THE CLIPS

1. Soliciting the client.
2. Initial interview with the client.
3. Discussing plea offers and settlement offers with the client.
4. Jury Selection.
5. Opening Statements.
6. Directs, Crosses, and Objections.
7. Tactics to Affect a Witness.
8. Closing arguments.
9. Verdict and Collections.
10. Resources available to attorneys who need help.

1st Clip

LAWYER HANDBOOK ON ADVERTISING AND SOLICITATION
The Florida Bar, Standing Committee on Advertising, 2013

Direct Contact with Prospective Clients - Rule 4-7.18(a)

A lawyer may not contact a prospective client in-person, by telephone, telegraph, or facsimile, or through other means of direct contact, unless the prospective client is a family member, current client, or former client. This prohibition does not extend to unsolicited direct mail or email communications made in compliance with Rule 4-7.18(b). The following have been found to be prohibited direct in-person solicitation by the SCA:

Cold calls.

An advertisement printed on a pharmacy bag that is handed directly to pharmacy customers.

An advertisement printed on a claim check for valet service at a hospital.

An advertisement printed on a folder given by a realtor to the realtor's clients.

Business cards and flyers left on car windshields or passed out to passers-by.

Faxed newsletters and news alerts.

An advertisement printed on a wristband to indicate that a customer or attendee is of legal drinking age.

Solicitation in an Internet chat room that uses real time communication between users.

Payment for Recommendations - Rule 4-7.17(b)

A lawyer may not give anything of value to a person for recommending the lawyer's services. This prohibition does not prevent a lawyer from paying the reasonable cost of advertising or the payment of usual charges to a lawyer referral service or other legal service organization; nor does it apply to the sale of a law practice as permitted under Rule 4-1.17.

Statutory Prohibitions

Lawyers should also be aware that certain forms of solicitation may be prohibited under Florida Statutes. See, e.g., § 119.105, Fla. Stat. (forbidding use of information from non-confidential police reports to solicit accident or crime victims or their relatives); §877.02, Fla. Stat. (making it a misdemeanor for employees of hospitals, sanitariums, police departments, wrecker services, garages, prisons or courts, or for bail bondsmen, investigators, photographers, insurance or public adjustors to assist an attorney in soliciting legal business); §316.066(3)(c), Fla. Stat. (forbidding use of information from accident reports prepared by law enforcement officers for commercial solicitation); and 49 U.S.C. §1136(g)(2) (no unsolicited communications offering personal injury representation within 45 days after an interstate or international air carrier accident).

2nd Clip

INTERVIEWING CLIENTS: A LINGUISTIC COMPARISON OF THE ″TRADITIONAL″ INTERVIEW AND THE ″CLIENT-CENTERED″ INTERVIEW

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Author: Linda F. Smith [*]

LexisNexis Summary

… In his influential book, Lawyer and Client: Who's in Charge?, Douglas Rosenthal drew on the burgeoning literature in the social sciences to critically examine the traditional attorney-client relationship. … In the 1970s, clinical legal educators adopted and promoted a participatory, client-centered model as advanced by Rosenthal. … Clinical educators not only advocated a ″client-centered″ participatory approach, but presented methods and models for talking to clients that were designed to achieve this result. … In four offices, ″lawyers exercised virtually exclusive control over the structure, sequence, content, and length of the dialogue with clients[,] … did not explain their design for the interview … [and] did not invite clients to discuss various ways in which the lawyer might serve the client.″ …
The student backs into the legal theory, as it were, by reflecting or repeating the client's factual statements and by mulling over the general topic of ″repairs.″ … Even without a conscious awareness of what legal theory to pursue, ″client -centered″ students tended to ask questions that were relevant and useful. … Although these questions were related to a legal theory (the various ways in which the client may have breached the lease), they seemed to impair rapport and were theory ″overkill.″ … This study attempted to capture a typical successful interview by an inexperienced law student instructed in the client-centered approach. …

Text

[*542]

Introduction

During the past quarter century, new ideas have evolved about how professionals should treat their clients and patients. Beginning in the 1950s, professionals in various fields increasingly questioned the long-held assumption that professionals have the right to control their clients or patients in the interest of serving them. [1] Some mental health professionals promoted a participatory or collaborative approach, arguing that effective psychotherapy requires active

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Professor and Clinical Program Director, University of Utah College of Law. The author wishes to thank the University of Utah Research Committee which provided funding to make this study possible, as well as the University of Utah College of Law Faculty Development Fund which provided additional funding. The author is indebted to Dr. Felice Coles (Ph.D. in Linguistics) and Kathleen Weeks (M.A. in Linguistics) for their consultation and guidance, for developing a coding system for the linguistic research, and for painstakingly coding the videotaped performances. In addition, Dr. Thomas Huckin of the University of Utah College of Humanities and Dr. David Dodd of the University of Utah Department of Psychology provided initial guidance regarding the feasibility of this project and the methodologies that should be employed. My colleagues at the University of Utah College of Law gave helpful feedback following a symposium I presented using this material. The actors who worked with me were most helpful. I deeply appreciate the work of the students who were willing to have their videotapes analyzed and who have consented to being identified in this article.

[1] See, e.g., Eliot Freidson, Profession of Medicine (1970); Robert Merson, Some Thoughts on the Professions in American Society (1960); Talcott Parsons, The Professions and Social Structure, in Essays in Sociological Theory 34, 43-46 (Talcott Parsons ed., 1954). See also Eliot Freidson, Professional Powers: A Study of the Institutionalization of Formal Knowledge (1986); Ivan Illich, Disabling Professions (1987). See generally Deborah L. Rhode & David Luban, Legal Ethics 42-62 (1992).

acceptance and assumption of personal responsibility by the patient. [2]

In his influential book, Lawyer and Client: Who's in Charge?, Douglas Rosenthal drew on the burgeoning literature in the social sciences to critically examine the traditional attorney-client relationship. [3] **[*543]** Like critics in the other professions, Rosenthal argued for client participation in place of professional control. Positing that ″the best course of action″ depends on ″what is important to the client as much as on some objectively right remedy,″ [4] Rosenthal argued that the ″participatory″ model of attorney-client interaction has several advantages over the traditional lawyer -controlling model:

The participatory model promotes the dignity of citizens as clients… Client participation in problem solving makes the client a doer, responsible for his choices… The participatory model increases the chances for client satisfaction … [by the client's] achieving a measure of control over [his] own life … [and by reducing] excessive anxieties which are the product of uninformed fears and unexpected stress.

Active participation can actually promote effective problem solving … [because] clients can supplement the specialized knowledge of professionals, fill gaps, catch mistakes, and provide criteria relevant for decision. Conversely, the collaborative task of having to explain and discuss the problem with the client can help the professional avoid mistakes and focus on the relevant aspects of the problem. [5]

In the 1970s, clinical legal educators adopted and promoted a participatory, client-centered model as advanced by Rosenthal. This model was integral to two works published by clinical legal educators during this period - Binder and Price's Legal Interviewing and Counseling [6] and Bellow and Moulton's The Lawyering Process [7] - which rapidly became the most widely used law school texts for teaching lawyering skills and the theory of practice. Clinical educators not only advocated a ″client-centered″ participatory approach, but presented methods and models for talking to clients that were designed to achieve this result.

We are now in an era in which theories about and models for ″client-centered″ representation have been accepted and adopted throughout the nation's law schools. But we do not yet have satisfactory answers to the question of whether these theories and models **[*544]** really make any difference. Is the ″client-centered″ interview we teach to our students any different - any more ″client friendly″ - than the ″traditional″ professional-dominated interview of the past? Do the techniques we teach produce the client empowerment we seek?

One way to address these questions is through linguistic analysis of attorney-client discourse. Linguistic analysis has been used to study relationships between professionals and the individuals they serve. Linguists have developed approaches to analyzing conversations to learn about power and dominance in a wide variety of interpersonal relations.

[2] See, e.g., Thomas Szasz & Mark Hollender, A Contribution to the Philosophy of Medicine: The Basic Models of the Doctor-Patient Relationship, 97 Archives of Internal Medicine 587, 591 (1956). As the mental health professionals explained, the traditional model of a passive patient who follows instructions and trusts the professional without questions or criticism was fundamentally inconsistent with the underlying theory of psychotherapy.

[3] Douglas E. Rosenthal, Lawyer and Client: Who's In Charge? 7 (1974) (″The traditional idea is that both parties are best served by the professional's assuming broad control over solutions to the problems brought by the client… The traditional view has been more systematically elaborated as part of a larger theory of professional service - especially by sociologists specializing in the study of professionalization in medicine. This view is traditional in the sense that it has been the prevailing view since the time of Hippocrates. Even Plato … viewed the physician as retaining the position of dominance, using the art of persuasion as a technique of control.″). See also Douglas E. Rosenthal, Client Participation in Professional Decision: The Lawyer-Client Relationship in Personal Injury Cases (1971).

[4] Rosenthal, Lawyer and Client: Who's In Charge?, supra note 3, at 18.

[5] Id. at 168-69. The Rosenthal study demonstrated that clients who were actively involved in decision-making obtained better results in their personal injury claims than did clients who delegated maximum decision-making to their lawyers.

[6] David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977).

[7] Gary Bellow & Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy (1978).

This article uses linguistic strategies, particularly linguistic indicia of power and dominance in conversations, to study the ″client-centered″ interview. I compare the ″client-centered″ interview, as performed by law students, with the types of traditional interviews that have been criticized for attorney dominance. Since the students in this study aspired to use the recommended client-centered techniques, their performance is also compared with the enunciated goals of the client-centered interview. Certain techniques are shown to be crucially important to engaging in ″client-centered″ representation. Other techniques and models for the client-centered interview are shown to be in need of improvement.

I. Linguistic Studies of Attorney-Client Discourse

At the same time that criticism of professional control grew, social scientists and linguists began to study language used between professionals and their clients or patients. There has been a significant number of studies regarding medical professionals' communications with their patients. [8] These linguistic studies have often focused upon the power exercised by the helping professional over the dependent patient. [9] However, studies of medical conversations have evolved **[*545]** over the years so that provider communication styles (greater information, more time, friendliness, seriousness and concern) can be related to greater patient understanding, satisfaction, and compliance with treatment regimens. [10] Linguistic study of lawyering is less developed and has tended to focus more upon the language employed in advocacy than it has upon language employed in interviewing and counseling clients.

A. Linguistic Approaches to Studying Lawyers

One focus has been the ″plain language″ move to reform legal language to improve its intelligibility to the lay public. [11] This has involved studies of written legal documents and studies of the comprehensibility of jury instructions. [12] A second area of inquiry has been the language employed in advocacy on behalf of clients. This has included primarily the nature of communication processes in trials (by witnesses, attorneys, and judges); and, more recently, participants' talk during other types of proceedings (small-claims court hearings, depositions, arraignments, change-of-plea hearings). [13] Only a very few inquiries have focused upon talk in the law office or between lawyer

[8] Brenda Danet, Language in the Legal Process, 14 Law & Soc'y Rev. 445, 452 (1980) (citing studies that conclude that patients do not understand medical terminology and ask few questions, and that doctors exaggerate their ignorance or withhold information).

[9] See, e.g., Michelina Bonano, Women's Language in the Medical Interview, in Linguistics and the Professions 27 (Robert J. DiPietro ed., 1982); Mary Klein Buller & David B. Buller, Physicians' Communication Style and Patient Satisfaction, 28 J. Health & Soc. Behavior 375 (1987); Aaron V. Cicourel, Doctor-Patient Discourse, in 4 Handbook of Discourse Analysis 193 (Teun A. Van Dijk ed., 1985); Sue Fisher, The Decision-Making Context: How Doctors and Patients Communicate, in Linguistics and the Professions, supra at 51); Judith A. Hall, Debra L. Roter & Cynthia S. Rand, Communication of Affect Between Patient and Physician, 22 J. Health & Soc. Behavior 18 (1981); Marie R. Haug & Bebe Lavin, Practitioner or Patient - Who's In Charge?, 22 J. Health & Soc. Behavior 212 (1981); Jacqueline J. Hinckley, Holly K. Craig & Lynda A. Anderson, Communication Characteristics of Provider-Patient Information Exchanges, in Handbook of Language and Social Psychology 520 (Howard Giles & W. Peter Robinson eds., 1989); Alion Shiloh, Equalitarian and Hierarchical Patients: An Investigation Among Hadassah Hospital Patients, in Medical Men and their Work 249 (Eliot Freidson & Judith Lorber eds., 1972); Roger W. Shuy, The Medical Interview: Problems in Communication, 3 Primary Care 365 (1976); Deborah Tannen & Cynthia Wallat, A Sociolinguistic Analysis of Multiple Demands on the Pediatrician in Doctor Mother Child Interaction, in Linguistics and the Professions, supra at 39; Paula A. Treichler, Richard M. Frankel, Cheris Kramarae, Kathleen Zoppi & Howard B. Beckman, Problems and Problems: Power Relationships in a Medical Encounter, in Language and Power 62 (Cheris Kramarae, Muriel Schulz & William M. O'Barr eds., 1984); Candace West, Medical Misfires: Mishearings, Misgivings, and Misunderstandings in Physician-Patient Dialogues, 7 Discourse Processes 107 (1984).

[10] See, e.g., Hinckley, Craig & Anderson, supra note 9, at 520.

[11] For an excellent review of linguistic research into the law, see Brenda Danet, Language and Law: An Overview of 15 Years of Research, in Handbook of Language and Social Psychology 537 (Howard Giles & William P. Fobinson eds., 1990).

[12] Id. at 538-41. See also Danet, supra note 8.

[13] Danet, supra note 11 at 541-46; Danet, supra note 8, at 490.

and client. [14] As one researcher has noted, the latter type of study **[*546]** is particularly important because ″only a small proportion of either civil or criminal legal actions ever actually goes to trial, and most of the routine business of modern legal systems is conducted in these other types of settings.″ [15]

Although there is an ″enormous diversity in the range of issues investigated, the theoretical orientations advocated, [and] the research methods used,″ [16] a principal focus has been the ″power″ wielded by the lawyer over the client or the witness. [17] The concern with the lawyer's power has related to inquiries into the intelligibility of legal language or jargon [18] and to the study of language used in legal argumentation, especially question form and degree of coercion. [19]

B. Linguistic Studies of Attorney-Client Conferences

In the last dozen years there has been only a handful of studies that analyze attorney-client conversations, using various linguistic approaches.

The first published study looked at attorney-client interactions in a free legal services office in Massachusetts. [20] In this study, Hosticka observed almost fifty interactions between relatively inexperienced lawyers and their impoverished clients. He relied upon ″paralinguistic aspects″ of conversation (floor control, topic control, question form) to ″discover relative degrees of power and describe the process of exercising control in the professional-client relations.″ [21] He concluded that these poverty lawyers consistently ″exercised considerable control,″ and ″exclusive control″ over the definition of the client's problem and what, if anything, was to be done. [22]

Brenda Danet, a leader in the study of law and linguistics, and her co-researcher studied lawyer-client interactions in an Israeli free **[*547]** legal aid office. [23] These researchers similarly studied question form, interruptions, and topic control. They concluded that the attorney defined the client's problem in a way that was most convenient for the bureaucracy of the legal aid office and ″applied her professional skills to discredit the client and deny him opportunities for self-enhancement.″ [24]

Felstiner and Sarat made an ethnographic study of conferences in divorce cases by audiotaping over one hundred at-

[14] These studies include: a study of attorney-client conversations in the course of divorce cases (Austin Sarat & William L.F. Felstiner, Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office, 98 Yale L.J. 1663 (1989); Austin Sarat & William L.F. Felstiner, Law and Strategy in the Divorce Lawyer's Office, 20 Law & Soc'y Rev. 93 (1986)); a study of an attorney-client interview in a legal aid office in Israel (Bryna Bogoch & Brenda Danet, Challenge and Control in Lawyer-Client Interaction: A Case Study in an Israeli Legal Aid Office, 4 Text 249 (1984)); a study of initial interviews of indigent clients in a legal services office in Massachusetts (Carl J. Hosticka, We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality, 26 Soc. Probs. 598 (1979)); a study of consumer bankruptcy attorneys' initial consultations with clients (Gary Neustadter, When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office, 35 Buff. L. Rev. 177 (1986)); and a study of clinical students' interviews of poor clients who were seeking marital dissolutions (Don Peters & Martha M. Peters, Maybe That's Why I Do That: Psychological Type Theory, The Myers-Briggs Type Indicator, and Learning Legal Interviewing, 35 N.Y. L. Sch. L. Rev. 169 (1990)). A study of lay narratives in small-claims court provides a related picture of ″client″ talk about legal troubles. See William M. O'Barr & John M. Conley, Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives, 19 Law & Soc'y Rev. 661 (1985).

[15] Danet, supra note 11, at 542.

[16] Id. at 538.

[17] See, e.g., Bogoch & Danet, supra note 14; Hosticka, supra note 14.

[18] For a discussion of linguists' critiques of professionals' jargon, see Danet, supra note 8, at 450-53.

[19] Danet, supra note 11, at 543-46.

[20] Hosticka, supra note 14.

[21] Id. at 599.

[22] Id.

[23] Bogoch & Danet, supra note 14.

[24] Id. at 270.

torney-client conferences, in forty different cases involving twenty different lawyers. They focused upon the ways in which the lawyers characterized the legal system and counseled clients about choice and strategy. They described a discourse in which the lawyers emphasized the uncertain and personal nature of the judicial process, increasing the clients' dependence upon their lawyers. [25]

In 1986 Professor Neustadter published an analysis of interviewing and counseling as performed by consumer bankruptcy attorneys. [26] He observed six different bankruptcy attorneys, each of whom conducted a handful of initial client conferences. He characterized the interactions as falling into the ″client-centered″ model or the ″product″ model, with the ″product″ model being predominant. In four offices, ″lawyers exercised virtually exclusive control over the structure, sequence, content, and length of the dialogue with clients[,] … did not explain their design for the interview … [and] did not invite clients to discuss various ways in which the lawyer might serve the client.″ [27] Although each of the lawyers seemed ″well versed in the relevant legal rules and procedures″ and was ″courteous″ to clients, [28] most of the lawyers behaved as if they were selling a product (either a Chapter 7 or Chapter 13 bankruptcy, as advertised) and the client had already chosen that solution. Two of the six lawyers acted more ″client-centered″ by inviting clients to put their financial difficulties in a broader context and by explaining bankruptcy law and the options available to the client. These two lawyers ″shared control of the content, sequence, and length, though not the general structure, of the interview.″ [29] **[*548]**

More recently, clinical educators have used linguistic tools to analyze law students talking to clients. Professor Peggy C. Davis studied first-year students engaged in simulated attorney-client interviews. [30] Professor Davis looked at discourse patterns of dominance by analyzing topic control, interruptions, loquaciousness, and patterns of requesting/challenging. Analysis of two interview tapes and transcripts showed a ″strong pattern of dominance based upon role, with the attorney taking the interactive lead in each interview.″ [31] Professor Davis suggests that there are two methods for the lawyer to structure the interview:

The first is a method of inquiry, in which facts are elicited by questions framed largely on the basis of the lawyer's sense of relevance to the end of facilitating legal problem-solving. The other is a method of conversation or collaboration, in which problem context and client perspective are probed to an end of broader problem-solving. [32]

In a study by Professors Don and Martha Peters, [33] students who had been taught ″client-centered″ counseling interviewed 23 indigent clients who were seeking to dissolve their marriages. The study concluded that the students ″had considerable difficulty using types of behavior advocated by the client-centered model.″ [34] In particular, ″few open questions were asked″ and ″few active listening responses were used.″ [35]

[25] See Sarat & Felstiner, Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office, supra note 14; Sarat & Felstiner, Law and Strategy in the Divorce Lawyer's Office, supra note 14.

[26] Neustadter, supra note 14.

[27] Id. at 229.

[28] Id. at 229-30.

[29] Id. at 233.

[30] Peggy C. Davis, Contextual Legal Criticism: A Demonstration Exploring Hierarchy and ″Feminine″ Style, 66 N.Y.U. L Rev. 1635 (1991). A primary focus of this article is upon discourse patterns associated with gender.

[31] Id. at 1676.

[32] Id. Professor Davis's study compares two interviews: one by a male student interviewing a male client (Team B), and the other by a female student interviewing a female client (Team A). She viewed the male team as engaged in the method of ″inquiry″ and the female team as engaged in the method of conversation or collaboration.

[33] Peters & Peters, supra note 14. While the Peters' study focused on relating psychological types to the ways in which students conducted interviews and acquired interactive skills, certain conclusions are relevant to this study.

[34] Id. at 184.

[35] Id.

Most recently, Professors Gellhorn, Robins and Roth teamed law students and anthropology students in the Discourse Project. [36] This involved microlinguistic analysis of law students' interviews of clients who were seeking federal disability benefits. Central concerns included verbal strategies which discourage or encourage client partici **[*549]** pation in the conversation, the relationship of question form to asymmetrical relationships, the role of narrative in interviewing, and responses to client stress during interviews.

These studies confirm some of the criticisms that have been leveled against ″traditional″ legal professionals. They show the lawyers as sometimes dominating their clients, controlling the conversation and the definition of the client's problem, and dictating its resolution.

This article uses linguistic indicia to analyze client-centered interviews as performed by law students. Its primary aim is to compare the client-centered interview with the ″traditional″ interview by referencing characteristics of dominance employed in prior linguistic studies. The article also seeks to compare the theoretical model of the client-centered interview taught to law students with the students' actual performances.

II. The Study

A. Instructing the Law Students in ″Client-Centered″ Lawyering

Before describing and analyzing the students' performances, it is necessary to briefly explain what the students were taught about ″client-centered″ representation. The students all were enrolled in my upper-division law school course on lawyering skills. The class read and discussed Binder and Price's textbook, Legal Interviewing and Counseling. [37] This text defines interviewing as ″the task of gathering information.″ [38] ″The initial lawyer-client interaction usually focuses on problem identification″ [39] and entails gathering information about:

(1) the nature of the underlying occurrences …

(2) the basic difficulties which now confront the client as the result of the occurrences, and

(3) the results the client desires. [40]

Binder and Price set forth an orderly structure for the interview. [41] After appropriate introductions (or ″ice breaking″), the attorney **[*550]** should ask the client to provide a general description of the problem, how it arose and what

[36] Gay Gellhorn, Lynn Robins & Pat Roth, Law and Language: An Interdisciplinary Study of Client Interviews, 1 Clin. L. Rev. 245 (1994). Anthropology students analyzed the linguistic behavior of the law students and their clients, and presented their analyses to the law students. A major goal of this project was to enhance the education of both groups of students.

[37] Binder & Price, supra note 6. Although I endeavored to teach the ″client centered″ model advanced by Binder and Price in order to conduct this study, there is some risk that the students learned my particular lessons about interviewing. The only corrective for this is further study, including study of students instructed by various teachers.

[38] Id. at 1. In contrast, counseling is seen as ″the process of … helping clients decide what course of action to adopt in order to resolve a problem.″ David A. Binder, Paul Bergman & Susan C. Price, Lawyers as Counselors 259 (1991).

[39] Binder & Price, supra note 6, at 2.

[40] Id.

[41] Certain alterations are made in the most recent edition of the book, Binder, Bergman & Price, supra note 38, at 84-164. The students whose interviews are analyzed had studied the earlier edition, Binder & Price, supra note 6, as their text. Accordingly, citations to both editions of the book are provided.

relief the client desires. [42] Next, the lawyer should obtain ″a step-by-step chronological narrative of the past transaction which underlies the client's problem … from the point where … the problem began, … up to the present.″ [43] Then the attorney should mentally review the entire problem to see what legal theories might apply and question the client in greater detail about the specific topics that are legally relevant. [44] Finally, the attorney should adjourn the interview, without necessarily assessing the client's legal position fully. [45] Binder and Price recommend that the attorney provide ″a basic legal analysis of the situation without turning the analysis into an overall evaluation″ in order to achieve the goals of reassuring the client, appearing competent and remaining honest. [46]

Besides recommending a structure for an interview, the authors also address question form: open questions, narrow questions, yes/no and leading questions. [47] Open questions are recommended to ″permit clients to report events in their own terms,″ so as to encourage better recall. [48] Open questions also provide a ″climate of openness and empathic understanding,″ allowing the client the freedom to select what is important to him or her and the opportunity to raise sensitive topics in the way s/he feels most comfortable. [49] However, open questions often do not elicit sufficient detail to reach legal conclusions, and they allow the reluctant client to avoid what may be definitive topics. [50] Accordingly, narrow questions must be used to elicit detail and to motivate inhibited clients. Leading questions may produce more accurate reporting in situations in which the client feels **[*551]** inhibited about admitting some negative fact which the lawyer suspects is true. [51]

Open questions are particularly recommended at the outset of an interview (problem/goal identification) so that the client may ″set forth his/her dilemma in any manner which feels comfortable, and in as much detail as seems appropriate.″ [52] Similarly, during the time-line, the attorney should ask primarily open questions which prompt the client to tell ″what happened next″ but with no other strictures on what information to provide. Here, too, open questions are ″in accord with the rapport-building goals″ of this stage, ″since the client is encouraged to speak about what is important to him or her.″ [53] During the ″theory development″ stage of the interview, the lawyer is advised to begin each new topic with an open question (″Tell me more about ...″) to maximize recall. Then, the attorney should follow up with various narrow questions to obtain details that may be legally relevant. [54]

Binder and Price advise [55] attorneys to do more than simply question during the initial interview. At certain points the attorney should provide the client with information - about what will happen during the interview and about what

[42] Binder & Price, supra note 6, at 53. See also Binder, Bergman & Price, supra note 38, at 84-104.

[43] Binder & Price, supra note 6, at 53-54. Binder, Bergman & Price, supra note 38, at 113, calls for a ″time line″ - ″a chronological, step-by-step (event by event) narrative of events giving rise to a client's problem.″

[44] Binder & Price, supra note 6, at 54-57, 85-92. See also Binder, Bergman & Price, supra note 38, at 113-14, 145-64.

[45] The later edition of the book recommends concluding the initial meeting by addressing what actions the attorney will take, what actions the client will take, what questions remain, and a time frame for all steps. Binder, Bergman & Price, supra note 38, at 225.

[46] Binder & Price, supra note 6, at 100. Binder, Bergman & Price, supra note 38, at 224-36, suggests discussing the ″next steps,″ dealing with the nature of the relationship (e.g., fees), and providing a ″tentative assessment.″

[47] Binder & Price, supra note 6, at 38-40. Other authors use slightly different terminology (as do linguists) but typically recommend similar techniques for similar reasons. See, e.g., Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating 145-74 (1990); Robert Louis Kahn & Charles F. Cannell, The Dynamics of Interviewing (1957).

[48] Binder & Price, supra note 6, at 41.

[49] Id.

[50] Id. at 42.

[51] Id. at 43-47.

[52] Id. at 59.

[53] Id. at 72-73.

[54] Id. at 92-99.

[55] Similar recommendations are made by other authors, also relying upon writings in the mental health field. See Bastress & Harbaugh, supra note 47, at 19-58, 175-196; Bellow & Moulton, supra note 7, at 212-39.

will happen at its conclusion. [56] However, throughout the interview the attorney should also respond to the client. Binder and Price promote ″active listening,″ the technique developed by mental health professionals to reflect the feelings expressed by the client. [57] They also advise the lawyer to provide the client with ″recognition″ by telling the client s/he is doing a good job at providing information. [58]

All these recommendations - format, questioning pattern, empathizing with and responding to clients - arise from the same concerns. Binder and Price hope to stimulate the ″client's willingness to **[*552]** participate fully in the interviewing and counseling process.″ [59] Relying upon Maslow and Carl Rogers, they assert that clients bring to an interview the full range of psychosocial needs and that various inhibitions (ego or ″case″ threats, role expectations or etiquette barriers) may block full participation in the interview. [60] Accordingly, the interview should be structured and conducted so as to meet the hypothesized psychosocial needs of the typical client. [61] Allowing the client to define the problem and desired solution recognizes the fact that most problems have ″both legal and nonlegal dimensions″ and that ″any solution … involves a balancing of legal and nonlegal concerns.″ [62] Allowing the client to give a chronological narrative of the problem in his or her own words promotes accurate and complete recall, as well as drawing upon natural conversational style. [63] Although Binder and Price assert that ″in an interview, the majority of communication from lawyer to client takes the form of questions,″ [64] they recommend that lawyers engage in ″active listening″ and reflect the client's feelings during the interview. [65]

B. Preparation of Law Students and ″Clients″

In addition to reading Binder and Price, the students observed and discussed American Bar Association videotapes of client interviewing and counseling, and role-played both interviews and counsel **[*553]** ing sessions with one another. Ultimately each student was asked to interview and thereafter counsel a simulated client (played by an actor) about a particular legal problem. These sessions were videotaped for later critique and grading. All the students were instructed to conduct a client-centered interview, employing the model advanced by Binder and Price. [66]

[56] Binder & Price, supra note 6, at 64, 99.

[57] Reflection of feelings should be an integral part of the lawyer-client dialogue.″ Id. at 75. The authors rely upon Alfred Benjamin, The Helping Interview (2d ed. 1974). See also Bellow & Moulton, supra note 7, at 212-16, 224-32, 1068-73, 1077-80; Thomas L. Shaffer, Death, Property and Lawyers 94-100, 263 (1970); Andrew S. Watson, The Lawyer in the Interviewing and Counseling Process 11-26 (1976); Andrew S. Watson, The Lawyer As Counselor, 5 J. Fam. Law 7, 9-12 (1965).

