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THE NEED FOR CLOSING ARGUMENT GUIDELINES IN JURY TRIALS

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I. INTRODUCTION

Closing arguments are an essential element of North Dakota's system of trial by jury.[1] A good closing argument can aid juries in understanding even the most complex cases by providing:

1. The advocate's best opportunity to explain the theory of the case in its entirety with minimal interruption.[2]
2. A forum to demonstrate the importance of details as well as to show the relationship of items of evidence to each other and to the theory of the case.[3]
3. The best occasion for counsel to urge the jury to draw conclusions and make inferences from the evidence.[4]
4. A time for attorneys to show how the evidence satisfies all legal requirements for a verdict in favor of a client.[5]
5. An occasion to rebut an opponent's allegations and persuade the jury that the client's position is correct.[6]
6. An opportunity to confront head-on the prejudices which jurors may unknowingly bring with them in their deliberations.[7]
7. A chance to persuade the jury that justice is best served by returning a verdict for the attorney's client.[8]

Unfortunately, improper arguments to juries have become commonplace in many jurisdictions.[9] Attorneys have used summation to mislead

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1. Fuhrman v. Fuhrman, 254 N.W.2d 97, 101 (N.D. 1977) (holding that the parties have the right to closing arguments in nonjury cases as well as in both civil and criminal jury trials).
2. STEVEN LUBET, MODERN TRIAL ADVOCACY 385 (1993).
3. *Id.*
4. *Id.* at 393-94.
5. J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 370 (2d ed. 1993).
6. *Id.*
7. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 496 (2d ed. 1987).
8. *See sample argument in* JAMES W. JEANS, SR., TRIAL ADVOCACY 18.9 (2d ed. 1993).
9. *See generally,* Brian McKeon et al., *Prosecutorial Misconduct, in Project, Twenty-second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-*

juries as to the law[10] and the evidence.[11] Some have even used highly emotional tactics in an attempt to frighten jurors into granting favorable verdicts.[12]

In other jurisdictions, there appears to be an increased willingness to tighten control over remarks made in argument.[13] Attorney misconduct during closing argument recently caused the Minnesota Supreme Court to reverse a conviction even though the defendant's counsel neither objected to the argument nor proved prejudice.[14] The opinion evidenced such continuing frustration over instances of misconduct in summation by both defense and prosecuting attorneys that it reprinted the American Bar Association Standards for Criminal Justice relating to closing arguments.[15]

1992, 81 GEO. L.J. 1267, 1356-67 (1993) (collecting significant federal criminal cases involving inappropriate arguments).

10. *Compare* People v. Gutierrez, 605 N.E.2d 1110, 1116 (Ill. App. 3d 1992) (finding reversible error in attorney's attempt to improperly shift the burden of proof) *with* People v. Deasee, 23 Cal. Rptr. 2d 505 (Cal. App. 2d 1993) (ridiculing the reasonable doubt standard by prosecuting attorney).

11. *E.g.*, Lone Star Ford, Inc. v. Carter, 848 S.W.2d 850, 852 (Tex. Ct. App. 1993) (inviting jurors to consider matters not in evidence).

12. *Cf.* City of Canton v. Lerario, No. CA-9147, 1993 Ohio App. LEXIS 4186, at *4 (Ohio Ct. App. Aug. 16, 1993) (discussing prosecutor's warning to jury against finding defendants not guilty and thereby letting them sell drugs in the jurors' neighborhoods).

13. *See, e.g.*, Guthrie v. State, 616 So. 2d 914, 931 (Ala. Crim. App. 1993); Kitze v. Commonwealth, 435 S.E.2d 583, 586 (Va. 1993) and *supra* notes 9-12.

14. State v. Salitros, 499 N.W.2d 815 (Minn. 1993) (en banc). The prosecuting attorney indicated that the defense argument would attempt to focus attention away from the defendant and onto a prosecution witness just as defense attorneys normally do in similar cases. *Id.* at 818-19. The prosecutor also continually commented on the need for accountability to a point that the jury might have been distracted from the other issues in the case. *Id.* at 819.

