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Allowing Improper Argument of Counsel to be Raised for the First Time on Appeal as Fundamental Error: Are Florida Courts Throwing out the Baby with the Bath Water?

Larry A. Klein

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ALLOWING IMPROPER ARGUMENT OF COUNSEL TO BE RAISED FOR THE FIRST TIME ON APPEAL AS FUNDAMENTAL ERROR: ARE FLORIDA COURTS THROWING OUT THE BABY WITH THE BATH WATER?

THE HONORABLE LARRY A. KLEIN*

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I. INTRODUCTION

In 1978 Florida’s Fourth District Court of Appeal wrote that it was distressed by the trial bar’s increased tendency “to permit the noble art of trial practice to degenerate into a free-for-all.”1 The statement was prompted by numerous improper remarks made by defense counsel in closing argument to which the plaintiff did not object at trial but was raising for the first time on appeal.2 The court noted that it would have reversed if the plaintiff’s counsel had ob-

* Judge, Florida Fourth District Court of Appeal. B.A., University of Michigan, 1962; J.D., University of Florida, 1964; L.L.M., University of Virginia, 1998. This Article is adapted from a thesis submitted by the author to partially fulfill the requirements of the degree of Master of Laws in the Judicial Process at the University of Virginia.
2. See id.
jected, but concluded that the failure to object was an intentional trial tactic and refused to grant a new trial.4

Several years later, exasperated by its experiences with unethical closing arguments, Florida's Third District Court of Appeal reversed a jury verdict and granted a new trial in which there had been no objection to the improper argument at trial.5 Concluding that the remarks were so egregious as to constitute fundamental error, the court rejected the appellee's argument that there had been no objection: fundamental error does not have to be preserved by objection at the trial level and may be raised for the first time on appeal.6

Florida's five district courts of appeal are divided as to whether counsel's unobjected-to argument can constitute fundamental error in civil cases—even judges on the same court are split on the issue.7 Improper argument is perceived to be such a problem that it generated three articles in 1995 and 1996 alone.8 Moreover, one recent concurring opinion suggests that the problem of improper closing argument is "an academic question deserving of consideration,"9 while another deplores the "waste of judicial resources, the squandering of juror time and effort and the expense of retrial incurred by the litigants."10

The general rule is that an appellate court will not entertain new issues on appeal that were not preserved at trial through objection. This Article will examine whether allowing improper argument to be raised for the first time on appeal in civil cases is a misuse of the fundamental error rule. Part II explains the general rule requiring objection in the trial court. Part III reviews the split among the Florida district courts of appeal, discusses the Florida Supreme Court precedent, and suggests that the trial courts are better equipped to determine whether an improper argument prejudices any party. Part IV discusses what other jurisdictions do and concludes that Florida courts are the only courts that permit counsel to raise the issue of improper argument for the first time on appeal.

Part V argues that a more effective deterrent for improper argument would be attorney sanctions and the reporting of unethical con-

3. See id. at 362.
4. See id.
5. See Borden, Inc. v. Young, 479 So. 2d 850, 851 (Fla. 3d DCA 1985).
6. See id.
7. See infra Part III.A.
duct to The Florida Bar, and suggests that trial courts should warn attorneys before trial that improper argument is unacceptable. Part VI suggests a very limited type of argument that could be raised for the first time on appeal. Finally, the Article concludes that improper argument is not fundamental error. Granting new trials when there have been no objections has not discouraged counsel from making improper argument. Therefore, courts should focus more narrowly on disciplining counsel rather than sacrificing jury verdicts.

II. THE RULE REQUIRING PRESERVATION OF ERROR

The rule that prohibits considering new issues on appeal originated in English common law when the purpose of review was solely to determine whether the judge committed error, not whether the judgment was just.11 As Judge Aldisert explained in *Pfeifer v. Jones & Laughlin Steel Corp.*,12 the rule requiring objection in the trial court goes "to the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways."13 Another court of appeal stated:

> [R]easonable adherence to clear, reasonable and known rules of procedure is essential to the administration of justice. . . . If the courts must stop to inquire where substantial justice on the merits lies every time a litigant refuses or fails to abide [by] the reasonable and known rules of procedure, there will be no administration of justice.14

Both the rule and the theory behind it are well established in Florida.15

Florida has developed very specific requirements for preservation of error regarding improper comments or argument of counsel. First, there must be an objection at the time the improper argument or remarks are made.16 If the trial court overrules the objection, a motion

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12. 678 F.2d 453 (3d Cir. 1982).

13. Id. at 457 n.1 (noting that requiring an objection "gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review").


for mistrial is unnecessary. Such a motion would be futile because
the court determined the argument was proper.\textsuperscript{17} If the court sus-
tains the objection and counsel intends to argue on appeal that there
should have been a mistrial, counsel must move for a mistrial at the
trial level.\textsuperscript{18} Although counsel must object at the time of the improper
remarks, counsel may move for a mistrial at the close of argument,
giving counsel time to consider whether to seek a mistrial.\textsuperscript{19}

In 1985 the Florida Supreme Court lamented how widespread im-
proper closing arguments had become and took a significant step to-
ward alleviating the prejudice imposed on the party aggrieved by the
improper argument.\textsuperscript{20} In \textit{Ed Ricke & Sons, Inc. v. Green},\textsuperscript{21} the court
held that when a party makes a timely motion for mistrial based on
an improper closing argument, the trial court can withhold ruling on
the motion until after the jury has returned a verdict.\textsuperscript{22} If the verdict
is satisfactory to the movant, the court does not need to rule on the
motion.\textsuperscript{23} In addition, there is no need for a new trial or an appeal.\textsuperscript{24}
The \textit{Ed Ricke} rule essentially eliminates any plausible excuse for
failing to preserve the record by parties aggrieved by improper ar-

gument.\textsuperscript{25}

III. THE PROBLEM IN FLORIDA

A. Departure from the Preservation Rule and the Conflict Among
Districts

The case that started the modern trend of reversing because of
improper but unobjected-to closing argument was \textit{Borden, Inc. v. Young},\textsuperscript{26} a personal injury case. In the \textit{Borden} opinion, the court did
not include most of the improper remarks that it attributed to both
counsel, but gave, as an example, plaintiff's counsel's assertion of
"his personal knowledge of nefarious activities supposedly engaged in
by the corporate defendant," which were neither in evidence nor
true.\textsuperscript{27} The court named counsel for both sides in its opinion and in a
footnote announced that it was sending a copy of the opinion to The
Florida Bar because both counsels' arguments were unethical.\textsuperscript{28}

17. \textit{See} \textit{Newton v. South Fla. Baptist Hosp.}, 614 So. 2d 1195, 1196 (Fla. 2d DCA
1993).
18. \textit{See}, \textit{e.g.}, \textit{Roundtree v. State}, 362 So. 2d 1347, 1348 (Fla. 1978).
20. \textit{See} id.
21. 468 So. 2d 908 (Fla. 1985).
22. \textit{See} id. at 909.
23. \textit{See} id. at 910.
24. \textit{See} id.
25. \textit{See} id.
26. 479 So. 2d 850 (Fla. 3d DCA 1985).
27. \textit{Id.} at 851.
28. \textit{See} id. at 851 n.2.
The *Borden* court cited the Florida Supreme Court's 1956 decision in *Seaboard Air Line Railroad v. Strickland* as authority for reversing. In *Seaboard*, a personal injury case, plaintiff's counsel argued that the defendant conspired with a physician through its counsel to show that the plaintiff was neurotic and not really injured. In reversing, the Florida Supreme Court characterized the counsel's argument as testimony. Although objections were made only to some of the improper arguments, the court concluded that the failure to object was not fatal. To support this conclusion, the court cited a federal case that found "flagrantly abusive statements" introducing irrelevant matters to be plain error.

In *Baggett v. Davis*, which was decided twenty years before *Seaboard*, the Florida Supreme Court acknowledged the general rule that objection is required to preserve issues for appeal, yet reversed for a new trial despite counsel's failure to object. The court cited *Akin v. State*, a criminal case, and concluded that "where the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence," objection is not required. *Seaboard* remains the last time the Florida Supreme Court has found improper argument to be fundamental error in a civil case.

