A LIAR BY ANY OTHER NAME? IOWA'S CLOSING ARGUMENT CONUNDRUM

TABLE OF CONTENTS

I. INTRODUCTION

The closing argument signifies many things for a trial attorney. The witnesses have all been called, the exhibits are all in, and the trial is almost over. This is an attorney's opportunity to sum up the important facts, highlight key witnesses, and capture the emotions of jurors. Unencumbered by the many formalistic and procedural restrictions present throughout the trial, the closing argument has been described as an "attorney's 'only opportunity to tell the story of the case in its entirety, *without interruption*, free from most constraining formalities.'"[1] Closing

1. Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing*

arguments are "the magical moment all trial lawyers crave; the stage is [theirs]."[2]

It is not unusual, however, for a trial lawyer caught in the moment to overstep the permissible bounds for a closing argument and possibly commit reversible error.[3] The prospect of committing reversible error may be more likely for Iowa trial attorneys after recent decisions by the Iowa Supreme Court and Iowa Court of Appeals.[4] These decisions offer vague, nebulous standards for proper closing arguments and cross-examination tactics that have left even Iowa judges questioning whether such opinions have changed the rules of evidence or just the rules of the game.[5]

Part II of this Note will discuss the importance and impact of persuasive closing arguments. Part II will explore the appropriate scope of closing arguments. This information provides a useful framework for Part III, which will offer an in-depth examination of the Iowa Supreme Court's failure in *State v. Graves*[6] to adequately address what may or may not be said during a closing argument and witness cross-examination.

In *Graves*, the Iowa Supreme Court failed to establish a bright-line test regarding the appropriate bounds for closing argument rhetoric or

---

Argument: An Examination of Federal and State Cases, 28 OHIO N.U. L. REV. 67, 68 (2001) (quoting STEVEN LUBET, MODERN TRIAL ADVOCACY 443 (2d ed. 1997)).

2. James H. Roberts, Jr., *The SEC of Closing Arguments*, 23 AM. J. TRIAL ADVOC. 203, 203 (1999) (explaining that the closing argument is one of the most exciting areas in trial advocacy).

3. Jeffrey J. Kroll, *Closing Arguments in Civil Trials: How Far Can Lawyers Go?*, 86 ILL. B.J. 666, 666 (1998) ("Closing argument is a highly emotional point in any trial. It is not uncommon for trial lawyers to become caught up in the argument to the extent that something regrettable, i.e., reversible error, occurs."); *see also* Montz, *supra* note 1, at 68–69 (explaining that, although the fact-finder has likely already determined the outcome of the case long before the closing argument, lawyers still risk reversible error during closing arguments through improper comments and references).

4. *See, e.g.*, State v. Graves, 668 N.W.2d 860, 876 (Iowa 2003); Allen v. State, No. 03-1288, 2005 WL 974189, at *4 (Iowa Ct. App. Apr. 28, 2005); Bowman v. State, No. 03-1769, 2005 WL 597059, at *4 (Iowa Ct. App. Mar. 16, 2005); State v. Habhab, No. 04-0182, 2005 WL 67586, at *1 (Iowa Ct. App. Jan. 13, 2005); Mott v. State, No. 03-1606, 2004 WL 2578988, at *2–3 (Iowa Ct. App. Nov. 15, 2004); State v. Stewart, 691 N.W.2d 747, 751–52 (Iowa Ct. App. 2004).

5. *See* Richard G. Blane II & Robert J. Blink, Address to the Iowa Academy of Trial Lawyers: What's Left of the Rule of Evidence After the *Werts* and *Graves* Cases? (Mar. 3, 2005) [hereinafter Blane II & Blink, Address] (questioning the effect that *Graves* and its progeny will have on closing arguments and cross-examinations in Iowa).

6. State v. Graves, 668 N.W.2d 1860 at 860 (Iowa 2003).

cross-examination of a witness.[7] Furthermore, the Iowa Supreme Court's ambiguous decision left attorneys confused as to whether the guidelines enumerated in *Graves* extend beyond prosecutorial conduct to all Iowa trial attorneys.[8]

Part IV will examine other jurisdictional approaches to similar problems regarding controversial closing arguments. Lastly, Part V will analyze the ethical implications and possible extension of the *Graves* holding to Iowa civil trial lawyers.[9]

II. CLOSING ARGUMENTS

"Lawsuits are won or lost based upon the evidence and the law, not on the advocate's analytical and oratory skill."[10] "The likelihood of a lawyer's snatching victory from the jaws of defeat with his or her closing argument is so slight that it hardly warrants consideration."[11] And yet, "lawsuits are lost by fumbling, stumbling, incoherent, exaggerated, [or] vindictive closing arguments."[12] Closing arguments and opening statements "are the only two opportunities lawyers have to speak directly to the jury."[13] Attorneys, at times, view these opportunities as a time to disregard rules of trial etiquette.