15. *Id.* at 817-18.

Standard 3-5.8. Argument to the jury.

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

Standard 4-7.8. Argument to the jury

(a) In closing argument to the jury the lawyer [i.e. defense counsel] may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for a lawyer to express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence, or to attribute the crime to another person unless such an inference is warranted by the evidence.

(c) A lawyer should not make arguments calculated to inflame the passions or prejudices of the jury.

North Dakota has not avoided the problem of inappropriate comment in closing argument.[16] During the years from 1930 to 1960, there were relatively few appeals which alleged that inappropriate argument had been made. Today, however, allegations of prejudicial closing arguments are much more common in both civil and criminal cases. Roughly half of all North Dakota appeals concerning prejudicial summations ever filed have been filed within the last fifteen years. While the number of instances of improper argument appears to be growing, the North Dakota Supreme Court appears quite reluctant to reverse a verdict solely on the basis of improper argument, with the last such reversal occurring in 1986.[17]

This Viewpoint will explore some of the problems which arise when unfair or misleading comments are made in closing argument, examine the procedures in place relating to those problem areas, and offer suggestions on how we might better deal with improper closing arguments.

II. DANGERS OF IMPROPER CLOSING ARGUMENTS

A. PREJUDICE AND CONFUSION

It must be conceded at the outset that closing arguments do not affect the outcome of many trials.[18] Jurors often have their minds made up before closing argument, and most jurors decide cases on the basis of the evidence and jury instructions rather than on argument.[19] Nevertheless, closing arguments are very important to some jurors.[20]

(d) A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict.

(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

Id.

16. North Dakota history is filled with "colorful" closing arguments, ranging from a prosecutor's reference to an alleged cattle thief as "Mustached Maude, the queen of the cattle rustlers," State v. Black, 223 N.W. 567, 569 (N.D. 1929), to an alleged description of one attorney by the other as "hired by his Satanic Majesty in Sioux County[.]" State v. Turner, 229 N.W. 7, 11 (N.D. 1930). Modern arguments, though less "colorful," often have substantial potential to prejudice. *Compare* South v. National R.R. Passenger Corp., 290 N.W.2d 819, 840 (N.D. 1980) (finding error in counsel's comments on other parties' failure to introduce evidence which was clearly inadmissible) *with* State v. Kunkel, 366 N.W.2d 799, 803 (N.D. 1985). The affidavits of jurors recite that the prosecuting attorney compared defendant to a Nazi and further said, "I think he's guilty as hell." There was substantial evidence from others present at trial that the remarks were not made. *Id. See also* State v. Mehralian, 301 N.W.2d 409, 418 (N.D. 1981) (discussing statements by prosecuting attorney that the defendant had committed illegal acts which were not established by the evidence).

17. Priel v. R.E.D., Inc., 392 N.W.2d 65 (N.D. 1986) (reversing a district court judgment on the grounds that attorney for the defendant incorrectly advised the jury that his client had no insurance).

18. TANFORD, *supra* note 5 at 369.

19. *Id.*

20. In mock trials held at the School of Law, we are able to hear juries deliberate. In complex cases and close decisions, jurors often rely strongly on what is said in closing argument.

Misstatement of the law or evidence may interfere with the jury's ability to render a fair verdict based upon the evidence and the trial court's instructions in a close case.[21] Appeals to passion and sympathy might also interfere with a fair determination of a case in which there are substantial emotional overtones present.[22] Since attorneys can seldom be sure how close a case is in the minds of jurors, substantial importance is attached to summation.