Since *Borden*, the Third District Court of Appeal has reversed a number of cases in the absence of objection. For example, in his closing argument in *Bloch v. Addis*, defense counsel told the jury about a conversation he had with the plaintiff's expert neurologist in which the expert did not mention the plaintiff's particular injury—despite the fact that this conversation was not introduced as evidence. In *George v. Mann*, defense counsel implied that the plaintiff was a liar and argued that she had perpetrated a fraud, con-

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29. 88 So. 2d 519 (Fla. 1956).
30. See *Borden*, 479 So. 2d at 851.
31. See *Seaboard*, 88 So. 2d at 521.
32. See *Baggett*, 124 Fla. at 522 ("Giving his version of the accident in which the plaintiff was injured and while speaking of a demonstration of it staged during the trial at the place of its happening in the yards of the defendant Railroad, counsel in his argument to the jury in effect gave the following testimony . . .").
33. See *id.* at 523.
34. Robinson v. Pennsylvania R.R., 214 F.2d 798, 802 (3d Cir. 1954). As in *Seaboard*, some improper argument objections were made in *Robinson*; however, the lack of objections was not fatal to finding error. See *id*.
35. 124 Fla. 701, 169 So. 372 (1936).
36. See *Baggett*, 124 Fla. at 716, 169 So. at 379.
37. 86 Fla. 564, 98 So. 609 (1923).
38. *Baggett*, 124 Fla. at 717, 98 So. at 379.
39. See *Seaboard*, 88 So. 2d at 522-23.
40. 493 So. 2d 539 (Fla. 3d DCA 1986) (medical malpractice action).
41. See *id.* at 540.
42. 622 So. 2d 151 (Fla. 3d DCA 1993) (personal injury action).
sealed evidence, and violated discovery orders. In *Martino v. Metropolitan Dade County*, defense counsel suggested to the jury that if it returned a verdict for the plaintiff, the county would be responsible for criminal acts committed by its employees in the future. In *Owens-Corning Fiberglas Corp. v. Crane*, counsel's closing argument attacked the integrity and credibility of opposing counsel, and in *Al-Site Corp. v. Della Croce*, counsel engaged in character attacks and name-calling. As a result of the Third District's liberal use of fundamental error to grant new trials, trial courts in that district have granted post-trial motions for new trials where no objections to the improper arguments were made during the trials.

Shortly after *Borden*, the Fifth District Court of Appeal reversed the granting of a new trial because of improper argument to which objection had been made. The court cited *Borden* and stated that it would not condone unethical arguments in the future, even where there was no objection. Six years later, the Fifth District Court of Appeal found fundamental error with regard to improper argument and has continued to do so in several cases. In *Schubert v. Allstate Insurance Co.*, defense counsel told jurors that they were the "con-
science of the community" and that the doctor who testified on behalf of the plaintiff usually found permanent injury in other cases, which was not introduced as evidence. In *Walt Disney World Co. v. Blalock*, plaintiff's counsel referred to inadmissible evidence in his closing argument and expressed his personal opinion regarding the credibility of witnesses—both of which violate Rule 4-3.4(e) of The Florida Bar Rules of Professional Conduct. Although the Fifth District has found fundamental error in closing arguments in several cases, not all members of the court agree that this is a proper application of the rule.

The First District Court of Appeal resisted calling improper argument fundamental error until 1993. Shortly thereafter, a panel of that court decided to reverse for a new trial, even absent objection, because of plaintiff's counsel's improper expressions of personal outrage about the defendant's "damage control" and his appeal for sympathy because the plaintiff was a priest. In at least three other cases, the First District has reversed in the absence of objection because of arguments similar to those made in the above cases.

56. A "conscience of the community" argument is impermissible in cases in which punitive damages are not being sought, where it can send a message to the jury that they are to punish the defendant. See *Erie Ins. Co. v. Bushy*, 394 So. 2d 228, 229 (Fla. 5th DCA 1981).
57. See *Schubert*, 603 So. 2d at 555.
58. 640 So. 2d 1156 (Fla. 5th DCA 1994).
59. See id. at 1157.
60. See R. REGULATING FLA. BAR 4-3.4(e).
61. See, e.g., *Hammond v. Mulligan*, 667 So. 2d 854, 855 (Fla. 5th DCA 1996) (showing that the panel of judges was split concerning fundamental error with regard to closing argument); *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1159 (Fla. 5th DCA 1994) (Griffin, J., concurring in part and dissenting in part) (stating that "[i]t is anomalous that the more objectionable the comment, the less the incentive to object"); *Schubert v. Allstate Ins. Co.*, 603 So. 2d 554, 555 (Fla. 5th DCA 1992) (Sharp, J., dissenting) (stating that "improper comments by trial counsel, which are unobjected to at trial, only constitute reversible error if they are so outrageous they impaired the jury's calm and dispassionate consideration of the evidence and resulted in an unfair trial").
62. See *Pippin v. Latoesinski*, 622 So. 2d 566, 568 (Fla. 1st DCA 1993).
63. See *Baptist Hosp., Inc. v. Rawson*, 674 So. 2d 777, 777 (Fla. 1st DCA 1996) (reversing and remanding for new trial because of egregious personal opinions and reference to matters outside the evidence); *Muhammad v. Toys "R" Us*, Inc., 668 So. 2d 254, 255 (Fla. 1st DCA 1996) (reversing and remanding for new trial because counsel expressed his personal opinion during closing argument and suggested that the plaintiff's claim was fraudulent); *Sacred Heart Hosp. v. Stone*, 650 So. 2d 676, 677 (Fla. 1st DCA 1995) (re-
The Second District Court of Appeal has not reversed based on unobjected-to remarks, and a 1996 opinion indicates that the Second District disagrees with the manner in which the First, Third, and Fifth Districts have applied fundamental error to arguments of counsel.64

This leaves the Fourth District Court of Appeal and the personal injury case, *Norman v. Gloria Farms, Inc.*,65 that provided the impetus for this Article. Before *Norman*, which was decided in 1996, the Fourth District took the position in *Nelson v. Reliance Insurance Co.*66 that failure to object to improper argument was counsel’s judgment call and, thus, a deliberate tactical trial decision which waived the error.67 Shortly before *Nelson*, the Fourth District adopted the following definition of fundamental error: “A reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. This rule is peculiarly applicable in criminal cases and especially in capital cases.”68

In *Norman*, the Fourth District reversed a defense verdict based on a combination of both unethical, unobjected-to argument and the fact that the jury’s foreman had contact with his brother, an employee of the defendant’s liability carrier, during the trial.69 The plaintiff in *Norman* was injured while hunting hogs on the defendant’s farm.70 Defense counsel argued that the jury should not return a verdict for the plaintiff because it would end hog hunting in Okeechobee County where the case was being tried.71 Of the six jurors and one alternate, four revealed on voir dire that they had hunted hogs sometime in the past.72 Characterizing the remarks as a “totally improper appeal to the jurors’ self-interest as hunters,” the court found the remarks constituted fundamental error.73 The panel apparently would not have reversed solely because of the argument but concluded that the combination of the juror problem and the unobjected-to remarks “substantially undermined plaintiffs’ right to a

64. See Hagan v. Sun Bank, 666 So. 2d 580, 584 (Fla. 2d DCA 1996).
65. 668 So. 2d 1016 (Fla. 4th DCA 1996). Although the author sits on the Fourth District Court of Appeal, he did not participate in the *Norman* decision.
66. 368 So. 2d 361 (Fla. 4th DCA 1978).
67. See id. at 362.
68. LeRutilley v. Harris, 354 So. 2d 1213, 1215 (Fla. 4th DCA 1978).
69. See *Norman*, 668 So. 2d at 1018.
70. See id.
71. See id. at 1020.
72. See id.
73. Id. at 1021-23.
fair trial, compromised the integrity of this jury trial, and thwarted substantial justice."

At least one non-panel member of the twelve-member Fourth District Court believed that reversal based on the unobjected-to argument created a conflict with prior decisions, such as Nelson and LeRetilley v. Harris, and sought en banc consideration. When the non-panel members were unable to obtain enough votes to receive en banc consideration, two of the non-panel members who felt strongly about the issue wrote dissenting opinions. This created another issue: whether a non-panel member should be permitted to publish an opinion under those circumstances. In response to the published dissents, other judges wrote opinions about the practice of non-panel members writing opinions.

