. 213, 179 S.W. 2 (1915).

irrelevant. As always, it is necessary to define the purpose of the statement¹⁹³ and its probable effect on the jury's decision.¹⁹⁴

Some have considered allegations of coercion of employees to testify and comments on trial and pre-trial tactics of an opponent to be "corporations"¹⁹⁵ comments. These, like references to wealth, are not necessarily peculiar to corporate parties but are peculiar to employers and parties generally.

H. Financial Status Of a Party

Neither poverty on the part of a plaintiff nor wealth on the part of a defendant constitutes a claim for relief. Conversely, neither wealth of a plaintiff nor poverty of a defendant is a legally recognized defense. While it is conceivable that the financial status of either a plaintiff¹⁹⁶ or a defendant¹⁹⁷ might be in issue, this ordinarily will not be the case and these facts will be irrelevant. Irrelevancy has not, however, prevented argument to the jury.

Often the incident on which the suit is based has caused the plaintiff to incur medical expenses and lose time from work, which would result in financial difficulty for most people; and it is under these circumstances that plaintiff's attorneys are most prone to argue the poverty of their clients. Despite the apparent nexus, the *effect* of the damages upon the particular plaintiff must be distinguished from the compensable damages, because in theory an award of the actual immediate damages is full compensation. Clearly, the amount of a person's net worth immediately preceeding an injury should not affect the damages resulting from the injury in any way. This is the position the Court has taken and it has been held that to argue the poverty of the plaintiff is improper.¹⁹⁸

From the foregoing must be distinguished two common types of

¹⁹³ *Brown-McClain Trans. Co. v. Major's Adm'r*, 251 Ky. 741, 65 S.W.2d 992 (1933).

¹⁹⁴ In *Louisville & N. R.R. Co. v. Mattingly*, 339 S.W.2d 155 (1960), the Court failed to find the disclosure prejudicial to the defendant as it was a matter of common knowledge.

¹⁹⁵ See *Comment*, 19 ALA. L. REV. 75, 87, 88-90 (1966).

¹⁹⁶ A plaintiff's financial status might be in issue in a suit to obtain public assistance. This would not be an action triable before a jury, however, being an appeal from administrative action on a question of law.

¹⁹⁷ A demand for punitive damages puts the defendant's financial status in issue.

¹⁹⁸ *Carpenter v. Galloway*, 344 S.W.2d 795 (Ky. 1961); *Southern-Harlan Coal Co. v. Galliaier*, 240 Ky. 106, 41 S.W.2d 661 (1931); *Sparks v. Maeschal*, 217 Ky. 235, 289 S.W. 308 (1926); *Elkhorn Coal Corp. v. Bumpass' Adm'r*, 195 Ky. 453, 243 S.W. 32 (1922); *Illinois C. Ry. Co. v. Proctor*, 122 Ky. 92, 89 S.W. 714 (1905); *Louisville, H. & St. L. Ry. Co. v. Morgan*, 110 Ky. 740, 62 S.W. 736 (1901).

arguments: (1) that the injury has been the proximate cause of the loss of the capacity to earn money; and (2) the actual physical condition of the plaintiff. The first of these is an element of compensable damages,¹⁹⁹ and the extent to which a plaintiff can no longer earn money is in issue. But there is a great deal of difference in the statements: "The plaintiff cannot earn money," and, "The plaintiff has no money." The latter can serve no useful purpose other than an appeal for sympathy.

A comment upon the actual physical condition of the plaintiff is usually justified in a personal injury case as it is this evidence upon which the determination of permanent injuries must be made.²⁰⁰ But the same argument would be impermissible in any other type of action.