A closing argument differs from an opening statement in that closing arguments should avoid becoming a summation of the evidence and instead should provide a narrative framework for jury analysis.[14] The word argument suggests more than a summary of the facts of the case:

---

7. *Id.* at 876.

8. *See id.* at 874 (applying Iowa Rule of Professional Responsibility DR 8-106(C)(4) to the prosecutor's misconduct). The ethical rule cited by the court applies to both criminal and civil attorneys. Therefore, the standards set forth in *Graves* may be read to apply not only to prosecutors, but to all Iowa trial attorneys. *See id.* This rule was later superseded by Rules 3.3 & 3.4 of the Iowa Rules of Professional Conduct.

9. *See* Blane II & Blink, Address, *supra* note 5, at 1-10.

10. James H. Seckinger, *Closing Argument*, 19 AM. J. TRIAL ADVOC. 51, 51 (1995).

11. KENNETH S. BROUN & JAMES H. SECKINGER, PROBLEMS AND CASES IN TRIAL ADVOCACY 239 (4th ed. 1990).

12. *Id.*

13. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 491–92 (2d ed. 1987).

14. *Id.* (finding that, unfortunately, some lawyers use summation in the place of argument which often is redundant if the jury is already aware of the facts and issues in the case).

"Argument brings to mind persuasion addressed to the thorniest problems a case can present."[15]

An effective closing argument identifies central and pivotal issues in the case and persuasively motivates the fact-finders to return a favorable verdict.[16] The rhetorical nature and dramatic tone of closing arguments can lead attorneys, at times, to believe that the rules no longer apply during this stage of the trial.[17]

Paradoxically, lawyers frequently engage in objectionable conduct during closing argument, despite the fact that "'studies demonstrate that most jurors have made up their minds before hearing [closing argument].'"[18] Reasons for this unprofessional conduct range from "lack of experience, lack of knowledge, [or a] lack of preparation" on the part of the attorney.[19] Additionally, it has been suggested that lawyers, emotionally excited by the impending conclusion of trial, simply forget or choose not to abide by the rules of practice during closing argument.[20]

An attorney's job during a closing argument is to aid the jury in analyzing and processing the evidence. An attorney should be persuasive, and may argue that the jury should adopt a conclusion as long as the conclusion is appropriate based on the evidence presented at trial.[21] Closing arguments must be confined to the evidence presented during trial.[22] Yet, attorneys are given significant leeway in forming inferences and conclusions based upon the evidence.[23]

However, a closing argument is not a proper venue for attorneys to attack the adversary's case or witnesses. "[C]ounsel may not premise arguments on evidence which has not been admitted"[24] or "ma[ke] statements as to facts not proven"[25] during the trial or inject personal belief

15. *Id.*
16. Seckinger, *supra* note 10, at 53.
17. *See* Rosemary Nidiry, Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1306–07 (1996) (finding that wide latitude given to litigators during closing arguments has led lawyers to disregard ethical and procedural rules).
18. Kerry E. Notestine, *Closing Arguments*, BRIEF, Fall 1992, at 72, 72 (1992).
19. *Id.* at 69.
20. *See id.* at 69–70.
21. *Id.* at 71.
22. *Id.*
23. *Id.*
24. Johnson v. United States, 347 F.2d 803, 805 (D.C. Cir. 1965).
25. United States v. Latimer, 511 F.2d 498, 503 (10th Cir. 1975).

or knowledge into the final argument.[26]

The judicially recognized "purpose of closing argument is to give [each side] the opportunity to explain the significance of the evidence and how it should be viewed."[27] Trial advocacy periodicals and treatises explain that certain rules must be followed during closing argument.[28] As noted by Professor James W. McElhaney in *McElhaney's Trial Notebook*, the basic rules of closing argument for an attorney include:

- You may not misstate the evidence or the law.
- You may not argue facts that are not in evidence.
- You may not state your personal belief in the justice of your cause.
- You may not personally vouch for the credibility of any witness.
- You may not appeal to passion or prejudice.
- You may not urge an irrelevant use of evidence.[29]

While these rules may seem relatively self-explanatory to a seasoned trial attorney, much litigation has resulted from what exactly these rules, and others like them, encompass or prohibit.[30] Closing arguments are an opportunity for persuasion and advocacy. However, as evidenced by *Graves* and similar case law in other jurisdictions, the question remains as to when this persuasion simply goes too far.[31]

III. *STATE V. GRAVES*

In the seminal Iowa case *State v. Graves*, the Iowa Supreme Court attempted to define what closing argument and cross-examination language

26. Montz, *supra* note 1, at 72.

27. *See, e.g.*, Dennis v. State, 963 P.2d 972, 976 (Wyo. 1998) (quoting Prindle v. State, 945 P.2d 1180, 1184 (Wyo. 1997)).

28. *See, e.g.*, JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 669 (4th ed. 2005) (laying out fundamental rules of closing arguments).

29. *Id.*

30. *See, e.g.*, State v. Graves, 668 N.W.2d 860, 876 (Iowa 2003) (holding that prosecutorial misconduct existed when the prosecutor referred to the defendant as a liar); State v. Nelson, No. 05-0882, 2006 WL 1896308, at *2 (Iowa Ct. App. July 12, 2006) (deciding whether it was improper for the prosecutor to refer to the defendant as a "dangerous individual" during closing argument).

31. *Graves*, 668 N.W.2d 860.

is permissible and what constitutes misconduct on the part of the attorney.[32] The defendant, Deon Graves, was convicted of manufacturing and possessing marijuana.[33] At trial, the dispute hinged upon the ownership of a shoebox containing nearly one ounce of marijuana found in the living room and a drying marijuana plant located in the basement of a house that Graves allegedly shared with Remos Quick.[34] Quick consented to a search of the residence.[35] Graves testified that he did not live with Quick but only stored some belongings in the house.[36]

The prosecution attempted to link the marijuana to Graves through the testimony of Officer Steil, the State's sole witness for its case in chief.[37] Officer Steil testified that after finding contraband in the living room and basement during the consensual search, Steil "went to the jail to obtain Graves' permission to search a room" that Quick stated was Graves's bedroom.[38] According to Steil, Graves allowed him to search his bedroom if Graves could accompany him.[39] Additionally, Steil stated that Graves told him that he had lived with Quick for about a month and was staying in the room that Quick had identified as Graves's room.[40] The State called a jail administrator as a rebuttal witness to lay foundation for the admission of Graves's booking records, which was evidence that Graves had identified Quick's address as his residence.[41]

At trial, Graves disputed that Quick's house was his residence and testified that he had not given Quick's address as his residence during the booking procedure.[42] The prosecution later relied, in part, on this contradictory evidence to show that Graves lied in his testimony.[43] Graves

32. *Id.* at 865.
33. *Id.* at 867.
34. *Id.* at 865–66.
35. *Id.* at 865.
36. *Id.* at 867.
37. *Id.* at 866.
38. *Id.* Graves was in jail because he had been arrested for driving with a suspended license. *Id.* at 865. Graves and Quick had been in the car together when Graves was arrested and taken to jail by another officer. *Id.* Steil searched the car, owned by Quick, and found a dried marijuana leaf and seeds. *Id.* "Quick then consented to the officer's search of Quick's residence, which he allegedly shared with Graves." *Id.*
39. *Id.* at 866.
40. *Id.*
41. *Id.* at 867.
42. *Id.*
43. *Id.* at 868.

was subsequently convicted and sentenced to a ten-year prison term.[44]

On appeal, Graves asserted that prosecutorial misconduct and ineffective assistance of counsel deprived him of his due process rights and, consequently, a fair trial.[45] Graves alleged that prosecutorial misconduct resulted from the prosecutor's cross-examination tactics and statements made during closing argument.[46]