The Norman case demonstrates the enormous judicial labor expended by appellate judges on the issue of whether unobjected-to remarks of counsel can be fundamental error. Ironically, after all of this judicial labor, the trial bar is probably unsure of the position of the Fourth District because the panel in Norman did not reverse solely on the basis of the unobjected-to remarks. Since Norman, the Fourth District has not found improper argument to be fundamental error. Rather, subsequent opinions have emphasized that objection is required.

The confusion that presently exists in Florida is exemplified by Winterberg v. Johnson. In Winterberg, counsel for the appellant, who was arguing for the first time on appeal that opposing counsel unethically expressed his personal beliefs in closing argument, told a panel of the First District that he had recently attended a seminar

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74. Id. at 1020.
75. 354 So. 2d 1213 (Fla. 4th DCA 1978).
76. See Norman, 668 So. 2d at 1024.
77. See id. at 1025 (Farmer, J., dissenting); see also id. at 1033 (Stevenson, J., dissenting).
78. See id. at 1024-25.
79. See id. at 1024 (Stone, J., concurring specially with opinion in which Dell, J., concurs) (Stevenson, J., dissenting with opinion in which Shahood, J., concurs).
80. See id. at 1018 (reversing because of improper unobjected-to argument and improper contact between a juror and an employee of the defendant).
81. See, e.g., Murphy v. International Robotics Sys., Inc., 710 So. 2d 587, 591 (Fla. 4th DCA 1998), rev. granted, No. 92,837, 1998 Fla. LEXIS 1617, at *1 (Fla. Aug. 7, 1998) (stating that "a party who does not object to counsel's comments in closing should not be allowed to complain of those comments on appeal"); Rutherford v. Lyzak, 698 So. 2d 1305, 1306 (Fla. 4th DCA 1997) (stating that even where there is improper argument an objection must be made); Weise v. REPA Film Int'l, 683 So. 2d 1128, 1129 (Fla. 4th DCA 1996) (emphasizing that a new trial should be requested at the time of objection); Donohue v. FPA Corp., 677 So. 2d 882, 883 (Fla. 4th DCA 1996) (stating that no fundamental error occurred when defense counsel implied that a video introduced by the plaintiff was doctored).
82. 692 So. 2d 254 (Fla. 1st DCA 1997) (holding that an attorney's communication of his personal opinion in closing argument is not always fundamental error).
83. See R. REGULATING FLA. BAR 4-3.4(e).
where he learned that in *Sacred Heart Hospital v. Stone*, the First District held that unethical closing argument was per se fundamental error and did not need to be preserved by objection. In *Winterberg*, the First District affirmed the trial court, emphasizing that the First District requires objection.

Even in the Second and Fourth Districts, in which objection is required, appeals are still being taken on this issue. Litigants in those districts entertain the hope that those courts will eventually allow unobjected-to arguments to constitute reversible error. After all, it took years before Florida's other district courts of appeal followed the Third District's example in *Borden*. Eventually, panels of the First, Fourth, and Fifth Districts became so exasperated by lawyer misconduct that they felt compelled to follow suit.

The conflict also creates a problem for trial judges when a party fails to object and moves for a new trial after an adverse verdict. Although the Second District clarified that a trial judge can grant a new trial on the basis of unpreserved error only under extreme circumstances, trial courts in the Second District have continued to grant new trials because of improper argument, even when no objection is made. As a result, the Second District had to reiterate that objection is required. The same problem exists in the Fourth District. When trial judges grant new trials, it not only increases litigation in the trial courts but in the appellate courts as well because ap-

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84. 650 So. 2d 676 (Fla. 1st DCA 1995) (personal injury action).
85. See id. at 679-80 (holding that the combined effect of unethical remarks pervading the entire trial was fundamental error but unobjected-to unethical remarks were not per se fundamental error).
86. See *Winterberg*, 692 So. 2d at 255.
87. See id. (citing the concurring opinion in *Rockman v. Barnes*, 672 So. 2d 890, 892 (Fla. 1st DCA 1996), which suggested that *Sacred Heart Hospital* was different because the conduct was "so egregious as to affect the fairness of those proceedings").
88. See supra notes 64-81 and accompanying text. Appellate courts in Florida are not required to write opinions. Statistics furnished by the five district courts of appeal for 1996 reflect that, on the average, about 40% of all final appeals are affirmed without opinion. Accordingly, there are likely more appeals produced by unobjected-to error in closing argument than the opinions cited in this Article.
89. See, e.g., Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1022 (Fla. 4th DCA 1996).
90. See Wasden v. Seaboard Coast Line R.R., 474 So. 2d 825, 832 (Fla. 2d DCA 1985).
91. See, e.g., Eichelkraut v. Kash N' Karry Food Stores, 644 So. 2d 90, 91 (Fla. 2d DCA 1994) (holding that the closing argument at trial did not deny the defendant a fair trial); Gregory v. Seaboard Sys. R.R., 484 So. 2d 35, 36 (Fla. 2d DCA 1986) (disagreeing with the trial court's conclusion that the closing argument was fundamental error).
93. See, e.g., Goutis v. Express Transp., Inc., 699 So. 2d 757, 764 (Fla. 4th DCA 1997) (finding that an attorney's questions and comments were not golden rule arguments or improper personal opinions); Rutherford v. Lyzak, 698 So. 2d 1305, 1306 (Fla. 4th DCA 1997) (stating that an objection must be made even where there is improper argument).
peals in Florida can be immediately taken from orders granting new trials. 84

B. Florida Supreme Court Precedent

In the leading case of Sanford v. Rubin, 95 the Florida Supreme Court defined fundamental error as "error which goes to the foundation of the case or goes to the merits of the cause of action" and cautioned that appellate courts should apply it "very guardedly." 96 In Sanford, the Third District Court of Appeal reversed an attorney's fee award because the statute authorizing the fee was found to be unconstitutional, even though the issue of constitutionality had not been raised in the trial court. 97 In reversing the appellate court, the supreme court concluded that the error was not fundamental and could not be raised for the first time on appeal. 98 Sanford was decided in 1970, fourteen years after Seaboard, when the Florida Supreme Court last found improper argument to be fundamental error in a civil case. 99 Improper closing argument does not appear to fit within the definition of fundamental error in Sanford because it does not go to the foundation of the case or to the elements of the cause of action. 100

The most recent Florida Supreme Court case addressing fundamental error in closing argument is Tyus v. Apalachicola Northern Railroad. 101 Tyus is significant because although the attorney's remarks were egregious, the court refused to find fundamental error. 102

The Florida Supreme Court quashed the First District's decision to reverse a plaintiff's verdict because of grossly improper unobjected-to argument, 103 holding that the rule requiring objection is subject to exception only if "the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury ... ." 104 The dissent set forth the objectionable remarks,

95. 237 So. 2d 134 (Fla. 1970).
96. Id. at 137 (citing State v. Heisler, 272 P.2d 660, 670 (N.M. 1954); Holman v. State, 262 P.2d 456, 457-58 (Okla. 1953); Goodhue v. Fuller, 193 S.W. 170, 172 (Tex. Civ. App. 1917)).
97. See Rubin v. Sanford, 218 So. 2d 177, 178 (Fla. 3d DCA), quashed by 237 So. 2d 134 (Fla. 1970).
98. See Sanford, 237 So. 2d at 138.
100. See Sanford, 237 So. 2d at 137.
101. 130 So. 2d 580 (Fla. 1961).
102. See id. at 587 (noting that the First District Court of Appeal stated that the improper remarks made by counsel deserved timely objection).
103. See Apalachicola N.R.R. v. Tyus, 114 So. 2d 33, 37 (Fla. 1st DCA 1959).
which were grossly improper. They were as prejudicial, if not more so, than any of the remarks described previously in this Article in which district courts of appeal are now finding fundamental error.

Plaintiff's counsel in *Tyus* argued that all railroad cases follow a similar pattern—the railroad tries to exonerate itself before the plaintiff is even buried. The attorney argued that the railroad not only hired two of the most brilliant Tallahassee lawyers, but also an ex-senator because the railroad's philosophy was a "million dollars for defense, but not a penny for compromise." Noting that there was only a rusty sign at the crossing at the time of the accident, plaintiff's counsel told the jury that the railroad had since installed blinkers—a fact that was not in evidence. He argued that if the corporation had spent the money for blinkers before the accident, another human being's life would not have been snuffed out in pursuit of the "almighty dollar." Counsel concluded by asking the jury to "give consideration to the rights and privileges of the citizens of Liberty County with reference to . . . a negligent murder." A majority of the Florida Supreme Court concluded that these remarks did not constitute fundamental error:

[It is most significant that in the instant litigation the veteran and learned trial judge, who was in the milieu of the court room throughout the trial and who was therefore in a much better position than this court or the District Court to determine whether the alleged prejudicial remarks were actually "in effect" of such character, denied a motion for a new trial. *Tyus* was a four-to-three decision. The question of whether egregious argument is fundamental error was controversial then, just as it is today.

