Sticks and Stones May Break My Bones, But Names Could Get Me a Mistrial: An Examination of Name-Calling in Closing Argument in Civil Cases

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*. J.D. candidate, Pepperdine University, May 2007. To my best friend and husband Tim, your patience, love, and support has made me strong. This article is as much yours as it is mine.And to Professor Caldwell, your friendship and advice both inspired this article and made me a better student of the law.

I. INTRODUCTION

Cheapskate . . . spin doctor . . . liar . . . cowardly, dirty low down dog . . . devil. These names and many others have found their way into our courtrooms time and time again. Despite the ubiquitous adage: "sticks and stones may break my bones, but names will never hurt me," are names really meaningless? In playground scuffles perhaps, but what about in the courtroom where someone's livelihood and reputation is at stake? Notwithstanding the potentially high stakes and despite the passions name-calling incites, appellate review and guidance on this issue has been both scarce and inconsistent.[1] Some courts dispose of the issue with very few words, others discuss it at length, and still others find that any prejudice is cured by a simple instruction to the jury.[2]

Regardless of the inconsistency of appellate review, the reality is that improper name-calling during closing argument can have very dire consequences. It can inflame passions and prejudices, it can distract from the real issues, and it can even result in unwarranted verdicts. But despite the undesirable consequences, name-calling during closing argument has received little attention, and the attention it has received has generally focused on name-calling in criminal cases, particularly prosecutorial name-calling of the defendant.[3] Few state or federal courts have

1. *See infra* notes 171-254 and accompanying text. In the last two centuries there have been less than thirty civil cases dealing with the issue of improper name-calling in closing argument. Moreover, the cases that have addressed the issue have been inconsistent, with some courts reversing the case and speaking very firmly about the name-calling, while others affirm in spite of it. *See infra* notes 171-254 and accompanying text.

2. *Compare* Al-Site Corp. v. Croce, 647 So. 2d 296, 297-98 (Fla. Dist. Ct. App. 1994) (stating that it would not let a judgment stand regardless of the fact that there were no timely objections to the inappropriate name-calling that occurred) *with* Olgetree v. Willis-Knighton Mem'l Hosp., Inc., 530 So. 2d 1175, 1181 (La. Ct. App. 1988) (stating that it would not reverse a judgment even though an attorney inappropriately called names because there were no objections and because corrective admonitions were given to the jury).

3. *See, e.g.*, Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1300 (1996); Harry Caldwell, *Name Calling at Trial: Placing Parameters on the Prosecutor*, 8 AM. J. TRIAL ADVOC. 385, 385 (1985); Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1214-15 (1992); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1159 (1999).

addressed name-calling concerns in civil trials, and indeed, the issue has never come before the Supreme Court. With no clear and consistent guidelines, trial lawyers do not have a means to determine whether or not they are overstepping the boundaries of closing argument.[4]

Apart from the paucity of appellate guidance, this issue merits attention because it provides a sense of proper professional behavior in an area that is becoming increasingly prone to scorched earth tactics. As professionals, attorneys have a duty to uphold the law, zealously represent their clients within the bounds of that law, and act civilly towards one another.[5] This duty exists regardless of the passions that are aroused by the particular case at hand. The fact is that "[n]ame-calling is . . . a playground prank [and] [i]t is unworthy of officers of the court who throughout three years of law school ought to have learned something about acceptable courtroom conduct."[6] Although our legal system encourages, and even mandates, zealous advocacy in the courtroom, this zealousness should not remain unchecked.[7] There is certainly "nothing wrong with strong advocacy in the cause of [a] client . . . but it has to be done with respect for . . . counsel, and respect for the court."[8] As a result of the scarce attention this issue has received and because of the inconsistent message from trial judges and appellate courts, this comment will cast the first stone in the brook that will hopefully lead to reform in the area and elimination of improper name-calling.

Part II of this article details the law that applies to this issue by outlining the purpose of closing argument and the various restrictions placed on its content.[9] Inasmuch as name-calling is an appeal to passion and prejudice, Part II will also specifically deal with the history and rationale behind the prohibition on appealing to passion and prejudice.[10] Part III discusses the Model Rules of Professional Conduct and other principles of professionalism in order to determine if they shed any light on the acceptable behavior of attorneys during closing argument.[11] Part IV provides a detailed analysis of the relevant case law addressing the issue of name-calling during

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4. Ty Tasker, *Sticks and Stones: Judicial Handling of Invective in Advocacy*, JUDGES' J., Fall 2003, at 17, 17 (stating that there is no precise "bright line between ethically zealous argument and improper vituperation").

5. *See id.*

6. *Id.* at 21 (quoting Landry v. State, 620 So. 2d 1099, 1103 (Fla. Dist. Ct. App. 1993)) (internal quotation marks omitted).

7. *See* Nidiry, *supra* note 3, at 1302. Additionally, the right to be zealous does not give attorneys the right to be uncivil. Tasker, *supra* note 4, at 17.

8. Tasker, *supra* note 4, at 17 (quoting Jon Jefferson, *But What Role for the Soul?*, 77 A.B.A. J. 60, 63 (Dec. 1991) (quoting Bradford, J.)) (internal quotation marks omitted).

9. *See infra* notes 15-67 and accompanying text.

10. *See infra* notes 68-105 and accompanying text.

11. *See infra* notes 107-66 and accompanying text.

closing argument in civil cases.[12] Part V discusses the typical remedies that courts, both at the trial and appellate level, employ when faced with name-calling in closing argument, as well as various proposals by scholars who have addressed name-calling in the criminal context.[13] Finally, Part V also proposes a remedy for the problem in civil cases.[14]

II. THE LAW OF CLOSING ARGUMENT

A. *Purpose of Closing Argument and Restrictions*

Closing argument is a crucial part of every case because it is the advocate's last chance to convince the jurors that he should win the case.[15] The closing argument is considered by many "as a legal battleground in which almost anything goes."[16] Unlike an opening statement, which is merely intended to explain the evidence and describe the issues,[17] "the purpose of closing argument . . . is to draw together all of the facts and to present the theories of the litigants so that the fact finder may make a proper decision."[18] The closing argument is the advocate's primary opportunity to "frame[ ] the evidence to support her 'theory' of the case, presenting the explanation for the facts that most strongly helps [her side] or hurts [the other side]."[19] According to the Supreme Court, closing argument is intended "to sharpen and clarify the issues for resolution by the trier of fact . . . ."[20] Despite its importance, the closing argument is not to be considered as evidence by the jurors, but is simply given "to assist the jury in analyzing the evidence."[21]

In accomplishing the purpose of closing argument, the advocate is "released from the highly-regulated process of factfinding" and is generally given wide latitude

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12. *See infra* notes 167-254 and accompanying text. Specifically this section will address the discrepancies in how different appellate courts deal with name-calling.

13. *See infra* notes 255-77 and accompanying text.

14. *See infra* notes 278-307 and accompanying text.

15. JOSEPH R. NOLAN, TRIAL PRACTICE: CASES AND MATERIALS 143 (1981).

16. Nidiry, *supra* note 3, at 1299 (quoting Bradley R. Johnson, *Closing Argument: Boom to the Skilled, Bust to the Overzealous*, 69 FLA. B. J. 12, 12 (1995)) (internal quotation marks omitted).

17. 2 ROGER HAYDOCK & JOHN SONSTENG, OPENING AND CLOSING: HOW TO PRESENT A CASE ¶ 2.01 (1994). Opening statement is entirely different from closing argument because the advocate is not permitted to argue his case to the jurors in opening statement. *Id.* at ¶ 2.06. Rather, the advocate must merely present the most persuasive case possible, while keeping in mind that he must have a witness who can competently testify to everything he discusses in the opening. *Id.* at ¶¶ 2.03, 2.06.

18. JACOB A. STEIN, CLOSING ARGUMENTS: THE ART AND THE LAW 1-6 (2d ed. 2005).

19. Nidiry, *supra* note 3, at 1306.

20. Herring v. New York, 422 U.S. 853, 862 (1975).

21. Candice D. Tobin, *Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law*, 24 NOVA L. REV. 35, 45 (1999) (quoting United States v. Bailey, 123 F.3d 1381, 1400 (11th Cir. 1997)) (internal quotation marks omitted).

"to use evidence combined with rhetorical skills to convince the factfinder that her inferences are correct."[22] For example, advocates are generally allowed "to explore the full realm of logic, eloquence and advocacy in closing argument . . . ."[23] Moreover, advocates may even "resort to flowery oratory and use emotional language, or may liken his or her demeanor in arguing to the picturesque image of lawyers painted by the theater, television and movie world."[24] Advocates are also permitted to use "poetry, cite history, fiction, personal experiences, anecdotes, biblical stories, or tell jokes."[25] Finally, it may even be permissible for advocates to display emotion by shedding tears.[26] The broad behavior allowable in closing argument does not mean, however, that an advocate's behavior or argument during summation goes unchecked. Instead, "the [legal] system wishes to provide advocates with a forum to forcefully and effectively present their arguments, but [it] also hopes to constrain this presentation within appropriate bounds."[27] Because of the need to find this balance, there are several restrictions that limit the actions and arguments of advocates during closing argument.[28]

1. Advocates May Not Interject Their Personal Beliefs

The first restriction on the content of closing argument prohibits advocates from interjecting their personal beliefs into their summation.[29] Not only are the advocate's personal beliefs about the case irrelevant, but it is also unprofessional to present them to a jury.[30] In fact, the Supreme Court has specifically noted that "it is unprofessional conduct for [an attorney] to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence . . . ."[31]

The reason for not allowing advocates to interject their personal beliefs into their closing arguments is that it might distract the jury and cause them to base their verdict

22. Nidiry, *supra* note 3, at 1306 (footnote omitted). *See also* STEIN, *supra* note 18, at 1-31.

23. STEIN, *supra* note 18, at 1-31.

24. *Id.* at 1-33 (footnote omitted).

25. *Id.* at 1-33-34 (footnote omitted).

26. *Id.* at 1-34.

27. Nidiry, *supra* note 3, at 1307.

28. *Id.*

29. NOLAN, *supra* note 15, at 146-47; L. TIMOTHY PERRIN ET AL., THE ART AND SCIENCE OF TRIAL ADVOCACY 495 (2003); LEONARD PACKEL & DOLORES B. SPINA, TRIAL ADVOCACY: A SYSTEMATIC APPROACH 155 (1984); J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 387 (3d ed. 2002); United States Army Legal Services Agency, *USALSA Report: The Advocate for Military Defense Counsel: DAD Notes*, 1999 ARMY LAW. 21, 22 (1990) ("[C]ounsel may not express or convey a personal belief or opinion as to the truth or falsity of any testimony or evidence.").