Determining just how great of an impact improper remarks may have had is a difficult task. Even when the jury has been admonished to completely disregard certain comments, it may be impossible to do so.[23] Test results of scientific studies cast doubt on the ability of jurors to disregard evidence and they might have similar difficulties disregarding strong arguments.[24]

B. PROCEDURAL REQUIREMENTS TO PRESERVE THE ISSUE OF IMPROPER ARGUMENT WORK AN UNDUE HARDSHIP ON THE VICTIM OF THE IMPROPER REMARKS

Court reporters are not required to record arguments unless requested by the parties.[25] Unfortunately, in the heat of the moments leading up to summation, attorneys often forget to request that arguments be recorded. This can be truly problematic because the supreme court usually refuses to consider claims of prejudicial closing argument when the record has not been made.[26] Prior to commencement of summation, attorneys must specifically request that the court reporter transcribe the arguments.

As soon as improper remarks are made in argument to the jury, the party victimized by the comments must comply with a variety of procedural requirements in order to preserve the matter for appeal. First, a timely objection must be raised[27] and a ruling received so that the trial court may take appropriate action to remedy prejudice.[28] An objection to closing argument made after the jury deliberations have commenced is not timely.[29]

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21. *See, e.g.*, Priel v. R.E.D., Inc., 397 N.W.2d 71 (N.D. 1986) (finding that jury was improperly advised that defendant had no insurance when defendant did carry insurance).

22. State v. Kaiser, 417 N.W.2d 376, 379 (N.D. 1987).

23. South v. National R.R. Passenger Corp., 290 N.W.2d 819, 837 (N.D. 1980).

24. RONALD L. CARLSON, EVIDENCE IN THE NINETIES 87 (3d ed. 1993).

25. State v. Rougemont, 340 N.W.2d 47, 51 (N.D. 1983).

26. *E.g.*, Morton v. Stensby, 232 N.W. 6, 9 (N.D. 1930).

27. Thomas v. Stickland, 500 N.W.2d 598, 601 (N.D. 1993).

28. Anderson v. Otis Elevator Co., 453 N.W.2d 798, 801 (N.D. 1990).

29. *Id.*

Failure to timely object to an adversary's argument generally acts as a waiver of the claim of error.[30] "The only exception to the general rule . . . is when the misconduct of counsel is so severe that it affects [a] party's substantial rights or constitutes a denial of a fair trial, thereby placing an independent duty upon the court to confine the attorney to the permissible bounds of argument, where necessary, and admonish the jury."[31] The power to notice error without objection is exercised cautiously and only in exceptional circumstances where a serious injustice has been done.[32]

A practical consideration also requires timely objection. The longer that the jury considers the opponent's remarks without contradiction or objection, the greater the potential for the jurors to accept the representation as true.

In addition to a timely objection, counsel must either request a cautionary instruction admonishing the jury to disregard the improper argument or move for a mistrial to preserve the matter for review.[33] Decisions as to whether to object, seek cautionary instructions, and/or move for a mistrial requires attention to a number of very practical considerations.

An obvious problem is that instant analysis of how badly one has been hurt by the unfair argument is required, as well as analysis into the likelihood that an objection will be successful. An unsuccessful objection may draw the jury's attention to the matter and give the impression that the opponent's argument is correct. Often, judges react to such objections by simply reminding the jury to rely on their own recollections in determining if facts have been misrepresented.[34] In the event of such a ruling, will the jury recall the evidence correctly?

The next decision is bound to be more difficult: Should the attorney move for a mistrial or seek a curative instruction? The decision to move for a mistrial requires a rapid calculation of the client's needs, the probability of success in the instant trial versus a retrial, the cost of a retrial, and the delay which a retrial might bring. The decision as to whether to seek a curative instruction requires an analysis of whether the prejudice could really be cured by an instruction or whether it might merely highlight the argument which is improper.

Improper argument often comes without warning at the worst possible time for the innocent attorney. Usually, the attorney is attempting to listen to the opponent, judge the reaction of jurors, and put finishing

30. Andrews v. O'Hearn, 387 N.W.2d 716, 730 (N.D. 1986).
31. *Id.* at 731.
32. State v. Thill, 473 N.W.2d 451, 453 (N.D. 1991).
33. Thomas v. Stickland, 500 N.W.2d 598, 601 (N.D. 1993).
34. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 365 (3d ed. 1992).

touches on his or her own argument or rebuttal. Determining whether evidence has been misstated often requires going through notes, depositions, exhibits, and/or transcripts. When so many decisions are made under such stress, some mistakes are almost inevitable. The attorney who made the improper argument may have planned the argument long before delivering it and might be in the best position to profit from an opponent's mistake.