[58] Binder & Price, supra note 6, at 76.

[59] Id. at 6. The initial goal is instrumental - obtaining information about the problem and goals from the client - with the ultimate goal of helping the client solve the problem in the way that he or she decides is best. Binder and Price do not enunciate any goal directly related to improving the experience of the interview for the client. Shaffer includes the goal of ″helping the client to accept, recognize and clarify … negative feelings.″ Shaffer, supra note 57, at 97.

[60] Binder & Price, supra note 6, at 6-14. For other discussions of the emotional needs of a lawyer that come into play in an attorney -client relationship, see, e.g., Bastress & Harbaugh, supra note 47, at 285-308; Bellow & Moulton, supra note 7, at 1076-80.

[61] Robert Kidder's study of lawyer-client relations in India captures a number of these characteristic dilemmas: ″… the client must then initiate the interaction by revealing deeply personal potentially damaging information… In doing so, both his story and his projected self-image are likely to be inflated by his eagerness to be accepted on his own terms.' ″ Bellow & Moulton, supra note 7, at 153-55 (quoting Robert Kidder, Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India, 9 Law & Soc'y Rev. 11, 24-27 (1974)).

[62] Binder, Bergman & Price, supra note 38, at 17.

[63] Binder & Price, supra note 6, at 116-24. The authors note: ″Chronological narratives are the typical medium of human communication… Clients will find it natural to tell, and you will find it natural to listen to, time line stories.″ Id. at 118.

[64] Binder & Price, supra note 6, at 20.

[65] The purpose of the active listening response is to provide nonjudgmental understanding and thereby stimulate full client participation. The technique is to be used to help the client feel free to discuss and reflect upon his/her problem in a comfortable and open manner. In short, the technique is to be used to develop rapport.″ Binder & Price, supra note 6, at 36.

[66] The students' instructions on ″Critique and Grading Criteria″ were: ″The goals of the interview are to establish a good rapport with the client, to understand the nature of the client's problem and goals, and to discover relevant facts in an organized fashion. How well you meet these goals will determine your grade.″ This was my attempt to summarize what I viewed as crucial in

The actor-clients were all professional local actors. The actors were, as it happened, all women. They were as old or older than the law students, ranging in age from their thirties to sixties. [67] I believe this combination of factors placed the actor-clients on a fairly equal footing with the law students, certainly more so than the impoverished clients observed in many of the other studies.

The actor-clients all learned the same role: a ″pink collar″ worker who was having a dispute with her landlord. The actors were instructed as to their situation (factually) and their feelings and preferences about the situation. Beyond that, they were asked to act extemporaneously, as they believed the fictional character would. Although the problem involved legal and practical issues with which any adult might be familiar, the actors were not instructed as to the law. The actors were asked to ″respond to″ the student lawyers and to ″react″ based on their own ″feelings.″ However, the actors were not instructed as to how ″clients″ should act with lawyers. Finally, the actors knew that the law students who would interview and later advise them were enrolled in a course dealing with legal interviewing and counseling. However the actors had not been instructed about legal interviewing or what the students were ″supposed″ to do. They did not know what ″client centered″ representation entails, or even **[*554]** that such a concept exists. In these ways the study attempted to approximate as nearly as possible a ″typical″ attorney-client interaction.

Each student first met with the client for an initial interview. The student played the role of a law clerk who had been asked by the private attorney for whom he or she was working to interview a client with an ″emergency″ problem. Although the student knew the general topic before the interview and had done some background study in that area of law, the student was not permitted to counsel the client during the first meeting. Instead, the student was required to report back to the attorney supervisor after the interview. The student would meet the same client in a few days to counsel that client, based upon the student's research of the law and the supervising attorney's judgment. In this way, the study separated as much as possible the ″legal interview″ information-gathering session from the ″legal counseling″ advice-giving session.

C. The Case - The Client's Problems and Goals

The client's problem was ″with her landlord - he [was] trying to evict″ her. Not only ″did [she] not want to be evicted,″ but the client was certain the landlord owed her something and ″would like to make him pay.″ [68]

The client's windows had been broken by vandals, and she had attempted to get the landlord to repair them for almost a week while she stayed with friends. While she was out of her apartment, burglars stole her TV and radio. Finally the client fixed the windows herself, deducted the cost of repairs from her next month's rent, and gave the landlord a note explaining this. The next thing the client knew, she was served with a three-day notice to pay rent or vacate. It was at this juncture that she sought legal help, and was interviewed by the law student-clerk.

The client's feelings included:

″strongly objecting to the suggestions that [she] should have to pay the full rent when [she] paid to repair the windows herself [and] … [being] quite upset with the way the landlord handled the broken windows in the first place. [The landlord] couldn't be reached and then never did anything.″

the client-centered model. In addition the students were given a ″Grading Form″ which listed the following criteria (most of which were derived from Binder and Price) with each sub-point carrying equal weight: ″1. Interview Structure: a) introduction, b) asks/gets overview, c) gives explanation (someplace), d) chronology (complete), e) topics follow chronology, f) concludes with plans; 2. Attorney-Client Interaction: a) eye contact, b) factual feedback/reflection, c) emotional refection, d) empathetic response to upset, e) shared, appropriate language, f) open questions where appropriate, g) closed/leading questions as appropriate; 3. Analysis: a) majority of topics covered during theory verification stage, b) some topics covered in some detail (more than three questions), c) topic coverage organized, d) pursuit of related problems, e) goal clarification with client.″

[67] There has been no attempt to study whether gender or age differences (as between attorney-client pairs, or as between female and male clients) influenced the interactions between the students and their clients. See also infra text accompanying note 71.

[68] Excerpted from instructions to client-actors. The summaries and quotations that follow also are taken from these instructions.

Her goals included ″keeping the house/apartment,″ being ″defended in any eviction action,″ and taking ″whatever action you can against this scum landlord″ for the ″TV and radio-tape player that were sto **[*555]** len″ as well as ″what it would have cost … to stay in a motel″ and for ″[her] time and upset in getting all the repairs made.″

The client had experienced additional problems with the landlord in the past. He had failed to fix minor items, such as the lack of heat in one room, a leaky roof in the kitchen, an outlet with a short circuit, and a running toilet. The client ″wouldn't have sought legal help for these other problems,″ and was instructed to mention them only to the extent it ″seemed natural to do so″ in telling the story. The client was asked to focus ″upon the immediate and most serious problem - the broken windows and the threatened eviction.″

D. The Analysis

Four different actors played the role of tenant-client. Twenty-eight students were videotaped, with each student conducting an interview of an actor-client and, a few days later, counseling that same actor-client. All of the videotapes were viewed and graded during the semester. At the conclusion of the semester, I reviewed the students' grades and identified three students who had received high grades (A or A-) in both the interview and the counseling sessions. These three videotapes (interviews and counseling sessions) were fully transcribed. [69]

The videotapes selected for study were of one female student (Mary Jane Ciccarello) and two male students (Reyes Aguilar and Michael Jones). [70] Two of these students (Reyes and Mary Jane) dealt with the same actor-client. All three students were slightly older than the ″average″ law student (late twenties and early thirties), and two of the students (Mary Jane and Mike) were also parents of young children. [71]

Although the videotapes and transcripts provide source material for analysis of client counseling as well as interviewing, the study focused upon the initial interview. Specifically, the study examined pat **[*556]** terns of control and dominance in interviews that had been consciously designed to effect the goals of the ″client-centered″ model of representation. Linguistic strategies were used to analyze the students' interviews [72] and ultimately to compare them with the ″traditional″ model of a legal interview. Because interruptions and question form are frequently used to measure dominance in conversation, [73] the three interview tapes were analyzed with respect to these measures. Overt control of the conversation and ″floor dominance″ were also analyzed.

III. Findings Regarding the ″Client-Centered″ Interview

[69] Obviously the fact that I was the only ″grader″ prevents me from asserting that these tapes were, objectively, the ″best″ tapes in the class. However, because this study is descriptive of the actual performance of law students instructed in clientcentered interviewing, it does not depend upon these performances actually being ″the best.″

[70] I appreciate my former students' permission to identify them and I thank them for their assistance in this research. They have generously permitted me to use the videotapes as research and teaching materials, and they have all commented upon this article and its conclusions. I owe a debt of gratitude to Reyes Aguilar (currently Assistant Dean for Admissions at the University of Utah College of Law), Mary Jane Ciccarello (currently a staff attorney at Utah Legal Services, Inc. and a supervising attorney in my Civil Clinic), and to Michael G. Jones (an attorney in private practice and airline pilot).

[71] As indicated in note 67 supra, this study did not examine the possible effects of gender, age, ethnic or other differences among the students or between the students and their clients.

[72] In analyzing the videotapes and transcripts, I was assisted by Felice Coles (Ph.D. in Linguistics) and by Katheryn Weeks (then a graduate student in Linguistics). Dr. Coles and Ms. Weeks advised me regarding the coding methods that were appropriate for linguistic research. I informed them of the instructions provided in the Binder and Price text. Together we arrived at coding criteria which we felt were both acceptable in linguistics research and responsive to the lessons of the text. Dr. Coles and Ms. Weeks individually viewed all three videotapes and coded the transcripts according to the agreed definitions; they consulted with one another regarding any discrepancies in their initial coding. Ultimately they arrived at consistent analyses of all linguistic criteria studied. I am indebted to them for their painstaking work and for their instruction and advice.

[73] See Deborah Tannen, Remarks on Discourse and Power, in Power through Discourse 3 (Leah Kedar ed., 1987).

Prior to any analysis, it will be useful to briefly describe the interviews themselves. [74] All three interviews began with brief introductions. The students all attempted to get the clients to briefly summarize the problem that brought them to the law office and what they wanted done. In two interviews the client resisted any summary and launched into a narrative. All three students obtained a complete and detailed time line. This took little affirmative effort on the students' part, beyond staying quiet and not interrupting or redirecting the client as she told her narrative. At the conclusion of the narratives, all three clients explained what they wanted done (two in response to students' questions). All three students followed the time line narrative with questions, and all asked a number of questions on certain legally relevant topics. However, the questioning was not organized by topics or conducted in T-funnels. Rather, much of the ″questioning″ was restating and confirming what the client had explained, and allowing the client to provide further details. None of the students provided the client with conclusory legal analysis or advice. All three concluded by discussing what would happen next and confirming the client's goals. **[*557]**

A. Interruptions

All three interviews contained interruptions by both attorneys and clients. [75] Since, as pointed out by Tannen as well as Bogoch and Danet, an interruption can show competition or cooperation, each interruption was analyzed with respect to this criterion. [76] Interruptions in which the speaker repeated a factual statement, expressed empathy or reflected the client's emotion, or began to provide an answer to a question while the questioner was still speaking, were designated as ″cooperative.″ As Tannen has noted, interruptions that occur at the end of utterances are usually of this cooperative variety. [77] Competitive interruptions include those where the interrupter changes the topic or insists upon an answer to a question which the other might have been avoiding. Competitive interruptions also include instances where one speaker discounts or ignores what the other is saying. Competitive interruptions occur more typically in mid-utterance, indicating an attempt to control the conversation. [78]

Chart of Interruptions by Speaker

[SEE CHART IN ORIGINAL]

[*558]

An analysis of the interruptions shows that the student lawyers interrupted relatively frequently. [79] As noted in the study by Bogoch and Danet, this amount of interrupting in a legal interview exceeds interruptions in ordinary speech. [80] However, unlike the lawyers studied by Hosticka, the law students did not interrupt more than their clients; the cli-

74 The coded transcripts and copies of the videotapes are on file with the Clinical Law Review as well as the author.

75 Interruptions″ were defined as simultaneous speech by two speakers. However, back-channel cues (″uh-huh″...″Good″...″I see″ ...″Go on″ ...″Fine″...″Okay″) in which there was no change of floor control or turn at speaking were not counted as interruptions even when the speakers overlapped.

76 Although it is generally recognized that simultaneous speech can mean different things in different contexts, there is not one accepted linguistic convention for defining and coding different kinds of simultaneous speech or ″interruptions.″ Accordingly, this study distinguishes ″competitive″ interruptions from ″cooperative or supportive″ interruptions in the ways described above in the text. Professor Davis makes a similar point: ″Some utterances that can be classified as interruptions are nonintrusive; indeed, some are supportive.″ Davis, supra note 30, at 1649 n.78. She distinguished between ″minimal″ and ″nonminimal utterance interruptions,″ with the ″nonminimal″ interruptions involving the interrupting speaker seizing the floor and providing evidence of conversational dominance. Id. at 1663 n.142.

77 Deborah Tannen, When is an Overlap Not an Interruption? (1980). See also Bogoch & Danet, supra note 14.

78 Tannen, supra note 77.

79 The students interrupted 6, 11, and 16 times per half-hour interview, compared with Hosticka's average of 10.4 times per half-hour interview; and once every 1.3, 2, 4 minutes compared with Hosticka's average of once every 3 minutes. Hosticka, supra note 14, at 605.

80 In the Bogoch and Danet study, 12% of turns were interrupted in the legal interview compared with 5% of turns interrupted in ordinary conversation. Bogoch & Danet, supra note 14, at 254-55. My students and their clients similarly had 16%, 18% and

ent interrupted as much or more than the law student. [81] But more importantly, the interviews differed from those studied by Hosticka and by Bogoch and Danet in that most of the interruptions (by both lawyers and clients) were ″cooperative″ interruptions. [82] These client-centered interviews were not struggles for control nor exercises in attorney domination.

Some examples of the lawyers' interruptions may prove instructive. Reyes' first interruption [83] was typical for him:

Client A:… somebody had thrown rocks and bricks through most of the windows in my house. It was so upsetting. Anyway//

Reyes: // That's too bad.

Client A: it's after midnight.

Inserting such an empathic and genuine statement should not be considered competitive or controlling.

Reyes made eleven interruptions and only two were competitive. The first was to ″clarify″ the date (erroneously) when the client was at the beginning of her ″story.″ Here is that competitive interruption by the attorney, followed by a cooperative client interruption: **[*559]**

Reyes: OK. Ike Jones is the landlord or is he the manager?

Client A: He is the manager

Reyes: OK [back-channel cue]

Client A: of the things, and so anyway.//

Reyes: //I see this occurred during Memorial Day, right?//

Client A: //No it was damaged

Reyes: //this damage to the house?

Client A: No, it was the week before.

The student has asked a narrow, clarifying question (about who Ike Jones is); the client answers it and attempts to con-

36% of total utterances interrupted. Professor Davis's study noted 14 interruptions by the female pair (all by the client) and 101 interruptions by the male pair with 39 by the law student. Davis, supra note 30, at 1662-63.

[81] The clients interrupted as much or more than the lawyer in the Bogoch and Danet study (client 14% and lawyer 9%) and in the Davis study (female client 14 and female lawyer 0; male client 62 and male lawyer 39). Bogoch & Danet, supra note 14, at 254-55; Davis, supra note 30, at 1662-63.

[82] In the Davis study, the interruptions were characterized as follows:

Female Attorney: 0 minimal interruptions; 0 nonminimal utterance interruptions.
Female Client: 9 minimal interruptions; 5 nonminimal utterance interruptions.
Male Attorny: 23 minimal interruptions; 16 nonminimal utterance interruptions.
Male Client: 49 minimal interruptions; 13 nonminimal utterance interruptions.

Davis, supra note 30, at 1663.

[83] Interruptions are noted by ″//″ where one speaker is cut off and also by ″//″ at the beginning of a speech which interrupts the prior speaker.

tinue with her story. At that point the student interrupts with a leading question seeking to ″clarify″ the date the damage occurred. (The student is wrong.) This is viewed as a competitive interruption because it takes the floor away from the client and makes the client address the lawyer's confusion over dates before the client can go on with her story.

Mike similarly interrupted primarily (4 of 6) with cooperative statements, particularly of emotional reflection or empathy. The first of the two competitive interruptions did not change the topic; it was designed to clarify a fact and to move the story forward in an orderly way:

Client B:… I called them again and did reach this Ike Jones character, and he's the managing guy. He's the guy who's - I've never met the owner, but he's the guy who manages the property//

Mike: //That was a personal visit or just a phone call?

Client B: Phone call. OK. I finally got through to someone. He said he'd get right on it.

It may have been that the student was frustrated with the amount of detail the client was providing about personal relations and sought to get the client back to the ″action″ of the story - making a complaint. The client provided the answer and then immediately moved on with the narrative of what happened after the contact. Mike's other competitive interruption occurred at the conclusion of the interview. As the client was answering a question about ″other concerns″ by musing ″I don't think … No.//I don't think I do,″ Mike interrupted after the ″No″ and said: ″OK. Let me get right on this.″ Although the client is being silenced while she is musing about ″other concerns,″ the attorney is at least interrupting her to tell her he will get to work on her problem. **[*560]**

Mary Jane interrupted more (16) than the two male students, [84] but also employed mostly (13) cooperative interruptions, often simply to reflect a fact or goal the client had just enunciated or to comment empathetically ″I believe it″ or ″I can understand that.″ Of her three competitive interruptions, one was an attempt to (erroneously) clarify a fact, another to continue rephrasing a question when the client had begun to answer it, and the third to clarify a previously stated fact and to keep the client focused on relevant details in the story when the client seemed to stray to trivial commentary. The third interruption is as follows:

Client A:… and so then on Saturday, I got up about 8:00 in the morning and about 8:30 //

Mary Jane: // I'm sorry, so from Wednesday when you spoke to him, [uh-huh] I think this was Saturday, [un-huh]// no response//.

Client A: //No response// [OK], Nothing was done. [OK] OK. So finally Saturday I go …

The clients' interruptions of the lawyers also were predominantly noncompetitive. The typical interruption was to begin to answer a question while the attorney was still asking it. These women clients either did not interrupt the male attorney at all or only once in a competitive way. The female client did interrupt the female attorney (in what was more of an interruption-filled interview) a total of 21 times, and 8 of these were deemed ″competitive″ interruptions. By and large, these competitive interruptions occurred when the student was still asking or modifying a question, and the client seized the floor to assert her views:

Mary Jane: Well, it sounds like this is your home//

Client A: //Yes it is. I don't like moving…

[84] Studies of differences between female-female and male-female conversations may explain these variations, but that inquiry is beyond the scope of this study. See notes 67, 71 supra and accompanying text.

Mary Jane: and you want to stay.

and again:

Mary Jane: And at the time you signed this [lease], had you read over everything//

Client A://Well pretty much so, I've rented properties before and you know, you read them and you - no wonder. But I mean aren't…

Mary Jane: //and understood it?

This study of ″client-centered interviewing″ did not find interruptions indicative of a struggle for control, as did researchers who studied ″traditional″ legal interviews. The image of an attorney **[*561]** interrupting the client to challenge or to avoid hearing the client's story, as depicted by Bogoch and Danet, was not apparent here. Nor is the image one of an attorney interrupting to cut off the client's account of one topic in order to redirect the client's attention to a different subject. Rather, most interruptions by both attorney and client were cooperative. The few competitive interruptions were primarily for clarification of something the client had already said, and only rarely to change the topic from what the client wished to discuss.

The fact that the interviews studied here, like those in prior studies, contained more interruptions than an ordinary conversation may simply be a fact to accept. The legal interview is usually time-bound and important to both conversation partners. The client wishes to get out his or her story and requests. The attorney wishes to collect the information he or she deems crucial and to clarify what the client wants done. Thus, both partners to the conversation have significant goals and only so much time to accomplish them. I believe we should accept that this type of conversation between client and professional will contain more interruptions than do typical, informal conversations. However, given the fact of these interruptions, the lawyer should be particularly respectful of the client's need to participate in the conversation as an equal partner and to tell his or her story and to express his or her concerns and goals.

B. Control of the Floor

Other studies have looked at topic control to learn about control in the conversation. They have calculated how often the attorney's questions introduced a new topic or changed the topic. I did not consider this approach very useful with a client-centered interview in which the client was asked to identify her problem and goals at the very outset of the interview, and then was asked to give a narrative of how the problem arose. If these two steps are followed, it will be unusual for the attorney to initiate a ″topic″ not already identified by the client. Moreover, it seemed that a client-centered attorney's tendency to introduce a new ″topic″ would have much to do with the nature of the legal problem and whether the client's narrative touched upon all of the issues that might have legal significance. Where legally relevant factors were not included in the client's telling of the story, an attorney familiar with the law would naturally and properly introduce new topics. In such a case, the attorney's introduction of new topics might **[*562]** demonstrate analytical knowledge of the law rather than evidencing a tendency to dominate the conversation. [85]

Accordingly, rather than focusing upon ″topic control,″ I decided to look at ″control of the floor″ as an indicator of control and dominance in the interview. To do this, my assistants compared the minutes and seconds of oral speech by each conversation partner and compared the percentage of time each spoke during the interview. [86] As indicated in the following chart, the interviews all were quite evenly balanced conversations. In two interviews, the clients spoke somewhat more than the attorneys (51% and 53% client share of total talk). In the other interview, the client (B) spoke 41% of the time and the attorney spoke 59%. [87]

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[85] In this particular case, uninhabitable living conditions might be relevant to a defense of the tenant. Yet the tenant-client might or might not allude to such conditions in her narrative. An analytically astute attorney would properly raise this ″topic″ of the conditions in the apartment, whether or not the client had included it in her narrative.

[86] This technique is a standard linguistic strategy, and one insisted upon by the linguistics professors whom I consulted. Another strategy to evaluate floor control, and one employed by Professor Davis, is a count of words. See Davis, supra note 30.

[87] This student also asked questions the smallest percentage of time. The larger share of the conversation was primarily due to this student's advising the client of the process of the interview and some basic landlord-tenant law.

Control of Floor - Floor Time

[SEE TABLE IN ORIGINAL]

As in Professor Davis's study, [88] the clients dominated during the opening narrative. Control of the floor had a great deal to do with the length of the client's narrative.

When the attorneys talked, they spent less than half of their time asking questions. This trend is reflected in the following chart on the amount of time devoted to Questions and Non-Questions. The finding is inconsistent with the suggestions in other studies that attorneys control conversations by asking questions. It is also inconsistent with Binder and Price's suggestion that in an ″interview, the majority of communication from lawyer to client takes the form of questions.″ [89] **[*563]**

Time of Questions and Non-Questions

[SEE TABLE IN ORIGINAL]

The law students made requests or asked questions much less often than they engaged in other forms of talk. Analyzing the ″floor time″ that was devoted to questioning by the student attorneys demonstrates that the arguably controlling act of questioning did not dominate the speech of any of the students. [90] They spent between 20% and 40% of their time asking questions. The rest of their time was spent in making statements, giving explanations, or making empathic responses to their clients. This amount of questioning is significantly less than the questioning that took place in either the studies by Hosticka or by Bogoch and Danet.

Each student spent a significant amount of time explaining office procedures and the general nature of landlord-tenant law. Reyes concluded his interview with a two-minute explanation of the eviction process and what his office would do to address the client's case. [91] Mike's major speeches include a one-minute introduction at the beginning of the interview, a one-and-a-half minute description of the interview process after problem identification, [92] and a 2:45 minute conclusion in which he explained the process of an eviction and the steps his office would take. Mary Jane included many brief analytical discussions of the client's options, often linked to additional questioning: **[*564]**

Mary J:… But we'll go through this and we'll certainly take care of it. We have to think a little bit before we kind of wind up here. We have to think a little bit that your main goal is that you want to stay in the apartment. Right?

[88] Professor Davis's students held the floor approximately [fr1/3] of the time, with the clients' control being directly related to the length of the opening narrative. Davis, supra note 30, at 1663.

[89] Binder & Price, supra note 6, at 20.

[90] To reach this conclusion, we analyzed the ″floor time″ devoted to questioning. The students' speech consisted of questioning 20%, 36% and 40% of the time.

[91] Its Ike basically acting on behalf of the landlord … Let me explain a little bit to you what's going to happen from here. After this first interview I'll meet with Mr. Bernard [the supervising attorney] after he comes out of court… We'll discuss the case and look at the law and we'll look over your rental agreement as far as responsibilities of the landlord and tenant… Then … I'd like to get back together with you and Mr. Bernard will discuss with you what advice and counsel you as to what direction we feel would be best to head in. As I said, we probably need to work rather quickly because you have received notice here of payment or vacate ...″

[92] I'll tell you what, let me just give you a brief overview and a feel for the process we'll step through initially. I'm sure you're aware, or hopefully you're aware that there's no fee for this initial consultation. If only after we do just a little more research on the facts and information we hear today and sit down with Mr. Bernard, if he decides to accept the case and handle the situation then at that time we'll discuss a further fee arrangement. We'll talk today for 20-25 minutes or so, and again, our primary goal here is to gather facts and information that will allow us to develop some legal theories and legal course of action or even perhaps some non-legal alternatives.″

Client B: Yes I would but I don't want to pay this money, and I do want them to compensate me for these other things.

Mary J: All right. Well, if it comes to a situation where, in which you might be forced to pay some money; I don't know, I don't want to say at this point that you will. I'm just asking you to have things clear and to see how we can approach your problem. If it's a question between actually paying and perhaps being reimbursed or we'll see, as I said, we'll have to see what all the, everything that's entailed here. But if you would actually - if you are, by the terms of the lease, responsible for paying for repairs, would you then simply refuse to pay that? Which would, what I'm trying to say is, is your main goal to stay in the apartment at all costs, or if you have to pay for these repairs, would you then be willing to actually leave? Do you see what I mean?

From this data we can conclude that the student who attempts to engage in client-centered interviewing can have a fairly equal conversation when initially interviewing a client. An interview which does not include advice or legal opinions can be fairly evenly balanced, with neither conversation partner dominating the conversation. The client gives a lengthy, uninterrupted narrative, the lawyer explains various things about the interview or the way the office will address the case, and the lawyer asks some additional questions which the client answers. All in all, such performances seem consistent with the client-centered model and goals of allowing the client to define her problems and the goals.

C. Directives and Question Form

Interviewers typically elicit information by asking questions or by directing or requesting that the information be provided. Hence, this study considers how the attorneys elicited information from their client, and how controlling the attorneys were in doing so. [93] The three interviews were analyzed by identifying imperatives, [94] leading questions, [95] yes/no questions, [96] narrow questions, [97] and ″open Wh″ ques **[*565]** tions. [98] The Imperative/Question chart below indicates the number of each sort of utterance and the percentage of type of question for each individual.

Imperative/Question

[SEE TABLE IN ORIGINAL]

At first blush, student questioning in the ″client-centered″ interview appears much like lawyer questioning in the traditional interview. The vast majority of all questions were of the varieties viewed as most controlling (29-59% leading questions, 28-61% yes-no; 76-94% combined). [99] Relatively few wh-questions were asked (6-19%). [100]

[93] Many linguistic studies, including both those by Bogoch and Danet, supra note 14, and by Hosticka, supra note 14, rely upon question form. Unfortunately, it is not possible to assure that the same definitions were used in all prior studies.

[94] Imperatives″ were defined as orders, such as: ″Give me a copy of the lease.″

[95] A ″leading question″ was defined as a question which contains its own answer in the structure, suggesting a ″yes″ answer, including statements with tag endings. For example: ″You didn't file a report, did you?″

[96] Yes/No″ questions were defined as questions requiring either a ″yes″ or ″no″ response but not suggesting either. For example: ″Did you report this to the police?″

[97] Narrow″ questions and requests ask for a brief answer response. For example: ″How many days went by between the time the windows were broken and you got them fixed?″

[98] Open Wh questions″ and requests invite a narrative response. For example: ″What happened next?″ or ″What outcome would you like to see?″

[99] In the study by Bogoch and Danet, the lawyer asked 79 questions and 75% of these questions were seen as coercive because they were leading or yes/no questions. Bogoch & Danet, supra note 14, at 260. Hosticka paints a similar picture of 90% of the lawyer's utterances seeking to control, with leading questions comprising 20% of the questions. Hosticka, supra note 14, at 605 -06. In the Peters' study, 19% of the questions were leading questions. Peters & Peters, supra note 14, at 187.

However, it seemed odd that the students would have asked so few open questions calling for a narrative, given that the clients provided lengthy narratives and talked approximately half of the time. Accordingly, it seemed appropriate to look at the conversational pattern during the early part of the interview when the client gave her narrative. In Reyes' interview, the client's narrative was concluded in five minutes. During that time, Reyes asked two narrow questions and two leading questions. However, he did not ask any questions at all for the first 2 [fr1/2] minutes. This client wanted to tell her story, and she was going to tell her story without any need for the student to ask her open questions.

During the first minute of Mike's interview, he asked the client to give him ″a feel for the problem″ and very briefly to ″step through **[*566]** what [the client] believed the problem [to be] and how the problem arose or the situations, and what solutions or alternative [the client was] hoping to achieve.″ [101] In response, the client spoke for 3 minutes, 43 seconds, and gave a chronological narrative of the problem, while Mike made empathic statements. (For example, ″You seem somewhat upset. I think I can understand that.″ and ″It sounds reasonable.″) Again, it was unnecessary for Mike to ask open questions to elicit this story from the client. After that brief narrative, Mike asked his first open question (″What is your primary goal right now?″), which elicited the client's particular complaints. Then, appearing to try to reproduce the Binder and Price structure, Mike requested that the client give him a complete time line. [102] In response, the client spoke for the next five minutes, giving a more detailed narrative. During that five -minute narrative, Mike spoke for 46 seconds, primarily asking questions (one open question, two narrow questions, three yes/no questions and five leading questions). These questions were all oriented to the story being told; they primarily reflected or clarified what the client had just said. However, before the client completely repeated the entire narrative, Mike changed the focus to asking about the client's lease. [103] Here again, asking open questions did not seem to be necessary for the client to continue with her narrative. However, her narrative was permanently terminated when Mike changed the topic, directing the client's attention away from the narrative to particular facts he found legally relevant.

