The GOLDEN RULE IN OPENING STATEMENT & CLOSING ARGUMENT:

What it is and what it isn't.

BY LIAM DUFFY

> ***"THIS CASE REALLY IS ABOUT CHOICE. IT'S ABOUT THE RIGHT OF EVERY SINGLE PERSON IN THIS ROOM TO MAKE A CHOICE ABOUT WHAT CHEMICALS THEY EXPOSE THEMSELVES, THEIR FAMILY OR THEIR CHILDREN TO..."***

That was the first line of plaintiff counsel's opening statement in the landmark 2018 *Johnson v. Monsanto Company* trial. [1] That case was the first of several to go before a jury in which plaintiffs alleged that Monsanto's flagship, glyphosate-based herbicide products, Roundup and Ranger Pro, were known by the company to cause cancer (information that Monsanto worked hard to keep from regulators and consumers). The trial ended with a California jury delivering a $289 million verdict against the agrochemical giant, one of several blockbuster verdicts against Monsanto for its reckless conduct and concealment.

At first glance, some might wonder whether those opening remarks violate "The Golden Rule"—the well-known rule of trial that prevents a lawyer from asking the jurors to place themselves in the shoes of the plaintiff or victim. In a recent trial, I used a similar opening theme and the defense lawyer who frantically objected and sought a mistrial certainly would be of that opinion. His objection (which I anticipated) was overruled, but it got me thinking. Particularly about how in personal injury cases, it seems many defense lawyers often adopt and advance an overly broad—and in my view, incorrect—interpretation of The Golden Rule prohibition, suggesting that it bars any community safety-related advocacy. We often see this in the form of improper motions in limine to "Preclude Reptile Litigation Tactics," which argue that any references to safety rules or community danger are surreptitious, backdoor, Jedi mind trick violations of The Golden Rule. [2] These misguided motions are usually canned, unpersuasive, and almost universally rejected by the courts. [3]

My hope is that this article will help debunk that misunderstanding, revisit what is and what is not covered by The Golden Rule, and serve as a useful reminder as you prepare for your next jury trial.

The Golden Rule Prohibition – Back to Basics

Few concepts are as well-known and ubiquitous as "The Golden Rule." It appears, in one form or another, in just about every culture and religion across the globe and is engrained in many of us at an early age. There are many different versions of The Golden Rule, but in short, it is an axiom or ethic of *reciprocity*, often articulated in American culture as, "Do unto others as you would have them do unto you." [4]

In the courtroom, a Golden Rule argument is one which asks the jurors to "place themselves in the victim's [or plaintiff's] shoes." [5] Such an argument is prohibited because it "tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." [6] Other examples of Golden Rule arguments include posing the question to jurors whether they would want to go through life in the condition of the injured plaintiff, or would want members of their family to do so. [7]

While this rule seems rather simple, courts have at times wrestled with its reach and come to differing conclusions when analyzing real-world arguments.

In South Carolina, most appellate opinions discussing this rule arise in the context of criminal trials. Almost always, those cases involve a convicted criminal defendant seeking appellate relief in light of a solicitor's alleged violation of The Golden Rule during closing argument. After reviewing those cases, and others from around the country, a clearer picture emerges about what likely is and is not a Golden Rule violation.

What Is a Golden Rule Violation

Most actual or claimed Golden Rule violations occur during opening statement or, more commonly, closing argument. Some real-world examples of indisputable violations include:

- In a rape and murder trial, a prosecutor's questions to an all-male jury: "How, if this young lady was your sister, how would you feel? How, if she was your wife, how would you feel? How, if she was your daughter, God only knows, how would you feel?" [8]
- A solicitor's use of "you" forty-five times during closing argument, including: "[Y]ou'd better hope that when you get raped, that at the same time he really beats you up and that you have some broken bones or something that you can bring into court. Because mere bruising on your face isn't enough."

Every SCAJ Justice Bulletin reader knows this, but in the civil context, the following would also be prohibited:

- "What would it take, if you were Mrs. Jones, to fully and fairly compensate you for going through the same experience she has been put through?"
- "Put yourself in Mr. Smith's place (or shoes)—how would you feel if you had lost the freedom to wake up without pain, or play with your grandchildren?"
- "Would any of you jurors accept less than $10 million for the loss of your leg?"

