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## Making Stuff Up

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## **Making Stuff Up**

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# Making Stuff Up

Richard H. Underwood<sup>†</sup>

## Abstract

*Beginning with an article in this Journal almost thirty years ago, Professor Underwood continues to research and write about legal ethics and litigation. In this Commentary, he offers a witty look at several cases where, in his opinion, the judge allowed improper arguments to the jury.*

## Introduction

Almost thirty years ago, as a new Assistant Professor, I published an article in the *American Journal of Trial Advocacy*.<sup>1</sup> My subject was trial ethics or, if you will, “dirty tricks” in litigation. My thought was that it might be helpful if new lawyers had “a primer on the more common forms of cheating employed by trial lawyers . . . [together with some suggested] antidotes that may be administered to curb . . . abuses.”<sup>2</sup> Thirty years later that little article has turned into a textbook of over 700 pages, with a 250-page supplement.<sup>3</sup>

Of course, my project was hardly original. A technical manual on the black arts of advocacy styled the *Rhetorica Ad Herennium* dates back as far as the first century B.C.<sup>4</sup> This treatise was used as a standard text on rhetoric during the Middle Ages and the Renaissance. The work addresses numerous subjects, including the mnemonic techniques used by ancient orators to memorize their speeches.<sup>5</sup> It also catalogs the

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<sup>1</sup> Richard H. Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADVOC. 265 (1982).

<sup>2</sup> *Id.* at 266.

<sup>3</sup> WILLIAM FORTUNE ET AL., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY (2d ed. 2001) (originally published as RICHARD UNDERWOOD & WILLIAM FORTUNE, TRIAL ETHICS (1988)).

<sup>4</sup> CICERO, RHETORICA AD HERENNIUM vii (Harry Caplan trans., Loeb Classical Library 1978) (1000 B.C.).

<sup>5</sup> The interested reader might enjoy FRANCES A. YATES, THE ART OF MEMORY (1966).

techniques or tricks of persuasion used by the ancients. We now call many of these standard arguments fallacies of language, or fallacies of informal logic.<sup>6</sup> In another article in the *Journal* I provided illustrations of how today's trial lawyers continue to employ fallacious arguments.<sup>7</sup> My point is that collections of dirty tricks, while well intended, will not lead to reform. Lawyers do not think about such things. Indeed, an early reviewer of my proposal for a book on "trial ethics" pretty much summed up the prevailing attitude:

What a coincidence! [Name omitted] was actually reading Underwood's article on dirty tricks when my letter requesting his help arrived. In general, [name omitted] is very keen on the [book] proposal, but he believes it must be restructured if it is to appeal to practitioners: the focus must be on ethics as a tool and a weapon.

In particular:

Underwood's article provides the model for the style of the book, and "to hell with the more scholarly approach"; practitioners are only interested in something they can use or "get screwed by!"<sup>8</sup>

Still, it is fun to collect, so I soldier on.

In this little Commentary, I am reporting on several new cases that I encountered when I was updating my collection. In each case, a trial judge allowed a lawyer to engage in what I think was clearly improper argument.<sup>9</sup> Now, you may say, this goes on all the time. Yes, it does, but these arguments were bizarre, even breathtaking, leaving one to ask—"What is going on out there?" But before examining these cases, let's review some basics.

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<sup>6</sup> See NICHOLAS CAPALDI, *THE ART OF DECEPTION* (rev. ed. 2007) (1987); S. MORRIS ENGEL, *FALLACIES AND PITFALLS OF LANGUAGE: THE LANGUAGE TRAP* (1994); ANTONY FLEW, *HOW TO THINK STRAIGHT: AN INTRODUCTION TO CRITICAL REASONING* (1977).

<sup>7</sup> Richard H. Underwood, *Logic and the Common Law Trial*, 18 AM. J. TRIAL ADVOC. 151 (1994).

<sup>8</sup> These comments were written from my editor to me when he was reviewing my proposal, in 1985, for the book, *Trial Ethics*. See UNDERWOOD & FORTUNE, *supra* note 3.

<sup>9</sup> I have my own theory—that the trial judge is probably a former prosecutor. Things follow from this, and I assume I do not need to spell these things out.

