

# Limitations on Closing Arguments

## ETHICAL AND EVIDENTIARY DO'S AND DON'T'S

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“There is a big difference between what we have a right to do and what is right to do.”

—Justice Potter Stewart, United States Supreme Court

This half-century-old sentiment is reflected in a “historic and significant change” in the preamble to our Ethics Rules, which has just been enacted by the Arizona Supreme Court. Arizona is the first state in the country to make this crucial change to its Rules of Professional Conduct; the Court has removed the obligation of an attorney to be a “zealous” advocate for the client from the Rules.<sup>1</sup> Instead, the Justices have substituted the requirement for an attorney to “act honorably in the furtherance of a client’s interests.” Other states have announced their intention to make the same change. Although this may be a subtle change in the wording of the Arizona Rules, attorneys should not expect application by the Arizona Supreme Court to be so subtle. The Court has stated that it expects this to be a significant foundational change in the way in which attorneys represent their clients—especially in trial practice.<sup>2</sup>

The Court intends to send a message to attorneys practicing in the state that there is a renewed focus on personal and professional ethics and integrity. The purpose of the change is to maintain “the integrity of the legal profession in Arizona, the administration of justice, and regulation of the professional conduct of lawyers practicing in the state” for the benefit of the public.<sup>3</sup>

The term “zealous” was removed because it had been relied upon by some lawyers to defend behavior that was seen as unprofessional. One area in which we might expect to see some change is the discovery or disclosure process. However, the area where trial practice may be most visibly affected is closing argument. This article is a discussion of the ethical limitations on closing arguments in light of the recent one-word change to the Ethics Rules by the Arizona Supreme Court.

### State Bar of Arizona Standards

One of the basic purposes of the State Bar of Arizona is to ensure that “our system of justice works fairly and efficiently.”<sup>4</sup> The preamble to the Arizona Rules of Professional Conduct states that a member of the Bar has an “obligation to protect and pursue a client’s legitimate interests, within the bounds of the law while act-

ing honorably and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”<sup>5</sup> Ethical Rule 3.4(e) states that a lawyer shall not:

In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.<sup>6</sup>

The scope of the Rules asserts, however, that these limitations “do not exhaust the moral and ethical considerations that should inform a lawyer.”<sup>7</sup> Accordingly, the Rules have, in general terms, prescribed the conduct for lawyers during all stages of trial practice, including argument at the conclusion of a trial.

### Consequences of Error

Many lawyers believe that there are no restrictions on closing arguments, that the presentation during closing argument is “sacro-sanct,” such that an objection by opposing counsel would not be proper. Moreover, some lawyers believe that a “license to distort” during closing argument is simply part of the repertoire of an advocate’s skills.

However, there are bases on which one can and should object to improper statements made during closing arguments<sup>8</sup> (see sidebar, page 28).

As discussed here, a failure to make a timely objection to improper conduct during closing argument is generally considered a waiver of error.<sup>9</sup> However, even in a situation in which one’s adversary “sleeps through” an objectionable closing, the making of improper comments during closing arguments may later lead to a judgment for one’s client being vacated and a new trial granted. This can occur, for example, when, in the court’s discretion, a verdict is found to have been the result of passion or prejudice.<sup>10</sup>

In Arizona, there is reason to believe that the use of improper comments in closing argument, the failure to object to improper comments or the failure to report improper comments may be considered malpractice. ER 8.3(a) of the Arizona Rules states:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided for in these Rules of by law.<sup>11</sup>

Based on this Rule and the *Himmel* decision,<sup>12</sup> courts have



determined that lawyers and judges have an obligation to report unethical conduct as soon as it happens. Failure to report another attorney under this Rule can result in suspension of one's license to practice law in Arizona.<sup>13</sup>