Recent Florida Supreme Court criminal cases indicate that obtaining a new trial based on fundamental error may be more difficult for a defendant in a criminal case than for a party appealing a civil case in the First, Third, and Fifth Districts. In *Mordenti v. State*, the supreme court affirmed the defendant's conviction and sentence, asserting that for "an error to be so fundamental that it can be raised for the first time on appeal, the error must be . . . equivalent to a denial of due process." In *Mordenti*, although several issues were

105. See id. at 591-93 (O'Connell, J., dissenting).
106. See id. at 591-92.
107. Id. at 592.
108. See id.
109. Id.
110. Id. at 593.
111. Id. at 588.
112. See id.
113. 630 So. 2d. 1080 (Fla. 1994) (appealing the death penalty).
114. Id. at 1084 (quoting State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)).
raised for the first time on appeal, egregious closing argument was not one of those issues.\(^{115}\)

Further, in *Ray v. State*\(^{16}\) the supreme court relied on the fundamental error definition established in the civil case *Sanford*—"error which goes to the foundation of the case or goes to the merits of the cause of action."\(^{117}\) In *Ray*, the defendant was convicted of a crime for which he had not been charged and which was not a lesser-included offense of the crime for which he was charged.\(^{118}\) His conviction was based on a jury instruction to which his counsel had not objected.\(^{119}\) In refusing to find fundamental error, the court stated that the "failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial."\(^{120}\)

Because of the Florida Supreme Court's refusal to find fundamental error in *Tyus*, its subsequent definition of fundamental error in *Sanford*, and its reluctance to apply fundamental error in criminal cases except when there is a denial of due process,\(^{121}\) one may argue that the supreme court would not now allow egregious closing argument in a civil case to be raised for the first time on appeal.

**C. Appellate Judges Do Not Agree on What Is Improper Argument**

Justice Holmes expressed the view that "[t]he life of the law has not been logic: it has been experience."\(^{122}\) Although this is by no means a universally accepted view, judges' experiences most likely shape their views on whether a specific argument is improper, and if so, whether it should result in a new trial. Judges who tried a large number of personal injury cases in a metropolitan area prior to going on the bench may be less offended by hardball tactics because they became hardened to them over the years. Judges who were trial lawyers in areas of Florida where professionalism may not have deteriorated as quickly as it has in the more urban areas may be more offended by improper argument. Judges who did not litigate prior to going on the bench may also be more sensitive to improper argument. In any event, whether it is experience or something else, judges have widely divergent views on what is improper argument.

Take the golden rule argument, for example, in which counsel urges jurors to put themselves in the place of one of the parties, or of

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115. *See id.* at 1083-84.
116. 403 So. 2d 956 (Fla. 1981).
117. *Id.* at 960 (citing *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970)).
118. *See id.* at 959.
119. *See id.* at 958.
120. *Id.* at 960.
121. *See supra* Part III.B.
the victim in a criminal case, and asks them to deliver the verdict they would want rendered under those circumstances.\textsuperscript{123} In 1966 the First District Court of Appeal concluded that where a golden rule argument is made, prejudice is presumed and per se reversible error exists.\textsuperscript{124} Although the Fourth District adopted this reasoning,\textsuperscript{125} it recently retrenched from the position by holding that a golden rule argument could be harmless.\textsuperscript{126} Shortly thereafter, in \textit{Grushoff v. Denny's, Inc.},\textsuperscript{127} the court adopted Judge Farmer's concurring opinion in \textit{Cleveland Clinic Florida v. Wilson}.\textsuperscript{128}

A blanket condemnation of all golden rule arguments on the rationale used in this state denigrates the common sense of those who serve on juries. I do not believe that most jurors are so swept away by appeals to the golden rule—to the commonness of human nature and experience—that they lose all control of their faculties and proceed to award verdict or money in spite of the facts and law.\textsuperscript{129}

This pronouncement is significant in two respects. First, it questions whether the golden rule argument is improper and, second, whether the impact of improper argument on juries has been exaggerated. On the other hand, the First District recently adhered to its position that the golden rule argument is reversible error.\textsuperscript{130}

Whether counsel can argue that a party or a witness is lying is another issue in dispute among the district courts of appeal. The Third District held that a lawyer's reference to a witness as a liar was fundamental error.\textsuperscript{131} A few years later, the same court held that it was not error, let alone fundamental error, for counsel to call a party a liar if the assertion was supported by evidence.\textsuperscript{132} Whether

\textsuperscript{123} See \textit{Garren v. State}, 528 So. 2d 353, 359 (Fla. 1988) (stating that the prosecutor made several remarks which were so egregious that mistrial was the only remedy and that violations of the golden rule are clearly prohibited); \textit{Goutis v. Express Transp., Inc.}, 699 So. 2d 757, 760 (Fla. 4th DCA 1997) (stating that golden rule arguments are impermissible because they encourage jurors to decide cases on personal interest and bias rather than on the evidence).

\textsuperscript{124} See \textit{Bullock v. Branch}, 130 So. 2d 74, 77 (Fla. 1st DCA 1961).

\textsuperscript{125} See \textit{Miku v. Olmen}, 193 So. 2d 17, 18 (Fla. 4th DCA 1966).

\textsuperscript{126} See \textit{Cleveland Clinic Fla. v. Wilson}, 685 So. 2d 15, 17 (Fla. 4th DCA 1996) (holding that a golden rule argument is subject to the harmless error doctrine because a golden rule argument may not result in a miscarriage of justice).

\textsuperscript{127} 693 So. 2d 1068, 1069 (Fla. 4th DCA 1997).

\textsuperscript{128} 685 So. 2d 15 (Fla. 4th DCA 1996).

\textsuperscript{129} See \textit{Grushoff}, 693 So. 2d at 1069 (citing \textit{Cleveland Clinic Fla. v. Wilson}, 685 So. 2d 15, 17 (Fla. 4th DCA 1996) (Farmer, J., concurring)).

\textsuperscript{130} See \textit{Tremblay v. Santa Rosa County}, 688 So. 2d 985, 986 (Fla. 1st DCA 1997).

\textsuperscript{131} See \textit{Kaas v. Atlas Chem. Co.}, 623 So. 2d 525, 526 (Fla. 3d DCA 1993).

\textsuperscript{132} See \textit{Forman v. Wallshein}, 671 So. 2d 872, 873 (Fla. 3d DCA 1996).
IMPROPER ARGUMENT OF COUNSEL

the prosecutor can call the defendant a liar has been a matter of dispute in the First District. 133

Lawyers are ethically prohibited from stating "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."134 Rule 4-3.4(e) of The Florida Bar Rules of Professional Conduct has been applied inconsistently by the courts as to whether counsel can say "I think" or "I believe" during argument.135 The Third District recently recognized that these are often simply manners of speech and neither improper nor ethical violations.136 The First District is more sensitive to this type of argument.137 In adopting the Third District's approach in Forman v. Wallshein,138 the Fourth District discussed the conflict between appellate courts about what is improper argument and when it becomes fundamental error.139 The court further noted that the confusion led the trial courts to grant new trials when there was absolutely no reason for doing so.140 The court observed in its conclusion that courts are trying to prohibit improper argument but "the hard part may be in determining what is in fact improper."141

The purpose of this discussion is not to criticize appellate judges for not always agreeing on what constitutes improper argument. These issues are by nature subjective. As time goes by and as judges read other opinions, some of the inconsistency should subside. The point is that when judges have to live with some vagueness regarding what is improper argument and whether improper argument is so prejudicial as to require a new trial, another level of subjective decision making, such as whether the improper argument is fundamental error, creates more confusion. The foundation of any good system of appellate review is consistency.142 What Florida has now is anything but consistent.