30. STEIN, *supra* note 18, at 1-36.

31. United States v. Young, 470 U.S. 1, 8 (1985) (quoting ABA Standards for Criminal justice 3-5.8(b) (2d ed. 1980) (internal quotation marks omitted).

on matters outside the evidence and testimony presented at trial.[32] As with many of the other restrictions on arguments that can be made during summation, this restriction seeks to ensure that the jury decides the case based solely on the evidence presented to them.[33] Additionally, this rule ensures that advocates "remain detached from the cases they argue."[34]

2. Advocates May Not Refer to Inadmissible Evidence

In addition to not being allowed to interject their personal beliefs into summation, advocates are equally restricted in their ability to refer to inadmissible evidence.[35] Along the same lines, advocates may not misstate the evidence, and they may not use evidence that was limited to a certain purpose for another purpose.[36] One common example of the latter restriction is when hearsay is admitted for a limited purpose such as impeachment.[37] In such a case it cannot be argued during summation for its substantive truth.[38] This limitation is sometimes construed broadly or enforced leniently as "courts usually make reasonable allowances for honest mistakes of memory . . . ."[39] Also, if the attorneys in a case disagree over what the actual evidence or testimony was, the court will typically "instruct the jurors that they must decide what the facts are, based on their recollection . . . of the testimony."[40]

The reason for this limitation is, once again, to ensure that the jury decides the case based on the facts in evidence and not on anything outside the trial record.[41]

3. Advocates May Not Invite the Jury to Speculate on Missing Evidence

Related to the prohibition against referring to inadmissible evidence is the rule that prevents advocates from inviting the jury to speculate about missing evidence.[42] Advocates are permitted to point out that a party has failed to introduce relevant documentary evidence, and they are also permitted to argue that the jury can infer that

32. STEIN, *supra* note 18, at 1-36.
33. *Id.*
34. TANFORD, *supra* note 29, at 387.
35. PACKEL & SPINA, *supra* note 29, at 155.
36. *Id.*
37. LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, TRIAL PRACTICE 179 (1991).
38. TANFORD, *supra* note 29, at 382.
39. *Id.*
40. *Id.*
41. *See* Andrew D. Ness & Louis Bagwell, *Closing Arguments: The Law and Practical Considerations*, CONSTR. LAW., Summer 2004 at 29, 31 ("[A] proper [closing] argument needs to be confined to the facts in evidence . . . .").
42. *Id.* at 32.

the party "failed to produce [the] evidence because it would hurt [his] case."[43] However, going beyond these arguments and "suggesting what the missing evidence would contain . . . is impermissible."[44] It is also highly improper for advocates to "suggest[ ] the existence of unproven facts . . . [,]"[45] this being very similar to advocates referring to inadmissible evidence. In both situations advocates are inviting the jurors to decide the case based on evidence that was not presented to them.

4. Advocates May Not Misstate the Law

The next restriction on closing argument prevents advocates from misstating the law.[46] In closing argument, unlike in opening statement, advocates are generally permitted to briefly discuss the law.[47] However, because the judge instructs the jury on the applicable law once closing arguments are finished, it is essential that the advocate's statements regarding the law are compatible with the judge's instructions so the jurors are not confused or misled.[48] Thus, in order to ensure that this limitation is not violated, advocates generally take their law from the jury instructions that the judge will read before the jury deliberations begin.[49] This is essential because "[a]ny misstatement of the law—by omitting part, by including an unnecessary element, or by an explanation that distorts the law—is error."[50]

5. Advocates May Not Make Golden Rule Arguments

The fifth limitation placed on the content of closing argument is most commonly known as the Golden Rule.[51] A Golden Rule argument is one that "ask[s] the jurors to put themselves into the shoes of one of the parties."[52] The main concern with this kind of argument is that it appeals to the jurors' emotions—their desire for vengeance and their sympathy for the injured party—thus preventing them from deciding the case based solely on the facts.[53] This could potentially lead to an extremely high,

43. *Id.*
44. *Id.*
45. *Id.*
46. DUBIN & GUERNSEY, *supra* note 37, at 179.
47. *Id.*
48. *Id.*
49. TANFORD, *supra* note 29, at 385.
50. *Id.*
51. PERRIN ET AL., *supra* note 29, at 496.
52. *Id.*
53. *See* DUBIN & GUERNSEY, *supra* note 37, at 179-80.

unwarranted award of damages if the plaintiff makes a Golden Rule argument, or it could lead to an unwarranted verdict for the defendant if he makes one.[54]

Although trial lawyers are generally forbidden from making Golden Rule arguments, there is one situation where it is allowed—when the case involves a claim of self-defense.[55] In a civil case involving an issue of self-defense, the argument is permitted because the jury must view the case from the defendant's perspective in order to determine if the defendant acted reasonably.[56] But, if there is no claim of self-defense, advocates are prohibited from making Golden Rule arguments in order to prevent the jury from deciding the case based on something other than the evidence.[57]

6. Advocates May Not Argue for Jury Nullification

Sixth, advocates are not permitted to encourage or request jury nullification during closing argument.[58] An argument for jury nullification basically asks the jury to ignore the law or avoid any unfair law.[59] These types of arguments typically occur in cases where someone who was abused and tormented is indicted for killing their abuser.[60] However, these arguments can also occur in other cases where the defendant is a large corporation and the plaintiff argues that the jury should find for them regardless of the law because the defendant supposedly values profits over people.[61] In this kind of situation, the plaintiff is asking the jury to "send a message" that this kind of behavior is not acceptable.

An argument encouraging jury nullification is inappropriate and prohibited for several reasons. First, it encourages the jury to return a verdict on the basis of their own personal prejudices or to favor a particular party.[62] As officers of the court that are responsible for upholding the law, it is improper for attorneys to encourage this kind of behavior. Additionally, when jury nullification occurs, the "jury subverts the

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54. PERRIN ET AL., *supra* note 29, at 496.

55. *Id.*

56. *Cf. id.*(while the rule generally applies to criminal cases, it is reasonable to apply it to civil self-defense cases).

57. *Id.*

58. *Id.* at 499.

59. TANFORD, *supra* note 29, at 385; R. Alex Morgan, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won't Be*, 29 ARIZ. ST. L. J. 1127, 1127 (1997) ("Nullification occurs when a jury finds a defendant not guilty despite the factual certainty he or she committed the acts as charged. Put another way, when a jury nullifies, it ignores the judge's instruction and decides questions of law as well as questions of fact.").

60. *See* Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U.L. REV. 825, 825 (1990).

61. *See infra* note 88 and accompanying text for an example of a similar argument.

62. *See* Irwin A. Horowitz et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1210-12 (2001).

legislative process by injecting into the judicial system the values and prejudices of twelve persons who cannot by any terms be said to adequately speak for the majority of society."[63]

7. Advocates May Not Appeal to Passion and Prejudice

The final restriction on closing argument prevents advocates from appealing to the passions or prejudices of the jury.[64] While there is undoubtedly some measure of emotion raised by every case, it is essential to our legal system that the jury's decision is based on the facts alone and not on any irrelevant passions or prejudices that advocates may wish to inflame.[65] Juries must decide the case only on the evidence; as a result, any closing argument that appeals to passion or prejudice "asks the jury to decide a case based on impermissible considerations."[66] Thus, "[a] closing argument should contain a proper balance of appeals to reason and appeals to emotion, depending on the facts and circumstances of each case."[67] Because inappropriate name-calling is an appeal to passion and prejudice, this prohibition will be discussed in detail in the next section. As discussed below, this limitation has a long history in the law of closing argument.

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63. Ran Zev Schijanovich, *The Second Circuit's Attack on Jury Nullification in* United States v. Thomas*: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275, 1290 (1999).

64. TANFORD, *supra* note 29, at 385-86 (stating that attorneys are permitted to display emotion during their closing arguments, but that they "are not permitted to appeal to the emotions and prejudices of the jurors"); STEIN, *supra* note 18, at 1-79 ("Generally speaking, any statement made by counsel during summation to the jury which is not based on the evidence and which tends to influence the jury to resolve the issues by an appeal to passion and prejudice is improper."); HAYDOCK & SONSTENG, *supra* note 17, at 129-30 (indicating that statements serving to inflame the passions are improper and that appealing to the prejudices of the jurors is "a gross violation of the fundamental precepts of our system"); ALAN E. MORRILL, TRIAL DIPLOMACY 98 (2d ed. 1972) (noting that improper argument includes "an unjustified appeal to passion or prejudice").

65. *See* Saffle v. Parks, 494 U.S. 484, 487 (1990) (noting that the trial court instructed the jury that "[it] must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence"); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 467 (1993) ("When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated."); Sisk v. Ball, 371 P.2d 594, 598 (Ariz. 1962) ("It is well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving the issues before them solely by an appeal to passion and prejudice are improper and will not be countenanced.") (quoting Narciso v. Mauch Chunk Twp., 87 A.2d 233, 234 (Pa. 1952)); Deangelis v. Harrison, 628 A.2d 77, 80 (Del. 1993) ("Any effort to mislead the jury or appeal to its bias or prejudice is inappropriate and, where objection is made, the trial court is obliged to act firmly . . . .").

66. Nidiry, *supra* note 3, at 1318.

67. ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES 605 (1991).

B. *The Prohibition on Appealing to Passion and Prejudice*

1. Origins of the Prohibition

The prohibition on appealing to passion and prejudice finds its beginning in an 1878 tort case, *Brown v. Swineford*.[68] In *Brown*, the court addressed the appropriateness of one attorney's closing argument.[69] The court took issue with the closing argument because the attorney waived his opening argument and then did not restrict his rebuttal to a reply of the defendant's summation.[70] Additionally, the attorney "state[ed] and comment[ed] on facts not in evidence."[71] The court reversed and remanded for a new trial after noting, among other things, that "[i]t [was] the duty and right of [the attorney] to indulge in all fair argument in favor of the right of his client; but [that] he [was] outside of his duty and his right when he appeal[ed] to prejudice irrelevant to the case."[72] The court also stated:

> The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof.[73]

Subsequently, *Brown v. Swineford* has been cited for its recognition that trial judges should act firmly when an advocate makes an improper appeal to passion and prejudice.[74] For example, the holding in *Brown* was cited just five years after its inception by the Michigan Supreme Court in *Rickabus v. Gott*, a probate case involving a missing will.[75] In *Rickabus*, the court noted that it is "[t]he duty of the trial judge to repress needless scandal and gratuitous attacks on character . . . and good care should be taken to discharge it fully and faithfully."[76]

In addition to being cited in *Rickabus*, *Brown* was cited nearly 100 years after its holding by the United States Court of Appeals for the Seventh Circuit.[77] Dealing with a tax refund case, the dissent in *Epperson v. United States*, referenced *Brown*, once again, with regard to the trial judge's obligation to prohibit appeals to passion

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68. 44 Wis. 282 (1878).
69. *Id.* at 291.
70. *Id.* at 290-91.
71. *Id.* at 291.
72. *Id.* at 293.
73. *Id.* at 293-94.
74. *See infra* notes 76-79 and accompanying text.
75. Rickabus v. Gott, 16 N.W. 384 (Mich. 1883).
76. *Id.* at 385.
77. Epperson v. United States, 490 F.2d 98, 102 (7th Cir. 1973) (Pell, J., dissenting).

and prejudice.[78] Specifically, the dissent stated, "[t]he public interest [in each case] 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 and prejudice."[79]

Rickabus and *Epperson* demonstrate the fact that improper appeals to passion and prejudice are not to be taken lightly and that they should be dealt with strongly when they occur. Although advocates should fight zealously for their clients, they should not make arguments that go beyond the bounds of permissible conduct. Unfortunately, this has not consistently occurred in the area of inappropriate name-calling, and for that reason the issue must be addressed.

2. Basis for the Prohibition on Appeals to Passion and Prejudice

The prohibition on appealing to passion and prejudice is based, just as with many of the other restrictions, on the concern that the jury might decide the case not on the evidence presented by the parties, but on irrelevant prejudices that they carry with them.[80] Instead of deciding the case based on prejudices or passions, the jurors must be impartial arbiters of the facts.[81] An appeal to passion and prejudice asks the jurors to do just the opposite. It invites them to "decide a case based on impermissible considerations."[82] Thus, the prohibition seeks to ensure that this does not happen and that the jury decides the case based solely on the evidence presented by the advocates.[83]

3. Determining What Is an Appeal to Passion and Prejudice

There is no single established test for courts to use in order to determine what an improper appeal to passion and prejudice is. Instead, the "what is or is not inflammatory argument is entirely dependent on the fact, issues, and conduct in the

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78. *Id.* at 102.

