May an attorney ask the jury to put themselves in the place of the plaintiff when deciding a case? Because of a circuit court split, it depends on where and why. All circuit courts to have considered the issue universally prohibit the use of the so-called “Golden Rule” argument with respect to damages. But while the D.C., Third and Seventh Circuits extend this prohibition to the issue of liability, the Second, Fifth, Tenth, and Eleventh Circuits do not and the U.S. Supreme Court has not yet reviewed this issue.

The Golden Rule Argument

Judges regularly instruct juries to decide the case before them without “prejudice, sympathy, fear, favor or public opinion.” When an attorney asks the members of the jury, in essence, to do unto his or her client as they would like done unto them, the attorney appeals to their sympathy and invokes the “Golden Rule” argument. An example of a prohibited Golden Rule argument is when a plaintiff’s attorney in a personal injury case delivers a closing argument in which he asks the members of a jury to consider during deliberations the value of the “loss of your legs . . . the limitation in your enjoyment of life, pain, further medical treatment . . .” This appeal to emotion is “universally condemned because [it encourages] the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence.” All circuits to have considered the issue have found the invocation of a Golden Rule argument at a jury trial with respect to damages to be improper. Depending upon the circumstances of the case, improper use of this tactic may be remedied by the trial court’s limiting instructions to the jury or it may require a new trial. However, the circuits are divided with respect to whether such an argument is permissible with regard to issues of liability.

The D.C. Circuit’s Caudle Decision

In February, the D.C. Circuit in Caudle v. District of Columbia joined the Third Circuit and Seventh
Circuit and refused to recognize a *per se* distinction between Golden Rule arguments regarding damages and those regarding liability. The court reasoned that it is equally improper for juries to decide issues of liability based upon inappropriate considerations, such as emotion, as it is for them to calculate damages with reference to those considerations. In *Caudle*, the appellees were employees who sued the District’s Metropolitan Police Department alleging they were denied certain positions in retaliation for complaining about unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

During the trial, their counsel made a series of statements to the jury to which the District objected and challenged on appeal. Particularly, in her closing statement, the appellees’ counsel stated, after two previous objections to similar entreaties to the jury to put themselves in their clients’ places were sustained:

> Now, in the end it is your job to determine how to make [the] plaintiffs whole for what they have had to endure. As you make those decisions, we ask yourselves [sic] to *put yourselves in the plaintiffs’ shoes*. What would it do to you to have *your* complaint broadcast to *your* entire office, to be the only one excluded…?7

The D.C. Circuit agreed with the district’s argument. Analyzing the appellees’ counsel’s statements, it found that two were Golden Rule arguments addressing liability, while the other was a “quintessential invocation of the Golden Rule argument” with respect to damages.8 Though the appellees argued that the statements were permissible because they explained the legal standard for retaliation, which proscribes “employer actions that would have been materially adverse to a reasonable employee,” the D.C. Circuit found that the subjective arguments did not describe the objective standard, but rather asked how each individual juror would react.9

The D.C. Circuit went on to determine whether such statements by appellees’ counsel were harmless, or whether they required that the verdict be overturned and a new trial granted. In the D.C. Circuit, the test for determining whether an evidentiary error is harmless requires the appellate court to consider whether (1) the case is close, (2) the issue central, or (3) effective steps were taken to mitigate the effects of the error.”10 The D.C. Circuit found that the appellees’ counsel’s statements were not harmless because the case was close and the central issue of motive on which the case hinged was proven only by circumstantial evidence and the jury resolved serious evidentiary weaknesses in appellees’ case in their favor.11 Further, the district court’s attempt to mitigate the effects of the statement by sustaining opposing counsel’s objections and giving a curative instruction did not remove the unfair prejudice against the District.12 The court also noted that this case did not involve a single misstatement by appellees’ attorney, but rather, repeated inappropriate statements of the same nature, each worse than the last, despite that the court sustained the District’s prior objections. In the end, the D.C. Circuit concluded that the appellees’ counsel
made inappropriate Golden Rule arguments that could not be cured by the district court and, thus, a new trial was warranted.\textsuperscript{13}

The Third Circuit’s Edwards Decision

The Third Circuit earlier rejected the use of the Golden Rule argument entirely.\textsuperscript{14} Because the argument poses the same concerns whether addressed to liability or damages – “the creation of undue sympathy and emotion” – the court held that there is no rational basis for a rule distinguishing between the use of the argument in one situation and not the other.\textsuperscript{15}

\textit{Edwards v. City of Philadelphia} involved a civil rights action where an arrestee appealed a jury verdict in favor of the city and the officer due to, among other things, the defense counsel’s use of a Golden Rule argument in his opening statement.\textsuperscript{16} In a footnote, the Third Circuit explicitly rejected the defense counsel’s argument that the Golden Rule can be used with respect to liability.\textsuperscript{17} It stated that it sees “no rational basis for a rule that proscribes the ‘Golden Rule’ argument when a plaintiff argues damages, but permits it when the defendant argues liability.”\textsuperscript{18}

Nevertheless, the Third Circuit affirmed the jury verdict in favor of the defendant, holding that a “clear and complete jury instruction on the elements of the claim asserted and on the allocation of the burdens of proof, whenever given, is sufficient to cure harm caused by a ‘Golden Rule’ argument.”\textsuperscript{19} The court explained that the Golden Rule prohibition did not apply because counsel’s statements only related to the reasonableness of the appellee’s actions under emergency conditions, and were not at all related to damages.\textsuperscript{20} The court went on to state that the argument was “not immoderate or unduly emotional and the trial court instructed the jury quite fully on the reasonable person standards of negligence.”\textsuperscript{21} The decisions suggest that in these courts, Golden Rule arguments will not jeopardize a verdict when they are directed at the reasonableness of a party’s actions in determining that party’s liability.