## Preserving the Issue and Standards for Review

It is well settled in Arizona that, to preserve for appeal an issue created during an improper closing argument, a "contemporaneous objection" is needed, at the moment of the objectionable statement or, perhaps, at the very latest, at the end of the offending presentation. If a timely objection is made, the trial court must use its discretion to determine if the lawyer's misconduct during closing argument could affect the result.<sup>14</sup> An appellate court will then review the trial court's ruling for abuse of discretion to determine if the error was so prejudicial as to have affected the rights of the parties.<sup>15</sup>

If no timely objection is made, the objection is waived and the appellate court will only review the trial court record for fundamental error.<sup>16</sup> "Fundamental error goes to the heart of the defendant's case or takes from him a right essential to his defense" and cannot be waived.<sup>17</sup>

Therefore, not only is it proper to object to improper comments during closing arguments, it is required that one do so to fully preserve the issue for appeal. The timeliness of objections during closing argument is critical, and the record should be made (at the very latest) before the judge has charged the jury.<sup>18</sup> Strategic considerations dictate when one's objection might best be made. The objection can be made before (if anticipatory), during (simultaneous) or after (single or cumulative objections). The objection can be made either in front of or outside the presence of the jury. For example, in a case in which plaintiff's counsel made arguments that included his personal beliefs regarding surveillance of the defendant, defense counsel objected after the argument, outside the presence of the jury. He stated that he "did not wish to emphasize the testimony by continually objecting" during the

argument.<sup>19</sup> The court found the objection to be timely and granted it.

## Gauging What Is Proper

Closing argument is the aspect of trial that the public, including juries, holds in the greatest awe. For the lawyer, it is often the culmination of weeks or months of hard work requiring every skill of a successful advocate. The entire process of trial preparation and trial itself has built toward this single event.<sup>20</sup> The lawyer must deliver an interesting, persuasive argument, summarizing the points of the case and rebutting the opponent's argument. Passion and emotions can be volatile, and invoking them properly may convince the jury to return or to prevent a favorable verdict.

The ability to persuade is one of the strongest tools that a lawyer may possess. In Arizona, courts have recognized that "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal."<sup>21</sup> Therefore, it has been stated repeatedly that "attorneys must be given wide latitude in their arguments to the jury."<sup>22</sup> In fact, as suggested by the large volume of case law on improper closing arguments, this maxim has become so commonplace in Arizona that many attorneys seem to have forgotten that the closing arguments are limited in many ways by rules of evidence—and by ethics.<sup>23</sup> Closing arguments "must be based on facts which the jury is entitled to find from the evidence and not on extraneous matter that were not or could not be received in evidence."<sup>24</sup> When improper comments are made so as "to inflame the minds of jurors with passion or prejudice or influence the verdict in any degree," attorneys have exceeded their discretion.<sup>25</sup>

What general standard should an attorney use in determining whether his own conduct or the conduct of opposing counsel may be improper? The best rule for determining whether conduct is prejudicial and grounds for reversal is: "Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, influenced by these

remarks?"<sup>26</sup> As this determination is always very fact specific, I have included a matrix with examples of leading case law organized into categories of improper conduct in closing arguments that have been acted upon by Arizona courts.<sup>27</sup> The following categories are a few examples of the information that is provided on the matrix:

### 1. Expressing Ill Will or Animosity Toward Opposing Counsel or Engaging in Personality Conflicts

The Arizona Supreme Court has stated, "Abuse of opposing counsel ... is not within the scope of proper argument and if carried too far may result in the granting of a new trial."<sup>28</sup>

In *Colfer v. Ballantyne*,<sup>29</sup> the jury returned a verdict for the plaintiff in a personal injury suit. The defendant filed a motion for a new trial alleging that plaintiff's counsel exhibited improper conduct during the trial, for example, suggesting plaintiff's counsel "bought" testimony in his favor. The trial court granted the motion and plaintiff appealed. During closing argument, plaintiff's counsel had made reference to the defense counsel's association with outstanding lawyers in big industry and big tort cases. He also mentioned the ability of defendant's counsel to "buy more portions of the transcript of testimony than he needed."<sup>30</sup> On appeal, the Court held that this conduct directed at a party's lawyer was improper and that the trial court did not abuse its discretion in granting the motion for new trial based on the excesses in the closing argument.