Mary Jane's interview of Client A began with the client's handing her a Notice to Pay Rent or Vacate and explaining: ″… there's this guy on my porch who hands me this.″ Mary Jane responds by asking to ″put this aside for one minute″ and stating: ″I'd like to start out first of all just hearing about your general problem and what you'd like to have done.″ In response, the client talks for approximately three minutes, delivering a complete narrative without further questioning.

This set of interviews suggests that questioning may not be important in eliciting a narrative from a client. Of course, these clients were **[*567]** all educated and highly verbal, and they felt wronged and indignant. The need for open questions in the course of a narrative might be greater with a less verbal client or with a client who was inhibited due to some feelings of guilt or fear. Nevertheless, it is important to recognize that a successful narrative may depend more upon the interviewer's listening receptively than upon his or her asking questions in a particular form.

Turning to the Yes/No and Leading questions, it seemed important to consider these ″coercive″ questions [104] in the context of the entire interview. To do this, I analyzed each leading question, its content and its placement in the entire con-

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[100] Professors Don and Martha Peters report that their clinical students' questions were ″open-ended″ questions only 6% of the time. Id.

[101] This seems to track very closely the introductory request for problem identification suggested by Binder and Price.

[102] Let's step back right to the beginning in a step-by-step fashion, step through it one more time. I think I have a feel for the sequence, but again, add in any detail that we may have just perhaps neglected. And really work hard in trying to remember even the little things here. And then we'll step through this time line, and I may come back and ask you some more detailed questions with respect to a particular area.″

[103] I consider this to be Mike's transition to the ″theory development and verification″ stage recommended by Binder and Price. Mike controlled this transition before the client had completed a second narrative, 12 minutes into the 25-minute interview.

[104] While imperatives are considered the most coercive verbal act, the two imperatives used (both of which were used by Mike) seemed to closely track the text's suggestions for giving the client recognition while pressing the client to remember. See Binder & Price, supra note 6, at 94-95; Binder, Bergman & Price, supra note 38, at 177-78. For example, Mike uses the first imperative in the following utterance: ″Good, good. Those are exactly the things I'm after. Can you think - Think real hard. Is there anything else that might relate along those lines?″ (Imperative in italics.) I did not view either this utterance, or Mike's other

versation. Did these questions constitute an inappropriate cross-examination of the client? Was the attorney deciding what facts should exist and merely asking the client to confirm them? To address these issues, I considered whether the leading questions sought new details or assumed new facts, or whether they confirmed or clarified statements that the client had already made. This analysis led to striking results. Although the students used many leading questions, the vast majority of these questions followed up on the client's statements and confirmed important information. This finding is reflected in the following charts:

Leading Questions in Context:
Leading Questions Related to Facts or Client Goals

[SEE TABLE IN ORIGINAL]

[*568]

Leading Questions - Comparing Repetition of Prior Statement with Questions Calling for New Information

[SEE TABLE IN ORIGINAL]

The students' leading questions were almost always (88%/100%/88%) used to confirm statements that the client had made in her initial, lengthy narrative. Most of the time (78%/64%/82%) the student correctly restated something the client had said. A few times (10%/36%/6%) the student attempted to confirm a fact that the student actually had misunderstood. [105] In these instances, the client invariably corrected the student's understanding of the facts.

The following is a representative example of the students' use of leading questions. Client A had given a ″chronological overview″ of the incident leading up to her problem, including these statements:

Client A: What all happened is that later on, finally on Saturday I went out and I'd had enough, hadn't heard from Ike or anything like that. So I go down to the glass place and they're busy as can be, but this young man agreed to come out. He and I together replaced the glass in my house, cost me $ 175. So what happened was - this was in May - my rent was due again on June 1. So I figured the hell with this, I'm not paying for this broken glass that they didn't fix in the first place, so I told them - I made out the check for my rent less this $ 175 and enclosed a note to them **[*569]** saying that I had repaired this. All I did, I didn't charge them for my time, just what the guy charged me, $ 175 … And that isn't all. I can't be in the place because there's no windows and everything is standing open. So lo and behold when I get there on Saturday I guess between Wednesday and Saturday my television had been taken and my tape deck were gone too…

imperative, as imposing control over the client. It may be worth noting that some of the text's suggested dialogues use imperatives in a way that linguists might view as controlling.

[105] The following are some examples of the students' use of leading questions to confirm facts that they had misunderstood:

Reyes asked ″I see this occurred during Memorial Day, right?″ although the client had previously said: ″This is back in May, I guess it was a week before Memorial Day .... ″ Mike and Mary Jane also asked erroneous leading questions relating to dates: Mike, with regard to the day of the week the rent was due; Mary Jane, with regard to the date the lease had begun.

Mike asked about service of process by stating: ″This was posted to your door; was that correct?″ The client corrected the student: ″Actually I was home. They handed it to me.″ The client had previously said that she had had ″contact″ with ″this server.″

Mike also used a leading question to summarize the landlord's inattention to the ″other problems″ in the apartment: ″And you say typically in the past when there have been repairs to be made, you've notified them and you haven't had real quick action on it?″ The client responds ″No action.″ The attorney then corrects himself (″Or no action″) and shortly thereafter reconfirms correctly with a leading question: ″So with respect to those minor problems there has been zero action [Client: ″Right″], no repairs at all?″ [Client: ″Right″].

Shortly thereafter, Reyes used ″leading″ and ″yes/no″ questions as follows:

Reyes: … First and foremost I see your concern being that of this three day notice//

Client A: //Yes yes.

Reyes: //to pay rent or vacate. [LQ-Goal] Okay. But you're also concerned about the money you've paid out to have the repairs done to your apartment, the windows. Did you pay that out of your own money? [Y/N]

Client A: Yes, I did, and that's why I deducted it from the rent.

Reyes: Okay, so you paid that from your own money. [LQ-Fact]

Client A: Yeah.

Reyes: And then you also had some items stolen. [LQ-Fact]

Client A: Yes.

Reyes: And I'm going to clarify this because I need to get this straight. Were those items stolen while the glass was broken? [Y/N]

Client A: Yes,//

Reyes: // While they were still broken?

Client A: Yes, I'm not sure which day. I know it wasn't Monday or Tuesday because I visited the house both those times and nothing was disturbed at that time. So it had to have been between, I don't know, maybe Wednesday that the stuff was gone. Then I didn't go back, didn't have time, you know, I kept hoping to hear from the landlord saying it's repaired, you know. What a nightmare.

As this dialogue demonstrates, the student's leading questions were all asked to confirm goals or facts that the client had already stated in her rather lengthy monologue. The facts were legally significant (that the client herself had paid for the repairs and that the client had suffered additional losses during the time the repairs needed to be made). The student's use of leading questions probably suggests that the student has been paying attention and wants to record the significant facts the client has told him. While any question on an issue already discussed might give the message that the listener had not been paying attention, a leading question is the least likely to suggest that. Accordingly, leading questions to confirm matters already stated in a detailed monologue probably convey respect and concern rather than control. Indeed, such questions actually are the best form of question to convey respect and concern in this context. **[*570]**

The same point can be made with regard to the yes/no questions. The student asks ″Did you pay that out of your own money?″ and ″Were those items stolen while the glass was broken?″ In both instances the student is reiterating points the client has made in her monologue. As with leading questions repeating information the client has previously conveyed, these yes/no questions are probably more respectful than controlling.

These leading and yes/no questions do not have the effect of silencing the client, as the client's response to the second yes/no question confirms. The student highlights the question as important and asks about the loss of property in relation to the time the windows were broken. The client agrees that the items were stolen while the glass was broken and then proceeds with a narrative to explain, as accurately as she can, when the loss occurred. In doing so, she places the loss as occurring after the landlord had notice of the damage. This is a legally significant fact. The student would have been astute to have identified and asked about this as well. However, his yes/no confirming question functioned to elicit this additional relevant information from the client. Although the form of question may appear to call for a simple ″yes/no″ response, even yes/no and leading questions often functioned in these interviews to elicit mini-narratives from the clients. These mini-narratives were helpful in developing the case.

Infrequently (less than 15% of the time), students asked leading questions that assumed new information. Here is one example:

Reyes: … As far as the incident breaking the glass. As I understand that, that occurred about the later part of May.

Client A: Yea. …

Reyes: You reported it or tried to report it. [LQ-Fact]

Client A: I called the police and they said to come and fill out a complaint. But I, you know, by that time it had been done and I just didn't even care. You just want to get it fixed and get on with your life.

Reyes: So you didn't have a police report on that. [LQ-Fact]

Client A: No.

In this example, the student's question about ″reporting the damage″ is ambiguous. The student may have been confirming the client's report of the damage to the landlord, or, as the client understood, inquiring in a suggestive way about a report to the police. Following the client's response, the student used a leading question to reconfirm the lack of a police report. This question may have been viewed by the client as implicitly criticizing her for failing to file the report. It is worth noting, however, that the client responded with a mini-narrative in which she gave additional relevant information. **[*571]**

Leading questions that sought new information were actually quite rare and most often innocuous. [106]

A few leading questions were not factual but rather focused on the client's goals. In all of these cases, the students repeated a goal the client had already stated. For example, the following dialogue occurred between Reyes and Client A near the end of the interview:

Reyes: … Let me go over a few things with you. Your main concern is clearing this up and not having to move out of your apartment. [LQ-Goal]

Client A: Well, yea and not only that but socking it to this guy, you know. I think I've been very, very nice about this and I think he owes me some compensation for these things. Why should I have to, you know, replace my TV because - out of my own pocket when, you know, because they didn't fix this glass, you know. I'm out of my house for, what, almost a week staying with a friend. I think he should compensate me for it. I really do. My time and everything else.

Reyes: Okay. So the rent is what you're concerned about, staying in your place, compensation for the things that were stolen. [LQ-Goal]

Client A: Yes.

Reyes: Are there any other things that you're really concerned about in regard to receiving this notice and what occurred as far as the damages? (Open/Wh)

[106] The leading questions which assumed new information included the following inquiries:

Reyes: ″You didn't fill out a service form or anything like that ...″ [LQ] (regarding broken windows).

Mary Jane: ″But in the past we could get proof of payment, you have checks or receipts.″ [LQ] (regarding proof of prior rent payments being made, following Y/N questions regarding stubs or returned checks which the client answered only with regard to the most recent month's rent).

Mary Jane: ″So you've always worked through Mr. Jones?″ [LQ] (after confirming Mr. Jones is the manager, and hearing of other repairs that the client had requested but that were never made).

Client A: No, I'd just like to get it taken care of. Like I said, I want …

As with the leading questions that confirmed facts, the leading questions regarding goals seem concerned rather than controlling. They communicate that the attorney wants to understand the client's goals and therefore is repeating what the attorney believes the client wants, so that the client can either confirm or correct. In the above example, the client amends or adds to the attorney's goal-oriented leading questions, and the attorney confirms this in the next leading question, following that with an open ″anything else″ question. The overall impression of this dialogue is not one of attorney control. **[*572]**

The vast majority of leading questions repeated either facts or goals which had been communicated by the client in her lengthy monologue. Although the leading question form has typically indicated professional control and dominance, their use in this context does not demonstrate professional dominance. If anything, they communicate a desire to understand the client and to convey respect for the client's right to define her own problem and goals.

D. Control of Subject and Interview Structure:
Initial Problem-GoalIdentification

All three interviews followed the ″client-centered″ format for interviewing, with the client's first identifying her problem/goal and then providing a chronology. This structure alone does much to give control to the client. Nevertheless, it is interesting to see how the attorney and client interacted to ″control″ the structure of their interview. All three students attempted to get the client to briefly identify her problem and goal at the outset. [107] In two cases the client resisted the request to summarize and told her story instead.

Client A was interviewed by both Reyes and Mary Jane; in both settings she was assertive. After Reyes says ″Nice to meet you,″ Client A launches into her story with ″I don't know where to start with these things. What happened was yesterday I was getting ready for work and I got a knock on my door. There's this guy out there who hands me this,″ thereupon producing a Notice to Pay Rent or Vacate. With minimal prompting (″okay″) and no questioning from the student, she continues by saying: ″I guess I better explain something because if you look it over you see I owe them some rent. Let me tell you what happened..... ″ She then describes how the windows were broken and relates that she made calls to the landlord for repairs. At this point the student asserts some control by asking two leading questions regarding ″Ike Jones's″ identity and the date of the incident, and the client answers these short questions.
Then the student attempts to impose upon the interview the structure suggested by Binder and Price - to get the client to briefly identify the nature of the problem and goal. The student says:

Reyes: Okay. I notice this is a Notice to Pay Rent or Vacate. Are you coming with the concern basically about the vacate or is this more along the lines of the damage to your apartment?

However, the client wants to tell her narrative in her way, without the introductory frame that the Binder-Price text suggests. So the client replies: ″That's what I'm getting to I guess. What all happened is that **[*573]** later on, finally on Saturday ...″ and she continues with her lengthy narrative. The student listens and responds primarily with back channel cues or reflective statements until the story is told.

The same client was interviewed by Mary Jane with very similar results. In that interview the student attempted to assert control and asked for an introduction after the client's first sentence:

Client A: I'm so upset. Anyway, yesterday morning I was getting ready for work and I hear this knock on my door and there's this guy on my porch who hands me this.

Mary Jane: All right. Okay. Why don't we put this aside for one minute, all right. I'd like to start out first of all just hearing about your general problem and what you'd like to have done.

[107] This is recommended by Binder and Price. See Binder & Price, supra note 6, at 53.

Client A: Well, it does show that I owe some money, but let me tell you what happened.

Mary Jane: Yeah.

Client A: Okay. Last May it was, let's see …

The client again avoided the introductory frame and insisted upon telling ″her story.″ Here, too, the student wisely allowed the client the opportunity to do so.

Mike asserted control by beginning the conversation and explaining how the office would deal with the client and how he would like the interview to proceed. Client B complied and gave this attorney a brief and to-the-point description of her problem:

Mike: … Initially what I'd like to do is just to give me a feel for the problem. Very briefly step through what you believe the problem is and how the problem arose or the situation, what solutions or alternative you're hoping to achieve.

Client B: Well, the problems are real straight forward. I've been served a notice of eviction.

The attorney responds with a statement of emotional reflection, whereupon the client expands upon her feelings (″it's grossly unfair″), the attorney again reflects the client's past feelings (″this took you by surprise″), and the client agrees and requests to tell her story: ″So I'll tell you what happened.″ At this juncture Client B launches into a lengthy narrative of the entire story, much as Client A insisted upon doing.

One might contend that Mike was successful in that he seized the floor and announced the structure of the interview. Reyes and Mary Jane did not instruct the client about how the interview was to proceed at the outset, and thus their clients began their stories. It was only after the client's narrative was under way that Reyes and Mary Jane attempted to replicate the Binder and Price structure by getting a brief introductory description of the client's problem and goal. How **[*574]** ever, it seems likely that Client A would have resisted summarizing her problem and goal no matter what the attorney did.

The students' attempts to structure the discussion so as to make the client summarize her problem and the client's resistance to that structure make these telling points. First, clients may feel driven to tell their stories. Therefore, requesting and listening to the client's ″chronological overview″ early in the interview is wise and respectful of the client's needs. This part of the ″client-centered″ interview is well-conceived. However, it may be unwise for the attorney to insist upon the client's briefly identifying her ″problem″ and ″goal″ at the outset. One client was able to do half that task (identifying the problem, though not the goal) when requested. The other client resisted giving such a summary in either interview. And two students' requests for a summary led to a struggle for control of the conversation.

Nor did these students need the summary in these cases. Although understanding the nature of the problem will allow the attorney to listen selectively and to note legally relevant details, the client's story typically will not be so lengthy or so convoluted that the attorney will be confused without the introduction. Accordingly, there needs to be a weighing of costs and benefits. The attorney will benefit if the client can provide an introductory definition of problem and goal, but the benefit often may be only slight. Insisting that the client fit her story into this framework may damage rapport and inappropriately deprive the client of significant control.

Finally, it may be inappropriate and unnecessary to expect a client to summarize both her problem and her goal at the outset. In a dispute resolution case, as this example shows, it may be comfortable for the client to summarize her problem. Perhaps in a transactional situation it will be natural for the client to summarize her goal - for example, ″We'd like to form a business.″ However, none of the transcribed interviews resulted in the client's summarizing her goal at the outset, even when that was requested. The clients ultimately did state their goals. But they did so only after they had told the narrative story.

Perhaps there were reasons for this structure unique to this problem. The client's goals were rather expansive; they

made more sense after the story was told; and the strongest demands seemed more justifiable once one understood everything that happened. So at least in cases where these factors are present, it may be wise to inquire about goals at the end of the client's narrative.

In any event, however, there does not seem to be a strong need for an attorney to obtain identification of both problem and goal at the outset. Either one will provide a framework. It may even be true **[*575]** that forcing the client to summarize both the problem and the goal at the beginning will encourage the attorney to think too narrowly in legal pigeonholes.

E. Questioning to Develop Legal Theories

Although linguistic studies do not typically focus upon questioning sequence, Binder and Price do. Their model calls for following up the client's narrative with questions to develop particular legal theories (the ″theory development and verification″ stage). This questioning is to be done in a ″funnel″ sequence, in which each new topic begins with an open question, followed ultimately by narrow and yes/no questions. This approach respects clients' abilities to focus on what is important as well as the attorney's ultimate need to get particular pieces of information. So, a ″funnel sequence″ in this case might take the form of an attorney's asking generally about the ″relationship″ with the landlord and following with focused questions about a lease, prior compliance with the lease agreement, prior difficulties in getting repairs, other personal conflicts, and so forth.

The transcribed interviews failed almost entirely to include any of these recommended ″funnel″ sequences. More frequently the student asked leading questions to confirm a fact, sometimes asking an additional related question at that time. Perhaps the performance which best approximates the funnel sequence simply continues to concentrate upon a legally relevant issue for thirteen turns:

Mike: You say typically in the past when there have been repairs to be made, you've notified them and you haven't had real quick action on it. (L)

Client B: No action.

Mike: Or no action. (L)

Client B: All that stuff's still the same. I didn't put it in writing though. I called and let it go at that.

Mike: Okay. So with respect to those minor problems there has been zero action, no repairs at all. (L)

Client B: Right.

Mike: Have you made repairs? (Y/N)

Client B: No I haven't brought in a plumber or an electrician or anything.

Mike: Major stuff. It must be frustrating to live with a broken toilet constantly.

Client B: Well, it works, it's just -

Mike: So you haven't got a specific example of where you've paid money and then taken it from the rent. (L) Do you know of any other tenants - have you talked with any other tenants about problems they've experienced in this area? (Y/N)

Client B: No, it's just a house. I'm not near anyone. **[*576]**

Mike: Because you do have a right under statute to have the landlord maintain the building in accordance with all the health and safety codes. Do you think that any of these issues might relate to a health or safety problem? (Open/Wh) Obviously the windows would relate to your security. That might be -

Client B: Heath or safety?

Mike: Are there other areas that you're aware of? (Open/Wh)

Client B: I don't think so. I mean the leaking roof -

Mike: That might be. Those are the kinds of things - anything else? (Open/Wh) What are the specific items that you tried - (Closed/Wh).

Client B: Yeah, okay. The back bedroom in the winter I discovered has no heat, and it has a radiator and I tried to turn on the steam, nothing happened. So since it's just me by myself I just shut it off in the wintertime. It's cold.

Mike: Good. Those are exactly the things I'm after. Can you think, think real hard. Is there anything else that might relate along those lines? (Open/Wh)

Client B: Okay, so we have the leaky roof which is over the stove. I put a pan underneath it when it rains. There's a plug that doesn't work in the living room. There's another one that if you plug anything in the fuse blows.

Mike: That doesn't sound good.

Client B: The toilet runs. It does work, but it runs. The kitchen sink backs up. I just chalk it off to old plumbing. but still - Then the back bedroom - that's about it. …

Mike: … So let me do some more research on those issues. Those are important. That's exactly the kind of information that is important to this case. I have a copy of your lease, the repair responsibilities are going to be one particular area. Let's go back to his track record or lack thereof, whether - think real hard now in conversation with other tenants, have they had this similar type of problems that you've had. (Y/N) Can you remember how they dealt with it? (Open/Wh)

Client B: It's just that I've never talked to any other tenants because mine is just a little house. So again, I don't know.

This exchange is the only lengthy exchange on a single topic in the three transcribed interviews, and it is not structured as a funnel. The student begins the topic of ″prior repairs″ with leading questions. The purpose of these questions is not clear; perhaps the student is attempting to establish that the landlord is negligent in his duties. The student then turns to other repairs the client may have made and may have deducted from her rent. Again, the legal purpose of these questions may have been to establish a prior practice on the part of the landlord to allow tenants to deduct the cost of repairs. Then the student thinks **[*577]** out loud and makes a statement about the landlord's obligation to comply with health and safety codes. This statement leads the student to ask about ″health and safety problems.″ It is obvious from the question and the statement that follows (″Obviously the windows would relate to your security″) that the student had not previously considered that ″bad conditions″ might be relevant to this client's problem or that a breach of contract or warranty of habitability defense might exist. [108] Once the student recognizes this (in the midst of conversation), he collects information by using funnel-style open questions. Finally, he reiterates that this might be important information, relating it both to the ″codes″ and to the ″lease.″

Here we see an example of ″theory development″ by a law student with basic knowledge of the area of the law. But it does not seem easy. The student backs into the legal theory, as it were, by reflecting or repeating the client's factual statements and by mulling over the general topic of ″repairs.″ It is out of that factual discussion of ″repairs″ generally, and the unresponsive landlord specifically, that the student discovers two legal theories.

This seems to be a successful part of the interview. The student ultimately sees a problem/theory that the client had not raised. The student collects a good deal of information about it. The student thanks and compliments the cli-

[108] In fact, at the time of the interviews, breach of warranty of habitability was not a defense to an eviction action in Utah. A case was pending in the Utah appellate courts which ultimately established this rule of law. However, one goal of this role play was to inform clinic students regarding the state of landlord-tenant law.

ent for remembering these facts. Finally, the student gives the client correct information without giving any erroneous legal advice. However, this successful ″theory development″ did not follow the recommended pattern and did not arise from the student's conceptualization of legal theories followed by questioning designed to explore them.

Mary Jane had two exchanges following the client's narrative in which she collected potentially useful information. One was a series of questions (the ″tail″ of the funnel), focusing upon other breaches the client might have committed:

Mary Jane: So let's go through this a little bit [referring to Lease Agreement]. Have you paid your rent on time?

Client A: Oh, always, yeah, I either made it a couple of days ahead or at their office because it's very close to where I live.

Mary Jane: Okay.

Client A: Yeah, usually with a check. And I did give a check to them on the first of June.

Mary Jane: Okay. And do you have the stubs of those checks or returned checks? **[*578]**

Client A: Oh, well, the one - I haven't got my statement yet so I could call the bank I guess and see if it was cashed.//

Mary Jane: //Right, but I mean in the past. We could get proof of payment, you have check or receipts.

Client A: Oh, sure, yeah. I'd have to try to find them all.//

Mary Jane: //Okay. But you could probably get that. Okay. And let's see, have you as far as you know you followed all the responsibilities you have here. Like I see it says no pets.

Client A: No, I don't have pets. And I keep my property clean. I really fixed it up a lot.

Mary Jane: Okay.

Client A: I like living in this place, so I feel like I'm a good tenant.

Mary Jane: Sure. Okay. Good, I'm sure you are. Have you ever had problems with the neighbors? Have neighbors ever complained about -

Client A: No, no, I never have. I've actually had some problems with teenagers, but you know, being noisy.

These seven exchanges reviewed three possible violations of the lease which the tenant may have committed and possible evidence to disprove one theory. They were clearly driven by the student's conscious awareness of legal theories and the lease agreement. However, they contained two interruptions by the attorney and some contention about the evidence. It seems that the client found this part of the interview threatening. While these questions were legally relevant, it is not clear why they were ″good″ or necessary questions to ask at this stage. The client had already admitted to breaching the lease by deducting the cost of repairs, and the landlord was claiming a right to exactly the amount of omitted rent. So, analytically, it seems like overkill to look for yet another way in which the client may have breached the lease.

Earlier in the interview the same student and client had this issue-related exchange, begun by an open (top-of-funnel) question:

Mary Jane: Did anything happen, ever happen before this? Did you ever have any trouble // before with // this landlord?

Client A: //Oh, well, yeah,// they're not really responsive. He's never - well, there's hardly ever anybody in the office. And I do have some problems with the house. I mean that I've just lived with. You tell them about - well, like the roof in my kitchen leaks where the exhaust fan is, you know, and so I have to put a bucket you know on the stove when it rains. I've got some electrical problems with some plugs, that one of them I think is really unsafe, but I just don't use it. It blows fuses all the time, and my sitting room has a radiator in it, but you can't get any heat to it. And the plumbing is not the best. The toilet runs all the time; the sink backs up and things. And I've let them know about these things. **[*579]**

Mary Jane: You have?

Client A: Yeah, and you get no response, you know. But I do - like the neighborhood, and I really like the house. I would like to stay.

Mary Jane: All right. So you do want to stay even though this landlord is not ever been particularly responsive and now we have this immediate problem. Okay.

Client A: Yeah, well. You know, really before you know you just put kind of put up with these things, and I have spent a lot of time and effort fixing up my place, and it's close to my work. The neighbors are nice, and I feel reasonably safe in the neighborhood even though we've had problems with teenagers and stuff.

Mary Jane: Well, it sounds like this is your home and you want to say in your home.

Client A: Yes, it is. I don't like moving. It's hard to find places that you like. And if he can take care of this stuff, you know, and compensate me for some time and effort and, you know, be a little more responsive, I think, you know, it would work out much better.

The interesting thing here is that the attorney elicits a great deal of relevant information - relevant to clarifying the client's goals as well as to a possible legal defense - through the use of Yes/No questions. When questioning, the student did not have in mind a defense due to the landlord's breach of the leasehold contract or due to warranty of habitability. After getting this information, she made no further inquiries about these unsafe conditions, demonstrating that she still did not recognize the legal relevance of these facts. (This is in contrast to Mike, who also stumbled upon this information but figured out its relevance during the conversation.)

Mary Jane did, however, use this information to further explore the client's goal of remaining in the apartment. While seeing uninhabitable conditions as a possible legal defense is certainly good analysis, seeing uninhabitable conditions and an unresponsive landlord as possible reasons for the client to rethink her goals also seems like helpful problem-solving analysis. [109] It is difficult to see why one discussion would be better than the other in an initial interview. **[*580]**

What lesson can be drawn from these segments of ″theory development″? First, that novice attorneys often do not - and perhaps often cannot - consciously think of and pursue relevant legal theories in an organized way during an initial interview. Although experienced attorneys may use T-funnels to develop legal theories while questioning clients about legal issues with which the attorneys are familiar, it may be unrealistic to expect novice attorneys (or any attorney interviewing outside his or her area of expertise) to question in this highly structured format. Suggesting this goal may only serve to make students feel inadequate or to induce them to ask questions that appear to embody a ″legal theory″ even when they are not pertinent.

The second lesson we should draw from these interviews is a positive one. Even without a conscious awareness of what legal theory to pursue, ″client-centered″ students tended to ask questions that were relevant and useful. The questioning communicated a desire to understand, which facilitated rapport. Moreover, the questions - irrespective of their form and the attorney's underlying theory - often elicited additional useful information from the client. Even if an attorney does not realize the legal import of all the facts immediately, that should be no cause for concern. The attorney usually will have time to reflect upon the information and to identify its theoretical import after the inter-

[109] Interestingly, the actors who commented upon the role play to the author stated that the only difficulty they had with the scenario was the client's goal of remaining in the apartment. They told me that they couldn't understand why their character would want to stay! Obviously, such a client would be helped or affirmed by Mary Jane's line of questioning.

view. The interviewer may just as usefully explore the practical import of the facts on the client's goals, as Mary Jane did when learning of the bad conditions in the apartment. During an initial encounter, it is important that the attorney maintain rapport, understand the client's goals, and obtain a detailed factual account of the problem. While T-funnels driven by legal theories may be consistent with mastery and ideal organization, various other conversation structures will also serve these ends.

Much more study of inexperienced and experienced attorneys conducting ″client-centered″ interviews is needed in order to understand the kinds of questioning that may be appropriate and useful during an initial meeting. In the meantime, we should not require or expect our students to conduct linear, logical, theory-driven questioning. We should also encourage questioning driven by creative, exploratory thinking so long as it is sensitive to the client's concerns and related to the problem presented. **[*581]**

F. Definition of Client Goals

Finally I studied the content of each interview to determine whose definition of the problem controlled. Did the attorney ″pigeonhole″ the client's concerns into convenient doctrinal categories? Or did the student come to understand the client's problems and goals from the client's perspective? To explore these questions, I compared the client's initial (and subsequent) statement of her problems and goals with the attorney's final restatement of them.

Client A initially defined her problem both to Reyes and Mary Jane by handing them the Notice to Pay Rent or Vacate. Following her narrative, she enunciated her goals to Reyes as follows:

Client A:… So I do not want to pay this. I don't figure I should have to pay this. And furthermore, I think this guy should compensate me now, not only pay for the glass, I want to sue him. I think he should pay for my television and my stereo thing and my time and effort and everything else and the harassment he's given me.