The Other Circuits Weigh In

Although all federal circuit courts of appeals that have considered the issue agree that Golden Rule arguments cannot be used when addressing damages, the Second, Fifth, Tenth, and Eleventh circuits have taken the position that such arguments can be used with respect to liability. For example, in a negligence case, \textit{Burrage v. Harrell}, the Fifth Circuit rejected plaintiff’s appeal from a judgment in favor of defendant based on, among other things, defendant’s counsel’s use of a Golden Rule argument during closing arguments.

The court explained that the Golden Rule prohibition did not apply because counsel’s statements only related to the reasonableness of the appellee’s actions under emergency conditions, and were not at all related to damages.\textsuperscript{22} The court went on to state that the argument was “not immoderate or unduly emotional and the trial court instructed the jury quite fully on the reasonable person standards of negligence.”\textsuperscript{23} The decisions suggest that in these courts, Golden Rule arguments will not jeopardize a verdict when they are directed at the reasonableness of a party’s actions in determining that party’s liability.

Going Forward

The Golden Rule speaks to reciprocity and is something we are encouraged to follow starting as children. Therefore, it may seem somewhat counterintuitive that invoking the Golden Rule in
litigation is problematic. Yet, all of these cases demonstrate that attorneys should be wary of raising a Golden Rule argument in their opening or closing statements during a jury trial, regardless if it pertains to liability or damages. Though there is a circuit split regarding its use as to liability, there seems to be a general consensus among the circuits that invoking the Golden Rule as to damages is improper. Some courts may go as far as to grant a new trial if the Golden Rule argument has a significant impact on the jury’s decision, despite the curative instruction that may have been given by the trial court.

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5. Caudle, 707 F.3d at 359; See, e.g., Granfield, 597 F.3d at 491 (acknowledging that Golden Rule arguments are universally condemned, but finding that “the use of such language is [not] per se reversible error”); Arnold v. E. Air Lines, Inc., 681 F.2d 186, 199 (4th Cir. 1982) (stating that “[t]he Golden Rule and sympathy appeals are the most obviously improper arguments from a technical standpoint. Having no legal relevance to any of the real issues, they were per se objectionable in this case as they are in any . . .” yet holding that actual prejudice from the arguments made by counsel in opening and closing statements were unlikely to have caused actual prejudice under the circumstances of the case); Loose v. Offshore Navigation, Inc., 670 F.2d 493, 496–97 (5th Cir. 1982) (recognizing that the use of a Golden Rule argument does not necessarily “create immutable error” when the judge appropriately instructs the jury, but reversing the jury verdict and remanding for a new trial where, among other things, the judge overruled defendant’s objection to such argument because its use can “so taint[] a verdict as to be grounds for a new trial,”); Leathers, 546 F.2d at 1086 (rejecting defendant’s argument that invoking the Golden Rule, on its own, is reversible error); cf. Klotz v. Scan, Roebuck & Co., 267 F.2d 53, 55 (7th Cir. 1959) (finding that despite the district court’s jury instruction, the use of the Golden Rule argument was so prejudicial that it warranted a new trial).

6. Caudle, 707 F.3d at 359.

7. Id. at 358.

8. Id.

9. Id. at 360–61 (quoting Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 57 (2006)).

10. Id. at 361.

11. Id.

12. Id. at 363.

13. Id.


15. Id. at 575 n. 6.

16. Id. at 573.

17. Id. at 575 n. 6.

18. Id.

19. Id. at 574.

20. Id. at 573.


22. Insurance Co. of N. Am., 870 F.2d at 154.


24. Id. See also, McNely v. Ocala Star-Banner Corp., 99 F. 3d 1068, 1071 n.3 (11th Cir. 1996) (agreeing with the Fifth Circuit in Burraaage and holding that the defense counsel's Golden Rule closing argument in employment discrimination case was directed at the reasonableness of the employer's actions); Johnson v. Celotex Corp., 899 F.2d 1281, 1289 (2d Cir. 1990) (concluding that the Golden Rule argument in closing was not “so inflammatory as to
require a new trial” and was directed only at the issue of liability); *Schultz v. Rice*, 809 F.2d 643, 652 (10th Cir. 1986) (finding that the defendant’s counsel’s Golden Rule closing argument was appropriate because it was directed solely at the reasonableness of the party’s actions, the counsel clarified the meaning of his request that jury place themselves in his client’s position, and the trial court instructed the jury to weigh the argument against the evidence and law presented to them).
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