During Graves's cross-examination, the prosecutor asked if the police officer who arrested him was lying and repeatedly questioned him regarding whether the officer made up his testimony.[47] Additionally, during closing argument, the prosecutor stated numerous times that Graves was lying in his testimony, arguing: "[Graves is] *lying to you about not living in the house*" and "*why does this young man sit there and lie to us the way he did.*"[48] The prosecutor added that the reason Graves continually lied to the jury was because "*he's guilty and he knows it*."[49] In sum, the prosecutor stated five times during closing argument that Graves had lied.[50] Defense counsel did not object to the prosecutor's closing argument.[51]

A. State v. Graves*: Standard for Prosecutorial Misconduct*

In order to prove a due process violation based on prosecutorial misconduct, it must first be demonstrated that the alleged prosecutorial misconduct occurred.[52] It must then be shown that the alleged "misconduct resulted in prejudice to such an extent the defendant was denied a fair trial."[53] The *Graves* court noted that prejudice is determined by looking at the context of the entire trial and considering five specific factors:

> (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense

44. *Id.* at 867.
45. *Id.* at 865, 867.
46. *Id.* at 867–68.
47. *Id.* at 867.
48. *Id.* at 868.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 869.
53. *Id.*

invited the misconduct.[54]

In *Graves*, the Iowa Supreme Court ultimately concluded, based upon these five factors, that prosecutorial misconduct occurred and resulted in deprivation of Graves's due process rights.[55] This Note specifically examines the first element of the five-factor due process analysis: whether prosecutorial misconduct in fact occurred based upon statements that Graves was lying and the prosecutor's questioning of Graves as to whether Officer Steil "made up" his testimony.

In analyzing whether the prosecutor's actions constituted misconduct, the court in *Graves* began by explaining the role of a prosecutor.[56] Consistent with ethical dictates and case law, the Iowa Supreme Court differentiated between the role of a prosecutor and that of a typical trial attorney.[57] The court explained that a prosecutor's duty, above being an advocate for the State, is to ensure that a defendant is afforded a fair trial.[58] Furthermore, the Iowa Supreme Court stated "the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction."[59] The American Bar Association Model Rules of Professional Conduct recognize the unique role of a prosecutor, devoting Model Rule 3.8 specifically to the duties and responsibilities of a prosecutor.[60] The

54. *Id.*

55. *Id.* at 883.

56. *See id.* at 870 (explaining "[a] prosecutor 'is not an advocate in the ordinary meaning of the term.' That is because a prosecutor owes a duty to the defendant as well as to the public.") (quoting 63C AM. JUR. 2D *Prosecuting Attorneys* § 1 (1997)).

57. *See id.*

58. *Id.*

59. *Id.*

60. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2005). Rule 3.8 provides that:

> The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past

comments to rule 3.8 indicate that a prosecutor is held to a higher standard based upon the fact that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[61]

After a preliminary discussion regarding the unique role of a prosecutor, the Iowa Supreme Court concluded that the prosecutor's cross-examination of Graves was improper. [62] The impropriety stemmed from the prosecutor questioning the defendant about the truthfulness of Officer Steil's testimony.[63] During cross-examination the prosecution specifically asked Graves:

> Q. Then later Officer Steil came back to the jail and advised you of your Miranda rights?
>
> A. Yes.
>
> . . . .
>
> Q. You also told him at that time that you and [Quick] had found the marijuana plant near Oskaloosa?
>
> A. No.
>
> Q. *Officer Steil made that up?*
>
> A. I suppose.

> or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information; (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Id.

61. *Id.* cmt. 1.
62. *Graves*, 668 N.W.2d at 873.
63. *Id.* at 867.

> Q. You also told him you and Mr. [Quick] tied the stalks together?
>
> A. No, I didn't.
>
> Q. *Officer Steil made that up?*
>
> A. I suppose so.
>
> Q. That the marijuana had been put in the basement to dry. Didn't you tell Officer Steil that?
>
> A. No.
>
> Q. *He made that up?*
>
> A. He told me that's where he found it out. [Quick] told me it was in the basement so I knew that, too. [64]

The Iowa Supreme Court cited various state and appellate decisions to support the proposition that questioning a defendant about the veracity of another witness during cross-examination is unacceptable.[65] The court explained that determinations as to whether a witness is lying are for a jury to determine, not for a witness or a defendant to decide.[66] Moreover, the court found the prosecutor's questioning to be inconsistent with the "primary obligation to seek justice, not simply a conviction."[67]

Courts are split as to whether such questioning is proper. In *Graves*, the court explicitly recognized that other jurisdictions have analyzed similar cross-examination testimony and have concluded that such cross-examination is proper.[68] The Iowa Supreme Court cited a passage from a Maryland decision where the court held that it was appropriate conduct for a prosecutor to question a defendant's credibility during cross-examination.[69] The Maryland court found:

---

64. *Id.* at 867–68.