In *State v. Gregory*,<sup>31</sup> the defendant was convicted of robbery and assault with a deadly weapon. The defendant moved for mistrial because of alleged misconduct by the prosecuting attorney. During closing arguments, the attorney for the State said, "He's defending this man on serious charges, but he put these people up without talking to them."<sup>32</sup> After defense counsel objected, the prosecutor went on to state, "Just remember the logic of that. Defending a man and not bothering to talk to the witnesses before he puts them on?"<sup>33</sup> In contrast to the comments made in *Colfer*, the Court in *Gregory* found that

these remarks were not as inflammatory or derogatory toward opposing counsel as the defendant contended and affirmed the denial of the motion for mistrial.

## 2. Departing From the Record, Drawing Illegitimate Inferences, Arguing Facts Not in the Record

*Liberatore v. Thompson*<sup>34</sup> was an action for damages resulting from an automobile accident. Thompson filed a motion for a new trial, which was granted by the trial court on the grounds that the victim's counsel had made improper comments during closing arguments and had violated an order *in limine*. The parties had been directed explicitly not to introduce evidence on previous driving-while-intoxicated citations.

During closing arguments, the attorney stated, "He went to his attorney the day after the crash and his attorney was able to arrange for him to pay a fine of approximately \$400 for two automobile crashes involving a drunken driver who hit and run and left the victims behind."<sup>35</sup> In the new trial order, the court "expressly found that improper argument and violation of its order *in limine* had cumulatively ... prevented a fair trial."<sup>36</sup> The court held that "Objection [during closing argument] is not only appropriate, but desirable ... when opposing counsel begins 'departing from the record, drawing illegitimate inferences, arguing facts not in the record, or stating counsel's personal conclusions.'"<sup>37</sup>

## 3. Asserting a Personal Belief in a Client's Cause—"Vouching"

*Forquer v. Pinal County*<sup>38</sup> was a wrongful death action during which the trial court granted a new trial based on improper argument. During closing argument, the plaintiff's counsel said, "Now, the way I see this case, I think it is about the most aggravated case I have ever run into or tried of liability."<sup>39</sup> He went on to say, "I think the police officer ... did not tell us the truth."<sup>40</sup>

On appeal, the court held that the trial judge was in the best position to determine the effect of such an improper comment and affirmed the grant of the motion for new trial because counsel injected his personal belief into the closing argument.

In *State v. Abney*,<sup>41</sup> defendant sought review of a judgment against him for first-degree burglary and rape. During closing arguments, the prosecutor said, "Ladies and gentlemen of the jury, I feel that the necessary elements of both of these charges have been fully proved. Not only by competent evidence, by overwhelming evidence. In my opinion, people seldom, if ever, you will seldom if ever find a criminal case that affords the great amount of proof that we were able to present to you in this case."<sup>42</sup>

The court directed the jury to disregard "any inference in the argument of either counsel relating to personal opinion" and that was considered by the Court of Appeals to have been sufficient to nullify the possibly harmful consequences of the objectionable statement. The judgment was affirmed.

Other examples of objectionable personal opinion are listed in the matrix. Included in this category are comments that the courts have classified as "vouching." Two other forms of impermissible vouching exist: "(1) when the prosecutor places the prestige of the government behind its witnesses, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony."<sup>43</sup>

## 4. Making Inflammatory and Prejudicial Statements Lacking Evidentiary Basis

In *Phoenix Newspapers Inc. v. Church*,<sup>44</sup> a libel case based on an editorial in which it was suggested that the attorney general was a communist, defendants asserted that plaintiff's counsel misrepresented the substance of the editorial. The defense counsel made improper comments such as "I told you that you must accept as a fact or you must accept as a firm and conclusive hypothesis that the editorial, as a matter of law, charged Mr. Church with being a communist and advocating a communist sympathy dedicated to the violent overthrow of the democratic process. You must start with this."<sup>45</sup> The court held that these comments and others like them could have led the jury to the conclusion that the editorial was directly calling the plaintiff a communist, and such comments were erroneous and prejudicial. However, defense counsel

failed to object at the time of the comments and therefore, the judgment for the plaintiff was affirmed.

