John P. Blumberg
BLUMBERG LAW CORP.

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The Golden Rule

INVOKING EMPATHY WITHOUT VIOLATING THE GOLDEN RULE

Final argument is when lawyers attempt to persuade the jury that the evidence supports a verdict for their client. Lawyers are not limited to discussing only the evidence. Reasonable inferences can be drawn, analogies and metaphors can be spun, stories can be told, values can be extolled, righteous indignation can be displayed.

> In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. . . . Counsel may vigorously argue his case and is not limited to "Chesterfieldian politeness." . . . An attorney is permitted to argue all reasonable inferences from the evidence. . . . Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety.

(*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.) (Citations and internal quotations omitted).

A "*Golden Rule*" argument is forbidden. It was described in *Beagle v. Vasold* (1966) 65 Cal.2d 166, 182, fn. 11, as "argument, by which counsel asks the jurors to place themselves in the plaintiff's shoes and to award such damages as they would 'charge' to undergo equivalent pain and suffering."

Why is the argument forbidden?

My research has been unsuccessful in finding the origin of the rule, but I found many attempts at justifying the prohibition, including that jurors would be converted into biased partisans for the plaintiff. For example:

> The appeal to a juror to exercise his subjective judgment rather than an impartial judgment predicated on the evidence cannot be condoned. It tends to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence. . . . Moreover, it in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence.

(*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484-485.)

This justification appears to have been based on the theory that emotion interferes with rational thought. Law professor Neal R. Feigenson (Quinnipiac University School of Law) studied the subject and wrote:

> The law's general attempt to exclude sympathy and other emotions from juror decision-making stems from two principal concerns. First, emotional decision-making is thought to be fundamentally irrational and unpredictable. Second, it is thought to bias decision-makers inappropriately. In both respects the legal ideal derives from a long history in Western philosophy and science of opposing emotion to reason and holding the latter to be the only proper basis for decision-making.

(Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis* (1997) 65 Tenn. L. Rev. 1, 15.)

EMPATHY

The problem with this "long history in Western philosophy and science" is that it ignores modern scientific research. For example, psychological and neurobiological researchers at the University of Southern California have discovered that the ability to make good decisions requires both rational thought *and* emotion. Without the ability to access emotions, so-called rational decisions are impossible. (Immordino-Yang, *We Feel, Therefore We Learn: The Relevance of Affective and Social Neuroscience to Education*, Journal of Mind, Brain and Education, March, 2007.)

Law professor Jody Lyneé Madeira (Maurer School of Law) offers this criticism of the law's backward thinking:

> Concerns over judicial perceptions of emotive response and empathy in particular suggest not only that judicial constraints upon such factors are faulty, but also that the very judicial understandings of these concepts are flawed. The shallowness of judicial comprehension of emotive response and its proper role explains why legal attempts to constrain empathic identification are so shaky. Because there is no firm doctrinal ground in which to sink them, judicial attempts to constrain empathy are necessarily ineffective, inefficient, and unworkable.

(Madeira, *Lashing Reason to the Mast: Understanding Judicial*

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Constraints on Emotion in Personal Injury Litigation (2006) 40 U.C. Davis L. Rev. 137, 192.)

Empathy is defined as "the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another." (www.merriam-webster.com.) If jurors are allowed to empathize, will they place a greater value on harm suffered by someone else? In a comprehensive study of the effect of allowing a Golden Rule argument, it was found that damage assessments were nearly doubled. (Edward J. McCaffery et. al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards* (1995) 81 Va. L. Rev. 1341, 1387.) Could it be that the purpose for prohibiting a Golden Rule argument was to keep damage awards down, and that the reasons for the rule were after-the-fact rationalizations?

There is no empirical evidence that I have located that a Golden Rule argument actually causes the feared consequences of converting an unbiased and unprejudiced juror into one who becomes a partisan for the plaintiff. One legal scholar wrote that "in U.S. civil litigation, Golden Rule reasoning more often than not is considered prejudicial, primarily because the *imaginative leap* that jurors are being asked to make compromises their impartiality – they are trying to put themselves in the position of one party and not the other – and has them focus on their emotions rather than on the trial evidence." (Emphasis added.) (Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and Law.* (2009) 84 Notre Dame L. Rev. 1529, 1573.) Nevertheless, the fact remains that the rule is not likely to change regardless of its faulty underpinnings. Trial lawyers need to know what is, and what is not, a Golden Rule argument and how they can abide by the rule and still access the empathy of the jurors.

The prohibition is very limited

In my book, *Persuasion Science for Trial Lawyers* (Full Court Press, 2022), I wrote about the research proving that unless people found a subject to be self-relevant, their interest would be low and, as a consequence, they would be less likely to favor the plaintiff's case. Can this be accomplished? The good news is that the application of the Golden Rule prohibition is narrow, and you can trigger empathy and self relevance without violating the Golden Rule prohibition. In *Cassim v. Allstate Ins. Co.*, *supra*, our Supreme Court did not question the wisdom of the rule, but made it clear that a Golden Rule argument is limited and applies only to an argument "in which counsel asks jurors to put themselves in the plaintiff's shoes and ask what compensation they would personally expect." (33 Cal.4th at 798.)

In *Cassim*, during final argument, the plaintiff's lawyer said: "Just think, you're at a job. You have worked at it real hard. You're a good employee. And then a new boss comes along. He doesn't like you. Maybe it's because of your sex, your race or whatever. And he discharges you. And he wrongfully discharges you." (33 Cal.4th at 791). The Supreme Court explained that the comments did not invoke the Golden Rule because "Herzog never urged the jurors to put themselves in the Cassims' position or to view the case from the Cassims' personal perspective. We thus find the disputed argument was not improper for either appealing to the jurors' self-interest or urging them to decide the case subjectively rather than objectively."