Toward the end of the interview, the attorney attempts to summarize the client's goals, and this results in further dialogue:

Reyes: … Your main concern is not having to move out of your apartment.

Client A: Well, yeah, and not only that but socking it to this guy, you know, I think I've been very very nice about this and I think he owes me some compensation for these things. Why should I have to, you know, replace my TV because - out of my own pocket, when, you know, because they didn't fix this glass, you know. I'm out of my house for, what, almost a week staying with a friend. I think he should compensate me for it. I really do. My time and everything else.

Reyes: Okay. So the rent is what you're concerned about, staying in your place, compensation for the things that were stolen.

Client A: Yes.

Reyes: Are there any other things that you're really concerned about in regard to receiving this notice and what occurred as far as the damages?

Client A: No, I'd just like to get it taken care of. Like I said, I want compensation now, personal too, you know …

The student was the first (and only) party to the conversation who enunciated the goal of not being evicted from the apartment. That clearly was a goal of the client, but she chose to focus her conversation upon the affirmative actions (suing the landlord for losses) rather than the defensive action of avoiding the eviction. When the client repeated these goals, the student added them to his list and asked whether there was anything else. **[*582]**

At the conclusion of the client's narrative, when Mary Jane asked about other problems, the client responded by tell-

ing her about the landlord's general failure to correct various other problems and then explaining that she nevertheless liked the house and neighborhood and wanted to stay. Mary Jane repeated her understanding and the client confirmed and gave reasons:

Mary J: All right. Okay. So you do want to stay even though this landlord has not ever been particularly responsive and now we have this immediate problem, okay.

Client A: Yeah, well. You know, really before you know you just put kind of put up with these things, and I have spent a lot of time and effort fixing up my place, and it's close to my work. The neighbors are nice, and I feel reasonably safe in the neighborhood even though we've had problems with teenagers and stuff.

Mary J: Well, it sounds like this is your home and you want to say in your home.

Client A: Yes, it is. I don't like moving. It's hard to find places that you like. And if he can take care of this stuff, you know, and compensate me for some time and effort and, you know, be a little more responsive, I think, you know, it would work out much better.

In the end, this client slightly altered her goals. She wanted things to be made better, as well as to be defended in any eviction action.

These examples serve as strong proof that goal reflection statements or questions about goals are important during an interview. It also indicates that the statement of goals is, ultimately, a joint effort between the client and attorney. The client must insure that her goals are comprehensively understood in lay or ″real world″ terms. The attorney should insure this level of understanding - what the solution will look and feel like to the client - before giving some legal structure or definition to the client's goals.

Professor William Simon has argued that this is the point where attorney-client communication fails: ″The client cannot be presumed to understand the available courses of action which are defined by the specialized knowledge for which she relies on the lawyer, and the lawyer cannot be presumed to understand the client's interests, which are by definition subjective.″ [110] However, this conclusion is overly pessimistic. The client need not describe solutions within the ″specialized″ world of law. Rather, she must describe the result in lay, or real world terms (″to stay in this apartment … to get compensated for all this **[*583]** harassment … to get the landlord to be more responsive″). The lawyer must struggle to understand such ″real world″ goals. Of course, we could dispute whether any human being can truly understand the subjective experience of another, but to the extent that one can, attorneys should be expected to understand the goals of their clients in lay terms and lay language. By reflecting the client's goal statements, attorneys stand the best chance of translating those goals into legal structures.

IV. Conclusions Regarding the Client-Centered Interview

The ″traditional″ client interview has been criticized for establishing an overly controlling working relationship. This seems to result from attorneys asking narrow questions focused upon legal analysis and driven by doctrinal categories. While this may establish an ambience of attorney-control, it may also maximize the discovery of legally relevant factual details, particularly if the attorney has acquired some level of expertise with the legal problems presented.

The ″client-centered″ interview is intended to return appropriate control to the client and to establish a working relationship of peers. It is also designed as a format for interviewing any new client about any problem - even in the absence of expertise in the area.

This study has demonstrated that the client-centered interview is not an exercise in professional dominance and control. It is conversational, with the power and control more evenly balanced than in the ″traditional″ interview. There are certain aspects of the client-centered interview that seem most important for achieving this balance. Other as-

[110] William H. Simon, Visions of Practice in Legal Thought, 36 Stan. L. Rev. 469, 476 (1984).

pects of the ″format″ for conducting a client-centered interview seem to hinder as much as to help in attaining this goal. While the client-centered format allows the attorney to understand the client's problems and goals, it may sacrifice quantity of detail for quality. The novice interviewer in particular may engage in very little legal analysis and questioning driven by doctrinal categories. However, questions driven by a desire to understand and to help solve the client's problem will usually be productive and helpful. Except in situations of extreme time pressure, it should be acceptable for much of the legal analysis, as well as more focused questioning, to take place later in the case.

A. Narrative Is Crucial

Perhaps the single most important benefit of the client-centered format is that the client is allowed to give an uninterrupted narrative about her problem. In all three transcribed interviews, the clients manifested a strong desire to do so. They insisted upon relating their **[*584]** story in their own words and in their own way. Even when the students attempted to structure their talk by asking for an initial summary of the problem or goal, the clients responded by continuing with their story, usually without giving the student the requested frame.

1. Confirming Questions Should Be Asked

Allowing the client to pour out her story, however, creates some practical difficulties which the ″client-centered″ model does not fully accommodate. First, the attorney may not be able to take in the resulting amount of detail. All three attorneys spent considerable time asking leading questions to confirm facts recounted by the client in her lengthy narrative. Presumably this was necessary to enable the attorney to focus upon and record those facts deemed most relevant. The ″client-centered″ model should be altered to allow such questions and statements of factual reflection and confirmation following a client's initial narrative.

2. An Introduction May Be Useful but Is Not Necessary

While getting the client's story is crucial, it may not be necessary to have the client introduce it. Asking the client to initially summarize her problems and goals is not essential and may even be dysfunctional. One client ignored that request on both of the occasions on which she was interviewed. (The other client summarized the problem but left the goals to be discussed after the narrative.) When the students pressed the request, the client insisted upon giving her story in her own way. While introductions are handy, the client-centered attorney should not insist, and should not even feel the need, to ask the client to do this editing work.

3. These Conclusions May Vary Somewhat for Different Clients

Perhaps the clients' drive to tell their stories in the videotaped interviews was related to two crucial facts. First, there was a story to tell. Something had happened, and it had happened in chronological order. My conclusions about the press and centrality of client-driven narrative may not hold true when the client does not have a ″dispute″ over an event, but rather has a desire to create something. For example, business people who wish to form a closed corporation or a limited partnership may not feel similarly impelled to ″tell their story.″ They may tend instead to state their desires (for example, ″We'd like you to do the incorporation″) and then wait for questions. In such an event, the attorney may nevertheless want a narrative. Moreover, the **[*585]** clients themselves may feel most comfortable giving a chronological story of their dealings to date, along with their immediate and long-range plans. But such a narrative may require both a specific request and guidance by the attorney.

Secondly, these clients were driven to spill out their story in part because they felt wronged. They believed in their story. Clients who feel inhibited because they think their case is weak or because they feel as if they did something wrong may not be impelled to present a narrative. Perhaps such a client would tend to give a flowing narrative about the aspects of the cause in which he or she believes, while avoiding those portions about which he or she is un-

certain. [111] This is not to suggest that a narrative should not occur, but rather that a different kind of narrative may take place and that the attorney may need to prompt the client in its telling. The attorney may be able to draw inferences from the absence of a narrative-style account, namely that the client feels some discomfort with those portions of the ″story″ that he or she is mentioning in summary fashion rather than recounting in story form.

Finally, clients who have difficulty communicating may need more assistance in providing a narrative than did these actor-clients. Clients who are less verbal or who feel intimidated by lawyers may need more questions to move their stories forward. Certainly, mentally ill clients with impaired abilities to think logically and sequentially are highly dependent upon an interviewer's guiding them through a time line.

B. Reflection Is Useful - Particularly Goal Reflection

The ″client-centered″ model places great emphasis upon the attorney's empathizing with the client by ″reflecting″ his or her emotions. Although the students knew this was a goal of ″client-centered″ interviews, emotional reflection was not terribly frequent. Nor did it seem crucial for eliciting more facts or establishing greater trust. Back-channel cues seemed to keep the narrative flowing. Thereafter reflection of the clients' goals did occur.

All three students asked goal-clarifying questions and made goal-reflective statements. These questions and statements were asked in lay language and described outcomes in practical terms. They were **[*586]** useful, as was apparent from the strong responses they elicited from the clients. Either the client responded by reconfirming the goal and explaining it or she responded by amending the attorney's statement until the goal was clarified.

C. A Questioning Stage Must Allow for Questions to Confirm Facts and to Creatively Explore Problem-Solving Ideas

The ″client-centered″ model calls for a stage of questioning driven by legal theories, in which the attorney begins a legally relevant topic with an open question or questions and follows up with related narrow questions. Almost no theory development questioning employing this linear, analytical pattern occurred in these interviews. While there were follow-up questions, most of them were narrow or leading, serving to confirm information conveyed in the narrative. Few follow-up questions were centered around a particular legal theory. Nor were there ″funnels″ of questioning. In all three interviews, there were only three sequences of questioning on a legally relevant topic. Not one of these sequences followed the funnel framework.

In one interview, Mary Jane asked a number of narrow questions on one topic - the tenant's possible breach of the lease. Although these questions were related to a legal theory (the various ways in which the client may have breached the lease), they seemed to impair rapport and were theory ″overkill.″ In the second interview, Mike ″backed into″ a theory (warranty of habitability), having begun to question about the landlord's repairs and repair-and-deduction practices generally. Once the student saw the theory (live, on camera, as it were), he began to conduct funnel-style questioning to fully develop the facts. Finally, Mary Jane asked a Yes/No question and received a mini-narrative about other problems with the apartment which raised an important legal issue (the landlord's breach of warranty of habitability as a defense). However, the student did not seem to recognize this as a legal issue and responded to it instead as an opportunity to clarify the client's goals.

These students' failure to question in T-funnel formats is consistent with the concerns expressed by other students of mine over the years. The question I most frequently am asked about client-centered interviews is how to know what areas to explore during the ″theory development″ stage. The videotapes in this study demonstrate just how difficult it is for students to select legal theories to explore in an organized fashion. However, these tapes also suggest that there are other appropriate questioning frameworks which a novice attorney can employ to follow up a client's narrative. **[*587]**

[111] Binder and Price recognize the possibility that clients will avoid certain topics, issues, and facts. They explain that such avoidance may result from ″ego threats,″ ″case threats,″ and other types of inhibitors.

I have no doubt that experienced attorneys questioning a client in their area of expertise conduct ″theory development″ questioning driven by legal theories. However, it may be that this structure is highly dependent upon legal knowledge that new attorneys often do not possess. It may be overly optimistic to expect novice interviewers to conduct such questioning during an initial interview. The students videotaped here had all completed the basic ″property″ law course, which raises landlord-tenant issues, and thus they had studied the ″warranty of habitability.″ They had also read a booklet about ″tenants' rights″ in preparation for the interview. While this background did not give them ″expertise,″ they did have some familiarity with the legal issues and relevant doctrines. Nevertheless, the students did not consciously identify and fully pursue the many legal issues suggested by their clients' accounts.

Alternatively, these examples may suggest that we should be open to and encourage a wider variety of questioning formats following the client narrative. The students' tendency to ask leading and narrow questions to confirm important facts seemed entirely functional. Such questions were well-received by the clients and often led to the disclosure of other useful details. I have observed myself and others asking such confirming questions with clients who had told an uninterrupted and detailed story. The literature does not describe this structure for questioning and I believe it should.

The students also engaged in exploratory, curiosity-driven probing. This questioning did not come from doctrinal analysis as much as a holistic problem-solving approach. Rather than asking funnelled questions about ″conditions″ of the rental unit, the students asked about the landlord's practices regarding repairs, repair-and-deduction practices, and prior problems between the landlord and tenant. Interestingly, these questions also resulted in the students discovering useful information, either from a legal analytical perspective or from a practical, problem-solving perspective.

In either event, the ″client-centered″ model should accommodate these approaches to conversing with a client after s/he has told his or her story.

V. Areas for Further Study

A. Further Descriptive Study of Initial Interviews Is Needed

This study attempted to capture a typical successful interview by an inexperienced law student instructed in the client-centered ap- **[*588]** proach. While some tentative conclusions can be derived from the findings here, they are incomplete in many respects.

There are many unaddressed questions about differences among clients. It remains to be determined whether the findings of this study will remain consistent irrespective of the type of legal problem; the comparative social prestige of attorney and client; the gender and age of the client; and the client's feelings about his or her legal predicament, including, for example, feelings of self-righteousness or fear. This study employed actor-clients, all of whom presented the same problems to different law students. Further studies, using different people to address the same problem, might allow for exploration of the differences among attorneys and among clients. However, using actors raises the question of how closely an actor can replicate an actual client's behavior.

There are also many questions about differences among attorneys. How do attorneys from different practice backgrounds conduct initial conferences with clients? Most of the studies have involved public sector or solo practice attorneys interviewing impoverished or desperate people. How will an attorney from a corporate law background converse with a business client? Are there differences in attorney behavior related to the practices (types of client or types of problems) the attorneys have had? It is my hypothesis that much of what is criticized in the ″traditional″ interview is attributable to the attorney's being knowledgeable about legal doctrine and practicing in a setting where there is financial pressure to control the conversation and to get to ″the facts″ as quickly as possible.

Just as importantly, how will an experienced attorney approach an initial interview, either in his or her area of expertise or in an unfamiliar area of law? Will an experienced or expert attorney turn from ″interviewing″ and inquiry too rapidly? Will the experienced attorney begin providing the analysis and legal solutions before he or she has fully understood the client's concerns and goals? Will an experienced attorney allow the client to remain an equal part-

ner in a conversation, exploring the problem from the client's perspective?

Finally, there is a need for further study of the relationship between the quality of attorney-client interactions and the degree of client satisfaction. This might include taping actual conferences and surveying the clients about them. It may be more practical, however, to inquire of mock clients interviewed by different attorneys. It also would be possible to videotape interviews and counseling sessions, show them to a cross section of lay people, and survey these people regarding their responses to the attorney. **[*589]**

As Professor Neustadter has commented, ″Our picture of how lawyers and clients actually interact in any environment, and hence our conceptualization of why they interact in certain ways, is terribly incomplete.″ [112] The research tends to suggest, and many believe, that attorneys are often too controlling and domineering. We have developed theoretical models that are supposed to return appropriate control to the client. But we are only beginning to study these models with a critical eye. And we have not yet begun to study naturally occurring interviews which were indisputably successful. We must do so in order to identify and understand the techniques and approaches that were used. Clearly, much more investigation remains to be done.

B. Attorney-Client Counseling Presents Further Challenges

This linguistic analysis has demonstrated that the ″client-centered″ model of interviewing need not be an exercise in attorney dominance or control. The attorney can afford the client appropriate control by allowing her to relate her story early in the interview, with a minimum of structure, in her own words. Although the attorney should question about legally relevant topics, generally there is no need for the attorney to put the client's problem and goals in doctrinal

pigeonholes.

Ultimately, however, the attorney will need to employ legal analysis and to discuss legal terms and standards with the client. Attorneys experienced in the area of the client's concern may do so during the initial conference. However, the point at which the attorney begins to translate client-enunciated goals into legal categories may be where the balance of power begins to shift. As Robert Gordon has recognized, the lawyer still ″has a major part in framing the client's desires - by translating them into the legal categories that constitute important forms of public discourse, ways of specifying what it's legitimate to want.″ [113]

When the attorney-client conference changes from an ″interview″ to a ″counseling″ session may be the point where attorney dominance and control threatens client autonomy.

Binder and Price present a model for attorney-client counseling which my students attempted to employ. The essence of that model is that the attorney and client should comprehensively identify all alter **[*590]** native courses of action, predict the consequences (legal and extra-legal) for each cause of action, and weigh and compare the alternatives in light of the client's goals and values. [114] In this study, the other researchers and I did not conduct a complete linguistic analysis of the students' counseling sessions. However, we did do some preliminary analysis. We analyzed floor control for each student-client pair in their counseling sessions and compared the resulting data with our findings regarding floor control during the interviews. The results were striking.

The speech patterns for the three attorney-client pairs in the counseling context were quite different from what they had been in the interviews. While the interviews had been fairly equal conversations, the counseling sessions were almost entirely dominated (95%/84%/88%) by the attorneys' talk:

[112] Neustadter, supra note 14, at 256.

[113] Robert W. Gordon, The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1970, in The New High Priests: Lawyers in Post-Civil War America 52-53 (G. Gawalt ed., 1984). Bellow and Moulton, although recognizing the difficulty of imagining the full range of options that might meet the client's needs, urge: ″The range of alternatives you can suggest to the client may largely determine your effectiveness.″ Bellow & Moulton, supra note 7, at 1002.

[114] See Binder & Price, supra note 6 at 135-91; Binder, Bergman & Price, supra note 38, at 258-361.

Floor Time During Counseling

[SEE TABLE IN ORIGINAL]

The students' tendency to dominate during counseling may be related to the goals of identifying all the alternatives and predicting the possible consequences. If so, the client-centered counselor's goal of comprehensiveness may work against maintaining an equal relationship in the conversation.

In this study, the legal situation the students confronted was fairly complex and the counseling session was limited to half an hour. Each student talked far more in the counseling session than he or she did in the interview and much more than the client did in the counseling session. Whereas the students' interviews were fairly balanced, their counseling sessions were terribly imbalanced.

The comparative imbalance during the advice-giving meeting suggests that attorney-client interviews which include counseling may also become dominated by the attorney's talk as the conversation shifts from the client's description of his or her problem and goals to the attorney's dispensing advice about the options available to the client. It is unclear whether prior studies of attorney-client conferences included counseling as well as interviewing. If so, that fact might explain the greater degree of attorney dominance found in those studies. **[*591]**

This comparison between the ″legal interview″ and the ″legal counseling session″ strongly suggests that the tendency for attorney control and dominance may be closely related to the analytical and counseling functions. Therefore, the counseling session or the advice-giving portion of the meeting should become a major focus of our inquiries in studying attorney dominance and client self-determination.

3rd Clip

OUTLINE

I. Question/Issue
   a. Where does a criminal defendant's right to stand on his/her principle to reject a plea offer end and an attorney's right or obligation to assert his/her professional legal opinion begin?

II. United States Constitution
   a. U.S. Const. Amend. VI

III. Court Rules
   a. Fla. R. Crim. P. 3.170 (Pleas)
   b. Fla. R. Crim. P. 3.171 (c) (Plea Discussions and Agreements)
      i. Counsel **shall** not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto.
      ii. Counsel **shall** advise the defendant of:
         1. All plea offers; and
         2. Pertinent matters bearing on the choice of which plea to enter.
            a. This includes collateral effects and possible alternatives to the plea.
   c. Fla. R. Crim. P. 3.172 (Acceptance of Guilty of Nolo Contendere Plea)
   d. Fla. R. Crim. P. 3.850 (a)(5) (Motion to Vacate, Set Aside, or Correct Sentence)
      i. If the plea is involuntary, there is a basis for collateral attack.

IV. Case Law
   a. *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012); see *also Hill v. Lockhart*, 474 U.S. 52 (1985); *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013).
         1. Applied *Strickland* standard:
            a. Attorney provided deficient performance; and
            b. Defendant suffered prejudice as a result of the attorney's deficient performance.
         2. Where counsel's ineffective advice led to a plea offer rejection, and where the prejudice alleged is having to stand trial, a defendant must show that *but for the ineffective advice*, there is a **reasonable probability** that the plea offer would have been presented, accepted, and the conviction or sentence would have been less severe than under the actual judgment and sentence imposed.

V. Ethical Rules
   a. R. Regulating Fla. Bar 4-1.2(a) (Objectives and Scope of Representation)
      i. Lawyer **shall**
         1. Abide by a client's decision concerning *objectives of representation*.
         2. *Reasonably consult* with the client as to the *means* which these objectives are to be pursued.
            a. This does not mean the lawyer must employ means simply because a client wishes him/her to do so.
         3. Abide by a client's decision on whether to settle a matter.
            a. In criminal case, as to the plea to be entered, waiver of jury trial, or whether client will testify.
   b. R. Regulating Fla. Bar 4-1.4 (b) (Communication)
      i. A lawyer **shall** explain a matter to the extent reasonably necessary to permit the client to make *informed decisions* regarding the representation.
      ii. This rule also mandates that the lawyer must promptly inform his/her client of any plea bargain in a criminal case or settlement offer in a civil case, *unless* the client has already previously indicated his intentions or given authorization to the attorney to accept or reject the offer.

22 Fla. Prac., Criminal Procedure § 11:6 (2013 ed.)

West's Florida Practice Series TM
Florida Criminal Procedure
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Michael E. Allen
Chapter 11. Pleas of Guilty or Nolo Contendere

§ 11:6. Plea bargaining—The right to competent counsel in the plea-bargaining process

Under both the Sixth Amendment and section 16 of the Florida Declaration of Rights, a defendant has the right to assistance of counsel at all critical stages of a criminal prosecution. [1] This right to counsel includes the right to the effective assistance of that counsel, [2] which itself includes the right to an attorney who performs with sufficient competency to fulfill the role of an advocate. [3] Because the plea bargaining process is a critical stage of a criminal prosecution, a defendant has the right to effective assistance of his counsel during the plea bargaining process and in connection with the entry of a plea of guilty or nolo contendere. [4] In *Cottle v. State*, [5] the Florida Supreme Court summarized the relevant considerations as follows:

> The primary guide for ineffective assistance claims is the United States Supreme Court's hallmark opinion in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) (adopted by this Court in *Downs v. State*, 453 So.2d 1102 (Fla.1984)). *Strickland* held that claimants must show both a deficient performance by counsel and subsequent prejudice resulting from that deficiency to merit relief …. In conducting this two-prong test, the court essentially decides whether the defendant's Sixth Amendment right to a fair trial has been violated …. This analysis extends to challenges arising out of the plea process as a critical stage in criminal adjudication, which warrants the same constitutional guarantee of effective assistance as trial proceedings. *See Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985); *see also Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971) (recognizing plea bargaining as "an essential component of the administration of justice"). [6]

Cottle alleged in his postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850 that his attorney had failed to tell him of a favorable plea offer and that, had the offer been conveyed, he would have accepted it and the plea would have resulted in a lesser sentence. After the trial court denied the motion without a hearing and the district court had affirmed, the issue of the sufficiency of Cottle's allegations to present a colorable claim of ineffective assistance of counsel due to attorney incompetence was presented to the Florida Supreme Court. Because the case law uniformly recognizes that a defense attorney's performance is deficient when the attorney fails to relate a plea offer to his client, [7] and because Cottle had sufficiently alleged the required prejudice for a claim under *Strickland v. Washington*, the Court held that Cottle had alleged a colorable basis for postconviction relief. The Court held that an incompetent counsel claim based upon a defense counsel's failure to convey a plea offer is established through demonstration of three elements: (1) the defense counsel failed to relay a plea offer to the defendant, (2) the defendant would have accepted the offer had it been relayed to him, and (3) the plea would have resulted in a lesser sentence. The Court held that a defendant presenting such a claim has no obligation to additionally establish that, if a plea in accordance with the plea offer had been tendered, it would have been accepted by the trial judge. [8] Florida Rule of Criminal Procedure 3.171 explains the obligations of defense counsel in connection with plea negotiations and the entry of pleas. It is a good general reference for ascertaining what is required of counsel in order to satisfy the performance prong of *Strickland v. Washington* in this context. It provides:

> **(c) Responsibilities of Defense Counsel.**

(1) Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

(2) Defense counsel shall advise defendant of:

(A) all plea offers; and

(B) all pertinent matters bearing on the choice of which plea to enter and the particulars attendant upon each plea and the likely results thereof, as well as any possible alternatives that may be open to the defendant. [9]

As discussed in § 11:16, attorney incompetence claims sometimes provide a basis for a defense motion to withdraw an accepted plea, with the most common of such claims involving attorney misadvice as to the consequences of a defendant's plea of guilty or nolo contendere.

Footnotes

1 See § 8:4.

2 See §§ 8:11 to 8:15.

3 See § 8:14.

4 Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

5 Cottle v. State, 733 So. 2d 963 (Fla. 1999).

6 733 So. 2d at 965.

7 See also Fla. R. Crim. P. 3.171(c) (“Defense counsel shall advise defendant of … all plea offers[.]”).

8 Florida courts apply a more relaxed showing than is required under federal decisional law. See Missouri v. Frye, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012) ("To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.").

9 Fla. R. Crim. P. 3.171(c).

14 Fla. Jur 2d Criminal Law—Procedure § 481

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Criminal Law—Procedure

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III. Assistance of Counsel
A. Right to Counsel
4. Effectiveness or Adequacy of Representation
b. Pretrial and Trial Representation
(2) Plea Process

Topic Summary Correlation Table References

§ 481. Plea offer or bargain

West's Key Number Digest

West's Key Number Digest, Criminal Law 1920

The ineffective assistance of counsel analysis, that claimants must show deficient performance and subsequent prejudice resulted from the deficiency, extends to challenges arising out of the plea process, which is a critical stage in a criminal adjudication and warrants the same constitutional guarantee of effective assistance as trial proceedings.[1] Defense attorneys have a duty to inform their clients of all plea offers and all pertinent matters bearing on the choice of which plea to enter and the particulars attending upon each plea and the likely results thereof, as well as any possible alternatives that may be open to defendant.[2] Defense counsel also has the obligation to ensure that a defendant understands the direct consequences of his or her plea.[3] The failure of trial counsel to properly advise a defendant about a plea offer by the state can constitute an ineffective assistance of counsel.[4]

However, ineffective assistance of counsel claimants, alleging that defense counsel failed to convey a plea arrangement to the defendant, are held to a strict standard of proof.[5] Thus, Florida case law has consistently relied on a three-part test for analyzing such claims based on allegations that counsel failed to properly advise the defendant about plea offers by the state.[6] Courts in Florida have required a claimant to show that: (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced; (2) defendant would have accepted the plea offer but for the inadequate notice; and (3) acceptance of the state's plea offer would have resulted in a lesser sentence.[7] A facially sufficient claim of ineffective assistance in the plea process thus requires alleging that: (1) counsel acted deficiently; and (2) but for counsel's deficiency, the defendant would not have pleaded but would have gone to trial.[8] To show prejudice in a plea bargain case, the defendant must show only that

without the misadvice of counsel, there was a reasonable probability he or she would not have pleaded guilty and would have chosen to go to trial. [9]

A defendant must be sufficiently informed about a plea offer by the state so that he or she understands the consequences of the plea, and an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea. [10]

An attorney's obligation to advise his or her client of information crucial to making an informed decision concerning a plea is just as vital as not providing a client with misinformation concerning a plea. [11] Moreover, the Florida Supreme Court rejects any requirement that the defendant must prove that a trial court would have actually accepted the plea arrangement offered by the state but not conveyed to the defendant, because any finding on that issue would necessarily have to be predicated upon speculation. In essence, an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer. [12]

In determining whether a defendant, with effective assistance of counsel, would have accepted a plea bargain offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether defendant indicated he or she was amenable to negotiating a plea bargain. [13]

Illustrations:

Counsel's off-the-cuff factual proffer for first degree murder did not prejudice a defendant as an element of ineffective assistance where both he and counsel were well aware that the state possessed the necessary evidence to prove his commission of the murders, the state submitted a competing written factual proffer, which was more explicit in describing the offenses the defendant committed, and trial counsel offered their factual proffer in hope of softening some or all of the facts for purposes of the penalty phase. Moreover, trial counsel and defendant were well aware that the facts supported a kidnapping charge and conviction, so any prejudice the defendant allegedly suffered from his counsel's factual proffer was de minimis and would not have altered his decision to plead guilty to the offense of kidnapping, the trial court was exceptionally thorough in its colloquy with the defendant, and the trial counsel only submitted the competing factual proffer to soften the facts for purposes of the penalty phase. [14] In addition, an attorney's decision to obtain a 15-year plea based on his investigation of three attempted robbery charges, contrasted with multiple life sentences facing the defendant, was a reasonable strategic decision and not ineffective assistance, even though he did not investigate the other 27 charges pending against the defendant, where the investigation revealed the strength of the state's case and the consequences of a conviction on those charges alone. [15]

However, trial counsel's failure to advise a defendant that he was eligible for habitual felony offender enhanced sentencing prior to the state withdrawing its plea offer constituted ineffective assistance of counsel. [16]

CUMULATIVE SUPPLEMENT

Cases:

In the context of defendant having rejected a plea offer from the prosecution based on counsel's alleged failure to inform defendant the correct maximum length of sentence he faced if tried and convicted, the prejudice inquiry is whether defendant

has shown a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time, not whether he received the same sentence as what he was incorrectly advised. U.S.C.A. Const.Amend. 6. Gribble v. State, 120 So. 3d 153 (Fla. 4th DCA 2013).

Defendant could assert claim of ineffective assistance of counsel in connection with State's offer to resolve his motion to withdraw plea after sentencing; motion to withdraw plea was not a postconviction motion as to which no ineffectiveness claim could be brought, but a critical stage of the proceedings at which defendant was entitled to counsel and to effective assistance from that counsel. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.170(*l*). Pagan v. State, 110 So. 3d 3 (Fla. 2d DCA 2012).