79. *Id.*

80. *See* MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS & STRATEGY 481 (1989) (stating that appealing to passions and prejudices may "inject matters into the trial that may undermine a fair determination of the case"). In addition to the concern that the jury might decide the case based on something other than the evidence, advocates should avoid appealing to passion and prejudice because "[j]urors who hear an inappropriate appeal to emotions may conclude that the facts, the law, logic, and reason do not support the attorney's position." HAYDOCK & SONSTENG, *supra* note 67, at 605. Thus, there may be a tactical disadvantage to making improper appeals. *See id.*

81. *See* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 22 (1990) (stating that the jury is an arbiter of the facts).

82. Nidiry, *supra* note 3, at 1318.

83. *Id.*

trial at bar."[84] Thus, it may be proper to call the plaintiff or defendant a thief if the evidence introduced at trial supports this statement. However, it would be improper to call a party a liar if there was no specific evidence to support the assertion. Essentially, the determination of what is or is not an appeal to passion and prejudice "is a matter addressed largely [by] the discretion of the trial court."[85]

4. Examples of Improper Appeals to Passion and Prejudice

Some examples of improper appeals to passion and prejudice include the following:[86]

- Appeals to religious prejudice[87]
- Appeals to prejudice against corporations as large, wealthy and unsympathetic[88]
- Appeals to sympathy, such as referring to the tears and sadness of the victim's family[89]
- Appeals to racial prejudice[90]
- Arguments against foreigners[91]
- Arguing that the jurors should send a message to the defendant or the community[92]

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84. STEIN, *supra* note 18, at 1-83-84.

85. *Id.* at 1-84; Fintak v. Catholic Bishop of Chi., 366 N.E.2d 480, 485 (Ill. Ct. App. 1977) ("Remarks which inflame the passions or prejudices of the jury constitute reversible error. . . . However, it is within the sound discretion of the trial court to determine whether arguments are inflammatory . . . .").

86. *See* TANFORD *supra* note 29, at 386.

87. *See, e.g.*, Bains v. Cambra, 204 F.3d 964, 974 (9th Cir. 2000) (noting that comments made during closing argument regarding the Sikh religion "went beyond merely providing evidence of motive and intent . . . and . . . invited the jury to give in to their prejudices and to buy into the various stereotypes that the [attorney] was promoting").

88. *See, e.g.*, Bellsouth Hum. Res. Admin. v. Colataraci, 641 So.2d 427, 428-29 (Fla. Dist. Ct. App. 1994) (referring to the following statement made by counsel: "[C]orporate America . . . the folks that brought you . . . [A]gent [O]range and silicon breast implants"); Southern-Harlan Coal Co. v. Gallaier, 41 S.W.2d 661, 663 (Ky. Ct. App. 1931) ("A case should be tried by the jury under the law and the evidence. No attempt should be made to prejudice the jury by the fact that the defendant is a corporation.").

89. *See, e.g.*, Williams v. State, 544 So. 2d 1114, 1115 (Fla. Dist. Ct. App. 1989) (stating that the prosecutor's statement referring to the tears of the victim's family was an improper appeal).

90. *See, e.g.*, Moore v. Morton, 255 F.3d 95, 113-14 (3d Cir. 2001) ("Racially or ethnically based prosecutorial arguments have no place in our system of justice.").

91. *See, e.g.*, Zakkizadeh v. State, 920 S.W.2d 337, 340 (Tex. App. 1995) (holding that it was improper for the prosecutor to state in closing argument that "in this country we don't allow foreigners to rape little girls").

92. *See, e.g.*, DeJesus v. Flick, 7 P.3d 459, 463 (Nev. 2000) (referring to counsel's statement that the jury send a message to attorneys that seek to prevent injured plaintiffs from recovering for

- Arguments encouraging the jury to consider the physical condition of a party in determining punitive damages[93]
- Appeals to local prejudices[94]
- Arguing that the defendant will "get rid of" the plaintiff after the case is over[95]
- Arguments referring to the impact upon the defendants professional reputation if an adverse verdict were returned[96]

The examples given above are by no means all the improper appeals to passion and prejudice that an advocate may make. However, they are intended to illustrate how courts have sternly dealt with improper appeals to passion and prejudice. Unfortunately, this stern approach has not been extended to inappropriate name-calling.

C. *How Name-Calling Is an Appeal to Passion and Prejudice*

Improper name-calling is a serious issue because it appeals to the passions and prejudices of the jurors, which is forbidden in closing argument.[97] All instances of name-calling are, "by [their] very nature . . . an attack on the character of the person."[98] Additionally, all names have some sort of emotional and passionate appeal to them, with some being extremely offensive.[99] In fact, one scholar has noted that a common method used by some attorneys "to inflame the jury's emotion is abusive name-calling."[100] Another scholar has observed: "The name-calling . . . and

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their injuries). This kind of argument is also very similar to the prohibition against urging jury nullification.

93. Jensen v. Peterson, 264 N.W.2d 139, 145 (Minn. 1978) (noting that the trial judge gave a "curative instruction" to the jury after an attorney "urged the jury to consider the physical condition of the plaintiffs in determining punitive damages").

94. Crowell-Collier Publ'g Co. v. Caldwell, 170 F.2d 941, 945 (5th Cir. 1948) ("Appeals to sectional and local prejudices should be vigorously suppressed.").

95. Griffith v. St. Louis-San Francisco Ry. Co., 559 S.W.2d 278, 281 (Mo. Ct. App. 1977) (noting that it was proper for the trial judge to sustain an objection to the attorney's argument that the defendant would get rid of the plaintiff).

96. Rush v. Hamdy, 627 N.E.2d 1119, 1124 (Ill. App. Ct. 1993) ("A reference to the impact of an adverse verdict upon [a party's] professional reputation is improper as it interjects an improper element into the case and is little more than an appeal to the passions and sympathy of the jury.").

97. *See* Tasker, *supra* note 4, at 19 ("Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord." (quoting 4 C.J.S. Appeal and Error § 617 (1993)) (internal quotations omitted). *See also supra* notes 64-67 and accompanying text.

98. Caldwell, *supra* note 3, at 388-89.

99. *See infra* notes 172, 183, 208, 252 and accompanying text (noting that parties, their attorneys, and witnesses have been referred to various things such as killers, devils, liars, and deadbeats).

100. James W. Gunson, *Prosecutorial Summation: Where is the Line Between "Personal*

pernicious character assassinations are offensive not only because they are indecorous and unprofessional, but because they are completely unrelated to the legal issue presented."[101] Moreover, the use of certain kinds of language has also been recognized as a means to try and inflame the passions of the jury.[102] Thus, name-calling is an impermissible appeal to passion and prejudice and as such it should be dealt with firmly when it occurs.[103]

However, instead of firmly dealing with the issue when it occurs, name-calling is often overlooked, or dismissed as harmless.[104] Rather than being dealt with sternly, name-calling appears to have been overlooked more and more.

III. RULES GOVERNING ATTORNEY BEHAVIOR

In addition to the rules governing the content of closing argument and permissible arguments that can be made, there are other rules that affect what attorneys can and cannot say during their summations.[105] These rules include the Model Rules of Professional Conduct as well as various local court rules.

A. *The Model Rules of Professional Conduct*

The Model Rules of Professional Conduct ("MRPC") are the result of over twenty years of deliberations and debate by members of the American Bar Association.[106] In 1977, "the ABA inaugurated a commission to prepare a new set of rules" to govern attorneys because of several weaknesses that became apparent in the Code of Professional Responsibility that had been adopted in 1970.[107] This commission "became known as the Kutak Commission, after Robert J. Kutak, an energetic and visionary lawyer . . . who chaired the commission until his . . . death in early 1983."[108] As the Kutak Commission set out to prepare a new set of ethics rules

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Opinion" and Proper Argument?, 46 ME. L. REV. 241, 252 (1994).

101. Tasker, *supra* note 4, at 19 (quoting Saks v. Parilla, 67 Cal. App. 4th at 567 n.3) (internal quotation marks omitted).

102. Tara J. Tobin, *Miscarriage of Justice During Closing Arguments by an Overzealous Prosecutor and a Timid Supreme Court in* State v. Smith, 45 S.D. L. REV. 186, 189 (2000). Tobin also notes that prosecutors in criminal cases still routinely "employ 'abusive name-calling' to arouse the jury's passions." *Id.* at 204 (quoting James W. Gunson, *supra* note 100, at 252). *See also* Karen E. Holt, *Hard Blows and Foul Ones: The Limited Bounds on Prosecutorial Summation in Tennessee*, 58 TENN. L. REV. 117, 132 (1990) (listing name-calling as an appeal to passion and prejudice).

103. *See supra* notes 72-79 and accompanying text.

104. *See infra* notes 204-40 and accompanying text.

105. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW & ETHICS 1-8 (7th ed. 2005).

106. *Id.* at 4-5.

107. *Id.*

108. *Id.*

for attorneys, "popular interest in legal ethics increased dramatically."[109] This was due, in part, because of the number of lawyers that were implicated in the Watergate scandal and because the number of practicing lawyers was increasing very quickly.[110] Following seven years of debate and several different drafts, "[t]he ABA House of Delegates adopted the [MRPC] . . . on August 2, 1983."[111]

When adopted in 1983, the MRPC assumed the format of a restatement, setting out black-letter rules that were followed with comments.[112] This format continues today with each comment "explain[ing] and illustrat[ing] the meaning and purpose of the Rule."[113] Although the rules are authoritative, the comments are intended to be an interpretive guide for courts and lawyers alike.[114]

Since 1983 the MRPC has undergone several amendments, many of which were the result of a recent commission that became known as the Ethics 2000 Commission ("E2K").[115] Additionally, the changes also occurred in the wake of corporate scandals that had taken place.[116] Following these events—especially the corporate scandals—the ABA formed a Task Force that was in charge of "propos[ing] rules and policies responsive to the corporate scandals."[117] This Task Force led the ABA to accept two exceptions to the rule of lawyer confidentiality that currently appear in the MRPC today.[118]

Following the ABA's adoption of the MRPC, acceptance of the Rules by the states "crept along."[119] However, by 2005, "45 states and the District of Columbia had adopted the Model Rules."[120] Although most states have now adopted the Rules,

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (internal quotation marks omitted).

114. *See id.*

115. *Id.* at 5. In addition to amendments that currently appear in the rules today, E2K also made several recommendations that affected "special ethical problems of lawyers in alternative dispute resolution." Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 207 (2001).

116. GILLERS, *supra* note 105, at 5. Following the corporate scandals of Enron, Tyco, Worldcom and others, "President Bush signed legislation that, among other things, required the SEC to adopt rules governing lawyers appearing and practicing before it." *Id.* This was revolutionary legislation "because it gave explicit authority to . . . a federal agency to make rules governing the practice of lawyers . . . ." *Id.* at 6. This meant that "[w]hatever rules the Securities and Exchange Commission adopted would affect the lives of many professionals and their clients." *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 4.