133. See Pacifico v. State, 642 So. 2d 1178, 1183 (Fla. 1st DCA 1994); Bass v. State, 547 So. 2d 680, 682-83 (Fla. 1st DCA 1989); Redish v. State, 525 So. 2d 928, 930 (Fla. 1st DCA 1988).
134. R. REGULATING FLA. BAR 4-3.4(e).
135. Compare Forman, 671 So. 2d at 874-75 (noting that the use of "I think" or "I believe" is often a figure of speech) with Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 257-58 (Fla. 1st DCA 1996) (objecting to a lawyer's use of "I think" in closing argument).
136. See Forman, 671 So. 2d at 874-75.
137. See Muhammad, 668 So. 2d at 257-58 (holding that comments by retailer's counsel in closing argument violated the rule of professional conduct prohibiting an attorney at trial from offering personal opinion as to justness of a cause or credibility of witnesses).
138. 671 So. 2d 872 (Fla. 3d DCA 1996).
139. See Goutis v. Express Transp., Inc., 699 So. 2d 757, 763 (Fla. 4th DCA 1997) (discussing a number of different comments that prompted the trial court to grant a new trial).
140. See id. at 760-65.
141. Id. at 765.
D. Trial Judges Are in a Better Position to Determine Prejudice than Appellate Judges

There is another reason why objection to improper argument should have to be made in the trial court. In *Tyus*, when the Florida Supreme Court last wrote on this issue, the court emphasized the significance of the fact that the trial judge, because of his presence in the courtroom throughout the trial, was in a better position than an appellate court to determine if the argument was so prejudicial as to require a new trial.\(^{143}\) Generally, a trial court's discretion to grant a new trial will not be disturbed "except on clear showing of abuse."\(^{144}\) Mere disagreement by an appellate court is legally insufficient to reverse a trial court order on motion for new trial because the trial court is in a better position to rule on the correctness of the verdict than the appellate court.\(^{145}\)

When a litigant does not give the trial court an opportunity to exercise its discretion on whether to grant a mistrial because of improper argument and raises the issue of improper argument for the first time on appeal, the appellate court has been deprived of the superior vantage point of the trial judge.\(^{146}\) When appellate courts grant new trials under these circumstances, they do so without the benefit of the trial court's opinion as to whether the improper argument resulted in a miscarriage of justice.\(^{147}\) Appellate courts might be less apt to overrule a trial court decision if they had to find that the trial court abused its discretion when it refused to set aside a jury verdict after having the opportunity to consider it.

IV. FUNDAMENTAL ERROR IN OTHER JURISDICTIONS

Professor Robert J. Martineau, who authored the leading article on fundamental or plain error, a subject upon which little has been written, suggests that the general rule requiring objection in the trial court has become meaningless because appellate courts have misused the fundamental error rule.\(^{148}\) Unrestrained by the general rule requiring objection, appellate courts have become 800-pound gorillas, doing whatever they want.\(^{149}\) He concludes that "[t]he only consistent feature of the current system is its inconsistency."\(^{150}\)

\(^{143}\) See *Tyus* v. Apalachicola N.R.R., 130 So. 2d 580, 588 ( Fla. 1961).

\(^{144}\) Castlewood Int'l Corp. v. LaFleur, 322 So. 2d 520, 522 (Fla. 1975) (quoting *Cloud* v. *Fallis*, 110 So. 2d 669, 672 ( Fla. 1959)).

\(^{145}\) See *id.* at 522.

\(^{146}\) See *id.* at 524 (Overton, J., concurring).

\(^{147}\) See *id.* at 523.


\(^{149}\) See *id.* at 1061.

\(^{150}\) *Id.*
Martineau recognizes there are certain issues that can be raised for the first time on appeal.\textsuperscript{151} Subject matter jurisdiction and certain “principles of federalism or constitutional adjudication” are two issues appellate courts can and should raise on their own.\textsuperscript{152} Apart from the exceptions, Martineau would not allow a party to “lie in wait during trial proceedings” and if unsuccessful, raise a previously known issue in the appellate court.\textsuperscript{153} He would limit what can be raised as fundamental error to issues that are similar to the grounds for relief from judgment under Federal Rule of Civil Procedure 60(b), such as mistake, void judgment, and misconduct of a party.\textsuperscript{154} Martineau reasons that it makes no sense to prohibit a party from raising an issue for the first time on appeal if the issue would authorize relief from a judgment that is final.\textsuperscript{155} Another author proposes a uniform model rule for hearing new issues on appeal.\textsuperscript{156} This solution would preclude appellate review unless a party could show there was no opportunity to object or to raise the issue in the trial court.\textsuperscript{157}

As a result of the lack of uniformity in the general application of the fundamental error rule, some courts have abolished it entirely.\textsuperscript{158} In Dilliplaine v. Lehigh Valley Trust Co.,\textsuperscript{159} the Pennsylvania Supreme Court stated that “[t]he theory [of plain error] has been formulated in terms of what a particular majority of an appellate court considers basic or fundamental. Such a test is unworkable when neither the test itself nor the case law applying it develop a predictable, neutrally-applied standard.”\textsuperscript{160} The court concluded that plain error is an anachronism and an impediment to the efficient and fair administration of justice.\textsuperscript{161} Commenting on this statement, Professor Martineau noted:

This statement, remarkable in its candor, acknowledges that appellate courts ignore a basic requirement of the appellate process when they make exceptions to procedural rules for reasons they describe as ‘plain,’ ‘basic,’ ‘fundamental error,’ or ‘in the interests of justice.’ Appellate judges must recognize that they cannot render decisions that apply only to the facts of one case. Precedent and stare decisis are essential features of a common-law system.

\textsuperscript{151} See id. at 1059.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 1060.
\textsuperscript{154} See id.
\textsuperscript{155} See id.
\textsuperscript{156} See Rhett R. Dennerline, Note, Pushing Aside the General Rule in Order to Raise New Issues on Appeal, 63 IND. L.J. 985, 1010 (1989) (advocating a uniform system for hearing issues on appeal when the issues are not raised at the trial level).
\textsuperscript{157} See id. at 1011.
\textsuperscript{158} See Martineau, supra note 148, at 1058.
\textsuperscript{159} 322 A.2d 114 (Pa. 1974).
\textsuperscript{160} Id. at 116-17 (footnote omitted).
\textsuperscript{161} See id.
Appellate courts undercut the entire system when they ignore the precedential value of cases.162

Federal Rule of Criminal Procedure 52(b) provides that "plain errors" affecting substantial rights may be raised for the first time on appeal. There is no federal civil counterpart to that rule.163 The Seventh Circuit Court of Appeals, which does not allow plain error in civil cases, explained why criminal cases are different: "What could justify the anomaly in the criminal sphere? It is the injustice of allowing the conviction of an innocent person, or an unlawful sentence imposed upon a guilty person, to stand."164 In order for error to amount to plain error in a federal criminal case, there must be a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."165

Attorney misconduct in closing argument is a nationwide problem.166 However, no courts outside Florida are attempting to curb improper argument in civil cases by allowing it to be raised for the first time on appeal. One federal decision grounded its reversal on the combination of a low verdict and unobjected-to argument.167 One year earlier, the same court initially granted a new trial because of unobjected-to remarks.168 On rehearing, the court reconsidered and affirmed the denial of a new trial because of the lack of an objection.169 A 1950 New Mexico Supreme Court decision warned in dictum that inflammatory comments by counsel in the absence of objection could result in reversal for a new trial, but the court has never carried out its threat.170 In fact, it appears that New Mexico, like Pennsylvania,171 does not even recognize fundamental error in civil cases.172 In

162. Martineau, supra note 148, at 1033.
163. Federal Rule of Evidence 103, which provides for objections to evidence and the proffering of it, does not preclude courts from applying plain error. See FED. R. EVID. 103(d).
166. See Mark Hansen, If the Claim Doesn't Fit, A.B.A. J., June 1997, at 18 (illustrating the increasing number of argument abuses and the unwillingness of judges to tolerate improper argument).
167. See Hall v. Freese, 735 F.2d 956, 959, 962 (5th Cir. 1984) (involving physical injury and economic damages of $500,000).
169. See id.
1958 the Missouri Supreme Court reversed for a new trial because of a highly prejudicial unobjected-to argument that asserted a conspiracy unsupported by evidence.\(^\text{173}\) No Missouri court has done so since then.\(^\text{174}\) Thus, Florida appears to be alone, at least in modern times, in granting new trials because of unobjected-to argument in civil cases.

