New Jersey Law Journal

TRIAL PRACTICE

The Perils of an Unduly Adversarial, Passionate or Emotional Summation

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April 23, 2015

During the course of his or her summation, it is understood that "[c]ounsel's arguments are expected to be passionate, 'for indeed it is the duty of a trial attorney to advocate.'" *Jackowitz v. Lang*, 408 N.J. Super. 495, 504–05 (App. Div. 2009) (quoting *Geler v. Akawie*, 358 N.J. Super. 437, 463 (App. Div. 2003), cert. denied, 177 N.J. 223 (2003)). As such, in closing arguments, "'counsel is allowed broad latitude.'" *Brenman v. Demello*, 191 N.J. 18, 33 (2007) (quoting *Bender v. Adelson,* 187 N.J. 411, 431 (2006)).

However, as set forth below, courts have consistently imposed certain limits. In instances in which lawyers attack their adversary, parties or witnesses; urge the jury to "send a message"; chide the defendant for its refusal to "accept responsibility"; make excessive appeals to emotion; or request that the jury step into the plaintiff's shoes, New Jersey courts have ordered new trials.

Attacks on Adversary and Opposing Party

[Defendant's counsel] is here for one purpose, and that's to hold down the damages as much as possible. I can't tell you how much to give, but he's trying to low ball it. He wants you to low ball it.

Henker v. Preyblowski, 216 N.J. Super. 513, 518 (App. Div. 1987).

"[Attorneys] may not use disparaging language to discredit the opposing party, or witness, or accuse a party's attorney of wanting the jury to evaluate the evidence unfairly, of trying to deceive the jury, or of deliberately distorting the evidence." *Rodd v. Raritan Radiologic Assocs*, 373 N.J. Super. 154, 171 (App. Div. 2004) (citations omitted). A recent unpublished opinion addressed the impropriety of lodging attacks on the credibility of defendant, his counsel and his experts. *Jones v. Alloy*, Docket No. A-0565-13T2 (App. Div. Feb. 18, 2015), was a medical negligence case in which, after an eight-day trial, the jury returned a verdict in favor of plaintiff and awarded damages of a little over $1 million.

In ordering a new trial, the panel found that, for various reasons, plaintiff's counsel's summation "violated the bounds of fair comment." Specifically, plaintiff's counsel accused the defendant, his counsel and his experts of preparing a "fabricated defense," derived from "courtroom medicine" and pursuant to a "script." Plaintiff's counsel accused the defendant's counsel of instructing its

expert witnesses that, "[w]hatever you say, do not say that [defendant] was negligent in any way, no matter what you' re presented with."

In ordering a new trial, the *Jones* court's holding was consistent with prior precedent. For example, in *Geler*, plaintiff's counsel was rebuked for referring to defendants' case as "rotten" and as "garbage," and their arguments as "hogwash" designed "[t]o confuse, to muddle, put up smoke screens." The court also criticized plaintiff's counsel's characterization of defendants' testimony as a "joke," "bunk," "nonsense" and an "outrage," as well as his reference to defendant's expert as "wily and wiggly" and his opinions as "garbage," "absurd" and "not worth a hill of beans."

In *Szczecina v. PV Holding Corp.*, 414 N.J. Super. 173 (App. Div. 2010), even in the absence of any objections by defense counsel, a panel ordered a new trial due in part to plaintiff's counsel's attacks on the integrity of defendants, defense counsel and the defense witnesses, whom he characterized as "spin doctors," "hired guns," etc. Similarly, in *Rodd*, which was a medical negligence case, plaintiff's counsel stated that "defendant missed the evidence of cancer because he cared about 'making money' and living 'the good life'…" Plaintiff's counsel also "disparage[ed] defendant's expert, who, he maintained, argued 'a little bit more like a lawyer than a doctor' and was 'a professional witness' who 'adjust[s] his testimony for every case.'" In ordering a new trial, the panel admonished plaintiff's counsel for his "attack on defendant's character and his witness's integrity …. They are not to be repeated on retrial."