Defendant who was convicted of aggravated battery on a pregnant victim, and sentenced as a Prison Release Reoffender (PRR) to 15 years' incarceration, failed to establish entitlement to postconviction relief on the ground that trial counsel was ineffective in failing to sufficiently advise defendant of the particulars of State's seven-year plea offer, in contrast to the consequences of rejecting the plea and accepting the jury's verdict; testimony at evidentiary hearing and transcript of the trial proceedings, where trial judge clearly informed defendant of the PRR sentence if the jury found him guilty, refuted defendant's claim. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.171(c)(2)(B). Plummer v. State, 95 So. 3d 463 (Fla. 1st DCA 2012).

Defendant's motion for postconviction relief stated claim of ineffective assistance of counsel, where defendant alleged that counsel failed to communicate a plea offer of ten years' imprisonment, that he would have accepted the plea had counsel so informed him, and that the plea would have resulted in a lesser sentence than the twenty years that were ultimately imposed; motion was not required to detail when the offer was made, who made it, and who he heard it from after the trial. Lopez v. State, 90 So. 3d 921 (Fla. 4th DCA 2012).

Defense counsel was not ineffective for failure to immediately advise defendant to accept plea offer involving a sentence of eight years, rather than researching whether Stop Turning Out Prisoners Act provision that might have required him to serve 85 percent of the sentence imposed would apply to the sentence under the plea offer, although State later rescinded the offer and defendant was sentenced to 15 years; counsel's inability to immediately provide perfect advice about the wisdom of accepting a plea offer, which resulted in the loss of what in hindsight turned out to have been a favorable plea offer, did not result in the type of prejudice necessary to establish a violation of the Sixth Amendment right to effective counsel. U.S.C.A. Const.Amend. 6. Hurt v. State, 82 So. 3d 1090 (Fla. 4th DCA 2012).

Counsel's inability to immediately provide perfect advice about the wisdom of accepting a plea offer, which results in the loss of what, in hindsight, turns out to have been a favorable plea offer, does not result in the type of prejudice necessary to establish a violation of the Sixth Amendment right to effective assistance of counsel. U.S.C.A. Const.Amend. 6. Hurt v. State, 82 So. 3d 1090 (Fla. 4th DCA 2012).

Defendant's counsel for plea bargain was ineffective in advising the defendant that convictions for both arson resulting in injury to another and second-degree arson did not violate Double Jeopardy Clause. U.S.C.A. Const.Amends. 5, 6; West's F.S.A. §§ 775.021(4), 806.01(2). Abbate v. State, 82 So. 3d 886 (Fla. 4th DCA 2011).

Any errors in plea colloquy were not prejudicial to defendant in prosecution for capital murder as required for relief on the basis of ineffective assistance of counsel, where the State provided a detailed factual basis for accepting pleas, the court conducted a thorough colloquy during which defendant indicated that he knew the import of his plea, and he voluntarily signed change of plea form. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.172(j). Griffin v. State, 114 So. 3d 890 (Fla. 2013).

Alleged premature ending of plea negotiations by trial counsel did not prejudice capital murder defendant, and thus was not ineffective assistance; defendant wavered between whether to accept a plea or reject a plea, which resulted in a decision to

reject a plea offer, as well as a decision to not pursue a possible plea offer by the state. U.S.C.A. Const.Amend. 6. Taylor v. State, 87 So. 3d 749 (Fla. 2012).

Counsel's failure to convey a client's acceptance of a plea offer to the State can constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6. Morris v. State, 50 So. 3d 696 (Fla. Dist. Ct. App. 5th Dist. 2010).

Trial attorney's failure to investigate a factual defense or a defense relying on the suppression of evidence, which results in the entry of an ill-advised plea of guilty, is a facially sufficient attack upon the conviction. U.S.C.A. Const.Amend. 6. MacKinnon v. State, 39 So. 3d 537 (Fla. Dist. Ct. App. 5th Dist. 2010).

Trial counsel's failure to advise defendant of statutory maximum sentence when discussing plea offer amounted to deficient performance, as element of ineffective assistance claim; information regarding full statutory maximum sentence was vital to informed decision regarding plea offer. U.S.C.A. Const.Amend. 6. Pennington v. State, 34 So. 3d 151 (Fla. Dist. Ct. App. 1st Dist. 2010).

[END OF SUPPLEMENT]

Footnotes

1 § 477.

2 Cottle v. State, 733 So. 2d 963 (Fla. 1999), citing Fla. R. Crim. P. 3.171(c)(2), (which mandates that counsel advise of "(A) all plea offers; and (B) all pertinent matters bearing on the choice of which plea to enter") Colon v. State, 907 So. 2d 1267 (Fla. Dist. Ct. App. 5th Dist. 2005).

3 Bolware v. State, 995 So. 2d 268 (Fla. 2008); State v. Rodriguez, 990 So. 2d 600 (Fla. Dist. Ct. App. 3d Dist. 2008).

4 Harris v. State, 974 So. 2d 1149 (Fla. Dist. Ct. App. 3d Dist. 2008); Hollander v. State, 920 So. 2d 204 (Fla. Dist. Ct. App. 4th Dist. 2006).

5 Cottle v. State, 733 So. 2d 963 (Fla. 1999).

6 Cottle v. State, 733 So. 2d 963 (Fla. 1999); Seymore v. State, 693 So. 2d 647 (Fla. Dist. Ct. App. 1st Dist. 1997); Lee v. State, 677 So. 2d 312 (Fla. Dist. Ct. App. 1st Dist. 1996); Hilligenn v. State, 660 So. 2d 361 (Fla. Dist. Ct. App. 2d Dist. 1995).

7 Cottle v. State, 733 So. 2d 963 (Fla. 1999); Dieudonne v. State, 993 So. 2d 640 (Fla. Dist. Ct. App. 4th Dist. 2008); State v. Rodriguez, 990 So. 2d 600 (Fla. Dist. Ct. App. 3d Dist. 2008); Jackson v. State, 987 So. 2d 233 (Fla. Dist. Ct. App. 4th Dist. 2008).

8 Borders v. State, 936 So. 2d 737 (Fla. Dist. Ct. App. 2d Dist. 2006).

9 Deck v. State, 985 So. 2d 1234 (Fla. Dist. Ct. App. 2d Dist. 2008).

10 Harris v. State, 974 So. 2d 1149 (Fla. Dist. Ct. App. 3d Dist. 2008); Gallant v. State, 898 So. 2d 1156 (Fla. Dist. Ct. App. 2d Dist. 2005).

11 Ruan v. State, 965 So. 2d 352 (Fla. Dist. Ct. App. 4th Dist. 2007); Colon v. State, 909 So. 2d 484 (Fla. Dist. Ct. App. 5th Dist. 2005).

12 Cottle v. State, 733 So. 2d 963 (Fla. 1999).

13 State v. Moses, 682 So. 2d 595 (Fla. Dist. Ct. App. 3d Dist. 1996).

14 Lynch v. State, 2008 WL 4809783 (Fla. 2008).

15 Ridel v. State, 990 So. 2d 581 (Fla. Dist. Ct. App. 3d Dist. 2008).

16 Revell v. State, 989 So. 2d 751 (Fla. Dist. Ct. App. 2d Dist. 2008).

End of Document

4th Clip

CLIP 1: Jury Selection

Propriety of time constraints

Ultimately:

Time Limits for Voir Dire-

1) **Must be reasonable/NOT arbitrary**
2) **Provided in advance to counsel (with sufficient/reasonable notice)**

Trial courts have considerable discretion in controlling the time allotted for voir dire (Roberts v. State, 937 So. 2d 781 (Fla. 2d DCA 2006).; Fredrick v. State, 832 So. 2d 245 (Fla. 5th DCA 2002).; Anderson v. State, 739 So. 2d 642 (Fla. 4th DCA 1999).; Wilson v. State, 676 So. 2d 1000 (Fla. 2d DCA 1996).)
No bright line rule to determine the limits that a trial court may impose on voir dire.

But may not impose arbitrary time limits. (Miller v. State, 785 So. 2d 662 (Fla. 3d DCA 2001).)

In reviewing the trial court's discretionary decision to limit the amount of time allotted for voir dire, appellate courts consider the *nature of the case* and the *reasonableness* of use of the time allotted. (Anderson v. State, 739 So. 2d 642 (Fla. 4th DCA1999).; Watson v. State, 693 So. 2d 69 (Fla. 2d DCA 1997).).

Trial court abuses its discretion when it unreasonably limits counsel's ability to conduct a meaningful voir dire. Mendez v. State, 898 So. 2d 1141 (Fla. 5th DCA 2005); Ferrer v. State, 718 So. 2d 822 (Fla. 4th DCA 1998).

Imposition of severe time constraints on counsel's voir dire examination of each prospective juror is unreasonable and an abuse of discretion. Francis v. State, 579 So. 2d 286 (Fla. 3d DCA 1991).

Counsel must be given reasonable notice of that limitation so that the attorneys can properly pace the timing of the voir dire examination. (Roberts v. State, 937 So. 2d 781 (Fla. 2d DCA 2006); Rodriguez v. State, 675 So. 2d 189 (Fla. 3d DCA. 1996).)

Timeliness of notification evaluated on a case-by-case basis. (Rodriguez v. State, 675 So. 2d 189 (Fla. 3d DCA. 1996)).

Examples:

- Unreasonable/Abuse of discretion to limit counsel's voir dire examinations of each potential juror to "one to three minutes," (White v. State, 717 So. 2d 1055 (Fla. 3d DCA 1998).) or to fewer than two minutes per juror in a case involving battery on a law enforcement officer and First Amendment issues. (O'Hara v. State, 642 So. 2d 592 (Fla. 4th DCA 1994).)

- Not abuse of discretion by allowing each side 30 minutes to question the prospective jurors, where: (1) the trial court informed the attorneys of the time limitation prior to commencement of voir dire; (2) the defendant's counsel made a tactical decision regarding what questions to ask during the examination; (3) there were no surprise or unanticipated replies; and (4) the proffered questions that the defense attorney would have asked in extended voir dire were either of minimal significance, covered by general jury instructions, or covered during the state's voir dire examination. (Watson v. State, 693 So. 2d 69 (Fla. 2d DCA 1997).)

5th Clip

Question to ask about Opening Statements:
What must a defendant prove in order to prevail on an ineffective assistance of counsel claim for the Defense failing to object during the Prosecution's opening?
-Think Stephens v. State (Fla. 2007) cited in McCoy v. State (Fla. 2013).

Opening Statements:
McCoy v. State, 113 So.3d 701 (Fla. 2013)
Defendant convicted of first degree murder and sentenced to death
-Post-conviction he challenged the use of the phrase "God given sense" in the ∏ opening statement. -This case cited *Stephens v. State,* 975 So.2d 405, 420 (Fla.2007), which said "To prevail on an ineffective assistance of counsel claim for failure to object to statements by the prosecution, a defendant "must first show that the comments were improper or objectionable and that there was no tactical reason for failing to object.
-Here, the Supreme Court of Florida in McCoy held that the phrase was not objectionable and that the Δ did not produce any case law showing that the phrase constituted reversible error AND failure of the Δ's attorney to object to the statement during trial did NOT prejudice the outcome of the trial, but rather it would have caused the jury to view the Δ negatively if he had objected to it.

Contradicting Statements in Opening and Closing:
Mendoza v. State, 87 So.3d 644 (Fla. 2011)
-Supreme Court of Florida held contradiction in the Δ's opening statement that one co-defendant was the shooter and closing arguments that the second co-defendant was the shooter was NOT ineffective assistance of counsel because the defense's theory of the case was that the defendant did not fire the shot.

Defense Opening:
Dillbeck v. State, 964 So.2d 95 (Fla. 2007)
-Defendant made ineffective assistance of counsel claim for trial counsel's reference of the crime as "brutal" and "terrible" during the opening statements in the guilt phrase of the trial.
-Trial counsel said,

> "That he was sure the State will do a very good job of convincing you that this was a "terrible, brutal crime. "The State, I'm sure, will show you in graphic detail the brutality of this crime, You will see some terrible photographs. You will hear some terrible details, but I think you'll soon see that the very brutality of this crime shows you what sort of state he was in. This wasn't some kind of calculated, planned act. It is the kind of brutality you will see in a frenzy, someone that's in a rage, someone who has simply lost control."

-In closing the trial counsel said,

> "This was "a terrible, terrible crime" and there **are** "**not** enough words to express the horrible nature of what he did. coming "back to the brutality, the intensity of the assault" noted that "they have some terrible pictures here in evidence," but

> the very intensity of the attack shows it was the kind of attack that would occur if the fellow was in a "frenzy, a rage." Trial counsel observed: "he's committed some terrible crimes here but clearly the State has not proven that it was a - premeditated killing."

-The postconviction court ruled that the defendant failed to prove both prongs of Strickland, because counsel did not concede to the HAC factor by describing the crime as brutal and that it was better to difficult confront issues then to ignore them.

-The Supreme Court of Florida affirmed the lower court. In addition, the Court ruled that counsel reasonably sought to soften the blow from the State by conceding that the crime was brutal.

Prosecution Opening:

Perez v. State, 919 So.2d 347 (Fla. 2005).

-Defendant was convicted of 1st degree murder, burglary with an assault or battery while armed with a dangerous weapon, and robbery with a deadly weapon and was sentenced to death.

-Prosecution made the following statement at trial:

> "One month later—we go to August 27, 2001. That was a Monday. That Monday night the defendant just after midnight which would be the morning of the 28th, drove up from Martin county where he lived and he went to Ms. Martin's house. He went there armed with a very small knife that he always carried and he went there, ladies and gentlemen, for two reasons."

-At trial, the Δ objected to the reference of "a very small knife that he always carried," as it was a major issue to guilt and the penalty phrase and thus prejudiced the Δ.

-Trial court overruled the objection and denied the motion for mistrial.

-Here in Perez, the court cited Breedlove v. State, 413 So.2d 1,8 (Fla. 1982), which held that "[w]ide latitude is permitted in arguing to a jury.... The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown."

-The Supreme Court of Florida ruled that Perez failed to show that the comments were misleading or made in bad faith.

-The Supreme Court of Florida ruled that the ∏ made the comments in good faith based on the expectation that they would establish it through evidence at trial.

-In addition, in the indictment it charged that in the course of committing the robbery, the Δ carried a firearm or other deadly weapon, to wit a knife; whether or not he carried a knife was relevant at trial.

-Supreme Court of Florida ruled the trial court did not abuse its discretion

Opening Statments

McCoy v. State, 113 So.3d 701 (Fla. 2013)

- Defendant convicted of first degree murder and sentenced to death
- -Post-conviction he challenged the use of the phrase "God given sense" in the ∏ opening statement. -This case cited *Stephens v. State,* 975 So.2d 405, 420 (Fla.2007), which said "To prevail on an ineffective assistance of counsel claim for failure to object to statements by the prosecution, a defendant "must first show that the comments were improper or objectionable and that there was no tactical reason for failing to object.
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"That he was sure the State will do a very good job of convincing you that this was a "terrible, brutal crime. The State, I'm sure, will show you in graphic detail the brutality of this crime, You will see some terrible photographs. You will hear some terrible details, but I think you'll soon see that the very brutality of this crime shows you what sort of state he was in. This wasn't some kind of calculated, planned act. It is the kind of brutality you will see in a frenzy, someone that's in a rage, someone who has simply lost control."

Dillbeck v. State, 964 So.2d 95 (Fla. 2007)

- -In closing the trial counsel said,
- "This was "a terrible, terrible crime" and there **are** "**not** enough words to express the horrible nature of what he did. coming "back to the brutality, the intensity of the assault" noted that "they have some terrible pictures here in evidence," but the very intensity of the attack shows it was the kind of attack that would occur if the fellow was in a "frenzy, a rage." Trial counsel observed: "he's committed some terrible crimes here but clearly the State has not proven that it was a -premeditated killing."

Dillbeck v. State, 964 So.2d 95 (Fla. 2007)

- -The postconviction court ruled that the defendant failed to prove both prongs of Strickland, because counsel did not concede to the HAC factor by describing the crime as brutal and that it was better to difficult confront issues then to ignore them.
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- -The Supreme Court of Florida affirmed the lower court. In addition, the Court ruled that counsel reasonably sought to soften the blow from the State by conceding that the crime was brutal.

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Perez v. State, 919 So.2d 347 (Fla. 2005)

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- -Trial court overruled the objection and denied the motion for mistrial.
- -Here in Perez, the court cited Breedlove v. State, 413 So.2d 1,8 (Fla. 1982), which held that "[w]ide latitude is permitted in arguing to a jury.... The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown."

Perez v. State, 919 So.2d 347 (Fla. 2005)

- -The Supreme Court of Florida ruled that Perez failed to show that the comments were misleading or made in bad faith.
- -The Supreme Court of Florida ruled that the ∏ made the comments in good faith based on the expectation that they would establish it through evidence at trial.
- -In addition, in the indictment it charged that in the course of committing the robbery, the Δ carried a firearm or other deadly weapon, to wit a knife; whether or not he carried a knife was relevant at trial.
- -Supreme Court of Florida ruled the trial court did not abuse its discretion

Question to ask about Opening Statements

- What must a defendant prove in order to prevail on an ineffective assistance of counsel claim for the Defense failing to object during the Prosecution's opening?
- -Think Stephens v. State (Fla. 2007) cited in McCoy v. State (Fla. 2013).

6th Clip

773 So.2d 1230
District Court of Appeal of Florida,
Third District.

Alexander MICHAELS, Appellant,
v.
The STATE of Florida, Appellee.

No. 3D00-917. | Dec. 13, 2000.

Attorney appealed from order of the Circuit Court, Dade County, Leslie B. Rothenberg, J., holding him in criminal contempt because he continued to make speaking objections after being told not to do so. The District Court of Appeal, Sorondo, J., held that trial court did not abuse its discretion in holding attorney in contempt.

Affirmed.

West Headnotes (1)

[1] Contempt
Misconduct as Officer of Court

Trial court did not abuse its discretion in holding defense attorney in criminal contempt, as trial court informed attorney that it would not allow speaking objections, attorney continued to make such objections, and, after court instructed attorney to show good cause why he should not be held in contempt, attorney, in explosive outburst, stated that he believed court was biased against his client and criminal defendants in general.

4 Cases that cite this headnote

Attorneys and Law Firms

***1230** Kenneth P. Speiller, Miami, for appellant.

Robert A. Butterworth, Attorney General, and Barbara A. Zappi, Assistant Attorney General, for appellee.

Before GODERICH and SORONDO, JJ., and NESBITT, Senior Judge.

Opinion

SORONDO, J.

Alexander Michaels appeals from the trial court's judgment and sentence for direct criminal contempt.

During the trial of Ulysses Sidney Morris, Michaels, his defense counsel, was admonished by the court on several occasions to refrain from making speaking objections. After several warnings, defense counsel again began voicing his objections and concerns in front of the jury. The jury was excused and the trial court instructed Michaels to show good cause why he should not be held in contempt of court for his behavior.

In an explosive outburst, Michaels stated that he believed the court was biased against his client and criminal defendants in general.[1] Michaels asserted that his ***1231** allegedly contumacious statements were in response to the court's question to him, which put him in the position of being embarrassed before the jury and was unfair.

The court found Michaels in direct criminal contempt, placed him on probation for six months, and ordered that he take six hours of continuing legal education in ethics, refrain from violating court rulings and act in a professional manner consistent with the Code of Professional Responsibility.

The trial judge had made her feelings known on the subject of speaking objections during the course of jury selection. At some point during voir dire examination it became necessary to examine certain jurors individually. Michaels was allowed to ask questions first. He was followed by the prosecutor. During one such examination Michaels asked for leave to ask additional questions after the prosecutor was finished. His request was denied and the following exchange between Michaels and the court occurred:

> MR. MICHAELS: Well, Judge, I am going to strongly object to this procedure. I am going to refuse from now on to ask questions first. I don't think that that is fair and I think that the state should be the one to ask the questions first and I come after. I feel I am being sandbagged here and I don't appreciate it.
>
> COURT: I think maybe we need to get some ground rules out of the way. **There will be no speaking objections**. If you wish to voice any objections you

need to do them side bar from now on. I will allow you to ask a follow-up question if you wish to do so and then we will address your concern after.

(Emphasis added). This exchange took place in the presence of the juror being questioned. Immediately after the juror was excused from the courtroom the judge returned to the subject:

COURT: Okay. Mr. Michaels, let's get this issue out of the way right now. **There will be absolutely and I mean absolutely no speaking objections.** You can either say yes or no or state your objection in two or three legal type words, but **there will be no speaking objections** and I will very strongly insist that you follow those rulings.

MR. MICHAELS: I assume you instruct everybody, not just me, right?

COURT: Everybody. I usually do it before the trial. I neglected to do so at my own parol (sic), obviously. **Usually the lawyers know you are not allowed to have speaking objections, but I always make a point to announce it before trial. But since I neglected to do so, I just want to make it clear right now, okay.**

MR. MICHAELS: Yes, Judge.

(Emphasis added). It is clear, therefore, that from the very beginning of the trial, even before the opening statements were delivered, the trial judge made it absolutely clear that she would not tolerate speaking objections. As the judge observed, all trial lawyers know that so-called speaking objections are improper, as they constitute nothing less than unauthorized communications with the jury. Such objections characteristically consist of impermissible editorials or comments, strategically made by unscrupulous lawyers to influence the jury. They are distinguishable from legitimate objections which simply state legal grounds that arguably preclude the introduction of the evidence at issue. Where an objection requires more than a simple statement of such legal grounds, experienced trial lawyers know they need to seek a side bar conference or ask the court to excuse the jury so that more thorough arguments can be made.[2]

***1232** Michaels argues that the comments for which he was held in contempt were not technically speaking "objections." This argument has no merit. In addition to the admonition concerning speaking objections, the trial judge warned Michaels repeatedly about his outbursts, his constant tendency to speak out of turn in the presence of the jury, and his refusal to lower his voice during side bar conferences. To suggest that the trial judge had only forbidden speaking "objections," and that the statements which resulted in the contempt adjudication were not covered by that order is a total distortion of what occurred below.

We review the trial court's order holding Michaels in direct criminal contempt under the abuse of discretion standard. *Thomas v. State*, 752 So.2d 679 (Fla. 1st DCA 2000); *Carnival Corp. v. Beverly*, 744 So.2d 489 (Fla. 1st DCA 1999); *Pompey v. Cochran*, 685 So.2d 1007 (Fla. 4th DCA 1997). Having thoroughly reviewed the transcript, we conclude that the trial judge did not abuse her discretion.

Affirmed.

Parallel Citations

25 Fla. L. Weekly D2826

Footnotes

1 Michaels' tirade, which followed the order to show cause, can only be characterized as a disgraceful personal assault on the integrity of the trial court. The judge, exhibiting the same remarkable patience she displayed during the rest of the proceeding, did not pursue an additional contempt citation, nor did she impose a jail sentence. Indeed, she clearly demonstrated the "care and circumspection" the Florida Supreme Court spoke of in *State v. Clemmons*, 150 So.2d 231 (Fla.1963), before holding this most obstreperous lawyer in contempt.

Because of his misconduct in this case, we refer attorney Alexander Michaels to the Florida Bar for disciplinary proceedings. We note that this is our second referral of this seemingly uncontrollable attorney. *See Quiñones v. State*, 766 So.2d 1165 (Fla. 3d DCA 2000).

2 Michaels advised the trial judge during the course of the trial that he has been a practicing criminal trial lawyer for over 15 years.

25 Fla. L. Weekly D2826

End of Document

7th Clip

Misrepresenting Anticipated Testimony to the Court

Courts have held that no ethical violation is more damaging to the legal profession and process than knowingly making misrepresentations to the court and therefore an attorney who "knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded from that process." Florida Bar v. Rightmyer, 616 So.2d 953, 955 (Fla.1993). citing Florida Bar v. Kravitz, 694 So.2d 725 (Fla.1997).

Section 4.6 of the Florida Bar's Standards for Imposing Lawyer Sanctions applies to cases where an attorney engages in fraud, deceit, or misrepresentation. Sanctions set out in the section vary between disbarment, suspension, public reprimand, or admonishment based on the gravity of the lawyer's deceit and the harm caused to the client as a result of the deceit.

The basic standards governing fraud on the court are set forth in Cox v. Burke, 706 So. 2d 43, 47 (Fla. 5th DCA 1998). Here, the court held that the requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989). Furthermore, the trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court. Kornblum v. Schneider, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

Generally Courts tend to impose harsh sanctions upon lawyers who have intentionally lied under oath, lied to the court, or forged documents. The Florida Bar v. Klausner, 721 So. 2d 720, 721 (Fla. 1998).

Sanctions may involve finding prosecutorial mistrial and reversing and remanding the case . Jackson v. State, 818 So.2d 539, 542 (Fla. 2d DCA 2002) (the court found prejudicial error and granted a mistrial due to the prosecutor's suggestion in opening statement that he would present evidence from the witness passenger that the defendant was concealing contraband during a traffic stop. However, the State did not call the passenger to testify nor did the officer testify about any statements made by the passenger); Maddox v. State, 827 So.2d 380, 381 (Fla. 3d DCA 2002) (the defendant was convicted of trespassing and petit theft and the court, citing Jackson, 818 So.2d at 542, reversed the conviction because the prosecutor prejudiced the defendant by alleging in opening that the defendant had made an incriminating statement to a police officer but the officer never testified); Mills v. State, 875 So. 2d 823 (Fla. 2d DCA 2004) (the Court reversed and remanded the lower court's ruling holding the state's failure to present a witness, after the prosecutor had extensively recited during opening statement the witness's anticipated testimony implicating the defendant warranted granting of mistrial in prosecution for first-degree murder, and home-invasion robbery because the anticipated testimony was never subjected to cross-examination by defense, and evaluation by jury.); Hayes v. State, 932 So. 2d 381, 382 (Fla. Dist. Ct. App. 2006) (the defendant was convicted of first-degree murder and his conviction was reversed and remanded due to prosecutorial mistrial because the state claimed during its opening that the defendant admitted his crime to a fellow inmate but the state

subsequently failed to present evidence to support that claim as the aforementioned inmate testified that he recalled no such conversation).

Alternatively sanctions could lead to the suspension of an attorney's license. Florida Bar v. Schramm, 668 So.2d 585 (Fla.1996)(imposing ninety-one-day suspension where attorney made false representations to judge, failed to properly represent client, failed to return fee paid by client, and failed to communicate with client); Florida Bar v. Kravitz, 694 So.2d 725 (Fla.1997)(imposing thirty-day suspension where attorney presented false evidence and made misrepresentations to client, opposing counsel, and court); The Florida Bar v. Klausner, 721 So. 2d 720 (Fla. 1998) (imposing a three-year suspension where attorney made misrepresentations to the court and forged signatures on documents presented to the court); The Florida Bar v. Lathe, 774 So. 2d 775 (Fla. 2000) (imposing ninety-one-day suspension where attorney made false representations to the judge on two occasions and for failure to pay costs in accordance with judge's order).

Sanctions may also involve a public reprimand in addition to the suspension of an attorney's license. The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989) (imposing a 30-day suspension in addition to a public reprimand on respondents who submitted a brief to the appellate court misrepresenting the facts of a case before the court and making extended argument based on the inaccurate facts).

8th Clip

766 So.2d 1010
Supreme Court of Florida.

Robert MURPHY and Technology Innovations International, Inc., Petitioners,
v.
INTERNATIONAL ROBOTIC SYSTEMS, INC., and Howard Hornsby, Respondents.

No. SC92837. | Aug. 17, 2000.

Civil action was brought for misrepresentation, breach of contract, and breach of fiduciary duty in connection with the production and marketing of low-profile, remote-controlled, unmanned marine vehicle, the assignment of two patents for vehicle, and the sale of assets of robotic systems corporation. The Circuit Court, Palm Beach County, Edward H. Fine, J., entered judgment on jury verdict in favor of defendants. Plaintiffs appealed. The District Court of Appeal, 710 So.2d 587, affirmed. Plaintiffs petitioned for review. After grant of review, the Supreme Court, Lewis, J., held that: (1) civil litigant may not seek relief in appellate court based on improper, but unobjected-to, closing argument, unless litigant has at least challenged such argument in trial court by way of motion for new trial, receding from *White Constr. Co. v. Dupont*, 455 So.2d 1026; *Tyus v. Apalachicola N. R.R. Co.*, 130 So.2d 580; *Seaboard Air Line R.R. Co. v. Strickland*, 88 So.2d 519; *Baggett v. Davis*, 124 Fla. 701, 169 So. 372; (2) closing argument may contain statement that witness is a liar provided that such characterization is supported by record, disapproving *King v. National Security Fire & Casualty Co.*, 656 So.2d 1335; (3) improper, but unobjected-to, closing argument must be, inter alia, harmful to obtain new trial, disapproving *Tremblay v. Santa Rosa County*, 688 So.2d 985 and *Bullock v. Branch*, 130 So.2d 74; (4) abuse of discretion standard of review applies to trial court's grant or denial of new trial based on unobjected-to closing argument, disapproving *Goutis v. Express Transport, Inc.*, 699 So.2d 757; *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So.2d 580; *Wasden v. Seaboard Coast Line R.R.*, 474 So.2d 825, *Eichelkraut v. Kash N' Karry Food Stores, Inc.*, 644 So.2d 90; *Sears Roebuck & Co. v. Jackson*, 433 So.2d 1319; and (5) trial court did not abuse its discretion in denying motion for new trial on basis of allegedly improper, but unobjected-to, closing argument.