## What We Talk About in Legal Ethics

I have taught evidence law, trial practice and legal ethics for thirty years, and based on my experience I suspect that law students have only a limited understanding of what is and is not proper argument to the jury. While there are exceptions,<sup>10</sup> I have not seen much attention paid to the subject in law school teaching materials, practice literature, or CLE programs. This is so despite well established rules of “ethics.” Consider Model Rule 3.4(e), titled “Fairness to Opposing Party and Counsel”<sup>11</sup>:

A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.<sup>12</sup>

There is a lot of “trial law”<sup>13</sup> in this rule. There should be no misstating of evidence, reference to extrarecord facts, misuse of evidentiary rulings, no personal opinion or belief or lawyer testimony in the argument, no misstatement of the decision-making criteria or mention of improper criteria, and no appeals to sympathy, passion or prejudice.<sup>14</sup> All of this is, in theory if not in practice, backed up by the general “rule” that “a lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal.”<sup>15</sup>

In practice, these rules are honored in the breach. While objections are frequently made when counsel refers to or relies on “facts not in evidence,” trial judges are, more likely than not, going to move on after

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<sup>10</sup> See JACOB STEIN, *CLOSING ARGUMENTS* (2d ed. 2005 & Supp. 2009).

<sup>11</sup> Now, there is a concept!

<sup>12</sup> ABA MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2007); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107 (2000).

<sup>13</sup> I strongly recommend that students and practitioners alike read and keep closely at hand: J. Alexander Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623 (1986).

<sup>14</sup> See FORTUNE ET AL., *supra* note 3, ch. 13.

<sup>15</sup> ABA MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2007); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 105 (2000).

muttering some vague incantation like “counsel’s argument is not evidence,” or “the jury will have to remember what the evidence is,” or a petulant “let’s move on, get on with it.”

As a state chairman of a Model Rules Committee—a Committee charged with reviewing and making recommendations on the adoption or amendment of the ABA Model Rules—I recall receiving a hostile reaction to Rule 3.4. Many members of the audience thought that we were engaged in an all-out and radical attack on the adversary system. “How can you advocate if you can’t tell the jury your personal opinion?” and so on. It did not matter that the same rules, word for word, had been included in the Code of Professional Responsibility, which had supposedly been in effect for years.<sup>16</sup> Oh well, professors “are not real lawyers anyway,” and “those who can’t do teach.”<sup>17</sup> “You don’t live in the real world.” Let’s get a taste of what goes on in the “real world.”<sup>18</sup>

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<sup>16</sup> See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(C)(1)-(7) (1980).

<sup>17</sup> My (hopefully funny) adventures and frustrations as an ethics chairman are recounted in more than one writing. See Richard H. Underwood, *Confessions of an Ethics Chairman*, 16 J. LEGAL PROF. 125 (1991); Richard H. Underwood, *What I Think I Have Learned About Legal Ethics*, 39 IDAHO L. REV. 245 (2003). When my Model Rules Committee proposed that Kentucky adopt the Model Rules, we were hammered (even by one of my Committee members, who had not raised any objection before the Committee) for suggesting that a lawyer had an obligation to disclose directly adverse law in the controlling jurisdiction, MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2007), despite the fact that that was the current rule under the Kentucky Code of Professional Responsibility; and that we suggested that a lawyer had an obligation to report the misconduct of other lawyers—a duty imposed under the prevailing Code and imposed on law students under our law school honor code. Some members of the audience, including a member of the Supreme Court (sitting on our panel in front of the audience) referred to the rule contemptuously as the “snitch rule.”

<sup>18</sup> Things have not changed much over time. Here is a funny little historical anecdote from Joseph Baldwin, describing the antics of “fictional” Kentucky lawyer Cave Burton:

[H]e was for “jurying” everything, and allowing the jury—the apostolic twelve as he was wont to call them—a very free exercise of their privileges . . . . He liked a free swing at them. He had no idea of being interrupted on presumed misstatements, or out-of-the-record revelations: he liked to be communicative when he was speaking to them, and was not stingy with any little scraps of gossip. Or hearsay, or neighborhood reports, which he had been able to pick up concerning the matter at hand or the parties. He was fond too, of giving his personal assurances and solemn asservations of personal belief or knowledge of facts and law.

JOSEPH BALDWIN, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI* 113 (reprinted in 1957).