Send a Message

[T]here's a larger reason you're here and that's to send a message that when somebody abuses the privilege of driving, when somebody cannot wait another 40 seconds for a light to change that there has to be consequences. … [S]end a message to [defendant] and to the other people that use the roads in New Jersey that there need to be consequences when people do these types of things.

Jackowitz, 408 N.J. Super. at 500.

Jackowitz was an auto case in which the defendant had stipulated to liability. In finding that the trial court did not abuse its discretion in ordering a new trial, the panel agreed "that the use of the 'sending a message' argument is inappropriate in a civil case where the only issue is compensatory damages." Similarly, in *Szczecina*, the appellate court determined that plaintiff's counsel's exhortation to "the jury to 'send a message' that 'we're not going to accept the paid agreers, the spin doctors[,] [who] are trying to get [defendants] off the hook'" was improper.

Like *Jackowitz*, *Szczecina* was a "damages-only trial." The *Szczecina* court noted that, in the punitive damages phase of a case, counsel may in certain circumstances "ask the jury to 'send a message' …" (citing *Jackowitz*).

Request That Defendant Accept Responsibility

We've got now people who don't want to accept responsibility for what they've done. … [W]e have [the defendant], what's he do? … He's not turning around and saying I caused the collision, these people got hurt, I'm sorry.

Szczecina, 414 N.J. Super. at 182.

"[I]t is improper to equate a defendant's decision to go to trial with bad faith." *Romano v. Stubbs*, Docket No. No. A-5355-08T3 (App. Div. Dec. 16, 2010) (citing *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 51 (2009)). In *Romano*, plaintiffs' counsel stated in his closing, "Why are we here? ... [W]e're here because [defendant] has refused to accept the civil responsibility for the damages we allege that he caused." Plaintiffs' counsel also presented Power Point slides stating, "The person who broke the rules refuses to accept responsibility." Due to these statements, along with plaintiffs' counsel's attacks on defendant and his counsel and plaintiffs' counsel's request that the jury send a "message to the community," the panel ordered a new trial on damages.

Excessive Appeals to Emotion

[T]hink as parents ... what do you think [the plaintiffs] went through? … [P]icking up your lifeless child ... and holding that child to your breast one last time ... and being the first person to put dirt on your child's coffin.'

Geler v. Akawie, 358 N.J. Super. 437, 465 (App. Div. 2003).

Geler was a wrongful birth case in which plaintiffs alleged medical negligence on the part of two obstetricians. The panel criticized plaintiffs' counsel for "incessantly and impermissibly invit[ing] the jury to view the case as though they, not [plaintiffs], were the parents of the child ...." Due to this practice, along with plaintiff's counsel's mischaracterizations of evidence; attacks on defendants, their counsel and witnesses; and other improper practices, the court reversed and remanded the case for a retrial of both liability and damages.

Asking Jury to Step Into Plaintiff's Shoes

Remember the wisdom tooth, a little canker sore in your mouth. You can't get rid of it. .... You know how much a dentist charges to give a shot of Novocain so you don't feel pain for ten, fifteen minutes. ... [T]hink about the thousands of hours that [plaintiff] has suffered pain in just the last three years.

Henker, 216 N.J. Super. at 519.

"The Old Testament's 'golden rule' that you should do unto others as you would wish them to do unto you" may not be utilized in a closing statement. *Geler*, 358 N.J. Super. at 464. A jury may not base its verdict on what it "would want as compensation for injury, pain and suffering, but [a]re instead required to base [its] verdict upon what a reasonable person would find to be fair and adequate in the circumstances."

Conclusion

In the heat of battle, it is easy to lose sight of the line between passionate advocacy and improper conduct. Nevertheless, attorneys who cross that line risk losing a favorable jury verdict.■

Next Week...

Conflicts of Laws

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