120. *Id.* Because the Rules are "model rules" they must be adopted in a particular jurisdiction before they will have any binding effect. *See id.* at 3.

they have done so with significant variation. Indeed, "not a single American jurisdiction has adopted the Model Rules verbatim."[121] In California, for example, much of the model rules contain "provisions unique to [the] state."[122] Moreover, the New York rules do not follow the MRPC's restatement format.[123] Instead, New York has kept a format that resembles the old Code of Professional Responsibility where the rules are divided into nine Canons.[124] Despite the fact that the MRPC have not been adopted verbatim by any jurisdiction, and even though New York and California seem to march to the beat of a different drummer,[125] the Rules are still an invaluable guide for law students, attorneys, and courts.

1. Specific Provisions in the MRPC[126] that Apply to Name-Calling

a. Preamble: A Lawyer's Responsibilities

The preamble to the MRPC contains two sections that are applicable to the issue of inappropriate name-calling. First, section five of the preamble states:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and *not to harass or intimidate others.* A lawyer should demonstrate *respect for the legal system and for those who serve it,* including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.[127]

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121. *Id.* at 6.

122. *Id.* at 4-5. One significant difference between the MRPC and the California Rules of Professional Conduct is that California has only one exception that allows attorneys to reveal confidential information about their clients. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004) (listing six circumstances in which attorneys are allowed, but not required, to reveal information relating to the representation of their client) *with* CAL. RULES OF PROF'L CONDUCT R. 3-100(B) (allowing, but not requiring a member of the State Bar to "reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual").

123. GILLERS, *supra* note 105, at 5.

124. *Id.* at 4-5.

125. *Id.* at 4.

126. For purposes of reference all citations to the MRPC will refer to the 2004 version.

127. SUSAN R. MARTYN ET AL., THE LAW GOVERNING LAWYERS: NAT'L RULES, STANDARDS, STATUTES, & STATE LAWYER CODES 8 (2005) (emphasis added).

This section indicates that a lawyer should not use the procedures of the law to harass or intimidate others.[128] However, lawyers do just that when they call opposing counsel, the parties, or the witnesses an inappropriate name. Additionally, section five also states that lawyers should have respect for those who serve the legal system.[129] This includes other lawyers and public officials, such as police officers, who may be called to testify.[130] Thus, in closing argument when an attorney refers to one of these parties by using a derogatory name that is not supported by the evidence, that attorney is not demonstrating the requisite respect for the legal system that the Rules require.

The second section in the MRPC Preamble that applies to name-calling in closing argument is section nine. Section nine states that the principles underlying the Rules "include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while *maintaining a professional, courteous, and civil attitude* toward all persons involved in the legal system."[131] This section of the preamble recognizes that attorneys will, and should, zealously represent their clients, but that they should do so while still maintaining a courteous and civil attitude toward everyone involved. This, once again, includes opposing counsel, the parties, and the witnesses. Therefore, when an advocate refers to opposing counsel, the opposing party, or any witnesses by calling them a derogatory name, that advocate is violating the principles underlying the Rules by exhibiting unprofessional, discourteous, and uncivil behavior.

b. Rule 3.4(e)

Rule 3.4(e) states that 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 . . . or state a personal opinion as to . . . the credibility of a witness . . . ."[132] The official comment to this rule states that fairness in the adversary system is secured and maintained by these kinds of prohibitions.[133] Thus, this rule seeks to promote an adversary system that is fair to both parties by prohibiting inappropriate behavior by the attorneys. Inappropriate name-calling not only degrades the adversary system, but it prevents the parties from receiving a fair trial because it incites the passions and prejudices of the jury. Furthermore, when attorneys improperly name-call they are making comments that are not supported by admissible evidence. This can lead to an

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* (emphasis added).
132. *Id.* at 65.
133. *Id.*

unwarranted verdict which, in turn, serves to denigrate not only the legal system but also the profession of law.

c. Rule 3.5(a)

Rule 3.5(a) of the MRPC prohibits lawyers from "seek[ing] to influence a judge, *juror, prospective juror* or other official by means prohibited by law."[134] As stated earlier, when name-calling is not supported by specific impeachment evidence it is an inappropriate appeal to passion and prejudice and thereby prohibited in closing argument.[135] Thus, when attorneys use names as a way to incite the jury and arouse its passions, they are violating Rule 3.5(a) by trying to inappropriately influence the jurors.

d. Rule 8.4(d)

According to Rule 8.4(d), "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."[136] Name-calling and abusive character attacks of opposing counsel, witnesses, or the parties is prejudicial to the administration of justice because it can potentially cause juries to base their verdicts on something other than the evidence presented. This is exactly the opposite result desired. When attorneys engage in name-calling during closing arguments, they are inviting, and sometimes even deliberately encouraging, the jury to decide the case improperly. This behavior is certainly prejudicial to the administration of justice.

Inappropriate name-calling violates at least four sections of the MRPC as well as the principles underlying the rules. It is disrespectful and discourteous to the participants of the legal system,[137] it is prejudicial to the administration of justice because it prevents litigants from receiving a fair trial based on the evidence,[138] and it is an improper attempt to influence the jury.[139] Despite this, the problem is dealt with

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134. *Id.* at 66 (emphasis added).

135. *See supra* notes 64-67 and accompanying text.

136. MARTYN ET AL., *supra* note 127, at 98.

137. *See infra* notes 183, 187 and accompanying text. In one case, an attorney referred to the defendant as a liar, fake and phony. Koufakis v. Carvel, 425 F.2d 892, 903 (2d Cir 1970). In another case, an attorney referred to another as a jerk. Al-Site Corp. v. Croce, 647 So. 2d 296, 297 n.1 (Fla. Dist. Ct. App. 1994). All of these names are discourteous and they are disrespectful to those that they are directed to.

138. *See infra* notes 172-75 and accompanying text for a discussion of one particular case where the attorney referred to the defendant as a killer by comparing him to Ford Motor Company. Specifically, the attorney brought up the emotional Ford Pinto case. Lone Star Ford, Inc. v. Carter, 848 S.W.2d 850, 852 (Tex. App. 1993). This highly aroused the passions and prejudices of the jurors, and the court barely hesitated in reversing this case. *Id.* at 855.

139. *See infra* note 182 and accompanying text. In this particular case, the plaintiff's attorney

rarely and inconsistently. Instead of attorneys and courts taking the issue seriously, it is ignored or treated with little conviction while the rules of professional conduct continue to be violated.

Although the MRPC "are not designed to be a basis for civil liability,"[140] "[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."[141] Moreover, according to the Rules themselves, a violation, or an attempt to violate, any of the rules constitutes professional misconduct.[142] Thus, attorneys are obliged to follow the rules however they may read in each individual state. When the rules are violated because of inappropriate name-calling, the attorney can be, and should be, disciplined.

B. *Bar Journal Commentary and Other Guidelines for Attorneys*

In addition to the MRPC, various local court rules also govern the conduct of attorneys appearing in those courts. For example, the rules for the Los Angeles Superior Court state that "[c]ounsel should at all times be civil and courteous in communicating with adversaries . . . ."[143] Additionally, attorneys appearing before the United States District Court for the Northern District of Texas are obliged to "treat each other, the opposing party, the court, and members of the court staff with courtesy and civility . . . ."[144] These rules, and others like them, are violated by inappropriate name-calling of witnesses, opposing parties, and opposing counsel because name-calling is both discourteous and uncivil.

Each individual state bar not only adopts the rules of professional conduct that will govern the attorneys that are admitted to that bar, but they also publish various journals with practical advice for attorneys.[145] Over the last few years, some of these bar journals have addressed the issue of improper remarks in closing argument, and specifically the occurrences of name-calling. For instance, the Florida Bar Journal published an article in 1999 recognizing the "difference between aggressive legal

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referred to the defendant as the head of the Mafia. *Carvel*, 425 F.2d at 901. This attempt to influence the jury was particularly emotional given the fear that people often have of the Mafia and its members. *Id.*

140. MARTYN ET AL., *supra* note 127, at 10.

141. *Id.*

142. *Id.* at 98.

143. Tasker, *supra* note 4, at 18 (internal quotation marks omitted).

144. Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988) (adopting standards for attorneys appearing before the court and including in those standards the rule requiring attorneys to "treat each other, the opposing party, the court . . . with courtesy and civility and conduct themselves in a professional manner at all times").

145. *See, e.g.*, www.calbar.org/2cbj/cbjndx.htm; http://www.texasbar.com/Content/NavigationMenu/Publications/Texas_Bar_Journal1/Texas_Bar_Journal.htm; http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Bar_Journal/Bar_Journal.htm.

practice . . . and a scorched earth policy."[146] This article also encouraged lawyers to stop treating each other in "undignified, silly, and . . . just plain ugly" ways.[147]

The Louisiana Bar Journal published an article that detailed the rules of closing argument and specifically stated that attorneys should not name-call during their closing arguments.[148] This article recognized that attorneys generally have wide latitude to make various arguments during their summation to the jury, but that "[t]he parties are [also] entitled to a fair trial uninfluenced by appeals to passion or prejudice."[149]

In addition to the southern states of Florida and Louisiana, the Michigan Bar Journal has also contributed to the minimal discussion of name-calling that has occurred. The Michigan Bar Journal article recognized that trial incivility has been on the rise and that the line between proper and improper argument has been growing harder and harder to discern.[150] This article also recognized that "unjust tactics [often] inure to the benefit of the perpetrator" and that "[u]nless [other attorneys] know[ ] the rules, it is impossible to forge an effective objection strategy . . . ."[151]

The examples of local court rules and various bar journals that address inappropriate name-calling provide additional evidence that the issue needs more attention and more consistent review from appellate courts. Trial incivility has been increasing, and when courts do not deal with the problem in a firm and consistent manner it will only continue to increase. Additionally, attorneys that inappropriately name-call are violating more rules than just the MRPC; they are also violating local court rules, and they are not giving the other members of their profession the respect they deserve.

C. *Principles of Professionalism*

"Did you hear the one about the lawyer?" Lawyers often bear the brunt of various jokes that depict attorneys as ethical corner-cutters, liars, and leeches.[152] As a result of this negative public image, the issue of professionalism and civility has

146. Ella Jane P. Davis, *Thoughts on the "Emperor Complex," the "Scorched Earth Policy," and Lawyer Professionalism*, FLA. BAR J., Feb. 1999, at 30.

147. *Id.* ("It needs to stop.").

148. James D. Kirk & Laura N. Sylvester, *Traversing the Slopes of Closing Argument*, LA. BAR J., Dec. 1997, at 326, 328.

149. *Id.* at 326.

150. Brian J. Benner & Ronald L. Carlson, *Over the Top: Violating the Law of Closing Argument*, MICH. BAR J., Oct. 2001, at 54-55.

151. *Id.* at 54.

152. Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403, 403 (2000); Aha! Jokes > Lawyer Jokes > Q & A Jokes, http://www.ahajokes.com/law001.html (last visited Sept. 6, 2006).

received more attention.[153] Nevertheless, attorneys continue to act inappropriately and unprofessionally, especially in the courtroom.[154] As a profession, the practice of law "is judged by the characters of those who compose it . . . ."[155] When attorneys act uncivilly in the courtroom, the public perception of the legal system and the legal profession is adversely affected.[156] In fact, at least one survey has noted that "[j]urors like lawyers to conduct themselves 'professionally,' to treat everyone—including opposing counsel, parties and adverse witnesses—politely and with respect."[157] When asked to rank specific concerns about the legal system, those jurors surveyed listed courtroom conduct of attorneys as one of their top five concerns.[158] Furthermore, the jurors surveyed made "[n]egative comments refer[ring] most often to the lawyer's disrespect for witnesses or opposing counsel[ ] [and] to name-calling . . . ."[159] Thus, if we want to change how the public views attorneys and the legal system, we must start by changing our courtroom behavior, which includes eliminating improper name-calling.