## Let's Make Up Some Stuff

How interesting can a “slip and fall case” be? In this case, pretty interesting.<sup>19</sup> For one thing, a law professor was allowed to sit on the jury. It happens!<sup>20</sup> A plaintiff’s verdict for \$876,000 was reversed on appeal, in part because of alleged jury misconduct by the professor foreperson.<sup>21</sup> I will not discuss the law professor part, although I do savor the opportunity to indulge in a little professional *Schadenfreude*.<sup>22</sup>

Joyce Barber sued alleging that she slipped and fell while looking for pantyhose in the defendant’s store.<sup>23</sup> She testified at the trial that she did not see anything on the floor before or after her fall, but the bottom of her pants were wet after the fall.<sup>24</sup> Needless to say the complaint alleged that the defendant was negligent in failing to maintain or inspect the premises.<sup>25</sup> However, things got complicated from the start. Plaintiff’s counsel made a number of assertions in his opening statement along the lines of—the store did not keep records of inspections of the floor; the store could not say when it last inspected the floor because there were no records; records would have shown when the floor was last inspected; “we’ve asked for those records [and not gotten them, was the implication].”<sup>26</sup> The defense objected to these and other statements, but the court glossed over the matter, simply instructing the plaintiff’s counsel to “move on” and that objections would be heard later.<sup>27</sup> At the close of the

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<sup>19</sup> See *Barber v. ShopRite of Englewood & Assocs.*, 966 A.2d 93 (N.J. Super. Ct. App. Div. 2009).

<sup>20</sup> I have served on juries in criminal cases. In one, the defense lawyer left me on a jury—and also accepted a former Assistant United States Attorney (and a Republican!). Yes, the “real world” is a strange place.

<sup>21</sup> *Barber*, 966 A.2d at 107-08. I think the court’s discussion of the alleged jury misconduct (if there was any, and if it was properly considered) was unnecessary to the decision, since the plaintiff’s lawyer’s conduct justified a new trial; but you can read the opinion for yourself.

<sup>22</sup> This term is defined as “enjoyment obtained from the troubles of others.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1110 (11th ed. 2003).

<sup>23</sup> *Barber*, 966 A.2d at 97.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

plaintiff's opening defense counsel moved for a mistrial. Among other grounds, the

[defense] argued that plaintiff improperly framed the opening to suggest that defendant failed to keep records it was obliged to keep [without proof of industry standards requiring such record keeping] and failed to provide them to plaintiff, implying that defendant either "got rid of them" or somehow destroyed "some kind of evidence."<sup>28</sup>

The judge denied the motion for a mistrial<sup>29</sup> and delivered some not particularly enlightening admonitions to the jury.<sup>30</sup> Now for the plaintiff's case-in-chief.

The plaintiff continued on the same theme. Russell Tyndall, a ShopRite field manager was called.<sup>31</sup> He had been in the store on the day of the fall, and he testified that walk-through inspections were done at the store five times a day—and he had no reason to believe inspections were not done that day.<sup>32</sup> He was asked whether the store kept records of "leaks or spills" and when he said it did not, counsel produced a "Wakefern corporate form" and without laying any foundation asked the witness what it was.<sup>33</sup> The witness did not know. The court did not rule on a defense objection, but instead repeated counsel's question about whether there was any record on inspections preceding the fall.<sup>34</sup> The witness indicated that a spiral notebook was used to log anything that needed to be logged, but also stated that the Wakefern form was not used.<sup>35</sup> The judge said "Okay. That's the end of that," but issued no admonition regarding the references to the form.<sup>36</sup> Plaintiff's counsel then moved on to suggest that there were "clear baby splash colognes in

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<sup>28</sup> *Id.* at 97-98.

<sup>29</sup> *Id.* at 108.

<sup>30</sup> *See id.* at 98-99.

<sup>31</sup> *Id.* at 99.

<sup>32</sup> *Id.*

<sup>33</sup> *Barber*, 966 A.2d at 99.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



that aisle” where the fall occurred.<sup>37</sup> The witness could not say.<sup>38</sup> Counsel then produced a bottle from his briefcase and, over objection, suggested that “PRM Slash Cologne” was across the aisle from the pantyhose plaintiff was looking for.<sup>39</sup> Again, the witness had no idea.<sup>40</sup> The witness could recall that the only liquid on the floor was a few drops of water from an umbrella plaintiff had placed in her shopping cart.<sup>41</sup>