However, just because something encroaches upon or even violates The Golden Rule does not automatically mean a mistrial should be granted. As most trial lawyers and judges know, there are times—especially during closing argument—where an impassioned plea for justice may occasionally and accidentally spill over into murky territory. As trial lawyers, we must always be mindful to avoid those missteps, and object when opposing counsel goes too far. However, if such an argument does leak out only *inadvertently and momentarily*, without more, any concerns likely can be dealt with through a sustained objection and, if needed, a curative instruction from the court. [9]

On the other hand, if counsel's improper argument is repeated, pervasive, or intentionally seeks to have jurors cast aside all impartiality, then a stronger sanction may be appropriate. [10] The case law makes clear that if an objection is raised on the grounds of The Golden Rule, the courts can and should take into account the nature, frequency, and apparent effect on the jury of an argument rather than applying a blanket "automatic mistrial" rule. Judicial economy is better served by a case-specific approach, and in addressing the propriety of counsel's arguments, our trial judges are granted wide discretion. [11]

What Isn't a Golden Rule Violation

As noted above, it all comes down to a lawyer's specific words and the context in which they're spoken. But in general, references to community values, safety rules (often testified to by experts), or other comments on the role of juries as the voice of the community are not violations of The Golden Rule. In fact, in South Carolina, "[a] basic purpose of the common law is to **preserve the community's security and liberty by enforcing a reciprocal system of rights and duties among its members.**" [12] With that as our legal backdrop, surely a closing argument that empowers the jury by reinforcing the concept that they serve as a bastion of accountability and enforcement of community rights (including safety and liberty) is not improper. That is likely true even in cases where punitive damages are not at issue.

Interestingly, in some states, The Golden Rule prohibition only applies to arguments directed at damages. [13] In those states, asking jurors to place themselves in the shoes of a party to assess conduct or liability is permissible. To my knowledge, that issue has not been addressed in South Carolina, but it serves as a good contextual reminder that The Golden Rule is not as sweeping as many defense lawyers would like to believe. The following examples are permissible arguments that in no way violate The Golden Rule, no matter what defense counsel may argue:

- "You must consider all of the noneconomic damages—the pain, suffering, anxiety, fear, and frustration—that Mrs. Jones has lived with since the crash. What are those worth?"
- "Think about—based on his testimony that you heard—what that was to Mr. Smith to have to endure all those surgeries, only to be left with a shell of what he once was."
- "You, the jurors, serve as the conscience of this community. And one of your jobs here today is to decide the fair value for the loss of an eye in this case and in this community."
- "Imagine in the moments before he became a paraplegic in this explosion, if someone told Mr. Miller he could give up the use of his legs in exchange for $20 million. Does anyone think for a second he'd consider taking that deal?"

Conclusion

The Golden Rule exists in the courtroom to prevent trials from becoming "so infected . . . with unfairness" and from "completely destroy[ing] all sense of [jurors'] impartiality" that a jury's verdict can no longer be rationally based on the evidence but instead on jurors' own passion and prejudice. In most cases, you'd have to push the bounds pretty far to reach that point, and it's unlikely an inadvertent mistake would get you there. So long as your arguments are rooted in the evidence at trial, the reasonable inferences drawn from that evidence, and are not explicitly asking the jurors to put themselves in your client's shoes, there is little chance you will run afoul of The Golden Rule. The good news for trial lawyers is this: creativity and zealous advocacy are still allowed (and rewarded). Don't let an extreme and erroneous interpretation of The Golden Rule steer you off course in your pursuit of justice for your clients.

End Notes:

1 The opening statements and closing arguments from this trial are available on CVN.com with a subscription.

2 Justin Kahn's and Wes Allison's article, *Who's Afraid of the Reptile Motion in Limine* (SCAJ Justice Bulletin, Spring 2014) contains a great discussion of how these motions are improper and how to combat them.

3 *See, e.g., Baxter v. Anderson*, 277 F.Supp.3d 860 (2017) (M.D. La.) (denying defendant's "Reptile" motion in limine directed at "amorphous and ill-defined concepts" and "abstract and generalized hypotheticals" rather than specific evidence).

4 In Christianity, Matthew 7:12 is often cited as the biblical source for this concept. ESV Bible, Matthew 7:12 ("So whatever you wish that others would do to you, do also to them, for this is the Law and the Prophets.").

5 *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006).

6 *Id.*

7 75A Am. Jur. 2d Trial § 540

8 *State v. White*, 246 S.C. 502, 504–05, 144 S.E.2d 481, 481–82 (1965).

9 *See Brown v. State*, 383 S.C. 506, 516–17, 680 S.E.2d 909, 915 (2009) (finding that the solicitor's remarks imploring the jurors to "speak for" the victim were improper, but were limited in duration and came only at the end of the argument, and thus did not infect the trial with unfairness); Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007) (any impropriety in the solicitor's closing argument was not sufficient to grant defendant post-conviction relief where solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsel's statements as evidence).

10 *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (finding solicitor's use of "you" forty-five times during closing argument asking the jurors to put themselves in the place of the victim constituted reversible error and warranted a new trial).

11 *State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975).

12 *Snakenburg v. The Hartford*, 299 S.C. 164 (Ct. App. 1989).

13 *Shaffer v. Ward*, 510 So. 2d 602 (Fla. 5th DCA 1987) (holding that an argument by the defendant's counsel that jurors all drove, that they all realized the possibility of hitting a car which unexpectedly stopped in front of them, and that everyone had had a close call due to an unexpected stop by another car was not an impermissible Golden Rule argument since it was not directed to damages); *Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983) ("The use of the Golden Rule argument is improper only in relation to damages. It is not improper when urged on the issue of ultimate liability.").

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