65. *Id.* at 871 (citing various courts on this issue).

66. *See id.* (finding that veracity and credibility of witnesses must be evaluated by a jury rather than attested to by a defendant or other witness).

67. *Id.* at 873.

68. *Id.* (citing Dorsey v. State, 387 S.E.2d 889, 890 (Ga. 1990); Fisher v. State, 736 A.2d 1125, 1163 (Md. Ct. Spec. App. 1999)).

69. *Id.* at 872 (citing *Fisher*, 736 A.2d at 1163).

> Regardless of what literal words were spoken, [the defendant] was not being asked to assess the credibility of those who had given different accounts of events. The only credibility in issue was her own. What [the defendant] was being asked to do was either 1) to acknowledge her own falsity or 2) to look foolish in denying it. Once the final rhetorical question "So all these people are lying but [you]?" was asked, the skillful cross-examiner would have been turning and walking disdainfully away without waiting for an answer. The answer no longer mattered.[70]

The Iowa Supreme Court, however, asserted that the credibility of all witnesses is at issue and that the purpose of questioning, such as was present in *Graves*, is to impugn the defendant.[71]

Some courts have allowed questioning similar to that in *Graves* where "the contradiction between the defendant's testimony and that of another witness can only be explained by the conclusion that someone is lying."[72] The reasoning behind allowing such questioning during cross-examination is essentially that the defendant has created the credibility contest and the prosecutor is, therefore, allowed to vigorously cross-examine the defendant. This reasoning seems exceedingly applicable to the facts present in *Graves*.

The Iowa Supreme Court's approach to prosecutorial misconduct during cross-examination may be unremarkable based on the fact that other jurisdictions follow similar reasoning with regard to cross-examination by reserving questions of witness credibility for the jury.[73] More importantly, and perhaps precedentially significant, was the Iowa Supreme Court's holding regarding the appropriate conduct, language, and scope of closing arguments.

B. *Were You Lying Then or Are You Lying Now?*

During closing arguments in *Graves*, the prosecutor repeatedly

70. *Id.* (quoting *Fisher*, 736 A.2d at 1163).

71. *Id.*

72. United States v. Martin, 454 F. Supp. 2d 278, 286 (E.D. Pa. 2006).

73. *See, e.g.*, United States v. Sanchez, 176 F.3d 1214, 1220 (9th Cir. 1999); United States v. Boyd, 54 F.3d 868, 871 (D.C. Cir. 1995); Scott v. United States, 619 A.2d 917, 924–25 (D.C. Cir. 1993); United States v. Akitoye, 923 F.2d 221, 224 (1st Cir. 1991); United States v. Richter, 826 F.2d 206, 208 (2d Cir. 1987); State v. Singh, 793 A.2d 226, 236 (Conn. 2002); State v. Flanagan, 801 P.2d 675, 679 (N.M. Ct. App. 1990); State v. Emmett, 839 P.2d 781, 787 (Utah 1992); State v. Casteneda-Perez, 810 P.2d 74, 79 (Wash. Ct. App. 1991); Beaugureau v. State, 56 P.3d 626, 635–36 (Wyo. 2002).

characterized the defendant as a liar.[74] The prosecutor stated that Graves was "*lying to* [the jury] *about not living in the house*" and that Graves's lies were based upon the fact that "*he's guilty and he knows it.*"[75] The prosecutor stated that the defendant had lied or was lying five times during his closing argument.[76] The Iowa Supreme Court held that "[a] prosecutor 'is entitled to some latitude during [a] closing argument in analyzing the evidence admitted in . . . trial.'"[77] A prosecutor is allowed to make reasonable inferences from the evidence so long as the prosecutor does not inject personal beliefs into the closing argument.[78] Insertion of personal opinions into a closing argument regarding a defendant or other witness's credibility is known as "vouching."[79] Vouching by an attorney during a closing argument may lead a jury to believe that the attorney has access to additional information that is inaccessible to the jury.[80] A jury may rely too heavily on statements made by attorneys.[81]

A prosecutor's interjection of personal opinion with no basis in evidence risks reversal.[82] Prosecutorial vouching includes alluding to facts not presented to a jury or asserting personal opinion as to the credibility of the witness.[83] Vouching has long been considered inconsistent with the role of a prosecutor as "vouching for a witness may induce the jury to trust the judgment of the prosecutor rather than their view of the evidence" presented.[84]

---

74. *See Graves*, 668 N.W.2d at 868.