During his closing argument plaintiff’s counsel argued that water “dissipates,” and that the fall “happened to be [near] . . . the baby bath and shampoo, the baby splash cologne.”<sup>42</sup> Defense counsel objected that reference to the splash cologne was improper without an adequate foundation, but the court simply said “no” and let the argument continue.<sup>43</sup> Again the argument returned to the theme of the opening statement, that inspection reports did not exist: “Maybe they don’t. Maybe a big store like this doesn’t have records.”<sup>44</sup> Then plaintiff’s counsel referred to a videotape of the plaintiff lying on the floor, which had been shown to the jury at the beginning of plaintiff’s case in chief, without any foundation testimony about it.<sup>45</sup> (Those pesky foundations and technicalities!) Counsel suggested that the defendant would destroy the videotape: “I’ll look at all this before anybody has a chance to erase that tape. No. No, I’m not going to do that. Credibility. It’s a key in this case.”<sup>46</sup> When defense counsel objected to the implication that non-existent records may have existed but that defendant failed to produce the nonexistent records, the judge declined to rule.<sup>47</sup> Observing that the Wakefern form was not relevant to the case, the judge still overruled the objection on that piece

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 99-100.

<sup>40</sup> *Id.* at 100.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Barber*, 966 A.2d at 100.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 101.

of evidence, and with respect to another objection, told defense counsel that he was “being too sensitive.”<sup>48</sup>

In reversing the jury verdict for the plaintiff, the appellate court opined:

Here, our review of the record has convinced us that plaintiff’s counsel persisted “in making unwarranted prejudicial appeals to [the] jury” and that the trial court did not adequately respond to defendant’s objections to cause plaintiff’s counsel to change his trial strategy . . . . [T]he court allowed plaintiff’s counsel to question Tyndall on the baby splash cologne without any foundation and without even establishing that the product was carried by the store at the time of the accident. Similarly, the court allowed plaintiff’s counsel to question Tyndall on the Wakefern document without any foundation. In neither instance did the court instruct the jury to disregard the questions and draw no inferences therefrom.

The court allowed plaintiff’s counsel to imply repeatedly that defendant failed to maintain and/or produce spill inspection records, without establishing whether industry standards required maintenance of such records, whether specific records were requested or whether there had been any pre-trial motions to compel discovery of such records.

We need not consider whether each error standing alone would warrant reversal because we are satisfied in the aggregate, the numerous errors recited . . . deprived defendant of a fair trial.<sup>49</sup>

## “Imagine”

If you like the song by John Lennon,<sup>50</sup> good for you—different strokes for different folks. Just do not sing it to me during your closing argument. If I hear my opponent say “Let’s imagine . . . ,” I am going to be on my feet objecting.

Mack Whittenburg was driving his pickup on a highway when he collided with a stalled tractor-trailer, and suffered a number of serious injuries, for which a jury awarded him \$3.2 million.<sup>51</sup> The appellate court

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 106-07. For the reversal of a \$30 million verdict, in part because of an argument referring to spoliation and cover-up, unsupported by the evidence, and advanced contrary to a prior ruling of the court, see *Harris v. Mt. Sinai Medical Center*, 116 Ohio St. 3d 139, 2007-Ohio-5587, 876 N.E.2d 1201.

<sup>50</sup> JOHN LENNON, *IMAGINE* (Apple Records 1971).

<sup>51</sup> *Whittenburg v. Werner Enters.*, 561 F.3d 1122, 1124 (10th Cir. 2009).

reversed because of an improper closing argument.<sup>52</sup> In the argument his counsel asked the jury to “imagine” with him that shortly after Mr. Whittenburg left his house the night of the accident, the defendant trucking company, Werner Enterprises, delivered a letter to Whittenburg’s children.<sup>53</sup> Counsel proceeded to read the imaginary letter to the jury.<sup>54</sup> It contained imaginary admissions—made-up stuff—never actually uttered by the defendants, and contained “vituperative and unprovoked attacks on defendants and their counsel.”<sup>55</sup> This made-up letter consumed over half of the plaintiff’s summation.<sup>56</sup> The defendants objected—“[t]his is no comment on any evidence we’ve heard in this case”<sup>57</sup>—but the judge overruled the objection and granted counsel a continuing objection. The appellate court reprinted the offending argument verbatim, and it takes up three pages of the opinion.<sup>58</sup> The court proceeded with its analysis:

Counsel conjured a letter written by Werner to [the plaintiff’s children] notifying them for the first time of the news of their father’s accident. The jury was then presented with a detailed and fabricated image about the children receiving the letter, and was implicitly invited to place themselves in the shoes of the children, with counsel repeatedly using phrases such as “your dad” and the pronoun “you.” Counsel then introduced a number of invented admissions by Werner—admissions that [the driver] was “inexperienced” and “too confused to read road signs;” and that [the driver’s trainer who was with the driver] was “to tired to properly supervise her” and was in a “blue funk;” that the two drivers together—rather than “taking a little extra time” to find a “safe place” to turn around—“ignore[d] the law” and “ignore[d] company procedures” to “recklessly set a trap” for [the plaintiff]; and that the drivers did so “so they don’t have to answer . . . for the delay and downtime” and so [the supervisor] didn’t have to explain why he allowed [the driver] to “execute an improper maneuver.”