Decision approved.

Pariente, J., concurred specially in result only with an opinion in which Anstead, J., concurred.

West Headnotes (13)

[1] Appeal and Error
Rulings as to Arguments and Conduct of Counsel

Civil litigant may not seek relief in appellate court based on improper, but unobjected-to, closing argument, unless litigant has at least challenged such argument in trial court by way of motion for new trial even if no objection was voiced during trial; receding from *White Constr. Co. v. Dupont*, 455 So.2d 1026; *Tyus v. Apalachicola N. R.R. Co.*, 130 So.2d 580; *Seaboard Air Line R.R. Co. v. Strickland*, 88 So.2d 519; *Baggett v. Davis*, 124 Fla. 701, 169 So. 372.

9 Cases that cite this headnote

[2] New Trial
Necessity of Objection and Exception at Trial

To receive new trial in civil case based on unobjected-to closing argument, a complaining party must establish that: (1) argument is improper; (2) argument is harmful; (3) argument is incurable; and (4) argument so damaged fairness of trial that public's interest in system of justice requires new trial; disapproving *Tremblay v. Santa Rosa County*, 688 So.2d 985; *Bullock v. Branch*, 130 So.2d 74.

23 Cases that cite this headnote

[3] Trial
Scope and Effect of Summing Up

Purpose of closing argument is to help jury understand issues in a case by applying evidence to law applicable to case.

8 Cases that cite this headnote

[4] Trial

Scope and Effect of Summing Up

Trial

Deductions or Inferences from Evidence

Attorneys should be afforded great latitude in presenting closing argument, but they must confine their argument to facts and evidence presented to jury and all logical deductions from facts and evidence.

5 Cases that cite this headnote

[5] Trial

Appeals to Sympathy or Prejudice

Closing argument must not be used to inflame minds and passions of jurors so that their verdict reflects an emotional response rather than logical analysis of evidence in light of applicable law.

4 Cases that cite this headnote

[6] Trial

Remarks Reflecting on Credibility of Witnesses

It is not improper for counsel to state during closing argument that a witness "lied" or is a "liar," provided such characterizations are supported by record; disapproving *King v. National Security Fire & Casualty Co.*, 656 So.2d 1335. West's F.S.A. Bar Rule 4-3.4.

6 Cases that cite this headnote

[7] Trial

Statements as to Facts, Comments, and Arguments

Counsel's use of personal pronoun "I" during closing argument is not, in and of itself, improper. West's F.S.A. Bar Rule 4-3.4.

[8] Trial

Statements as to Facts, Comments, and Arguments

Trial

Deductions or Inferences from Evidence

When determining whether counsel's use of personal pronoun "I" in closing argument is improper, judge must not place form over substance; it must be understood that counsel is required to analyze evidence and present reasonable interpretations and inferences based on evidence to jury. West's F.S.A. Bar Rule 4-3.4.

1 Cases that cite this headnote

[9] New Trial

Harmless Error

"Harmfulness" required to obtain new trial based on improper, but unobjected-to, closing argument in civil case carries requirement that comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of case by jury.

34 Cases that cite this headnote

[10] New Trial

Harmless Error

Extensiveness of objectionable material in closing argument is a factor to be considered in harmfulness analysis, on motion for new trial based on improper, but unobjected-to, closing argument in civil case.

8 Cases that cite this headnote

[11] New Trial

Order Granting or Refusing New Trial

When granting new trial based on unobjected-to closing argument in civil case, trial court must specifically identify improper arguments of counsel and actions of jury resulting from those arguments.

8 Cases that cite this headnote

[12] Appeal and Error

Misconduct of Party or Counsel

Abuse of discretion standard of review applies to review of trial court's grant or denial of new trial based on unobjected-to closing argument in civil case; disapproving *Goutis v. Express Transport, Inc.*, 699 So.2d 757; *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So.2d 580;

Wasden v. Seaboard Coast Line R.R., 474 So.2d 825, *Eichelkraut v. Kash N' Karry Food Stores, Inc.*, 644 So.2d 90; *Sears Roebuck & Co. v. Jackson*, 433 So.2d 1319.

3 Cases that cite this headnote

[13] **Trial**

Comments on Character or Conduct of Party

Trial

Sufficiency of Action in General

Trial court did not abuse its discretion in denying plaintiffs' motion for new trial on basis of allegedly improper, but unobjected-to, closing argument made by defense counsel, in action for misrepresentation and breach of contract involving the production and marketing of low-profile, remote-controlled, unmanned marine vehicle, the assignment of two patents for vehicle, and the sale of assets of robotic systems corporation; although portions of closing argument were indeed improper, especially counsel's repeated use of term "B.S. detector" and counsel's characterization of plaintiffs' case as cashing in on a "lottery ticket," a reasonable jurist could conclude that improper closing argument was not harmful, incurable, or of a character to so damage fairness of trial that public's interest in system of justice requires new trial.

39 Cases that cite this headnote

Attorneys and Law Firms

***1012** R. Stuart Huff and Mark L. Mallios, Coral Gables, Florida, for Petitioners.

David A. Jaynes, West Palm Beach, Florida, for Respondents.

Opinion

LEWIS, J.

We have for review *Murphy v. International Robotics Systems, Inc.*, 710 So.2d 587 (Fla. 4th DCA 1998), which expressly and directly conflicts with decisions from the First and Third District Courts of Appeal [1] regarding when relief may be granted in a civil case based upon improper, but unobjected-to, closing argument. We have jurisdiction. *See* Art. V, § 3(b)(3), Fla. Const. As explained more fully below, we hold that relief may not be granted in a civil case [2] based on improper, ***1013** but unobjected-to, closing argument unless such argument is first challenged and judicially evaluated in the trial court.

I. GENERAL FACTUAL BACKGROUND IN THE PRESENT CASE

During the mid-1980s, Robert Murphy (Murphy) and Howard Hornsby (Hornsby) developed a low-profile, remote-controlled, unmanned marine vehicle known as the OWL. Generally described, the OWL consists of a fiberglass hull, motor, and various electronic components, all formed around the base of a jet ski type personal watercraft. In 1988, Murphy and Hornsby, along with several other individuals, formed International Robotic Systems, Inc. (Robotic Systems I), a Florida corporation, in large part to conduct business relating to the development and marketing of the OWL. Murphy and Hornsby each owned forty percent of the stock in Robotic Systems I; Murphy became the president of the company and Hornsby its vice-president. By 1990, two patents had been issued to Murphy and Hornsby as co-inventors of the OWL, and they assigned those patents to Robotic Systems I.

During the late 1980s and early 1990s, Murphy and Hornsby attempted to attract business interest in the OWL, with a primary potential customer being the U.S. Navy. In addition to the U.S. Navy, private companies such as Boston Whaler and Israeli Aircraft Industries expressed varying interest in the product. Also during this time period, several business interests loaned funds to Robotic Systems I, including a New York financier who loaned $100,000 to the company, and International Commercial Development Company (ICDC), which loaned the company $125,000. To secure the $125,000 loan from ICDC, Robotic Systems I assigned the two patents on the OWL to ICDC as collateral. Robotic Systems I also obtained several other smaller loans during this time period.

By the end of 1991, the U.S. Navy had expressed an interest in purchasing a prototype OWL, but there were no guarantees of when, if ever, the Navy would actually make the purchase. During February 1992, Murphy and Hornsby were introduced to John Terry Carroll (Carroll), an employee and representative of United Technologies Optical Systems

(UTOS), a subsidiary of United Technologies Corporation (UTC). UTOS was not UTC's only subsidiary, as UTC was also the parent company of entities such as Pratt-Whitney; generally speaking, UTC was a large corporate entity with significant ties to the defense industry. Upon meeting with Murphy and Hornsby and viewing the OWL, Carroll expressed interest in the OWL's potential uses.

In April 1992, Carroll introduced Murphy and Hornsby to Peter Just (Just) and John Wood (Wood), officers of Laser Holdings, Ltd. (Laser), an Australian company with which UTC had a pre-existing business relationship. On April 12, 1992, Murphy, Hornsby, Just, and Wood met to discuss the sale of Robotic Systems I's assets to Laser. Carroll attended this meeting as well, acting in large part as moderator. At the end of the meeting, Murphy and Hornsby on behalf of Robotic Systems I, and Just and Wood on behalf of Laser, executed a "Memorandum of Understanding" (MOU). According to the terms of the MOU, Robotic Systems I agreed to sell its assets to Laser for $200,000, of which $25,000 would be payable on April 15, 1992, with the remaining $175,000 payable at closing. The assets to be transferred included, among other things, the two OWL patents, any future contract with the U.S. Navy, a prototype OWL, and the goodwill of Robotic Systems I, including its corporate name. The memorandum also specified that any sale was contingent upon (1) Robotic Systems I successfully procuring a contract from the U.S. Navy for the purchase of an OWL; and (2) Hornsby becoming an employee of the purchasing company.

After executing the MOU, but prior to closing, the parties entered into several additional agreements. Specifically, on ***1014** May 27, 1992, Laser entered into a "Consultancy Agreement" and a "Loan Agreement" with Robotics Systems I, and Laser also entered into a "Commission Agreement" with Hornsby and Murphy, individually. Under the terms of the "Consultancy Agreement," Robotic Systems I agreed to be a consultant to Laser for a period of five years for development of the business purchased from Robotic Systems I, and Laser agreed to pay a total consultant's fee of not less than $300,000 but not more than $400,000 during that five-year period. According to the "Loan Agreement," Laser agreed to lend $300,000 to Robotic Systems I for a five-year period at an interest rate of six percent, to be paid back in amounts to be agreed upon by the parties "from time to time." Finally, under the terms of the "Commission Agreement," Laser agreed to pay Murphy and Hornsby a commission of $5000 each for every OWL produced in the first twelve months following the date of execution of the agreement, and $750 for every OWL produced in the four years following that first twelve-month period. The cap on commissions payable to Murphy and Hornsby over the five-year period was $1,000,000 each.

The closing on the proposed transaction was held on July 24, 1992. Several weeks prior to that time, one of the conditions precedent to the proposed transaction had been fulfilled; namely, the U.S. Navy entered into a contract with Robotic Systems I for the purchase of a prototype OWL, with a sales price of approximately $449,000. Hornsby fulfilled the other condition precedent set forth in the MOU by agreeing at the closing to a five-year employment contract with the Australian interests, with a starting salary of $80,000 per year. In conjunction with the closing, Just and Wood formed a new Florida corporation, Justwood, Inc. (Justwood), to receive the assets of Robotic Systems I, including its corporate name. Additionally, all of Laser's rights under the previously executed agreements were transferred to Justwood, which adopted the name International Robotic Systems, Inc. (Robotic Systems II). At the same time, Robotic Systems I changed its name to Technology Innovations International, Inc. (Innovations), and Murphy remained with Innovations. Using the money obtained from the sale, Robotic Systems I satisfied all of its existing debts.

After the closing, Hornsby, as president of Robotic Systems II, began developing and building a new prototype OWL according to the specifications and requirements set forth in the contract with the U.S. Navy. Cost overruns occurred during this development and building process, and the OWL ultimately was delivered to the U.S. Navy behind schedule. During the same time period, Laser experienced financial difficulties and was placed into receivership in Australia. A $5000 commission check was sent to Murphy for the OWL produced for the U.S. Navy, and another $750 commission check was sent to him after another prototype demonstrator OWL was produced. The OWL built for the Navy and the demonstrator OWL were the only two OWLs fully produced in the three years following the closing of July 14, 1992.

II. PROCEEDINGS IN THE TRIAL COURT AND THE FOURTH DISTRICT

Murphy and Innovations (collectively "the Plaintiffs") filed suit against UTC/UTOS, Laser, Robotic Systems II, and Hornsby (collectively "the Defendants"). One of the Plaintiffs' primary allegations was that Carroll, the employee

and representative of UTOS/UTC, had misrepresented the extent of involvement that UTC/UTOS would have in producing and marketing the OWL after the deal with Laser was completed. More specifically, the Plaintiffs asserted that Carroll represented that the Australian interests were merely a conduit for UTC/UTOS to become involved with the OWL. The Plaintiffs claimed that if the major corporate presence of UTC/UTOS had supported the OWL, the ultimate financial and production ***1015** problems associated with the product would not have occurred.

The case proceeded to trial and, at the conclusion of the four-week trial, the jury found in favor of the Defendants [3] on all but one claim. Specifically, the jury returned a special interrogatory verdict form finding the following: (1) none of the Defendants either intentionally or negligently misrepresented material facts which the Plaintiffs reasonably relied upon and which caused monetary losses to the Plaintiffs; (2) none of the Defendants conspired with one another to intentionally misrepresent material facts which the Plaintiffs relied upon and which caused monetary losses to the Plaintiffs; (3) none of the Defendants breached the "Commission Agreement" with Murphy; (4) none of the Defendants breached the "Consultancy Agreement" with Innovations; [4] (5) Hornsby, individually, breached a fiduciary duty owed to the Plaintiffs, from which the Plaintiffs suffered damages in the amount of $1; (6) Hornsby, individually, did not receive and conceal moneys for himself which were corporate opportunities of Innovations; [5] (7) the assignment of the two OWL patents from Innovations to Robotic Systems II should not be held null and void due to the conduct of the Defendants; and (8) none of the Defendants were liable for punitive damages.

After the jury returned its verdict and the trial court had discharged the jury, the Plaintiffs filed a motion for new trial, seeking relief on several grounds. First, the Plaintiffs alleged that a special "reasonable reliance" jury instruction given by the trial court at the request of the Defendants erroneously stated the law and thus required a new trial. Second, the Plaintiffs argued that they were entitled to a new trial against the Defendants because counsel for UTC/UTOS [6] allegedly made numerous improper comments during closing argument, even though counsel for the Plaintiffs made no objections during such argument. Finally, the Plaintiffs alleged that the jury verdict was against the manifest weight of the evidence and was grossly inadequate as to the award of damages against Hornsby. After considering the parties' memoranda of law and conducting a hearing, the trial court entered an order summarily denying the Plaintiffs' motion for new trial, and the Plaintiffs appealed. [7]

On appeal, the Fourth District rejected the Plaintiffs' request for relief on the closing argument issue. [8] *See Murphy*, 710 So.2d at 587-91. In so doing, the court (1) disagreed with decisions from the First, ***1016** Third, and Fifth Districts [9] as to when relief may be granted in a civil case based upon improper, but unobjected-to, closing argument, *see id.* at 587-88; (2) stated that "we do not think improper, but unobjected-to, closing argument in a civil case is something which is so fundamental that there should be an exception to the rule requiring an objection," *id.* at 589; and (3) expressed that it did not think it was being inconsistent with precedent from this Court on the improper, but unobjected-to, closing argument issue. *See id.* at 590. The Plaintiffs petitioned this Court for review, and we granted review to resolve the conflict among Florida's District Courts of Appeal regarding the improper, but unobjected-to, closing argument issue. [10] Thus, it is within these complex and multiple contractual circumstances that required four weeks of trial for presentation to a jury that we consider the unobjected-to closing argument issue.

III. ANALYSIS OF THE CONFLICT ISSUE

A. GENERAL BACKGROUND

This Court has previously decided four civil cases involving the issue of improper, but unobjected-to, closing argument. *See White Constr. Co. v. Dupont*, 455 So.2d 1026 (Fla.1984); *Tyus v. Apalachicola N. R.R. Co.*, 130 So.2d 580 (Fla.1961); *Seaboard Air Line R.R. Co. v. Strickland*, 88 So.2d 519 (Fla.1956); *Baggett v. Davis*, 124 Fla. 701, 169 So. 372 (1936). As explained in more detail below, this Court recognized in those cases that, under certain circumstances, a civil litigant may obtain relief based on improper closing argument made by counsel for an opposing party, even though the litigant's own counsel failed to contemporaneously object to such improper argument. *See Dupont*, 455 So.2d at 1030; *Tyus*, 130 So.2d at 587-88; *Strickland*, 88 So.2d at 523-24; *Baggett*, 124 Fla. at 717, 169 So. at 379. Stated another way, this Court recognized an exception to the contemporaneous objection requirement in civil cases in the context of improper, but unobjected-to, closing argument. However, despite this Court's prior decisions, there has been

much recent debate regarding (1) whether an exception to the contemporaneous objection requirement should continue to exist in civil cases in this context; and (2) if such an exception continues to exist, what the appropriate standard for relief should be. This case affords the opportunity to address both the continuing validity of the exception and the appropriate standard for determining whether relief should be granted.

B. CONTINUING VALIDITY OF THE EXCEPTION

The contemporaneous objection requirement originated in the English legal system as a mechanism for preserving error for appellate review, and the requirement was carried forward and generally adopted in America. *See, e.g.*, Robert J. Martineau, *Considering New Issues On Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L.Rev. 1023, 1026 (1987). In Florida, "[j]ust like with any other trial error, lawyers have a duty to object to improper comments made during closing arguments." *Fravel v. Haughey*, 727 So.2d 1033, 1034 (Fla. 5th DCA 1999) (en banc). In *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n. 1 (3d Cir.1982), *vacated on other grounds*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), the United States Court of Appeals for the ***1017** Third Circuit stated that the reasons for the contemporaneous objection requirement:

> go 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: it 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.

In *Castor v. State*, 365 So.2d 701, 703 (Fla.1978), this Court similarly stated:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

While it is clear that this Court has previously recognized an exception to the contemporaneous objection requirement in civil cases in the context of improper, but unobjected-to, closing argument, there has been much recent debate regarding whether such an exception should continue to exist. For example, the Fourth District stated in *Murphy* that "we do not think improper, but unobjected-to, closing argument in a civil case is something which is so fundamental that there should be an exception to the rule requiring an objection." 710 So.2d at 589. Similarly, in *Walt Disney World Co. v. Blalock*, 640 So.2d 1156, 1159 (Fla. 5th DCA 1994) (Griffin, J., concurring in part and dissenting in part), Judge Griffin commented: "I have come to be of the view that a party who does not object to counsel's comments in closing should not be allowed to complain of those comments on appeal." Finally, in a recently published law review article, the author of the opinion below, Judge Klein, concluded that there should no longer be an exception to the contemporaneous objection requirement in civil cases in the context of improper, but unobjected-to, closing argument. *See* Larry A. Klein, *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?*, 26 Fla. St. U.L.Rev. 97, 98-126 (1998) [hereinafter Klein, *Baby with the Bath Water*]; *see also* Gary D. Fox, *Objectionable Closing Argument: Causes and Solutions*, 70 Fla. B.J. 43, 48 (Dec.1996) (proposing abolition of "the part of the fundamental error rule that allows a party to preserve error without objecting to its adversaries' closing argument"). In determining whether we should continue recognizing an exception to the contemporaneous objection requirement in civil cases in this context, we consider this Court's prior decisions addressing the issue, how courts in other jurisdictions have addressed the issue, and the competing policy concerns that must be considered.

1. THIS COURT'S PRIOR DECISIONS

The first of this Court's decisions in the civil context addressing improper, but unobjected-to, closing argument

was *Baggett*, in which the plaintiff sought recovery for injuries sustained in an automobile accident. *See* 124 Fla. at 704, 169 So. at 374. The jury found in favor of the plaintiff, and the defendant filed a motion for new trial; the trial court denied that motion, and the case proceeded for review in this Court. *See id.* at 706, 169 So. at 375.

Before this Court, the defendant asserted that numerous errors had occurred during trial, many of which related to the jury instructions given by the trial court, *see id.* at 709-13, 169 So. at 376-78, two of which related to the admission of evidence, *see id.* at 706-10, 169 So. at 375-76, and two of which related to several statements made ***1018** by plaintiff's counsel during closing argument.[11] *See id.* at 715-16, 169 So. at 378-79. After addressing the admission of evidence and jury instruction issues and finding two errors therein, *see id.* at 709-15, 169 So. at 376-78, this Court considered the statements made by plaintiff's counsel during closing argument. *See id.* at 714-17, 169 So. at 378-79.

The bill of exceptions filed by the defendant showed that the first allegedly improper statement made by plaintiff's counsel consisted of the following:

> Gentlemen of the Jury, in considering the amount of your verdict you need not stop to consider that it will cost Mr. Baggett, the defendant, because he will not be out anything, and that same will not cost him a cent, and that he will not be one cent richer or poorer; or words to that effect.

Id. The *Baggett* Court noted that the defendant did not object to this statement, nor had the trial court "of its own motion" admonished plaintiff's counsel or instructed the jury not to consider the statement. *See id.* at 715, 169 So. at 378. The defendant's bill of exceptions also set forth the nature of plaintiff's counsel's second allegedly improper statement:

> That the defendant if a verdict was found against him had a right to file a motion for a new trial, and upon the hearing of which the trial judge would determine whether the verdict should stand or fall, and that thereafter if the trial judge held that the verdict should stand the defendant had available the right of appeal by writ of error to the Supreme Court of Florida where the legal errors in the proceedings might be reconsidered and readjudged, and that thereafter it would be necessary for the plaintiff to sue out an execution; or words to that effect.

Id. at 716, 169 So. at 378. The *Baggett* Court noted that defense counsel objected to this second statement and that the trial court "immediately stopped counsel for plaintiff and stated to the jury that this statement should not be considered." *Id.*

In analyzing the second, objected-to statement, this Court determined that the statement was improper but that the trial court corrected any error by immediately cautioning the jury to disregard the statement. *See id.* In analyzing the unobjected-to statement, the *Baggett* Court first reiterated that a party should state the grounds for objection to improper argument. *See id.* The Court then quoted from its prior decision in the criminal case of *Akin v. State*, 86 Fla. 564, 572-73, 98 So. 609, 612 (1923), in which the Court stated:

> The law seems to be well settled that it is the duty of the trial judge, whether requested or not, to check improper remarks of counsel to the jury, and to seek by proper instructions to the jury to remove any prejudicial effect they may be calculated to have against the opposite party. A verdict will not be set aside by an appellate court because of such remarks or because of any omission of the judge to perform his duty in the matter, unless objection be made at the time of their utterance. This rule is subject to the exception that, if the improper remarks are of such a character that neither rebuke nor retraction may entirely destroy their sinister influence, in which event a new trial should be awarded regardless of the want of objection or exception.

***1019** *See, Baggett*, 124 Fla. at 716-17, 169 So. at 379. The *Baggett* Court found that the unobjected-to statement made by plaintiff's counsel during closing argument "was similar in its probable effect upon the jury to the first remark of counsel objected to in ... Akin v. State," and then, after addressing several other issues, reversed the trial court's judgment "for the errors pointed out herein." *Id.* at 717-18, 169 So. at

379. On the face of the *Baggett* opinion, however, it is not absolutely clear whether the unobjected-to statement made by plaintiff's counsel during closing argument was among the multiple "errors" for which this Court reversed due to the reliance upon *Akin.* To understand the principles, therefore, we must look to *Akin* for guidance.

In *Akin,* the defendant appealed to this Court after being convicted of forgery, arguing that numerous errors had occurred during his trial. *See* 86 Fla. at 566-72, 98 So. at 610-12. After agreeing with the defendant that numerous errors occurred concerning the admission and exclusion of certain evidence, *see id.,* the *Akin* Court addressed the propriety of various statements made by the prosecutor during closing argument, an issue that the defendant had raised in a motion for new trial. [12] *See id.* at 572-73, 98 So. at 612. The first statement made by the prosecutor during closing argument in *Akin,* to which the *Baggett* Court analogized the unobjected-to statement made by plaintiff's counsel in that case, consisted of the following:

> (1) "This defendant has other indictments pending against him in connection with these transactions. I do not intend to try the other cases, and it is up to you as to whether you will let this man go scot free and say that he has not committed any wrong. If he is convicted he would probably only have to pay a small fine, and it is in the power of the court to fine him not more than 5 cents, if he wanted to."
>
> *Akin,* 86 Fla. at 571, 98 So. at 612. The defendant also challenged three other statements made by the prosecutor during closing argument. *See id.* In analyzing all of the statements made by the prosecutor, the *Akin* Court used the language quoted in *Baggett:* in short, that a timely objection to improper closing argument is required before a new trial may be granted based on such argument unless "the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence." *Akin,* 86 Fla. at 572-73, 98 So. at 612. The *Akin* Court determined that the prosecutor's first statement during closing argument was both a misstatement of the law and had no basis in the record, and that the other statements made by the prosecutor were also improper. *See id.* at 572, 98 So. at 612. However, the *Akin* Court stated the following regarding all of the prosecutor's statements:

> > In the case at bar no attempt seems to have been made to check the improper remarks of the state attorney by the trial court, and they were not properly excepted to by the defendant, *nor does it fully appear that they came within the exception to the rule as above announced.* It is proper to state, however, in addition to what has already been said in this connection, that these remarks have no basis in the record, should never be indulged in trial courts, and *would ordinarily be ground for reversal.*
>
> *Id.* at 573, 98 So. at 612 (emphasis added). The *Akin* Court reversed and remanded for a new trial, *see id.* at 574, 98 So. at 613, but, based on the language quoted and emphasized above, it is clear that the Court did not reverse based on the prosecutor's improper statements during closing argument. Concomitantly, by analogizing the unobjected-to improper statement made by plaintiff's counsel in *Baggett* with the prosecutor's first statement in *Akin,* it appears that the *Baggett* Court may not ***1020** have counted plaintiff's counsel's improper, but unobjected-to, statement among the errors for which it reversed. [13]

Twenty years after *Baggett,* this Court decided *Strickland,* which involved an employee suing a railroad company by which he was employed to recover for personal injuries he sustained while on the job. *See* 88 So.2d at 520-21. [14] After the plaintiff prevailed in the trial court, the defendant appealed to this Court, claiming that several errors were made during the trial. [15] *See id.* at 521. Specifically, the defendant claimed on appeal that (1) the trial court erred in admitting several letters into evidence; and (2) various statements made by plaintiff's counsel during examination of witnesses and closing argument-concerning those letters and other matters-were so prejudicial as to warrant a new trial. *See id.* Several of the letters showed that the railroad's general counsel and its doctor derived "amusement" and engaged in "hearty laughter" after receiving a report from a doctor who had examined the plaintiff. *See id.* at 520-21. After reviewing the content of the letters, this Court determined that "[t]here was no foundation in the evidence for admitting the letters and it was error to admit them over objection of defendant." *See id.* at 521. The Court then proceeded to review the various comments made by plaintiff's counsel throughout the trial. *See id.* at 522-23.

First, the Court reviewed comments made by plaintiff's counsel while questioning one of the plaintiff's witnesses. *See id.* at 521-22. In short, counsel's comments during questioning

stressed the "amusement" referred to in several of the letters mentioned above, obviously attempting to elicit testimony from the witness that the plaintiff's injuries were nothing to laugh about. *See id.* The Court noted that defense counsel objected to many of the comments, with the trial court sustaining some of the objections and issuing a "mild rebuke" to plaintiff's counsel in several instances. *See id.* at 523. The Court then considered various comments made by plaintiff's counsel during closing argument-relating to the letters-in which counsel expressed that he could envision the railroad's general counsel and doctor sitting in their office "laughing," feet on their desks, saying," 'Isn't this a big joke? Strickland has hurt his back, and he is having trouble with it.' " *Id.* at 522. Plaintiff's counsel argued that the matter was not a joke and that he would "like to wipe that smile off [general counsel's] face." *Id.* Finally, the Court considered comments made by plaintiff's counsel during closing argument related to a demonstration the jury had seen at the railroad yard that attempted to recreate the plaintiff's working conditions when he was injured. *See id.* at 522-23. Counsel repeatedly injected his personal observations about the demonstration, ultimately stating that there was no doubt in his mind that the railroad was negligent. *See id.* at 523. Counsel ended this portion of the argument by commenting that "I think in this case [the defendant] has pulled every sly trick in the books." *Id.*

***1021** After finding that defense counsel raised no objections during closing argument by plaintiff's counsel, this Court stated:

> While we are committed to the rule that in the ordinary case, unless timely objections to counsel's prejudicial remarks are made, this court will not reverse the judgment on appeal, however, this ruling does not mean that if prejudicial conduct of that character in its collective impact of numerous incidents, as in this case, 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, this court will not afford redress. In this state of the record, even though the [letters were] admissible, [16] the prejudicial remarks of counsel, including the statements made in argument amounting to testimony in the case, require a new trial. Courts are conscious of the fact that without partisan zeal for the cause of this client, counsel in many instances could have little success in properly representing litigants in sharply contested cases, but his conduct during the cause must always be so guarded that it will not impair or thwart the orderly processes of a fair consideration and determination of the cause by the jury.

Id. at 523 (footnote added). The *Strickland* Court reversed and remanded for a new trial, closing with the following comment: "It is the responsibility of the trial court to protect litigants against such interference by counsel with the orderly administration of justice and the protection of the right of the litigant to a verdict 'uninfluenced by the appeals of counsel to passion or prejudice.' " *Id.* at 524.

Five years after deciding *Strickland*, this Court decided *Tyus*, in which the plaintiff sought recovery due to the death of her husband resulting from a collision with one of the defendant's trains. *See* 130 So.2d at 582. The case proceeded to trial, and a jury found in favor of the plaintiff. *See id.* The trial court entered judgment in favor of the plaintiff after denying the defendant's motion for new trial, and the defendant appealed to the First District. *See id.* at 582, 588.