75. *Id.*

76. *Id.*

77. *Id.* at 874 (quoting State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975)).

78. *Id.*

79. *See id.* Some courts have found that despite vouching by the prosecutor, prosecutorial misconduct was not of such a serious nature to require reversal of a conviction. *See, e.g.*, Trump v. State, 753 A.2d 963, 964 (Del. 2000) (holding that in order to constitute impermissible vouching, "credibility must be a central issue in a close case . . . [and] the prosecutor's comments must be so clear and defense counsel's failure to object so inexcusable that a trial judge . . . has no reasonable alternative . . . [but to] declare a mistrial").

80. *See, e.g.*, *Trump*, 753 A.2d at 966, 969 (holding that it was improper for the prosecutor to vouch for the credibility of a child witness in a sexual misconduct case where the prosecutor stated: "*I submit to you, I think she's telling . . . the truth*").

81. *See id.* at 967.

82. *Id.* at 964–65.

83. *Id.* at 966–67.

84. State v. Carey, No. 03-1953, 2005 WL 291540, at *8 (Iowa Ct. App. Feb. 9, 2005) (Hecht, J., dissenting) (quoting State v. Martens, 521 N.W.2d 768, 772 (Iowa Ct. App. 1994)).

In order to determine whether the prosecutor's comments could be construed as vouching or were otherwise improper, the court in *Graves* first questioned whether it could be legitimately inferred that the defendant had lied.[85] Secondly, the court examined if the prosecutor's statements that the defendant lied were conveyed to the jury as a matter of the prosecutor's personal opinion or whether the argument was related to specific evidence showing that the defendant had been untruthful.[86] Lastly, the court considered whether the argument was made in a professional manner, or whether it unfairly disparaged the defendant and caused the jury to decide the case based on emotion rather than evidence.[87]

Based upon these questions, the court held that it was reasonable for the prosecutor and the jury to believe that Graves had lied from his testimony.[88] The court found the prosecutor's statement did not constitute vouching:

> [A] fair inference from the divergent testimony of Graves and [the arresting officer] was that Graves lied about his conversations with the officer, an inference supported as well by Graves' interest in avoiding conviction. Therefore, the prosecutor's comments on the defendant's lies or lying were legitimate inferences from the evidence.[89]

Additionally, the court held that comments made by the prosecutor in *Graves* "were generally made in the context of references to the evidence and not as an expression of the prosecutor's personal opinion."[90]

Despite acknowledging that proper inference was made that the defendant had lied, and that the prosecutor did not insert personal opinion during the closing, the Iowa Supreme Court held that it was "improper for [the] prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments [during the closing argument]."[91] The court determined that calling the defendant a liar, in and of itself, constituted misconduct.[92] Notwithstanding this holding that a prosecutor may not refer to the defendant as a liar, the court held that "a prosecutor is still free 'to craft an argument that includes reasonable inferences based on

85. State v. Graves, 668 N.W.2d 860, 874 (Iowa 2003).
86. *Id.*
87. *Id.* at 874–75.
88. *Id.* at 875.
89. *Id.*
90. *Id.*
91. *Id.* at 876.
92. *Id.*

the evidence and . . . when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable.'"[93] In this case, however, the court found that the prosecutor did not meet the standard, and prosecutorial misconduct resulted from the prosecution's "inflammatory characterizations of the defendant's testimony."[94]

C. *Bright Line Test Not All That Bright*

In *Graves*, the Iowa Supreme Court arguably attempted to establish a framework with which other Iowa courts could determine what rhetoric constituted improper conduct during cross-examination and closing argument. This supposed bright line test has proven not to be as bright as perhaps hoped by the Iowa Supreme Court.[95] Iowa attorneys and judges alike have questioned whether it would be prosecutorial misconduct to say, during closing, that a defendant has an "allergy to the truth" or that the defendant was "dishonest."[96] Are prosecutors simply able to circumvent this alleged bright line test by playing with semantics? Professor Craig Lee Montz, in his article, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Courts*, proposes an alternative to calling a witness a liar by incorporating similes or metaphors to inform the jury that the defendant is lying.[97] Additionally, Montz recommends that it may be preferable to suggest to a jury that the witness has a faulty memory or is mistaken.[98]