C. PROCEDURES USED TO DEAL WITH IMPROPER ARGUMENT ARE UNFAIR TO THE TRIAL COURT

Improper arguments at the close of trial place the trial court under substantial pressure. If an objection is made, the court must rule quickly or risk that the longer the jury has to consider the unfair remark, the greater damage which may be done.

If the opponent of the improper remarks does not object, the court must determine whether action should be taken. On one hand, the judge risks interference with the trial strategies of one of the parties. On the other hand, failure to act in the case of misconduct affecting substantial rights may cause reversal on appeal.[35] Rapid evaluation of the effect of such improper argument in a complex trial is sometimes a difficult task. Drafting of curative instructions, consideration of motions for mistrial, and determination if admonitions should be necessary are difficult tasks under such time pressures.

D. UNFAIR ARGUMENT BREEDS MORE UNFAIR ARGUMENT

The most common remedy for another party's improper argument is more improper argument.[36] An attorney who has been the subject of the other attorney's personal attacks may respond in kind either because of the emotional atmosphere present as the trial reaches conclusion, a calculated decision that a response is necessary, or the realization that there is scant chance of appellate relief.

The reluctance of appellate courts to reverse trials on the ground of improper argument may also encourage new attempts to test how far one can go in summation. Not all improper argument is the result of split second decisions by counsel. Improper closings are sometimes calculated long before the conclusion of trial.[37]

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35. *See* Priel v. R.E.D., Inc., 392 N.W.2d 65 (N.D. 1986).

36. *Cf.* United States v. Young, 470 U.S. 1, 4 (1985) (characterizing by defense of the prosecution's case as "unfair" and "reprehensible" in response to prosecution's summary of the evidence against the defendant).

37. *See, e.g.*, Hoffer v. Burd, 49 N.W.2d 282, 294 (N.D. 1951).

E. THE RISK THAT ATTORNEYS WILL PROFIT FROM THEIR IMPROPER ARGUMENTS

It has traditionally been assumed that attorneys who made improper arguments put their clients at substantial risk. If a jury saw through appeals to passion or misstatement of the evidence, the attorney would lose credibility and thereby endanger the case.[38] Even worse, the judge might indicate that the attorney had acted improperly and instruct the jury accordingly. It cannot be doubted that in some instances, juries have found counsel's arguments offensive; however, there are a significant number of instances in which the offending attorney prevailed.[39]

Hopefully, juries decide cases on the basis of the evidence and judge's instruction rather than on improper closing argument. We cannot be sure that this is the case. Why does there appear to be an increase in the number of instances of improper argument? Not all of the prejudicial statements come from inexperienced attorneys. We cannot escape the possibility that some improper comments are the result of a calculated risk by advocates who believe that juries may not know their arguments are unfair.

Jurors may have a more difficult time seeing through misrepresentations of evidence in cases which are made increasingly complex by reason of expert testimony, massive computer generated records, and the sophisticated subject matter of today's litigation. Jurors might quickly see misrepresentations concerning the testimony of an eyewitness, but would they be able to detect mistakes in summarizing the voluminous sources underlying the expert opinion of an economic or medical expert? Even litigators thoroughly familiar with exhibits could be severely tested in such a situation.

A final concern may be unnecessary due to the quality of North Dakota attorneys. The concern is included because of the substantial number of attorneys traveling into North Dakota for a single trial. An attorney who believes that the case is going to be lost might estimate that there is nothing to lose by improper argument. He or she would never have to deal with the judge again, and a mistrial, although a remote possibility, might be better than a loss. Making an improper argument forces the opponent to react and risk a mistake. The potential value of prejudicial remarks as a weapon is substantial.