The same considerations have prevailed where counsel has argued the wealth of the defendant. Where financial worth of a defendant is not in issue, his ability to pay an award is irrelevant.²⁰¹ This rule applies whether the defendant is an individual²⁰² or a corporation,²⁰³ although the latter appears to be more often the target of such argument. This is probably one of the most violated rules of argument and an area in which counsel have waxed eloquent. Arguments have been made that the jury should "[g]ive us as much as a railroad magnate would spend for a rosebud, give us as much as one of these magnates would tip a waiter,"²⁰⁴ and that "[y]ou can take from this corporation its hoarded thousands and millions, and you can't pay this man for these wails and pains and agonies he has suffered."²⁰⁵ Another interesting appeal was:

He may live in a magnificent home, surrounded and furnished with beautiful furniture, the floors of which are covered with oriental rugs, the grandeur of which are beyond our most extravagant imagination, but the little home of Phillip King by the side of the road and his power to earn money for his little family

¹⁹⁹ *W. A. Wickliffe Coal Co. v. Ryan*, 241 Ky. 537, 44 S.W.2d 525 (1931); *Jones Savage Lumber Co. v. Thompson*, 233 Ky. 198, 25 S.W.2d 373 (1930).

²⁰⁰ *Louisville & N. R.R. Co. v. Mattingly*, 339 S.W.2d 155 (Ky. 1960).

²⁰¹ *Coomb's Adm'r v. Vibbert*, 289 Ky. 463, 158 S.W.2d 957 (1941); *Singer Sewing Machine Co. v. Dyer*, 156 Ky. 156, 160 S.W. 917 (1913).

²⁰² *Wright's Ex'r v. Craft*, 309 Ky. 198, 217 S.W.2d 228 (1949); *Coomb's Adm'r v. Vibbert*, 289 Ky. 463, 158 S.W.2d 957 (1941); *Wells v. King*, 219 Ky. 201, 292 S.W. 777 (1927).

²⁰³ *Murphy v. Cordle*, 303 Ky. 229, 197 S.W.2d 242 (1946); *Sparks v. Maeschal*, 217 Ky. 235, 289 S.W. 308 (1926); *Elkhorn Coal Corp. v. Bumpass Adm'r*, 195 Ky. 453, 243 S.W. 32 (1922); *Carter Coal Co. v. Hill*, 166 Ky. 213, 179 S.W. 2 (1915); *Louisville & N. R.R. Co. v. Payne*, 138 Ky. 274, 127 S.W. 993 (1910).

²⁰⁴ *Louisville & N. R.R. Co. v. Payne*, 138 Ky. 274, 275, 127 S.W. 993, 994 (1910).

²⁰⁵ *Carter Coal Co. v. Hill*, 166 Ky. 213, 216, 179 S.W.2d 2, 4 (1915).

are as sweet to him as it is to any man who lives in a mansion or drives a car along this highway.²⁰⁶

As this is a commonly understood rule, it should suffice to say that more subtle references are also condemned.

I. Punitive Damages

In considering punitive damages as a topic of argument our usual analysis must shift from admissibility of evidence and the record to a consideration of the instructions. Again, of course, there must be admissible evidence in the record to support the comment, but there must also be a decision by the trial judge that the case is appropriate for an instruction on punitive damages. Where the judge denies such an offered instruction, whether erroneously or not, no argument may be made for punitive damages.²⁰⁷ Actually, this rule prevails no matter what comment is being considered, but it is punitive damages which bring the principle to the fore. Stated in another way which we shall consider shortly, counsel may not argue to the jury that they should ignore the instructions and decide the case on some other basis.²⁰⁸

This leads us to the most common problem in this area—the request for actual damages to punish. The usual import of such arguments is that the measure of damages should be based upon the culpability of the defendant rather than upon the evidence of damages. An example of this is found in the 1902 case of *Louisville, H. & St. L. Ry. Company v. Chandler's Administrator*²⁰⁹ where counsel asked that the jury “render such a verdict here as will teach this railroad company that it can not violate the law. . . .”²¹⁰ Reasoning in a manner not destined to prevail, the Court stated:

In this case it is certain that the attorney did not undertake to state any fact bearing upon the case on trial, nor did he attempt to state any proposition of law that should govern the case. It was simply an appeal to the jury to render such a verdict as would teach the appellant to obey the law. Surely every one ought to obey the law.²¹¹

In *Weil v. Hagan*,²¹² counsel for plaintiff appealed to the jury:

²⁰⁶ *Wells v. King*, 219 Ky. 201, 204, 292 S.W. 777, 778 (1927).