V. **Punishment Should Be Aimed Directly at Offending Counsel**

A. The Courts Are Reacting to Unethical Conduct, but New Trials Are Not Curbing the Unethical Conduct

The ethical rule that can be most directly violated by improper argument is Rule 4-3.4(e) of The Florida Bar Rules of Professional Conduct, which provides that lawyers 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 the 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.\(^\text{175}\)

In *Hagan v. Sun Bank*,\(^\text{176}\) the Second District suggested that one of the reasons for confusion about fundamental error is that both trial courts and appellate courts are tempted to use a new trial as a remedy to punish attorney's misconduct.\(^\text{177}\)

In *Silva v. Nightingale*,\(^\text{178}\) a case in which there were a few objections, the court observed that improper argument by counsel for both sides was occurring with "alarming and increasing frequency," particularly in personal injury cases.\(^\text{179}\) In reversing, the court made it clear that it would not hesitate to reverse in the future, even in the

174. See, e.g., Long v. Twehous Contractors, Inc., 904 S.W.2d 285, 290 (Mo. Ct. App. 1995) (affirming the lower court's decision even though the plaintiff made no objection to a possibly prejudicial argument); Hammer v. Waterhouse, 895 S.W.2d 95, 107 (Mo. Ct. App. 1995) (holding that an argument is not preserved for review when counsel fails to object to inappropriate comments).
175. R. Regulating Fla. Bar 4-4.3(e); accord Bellsouth Human Resources Admin. v. Colatarci, 641 So. 2d 427, 429 (Fla. 4th DCA 1994) (stating that "[t]he remarks of both counsel are in direct violation of [Rule] 4-3.4(e)"); Pippin v. Latosynski, 622 So. 2d 566, 569 (Fla. 1st DCA 1993) (stating that "[c]ounsel's expression of personal outrage amounts to a personal opinion clearly in breach of the Rules Regulating The Florida Bar, Rule 4-3.4(e)"); Silva v. Nightingale, 619 So. 2d 4, 5-6 (Fla. 5th DCA 1993) (holding that a lawyer's comments violated Rule 4-3.4(e) as improper argument).
176. 666 So. 2d 580 (Fla. 2d DCA 1996).
177. See id. at 584.
178. 619 So. 2d 4 (Fla. 5th DCA 1993).
179. Id. at 4.
absence of an objection. As noted earlier, the Fifth District made that threat good in Schubert and Walt Disney World. Punishing counsel was also clearly one of the motivating factors that prompted the Fourth District to find fundamental error in Norman v. Gloria Farms, Inc.

Granting new trials where there has been no objection has not deterred counsel from making unethical remarks. As the cases discussed throughout this Article indicate, unethical argument is a continuing problem in all five of the Florida district courts of appeal. It generated three articles in The Florida Bar Journal between 1995 and 1996 alone. Gary Fox, a trial attorney, concluded that one of the reasons for the problem is that appellate courts send mixed signals concerning what is improper argument and when an objection is required. Fox recommends abolishing the part of the fundamental error rule that allows a party to raise improper argument as an issue on appeal without objecting in the trial court. Although it might have been reasonable to expect that Borden would have resulted in curtailing unethical argument of counsel, experience has shown that it did not have the desired effect.

B. Attorney’s Fees and Costs Should Be Assessed Against Counsel Whose Improper Remarks Result in a Mistrial

The Fourth District observed that “[w]hen counsel engages in misconduct so prejudicial as to warrant a mistrial, opposing counsel is in the unenviable position of having to move for [a mistrial] which, if granted, can be devastating to the client in terms of both time and expense.” This is a legitimate concern. For example, plaintiffs’ counsel in personal injury cases are normally working on a contingent fee basis. Contingent fees are also being used more widely in business litigation, as clients seek ways to save costs and have counsel bear some of the risks of a loss. The consequences of a court granting a mistrial to counsel on a contingent fee are enormous and

180. See id. at 5 (citing Borden, Inc v. Young, 479 So. 2d 850 (Fla. 3d DCA 1985)).
181. See supra notes 55-59 and accompanying text.
182. 668 So. 2d 1016, 1023-24 (Fla. 4th DCA 1996).
183. See, e.g., Goutis v. Express Transp., Inc., 699 So. 2d 757 (Fla. 4th DCA 1997); Hagan v. Sun Bank, 666 So. 2d 580 (Fla. 2d DCA 1996); Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994); Schubert v. Allstate Ins. Co., 603 So. 2d 554 (Fla. 5th DCA 1992).
184. See Fox, supra note 8, at 43; Johnson, supra note 8, at 12; Reis, supra note 8, at 60. All three articles point out that the lawyers are not getting the message regarding improper argument.
185. See Fox, supra note 8, at 46-47.
186. See id. at 48.
may cause a conflict between what is in the best interest of the client and what is in the best interest of counsel. Under these circumstances, counsel will be loath to move for a mistrial. Further, clients paying hourly rates to their counsel will not be enthusiastic about the prospect of a mistrial.

Assessing attorney’s fees and costs by granting a mistrial against counsel whose improper remarks caused the mistrial would serve two purposes. First, it would encourage compliance with the rule requiring an objection and motion for mistrial where the improper argument warrants it. Second, the possibility of having substantial monetary sums assessed against counsel personally may deter counsel from making improper argument more than would the possibility of merely having to try the case over again. This would most likely result in fewer appeals of verdicts grounded on fundamental error.

Florida has precedent that would support an award of attorney’s fees and costs of a mistrial caused by improper argument. In Emerson Realty Group, Inc. v. Schanz, the Fifth District found that counsel’s representations to the trial court “bordered on fraud” and violated Rule 4-3.4(e), which prohibits lawyers from knowingly making false statements of material fact or law to a tribunal. The misconduct caused the trial court to dismiss the action. The Fifth District reversed the dismissal and assessed attorney’s fees and costs incurred by the adverse party against the lawyers personally because their unethical conduct caused the unnecessary litigation. Similarly, if unethical conduct in the form of improper argument of counsel causes an otherwise unnecessary appeal or new trial, attorney’s fees and costs could be assessed against counsel causing the unnecessary trial or appeal under Emerson.

The Fourth District followed Emerson in Patsy v. Patsy where counsel moved to disqualify opposing counsel with no factual basis for disqualification and in bad faith. After observing there was no rule of procedure or statute in Florida that would have authorized the assessment of attorney’s fees against counsel for having filed the sham motion to disqualify, the court concluded that it had the inherent power to assess attorney’s fees against counsel for litigating in

190. 572 So. 2d 942 (Fla. 5th DCA 1990).
191. See id. at 944-45.
192. See id. at 944.
193. See id. at 945.
194. See id.
195. 666 So. 2d 1045 (Fla. 4th DCA 1996).
196. See id. at 1046.
bad faith. The court relied on a Third District decision, which held that courts have the inherent power to assess attorney's fees against counsel, as well as a United States Supreme Court opinion holding that federal courts have the inherent power, apart from authority contained in rules or statutes, to assess attorney's fees against counsel who litigate in bad faith.

Granting new trials has probably not deterred unethical argument because the cost of the new trial is simply not enough to discourage the conduct. A plaintiff's personal injury lawyer may be willing to assume the risk of a new trial because inflammatory argument could result in a substantially higher verdict. As the verdict increases, so does the contingent fee. On the other hand, counsel billing by the hour will be paid regardless of whether a case is retried. Further, clients who have to pay those hourly fees may not complain about appeals or a new trial because counsel can always explain that they have to play hardball to win. If a lawyer's unethical conduct increases the chances of the client prevailing, the client will probably not mind the risk of having to pay more fees if a favorable verdict is reversed for a new trial. However, if attorney's fees and costs were assessed personally against counsel the courts might be able to accomplish what granting new trials without objection has failed to achieve.