### 5. Appealing to Prejudice Based on Wealth or Financial Status

Reference to the financial status of the parties in closing arguments is improper. In *Valley National Bank v. Witter*,<sup>46</sup> plaintiff's counsel stated that the defendant was a poor depositor whose check was wrongfully refused. The court held that the statement was improper but not so prejudicial that it should cause a reversal. Likewise, in *Tryon v. Naegle*,<sup>47</sup> defense counsel improperly referred to the financial ability of defendants to satisfy the judgment. Counsel said, "With respect to the Naegles, the amount of money in excess of 15 to 20,000 would be very tragic to these people. It would be unconscionable."<sup>48</sup> The court held that this comment was improper, but since it was not objected to at the time, it did not constitute fundamental error.

### 6. Misconstruing a Court's Ruling

Arizona courts have held that counsel may submit any reasonable inference that can be drawn from the evidence.<sup>49</sup> However, there are occasions when the court has held unreasonable inferences to be improper. For example, in *McGuire v. Caterpillar Tractor Co.*,<sup>50</sup> plaintiff's counsel argued to the jury that the defendant was negligent based on the following statement: "He asked the Judge to kick this whole case out. And he argued. ... And they sat there for a day and a half to try to do it and they couldn't do it. [Objection] The Court refused to kick it out."<sup>51</sup> The court held, "It is highly improper for plaintiff to argue that a refusal by the court to direct a verdict indicates its view to be that the evidence justifies a recovery."<sup>52</sup> A new trial was ordered by the Court of Appeals.

### 7. Referring to Evidence Not Admitted or to What a Witness Not Called Would Have Testified

In *Broderick v. Coppinger*,<sup>53</sup> a personal injury case, the court held that comments by defense counsel alluding to evidence not