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38. *See, e.g.*, South v. National R.R. Passenger Corp., 290 N.W.2d 819, 837 (N.D. 1980).

39. A number of North Dakota's reported decisions indicate that improper comments were made by the party who prevailed both at trial and on appeal. *See, e.g.*, City of Grand Forks v. Cameron, 435 N.W.2d 700 (N.D. 1989). Acquittals are not appealed, therefore, we have few records of improper defense remarks in closing.

F. PUBLIC PERCEPTION OF THE PROFESSION

We have been hearing a great deal about attacks on the legal profession by politicians, advertisers, comedians, and the general public. Perhaps we should pay more attention to what we say about our fellow attorneys in closing argument.

It is an easy step to cross the line from attacking the ideas of opposing counsel to attacking the character of the attorney. When such attacks are made, all attorneys suffer in the eyes of the public. The practice of putting opposing counsel "on trial" is not new,[40] but the continuance and spread of the practice are very much in our own hands. Separate disciplinary hearings are the place to look into the conduct of those accused rather than grandstanding in court. Our trial courts have discretion to limit closing argument. This would be a good place to promptly invoke that power.[41]

III. THE NORTH DAKOTA LAW OF CLOSING ARGUMENT

A. STANDARDS USED TO DETERMINE IF ARGUMENT IS IMPROPER

Attorneys have the right to closing argument in both civil and criminal trials.[42] The content of closing argument is governed entirely by common law. The control and scope of closing arguments are largely a matter left to the discretion of the trial court.[43] We are advised that the line between proper and improper advocacy in closing argument "falls within a huge gray area . . ."[44] and that "the determination of conduct which is not proper is, at best, a difficult assessment to make."[45]

The North Dakota cases on closing argument[46] do not provide easy reading. On one hand are cases which describe the allowable areas broadly. A prosecuting attorney "is allowed a wide latitude of speech, and must be protected therein."[47] "It is his duty to use all the convincing power of which he has command, and the weapons of wit and satire and of ridicule are all available to him so long as he keeps within the record."[48] On the other hand, there are a few cases which clearly set out improper areas of argument, such as a prohibition against attorneys giving

40. *See, e.g.*, United States v. Young, 470 U.S. 1, 4 (1985) (arguing by defense counsel that prosecutors don't believe defendant is guilty).

41. *Id.* at 13.

42. Fuhrman v. Fuhrman, 254 N.W.2d 97, 101 (N.D. 1977).

43. State v. Mehralian, 301 N.W.2d 409, 418 (N.D. 1981).

44. State v. Schimmel, 409 N.W.2d 335, 342 (N.D. 1987) (citing United States v. Young, 470 U.S. 1, 10-11 (1985)).

45. *Id.*

46. A closing is sometimes also referred to as "argument," "final argument," "jury argument," "summation," and other terms.

47. State v. Loyland, 149 N.W.2d 713, 731 (N.D. 1967).

48. *Id.*

independent testimony in closing[49] and giving misleading facts about defendant's insurance.[50] In between the cases which take clear positions are well over one-hundred cases with dicta concerning closing arguments.

Although North Dakota has had many appellate cases in which improper closing arguments were alleged, very few have been decided on that issue. The North Dakota Supreme Court opinions often skirt the issue of the impropriety of the argument by finding that the trial record is incomplete,[51] the attorney failed to promptly object,[52] or the argument, if improper, was not so prejudicial as to require reversal.[53]

For example, consider North Dakota's cases with regard to the "Golden Rule" argument that jurors should place themselves in the position of a litigant or allow a party the same recovery as the jurors would wish if they were in the same position. North Dakota courts have never reversed a trial court for allowing "Golden Rule" arguments,[54] although a warning has been given that such "arguments should generally be avoided."[55] Even where the "Golden Rule" argument was clearly used, the supreme court found it did not appeal to the sympathy of the jury or constitute inflammatory argument and hence was not prejudicial.[56] On the other hand, a case was reversed when plaintiff's counsel asked jurors to imagine their wives in the place of the plaintiff.[57] One could argue that the law is not very clear in the area of the use of the "Golden Rule."