In addition to being a disservice to the legal profession, improper name-calling by an advocate is a disservice to her clients. There is no doubt that passionate advocacy on behalf of one's client is "fully consistent with the finest effectuation of skill and professionalism."[160] In fact, "it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process."[161] However, as the Committee on Civility for the Seventh Federal Judicial Circuit observed, "[a] lack of civility can escalate clients' litigation costs

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153. *See, e.g.*, Andrew C. Simpson, *Staying Civil*, GP SOLO, Oct.-Nov. 2005, at 32. This article was featured on the front cover of the issue. *See also* Benner & Carlson, *supra* note 150, at 54 (noting that incivility in trials has been increasing and that attorneys need the tools to make proper objections); Jean M. Cary, *Teaching Ethics and Professionalism in Litigation: Some Thoughts*, 28 STETSON L. REV. 305, 306-07 (1998) (noting that lawyer-to-lawyer incivility extends from depositions, to hallways outside the courtroom, to judicial chambers and the courtroom).

154. Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657-59 (1994) ("Lawyers have been complaining about the symptoms [of unprofessional behavior] for years. Among other things, they point to escalating rudeness among attorneys . . . the prevalence of Rambo litigation tactics, and the abandonment of common courtesy."); Cary, *supra* note 153, at 307 (noting that one Florida attorney called opposing counsel an extremely degrading name and told her "he would 'see her later' after the court had granted her Motion for Directed Verdict").

155. GLEASON L. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 39 (1981).

156. Tasker, *supra* note 4, at 19.

157. The Honorable D. Brock Hornby, *How Jurors See Us*, ME. BAR J., July 1999, at 174, 177.

158. *Id.* at 176.

159. *Id.* at 178.

160. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 54 (Del. 1994).

161. *Id.*

while failing to advance their interests or bring them closer to their ultimate goal of ending disputes."[162]

Finally, name-calling also affects the legal profession itself. Attorneys acting uncivilly toward one another creates tension in an arena that must be guided by cooperation and professional behavior.[163] Moreover, unprofessional behavior breeds mistrust and discontentment among attorneys. In fact, Justice Stephen Breyer has noted "that lawyers themselves increasingly describe their profession in negative terms."[164]

Incivility also hurts the legal profession because it threatens the profession's "monopoly as the sole provider of legal services."[165] As Roscoe Pound stated, "lawyers have positioned themselves, in the name of professionalism . . . to be the sole legal service providers . . . ."[166] Thus, when trial lawyers are unprofessional in the courtroom and when they inappropriately name-call, the professionalism that provides the foundation for the practice of law begins to crumble.

Inappropriate name-calling has no positive effects—it hurts the public's perception of the legal profession, it hurts clients, and it hurts the legal profession itself. Although name-calling may seem like an easy way to influence jurors, an unprofessional lawyer that uses this tactic does nothing beneficial for herself, her client, or the legal system.

IV. HISTORY OF RELEVANT CASE LAW

When reviewing case law dealing specifically with name-calling as an improper appeal to passion and prejudice, one thing becomes apparent—there are a few disparities in how the cases are dealt with. The first disparity is between name-calling in civil versus criminal cases. Specifically, the issue receives considerably more attention when it occurs in criminal cases than in civil.[167] There are a few reasons that may potentially explain this disparity. First, in criminal cases the defendant's freedom, and possibly his life, is at stake.[168] On the other hand, in a civil case there is

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162. FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT (1992), http://law.stetson.edu/litethics/conclave/aspenreport.htm.

163. David J. Abeshouse, *Civility and Negotiations*, GP SOLO, Oct.-Nov. 2005, at 35 (noting that civility in negotiations makes life more pleasant).

164. Breyer, *supra* note 152, at 403. Justice Breyer states that attorneys are "concerned about a big firm 'treadmill': 2,100 or more hours billed to clients each year . . . work that is too narrow, too tedious, *leading to incivility* and job dissatisfaction." *Id.* at 403-04 (emphasis added).

165. William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L. J. 255, 259 (2005).

166. *Id.*

167. *See supra* note 3 and accompanying text.

168. *See, e.g.*, CAL. PENAL CODE § 37 (2006) (stating that the possible sanctions for the crime of treason are death penalty and life imprisonment); TEX. PENAL CODE § 12.31 (2005) (stating that those found guilty in a criminal case of a capital felony may be punished by death or life

typically no jail time involved and there is no possibility of the defendant receiving the death penalty. Most likely there is only the possibility of having to pay monetary damages, which is typically not life threatening. Second, there may be a greater desire to ensure that the prosecutor, who has a large amount of discretion, follows ethical guidelines when prosecuting a defendant who may in fact be innocent of the crime accused.[169] Despite these differences between civil and criminal cases, it seems inappropriate to have different standards for one type of case than another. The rules should be equally firm in civil cases even though the possible consequences of a guilty verdict are not as serious as the possible consequences in criminal cases.

In addition to the disparity between criminal and civil cases, there is a disparity in how different jurisdictions handle civil cases dealing with name-calling.[170] As discussed below, some courts take the issue of name-calling very seriously, while others seem to gloss over it without a second thought. This disparity is a major reason why the name-calling issue deserves attention and reform.

A. *Disparities Among Civil Cases Discussing Name-Calling*

There are generally three ways that reviewing courts handle a case involving name-calling. First, the court may reverse because of the improper name-calling during closing argument. Second, the court may disapprove of the name-calling but still affirm the judgment. Third, the court may reverse on an entirely different issue.

1. Reversal Because of Improper Name-Calling

The first way that courts deal with improper name-calling is to reverse any favorable judgment for the offending party. For instance, in *Lone Star Ford, Inc. v. Carter,* the Court of Appeals of Texas dealt with a particularly emotional appeal.[171] In *Carter,* the court reversed a ruling for the plaintiff after her attorney continually likened the defendant to a killer by comparing them to Ford Motor Company.[172] The court "believe[d] that the improper jury argument . . . [was] the only possible

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imprisonment).

169. *See, e.g.*, Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587 (2003); Samuel J. Levine, *The Yale L. Rosenberg Memorial Lecture: Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1339 (2004).

170. *Compare* Ogletree v. Willis-Knighton Mem'l Hosp., Inc., 530 So. 2d 1175, 1181 (La. Ct. App. 1988) (disapproving of name-calling but affirming the judgment) *with* Lone Star Ford, Inc. v. Carter, 848 S.W.2d 850, 855 (Tex. Civ. App. 1993) (reversing due to inappropriate name-calling).

171. *Lone Star Ford*, 848 S.W.2d at 855.

172. *Id.* at 851, 855. The plaintiff's attorney made several references to the infamous Ford Pinto case, and following closing arguments one of the jurors asked the judge for a calculator before deliberations even started. *Id.* at 852-53.

explanation for some of the amounts awarded."[173] Additionally, the court noted that justice would not be done by allowing attorneys to argue that the opposing party was a killer when there was no evidence to support such an argument.[174] Finally, the court refused to allow the attorney "to refer to a party as a 'killer of families'. . . . [when] [s]uch an argument is nothing more than appeal to the jury's passion . . . ."[175]

Another Texas court, the Court of Civil Appeals, dealt with name-calling that it called "inexcusable."[176] In *Wilkerson,* the plaintiff's attorney continually referred to defense counsel sarcastically as "Baby Bill."[177] Although no objection was made to the attorney's summation, the reviewing court held that "[t]he epithets and the continued use of words to belittle and criticize the [defendant] and its counsel [were] inexcusable."[178] The court reversed the jury's verdict for the plaintiff after finding "that the impropriety of the argument probably influenced the verdict unfavorably . . . ."[179]

In addition to various Texas courts that have dealt with inappropriate name-calling, the Second Circuit has also dealt with the issue on at least two occasions. First, in *San Antonio v. Timko* the court reversed an award for the plaintiff, in part, because his attorney called the defendant a villain during summation.[180] Four years after this decision, the Second Circuit, in *Koufakis v. Carvel,* ordered a new trial after the plaintiff's attorney made several improper remarks in his closing argument.[181] Among the improper remarks were several comparisons of the defendant to the head of the Mafia and comparisons of his organization to that of the Mafia.[182] The plaintiff's attorney also called the defendant a liar, faker, and phony.[183] In both of these cases the Second Circuit dealt very firmly with the inappropriate name-calling. For instance, in *Timko* the court referred to the attorney's conduct throughout the summation as "outrageous" and "flagrant."[184] Then, in *Carvel* the court stated that

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173. *Id.* at 854.

174. *Id.* at 855.

175. *Id.*

176. Texas & N.O.R. Co. v. Wilkerson, 260 S.W.2d 912, 933 (Tex. Civ. App. 1953).

177. *Id.* at 923.

178. *Id.* at 933.

179. *Id.* Because of its decision regarding the attorney's closing argument (and the insufficiency of the evidence), the court declined to discuss other points of error. *Id.* at 934.

180. San Antonio v. Timko, 368 F.2d 983, 986 (2d Cir. 1966). The court also briefly addressed an issue dealing with the sufficiency of the evidence, but "properly avoid[ed] deciding the close question of sufficiency" because they found that the inappropriate closing argument of plaintiff's counsel was "an incident at . . . trial that might be ignored [if] the case was stronger . . . ." *Id.*

181. Koufakis v. Carvel, 425 F.2d 892, 894 (2d Cir. 1970).

182. *Id.* at 901. When the defendant's attorney objected and asked the judge to instruct the jury to disregard the statements, "the trial judge responded, 'Yes, they understand that. Mr. Berg is not accusing Mr. Carvel of being a Mafia member.'" *Id.*

183. *Id.* at 903.

184. *Timko,* 368 F.2d at 986. The court was also concerned with the attorney's "argument

the attorney's comments were "grossly improper" and that he "misused his freedom to comment on [the defendant's] failure to testify."[185] The court also strongly reprimanded the trial judge's lack of control over the plaintiff's attorney's conduct.[186]

The Florida Courts of Appeal have also dealt with improper name-calling in closing argument several times. In *Al-Site Corporation v. Croce* the court was faced with "bully," "jerk," and "tough son of a gun."[187] In another case, *Kaas v. Atlas Chemical*, the plaintiff's attorney repeatedly called one of the witnesses a liar.[188] Finally, in *George v. Mann*, the court reversed a decision for the defendant after his attorney improperly argued in summation that the plaintiff was a liar and had "lawsuit pain."[189]

In all three of these cases the Florida Court of Appeal dealt firmly with the inappropriate name-calling by each attorney. For instance, in *Al-Site* the court barely hesitated in reversing the judgment and ordering a new trial—its opinion was a paragraph long.[190] The court stated that "name calling [ ] and grossly inappropriate language . . . turned what occurred below into something less than a legitimate trial, and a great deal less than a fair one."[191] It refused to let the judgment stand regardless of the fact that there was no timely objection to the comments.[192] In *Kaas* the court stated that "it is fundamentally incorrect for counsel to attempt to impugn the integrity of a witness by calling him a liar."[193] Finally, in *Mann* the court stated once again that inappropriate remarks and name-calling constitute reversible error, even if there was no objection.[194]

In addition to the Texas Courts of Appeal, the Second Circuit and the Florida Courts of Appeal, the Appellate Court of Illinois has also dealt with inappropriate name-calling. First, in *Cecil v. Gibson* "defense counsel characterized [the] plaintiffs'

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that by contesting the amount of damages the defense in effect acknowledged liability." *Id.*

185. *Carvel*, 425 F.2d at 901-02.