There is arguable justification for this limited application. For example, what if the plaintiff suffered an amputation of his left-hand pinky finger, and a juror was a world-famous violinist. To that juror, the loss would be catastrophic because the fingers of the left hand play the notes. Therefore, a suggestion that the damages should be considered in terms of a personalized loss would be improper.

Does this mean that plaintiff attorneys can make the subject matter personally relatable without violating the Golden Rule prohibition? The answer seems to be yes. Apparently, it is not a violation of the Golden Rule if you do not say the quiet part out loud. Don't use words that ask jurors to personalize the harm like, "How would you feel?" and don't ask jurors to determine damages based on what it would be worth to them.

Invoking empathy without violating the Golden Rule

A Golden Rule violation seems to simply be an article of faith that has been part of the lore of the law for so long that it need not be questioned. Therefore, it is a useless exercise to debate whether the Golden Rule prohibition is or isn't based on empirical evidence that jurors lose impartiality when they hear the forbidden words. The forbidden words remain forbidden. Nevertheless, because jurors are more likely to favor plaintiffs when they are able to empathize, the task for trial lawyers is to engender empathy without telling jurors what they should think or feel. In *Cassim*, *supra*, the Court said, "In conducting closing argument, attorneys for both sides have wide latitude to discuss the case." Accordingly, so long as you don't ask the jurors to put themselves in plaintiff's shoes, it is perfectly appropriate to discuss the effect of pain or other conditions. The goal is to provoke imagery. Consider this argument:

> There are people who feel no pain. These people would have difficulty as jurors because knowing what it is like to experience pain is important to be able to understand what [plaintiff] has been through and lives with. Those who have never felt constant pain, can't imagine what it's like; how it affects the ability to think clearly, to communicate with others, and how it robs you of energy and stamina. And what must it be like to live with anxiety, panic attacks and depression? Does it tear at the fabric of the mental tranquility that is needed to get though the day?

Because you have not asked the jurors to put themselves in plaintiff's shoes or asked them to feel what plaintiff feels ("Imagine what it would be like if *you* had constant pain"), there is no *Golden Rule* violation. There is no prohibition on motivating jurors to draw on their life

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experiences. The contrary is true: "Jurors' views of the evidence . . . are necessarily informed by their life experiences. (*In re Malone* (1996) 12 Cal.4th 935, 963.) "Jurors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself. Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them." (*Moore v. Preventive Medicine Medical Group, Inc*. (1986) 178 Cal.App.3d 728, 742.) "The jury system in this country is based on the belief that non-professional jurors will bring to the fact finding process a combination of community attitude and practical wisdom born of real life experience . . . ." (*Maple v. Cincinnati, Inc*. (1985) 163 Cal.App.3d 387, 394.)

Jurors are required to evaluate what it must be like for the plaintiff to have suffered. "The jury must impartially determine pain and suffering damages based upon evidence specific to the plaintiff . . . ." (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764). In fact, there are specific instructions that tell the jurors that damages must be awarded even if plaintiff was more susceptible than a "normal healthy person" and even if plaintiff had a pre-existing condition that was made worse. (CACI Nos. 3927, 3928.) This is a good reason why advocates for plaintiffs wouldn't want jurors to weigh damages according to their own healthy constitution.

The Golden Rule prohibition applies only to damages, not causation

Personalization of damages is the basis of the Golden Rule argument preclusion. No case says that it can't be used in arguing causation. In fact, even though some courts have held that reference to "keeping the community safe" in final argument is improper if there is an inference that jurors might personalize it as applying to them (see, e.g., *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 599), reference to "community standards" is appropriate when arguing causation. CACI 413 instructs: "You may consider customs or practices in the community in deciding whether [name of plaintiff/defendant] acted reasonably."

Federal courts agree. "The use of the Golden Rule argument is improper only in relation to damages. It is not improper when urged on the issue of ultimate liability." (*Stokes v. Delcambre* (5th Cir. 1983) 710 F.2d 1120, 1128.) "[C]ounsel's alleged appeals to the Golden Rule argument related to liability only and not damages and were therefore not improper." (*Johnson v. Celotex Corp*. (2d Cir. 1990) 899 F.2d 1281, 1289.)

Putting it all together

The Golden Rule prohibition is very specific: it is argument that asks jurors to personalize how a similar injury to themselves should be compensated. It does not, however, disallow argument related to liability, or that triggers imagery that evokes memory or imagination of how the plaintiff must feel based on personal experience. "Most people, whether acting as jurors or judges, are bound to experience emotion in response to many of the conflicts with which the law deals. To conceive of justice as nonemotional implies a model of decision-making in which the decision-maker acts without body or soul. It seems reasonable to suppose that many people would find such a model of decision making not only impossible to approximate, but also not worth striving for." (Neal R. Feigenson, *supra*, 65 Tenn. L. Rev. 1, 37–38.) Motivating jurors to apply their values and search their memories or imagination for what it was like to be in pain or to suffer is proper advocacy.

John P. Blumberg specializes in tort litigation. He is triple-board certified: as a trial lawyer by the National Board of Trial Advocacy, as a medical malpractice specialist by the American Board of Professional Liability Attorneys, and as a legal malpractice specialist by the State Bar of California, Board of Legal Specialization. He is a member of the American Board of Trial Advocates with the rank of Advocate. He is also the author of the book, Persuasion Science for Trial Lawyers. (Full Court Press, 2022, Persuasion-Science.com.)