Without going through all of the dicta in all of the cases involving closing arguments, I suggest that lawyers and courts are not well served by such difficult case law to follow every time a closing argument is given. We would be better served by a set of guidelines which would more clearly outline the permissible types of argument and prohibited practices.

Rules of professional responsibility often touch upon the conduct of attorneys in giving closing argument; however, these rules have not served

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49. *Id.* *See* King v. Ry. Express Agency, Inc., 107 N.W.2d 509, 516 (N.D. 1961) (arguing that the plaintiff was entitled to damages for pain and suffering on per diem figures with no basis in the evidence); State v. Nyhus, 124 N.W. 71, 75 (N.D. 1909) (claiming that the defendant had ruined two girls' lives when there was no evidence that the girls' lives were ruined).

50. Priel v. R.E.D., Inc., 392 N.W.2d 65, 68 (N.D. 1986).

51. *See* Sabot v. Fargo Women's Health Org., 500 N.W.2d 889, 893 (N.D. 1993).

52. *See* Andrews v. O'Hearn, 387 N.W.2d 716, 731 (N.D. 1986).

53. *See* Thomas v. Stickland, 500 N.W.2d 598, 601 (N.D. 1993).

54. See *Cf.* Brauer v. James J. Igoe & Sons Constr. Inc., 186 N.W.2d 459, 473 (N.D. 1971) (finding that while argument may have been improper it did not constitute prejudicial error).

55. Glatt v. Bank of Kirkwood Plaza, 383 N.W. 2d 473, 481 (N.D. 1986).

56. *See* Larson v. Meyer, 135 N.W.2d 145, 161-62 (N.D. 1965) (overruled in part on other grounds by Hopkins v. McBane, 427 N.W.2d 85, 94 (N.D. 1988)).

57. Crosby v. Minneapolis, St. P. & S. S. M. Ry. Co., 237 N.W. 803, 809 (N.D. 1931).

as a basis for reported North Dakota decisions involving improper argument.[58]

B. LIMITED REMEDIES AFTER IMPROPER ARGUMENT HAS BEEN MADE

Courts have a limited number of alternatives once improper argument has been made. Curative instructions can be given, a mistrial declared, and/or attorneys sanctioned. Appellate courts have even fewer options, since the decision must be either to reverse or affirm the trial court. All of these solutions are akin to closing the barn door after the horses are out.

A party should not be deprived of a verdict in his or her favor because of improper conduct of his or her counsel unless prejudice is clear.[59] There is a reluctance of courts to grant mistrials.[60] There have been no reported sanctions of attorneys for improper argument. Appellate courts have been very reluctant to reverse a trial court's denial of motions for a mistrial or a new trial absent a clear indication that the improper comment, in light of all the evidence, swayed the jury's decision in criminal cases.[61] In civil matters, the improper remark must be shown to have clearly deprived the adverse party of a fair trial.[62] The tests are difficult at best.

The remedy most often relied upon is the curative instruction together with the presumption that juries follow the instructions to disregard particular remarks.[63] There is no way of being sure that jurors will disregard such information. However, there is substantial cause for skepticism.[64]

C. IN SEARCH OF A BETTER SOLUTION

Rather than deal with improper argument after it is delivered, could we find a way to prevent the problem from occurring? Could we agree on some minimal guidelines for closing arguments which would allow courts and attorneys to set boundaries on closing argument before the argument

58. *See* State v. Schimmel, 409 N.W.2d 335 (N.D. 1987). "We point out that the purpose of the Code of Professional Responsibility is to act as both an inspirational guide for the members of the legal profession and as a basis for disciplinary action when the conduct of a lawyer falls below the minimum standards presented by the Code." *Id.* at 343-44.

59. Hoffer v. Burd, 49 N.W.2d 282, 295 (N.D. 1951).

60. State v. Kaiser, 417 N.W.2d 376, 379 (N.D. 1987) (stating that a mistrial is an "extreme remedy" used when there is a "fundamental defect" or "manifest injustice").