On appeal, the First District determined that the evidence presented was insufficient to warrant submission to the jury and reversed with directions to enter judgment in favor of the defendant. *See id.* at 582; *see also Apalachicola Northern Railroad Co. v. Tyus*, 114 So.2d 33, 35-37 (Fla. 1st DCA 1959), *quashed*, 130 So.2d 580 (Fla.1961). In addition, the First District concluded that plaintiff's counsel had made improper statements during closing argument which, standing alone, constituted grounds for reversal "notwithstanding the effort of the trial court to remove their effect by instructing the jury to disregard them." *Id.* at 37. In denying a motion for rehearing, the First District set forth the statements made by plaintiff's counsel which the court held to be reversible error:

> "It would have cost them very little to have put some kind of signals there so that the man, when he was going across that track, would have had knowledge of the fact that the train was coming out from this blinding end of the railroad;

> but they didn't value the life of somebody crossing that track enough to do it. * * *
>
> "In other words, what is another man unless he can be some gain to that corporation, knowing its enterprise? What is a mere human being, dead or alive, unless he can contribute something to the fortune and future of the Apalachicola Northern Railroad?"

Id. at 38.

This Court accepted jurisdiction in the case to resolve a conflict regarding the sufficiency of the evidence issue. *See Tyus*, 130 So.2d at 582-83. After analyzing that issue, this Court proceeded to ***1022** disagree with the First District and held that there was sufficient evidence to submit the case to the jury for determination. *See id.* at 586-87. This Court's view also differed from that of the First District regarding whether plaintiff's counsel's closing argument statements constituted grounds for reversal. *See id.* at 587. This Court noted that (1) defense counsel failed to object to the improper statements quoted in the First District's opinion; and (2) the trial court sustained objections to other improper statements and charged the jury to disregard such statements. *See id.* The *Tyus* Court reiterated the standard for reviewing unobjected-to improper statements by counsel set forth in *Strickland, see id.*, and also referred to *Baggett. See id.* at 587 n. 10. Further, the *Tyus* Court clarified the term "pervades" as used in the *Strickland* standard, finding that "in order to employ the exception to the general rule where no objections are made to alleged prejudicial remarks or conduct, such remarks or conduct need not begin at the outset of a trial and continue intermittently to its conclusion." *Id.* at 587. In declining to reverse for a new trial, the *Tyus* Court closed with the following remarks:

> We believe that the charge given in this case by the able circuit judge was sufficient to alleviate any harm to the defendant which might otherwise have existed by virtue of the alleged prejudicial remarks made by counsel for the petitioner only in his closing argument.
>
> We are of the opinion that when the charge delivered by the trial judge is considered together with the fact that respondent failed to object to the alleged prejudicial remarks relied on by the District Court of Appeal as the basis for its holding on this issue, coupled with the fact that the alleged "prejudicial conduct" took place only during petitioner's closing argument and was not so extensive that its influence pervaded the trial, it is crystal clear this case should not have been reversed even for a new trial.
>
> Moreover, 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.
>
> No useful purpose would be served by submitting the factual issues in this case to a second jury for a retrial thereof because we find that such issues were fairly considered and determined by the jury....

Id. at 588. [17]

The last civil case in which this Court addressed improper, but unobjected-to, conduct by counsel during closing argument was *Dupont.* In that case, the subject of the litigation was an accident that occurred at a mining site. *See Dupont*, 455 So.2d at 1027. At the conclusion of the trial, the jury awarded the plaintiffs both compensatory and punitive damages. *See id.* at 1027-28. The defendants filed a motion for new trial raising several claims for reversal, including a claim that plaintiffs' counsel made inflammatory statements during closing argument. *See id.* at 1028. The trial court denied the motion ***1023** for new trial, and the defendants appealed. *See id.*

On appeal, the First District affirmed the trial court's ruling on all but one basis, and the defendants sought review before this Court. *See id.* This Court accepted review to resolve a conflict regarding the admissibility of evidence relating to post-accident repairs, *see id.* at 1027, 1029, but proceeded to resolve several other issues. *See id.* at 1028-30. Specifically, this Court found that punitive damages should not have been assessed against the defendants, *see id.* at 1029, and determined that several statements made by plaintiffs' counsel during closing argument did not constitute a basis for reversal. *See id.* at 1030. In resolving the closing argument issue, this Court stated the following:

> Petitioners argue that some of the comments made by respondent's counsel during closing argument were improper and prejudicial. These comments concerned the differences in race and economic standing

> between the two parties, among other things. Some latitude is permitted when arguing the amount of "smart money" to punish defendants. *See, e.g., Wackenhut Corp. v. Canty,* 359 So.2d 430 (Fla.1978); *Tate v. Gray,* 292 So.2d 618 (Fla. 2d DCA 1974); *Dixie-Bell Oil Co. v. Gold,* 275 So.2d 19 (Fla. 3d DCA 1973). However, since in today's decision we hold that the issue of punitive damages was improperly submitted to the jury, it was error for the trial judge to allow these comments. In any event, we hold that these comments do not amount to fundamental error, and therefore, they cannot form the basis for a new trial on appeal, since there was no timely and proper objection made by defense counsel. *Tyus v. Apalachicola Northern Railroad [Co.],* 130 So.2d 580, 587 (Fla.1961); *Bishop v. Watson,* 367 So.2d 1073 (Fla. 3d DCA 1979).

Dupont, 455 So.2d at 1030.

After analyzing this Court's decisions in *Baggett, Strickland, Tyus,* and *Dupont,* several matters are clear. First, this Court has recognized that a trial judge is in the best position to determine both the propriety of counsel's closing argument and any possible prejudice resulting from any improper argument. Second, this Court has recognized that a trial judge has a duty to prevent improper closing argument from prejudicing the jury. [18] Third, it is clear that in all but the *Strickland* case, the party seeking relief on the basis of improper, but unobjected-to, closing argument initially sought relief on that basis by filing a motion for new trial in the trial court. Finally, it is also clear that this Court's overarching concern in allowing an exception to the contemporaneous objection requirement in civil cases in the context of improper, but unobjected-to, closing argument is that a party should not be deprived of a fair trial and due process based on such improper argument and that public confidence in the system of justice be maintained. With these observations from prior decisions of this Court in mind, we now review how courts in other jurisdictions have addressed the issue of improper, but unobjected-to, closing argument in civil cases.

2. DECISIONS FROM OTHER JURISDICTIONS

In the decision below, the Fourth District observed that other courts in this country do not allow issues concerning improper argument to be raised for the first time on appeal in civil cases. *See Murphy,* 710 So.2d at 591; *see also Fravel,* 727 So.2d at 1036 (citing *Murphy* for similar proposition); Klein, *Baby with the Bath* ***1024** *Water,* 26 Fla. St. U.L.Rev. at 114 (stating that "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"). Therefore, we consider the jurisprudence from other jurisdictions to assist in the formulation of a just and workable framework, and our research indicates that courts in other jurisdictions have addressed the issue. We now discuss the decisions of our sister courts. [19]

a. FEDERAL COURTS

Many of the federal appellate courts have taken similar approaches in addressing the issue of improper, but unobjected-to, closing argument. Illustrative is *Smith v. Kmart Corp.,* 177 F.3d 19, 24-26 (1st Cir.1999), in which the First Circuit determined that the defendant could seek a new trial based on improper statements made by plaintiffs' counsel during closing argument, even though defense counsel failed to object to such argument and failed to address such argument in a motion for new trial filed in the trial court. The First Circuit found that even in the absence of a contemporaneous objection to the allegedly improper argument, an appellate court may conduct a "plain error" review of the improper argument. *See id.* at 25-26. The Second, Fifth, Sixth, Eight, Ninth, and Eleventh Circuits have taken approaches similar to that of the First Circuit. *See, e.g., Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 51 (2d Cir.1998) (finding that an appellate court may reverse for a new trial in a civil case based on improper, but unobjected-to, closing argument only for plain error); *Strickland v. Owens Corning,* 142 F.3d 353, 358-59 (6th Cir.1998) (recognizing exception to contemporaneous objection requirement in civil case where conduct of counsel is outrageous); *Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc.,* 984 F.2d 1118, 1128-29 (11th Cir.1993) (finding that improper, but unobjected-to, closing argument in a civil case may be reviewed by appellate court only for plain error); *Manning v. Lunda Constr. Co.,* 953 F.2d 1090, 1092-93 (8th Cir.1992) (quoting *Thomure v. Truck Ins. Exch.,* 781 F.2d 141, 143

(8th Cir.1986), for the proposition that "[w]hen statements in a closing argument are not objected to at trial, we may only review them on a plain error standard"); *Kaiser Steel Corp. v. Frank Coluccio Constr. Co.*, 785 F.2d 656, 658 (9th Cir.1986) (recognizing "high threshold" party must meet where no objection made to improper closing argument; finding no "fundamental error"); *Rojas v. Richardson*, 703 F.2d 186, 190 (5th Cir.) (reviewing improper, unobjected-to closing argument in a civil case for plain error and finding that argument rose to the level of plain error), *modified on rehearing*, 713 F.2d 116 (5th Cir.1983) (reversing earlier plain error finding based on supplemental record information). Based on these decisions, it is clear that many federal appellate courts have recognized an exception to the contemporaneous objection requirement in civil cases in this context. However, those courts have seldom granted relief in cases where counsel failed to contemporaneously object to improper argument. *See, e.g., Smith*, 177 F.3d at 26-28 (stating that "[p]lain error is a 'rare species in civil litigation,' encompassing only those errors that reach the 'pinnacle of fault' " and finding that plaintiffs' counsel's improper, but unobjected-to, closing argument did not warrant reversal for a new trial).

b. STATE COURTS

State courts have taken more varied approaches than the federal appellate courts in addressing the issue of improper, but unobjected-to, closing argument in civil cases. Some state courts have created a bright-line rule: if counsel fails to timely object to improper closing argument made by opposing counsel, then such argument cannot form the basis for a new trial. *See, e.g.,* ***1025** *Copeland v. City of Yuma*, 160 Ariz. 307, 772 P.2d 1160, 1162-63 (App.1989); *Kempner v. Schulte*, 318 Ark. 433, 885 S.W.2d 892, 894 (1994); *Rego Co. v. McKown-Katy*, 801 P.2d 536, 540 (Colo.1990); *Whitley v. Gwinnett County*, 221 Ga.App. 18, 470 S.E.2d 724, 730 (1996); *Cooper v. United Southern Assurance Co.*, 718 So.2d 1029, 1037-39 (La.Ct.App.1998); *cf. Johnson v. Emerson*, 103 Idaho 350, 647 P.2d 806 (App.1982) (finding that exception to improper closing argument is timely if made before case is submitted to the jury); *Siler v. City of Kansas City*, 211 Kan. 258, 505 P.2d 765, 766 (1973) (finding that improper closing argument was not available as basis for reversing judgment where counsel for the party seeking relief did not object, request a curative instruction, or move for a mistrial based on such improper argument). Other state courts have allowed parties to seek relief based on improper closing argument, even in the absence of a timely objection, although the standards for obtaining relief have varied significantly. *See, e.g., Hill v. Sherwood*, 488 So.2d 1357 (Ala.1986) (relief warranted only "where counsel's remarks were so grossly improper and highly prejudicial as to be beyond corrective action by the trial court") (quoted source omitted); *Rizzo Pool Co. v. Del Grosso*, 232 Conn. 666, 657 A.2d 1087, 1097 (1995) (relief warranted only where party can show it is "necessary to remedy a manifest injustice"); *Medical Center of Delaware, Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del.1995) (relief warranted only where improper remarks amount to "plain error"); *Zoerner v. Iwan*, 250 Ill.App.3d 576, 189 Ill.Dec. 191, 619 N.E.2d 892, 899-900 (1993) (stating that "despite the absence of an objection, a reviewing court may consider claims of improper statements during closing argument to the extent such statements prevented a fair trial"); *Miller v. Szelenyi*, 546 A.2d 1013, 1018 (Me.1988) (reviewing unobjected-to closing argument only for "obvious error"); *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 330 N.W.2d 638, 641-42 (1982) ("Where improper conduct by one or both parties influences the outcome of a trial, an appellate court may reverse although the appellant's attorney did not seek to cure the error."); *Molkenbur v. Hart*, 411 N.W.2d 249, 254 (Minn.Ct.App.1987) (relief warranted only where trial court should have stepped in, sua sponte, and given curative instructions); *Nisivoccia v. Ademhill Assocs.*, 286 N.J.Super. 419, 669 A.2d 822, 825 (App.Div.1996) (reviewing unobjected-to closing argument only for "plain error"); *City of Bellevue v. Kravik*, 69 Wash.App. 735, 850 P.2d 559, 564 (1993) ("Absent an objection to counsel's remarks, the issue of misconduct cannot be raised on appeal unless the misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct."). Finally, several state courts have held that a party may not seek relief in an appellate court based on improper, but unobjected-to, closing argument unless such argument is first brought to the attention of the trial court by way of a post-trial motion. *See, e.g., Dial v. Niggel Assocs. Inc.*, 333 S.C. 253, 509 S.E.2d 269, 271 (1998); *Austin v. Shampine*, 948 S.W.2d 900, 906 (Tex.Ct.App.1997). The varied approaches taken by our sister courts in addressing a common issue show that there are substantial policy concerns on both sides of the debate regarding whether there should be an exception to the contemporaneous objection requirement in civil cases in this context. We now consider those policy concerns.

3. POLICY CONCERNS

In *Fravel*, 727 So.2d at 1038-39 (Cobb, J., concurring specially), Judge Cobb succinctly summarized the focus of the competing policy concerns regarding this subject when he stated:

> The basic conflict is exemplified by the clash between the opinion of Judge Schwartz in *Borden, Inc. v. Young*, 479 So.2d 850 (Fla. 3d DCA 1985), *rev. denied*, 488 So.2d 832 (Fla.1986), and that of Judge Klein in *Murphy*, and derives from a difference in focus: the former is primarily concerned with correcting reprehensible ***1026** attorney misconduct during closing argument; the latter with the proper preservation of trial error and appellate predictability. Formidable arguments are available on both sides of this issue....

In *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099, 1103 (1997), the Supreme Court of Ohio used similar language while addressing whether the "plain error" doctrine should apply in civil cases: "Reviewing courts desire to see justice done; they also appreciate the importance of consistent application of procedural rules which promote expeditious and uniform resolution of disputes in our adversary system of litigation." We must consider the various policy concerns summarized in *Fravel* and *Goldfuss.*

Several policy concerns weigh against an exception to the contemporaneous objection requirement under the circumstances of improper arguments. First, if counsel contemporaneously objects to improper closing argument, such objection can deter opposing counsel from making further improper argument, thus preventing improper argument from becoming cumulative. Second, requiring a contemporaneous objection prevents counsel from engaging in "sandbagging" tactics, whereby counsel may intentionally refrain from objecting to improper closing argument, hoping to prevail despite such argument, and then seek relief based on the unobjected-to argument in the event that the desired outcome in the case is not achieved. *See, e.g., Lowe Invest. Corp. v. Clemente*, 685 So.2d 84, 85 (Fla. 2d DCA 1996) ("Trial counsel simply cannot allow error to occur without objection, hope they will win in spite of the error, and be confident of a new trial when the trial court has not been afforded an opportunity to cure the error. The cases are legion that warn trial counsel they cannot have their cake and eat it too."). Relatedly, precluding relief absent a contemporaneous objection accounts for the possibility that counsel may, as a tactical decision, refrain from objecting to opposing counsel's improper argument based on the belief that such improper argument actually hurts opposing counsel's rapport with the jury. *Cf. Nelson v. Reliance Ins. Co.*, 368 So.2d 361, 362 (Fla. 4th DCA 1978). Also, requiring a contemporaneous objection provides the trial judge, who is in the best position to evaluate the propriety and possible impact of allegedly improper closing argument, with the optimal opportunity to stop such argument when it is made. Finally, requiring a contemporaneous objection helps prevent confusion that can stem from appellate courts making "cold record" decisions regarding improper closing argument. *See, e.g.*, Klein, *Baby with the Bath Water*, 26 Fla. St. U.L.Rev. at 109-15.

Juxtaposed against the policy concerns just discussed is the overarching concern that a litigant receive a fair trial and that our system operate so as to deserve public trust and confidence. Indeed, the concern that civil litigants receive a fair trial undoubtedly was this Court's primary concern in recognizing an exception to the contemporaneous objection requirement in *Baggett*, *Strickland*, *Tyus*, and *Dupont.* However, as evidenced by the present case, Florida's courts have had difficulty balancing the right to a fair trial with the competing policy concerns discussed above. We now attempt to strike such a balance. The policy considerations favoring a bright-line rule requiring an objection are, most assuredly, attractive. However, we believe an escape valve with a very narrowly defined parameter and of extremely limited application is essential to maintain public trust in our jury trial system. Additionally, the manner in which review of the issue is conducted needs limitation.

4. CONCLUSION

[1] After considering this Court's prior decisions, the analysis of each of our District Courts of Appeal, the decisions of courts in other jurisdictions, as well as the policy concerns discussed above, we find that the time has come to restate the approach to be taken regarding the issue ***1027** of improper, but unobjected-to, closing argument in civil cases. It has become increasingly clear that the problem is not so much whether an exception exists, but, on the contrary, the difficulty has been generated by a lack of

appellate uniformity and a failure at the appellate level to apply a very narrow and limited parameter of "fundamental error." Accordingly, we now hold that a civil litigant may not seek relief in an appellate court based on improper, but unobjected-to, closing argument, unless the litigant has at least challenged such argument in the trial court by way of a motion for new trial even if no objection was voiced during trial. This approach is similar to that taken by our sister courts in South Carolina and Texas, *see Dial,* 509 S.E.2d at 271; *Austin,* 948 S.W.2d at 906, and we find that such approach adequately promotes the need for procedural rules, which enhance predictability in the resolution of cases, while also recognizing that justice may require relief in certain very limited situations even when established procedural rules have not been followed. Moreover, this approach ensures that the trial judge, who is in the best position to determine the propriety and potential impact of allegedly improper closing argument, has an opportunity to make a such a determination. In holding as we do, we recede from this Court's prior decisions in *Baggett, Strickland, Tyus,* and *Dupont* to the extent that those decisions stand for the proposition that improper, but unobjected-to, closing argument in a civil case may be challenged for the first time on appeal. [20] We also disapprove decisions issued by Florida's District Courts of Appeal to the extent that they stand for such proposition.

In adopting this method of analysis, we have disposed of the first question posed above; namely, whether an exception to the contemporaneous objection requirement should continue to exist in civil cases in the context of improper, but unobjected-to, closing argument. However, we are mindful that adopting this approach does not clarify the appropriate standard for determining whether relief should be granted in post-trial proceedings at the trial level when no objection was presented during trial but the issue is presented in a motion for new trial. Therefore, we must now address the appropriate standard to be applied by the trial court.

C. THE APPROPRIATE STANDARD

In *Baggett, Strickland, Tyus,* and *Dupont,* this Court set forth different standards for determining whether relief should be granted in a civil case based on improper, but unobjected-to, closing argument. In *Baggett,* this Court focused on whether the improper argument was, in effect, incurable, *see* 124 Fla. at 717, 169 So. at 379; in *Strickland* and *Tyus,* this Court focused on the cumulativeness of the improper argument and whether such argument "gravely impair[s] a calm and dispassionate consideration of the evidence and the merits by the jury," 88 So.2d at 523, 130 So.2d at 587; and in *Dupont,* this Court stated that improper, but unobjected-to, closing argument cannot form the basis of a new trial unless such argument constitutes "fundamental error." 455 So.2d at 1030. Further, Florida's District Courts of Appeal have applied different standards for determining whether relief should be granted when the situation arises. *See, e.g., Murphy,* 710 So.2d at 587; *D'Auria v. Allstate Insurance Co.,* 673 So.2d 147, 147 (Fla. 5th DCA 1996) (Antoon, J., concurring) ("Recent case law from the various district courts has provided little guidance on the question of when unpreserved error justifies reversal."); *Hagan v. Sun Bank of Mid-Florida, N.A.,* 666 So.2d 580, 583 (Fla. 2d DCA 1996) ("Confusion, if not conflict, exists concerning the tests that trial courts should apply in granting or denying a new trial based ***1028** on preserved or fundamental error in closing argument and the standards of review that appellate courts should apply ...."); *see also* Michael A. Kamen, *Summation, in Florida Civil Trial Practice* 48, 50 (1998) ("There is a divergence among the district courts about the propriety of granting a new trial in a civil case based on improper, but unobjected to, closing argument."). We now attempt to eliminate the confusion over the appropriate standard and outline the standard to be applied by the trial court when considering unobjected-to statements on a motion for new trial.

1. THE CHALLENGED ARGUMENT MUST BE IMPROPER

[2] To receive a new trial in a civil case based on unobjected-to closing argument, a complaining party must first establish that the argument being challenged is, in fact, improper. In determining whether the argument being challenged is improper, a trial judge should be guided by the following principles.

[3] [4] [5] The purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." *Hill v. State,* 515 So.2d 176, 178 (Fla.1987). Attorneys should be afforded great latitude in presenting closing argument, but they must "confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence." *Knoizen v. Bruegger,* 713 So.2d 1071, 1072 (Fla. 5th DCA 1998); *see also Venning v. Roe,* 616 So.2d 604 (Fla. 2d DCA 1993). Moreover, closing argument must not be used to "inflame the

minds and passions of the jurors so that their verdict reflects an emotional response ... rather than the logical analysis of the evidence in light of the applicable law." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985).

Attorneys presenting closing argument in Florida courts, whether in criminal or civil trials, are governed by rule 4-3.4 of the Rules Regulating The Florida Bar. Rule 4-3.4 states:

> 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.

R. Regulating Fla. Bar 4-3.4(e). The underpinnings of this ethical rule are well-founded; it not only prevents lawyers from placing their own credibility at issue in a case, it also limits the possibility that the jury may decide a case based on non-record evidence. *See Davis v. South Florida Water Management Dist.*, 715 So.2d 996, 999 (Fla. 4th DCA 1998): *Forman v. Wallshein*, 671 So.2d 872, 875 (Fla. 3d DCA 1996). In sum, rule 4-3.4 is in place to help ensure that juries render verdicts based on record evidence and applicable law, not based on impermissible matters interjected by counsel during closing argument.

[6] While we do not attempt to list here all of the various types of improper argument, we do wish to clarify several matters regarding how rule 4-3.4 should be interpreted. First, it is not improper for counsel to state during closing argument that a witness "lied" or is a "liar," provided such characterizations are supported by the record. *See Craig v. State*, 510 So.2d 857, 865 (Fla.1987) (finding that even though intemperate, prosecutor's closing argument remarks characterizing defendant's testimony as untruthful and the defendant himself as being a "liar" did not exceed the bounds of proper argument in view of the record evidence); *Forman*, 671 So.2d at 874 (refusing to find improper counsel's closing argument characterization of plaintiff as being a liar where "there was an ample evidentiary basis on which to dispute the credibility of the ***1029** plaintiff"); *see also Goutis v. Express Transport, Inc.*, 699 So.2d 757, 763-64 (Fla. 4th DCA 1997) (agreeing with *Forman*). If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence. [21]

[7] **[8]** Second, use of the personal pronoun "I" during closing argument is not, in and of itself, improper. On this issue, we agree with the Third District's analysis in *Forman*, wherein the court reviewed several treatises and concluded that defense counsel's use of the phrases "I think" and "I believe" did not impermissibly express a personal opinion, but was instead merely a figure of speech. *See* 671 So.2d at 874-75 (reviewing Thomas A. Mauet, *Fundamentals of Trial Techniques* 366 (3d ed.1992), and Steven Lubet, *Modern Trial Advocacy Analysis and Practice*, 432-33 (1993)). When determining whether counsels' use of the personal pronoun "I" is improper, judges must not place form over substance; it must be understood that trial counsel is required to analyze the evidence and present reasonable interpretations and inferences based on the evidence to the jury.

2. THE ARGUMENT MUST BE HARMFUL

Should a complaining party establish that the unobjected-to argument being challenged is improper, the party must then also establish that the argument being challenged is harmful. [22] *See, e.g.*, § 59.041, Fla. Stat. (1999); *Weise v. Repa Film Int'l, Inc.*, 683 So.2d 1128 (Fla. 4th DCA 1996) (declining to grant new trial based on allegedly improper closing argument where complaining party failed to establish that such argument was harmful). In imposing this harmfulness requirement, we recognize that "there is a temptation for both trial courts and appellate courts to use the remedy of new trial as a tool to punish misconduct of an attorney." *Hagan*, 666 So.2d at 584. However, closing argument that is violative of rule 4-3.4 does not necessarily constitute harmful error. *See, e.g., Winterberg v. Johnson*, 692 So.2d 254, 255 (Fla. 1st DCA 1997). Although courts have a supervisory role in overseeing the conduct of attorneys, the primary concern of courts must be how the improper closing argument affected the fairness of the trial proceedings. Thus, we agree with the Fifth District's statement in *Fravel* that, in many cases, "[w]hen argument descends to the level of ethical violations, there are other ways to address the transgression than reversal of a jury verdict." 727 So.2d at 1036; *cf. United States v. Hasting*, 461 U.S. 499, 506, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (finding that court should not exercise supervisory power to reverse jury verdict

based on improper closing argument where such argument is harmless and where "means more narrowly tailored to deter objectionable prosecutorial conduct are available"). We in no way condone improper comments but conclude the litigation process is intended to resolve the pending dispute, not provide a mechanism to deal with wayward lawyers.

[9] **[10]** Harmfulness in this context also carries a requirement that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury. Passing remarks of little ***1030** consequence in the scope of a lengthy trial should find little sympathy if no contemporaneous objection is voiced. The extensiveness of the objectionable material is a factor to be considered in the harmfulness analysis. In sum, the improper closing argument comments must be of such a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments.

3. THE ARGUMENT MUST BE INCURABLE

Should a complaining party establish that the unobjected-to closing argument being challenged is both improper and harmful, the party must then establish that the argument is incurable. Specifically, a complaining party must establish that even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict. This concept of "incurability" can be traced back to the *Baggett* standard that a timely objection to improper closing argument is required before a new trial may be granted based on such argument unless "the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence." 124 Fla. at 717, 169 So. at 379. As evidenced in *Akin* and *Baggett*, it will be extremely difficult for a complaining party to establish that the unobjected-to argument is incurable.

4. THE ARGUMENT MUST BE SUCH THAT IT SO DAMAGED THE FAIRNESS OF THE TRIAL THAT THE PUBLIC'S INTEREST IN OUR SYSTEM OF JUSTICE REQUIRES A NEW TRIAL

Should a complaining party establish that the unobjected-to argument being challenged was improper, harmful, and incurable, the party finally must also establish that the argument so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial. *See Hagan*, 666 So.2d at 586; Klein, *Baby with the Bath Water*, 26 Fla. St. U.L.Rev. at 122-23; *cf. Goldfuss*, 679 N.E.2d at 1104 (holding that in civil cases, the plain error doctrine is applicable "only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself"). Although we do not specifically limit the types of improper argument that may fit within this category, we recognize that the category necessarily must be narrow in scope. For example, closing argument that appeals to racial, ethnic, or religious prejudices is the type of argument that traditionally fits within this narrow category of improper argument requiring a new trial even in the absence of an objection.

5. STANDARD OF REVIEW ON APPEAL

[11] **[12]** If a complaining party establishes that the unobjected-to argument being challenged was improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial, then the complaining party is entitled to a new trial. [23] We agree with the Second District that, when granting a new trial based on unobjected-to closing argument, the trial court must specifically identify the improper arguments of counsel and the actions of the jury resulting from those arguments. *See Hagan*, 666 So.2d at 583 (relying on *Wasden v. Seaboard Coast Line R.R.*, 474 So.2d 825, 830 (Fla. 2d DCA 1985)); *cf.* Fla. R. Civ. P. 1.530(f) (stating that "[a]ll orders granting a new trial shall specify the specific grounds therefor"). On appeal, the appellate court must then apply an abuse of discretion standard in reviewing ***1031** either the trial court's grant or denial of a new trial based on the unobjected-to closing argument. [24] *Cf., e.g., Brown v. Estate of A.P. Stuckey*, 749 So.2d 490, 498 (Fla.1999) ("Regardless of whether a new trial was ordered because the verdict was excessive or inadequate or was contrary to the manifest weight of the evidence, the appellate court must employ the reasonableness test to determine whether the trial judge abused his or her discretion."). We find that appellate courts must apply the abuse of discretion standard of review because applying such standard sufficiently recognizes that the trial

judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument. [25]

6. CONCLUSION

In conclusion, we hold that before a complaining party may receive a new trial based on unobjected-to closing argument, the party must establish that the argument being challenged was improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial. Should the trial court find that these criteria have been established, the court must enter an order granting a new trial specifically identifying both the improper arguments of counsel and the actions of the jury resulting from those arguments. Finally, an appellate court must employ an abuse of discretion standard of review when considering the correctness of the trial court's grant or denial of a new trial based on unobjected-to closing argument. Although we have not absolutely "closed the door" on appellate review of unpreserved challenges to closing argument, we have come as close to doing so as we believe consistent with notions of due process which deserve public trust in the judicial system. With these standards in mind, we now review the closing argument being challenged in the present case.