186. *Id.* at 900-01 ("The single most important task of a district judge presiding at a trial before a jury is to exercise that degree of control required by the facts and circumstances of each case to assure the litigants a fair trial."). The court continued, "This obligation does not arise only when objections are raised by one of the litigants or his counsel. Repeated improprieties by one counsel severely prejudice his adversary." *Id.* at 901. The judge in this case apparently let the attorney continue with his improper behavior and because of that the Second Circuit found that it was "likely that both the jury and [plaintiff's counsel] considered his failure to intervene as tacit approval of the line of argument." *Id.*

187. Al-Site Corp. v. Croce, 647 So. 2d 296, 297 n.1 (Fla. Dist. Ct. App. 1994).

188. Kaas v. Atlas Chem. Co., 623 So. 2d 525, 525-26 (Fla. Dist. Ct. App. 1993).

189. George v. Mann, 622 So. 2d 151, 151-52 (Fla. Dist. Ct. App. 1993).

190. *Al-Site Corp.*, 647 So. 2d at 297-98.

191. *Id.*

192. *Id.* at 298.

193. *Kaas*, 623 So. 2d at 526.

194. *Mann*, 622 So. 2d at 152.

attorney as a 'slick attorney from Chicago.'"[195] But the defense counsel's name-calling didn't stop with just his opposing counsel. He continued his closing argument by "referr[ing] to plaintiffs' medical expert witness as a 'sidekick' and a 'righthand man.'"[196] The court "believe[d] that [the] defense counsel's final argument clearly exceeded all bounds."[197] Moreover, the court recognized that emotions often run high in an extremely contested trial, but that "[w]hen . . . arguments become unreasonable and highly prejudicial in character and [when] counsel indulge[s] in misleading statements, improper innuendos and inflammatory remarks, reversal *must follow* as a matter of course."[198]

The second time the Appellate Court of Illinois dealt with inappropriate name-calling was in *Harrison v. Chicago Transit Authority.*[199] In *Harrison,* the plaintiff's attorney made statements implying that the defendant's attorney was a liar.[200] Although the trial court sustained an objection to this argument, the Illinois Appellate Court affirmed the trial judge's grant of a new trial because of "unsubstantiated accusations . . . by plaintiff's counsel . . . which caused prejudice in the jury toward the defendant and denied the defendant a fair trial."[201]

As evidenced by the cases discussed above, some appellate courts deal with improper name-calling very firmly. The Florida Courts of Appeal, for example, have refused to let a verdict stand even if the inappropriate remarks are not objected to.[202] Furthermore, the Appellate Court of Illinois has set forth a practice of reversal as a matter of course when counsel makes inflammatory remarks.[203] Unfortunately not all courts take this approach. In fact, as discussed below, some courts appear to treat name-calling with very little conviction and almost no sense of the prejudice that it can cause.

2. Disapproval of Name-Calling but Affirmation of the Judgment

In other cases dealing with inappropriate name-calling, courts have disapproved of the name-calling, but nevertheless have affirmed a favorable judgment for the

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195. Cecil v. Gibson, 346 N.E.2d 448, 449 (Ill. App. Ct. 1976).

196. *Id.* The attorney continued by making reference to the plaintiffs' attorney as the "'captain of the ship' who was 'piloting' the testimony of plaintiffs' expert witness." *Id.* He also likened "the relationship between plaintiff's counsel and his expert witness to that existing between the 'Cisco Kid and Poncho' and 'Matt Dillon and Chester.'" *Id.*

197. *Id.*

198. *Id.* (citing Owen v. Willett Truck Leasing Corp., 209 N.E.2d 868, 872 (Ill. App. Ct. 1965)) (emphasis added).

199. Harrison v. Chicago Transit Auth., 363 N.E.2d 81 (Ill. App. Ct. 1977).

200. *Id.* at 82.

201. *Id.* at 83.

202. *See supra* notes 187-94 and accompanying text.

203. *See supra* note 198 and accompanying text.

offending party. For instance, in *Olgetree v. Willis-Knighton Memorial Hospital* the defendant's attorney "referred to the plaintiffs' experts as . . . 'hired guns'. . . ."[204] He also called them "out-of-town doctors" and "out-of-town so-called experts."[205] In ruling on the propriety of the statements, the court first recognized that "[a]ll parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion and prejudice."[206] Nevertheless, the court affirmed the judgment for the defendant "[b]ecause the comments were not objected to and because corrective admonitions and instructions were given . . . ."[207]

Then, in *Carter v. Baham*, the Louisiana Court of Appeal held that it was inappropriate for the plaintiff's attorney to call the defendant, an insurer, a "dead beat."[208] Nonetheless, the court ruled that subsequent instructions to the jury cured any prejudice.[209] The court spent little time discussing the issue; it simply noted that "[a] review of the entire record reveals that [the defendant] was not prejudiced to the extent that would justify reversal."[210]

In the federal court system, the Eighth Circuit dealt with inappropriate name-calling in *Alholm v. American Steamship Company*.[211] In *Alholm*, the plaintiff's attorney referred to the defendant, American Steamship, as "a gang of bullies" and also referred to its attorney as a "spin doctor."[212] Despite this improper name-calling the court affirmed the judgment for the plaintiff.[213] The court briefly discussed the attorney's actions, but in the end it gave considerable deference to the trial court's discretion and it relied on a sustained objection and instruction to disregard to cure any prejudice that may have resulted.[214] The court also relied on "the few objections and the cautionary instruction to the jury" in making its decision.[215]

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204. Ogletree v. Willis-Knighton Mem. Hosp., Inc., 530 So. 2d 1175, 1181 (La. Ct. App. 1988).

205. *Id.*

206. *Id.*

207. *Id.* The court noted that the trial judge "admonished the jury both at the start of the trial and when all parties had rested that the statements of counsel were not evidence and should not interfere with its determination of the facts." *Id.* Also, the court firmly stated that the court's instructions to the jury "served to counteract the *possibly* adverse effect of [the attorney's] argument." *Id.* (emphasis added).

208. Carter v. Baham, 683 So. 2d 299, 304 (La. Ct. App. 1996).

209. *Id.* at 305.

210. *Id.* (recognizing that the trial was very emotional, but holding that the instructions given by the trial judge served to cure any prejudice that could have resulted).

211. Alhorn v. American S.S. Co., 144 F.3d 1172 (8th Cir. 1998).

212. *Id.* at 1181.

213. *Id.* at 1182.

214. *Id.* at 1181 ("While we do not approve of such name calling, the district court sustained an objection to one reference and instructed the jury to disregard the other. This was sufficient to prevent undue prejudice to [the defendant] in the entire context of the arguments.").

215. *Id.* at 1182.

Several years before the Eighth Circuit was faced with "gang of bullies" and "spin doctor," the Court of Appeals of Georgia faced "cheapskate," "scheming lowdown pup," and "snake in the grass" in *Dudar v. Lewis*.[216] However, despite these atrocious names, the court affirmed the verdict because it did not believe "that the argument was based on matters not in evidence or that [the defendant] was denied a fair trial."[217]

The Supreme Court of Colorado has also dealt with improper name-calling. For example, in *Gaddy v. Cirbo* the plaintiff's attorney referred to the defendants "as 'two mad dogs' and as 'cowardly, dirty, low down dogs.'"[218] Despite this name-calling the court affirmed the jury's verdict for the plaintiff.[219] The court made several comments about the statements, most of which seemed to minimize the effect of the remarks. For instance, the court implied that the defendant's attorney had invited this response by the plaintiff's counsel because he characterized a fight between the parties as a "dog fight."[220] Additionally, the court relied on the fact that the trial judge "advised the jury that the arguments of counsel were not evidence" and on the principle that "[w]ide latitude is allowed an attorney in advocating his client's cause."[221] Although the court did not approve of the name-calling, it did not find it sufficient to reverse the judgment.[222]

In an automobile injury case that came before the Court of Appeals of Missouri, the plaintiff's attorney referred to the defendant as a "hotrod."[223] The defendants argued that this was "gutter language" as well as a "highly improper accusation."[224] However, the court did not agree.[225] Although it found the accusation and name-calling improper, the court did not think the remarks were "mortal sins."[226] Rather, the court felt that any right to appeal based on the remarks was waived because the defendant's attorney did not object at the time they were made.[227] Additionally, the court stated that if the attorney had objected, any prejudice "might very well have cured or forestalled the improprieties . . . ."[228]

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216. Dudar v. Lewis, 282 S.E.2d 194, 196 (Ga. Ct. App. 1981).
217. *Id.*
218. Gaddy v. Cirbo, 293 P.2d 961, 961 (Colo. 1956).
219. *Id.* at 962.
220. *Id.*
221. *Id.*
222. *Id.*
223. Speicher v. Dunn, 530 S.W.2d 45, 47 (Mo. Ct. App. 1975).
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 48.
228. *Id.*

Another court, the Court of Civil Appeals of Texas, dealt with a reference to a witness as a "bushy-haired insurance adjustor."[229] Despite this comment that was not at all based on the evidence and despite other cases where this court had reversed for name-calling, in this particular case the court labeled the remark as mere "teasing" and affirmed the jury's decision.[230] The court's only real discussion of the issue was a statement that it did not believe that any "juror of ordinary intelligence could have been persuaded by [the attorney's] argument to agree to a verdict contrary to that to which he would have agreed but for such argument."[231]

Finally, the Alabama Supreme Court faced one case involving a breach of contract where the defendant's attorney exclaimed "[what] monumental liars these plaintiffs are" in his summation.[232] Despite its disapproval of the attorney's remarks, the court disposed of the issue by quickly holding that the statement "was a comment on the evidence . . . ."[233] Thus, the court avoided the issue by ruling that the comment "[did] not come within the rule requiring the court to exclude improper remarks."[234]

A review of the cases that disapprove of name-calling but still affirm the judgment for the offending party demonstrates a few things. First, many of the courts rely on the losing party's waiver because of their failure to object to the comments.[235] This is very inconsistent with other courts, such as the Florida Courts of Appeals, that have reversed for name-calling despite a lack of objection.[236] Second, many of the courts that affirm a judgment regardless of name-calling rely heavily on the trial judge's sustained objection and a limiting instruction to the jury.[237] However, as one scholar notes, "[w]hile limiting instruction[s] offer [ ] some protection, there is no guarantee that the jury will follow [the] instruction[s]."[238] Also, there is no guarantee that jurors can "erase from their minds what has been exposed to them, and even if a juror tries to follow the instruction, it remains embedded in his or her subconscious and may nonetheless permeate their thought process."[239] Additionally, there is support for the notion that jurors even "have difficulty understanding instructions generally."[240] Therefore, appellate court reliance on an objection and limiting

229. Texas Employers' Ins. Ass'n v. Hadley, 289 S.W.2d 809, 811 (Tex. Civ. App. 1956).

230. *Id.* at 811, 813.

231. *Id.* at 812 (internal quotation marks omitted).

232. Green & Sons v. Lineville Drug Co., 52 So. 433, 435-36 (Ala. 1910).

233. *Id.* at 436.

234. *Id.*

235. *See supra* notes 207, 227 and accompanying text.

236. *See supra* notes 192, 194 and accompanying text.

237. *See supra* notes 207, 209, 214, 221 and accompanying text.

238. Bryant M. Richardson, *Casting Light on the* Gray *Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confession Under* Bruton, Richardson, *and* Gray, 55 U. MIAMI L. REV. 826, 829 (2001).

