

# ETHICS OF OPENING STATEMENTS

- **Rule 4-3.4(e)** - A lawyer shall not:
- State a **personal opinion** about the credibility of a witness unless authorized by law
- Allude to any matter that is **not relevant** or that **will not be supported by admissible evidence**
- **Assert personal knowledge** of facts in issue
- State a **personal opinion** as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused.
- **Rule 4-8.4(d)** Conduct Prejudicial to Administration of Justice.

# Common Examples of Error

- **Argument in Opening.** See, *Murphy v. International Robotic Systems*, 766 So. 2d 1010 (Fla. 2000).
- **Reference to Collateral Source.** See, *Gormley v. GTE*, 587 So. 2d 455 (Fla. 1991).
- **Reference Whether a Party is Insured.** See, *Thompson v. Florida Drum Co.*, 668 So. 2d 192 (Fla. 1996); *Hollenbeck v. Hooks* 993 So. 2d 50 (Fla 1<sup>st</sup> DCA 2008).
- **Comment on Wealth or Poverty of Party.** See, *Chin v. Caiffa*, 42 So. 3d 300 (Fla. 3d DCA 2010).
- **Express Personal Knowledge or Opinion.** Rule 4-3.4(e), *Murphy v. International Robotic Systems*, 766 So. 2d 1010 (Fla. 2000).

# Examples of Error II

- **Disparagement of Counsel.** See, Rule 4-8.4(d); *Sun Supermarkets v. Fields*, 568 So. 2d 480 (Fla. 3d DCA 1990)
- **Vouching for Party or Witness.** See, *Sacred Heart Hospital v Stone*, 650 So. 2d 676 (Fla. 1<sup>st</sup> DCA 1995), Rule 4-3.4(e).
- **Reference to Inadmissible Evidence.** See, Rule 4-3.4(e).
- **Send A Message.** See, *Pier 66 Co. v. Poulos*, 542 So. 2d 377 (Fla. 4<sup>th</sup> DCA 1989).
- **Subsequent Remedial Measures.** See, F.S. 90.407.
- **Undue Prejudicial or Emotional Appeal.** See, *Pier 66 Co. v. Poulos*, 542 So. 2d 377 (Fla. 4<sup>th</sup> DCA 1989).
- **Demonstrative Aid must not be Misleading.** See *Taylor v. State*, 640 So. 2d 1127 (Fla. 4<sup>th</sup> DCA 1994)

# **ERROR AND PRESERVATION OF ERROR**

- **FUNDAMENTAL ERROR**
- **REVERSIBLE ERROR**
- **HARMLESS ERROR**

# FUNDAMENTAL ERROR

- It is only in those rare circumstances where the comments are of such sinister influence as to constitute irreparable and fundamental error. *Budget Rent A Car v. Jana*, 600 So. 2d 466 (Fla. 4<sup>th</sup> DCA 1992).
- The cumulative effect of the comments must be prejudicial to the extent they pervade the entire trial and gravely impair the calm and dispassionate consideration of the evidence.
  - *Sacred Heart Hospital v Stone*, 650 So. 2d 676 (Fla. 1<sup>st</sup> DCA 1995).
- Improper, harmful, incurable, fundamental damage to public interest. *Murphy v. International Robotic Systems*, 766 So. 2d 1010 (Fla. 2000)

# PRESERVATION OF ERROR

- Consider a Motion In Limine
- Contemporaneous Objections
- Move for Mistrial
- Request Curative Instruction
- Move for Directed Verdict
- Motion for New Trial
  
- Tactical Considerations

# REVERSIBLE OR HARMLESS ERROR

- No reversal or new trial unless:
- Requires an examination of the entire record
- The error must cause a miscarriage of justice
- Shall be liberally construed.
- [F.S. 59.041.](#)