IV. ANALYZING THE CHALLENGED ARGUMENT IN THIS CASE

[13] At the outset, we note that Plaintiffs' counsel failed to raise any objections during closing argument made by counsel for UTC/UTOS, nor did Plaintiffs' counsel request a curative instruction or a mistrial during or at the close of such argument. As noted above, however, Plaintiffs' counsel did challenge various portions of opposing counsel's closing argument by way of a motion for new trial, [26] which was summarily ***1032** denied by the trial court. Accordingly, we must determine whether the trial court abused its discretion in denying the Plaintiffs' motion for new trial on the basis of allegedly improper, but unobjected-to, closing argument made by counsel for UTC/UTOS. After reviewing the closing argument being challenged, as well as the entire record in this case, we find that the trial judge did not abuse his discretion in denying the Plaintiffs' motion for new trial.

We agree with the Plaintiffs that portions of the closing argument now being challenged were indeed improper, especially (1) counsel's repeated use of the term "B.S. detector"; (2) counsel's comment that if the jury found for the Plaintiffs on the consultancy agreement claim, the jury would be "accessories, after the fact, to tax fraud"; and (3) counsel's characterization of the Plaintiffs' case as cashing in on a "lottery ticket." However, we do not find improper counsel's comments regarding Murphy's credibility, as there was sufficient record evidence to support counsel's questioning of Murphy's credibility. More importantly, it is clear that a reasonable jurist could conclude that the improper closing argument made by counsel for UTC/UTOS was not harmful, incurable, or of a character to so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. Accordingly, based on the foregoing, we approve the Fourth District's affirmance of the trial court's denial of the Plaintiffs' motion for new trial.

It is so ordered.

WELLS, C.J., and SHAW, HARDING and QUINCE, JJ., concur.

PARIENTE, J., concurs specially in result only with an opinion, in which ANSTEAD, J., concurs.

PARIENTE, J., concurring specially in result only.
I concur in the result reached by the majority and commend Justice Lewis's scholarly analysis. I agree with the majority's rejection of the Fourth District's bright-line rule in *Murphy* that would preclude reversal if no objection to the improper argument was registered at trial. *See* majority op. at 1026. Further, even under our prior case law, the unobjected-to arguments in this case do not constitute fundamental error.

I am concerned, however, that the majority's newly formulated four-prong test [27] for fundamental error might unnecessarily restrict the authority of trial courts to grant new trials. Further, although I generally agree with the majority's requirement that the trial court first evaluate the unobjected-to improper argument in a motion for new trial, I would still retain the right of appellate courts to reverse for fundamental error where the conduct "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." Majority op. at 1030. The appellate courts should exercise this right, however, only in those rare cases where the

public's confidence in the judicial process would be seriously undermined if the improper argument went uncorrected.

I reach this conclusion because the primary reason to continue to embrace the "fundamental error" doctrine based on unobjected-to closing argument in civil cases, or the "plain error" doctrine as the term is used by many other state and ***1033** federal jurisdictions,[28] is to ensure the fundamental fairness of the judicial process and the public trust and confidence in what transpires in our halls of justice. Accordingly, I regard the conflict represented by the competing viewpoints in this case as more than simply a dispute between whether it is more important to correct "reprehensible attorney misconduct during closing argument" or whether it is more important to promote the principle of "proper preservation of trial error and appellate predictability." Majority op. at 1025 (quoting *Fravel v. Haughey*, 727 So.2d 1033, 1038-39 (Fla. 5th DCA 1999) (Cobb, J., concurring specially)). In addition, I agree that the fundamental error principle should not be used by courts to enforce compliance with ethical standards or to sanction lawyer misconduct. Other methods are available when those issues require redress.[29]

The fundamental or plain error doctrine recognizes the public responsibility of the appellate court to reverse when the improper misconduct during closing argument "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099, 1104 (1997). In recognizing this important interest in *Seaboard Air Line R.R. Co. v. Strickland*, 88 So.2d 519, 524 (Fla.1956), we quoted with approval the following statement from the United States Supreme Court:

> [A] trial in court is never, as respondents in their brief argue this one was, "purely a private controversy ... of no importance to the public." The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error.

New York Cent. R.R. v. Johnson, 279 U.S. 310, 318-19, 49 S.Ct. 300, 73 L.Ed. 706 (1929). As Judge Altenbernd has explained:

> Although fundamental error is extraordinarily difficult to define, the doctrine functions to preserve the public's confidence in the judicial system. Relief is granted for a fundamental error not because the party has preserved a right to relief from a harmful error, but because the public's confidence in our system of justice would be seriously weakened if the courts failed to give relief as a matter of grace for certain, very limited and serious mistakes.

Hagan v. Sun Bank of Mid-Florida, 666 So.2d 580, 584 (Fla. 2d DCA 1996).

In this case, the majority has rejected the Fourth District's bright-line rule abolishing fundamental error in civil cases and instead has recognized "an escape valve with a very narrowly defined parameter and of extremely limited application." Majority op. at 1026. At the same time, the majority has also included an additional requirement that the trial court should ***1034** first evaluate the impact of the objectionable, but not objected-to, closing argument.

I generally agree with the requirement that the objectionable closing argument remarks should first be addressed by the trial court through a post-trial motion. This requirement is a sound one because of the trial court's unique ability to evaluate the impact of the allegedly improper argument along with other conduct that the litigant claims forms the basis for a new trial. Because appellate courts have only the written record by which to evaluate the impact of the argument, undue emphasis may be placed on a comment that was innocuous at the time it was uttered. This is especially true with arguments involving words such as "you" or "I," that often may be misconstrued and that rarely constitute the type of highly prejudicial or inflammatory argument precluding dispassionate consideration of the evidence. *See* majority op. at 1029. In addition, review by the trial court would provide the appellate court with the benefit of the trial court's assessment of the allegedly improper remarks and their impact, or lack of, on the trial.

Long ago, we acknowledged that it is the trial judge's responsibility, as the impartial judicial officer in charge of the proceeding, "to protect litigants against such interference by counsel with the orderly administration of justice and the protection of the right of the litigant to a verdict 'uninfluenced by the appeals of counsel to passion or prejudice.' " *Strickland*, 88 So.2d at 524. Recently, we reiterated the trial court's broad discretionary power to grant a new trial when a verdict is against the manifest weight of the evidence and we explained that "this discretionary power emanates from the common law principle that it is the duty of the trial judge to prevent what he or she considers to be a miscarriage of justice." *Brown v. Estate of Stuckey*, 749 So.2d 490, 495 (Fla.1999).

Despite my general agreement with the requirement that the trial court first evaluate the effect of the unobjected-to closing argument, I disagree with the majority as to the standard the trial court should follow when evaluating the effect of the unobjected-to closing argument. In my opinion, the trial court should have the power to grant a new trial based on pervasive, improper closing argument when necessary to prevent a miscarriage of justice. In other words, I would enunciate a two-part test that would allow trial courts to grant a new trial based on unobjected-to closing argument where the trial court finds that: (1) the improper remarks are incurable; that is, the trial court finds the remarks to be "of such character that neither rebuke nor retraction may entirely destroy their sinister influence," *Baggett v. Davis*, 124 Fla. 701, 717, 169 So. 372, 379 (1936); and (2) "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." *Tyus v. Apalachicola N. R.R.*, 130 So.2d 580, 587 (Fla.1961); *see also Strickland*, 88 So.2d at 523.

A standard that would allow trial courts to evaluate cases under this two-part analysis would blend our prior case law on fundamental error as set forth in *Baggett, Strickland* and *Tyus* and would be more consistent with the approach taken by those states that require evaluation by a trial court. *See Austin v. Shampine*, 948 S.W.2d 900, 906 (Tex.Ct.App.1997) (reversing only where issue preserved through motion for mistrial and where the argument is so inflammatory that its harmful or prejudicial nature cannot be cured by an instruction to disregard); *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 509 S.E.2d 269, 271 (1998) (even where there has not been a contemporaneous objection, a new trial motion should be granted "in flagrant cases where a vicious inflammatory argument results in clear prejudice"). In contrast, the stringent four-part test set forth by the majority risks undermining the major tenet of both *Tyus* and *Strickland*, that "the judge in the milieu of the trial courtroom is in the best position to gauge the ***1035** actual effect of prejudicial remarks and deal with them accordingly." *Fravel*, 727 So.2d at 1039 (Cobb, J. concurring specially). [30]

I also write to emphasize that the majority opinion should not be read to condone arguments that permit the "noble art of trial practice" to at times "degenerate into a free-for-all." *Nelson v. Reliance Ins.*, 368 So.2d 361, 361 (Fla. 4th DCA 1978). As Judge Schwartz observed long ago, it is unacceptable "for the judiciary to act simply as a fight promoter, who supplies an arena in which parties may fight it out on unseemly terms of their own choosing." *Borden, Inc. v. Young*, 479 So.2d 850, 851 (Fla. 3d DCA 1985). Thus, it remains the duty of trial judges to admonish lawyers to refrain from improper closing argument. *See Fravel*, 727 So.2d at 1036 ("[W]e find it troubling that trial judges are reluctant to curb the abuse perpetrated by trial counsel in the area of improper comments made during closing arguments."). I have no doubt that many trial judges take this responsibility seriously.

Even those judges who may be reluctant to step in during closing argument do not hesitate to issue instructions to lawyers before closing argument reminding the litigants what is and what is not proper argument based on the plethora of appellate decisions that have previously identified the limits of proper advocacy. For these reasons, and to provide further guidance for the trial courts and trial lawyers as to the permissible bounds of advocacy, I urge appellate courts to continue to report the actual substance of the remarks that they deem objectionable, and to explain why they are objectionable.

The type of closing arguments to which I refer are not simply those advanced by lawyers engaged in zealous advocacy or ones that contain words such as "ridiculous" [31] or other colorful adjectives. Instead, I am referring to those clear instances of a lawyer's attempt to appeal to juries' passions and prejudices by drawing attention to impermissible considerations outside of the record. Arguments about "[w]hat other lawyers have done, what has occurred in other law suits, and what other corporations have done," are examples of arguments that are clearly outside the bounds of vigorous but acceptable advocacy. *Bellsouth Human*

Resources Admin., Inc. v. Colatarci, 641 So.2d 427, 430 (Fla. 4th DCA 1994).

As much as it is the primary responsibility of trial lawyers to lodge proper, specific and timely objections and the responsibility of the trial court to maintain a fair and orderly trial, we, at the appellate level, cannot abdicate all responsibility. Although there are many sound reasons why a litigant should not be "rewarded" because his or her attorney strategically decides not to object, it is important that appellate courts nonetheless retain the right to address fundamental error. As Judge Dauksch explained in his specially concurring opinion in *Fravel* :

> It is not a matter of who is at fault-the offending lawyer who misbehaves, or the negligent or crafty lawyer on the other side who does not object, or the trial ***1036** judge who shirks his duty to intercede. It is a matter of fundamental fairness and this court's duty to see to it that all litigants are given their due in court. That is the primary reason for having courts of appeal.

727 So.2d at 1038 (Dauksch, J., concurring specially). If we simply preclude consideration of fundamental error in civil cases, the danger, as Judge Sharp observes, is that "we ourselves, as appellate judges, have all but disappeared from this equation, like the Chesire Cat, fading behind a smile in search of a 'bright line,' leaving only the trial judges to fight the battle." *Id.* at 1040 (Sharp, J., dissenting). [32]

ANSTEAD, J., concurs.

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Footnotes

1 In the decision below, the Fourth District identified decisions from the First, Third, and Fifth District Courts of Appeal with which it disagreed. *See Murphy v. Int'l Robotics Sys., Inc.*, 710 So.2d 587, 587 n. 1 (Fla. 4th DCA 1998). After the Fourth District decided *Murphy*, however, the Fifth District issued its decision in *Fravel v. Haughey*, 727 So.2d 1033, 1034-37 (Fla. 5th DCA 1999) (en banc), wherein the court essentially aligned itself with the Fourth District on the issue of improper, but unobjected-to, closing argument in civil cases. Thus, conflict no longer exists between decisions from the Fourth and Fifth Districts.

2 Our decision here does not affect the law in criminal cases regarding improper, but unobjected-to, closing argument. Further, this decision does not impact the legal standards applicable to consideration of the issue that has been properly preserved by objection and motion for mistrial, which remains whether the comment was highly prejudicial and inflammatory. *See, e.g., Hagan v. Sun Bank of Mid-Florida, N.A*, 666 So.2d 580, 585 (Fla. 2d DCA 1996). The rules and standards applicable to preserved and unobjected-to comments are substantially different.

3 The judgment in favor of the Defendants did not include Laser, however, because the trial court previously had entered a default judgment as to liability against that business entity. The Plaintiffs moved for a new trial on damages in relation to Laser, but the trial court denied that motion. The validity of that denial is not before this Court for review.

4 Hornsby, individually, was not included as a defendant on the counts relating to the "Commission Agreement" and the "Consulting Agreement."

5 The breach of fiduciary duty and misappropriation/concealment claims concerned only Hornsby individually, not the other defendants.

6 The Plaintiffs noted in their motion for new trial that counsel for Hornsby and Robotic Systems II had not participated in the "offending argument." However, the Plaintiffs argued that the trial court should grant a new trial against every defendant (except for Laser, *see supra* note 3), including Hornsby and Robotic Systems II, because every defendant benefitted from the improper argument made by counsel for UTC/UTOS. In support of this argument, the Plaintiffs relied on the Third District's decision in *Owens Corning Fiberglas Corp. v. Morse*, 653 So.2d 409, 412 (Fla. 3d DCA 1995), wherein the court granted a new trial against every defendant based upon improper closing argument made by counsel for only one defendant.

7 Sometime after the trial concluded, the Plaintiffs settled all claims against UTC/UTOS. Therefore, those business entities are not involved in the present proceedings before this Court.

8 The Fourth District also considered and rejected on the merits "the other issues" raised by the Plaintiffs, but the court in its opinion did not identify the substance of those other issues. *See Murphy*, 710 So.2d at 591.

9 As noted above, the Fourth District issued its decision in *Murphy* before the Fifth District issued its decision in *Fravel*. *See supra* note 1.

10 The Plaintiffs also request that this Court address the "reasonable reliance" jury instruction issue, which they raised in their motion for new trial. However, because that issue is outside the scope of the conflict issue, we decline to address it. *See, e.g., Asbell v. State,* 715 So.2d 258, 258 (Fla.1998). Further, we consider the Plaintiffs' claim that the verdict was against the manifest weight of the evidence only to the extent necessary to analyze whether the closing argument comments being challenged as improper warrant a new trial against Hornsby and Robotic Systems II.

11 As noted above, the trial court in *Baggett* denied a motion for new trial filed by the defendant. *See* 124 Fla. at 706, 169 So. at 375. This Court's opinion in *Baggett* did not identify the specific issues raised in the defendant's motion for new trial, noting only that the motion "embod[ied] some of the grounds found in the assignment of errors, which grounds will be taken up in detail on disposing of the questions presented." *See id.* However, while addressing the propriety of the statements made by plaintiff's counsel during closing argument, the *Baggett* Court noted that plaintiff's counsel "filed an affidavit in his motion for new trial which attempted in some measure to deny the facts as set out in the bill of exceptions as to what actually took place at the trial." *See Baggett,* 124 Fla. at 716, 169 So. at 378. This language indicates that at least one of the issues raised in the defendant's motion for new trial concerned the propriety of the statements made by plaintiff's counsel during closing argument.

12 While *Akin* does not specifically state that the trial court denied the defendant's motion for new trial, *see* 86 Fla. at 570-71, 98 So. at 612, it is clear that the court did so given the defendant's appeal to this Court.

13 The Second District concluded in *Hagan v. Sun Bank of Mid-Florida, N.A.,* 666 So.2d 580, 585-86 (Fla. 2d DCA 1996), that the defendant in *Baggett* received a new trial based on plaintiff's counsel's improper, but unobjected-to, closing argument. Similarly, the Fourth District's decision in *Carlton v. Johns,* 194 So.2d 670, 674 (Fla. 4th DCA 1967), may be read as concluding that this Court granted a new trial in *Baggett* based on plaintiff's counsel's improper, but unobjected-to, closing argument. Regardless of the proper *Baggett* interpretation, based upon an analysis of *Akin,* the standard for relief is exceedingly high.

14 The underlying facts in *Strickland* are fully set forth in this Court's earlier decision in that case, a decision that was reversed by the United States Supreme Court on an issue of federal law. *See Seaboard Air Line R.R. v. Strickland,* 80 So.2d 914, 915-17 (Fla.), *rev'd,* 350 U.S. 893, 76 S.Ct. 157, 100 L.Ed. 786 (1955). The *Strickland* case that we now analyze came to this Court upon remand from the decision of the U.S. Supreme Court. *See Strickland,* 88 So.2d at 520.

15 Neither of this Court's *Strickland* opinions indicate whether the defendant included objectionable statements as a basis for a new trial.

16 As stated above, the *Strickland* Court previously had determined that the trial court erred in admitting the letters into evidence. *See* 88 So.2d at 521. Thus, the use of the word "admissible" here must mean "admitted."

17 We note that *Tyus* was a four-to-three decision, with Justice O'Connell authoring the dissenting opinion. *See Tyus v. Apalachicola N. R.R. Co.,* 130 So.2d 580, 588-96 (Fla.1961) (O'Connell, J., dissenting in part, joined by Roberts and Drew, JJ.). While the three dissenting justices agreed with the majority's ruling on the sufficiency of the evidence issue, *see id.* at 588, they disagreed with the majority's decision on the closing argument issue. *See id.* at 588-96. The majority apparently alleviated one of the main concerns expressed in the dissenting opinion by clarifying the meaning of the term "pervades" as used in the *Strickland* standard. *See id.* at 587, 588-91. However, the dissenting justices set forth the numerous improper statements made by plaintiff's counsel during closing argument, some of which were objected to and some of which were not, and disagreed with the majority that such statements did not warrant reversal for a new trial. *See id.* at 591-96.

18 It should be noted, however, that this Court has not allowed a trial judge's breach of duty in the context of improper, but unobjected-to, closing argument to form an independent basis for appellate review. *See Baggett,* 124 Fla. at 717, 169 So. at 379 ("A verdict will not be set aside by an appellate court because of [improper] remarks or because of any omission of the judge to perform his duty in the matter, unless objection be made at the time of their utterance.").

19 We do not attempt to discuss decisions from every state and federal court, but instead attempt to provide an overview of the various approaches taken by courts in other jurisdictions.

20 As we noted above, however, the parties challenging the improper, but unobjected-to, closing arguments in *Baggett, Tyus,* and *Dupont* first challenged such arguments by filing a motion for new trial in the trial court, and were therefore not challenging such arguments for the first time on appeal.

21 We disapprove *King v. National Security Fire & Casualty Co.,* 656 So.2d 1335, 1337 (Fla. 4th DCA 1995), to the extent that it stands for the proposition that counsel may not use the terms "liar" or "lied" regarding a witness when there is record support to question the witness's credibility.

22 We disapprove *Tremblay v. Santa Rosa County,* 688 So.2d 985, 988 (Fla. 1st DCA 1997), and *Bullock v. Branch,* 130 So.2d 74, 77 (Fla. 1st DCA 1961), to the extent that those decisions stand for the proposition that a complaining party need not establish the harmfulness of improper, but unobjected-to, closing argument in order to be granted a new trial based on such argument.

23 Depending upon the extent to which the improper argument affected the trial, the trial court may award a new trial as to liability, damages, or both.

24 We disapprove *Goutis*, 699 So.2d at 760; *Tremblay*, 688 So.2d at 987; *Hagan*, 666 So.2d at 587; *Eichelkraut v. Kash N' Karry Food Stores, Inc.*, 644 So.2d 90, 92 (Fla. 2d DCA 1994); *Wasden*, 474 So.2d at 829; and *Sears Roebuck & Co. v. Jackson*, 433 So.2d 1319, 1322 (Fla. 3d DCA 1983), to the extent that those decisions stand for the proposition that a trial court's grant of a new trial based on unobjected-to closing argument should be subject to a de novo standard of review on appeal. The nature of the elements to be examined and the impact upon a trial are issues that are more properly resolved at the trial level, subject to extremely limited review on appeal.

25 In *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla.1980), this Court set forth the standard of review to be employed by an appellate court in reviewing a discretionary act of the trail judge:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

26 The actual motion for new trial filed by the Plaintiffs did not identify any of the allegedly improper closing argument made by counsel for UTC/UTOS, but instead stated, "The jury's verdict was tainted by inflammatory and unfairly prejudicial closing argument of counsel for UTC/UTOS which permeated the entire proceeding and amounted to fundamental error depriving the Plaintiffs of a fair trial." The Plaintiffs' memorandum of law in support of their motion for new trial did, however, specifically identify various portions of opposing counsel's allegedly improper closing argument, and the Plaintiffs' initial brief filed in this Court closely tracks the memorandum of law filed in the trial court. In fact, all of the allegedly improper closing argument identified in the memorandum of law is identified in the Plaintiffs' initial brief as a basis for a new trial.

27 This four-part test, which all but closes the door on unobjected-to closing argument, requires that the challenged argument be: (1) improper; (2) harmful, which the majority defines as "be[ing] of such a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments"; (3) incurable; and (4) such that it "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." Majority op. at 1028-1030.

28 Many of the opinions of the other courts that have embraced this doctrine are discussed extensively in the majority's opinion. *See* majority op. at 1024-1025. Accordingly, I question the accuracy of the Fourth District's statement that "[s]o far as our research indicates, no other courts in this country allow improper argument to be raised for the first time on appeal in civil cases." *Murphy v. Int'l Robotics Sys., Inc.*, 710 So.2d 587, 591 (Fla. 4th DCA 1998).

29 *See, e.g.*, R. Regulating Fla. Bar 4-3.4(c) ("A lawyer shall not ... knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."); *id.* 4-3.4(e) ("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 ...."); *id.* 4-3.5(a) ("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.").

30 In *Hagan*, Judge Altenbernd set forth a two-part analysis, which provides:

> First, the trial court must determine whether the error was so pervasive, inflammatory, and prejudicial as to preclude the jury's rational consideration of the case.... Second, the trial court must decide whether the error was fundamental. In essence, this is a legal decision that the error was so extreme that it could not be corrected by an instruction if an objection had been lodged, and that it 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.

666 So.2d at 586. Judge Cobb objected to this two-step analysis as "a constriction of the authority of a trial judge to deal with the problem of attorney misconduct in closing argument." *Fravel*, 727 So.2d at 1039 (Cobb, J. concurring specially).

31 In *Sacred Heart Hosp. v. Stone*, 650 So.2d 676, 679 (Fla. 1st DCA 1995), a case in which the court reversed for a new trial based on improper closing argument, the appellant cited to many instances of counsel's use of the word "ridiculous" during closing argument.

32 Further, if the attorney has made objections to some of the closing argument remarks, which have been overruled, the fact that all of the objectionable remarks have not been preserved by subsequent objection does not preclude the appellate court from reviewing the cumulative effect of the objected-to and unobjected-to remarks. I also share Judge Sharp's concern that even when there has been proper objection, the appellate court standard for reversal for a new trial may be unreasonably high. *See Fravel*, 727 So.2d at 1039-40 (Sharp, J., dissenting).

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Disciplinary Actions

Prepared by The Florida Bar's Public Information and Bar Services Department

The Florida Supreme Court in recent court orders disciplined 29 attorneys; disbarring two, revoking the licenses of two, suspending 18, and publicly reprimanding seven. Four attorneys received more than one form of discipline. Three were placed on probation and one was ordered to pay restitution.

The following lawyers are disciplined:

Antonio R. Arnao, 28870 U.S. Highway 19 N., Suite 300, **Clearwater, suspended** until further order, effective 30 days from an August 20 court order. (Admitted to practice: 1988) Arnao failed to comply with an October 2011 suspension order directing him to adhere to the conditions of a Florida Lawyers Assistance contract, including timely payments of related fees. (Case No. SC13-187)

Thomas William Austin, Jr., 2949 N.W. 12th Ave., **Wilton Manors, suspended** for 91 days, effective 30 days from an August 22 court order. (Admitted to practice: 1996) Austin purchased an already existent loan modification business called Protection Law Center. Protection Law Center purchased from a separate entity names of potential loan modification clients who had responded to Internet ads placed by this separate entity. Austin's employees then improperly solicited these potential clients. Austin also failed to properly supervise some of these nonlawyer employees who at times guaranteed that the potential client's loans would be modified. In several instances after being retained, Austin failed to adequately communicate with clients regarding their loan modification matters. He also commingled funds and failed to use proper trust accounting records and procedures. (Case No. SC13-759)

Michael Harvey Blacker, P.O. Box 162850, **Miami,** to be **publicly reprimanded** following an August 22 court order. (Admitted to practice: 1969) After selling their house, Blacker and his wife learned that the house was encumbered by a home equity mortgage they had applied for previously. Blacker mistakenly believed it was a personal loan. (Case No. SC12-1562)

Scott Vincent Boruta, 1880 Shetland Court, **Palm Harbor.** Pursuant to an August 20 order, The Supreme Court granted Boruta's petition for **disciplinary revocation,** effective immediately, with leave to apply for readmission after five years. (Admitted to practice: 2003) Boruta had two complaints pending for misappropriation of client funds and criminal theft. (Case No. SC12-2475)

Donald Walter Bradshaw, P. O. Box 3792, **Ocala, suspended** for 91 days, effective retroactive to August 7, 2012, following an August 22 court order. (Admitted to practice: 2001) In one case, Bradshaw initiated a legal action but thereafter neglected the case, resulting in a dismissal without prejudice for lack of prosecution, and his abandonment in a second matter led to a client hiring new counsel for representation. (Case No. SC13-750)

Joseph Andrew Caramadre, 90 Beechwood Drive, **Cranston, R. I., suspended** effective 30 days from an August 26 court order. (Admitted to practice: 1994) Caramadre is also a member of the State Bar of the Commonwealth of Massachusetts and the Rhode Island Bar. He pleaded guilty to one felony count of wire fraud and one felony count of conspiracy to commit offenses including: mail fraud, wire fraud, and identity theft in Rhode Island. He was subsequently suspended from practicing law in Massachusetts based on the felony conviction. Caramadre also failed to timely notify The Florida Bar of his indictment, judgment, or suspension from Massachusetts. (Case No. SC13-1540)

Kenneth D. Doerr, 1641 Field Road, **Sarasota, suspended** for four months, effective 30 days from an August 20 court order. (Admitted to practice: 1996) In an estate case, Doerr had a conflict of interest, representing two clients in a matter in which they had adverse interests and wishes. He displayed a lack of diligence and candor by not disclosing to each client his representing the other. (Case No. SC12-2390)

David Anthony Fontes, 2917 W. Bayshore Court, **Tampa.** Pursuant to an August 20 order, the Supreme Court granted Fontes' petition for **disciplinary revocation,** effective immediately, with leave to apply for readmission after five years. (Admitted to practice: 1986) Fontes had misappropriated of over $138,000 of client funds entrusted to him, failed to complete a legal matter, and failed to communicate. Fontes subsequently reimbursed the client's money. (Case No. SC12-609)

Stephen Douglas Fromang, 1620 26th St., **Vero Beach,** to be **publicly reprimanded** by an August 22 court order. (Admitted to practice: 1976) Fromang's failure to provide effective counsel to a client facing felony charges resulted in reversal of the conviction. In a court order, the Fourth District Court of Appeal found that Fromang's performance was so clearly deficient that it affected the outcome of the trial. (Case No. SC12-2736)

John Robert Fuchs, 12100 Wilshire Blvd., Suite M-50, **Los Angeles, Calif., suspended** for 91 days, effective 30 days from an August 20 court order. (Admitted to practice: 1988) This was a reciprocal agreement based on the California Supreme Court order of July 14, 2011, both suspending Fuchs and placing him on probation. Fuchs inappropriately communicated with a judge regarding a case in which they were both involved. (Case No. SC12-1822)

Bennett Lloyd Grossman, 1919 N.E. 45th St., Suite 212, **Ft. Lauderdale, suspended** for 90 days, effective 30 days from an August 22 court order. (Admitted to practice: 2009) Grossman shared fees with a non-attorney and he failed to supervise her activities. Grossman opened his own law practice in 2011 and a former co-worker, a paralegal, opened an executive law center at the same time. The paralegal referred numerous clients to Grossman. Thereafter, Grossman agreed to represent all clients that hired the law center. He was paid $3,500 per month. (Case No. SC13-1022)

Sarah Elizabeth Gumz, 220 S.W. 4th Ave., **Boynton Beach, suspended** for 30 days, effective 30 days from an August 22 court order. Further, Gumz is placed on **probation** for three years. (Admitted to practice: 2011) Gumz was conditionally admitted to The Florida Bar in June 2011, based on alcohol abuse issues and placed on probation for two years until May 2013. Gumz reported to the Bar in June 2012 that she was arrested for misdemeanor DUI in May 2012. (Case No. SC12-1406)

Mark Alexander Hutner, 3191 Coral Way, Suite 504, **Miami, suspended** for three years, effective 30 days from an August 22 court order. (Admitted to practice: 2003) In August 2011, the Bar received notice from a bank that Hutner had issued a nonsufficent funds check in the amount of $13,150 from his trust account. The check was paid by the bank and subsequently covered by Hutner. (Case No. SC13-751)

Edward Petrie Jordan II, 1460 E. Highway 50, **Clermont,** to be **publicly reprimanded** following an August 22 court order. (Admitted to practice: 1986) Further, Jordan shall complete the Continuing Legal Education course, "The Shield and the Sword: Protecting Yourself and Your Client in the Practice of Family Law." In two dissolution of marriage cases, Jordan had a conflict of interest. In both instance, he was hired to represent the husbands, but he had previously represented the

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