²⁰⁷ *Louisville Woolen Mills v. Kindgen*, 196 Ky. 568, 231 S.W. 202 (1921); *Harrison v. Park*, 24 Ky. (1 J. J. Marsh.) 170 (1829); *Smith v. Morrison*, 10 Ky. (3 A.K. Marsh.) 81 (1820).

²⁰⁸ See the discussion of comments upon the instructions, *infra*.

²⁰⁹ 24 Ky. L. Rptr. 998, 70 S.W. 666 (1902).

²¹⁰ *Id.* at 1001, 70 S.W. at 667.

²¹¹ *Id.*

²¹² 161 Ky. 292, 170 S.W. 618 (1914).

You should find a verdict against the defendants in order to protect the lives of citizens in traveling on the highway, and that would be a warning to the drivers of automobiles on the highway.²¹³

Here the Court analyzed the argument in terms of the measure of damages and found that

[w]here an automobile owner or driver is negligent and injures another, he should answer only for the reasonable consequences of his own acts. He should not be mulcted in damages in order that a verdict in his case might operate as a warning to others.²¹⁴

This reasoning has prevailed and it is improper to appeal to the jurors to render a verdict to punish the defendant or to serve as a warning to others.²¹⁵

What might be considered the converse of the rule of *Weil v. Hagan* is to be found in *Colker v. Connecticut Fire Insurance Company*²¹⁶ where the defendant sought to have his liability mitigated because the plaintiff had been convicted for operating an illicit still in the insured building. This, among other comments, was deemed improper.

J. Comments Upon Objections and Rulings

It is fundamental that objections raise questions of law of which the judge is the proper arbiter,²¹⁷ the jury being the proper body to determine the facts of the case.²¹⁸ It should be clear, then, that the theory of an objection should not be debated to the jury. On occasion, however, counsel have been moved to argue the propriety of a ruling of the court to the jury.²¹⁹ It is difficult to see, however, why such an argument should be reversible error in itself. In the first instance, the argument of abstract legal theory should result in a little more than confusion in the minds of the jurors but may be objectionable as an appeal to disregard the instructions.²²⁰

²¹³ *Id.* at 293, 170 S.W. at 619.

²¹⁴ *Id.* at 294, 170 S.W. at 619.

²¹⁵ *Nashville, C. & St. L. Ry. Co. v. Byars*, 240 Ky. 500, 42 S.W.2d 719 (1931); *Consolidated Coach Corp. v. Garmon*, 233 Ky. 464, 26 S.W.2d 20 (1930); *Standard Mfg. Co. v. Brian's Adm'r*, 224 Ky. 419, 6 S.W.2d 491 (1928); *Weil v. Hagan*, 161 Ky. 292, 170 S.W. 618 (1914).

²¹⁶ 224 Ky. 837, 7 S.W.2d 502 (1928).

²¹⁷ *Horton Transfer & Storage Co. v. Donaldson*, 265 Ky. 47, 95 S.W.2d 1086 (1936).

²¹⁸ *Morton's Adm'r v. Kentucky-Tennessee Light & Power Co.*, 282 Ky. 174, 138 S.W.2d 345 (1940); *Barnett v. Gilbert*, 280 Ky. 402, 133 S.W.2d 529 (1939); *Horton Transfer & Storage Co. v. Donaldson*, 265 Ky. 47, 95 S.W.2d 1086 (1936); *Caledonian Ins. Co. v. Naifeh*, 229 Ky. 293, 16 S.W.2d 1086 (1936); *Forbes v. Hunter*, 31 Ky. L. Rptr. 285, 102 S.W. 246 (1907).

²¹⁹ *Louisville Woolen Mills v. Kindgen*, 191 Ky. 568, 231 S.W. 202 (1921).

²²⁰ *Thomas v. Smith*, 302 Ky. 636, 195 S.W.2d 274 (1946). See the consideration of comments on instructions *infra*.