The court in *Graves* explicitly stated that a prosecutor may '"craft an argument that includes reasonable inferences based on the evidence and . . . when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable.'"[99] The court limited this statement, however, by instructing prosecutors to refrain from calling the defendant a liar or "to make similar disparaging comments [about the defendant]."[100] These tests have been difficult to apply and administer by the lower courts.[101] Frequently, veracity of witnesses or defendants is at the

93. *Id.* (quoting State v. Davis, 61 P.3d 701, 710–11 (Kan. 2003)).
94. *Id.*
95. Blane II & Blink, Address, *supra* note 5, at 1-12.
96. *Id.*
97. Montz, *supra* note 1, at 120.
98. *Id.*
99. *Graves*, 668 N.W.2d at 876 (quotation omitted).
100. *Id.*
101. *See, e.g.*, Nguyen v. State, 707 N.W.2d 317, 326 (Iowa 2005) (stating "[t]he bright-line rule of *Graves* is not a bright-line rule for prejudice").

crux of a criminal case.[102] By limiting a prosecutor's ability to adequately explain and examine the credibility of witnesses or the defendant during closing argument, the Iowa Supreme Court has severely disabled a prosecutor's persuasive ability. Furthermore, the *Graves* standard may prove to have a chilling effect on closing argument rhetoric. Fearful of reprisal, a prosecutor may avoid highlighting to the jury that a defendant is clearly lying about key facts.

D. *What Falls Under "Similar Disparaging Remarks"?*

In *Graves*, the Iowa Supreme Court stated that a prosecutor may not call the defendant a liar, state that the defendant is lying, or make similar disparaging remarks.[103] Difficulty in the application of this precedent arises from the vagueness of the phrase "similar disparaging remarks." In *Graves*, the prosecutor called the defendant a liar multiple times.[104] Should disparaging remarks, thus, only be applied to name-calling of a witness?[105] Or do disparaging remarks apply strictly with regard to attacking the credibility of witness or defendant testimony?[106] These questions remain largely unanswered despite several opinions which utilize the *Graves* framework.[107]

E. *Lack of Faith in the Fact-Finding Body*

The statements made by the prosecutor in *Graves* regarding the veracity of the defendant's testimony were not without mitigation before the jury.[108] Before both the opening statement and closing argument, as is typical in criminal trials, "the court orally advised the jury that the comments of the attorneys were not evidence and should not be considered as evidence by the jury."[109] Additionally, the jury received this admonition in the written instructions.[110] Arguably, this procedural protection should prevent the jury from concluding the defendant is a "liar" based solely on comments from the prosecutor. Juries are familiar with the adversarial

102. *See, e.g.*, *Graves*, 668 N.W.2d at 880 (stating the prosecutorial "misconduct cannot be minimized, as the State's case was not strong").
103. *Id.* at 876.
104. *Id.* at 868.
105. Blane II & Blink, Address *supra* note 5, at 1-12.
106. *Id.*
107. *See, e.g.*, State v. Stewart, 691 N.W.2d 747, 750–51 (Iowa Ct. App. 2004).
108. *Graves*, 668 N.W.2d at 878.
109. *Id.*
110. *Id.*

nature of our system and the persuasive tone of a trial. Intelligent and vigorous debate between adversaries is desired and expected. During closing argument, a prosecutor frames the evidence to support his theory of the case. The prosecutor delivers his closing argument before defense counsel. The defense would therefore be able to respond to any concerning statements that were propounded during the prosecutor's closing. "Judge Learned Hand once wrote: 'It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood . . . .'"[111]

By prohibiting certain rhetoric from closing arguments or witness cross-examinations, the Iowa Supreme Court's paternalistic approach has limited a prosecutor's ability to present the case as the prosecutor finds appropriate. Prosecutors should have wide latitude in closing argument to present their theory of the case. Rosemary Nidiry explains that prosecutors should be restricted in their rhetoric because there is particular concern that a jury is more willing to give stronger weight to any argument set forth by prosecutors based upon the fact that juries respect a prosecutor's experience, knowledge, and the special role they play in society.[112] However, prosecutors have specific ethical and professional rules to help keep their arguments in check.[113] Moreover, courts are quick to conclude that prosecutorial misconduct exists if prosecutors attempt to vouch for a witness or emphasize that they have personal knowledge of the witness testimony.