# Ethical\* and Legal\*\* Limitations in Closing Arguments

ATTORNEY'S CONDUCT OR WORDS	RULES OR STATUTE	LEADING ARIZONA CASE LAW
Express ill will or animosity toward opposing counsel or engage in personality conflicts	ER 8.4, formerly EC 7-37	<i>Colfer v. Ballantyne</i> , 363 P.2d 588 (Ariz. 1961) <i>State v. Gregory</i> , 501 P.2d 387 (Ariz. 1972)
Misquote testimony or legal arguments or misstate the law	ER 3.4(e), formerly DR 7-102(A)	<i>Liberatore v. Thompson</i> , 760 P.2d 612 (Ariz. Ct. App. 1988) <i>State v. Tims</i> , 693 P.2d 333 (Ariz. 1985)
Assert a personal belief in a client's cause	ER 3.4(e), formerly DR 7-106(C)(4)	<i>Grant v. Arizona Public Service</i> , 652 P.2d 507 (Ariz. 1982) <i>Forquer v. Pinal County</i> , 526 P.2d 1064 (Ariz. Ct. App. 1979) <i>State v. Serrano</i> , 498 P.2d 547 (Ariz. Ct. App. 1972) <i>Frontier Motors, Inc. v. Horrall</i> , 496 P.2d 624 (Ariz. Ct. App. 1972) <i>State v. Hallman</i> , 668 P.2d 874, 890 (Ariz. 1983) <i>State v. Abney</i> , 440 P.2d 914 (Ariz. 1968) <i>State v. Gonzales</i> , 466 P.2d 388 (Ariz. 1970) <i>State v. Dumaine</i> , 783 P.2d 1184 (Ariz. 1989) (vouching) <i>Cf. State v. Dunlap</i> , 930 P.2d 518 (Ariz. 1996) (statements that are obscure and open to more than one interpretation will be considered harmless error)
Make inflammatory and prejudicial statements lacking evidentiary basis in the record	ER 3.4(e), formerly DR 7-102(A)(5)	<i>Phoenix Newspapers, Inc. v. Church</i> , 537 P.2d 1345 (Ariz. Ct. App. 1975) (no violation absent extreme factual circumstances when defense counsel failed to object, possibly for strategic reasons, and trial judge did not act on his own motion)
Appeal to prejudice based on wealth of financial status of parties NOTE: Permissible in punitive damages cases		<i>Valley National Bank v. Witter</i> , 121 P.2d 414 (Ariz. 1942) (reference to "poor" depositor whose check was wrongfully refused was improper) <i>Tyron v. Naegle</i> , 510 P.2d 768 (Ariz. Ct. App. 1973) (reference to financial ability of party to satisfy judgment improper)
Misconstrue a court's ruling, e.g., refusal to direct a verdict shows court's view that evidence warrants verdict for plaintiff		<i>McGuire v. Caterpillar Tractor Company</i> , 728 P.2d 290 (Ariz. Ct. App. 1986) <i>Anderson Aviation Sales Co., Inc. v. Perez</i> , 508 P.2d 87 (Ariz. Ct. App. 1973) <i>Sanchez v. Stremel</i> , 391 P.2d 557 (Ariz. 1964) <i>Cf. Dykeman v. Engelbrecht</i> , 803 P.2d 119 (Ariz. 1990) (counsel may submit any inference that can be drawn from evidence)
Refer to evidence not admitted or to what a witness not called would have testified		<i>Broderick v. Coppinger</i> , 14 P.2d 714 (Ariz. 1932) <i>State v. Smith</i> , 561 P.2d 739 (Ariz. 1977) <i>State v. Hardin</i> , 406 P.2d 406 (Ariz. 1965) <i>State v. Neil</i> , 428 P.2d 676 (Ariz. 1967)
Discuss fact that party has a dependent family (except in wrongful death cases)		<i>Sanchez v. Stremel</i> , 391 P.2d 557 (Ariz. 1964)
Suggest that party has insurance		<i>Butane Corp. v. Kirby</i> , 187 P.2d 325 (Ariz. 1947) <i>Manhattan-Dickman Constr. Co. v. Shawler</i> , 558 P.2d 894 (Ariz. 1976) (palpable error for defense counsel to mention that plaintiffs got workers' compensation for their injuries) <i>Cf. Cavanagh v. Ohio Farmers Ins. Co.</i> , 509 P.2d 1075 (Ariz. 1973) (permissible when policy itself relevant)
Argue Golden Rule		Cases are divided as to whether attorney may ask jurors to put themselves in plaintiff's position versus argue jury should award what they would want ("golden rule") <i>City of Phoenix v. Boggs</i> , 403 P.2d 305 (Ariz. Ct. App. 1965)
Comment on witness credibility or failure of party to call a witness in a civil case, UNLESS justified by the evidence		<i>Krek v. Briel</i> , 412 P.2d 301 (Ariz. Ct. App. 1966) <i>State v. Bailey</i> , 647 P.2d 170 (Ariz. 1987) (prosecutor committed reversible error by insinuating defendant's expert witness was incompetent when prosecutor had not introduced supporting evidence)
Comment on party's exercise of a privilege not to introduce evidence In criminal cases, no comment should be made; cases conflict on civil matters	ARS § 13-117	<i>State v. Whitaker</i> , 544 P.2d 219 (Ariz. 1975) (marital privilege) <i>Griffin v. California</i> , 380 U.S. 609 (1965) (constitutional right to not testify) <i>State v. Byrd</i> , 503 P.2d 958 (Ariz. 1972)
Comment on conduct or motives of parties and witnesses unless supported by evidence or inference		<i>Starkovich v. Noye</i> , 519 P.2d 77 (Ariz. Ct. App. 1974)
Engage in obsequious flattery		<i>Barzelis v. Kulikowski</i> , 418 F.2d 869 (9th Cir. 1969)
Comment on character of parties		<i>State v. Geotis</i> , 930 P.2d 1324 (Ariz. 1996) <i>State v. Byrd</i> , 503 P.2d 958 (Ariz. 1972)

\*You won't go to heaven and you may get reported to the Bar.