On the other hand, where the argument is directed to the evidence occasioning the objection, which may be inevitable in every instance, two situations are possible: counsel may argue that his objection should not have been overruled; counsel may argue that the opponent's objection should not have been sustained. In the first instance, with notable exceptions such as privileges, counsel will ordinarily simply be arguing that the evidence should be given no weight, and this should be given the same treatment as comments upon other, proper evidence.

In the second instance, counsel's argument will be objectionable on the ground that it states and comments upon facts not in evidence,²²¹ logically a separate and distinct ground. A second objection would be that the argument injects into the trial improper considerations.²²²

Argument that the court was correct in excluding offered evidence, and stating the excluded evidence while admitting its inadmissibility, is equally objectionable.²²³ Here the attempted "end run" around the ruling of the court achieves the same objective that was objectionable in the first instance—exposing to the jurors improper evidence.

In any of the situations cited, such disrespect for the trial judge should, it is submitted, subject the attorney to reprimand. It should be pointed out that the new Canons of Ethics specifically provide for such instances by stating that ". . . a lawyer should not by subterfuge put before a jury matters which it cannot properly consider."²²⁴ Nonetheless, we must here contend that it adds nothing but confusion to the law to make such comments error in themselves without consideration of the practical consequences of the actual comment.

A second type of comment on objections is comment upon the mere fact of objecting with no reference to the matter objected to or to the ruling. Here it is permissible to make reference to the many objections made by the party making the reference where this is actually borne out by the record.²²⁵ The same rule should apply where the objections were made by the opposing party. In both instances, it should not be improper to point out to the jury the proper manner in which the trial had been conducted.

The point may be reached, however, where such comments become improper as disparaging remarks upon the character of opposing

²²¹ *Louisville & N. R.R. Co. v. Gregory*, 284 Ky. 297, 144 S.W.2d 519 (1940); *Bonta v. Bonta*, 175 Ky. 26, 193 S.W. 648 (1917).

²²² *Gunterman v. Cleaver*, 204 Ky. 62, 263 S.W. 683 (1924); *Bonta v. Bonta*, 175 Ky. 26, 193 S.W. 648 (1917).

²²³ *McHenry Coal Co. v. Sneddon*, 98 Ky. 684, 34 S.W. 228 (1896).

²²⁴ ABA CANONS OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-25 (1970).

²²⁵ *Reed v. Hostetler*, 245 S.W.2d 953 (Ky. 1952).

counsel. Thus, where the comment suggests that opposing counsel repeatedly attempted to introduce improper evidence for improper purposes, it approaches a request for the jury to penalize the opposing party for his misconduct.²²⁶ Where counsel comments upon the many objections to his own offers of evidence, the comment may be construed as an implication that the opposing party has something to hide,²²⁷ or may even imply that objections themselves are underhanded tactics.²²⁸

Yet another type of comment which has been condemned is argument that a ruling "proves" one's case. This is the situation where counsel argues that his success in resisting a motion for a directed verdict means that his client has a right to recover. The ruling does not mean this at all, but merely means that there is a question of fact for the jury to determine and such perversion of the law in summation is improper.²²⁹

V. THE REPLY DOCTRINE

No discussion of permissible comment can be completed without consideration of the reply doctrine. This rule provides that otherwise improper comments will not be a ground for reversal if made merely in reply to an improper comment by opposing counsel.²³⁰ There are several facets to this rule which need to be explored.

First, the mere fact that an improper comment is in reply to a previous improper comment does not make the second comment any less objectionable.²³¹ The offended party may object and obtain an admonition to the jury.²³² The important feature of the rule is that an admonition should be the only remedy available as it will be assumed that the error created by the improper reply will be cured by the

²²⁶ *Louisville & N. R.R. Co. v. Gregory*, 284 Ky. 297, 144 S.W.2d 519 (1940).

²²⁷ *Southern-Harlan Coal Co. v. Galliaier*, 240 Ky. 106, 41 S.W.2d 661 (1931).

²²⁸ *Louisville & N. R.R. Co. v. Gregory*, 284 Ky. 297, 144 S.W.2d 519 (1940);

Sacre v. Louisville Ry. Co., 152 Ky. 473, 153 S.W. 760 (1913).