C. Florida Bar Discipline: Courts Should Report Offending Counsel to the Bar

When attorney misconduct in argument is so prejudicial as to result in a court granting a new trial, in the absence of an objection, it usually violates Rule 4-3.4(e), which prohibits lawyers from arguing facts that are not in evidence and expressing personal opinions. Such arguments could also violate Rule 4-3.5(a), which provides that a "lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court." In at least two cases, the Florida Supreme Court has either publicly reprimanded or suspended lawyers for violating these rules. In another case, counsel was charged with making an un-

197. See id. at 1047.
198. See Sanchez v. Sanchez, 435 So. 2d 347, 350 (Fla. 3d DCA 1983).
201. See R. REGULATING FLA. BAR 4-3.4(e).
202. R. REGULATING FLA. BAR 4-3.5(a).
ethical closing argument, but the court appears to have reprimanded him only for the improper communication with jurors after an adverse verdict.\textsuperscript{204}

Appellate courts have also specifically named the guilty counsel in the opinions.\textsuperscript{205} However, this approach would be even more effective if the courts explicitly stated that they found the conduct so egregious they were referring it to The Florida Bar.\textsuperscript{206} Even if the Bar did not discipline the lawyer, the opinion would be a permanent blemish on the lawyer's record. The opinion could be dredged up if the lawyer ever sought judicial or public office. Such publication could also result in increased punishment for future ethical violations.

Professionalism in general has deteriorated to such an extent that the Florida Supreme Court recently established a commission on professionalism composed of lawyers, judges, and legal educators to develop ways to remedy this lack of professionalism.\textsuperscript{207} At this point, both The Florida Bar and the Florida Supreme Court should be willing to enforce the ethical rules.

D. Trial Judges Must Become More Involved

1. Trial Judges Can Notify Counsel Before Trial That Improper Argument Will Not Be Tolerated

Unethical argument of counsel has become such a problem that some courts are letting counsel know, prior to trial, that it will not be tolerated. At the beginning of trial, one federal trial judge furnishes counsel with a directive entitled "Opening Statements and Final Arguments."\textsuperscript{208} It notes that appellate courts have urged trial courts to exercise closer supervision over opening statements and final arguments.\textsuperscript{209} It also sets out Rule 4-3.4(e) of The Florida Bar Rules of Professional Conduct and quotes the following statement from the Fourth District's opinion in \textit{Bellsouth Human Resources Administration v. Colatarci}:\textsuperscript{210}

\textsuperscript{204} \textit{See} The Florida Bar v. Newhouse, 498 So. 2d 935, 937 (Fla. 1986) (reprimanding an attorney for contacting jury members after an adverse verdict to find out why the jury found against his client).

\textsuperscript{205} \textit{See} Borden, Inc. v. Young, 479 So. 2d 850, 850-51 (Fla. 3d DCA 1985); Donohue v. FPA Corp., 677 So. 2d 882, 883 (Fla. 4th DCA 1996) (Klein, J., concurring); Baptist Hosp., Inc. v. Rawson, 674 So. 2d 777, 778-79 (Fla. 1st DCA 1996).

\textsuperscript{206} \textit{See} Borden, 479 So. 2d at 851 n.2.

\textsuperscript{207} In re Florida Supreme Court Comm'n on Professionalism, Fla. Admin. Order (Fla. July 19, 1996) (on file with Clerk, Sup. Ct. of Fla.).

\textsuperscript{208} Letter from Daniel T.K. Hurley, Judge, United States District Court, Southern District of Florida, to Larry A. Klein, Judge, District Court of Appeal, Fourth District (Aug. 10, 1996) (on file with the author) [hereinafter Letter].

\textsuperscript{209} \textit{See} id.

\textsuperscript{210} 641 So. 2d 427 (Fla. 4th DCA 1994).
It is the trial court's responsibility, when objections are made to improper argument, to sustain the objections and let counsel know that these tactics will not be tolerated. Since the basic parameters of proper argument are the issues reflected in the pleadings; the facts shown by the evidence and the inferences to be drawn therefrom; and the instructions given to the jury, with some latitude for rhetoric, it should not be difficult for trial judges to recognize when counsel are exceeding the bounds of propriety. What other lawyers have done, what has occurred in other lawsuits, and what other corporations have done, are things which are clearly outside the bounds, and reference to them directly violates the ethical rule.

No judge wants to refer a lawyer to the Bar for unethical conduct. The Florida Supreme Court has, however, written that trial and appellate courts should not only register disapproval but in appropriate cases refer misconduct by lawyers for Bar discipline. Judges are also ethically required to “take appropriate action” when they have actual knowledge that a lawyer has violated a Florida Bar Rule. If a court has given counsel guidelines in advance about improper argument, it will be easier for the trial judge to take appropriate action if the lawyer violates the directive.

2. Trial Judges Must Act Promptly When Counsel Objects to Improper Argument

Trial judges must react appropriately when counsel raises objection to improper argument. In Bellsouth, defense counsel attacked trial lawyers in general and suggested that frivolous law suits were one of the major ills of society. Instead of sustaining the objection of the plaintiff's counsel, the court allowed opposing counsel to rebut the attack. Counsel accepted the invitation and responded that the defendant, Bellsouth, was part of the corporate America that "brought you the gas tank that explodes, and agent orange, and silicone breast implants." If the trial judge had been attentive and initially sustained the objection to defense counsel's argument, the attacks may not have gotten out of hand.

Counsel are naturally reluctant to interrupt opposing counsel's argument, fearing the jury may resent it. If the trial court immediately reacts to improper argument, as soon as the objection is made, the court can minimize the objection by drawing the jurors' attention away from objecting counsel. Also, by quickly taking control, the ac-

211. Letter, supra note 208.
212. See State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).
213. See FLA. CODE JUD. CONDUCT, Canon 3D(2).
214. See Bellsouth, 641 So. 2d at 429.
215. See id.
216. Id. at 428.
tion can have the beneficial effect of alerting counsel who is not intentionally, but only inadvertently, making improper argument.

3. Trial Courts Should Step in Under Some Circumstances, Even in the Absence of an Objection

In 1978 the Fourth District expressed its concern about the trial bar permitting the “noble art of trial practice to degenerate into a free-for-all,” but affirmed the trial court’s ruling because there had been no objection at trial. The court stated that “while all judges are required by judicial dictates to exercise control over a trial, absent proper objections, neither trial, nor appellate judges, can be expected to take on the role of school teachers, continually correcting argument or comment unobjected to by opposing counsel.”

The Third District disagreed with the above statement, suggesting that even where there is no objection “the proper performance of our duties as judges may indeed require something more than letting the children settle their playground disputes among themselves.” Recently, an experienced trial judge, soon after becoming an appellate judge, strongly recommended that trial judges step in on their own in order to avoid the fundamental error problem.

Clearly, if judges got involved when closing argument first exceeded the proper bounds, a new trial could almost always be avoided. For example, the opinion in Norman recounted that the improper remarks began with the following improper statement: “A verdict in this case for the Normans, a verdict in this case against Gloria Farms is going to bring an immediate halt to hog hunting in Okeechobee.” If the trial court had interrupted and stopped the improper argument at that point, the Fourth District may not have reversed for a new trial because the reversal was based on the “collective import” and “pervasiveness throughout closing argument.” The supreme court’s holding in Tyus that remarks must be pervasive in order to constitute fundamental error could almost never be satisfied if trial courts would step in on their own at the first transgression.

Whether trial courts should have to undertake the responsibility of policing counsel’s argument when the other side makes no objection is debatable except to prevent a slugfest which could undermine

218. Id. at 361-62.
219. Borden, Inc. v. Young, 479 So. 2d 850, 852 n.6 (Fla. 3d DCA 1985).
222. Id. at 1024.
the integrity of the entire judicial process. Trial courts are naturally reluctant to interrupt during closing argument because final argument is the culmination of the trial and is a significant and emotional event both for counsel and the jurors. If appellate courts' indiscriminate use of fundamental error regarding closing argument were eliminated, and counsel were required to object and move for a mistrial, counsel would no longer remain silent. If counsel believed that the remarks were so improper and prejudicial that a mistrial was necessary, they would make the motion. This would relieve the trial courts from having to do what counsel should have done in the first place.

VI. LIMIT ARGUMENT THAT CAN BE RAISED FOR THE FIRST TIME ON APPEAL TO COMMENTS THAT WOULD HAVE BEEN INCURABLE AND SO PREJUDICIAL AS TO HAVE AFFECTED THE INTEGRITY OF THE PROCESS

Judge Altenbernd of the Second District Court of Appeal wrote one of the more thoughtful opinions addressing fundamental error and improper argument in civil cases. In Hagan, the trial court granted a motion for a new trial, concluding that unobjected-to remarks constituted fundamental error. The Second District held that in order for a trial court to grant a new trial under these circumstances, it must make an analysis under the Florida Supreme Court's opinions in Akin and Tyus. First, the court must find that the error was "so pervasive, inflammatory and prejudicial as to preclude" rational consideration by the jury. Then, in order to determine whether the error was fundamental, the court must find "that the error was so extreme that it could not [have been] corrected by an instruction" and that the error "so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial even when no lawyer took the steps necessary to give a party the right to demand a new trial."