Before us, the parties fight considerably over the propriety of ever using an imaginary letter as a way to structure a closing argument. But we need not resolve today an abstract debate over the proper *form* of closing

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<sup>52</sup> *Id.* at 1133.

<sup>53</sup> *Id.* at 1124.

<sup>54</sup> *Id.* at 1127.

<sup>55</sup> *Id.* at 1124.

<sup>56</sup> *Id.* at 1127.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1125-27.

arguments because in this case there is a more pressing problem. Even assuming the possible propriety of this technique generally, the *content* of this particular imagined letter included a great many facts about Mr. Whittenburg's children and Werner's conduct that lacked any basis in the evidence adduced at trial. Counsel's argument accordingly violated the cardinal rule of closing argument: that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence . . .

The invented facts placed before the jury were also plainly calculated to arouse its sympathy, evoking, as they did, images of plaintiff's children receiving for the first time news of their father's injuries, implicitly asking the jury to place themselves in the shoes of the children, and portraying Werner as repeatedly admitting to reckless conduct. What's more, as these admissions were couched in terms of Werner planning future actions to harm Mr. Whittenburg, the closing argument at least subtly, if not overtly, placed before the jury the suggestion that Werner acted with a degree of calculated intentional malevolence—a suggestion that had no foundation in this trial on negligence . . .

But these are not the only problems with counsel's argument. . . . [C]ounsel went much further, devoting a quarter of his closing argument (14 paragraphs' worth)—to vituperative attacks on defendants and their counsel—attacks that likewise had no basis in evidence adduced at trial. Counsel's imagined letter is littered with putative confessions from Werner that it improperly took this case to trial; . . . that it purposefully mounted an improper and dishonest defense in which it unfairly ridiculed Mr. Whittenburg, presented a one-sided view of the evidence, "forced" and "subjected" Mr. Whittenburg to a trial, and used "smoke and mirrors and half truths" in order "to try and shift the jury's focus away from the real issue in this case."<sup>59</sup>

Here again, as in the preceding case, the appellate court faulted the trial court for simply overruling defense counsel's objections without taking any curative action, which "could only have left [the jury] with the impression that they might properly be influenced by [the improper appeal] in rendering their verdict."<sup>60</sup> Imagine that!

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<sup>59</sup> *Id.* at 1128-29; see also *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004) (in a sexual harassment action, rhetorical aim of making defendant's German ownership an issue, with repeated attempts to equate plaintiff with a Holocaust victim); cf. *Powell v. St. John Hosp.*, 614 N.W.2d 666 (Mich. Ct. App. 2000) (relentless attacks on defense counsel and assignment of blame to defense counsel for defendant's alleged misdeeds); *Badalamenti v. William Beaumont Hospital-Troy*, 602 N.W.2d 854 (Mich. Ct. App. 1999) (attacks with no basis in fact that defendants and their witnesses were engaged in conspiracy, collusion and perjury; appeal to jurors as taxpayers).

<sup>60</sup> *Whittenburg*, 561 F.3d at 1131.

## Let's "Channel"

Many odd ideas are passed on in CLE presentations. I have a vague memory of attending one program years ago in which a lawyer was holding forth on his use of "Day in the Life Films." The film he showed had all kinds of objectionable sound and fury in it. I wondered if he had actually used the film as shown, and how many attendees actually thought that the presentation was proper. How things get started!

"Channeling the victim," a technique in which the lawyer speaks in the voice of the victim in a criminal<sup>61</sup> or civil case, got the attention of the popular press during John Kerry's run for the Presidency in 2004.<sup>62</sup> His running mate, John Edwards, was said to have used the technique in at least one medical negligence case in which the parents of a child, born with cerebral palsy, hired Edwards to sue on the theory that a CEsarian-section would have prevented the child's injuries.<sup>63</sup> During his summation he pretended to be the child speaking through him:

She said at 3, "I'm fine." She said at 4, "I'm having a little trouble, but I'm doing O.K." Five, she said, "I'm having problems." At 5:30, she said "I need out." She speaks to you through me. . . . And I have to tell you right now—I didn't plan to talk about this—right now I feel her. I feel her presence. She's inside of me, and she's talking to you.<sup>64</sup>

Edwards reportedly got a \$6.5 million verdict.<sup>65</sup> Permissible rhetoric or improper argument? Is a little okay—but not too much? Did anyone object? Consider the following case.