\*\*You may get reversed on appeal, but the standard of review is abuse of discretion, and trial judges have wide latitude to determine prejudicial effect of attorneys' conduct or words on the jury decision. See, e.g., *Grant v. Arizona Public Service Co.*, 652 P.2d 507 (Ariz. 1982). You may also get reported to the Bar and/or not go to heaven.

admitted were improper. Counsel said, “If Dr. Greer had gone on the stand, I believe he would have told a different story: If you had allowed Dr. McLoone I believe he would have told a different story; if the nurse had been called, I believe she would have told a different story; if the school teacher had been called, I believe she would have told a different story.”<sup>54</sup> Although plaintiff’s counsel timely objected, the court held that the jury instructions were sufficient to overcome the error. The Supreme Court held that, given the trial judge’s prompt admonition to the jury, there was no need for a new trial. In contrast, comments made in *State v. Neil*<sup>55</sup> in which the county attorney alluded to a prior criminal record were sufficient for reversal. The attorney said, “Now, he said this person has got an unblemished record. ... That was a misstatement. I won’t go any further, but that was a misstatement, I can prove it.”<sup>56</sup>

### Conclusion

These seven examples and the 15 categories of Arizona case law listed in the matrix show that, despite trial court warnings and appeals court reversals, misconduct during closing arguments continues to occur. In light of the new standard related to “zealous,” increased scrutiny of closing arguments can be expected. Courts and attorneys should apply higher legal and ethical standards to closing arguments. Attorneys should be more disposed to object to improper conduct during closing arguments. Finally, attorneys and judges should report unethical conduct as it occurs. ▀

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1. Press Release, *Supreme Court Approves Amendments to Governing Rules* (June 6, 2002), available at [www.supreme.state.az.us/media/archive/060603Rules.htm](http://www.supreme.state.az.us/media/archive/060603Rules.htm). The official changes are reflected in *Order Amending Rules 42 and 43*, Rules of the Supreme Court, effective as of Dec. 1, 2003. Vice Chief Justice Ruth McGregor also notes, “Other state supreme courts and the American Bar Association have expressed both an interest in Arizona’s change, and intent to adopt it in their rules.”
2. *Id.*
3. *Id.*
4. Board of Governors, *A Lawyer’s Creed of Professionalism of the State Bar of Arizona*, State Bar of Arizona (May 19, 1989), available at [www.azbar.org/AttorneyResources/creed.asp](http://www.azbar.org/AttorneyResources/creed.asp).
5. Rule 42, ARIZ.R.S.C.T., Preamble ¶ 9 (refer to *Order Amending Rules*, *supra* note 1).
6. ER 3.4(e).
7. Rule 42, ARIZ.R.S.C.T., Scope ¶ 16.
8. TRIAL OBJECTIONS § 600 (James Publishing 2002).
9. *See Phoenix Newspapers, Inc. v. Church*, 537 P.2d 1345, 1352 (Ariz. Ct. App. 1975), in which the court held that defense counsel’s failure to object may have been a strategic move and could have been cured by jury instruction.
10. Rule 59, ARIZ.R.S.C.T. (2003).
11. Rule 42, ARIZ.R.S.C.T., ER 8.3 (effective Dec. 1, 2003).
12. *See Justice Corcoran, In Re Himmel: Am I My Brother’s Keeper?* 26 ARIZ. ATTORNEY 15 (1989), in which Justice Corcoran states that lawyers and judges have an obligation to report unethical conduct when it happens. His determination is based on application of Rule ER 8.3 and *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), in which the court suspended a lawyer for one year solely because he failed to report another attorney’s unethical conduct.
13. *See Margaret Downie, Attorneys Disciplined: Ethics in Practice Duty to Report*, 32 ARIZ. ATTORNEY 42 (1996).
14. *See Grant v. Arizona Public Service Co.*, 652 P.2d 507, 527 (Ariz. 1982).
15. *Id.* *See also Phoenix Newspapers*, 537 P.2d at 1353. Reversal for error without objection would require a motion under Rule 60(c)(3) (2003). Under this Rule, the exercise of the court’s discretion must be supported by facts or sound legal policy. *See Hilgeman v. American Mtg. Secs., Inc.*, 994 P.2d 1030, 1033 (Ariz. Ct. App. 2000).
16. *See State v. Phillips*, 46 P.3d 1048, 1058 (Ariz. 2002).
17. *Id.* *See also* the ARIZ. CONST. art. 6, § 27 (2003), which requires that “no cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.”
18. TRIAL OBJECTIONS, *supra* note 8. *See also Kaiser Steel Corp. v. Frank Coluccio Constr.*