The Second District acknowledged that it would be very difficult for an aggrieved party to get a new trial under these circumstances. Counsel is in somewhat of a catch-22 having made no objection to an argument that later must be characterized on appeal as outrageous. Judge Griffin, in dissenting to the Fifth District's finding of fundamental error in Walt Disney World, had previously

225. See id.
226. See id. at 582, 585-86 (citing Tyus, 130 So. 2d at 587); Akin v. State, 86 Fla. 564, 98 So. 609 (1923).
227. Hagan, 666 So. 2d at 586.
228. Id.
229. See id.
230. See id.
noted that "[i]t is anomalous that the more objectionable the comment, the less the incentive to object." 231

The Hagan analysis would allow a new trial to be granted based on fundamental error only if the error could not have been corrected by an instruction and "so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial." 232 A classic example of the public interest type of fundamental error occurred in a criminal case in which an African-American defendant was convicted of sexually assaulting a white woman, and the prosecutor made an appeal to racial prejudice in his closing argument. 233 Despite the lack of objection, the court found fundamental error and reversed the defendant's conviction because the argument denied due process to a defendant in a criminal case. 234

Similarly, in 1995 the Florida Supreme Court concluded in Powell v. Allstate Insurance Co., 235 a civil case, that alleged racist statements made by white jurors during deliberation, if actually made, would entitle African-American plaintiffs to a new trial. 236 The court observed that the "authority of a trial court to grant a new trial derives in part from the equitable principle that neither a wronged litigant nor society itself should be without a means to remedy a palpable miscarriage of justice." 237 Although the error in Powell had been raised at the earliest possible moment and was not being argued for the first time on appeal, 238 it is an example of the type of wrong under the Hagan analysis that would justify a new trial in a civil case because of the "public's interest in our system of justice." 239

Some remarks are considered incapable of being cured by any instruction from the trial court and are thus deemed per se reversible error. 240 As one court observed, "You can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any

231. Walt Disney World Co. v. Blalock, 640 So. 2d 1156, 1159 (Fla. 5th DCA 1994) (Griffin, J., concurring in part and dissenting in part).
232. Hagan, 666 So. 2d at 586.
234. See id.
235. 652 So. 2d 354 (Fla. 1995).
237. Id.
238. See id. at 355-56.
240. See Royal Indemnity Co. v. Muscato, 305 So. 2d 228, 229 (Fla. 4th DCA 1974) (limiting a new trial in a personal injury action to the question of liability). The plaintiff in Royal Indemnity Co. was injured while sitting on a parade float. See id. at 228. Although the defendant's attorney objected to the plaintiff attorney's repeated questions about whether the float driver received a traffic citation after the accident, the trial court sustained the objection and instructed the jury to disregard what they heard. See id. at 229. The Fourth District reversed because "[t]he trial court's instruction to the jury to disregard the allusions to the traffic citation could not possibly erase the effect of the prejudicial question from the mind of the jury in their consideration of liability." Id.
good." For example, if counsel were to argue in a motor vehicle accident case that his client had not been ticketed by the investigating officer—a fact that was not in evidence and not admissible in evidence—an appellate court would reverse for a new trial, assuming the issue was preserved, even where the trial court instructed the jury to disregard it. As one court explained, when an officer decides not to charge a driver with a traffic violation, jurors may feel they need nothing further in order to decide the question of liability. The improper injection of the fact that the defendant settled with another party injured in the same accident as the plaintiff is another example of prejudice that would be incurable by an instruction. Objection is still required, however, when inadmissible, highly prejudicial facts are elicited from witnesses. Objection should also be required for argument that is, after all, only argument and not evidence.

VII. CONCLUSION

Criticizing the appellate courts' indiscriminate use of fundamental error, Professor Martineau explained why it is important to adhere to the general rule requiring an objection:

The validity of this approach should be examined from the viewpoints of the private and public interests involved in the court proceeding. The private interests are those of the litigants in the particular case. From the perspective of the party who is affected adversely by the trial court action, common sense dictates that the party should be compelled to 'speak up now or forever hold your peace' if the party realizes or should realize at the time the action is taken that the effect will be adverse to its interests. In various legal contexts, this principle is characterized as waiver, clean hands, and invited error. At the heart of these doctrines is the essential point that a person should not benefit from his own inac-

241. O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1309 (5th Cir. 1977) (quoting the trial judge).
242. See Moore v. Taylor Concrete & Supply Co., 553 So. 2d 787, 791-92 (Fla. 1st DCA 1989) (reversing and remanding because, through questioning, defendant's counsel suggested that his client had not been cited for a traffic violation); Royal Indem. Co., 305 So. 2d at 229.
243. See Royal Indem. Co., 305 So. 2d at 229.
244. See, e.g., Henry v. Beacon Ambulance Serv., Inc., 424 So. 2d 914, 915 (Fla. 4th DCA 1982) (holding that a mistrial should have been granted after counsel disclosed a prior settlement).
245. See e.g., Parry v. Nationwide Mut. Fire Ins., 407 So. 2d 936, 937 (Fla. 5th DCA 1981) (stating that the failure to object was a waiver as to irrelevant evidence that the insured had previously made a fraudulent insurance claim); Swan v. Florida Farm Bureau Ins. Co., 404 So. 2d 802, 803 (Fla. 5th DCA 1981) (stating that the failure to object was a waiver as to irrelevant evidence of the insured's drug violations in his fire insurance claim).
tion or, stated obversely, a person has an obligation to assert his rights at the first opportunity or within a specified time.246

During the first part of this century, when the Florida Supreme Court carved out an exception to the rule requiring objection and allowed highly prejudicial argument to be raised for the first time on appeal, there was more reason to have an exception than there is now.247 Because the consequences of a motion for mistrial could be devastating to a client—and to counsel on a contingent fee—in terms of delay and expense, the court had more reason to be lenient about applying the preservation rule.248 However, the Florida Supreme Court obviated the problem in Ed Ricke by holding that a trial court can reserve ruling on a motion for mistrial until after the jury returns its verdict.249 Thus, a party aggrieved by improper argument can preserve the issue without having to immediately take a mistrial.250

Justice Holmes expressed his view to Learned Hand, who was Holmes' law clerk at the time, that his job was not to do justice but, rather, to play the game according to the rules.251 To those who would condone a departure from the rule requiring an objection in order to "do justice," Justice Cardozo's well-known words are particularly worthy of consideration:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.252

Unobjected-to argument of counsel is not fundamental error—calling it such is not playing by the rules. In addition, reversing for new trials under the guise of fundamental error has not had the intended effect of making lawyers comply with the ethical rules. What this use of fundamental error has done is to permit appellate courts to set aside jury verdicts with no input from trial judges.

246. Martineau, supra note 148, at 1030.
247. See Akin v. State, 86 Fla. 564, 571, 98 So. 609, 612 (1923).
248. See supra notes 188-89 and accompanying text.
249. See Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908, 910 (Fla. 1985).
250. See id.
252. Castlewood Int'l Corp. v. LaFleur, 322 So. 2d 520, 523 (Fla. 1959) (Overton, J., concurring) (quoting BENJAMIN CARDozo, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)).
who are in a far better position to decide if improper argument may have affected the outcome. Also, this use of fundamental error has permitted counsel to employ the failure to object as an intentional trial strategy in order to maintain an ace in the hole if the jury verdict is adverse to their party. Furthermore, the problematic treatment of fundamental error has resulted in additional appeals in which innocuous arguments that no one would find objectionable are being raised for the first time on appeal on the chance that an overly sensitive panel may be offended.

Instead of throwing out the baby—the jury verdict in a case in which there has been no preserved error—the courts should focus more narrowly on the bath water by reporting ethical violations to the bar and assessing attorney's fees and costs when objected-to remarks require new trials. As the Florida Supreme Court observed when it affirmed a conviction in spite of the prosecutor's unethical argument, "[I]t is appropriate that individual professional misconduct not be punished at the citizen's expense, by reversal and mistrial, but at the attorney's expense, by professional sanction."253