239. *Id.*

240. Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547,

instruction is quite possibly misplaced. Nevertheless, courts still rely heavily on these methods to cure any prejudice that could result from name-calling.

3. Reversal Based on a Different Issue

In some cases, a court faced with inappropriate name-calling does not even need to decide the issue because it reverses the judgment for a different reason. This has happened in several cases, the first of which occurred in the Supreme Court of Alabama.

In *Florence Cotton & Iron Company. v. Field*, the plaintiff's attorney referred to the defendant as "a party of rich Northern capitalists . . . trying to rob an elegant, chivalrous southern gentleman of his justly and hard earned salary."[241] The court had very stern words for the attorney and the trial judge, and although it had found several other reversible errors with the judgment, it still "referred to [the statement], to state, that the remark was calculated to seriously prejudice and injure the defendant with the jury."[242] The court felt that the trial judge acted very mildly in response to the attorney's comments and that this was "not a sufficient antidote to the poison that had been injected into the minds of the jury by the use of such language."[243]

Several years after *Field,* the Minnesota Supreme Court held that the defendant in a negligence suit would have been entitled to a new trial simply because of improper conduct and language by the plaintiff's attorney during summation.[244] The attorney accused the opposing counsel of not being a gentleman and made various threats.[245] Though the court had already decided to order that a judgment notwithstanding the verdict be entered for the defendant, it proceeded to describe the plaintiff's attorney's conduct as beyond the bounds of propriety, and it spoke harshly in response to the actions of the trial judge.[246] For instance, the court stated:

> The trial court is not merely to rule when a point of controversy is raised; but to so control the trial in the interests of justice that improper arguments or offensive

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1575 (1998). *See also* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 402 (1990) (noting that jurors are sometimes confused "over the meaning of judicial instructions").

241. Florence Cotton & Iron Co. v. Field, 16 So. 538, 540 (Ala. 1894).

242. *Id.* at 540-41. ("Verdicts ought not to be won by such methods, and when an attorney, in the heat of debate, goes to such extraordinary lengths, generally, the court should promptly set aside any verdict that may be rendered for his client.").

243. *Id.*

244. Jovaag v. O'Donnell, 249 N.W. 676, 678 (Minn. 1933).

245. *Id.* at 677.

246. *Id.*

> conduct will not give rise to needless interruptions in order to preserve a litigant's right to a fair trial.[247]

The court continued by stating that misconduct of this nature should result in "a new trial in each case unless . . . further consideration results in judgments notwithstanding the verdicts."[248]

In *Watts v. Handley,* the Missouri Court of Appeals affirmed a verdict regarding liability, but reversed for reconsideration of damages.[249] The court considered various issues on appeal including the abusive name-calling by the plaintiff's attorney.[250] However, the court had already decided the case's outcome and disposed of the name-calling issue with one sentence: "We do not believe this issue will likely arise in a second trial."[251]

Most recently, the Court of Appeal of California dealt with an attorney that referred to Philip Morris Tobacco Company as the devil.[252] Despite this inappropriate name-calling, the court reversed only on the issue of punitive damages and held that Philip Morris "waived any contention based upon improper argument" because his counsel did not object to the statement at trial or request that the jury be admonished.[253]

Much like the courts that reverse for name-calling and those that affirm in spite of it, the courts that reverse a judgment on a different issue have proven inconsistent in their approach. Some, like the court in *Florence Cotton,* find it necessary to speak firmly regarding the attorney's actions while others, like the *Watts* court, "do not believe [the] issue will . . . arise [again]."[254] Thus, once again attorneys have no clear and consistent standards to govern their behavior. Though attorneys are supposed to be guided by various rules, including those of closing argument, some courts appear to treat these rules more leniently than others.

A brief review of the case law dealing with name-calling demonstrates that courts vary greatly in how they handle the issue. Some courts refuse to tolerate name-calling even though the injured party does not object. Conversely, some courts refuse to address the issue *because* the injured party did not object. This, and other inconsistencies in how courts deal with name-calling, exacerbates the problem

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247. *Id.* (internal quotation marks omitted).

248. *Id.*

249. Watts v. Handley, 427 S.W.2d 272, 276 (Mo. Ct. App. 1968).

250. *Id.* at 275.

251. *Id.*

252. Boeken v. Philip Morris, Inc., 19 Cal. Rptr. 3d 101, 133 (Ct. App. 2004) ("Philip Morris complains that opposing counsel was permitted to argue that Philip Morris was the 'devil' because of its allegedly glamorous advertising practices.") (internal quotation marks omitted).

253. *Id.* at 133-34, 148.

254. *Compare* Florence Cotton & Iron Co. v. Field, 16 So. 538, 540-41 (Ala. 1894) *with Watts,* 427 S.W.2d at 275.

because it does not send a clear message to attorneys—a message that name-calling will not, under any circumstances, be tolerated. Rather, trial lawyers are given an unclear and inconsistent message that varies from court to court. This disparity is one of the biggest reasons that we must give this issue more attention so that we can eliminate improper name-calling in closing argument.

V. PROVIDING A REMEDY FOR THE PROBLEM

A. *The Typical Responses of Trial Judges and Reviewing Courts*

As evidenced from the review of relevant case law, most courts that affirm a judgment involving inappropriate name-calling hold that a sustained objection or limiting instruction cures any prejudice that could result from the name-calling.[255] However, as stated earlier, this trust in the effectiveness of limiting instructions may be misplaced.[256] Also, the courts frequently find that any arguments on appeal regarding name-calling are waived if the attorney does not object during trial.[257]

At the trial level, one scholar has found that judges often "criticize[ ] counsel for name-calling without taking any further action."[258] Other possible sanctions that have been used include "attorney disqualifications, new trials, judge recusals, [and] disciplinary reporting . . . ."[259]

The truth is that the typical responses by trial judges and appellate courts do nothing to effectively discipline or prevent the issue of improper name-calling. "[I]n most jurisdictions misbehaving attorneys ultimately have little to fear."[260] In fact, "[t]he most surprising (or relieving) point observed by review of closing argument issues is that rarely does closing argument constitute reversible error, especially when the trial court properly instructs the jury that closing arguments are not evidence."[261] Thus, when an attorney name-calls—which is not dealt with consistently—during closing argument—which rarely constitutes reversible error—the problem is largely ignored. However, our courts, both at the trial and appellate levels, continue to rely on instructions to the jury to deal with an issue involving name-calling. Attorneys call names, the jury is told to "unring a bell" that has already been rung, and then an appellate court upholds the trial judge's actions while the attorney goes unpunished and the problem continues.

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255. *See supra* notes 204-40 and accompanying text.
256. *See supra* notes 238-40 and accompanying text.
257. *See supra* notes 207, 227 and accompanying text.
258. Tasker, *supra* note 4, at 18.
259. *Id.*
260. *Id.* at 21.
261. Kirk & Sylvester, *supra* note 148, at 329.

B. *Proposals by Others*

There have been several proposals to deal with the issue of name-calling, but like the general attention directed to the issue, they have dealt mainly with prosecutorial name-calling of the defendant. Nevertheless, they can provide guidance for how to remedy the problem in civil cases. Therefore, a few of these proposals will be briefly discussed.

One proposal, set forth in the Judges' Journal by research attorney Ty Tasker, suggests that it is our "[c]ourts [that] need to send a clear message to counsel that mean-spirited litigation will not be tolerated."[262] "[Such litigation tactics] should have the disapproval rather than the tacit approval of the court" he writes.[263] Tasker opines that this action will benefit the system and alleviate the problem in two ways. First, it "would remove . . . the option for clients to request such behavior . . . ."[264] Second, it would remove "the concomitant market incentive for attorneys to deliver such representation."[265] Additionally, Tasker argues that judges need to take action in the courtroom by "express[ing] support of[ ] new legislation, rulemaking, and ethics guidelines where needed."[266]

Tasker also argues that judges can teach trial lawyers about what is expected of them and what will not be tolerated during trial.[267] Moreover, he believes that this professional education should also come from "bar associations, institutes, and law schools."[268] Finally, once this education becomes instilled in attorneys, Tasker proposes that "ethics-based mentoring in law firms [could] be helpful . . . ."[269]

Another article argues that the problem of name-calling could in fact be getting worse because appellate review does not fall equally on both litigators.[270] This article states that because of a prosecutorial focus, appellate courts have actually aided the problem by creating the invited response doctrine and the harmless error review standard.[271] In order to alleviate the problem the article "proposes to . . . set[ ] out enforcement measures that will allow trial judges to rein in the excesses of both prosecution and defense counsel while still preserving zealous representation."[272] Additionally, the article acknowledges that other "[s]uggestions have included . . . encouraging judges to utilize their power to summarize and comment on the

262. Tasker, *supra* note 4, at 21.
263. *Id.* (internal quotation marks omitted).
264. *Id.*
265. *Id.*
266. *Id.*
267. *See id.*
268. *Id.*
269. *Id.*
270. Nidiry, *supra* note 3, at 1300.
271. *Id.*
272. *Id.*

evidence, and encouraging more forceful appellate review of improper summation."[273] But ultimately the article argues, like Tasker, that the trial court is the best place to control the problem of improper argument in summation.[274]

One article, published in the Villanova Law Review, advocates attorney reporting of misconduct as well as judicial action in order to alleviate the problem of improper conduct during closing argument.[275] This article also argues that attorneys and judges "need to create a continuing legal education videotape for . . . attorneys, demonstrating improper closing arguments that are against the rules and should never be made."[276]

Finally, one law professor dealing specifically with prosecutorial name-calling proposes a variety of methods, including the declaration of a mistrial, a reprimand, or an order of contempt in order to deal with the problem.[277]

Though there are many other proposals, the articles discussed above provide an overview of the variety of methods that can be used to curb and hopefully eliminate improper name-calling. Combining and building upon these proposals, the next section suggests a proposal that involves several "lines of defense" to protect against inappropriate name-calling. These lines of defense should provide ample protection to ensure that name-calling is effectively and consistently dealt with.

C. *A Proposal for Change*

Ultimately, any proposal that will effectively deal with the issue of inappropriate name-calling in closing argument must find "an acceptable balance between zealous advocacy and ethical argument."[278] Any proposal that would stifle appropriate, zealous advocacy on behalf of one's client does more harm than good. Therefore, in crafting a proposal to remedy the problem of inappropriate name-calling, care must be taken to balance these two competing goals. In an effort to find this balance, and building on the previous proposals of others, this article offers a proposal that focuses on four levels—each of which has the ability to put a stop to inappropriate name-calling. Ideally, change will start at the first level, but in the event that it does not, the other three levels provide ample protection to put an end to this problem.

First, in order to stop name-calling each individual attorney must make an effort to keep his or her emotions and desire to win in check. There is no doubt that "[e]motion is a natural by-product of a trial" and that, if unchecked, this emotion can

273. *Id.* at 1325.

274. *Id.* ("[T]he trial court is still the only effective means of controlling closing arguments while preserving the adversarial responsibility of attorneys.").

275. Tobin, *supra* note 21, at 39.

276. *Id.* at 70.