- Co.*, 785 F.2d 656, 658 (9th Cir. 1986), in which the court held that a contemporaneous objection should be raised well before the jury began its deliberations to allow “the judge to examine the alleged prejudice and to admonish counsel or issue a curative instruction.”
19. *State v. Serrano*, 498 P.2d 547, 550 (Ariz. Ct. App. 1972).
  20. See TRIAL PRACTICE CHECKLIST § 9:53 (West 2001) (proposing that the closing argument is the focus of the entire trial and trial preparation).
  21. *State v. Gonzales*, 466 P.2d 388, 391 (Ariz. 1970).
  22. *State v. Thomas*, 275 P.2d 408, 419 (Ariz.), *aff'd*, 356 U.S. 390; *State v. Neil*, 428 P.2d 676, 677 (Ariz. 1967).
  23. See the Arizona Rules of Evidence: Rule 402 (evidence which is not relevant is not admissible); Rule 403 (evidence that may mislead or prejudice the jury may be excluded); Rule 411 (evidence that a person was not insured against liability is not admissible upon the issue of negligence). See also ER 3.4.
  24. See *Neil*, 428 P.2d at 677.
  25. *State v. Herrera*, 850 P.2d 100, 111 (Ariz. 1993).
  26. *Sullivan v. State*, 55 P.2d 312, 317 (Ariz. 1936) (holding that comments cannot be taken out of context and that given all of the arguments and instructions, the jury could not have confused “premeditated” with “deliberate”).
  27. Each category includes one or two examples of actual improper conduct. Refer to the matrix for additional cases and additional categories.
  28. *State v. Gregory*, 501 P.2d 387 (Ariz. 1972).
  29. 363 P.2d 588 (Ariz. 1961).
  30. *Id.*
  31. 501 P.2d 387 (Ariz. 1972).
  32. *Id.* at 390.
  33. *Id.*
  34. 760 P.2d 612 (Ariz. Ct. App. 1988).
  35. *Id.* at 615.
  36. *Id.* at 618.
  37. *Id.* at 619.
  38. 526 P.2d 1064 (Ariz. Ct. App. 1979).
  39. *Id.* at 1065.
  40. *Id.*
  41. 440 P.2d 914, 915 (Ariz. 1968).
  42. *Id.*
  43. *State v. Dumaine*, 783 P.2d 1184, 1192 (Ariz. 1989).
  44. 537 P.2d 1345 (Ariz. Ct. App. 1975).
  45. *Id.* at 1352.
  46. 121 P.2d 414, 420 (Ariz. 1942).
  47. 510 P.2d 768, 772 (Ariz. Ct. App. 1973).
  48. *Id.*
  49. See, e.g., *Dykeman v. Engelbrecht*, 803 P.2d 119, 123 (Ariz. 1990).
  50. 728 P.2d 290 (Ariz. Ct. App. 1986).
  51. *Id.* at 293.
  52. *Id.* at 294.
  53. 14 P.2d 714 (Ariz. 1932).
  54. *Id.* at 716.
  55. *Neil*, 428 P.2d at 676.
  56. *Id.*