61. *See* State v. Paulson, 477 N.W.2d 208, 210 (N.D. 1991).

62. Thomas v. Strickland, 500 N.W.2d 598, 601 (N.D. 1993) (citing the standard derived from Hoffer v. Burd, 49 N.W.2d 278, 294 (N.D. 1951)).

63. *Cf.* State v. Paulson, 477 N.W.2d 208, 210 (N.D. 1991) (finding trial court's curative instruction proper).

64. *See* CARLSON, *supra* note 24.

was delivered? The recommendations which follow are made in the belief that action can often be taken to prevent improper argument without unduly restricting closing argument.

IV. THREE RECOMMENDATIONS

A. A REQUIREMENT OF RECORDING CLOSING ARGUMENTS

Is there really any reason why all closing arguments should not be recorded? In the days before computers, there was an obvious hardship on court reporters who were required to type jury instructions at about the same time that final arguments were given. With today's technology, the hardship is greatly reduced.

When the supreme court held that closing argument need not be recorded unless requested by counsel, it noted that attorneys might prefer not to have closing arguments recorded in order to have more leeway in summation.[65] Several years of experience have indicated that giving more leeway is not always a good idea, especially if the lack of a record prevents an appellate court from acting in the event of improper argument.

B. GUIDELINES FOR CLOSING ARGUMENT

In evaluating whether or not statements made in closing argument are improper, North Dakota trial courts rely on guidelines provided by the common law. I have attempted to illustrate that our common law guidelines are not easily accessible and are sometimes less than clear. One of the disadvantages in states with small populations and high standards of professionalism is that there are fewer cases which provide the opportunity to develop a common law of improper closing argument. We have enough references to closing argument in our decisions to make research difficult, but not enough meaningful cases to develop the sort of guidance which judges and attorneys would find useful.

Easily accessible guidelines are particularly helpful to attorneys. A list of general rules which could be used in preparing closing arguments, and then testing them before delivery can prevent many improper arguments from being delivered. The Minnesota Supreme Court recently reprinted the ABA Standards for Criminal Justice dealing with closing arguments of both prosecutors and criminal defense counsel.[66]

There are two difficulties with the ABA Standards for Criminal Justice which lead me to propose an alternative to them. First, the ABA standards were meant to apply only to criminal cases. I believe it would

65. *See* State v. Rougemont, 340 N.W.2d 47, 50 (N.D. 1983) (referring to the court's ruling from Square Butte Elec. Coop. v. Dohn, 219 N.W.2d 877 (N.D. 1974)).

66. State v. Salitros, 499 N.W. 2d 815, 817-18 (Minn. 1993).

be desirable to develop standards which could be used to promote high standards in both civil and criminal cases. Second, the ABA standards concentrate only on what is not proper, rather than also providing a statement of what is proper. A better set of guidelines would provide positive as well as negative standards.

Couldn't a set of guidelines be developed which would provide useful guidance in preparing arguments and which would embody the best of the nation's common law experiences? A number of writers suggest just such a possibility. Consider the following guidelines which are similar to the advantages of good closing argument on the first page of this Viewpoint:

Guidelines For Closing Argument:

Attorneys for all parties shall be entitled to make a closing argument to the jury after all evidence has been received. Attorneys may:

1. Explain the theory of the client's case.[67]
2. Review the evidence which has been admitted at trial and discuss the importance of items of evidence to the theory of the case.[68]
3. Urge the jury to draw reasonable inferences and conclusions from the evidence.[69]
4. Demonstrate that the evidence satisfies all legal requirements for a verdict in favor of the client.[70]
5. Persuade the jury within the bounds of admitted evidence and the court's instructions that justice is best served if a verdict is returned for the client.[71]
6. Rebut an opponent's allegations within the bounds of the evidence admitted and the trial court's jury instructions.[72]
7. Confront head-on the prejudices which jurors bring with them in their deliberations.[73]

During closing argument an attorney may not:

1. Misstate the evidence.[74]
2. Ask the jury to consider inadmissible evidence.[75]
3. Misstate the law.[76]

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67. LUBET, *supra* note 2, at 385.
68. *Id.*
69. *Id.* at 393-394.
70. TANFORD, *supra* note 5, at 370.
71. JEANS, *supra* note 8, § 18.9.
72. TANFORD, *supra* note 5, at 370.
73. MCELHANEY, *supra* note 7, at 496.
74. State v. Mehralian, 301 N.W.2d 409, 418-19 (N.D. 1981).
75. South v. Nat'l R.R. Passenger Corp., 290 N.W.2d 819, 839-40 (N.D. 1980).
76. State v. Jacob, 222 N.W.2d 586, 590-91 (N.D. 1974).

4. State the attorney's personal belief.[77]
5. Make undue appeals to emotion.[78]
6. Comment on privileged matters.[79]
7. Make personal attacks on other attorneys.[80]
8. Appeal to the pecuniary interest of jurors.[81]
9. Threaten that jurors may suffer if an unfavorable verdict is returned.[82]

The guidelines are not complete and may be modified by the courts. They do give guidance on issues which most commonly are the subject of appeals yet do not unduly restrict attorneys in arguing for their clients. Hopefully, annotations to the guidelines would focus research by categorization of specific types of issues. Attorneys and judges should not have to read through dozens of cases generally labeled "improper argument" to find the few cases concerning a specific type of improper argument.

Because the guidelines do not have the full force of law, they could be modified by the trial court in accord with the needs of a given case. Since the guidelines are available before trial, any party who believes that the guidelines are unduly restrictive can seek modification before the trial begins or at least before argument. The court may also consider additional guidelines or issues which should be discussed. In the relative calm of pretrial hearings, the issues may be more intelligently discussed, and authority may be cited.

C. COLLECT INFORMATION TO ALLOW NECESSARY MODIFICATIONS TO THE GUIDELINES

The requirement that all closing arguments be recorded should provide significant resource material for evaluation of problem areas. Arguments which do not reach appellate courts for a variety of reasons still may provide useful material to those seeking improvements in this important area of advocacy.

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77. LUBET, *supra* note 2, at 432-33 (citing Rule 3.4(e) of the Model Rules of Professional Conduct).

78. State v. Paulson, 477 N.W.2d 208, 210 (N.D. 1991).

79. N.D. R. EVID. 512.

80. Missouri K. T. R. Co. v. Ridgway, 191 F.2d 363, 369 (8th Cir. 1951).

81. *Cf.* Byrns v. St. Louis County, 295 N.W.2d 517 (Minn. 1980) (discussing the impropriety of statements aimed at the self-interests of jurors).

82. *Cf.* Andrews v. O'Hearn, 387 N.W.2d 716, 731 (N.D. 1986) (finding statements which could be interpreted as a threat to jurors deserve immediate court admonishment to the jurors to disregard the statement).

V. CONCLUSION

Closing arguments are basic to both jury and nonjury trials in North Dakota, and yet, there has been little recent effort to improve this element of our trials. To the contrary, it appears that unfair comment is more likely than ever to find its way into trials. Unless fair guidelines are easily accessible to attorneys, mistakes of the past will be repeated by inexperienced attorneys and perhaps by some experienced attorneys who take advantage of the reluctance of appellate courts to reverse a case for misconduct of counsel.

It is possible to make some improvements in our closing arguments without unduly limiting the freedom necessary to adequately represent our clients' interests. By providing clear and flexible guidelines before closing arguments are given, we greatly reduce the chance of innocent error which might cause a mistrial or reversal at the client's expense. We also provide a fairer trial by removing some of the distractions which could improperly influence jurors.

Nothing that our profession does is so much in the public eye as our closing arguments. The news media focus on summation as do historians, dramatic artists, and the general public. Improvement in our trial system should be made regardless of whatever publicity will be given, but there may be no better way to represent to others the importance of our calling and the steps we are taking to improve our system than to begin with our closings.