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<sup>61</sup> For a particularly bizarre performance, see *Drayden v. White*, 232 F.3d 704, 711 (9th Cir. 2000) (during closing argument the prosecutor took the witness stand in the role of the victim and delivered a soliloquy in the victim's voice; this risked manipulation and misstatement of the evidence and inflaming the passions and prejudices of the jurors).

<sup>62</sup> See generally Adam Liptak & Michael Moss, *In Trial Work, Edwards Left a Trademark*, N.Y. TIMES, Jan. 31, 2004, at A1, available at <http://www.nytimes.com/2004/01/31/politics/campaign/31EDWA.html?pagewanted=all>; Ann Coulter, *John Edwards: The Candidate Some Dead Babies Speak Through*, PITTSBURGH TRIB.-REV., July 11, 2004, available at [http://www.pittsburghlive.com/x/pittsburghtrib/s\\_202515.html](http://www.pittsburghlive.com/x/pittsburghtrib/s_202515.html).

<sup>63</sup> See Liptak & Moss, *supra* note 62.

<sup>64</sup> *Id.*; see Coulter, *supra* note 62.

<sup>65</sup> See Liptak & Moss, *supra* note 62; Coulter, *supra* note 62.

In a recent Montana case, Amy Heidt brought an action against Dr. Faranak Argani and her employer, the Deaconess Billings Clinic, alleging that the doctor's medical negligence had led to the death of her husband, Gerald Heidt.<sup>66</sup>

On the fifth day of trial Heidt's attorney presented his closing argument to the jury. Most of the argument was delivered as a first-person narrative by Heidt's attorney who assumed the persona of Heidt's deceased husband to recount the events leading to his death. On appeal Heidt's attorney describes his presentation as "[c]hanneling . . . as though he was the decedent." After an extended closing, Heidt's attorney began to "channel" a description of the death of Heidt's husband, using phrases such as: "Then, oh my God, I'm dying." He then began describing being autopsied, including a description of being cut open and of his sorrow at not getting to see his children grow up.<sup>67</sup>

The opinion does not state whether objections were made to this argument. (Is this made up testimony about irrelevant matters—the autopsy—not directed at passion and prejudice?<sup>68</sup>) But the issue on appeal was not the propriety of "channeling the victim."<sup>69</sup> The verdict was for the defendant, and the plaintiff was seeking a new trial.<sup>70</sup> Why?

[The channeling about the autopsy] got to be more than some could bear. One of the jurors announced that she was "not okay" and that she thought she was going to pass out. She attempted to leave the jury box and the court called a recess. The remaining jurors were taken to another room, and the ill juror was assisted into the jury room. She was attended by the defendant [Dr. Argani], by Heidt's co-counsel Hammond, who is also a physician, and, with the District Court's permission, by three other jurors who were also nurses. Emergency medical personnel were summoned and took the ill juror to the hospital. Dr. Argani was with the ill juror for approximately fifteen to twenty minutes.<sup>71</sup>

After the parties reconvened without the jury, plaintiff's counsel moved for a mistrial, on the theory that Dr. Argani's attending to the ill

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<sup>66</sup> Heidt v. Argani, 214 P.3d 1255, 1257 (Mont. 2009).

<sup>67</sup> *Id.* at 1257.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

juror was an irregularity that could prevent a fair trial.<sup>72</sup> The trial judge admonished the jury not to allow the events to effect their verdict, and asked the jurors whether they could set aside what happened and render a fair verdict.<sup>73</sup> None of the jurors expressed any problem.<sup>74</sup> The motion for a mistrial was denied, an alternate juror was seated, and closing arguments were completed.<sup>75</sup> The jury returned a verdict for the defendant.<sup>76</sup>

The appellate court reversed the verdict and ordered a new trial.<sup>77</sup> Make the jury sick and get a new trial! As I said before, the “real world” is a strange place.

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<sup>72</sup> *See id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Heidt*, 214 P.3d at 1259-60.