277. Caldwell, *supra* note 3, at 394.

278. Tasker, *supra* note 4, at 17.

result in name-calling.[279] However, this is no excuse to resort to name-calling of opposing counsel, the opposing party, or any witnesses. Despite the emotions that typically arise during trial, "[l]awyers should not lose their objective ability to distinguish the difference between aggressive advocacy and the detached, civilized role of representation."[280]

In addition to keeping their emotions in check during trial, attorneys must learn to balance the desire to be an aggressive advocate with the need to follow the rules of closing argument. Although trial lawyers typically have a desire to win and to be an aggressive advocate, this "does not justify behavior that is prohibited by professional conduct rules or that obstructs the administration of justice."[281] The rules that govern closing argument are in place for a reason. They are not merely guidelines or procedural rules that attorneys can follow if it is convenient. Rather, the rules determine the content of closing argument and what arguments attorneys can and cannot make.[282] Moreover, they are designed to ensure that a verdict is based *solely on the evidence* rather than improper considerations.[283]

In addition to following the rules of closing argument, trial lawyers also need to be mindful of the rules of professional conduct. As discussed earlier, there are several provisions in the MRPC that attorneys violate when they improperly name-call.[284] Thus, attorneys must also balance their emotions with these rules.

When the individual attorney fails to keep his emotions in check and allows himself to be overtaken by a desire to "win at all costs," there is another party that can, and should, deal with inappropriate name-calling—the trial judge. Judges are not merely objective listeners that rule on issues of hearsay and best evidence, but they also "ha[ve] an abiding obligation to take *or initiate* appropriate disciplinary measures against a lawyer for unprofessional conduct . . . ."[285]

As the Second Circuit has held, "the trial judge should not guess about the jurors' reactions to an obviously improper argument. It is his responsibility to prevent counsel from continually making improper arguments and using slanderous and baseless epithets."[286] However, our courts continually guess about the jury's reaction to improper argument.[287]

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279. *Id.* at 20 (internal quotation marks omitted). Because emotion can result in name-calling attorneys "need an especially strong ability to control their temperament." *Id.*

280. *Id.*

281. AMERICAN BAR ASSOCIATION, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 61:905 (2002).

282. *See supra* notes 29-67 and accompanying text.

283. *See supra* notes 29-67 and accompanying text.

284. *See supra* notes 127-42 and accompanying text.

285. Cotto v. United States, 993 F.2d 274, 281 (1st Cir. 1993) (emphasis added).

286. Koufakis v. Carvel, 425 F.2d 892, 901 (2d Cir. 1970).

287. *Id.* at 901. After the attorney objected to counsel's argument that his client was the head of the Mafia, the court simply responded by stating that the jury understood that the attorney was not

Additionally, the Second Circuit has also noted that the primary "task of a . . . [trial] judge . . . is to exercise that degree of control required by the facts and circumstances of each case to assure the litigants of a fair trial."[288] The court stated that this responsibility "does not arise only when objections are raised by one of the litigants or his counsel."[289] Rather, the judge should take action even if there is no objection to an improper argument.[290] In some instances this may be all that is needed to stop the inappropriate behavior and send a message to other attorneys that it will not be tolerated.[291]

However, if the attorney does not respond to a trial judge's stern admonition, the judge should take more drastic measures. At least one court has held that this is required of trial judges when faced with improper conduct—including name-calling—that cannot be adequately handled by an instruction from the trial judge.[292]

Specifically, there are two additional measures that trial judges can take to try and eliminate name-calling during closing argument. First, the trial judge should report the attorney's conduct to the appropriate professional authority. As lawyers, judges have the same duty to report misconduct that practicing attorneys do.[293] This duty is not relieved merely because the judge is on the bench rather than seated at the counsel table.

Second, trial judges may also issue an order of contempt. The trial judge's authority to issue an order of contempt was discussed by the Supreme Court in *Pounders v. Watson*.[294] In *Pounders,* the Court upheld a trial judge's order of contempt after an attorney persisted in asking questions about a subject that the judge had forbidden.[295] The Court held that when misconduct occurs in open court in front of the judge, a summary contempt order may be appropriate.[296] The Court also noted, "[t]o preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or . . . disrespect to the court when

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accusing the man of being part of the Mafia. *Id.* Thus, the court assumed that the jurors clearly understood the attorney's reason for objecting and the judge assumed that the jurors would not be influenced by a reference to such a hated and feared organization.

288. *Id.* at 900-01.

289. *Id.* at 901.

290. *See id.*

291. Tasker, *supra* note 4, at 18 ("When lawyer misbehavior occurs in proceedings, a judge's stern admonition with just the right demeanor may be all that is needed to persuade counsel to stop the behavior. When that approach fails, more drastic steps may be warranted . . . .").

292. Tobin, *supra* note 21, at 39 ("The Fifth District Court of Appeal recently stated that a trial judge, 'in the case of lawyers who do not heed less severe judicial efforts to correct such conduct . . . ,' should refer the matter to [t]he . . . [state] bar.").

293. MARTYN ET AL., *supra* note 127, at 97.

294. 521 U.S. 982 (1997).

295. *Id.* at 985, 990.

296. *Id.* at 988.

occurring in open court."[297] Although it is probably not appropriate for a trial judge to issue an order of contempt after one instance of name-calling, it is also not necessary for the attorney to "engage in a pattern of repeated violations."[298]

Based on the Supreme Court's holding in *Pounders,* a trial judge is permitted to issue an order of summary contempt when an attorney engages in misconduct in open court. Apart from the need for such an order to vindicate the court's authority, an order of contempt will also deter attorneys from improper name-calling after they have been warned of the consequences of such action.

Thus, when an attorney acts inappropriately by calling the opposing counsel, the other party, or witnesses a name that is not supported by the evidence, the trial judge has an obligation to act firmly and to send a message that the behavior will not be tolerated.[299] If the judge does not, he is not fulfilling his responsibility of ensuring a fair trial for everyone involved. Then, if the attorney persists in the improper behavior, the judge has an obligation to report the matter to the appropriate professional authority or take other, more severe measures. This kind of judicial leadership cannot be legislated or mandated by anyone. Rather, the change must come "from the individual effort of each participant in the litigation process as part of a personal obligation assumed equally by lawyers and judges."[300] Just like attorneys must make an individual effort to spark change in this area, judges must do the same.

If the trial judge fails in his or her responsibility to ensure a fair trial for everyone, there is another party that can, and should, play a role in putting an end to improper name-calling—the opposing attorney. Apart from objecting during trial when name-calling occurs, the opposing attorney has a duty to report the misconduct of other attorneys.[301] In fact, the Model Rules of Professional Conduct indicate that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[302] While opposing counsel does not have standing to seek that a rule of conduct is enforced,[303] this does not relieve them of their duty to report

297. *Id.* at 987 (internal quotation marks omitted).

298. *Id.* at 989 (internal quotation marks omitted). The Court stated that "summary contempt convictions [have been] upheld after a single refusal . . . ." *Id.*

299. *See* Cotto v. United States, 993 F.2d 274, 281 (1st Cir. 1993) ("A judge has an abiding obligation to take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge becomes aware.").

300. *See supra* note 162.

301. MARTYN ET AL., *supra* note 127, at 97.

302. *Id.* In order for the legal profession to continue to be largely self-regulated, "members of the profession [must] initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct." *Id.* at 97. While lawyers cannot be required to report *every* instance of misconduct, they should report "those offenses that a self-regulating profession must vigorously endeavor to prevent." *Id.*

303. *Id.* at 10 ("The fact that a Rule is a just basis for a lawyer's self-assessment, or for

the misconduct. The practice of law is largely self-governing and for that reason "[e]very lawyer is responsible for observance of the Rules of Professional Conduct."[304] We fulfill this obligation by "securing . . . observance [of the rules] by other lawyers."[305] If attorneys neglect these responsibilities it "compromises the independence of the profession and the public interest which it serves."[306]

The final line of defense, if attorneys and judges fail to correct the problem, is the appellate court. While appellate courts can only review the cases that are brought to them, this should not prevent them from taking the issue of inappropriate name-calling seriously. Rather than treating the issue inconsistently, appellate courts should send a clear message to trial lawyers—that inappropriate name-calling will not be tolerated in any circumstance, regardless of the fact that it is not objected to. Additionally, appellate courts should not be quick to assume, as many have, that prejudice did not result or that a sustained objection and limiting instruction cured any prejudice.[307] This does not mean that every single case involving name-calling should be reversed, but it does mean that courts should not take the issue lightly. If, after a thorough reading of the record, consideration of the words used, and the circumstances of their use, the court finds that prejudice probably did not occur, they should still employ some method to sanction the offending attorney. For example, the appellate court could still refer the case to the state bar or other professional authority for review.

Additionally, appellate courts should be more supportive of a judge's order of contempt or grant of a new trial. While appellate courts generally give great deference to a trial judge's decision, it should be clear that part of the reason for this deference is to demonstrate that name-calling will not be tolerated.

The four part proposal discussed above begins with each individual trial lawyer. While attorneys may desire to win every case that comes into their hands, it would be improper for this desire to cloud their judgment and lead them to improperly call names. But, in the unfortunate event that this does occur, our trial judges must take action. Judges can no longer tacitly approve improper name-calling by remaining silent. Instead, trial judges must act firmly when name-calling occurs so that the integrity and professionalism of the practice of law is protected. If our trial judges fail to act with conviction, other trial lawyers and those who are the victims of name-calling must report the misconduct to the state bar or other professional authority. Finally, if all the other lines of defense fail, our appellate courts must send a clear and consistent message—that improper name-calling will not be tolerated.

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sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.").

304. *Id.* at 9.

305. *Id.*

306. *Id.*

307. *See supra* notes 207, 210, 214 and accompanying text.

D. *Impact of Clearer Guidelines*

If we all do our part, from each individual trial attorney, to each trial judge and each appellate court, we will eventually have a clearer and more consistent guideline and the problem of inappropriate name-calling during summation will be vastly reduced and, hopefully, one day eliminated. As individuals in a profession that has received ever-increasing bad publicity, we should all recognize that controlling name-calling is key to an increase in the level of esteem that others have for our profession and those of us who comprise it.

Moreover, we must also recognize that in the wake of clearer guidelines and a clearer message for attorneys, the courtroom will become a much more civilized setting. And, "[a] civilized setting is fundamental to accomplishing the courts' goal of fair resolutions."[308] By providing a more civilized setting for our courtrooms, we are ensuring fairer trials for our clients. Instead of the party whose attorney is unethically and unprofessionally winning the case because he or she incited the jury, the party with the strongest evidence will, ideally, prevail.

VI. CONCLUSION

Despite a recent desire to return professionalism and civility to the legal profession, "[a]ny review of case law of American jurisdictions reveals the existence of personal character attacks by lawyers directed at judges, attorneys, parties . . . and witnesses . . . ."[309] While we want to encourage attorneys to be zealous in the representation of their clients, "overzealous advocacy results in a number of undesirable outcomes."[310] One of these undesirable outcomes is inappropriate name-calling during closing argument. Our courts have done little to alleviate the problem as they have largely remained silent. If they have spoken, their words have not been clear and consistent; with some courts dealing with the issue with stern words, while others simply gloss over it. The result: name-calling continues and the legal profession suffers. The problem cannot be allowed to continue, yet it will if attorneys continue to let their emotions run wild, if our courts continue to treat inappropriate name-calling lightly, and if we continue to ignore the issue. The reality is that instead of the ineffective guidelines our courts have provided, "[a]ttorneys, as officers of the courts, need a clearer, more consistently enforced message . . . that a license of admission to the bar is not a license to smear opponents."[311] Until this happens, inappropriate name-calling will continue and the image of the legal profession will continue to suffer. Sticks and stones may break bones, but names continue to hurt us.

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308. Tasker, *supra* note 4, at 19.
309. *Id.* at 17.
310. *Id.*
311. *Id.* at 21.