²²⁹ *Scudamore v. Horton*, 426 S.W.2d 142 (Ky. 1968).

²³⁰ *Moore v. Lyons*, 386 S.W.2d 717 (Ky. 1965); *Lanning v. Brown*, 377 S.W.2d 590 (Ky. 1964); *Aker v. Smith*, 290 S.W.2d 496 (Ky. 1956); *Guyan Chevrolet Co. v. Dillow*, 264 Ky. 812, 95 S.W.2d 796 (1936); *Warfield Natural Gas Co. v. Clark's Adm'x*, 257 Ky. 724, 79 S.W.2d 21 (1935); *Woltering v. Weber's Adm'x*, 253 Ky. 55, 68 S.W.2d 440 (1934); *Louisville Ry. Co. v. Farmer*, 182 Ky. 368, 206 S.W. 619 (1918); *Evans Chem. Works v. Ball*, 159 Ky. 399, 167 S.W. 390 (1914); *Illinois C. Ry. Co. v. Colly*, 27 Ky. L. Rptr. 730, 86 S.W. 536 (1905).

²³¹ *Lanning v. Brown*, 377 S.W.2d 590 (Ky. 1964); *Guyan Chevrolet Co. v. Dillow*, 264 Ky. 812, 95 S.W.2d 796 (1936); *Warfield Natural Gas Co. v. Clark's Adm'x*, 257 Ky. 724, 79 S.W.2d 21 (1935).

²³² *Louisville Ry. Co. v. Farmer*, 182 Ky. 368, 206 S.W. 619 (1918).

admonition.²³³ Where the reply conforms to the rules next to be considered, no mistrial, new trial, or reversal should be granted.

Secondly, an obvious rule is that the comment must be pertinent to the previous comment to which it purports to be a reply.²³⁴ One may not, for example, latch on to an improper comment upon the character of a witness to inject into the case that the defendant is insured or to argue the "Golden Rule."

Some courts appear to have ranked improper comments in order of importance and restrict replies to the same degree of error as the initial improper comment.²³⁵ Thus, an "improper" comment may not be answered with a comment which is deemed to be "grossly improper." It does not appear that Kentucky has recognized this distinction explicitly, but the language of *Evans Chemical Works v. Ball*²³⁶ can certainly be read to mean that this is the actual practice of the Court. The appellee should take care to include in the certified record the improper comment and attending circumstances provoking his reply.²³⁷

VI. CONCLUSION

From the foregoing it appears that objections to comments may be founded upon various theories, and that the objection preferred may depend upon the time in the trial when the comment was made. As the basic objections were considered earlier, we shall dwell here for a moment on the "mental set" of counsel at the different stages of the trial.

In making and hearing the *voir dire* and the opening statement counsel should keep two questions in mind: Would the rules of evidence allow admission of the subject of a statement; and, is this the type of statement which may be made at this stage of trial?

When evidence is being presented, counsel should concentrate on the rules of evidence and apply them both to the evidence offered and the attending comments.

Once the parties have rested, counsel must shift his train of thought. Here there are again two primary questions to be kept in mind: Is the statement on evidence shown by the record; and, if the statement is upon the record, is the evidence being used for the purpose for which it was introduced?

²³³ *Id.*

²³⁴ *Id.*; *Evans Chem. Works v. Ball*, 159 Ky. 399, 167 S.W. 390 (1914).

²³⁵ Comment, 19 ALA. L. REV. 75 (1966).

²³⁶ 159 Ky. 399, 167 S.W. 390 (1914).

²³⁷ In the *Evans Chem. Works* case the Court assumed the reply to be appropriate due to an absence of the original statement by which to test the latter.

No special mention has been made of misstatement of the law. This is a readily recognizable problem which may arise at any stage and on which counsel will already be well versed.

Throughout this note we have quoted improper comments liberally in order to more clearly point out the objectionability of them. To those who made them we are indebted for the warnings. To those who intended to make them tomorrow we repeat them.

Jerry Lee Foster