F. *Application of* Graves *by Iowa Courts*

Iowa courts have applied *Graves* several times with varying results.[114]

111. Nidiry, *supra* note 17, at 1307 (quoting United States v. Wexler, 79 F.2d 526, 529–30 (2d Cir. 1935)).

112. *Id.* at 1311.

113. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2005) (explaining the special duties of a prosecutor).

114. *See, e.g.*, State v. Kinney, No. 03-1149, 2005 WL 291529, at *3 (Iowa Ct. App. Feb. 9, 2005) (holding that the prosecutor's reference to the defendant's untruthfulness was reasonable); State v. Pirtle, No. 03-1655, 2005 WL 67524, at *2 (Iowa Ct. App. Jan. 13, 2005) (concluding that the prosecutor's conduct in asking the defendant if other witnesses were lying was inappropriate); Mott v. State, No. 03-1606, 2004 WL 2578988, at *3 (Iowa Ct. App. Nov. 15, 2004) (holding the prosecutor's statements that all of the defendant's witnesses were lying was improper); State v. Stewart, 691 N.W.2d 747, 750–51 (Iowa Ct. App. 2004) (holding the prosecutor's

In *Nguyen v. State*, the Iowa Supreme Court again addressed this issue and found that the cross-examination and closing argument testimony in *Graves*

> transform[ed] the issue of contradictory testimony on a critical factual point in the case into an aggressive attack by the prosecutor to portray the defendant as a liar and a person who called another witness—a police officer—a liar, something that could only be done to inflame the jury in deciding the factual dispute.[115]

When applying *Graves*, Iowa courts frequently focus specifically upon the fact that in *Graves* the prosecutor referred to the defendant as a liar.[116] This characterization of the opinion thus permits the Iowa appellate courts to deviate from the *Graves* holding if the prosecutor did not explicitly call the defendant a liar. In *Nguyen v. State*, the Iowa Supreme Court concluded that the prosecutor's closing argument was not improper and met the standards of *Graves* because "the prosecutor did not engage in any name-calling tactics."[117]

The Iowa Court of Appeals attempted to address whether the *Graves* decision could be avoided by choosing another way to call the defendant a liar.[118] In *State v. Kinney*, the Iowa Court of Appeals was asked to decide, under the *Graves* doctrine, whether it was appropriate for the prosecutor to state during closing arguments that the defendant was "not telling the truth."[119] The court concluded that this was "a reasonable argument from the evidence rather than the type of disparaging comment condemned in *Graves* . . . ."[120] *Kinney* epitomizes the difficulty that results when Iowa

insinuation that the defendant was lying was acceptable).

115. Nguyen v. State, 707 N.W.2d 317, 324 (Iowa 2005).

116. *See, e.g.*, *id.* at 326 (holding that the prosecutor's closing argument did not constitute misconduct based on the fact that the prosecutor was making inferences from the evidence and was not engaging in name-calling); Allen v. State, No. 03-1288, 2005 WL 974189, at *4 (Iowa Ct. App. Apr. 28, 2005) (finding that the prosecutor committed misconduct when he stated the alibi the defendant told the police was a lie); State v. Carey, No. 03-1953, 2005 WL 291540, at *4 (Iowa Ct. App. Feb. 9, 2005) (holding that State properly conceded that it was improper for the prosecutor to ask the defendant whether the doctor had lied).

117. Nguyen v. State, 707 N.W.2d 317, 326 (Iowa 2005).

118. *See, e.g.*, State v. Kinney, No. 03-1149, 2005 WL 291529, at *3 (Iowa Ct. App. Feb. 9, 2005) (explaining that the prosecutor referred to defendant's untruthfulness).

119. State v. Kinney, No. 03-1149, 2005 WL 291529, at *3 (Iowa Ct. App. Feb. 9, 2005).

120. *Id.*

courts attempt to apply the *Graves* standard.

In *Bowman v. State*, the Iowa Court of Appeals questioned whether the prosecutor's cross-examination of the defendant was appropriate under the *Graves* doctrine.[121] The prosecutor questioned the defendant several times regarding whether the State's witnesses had lied.[122] The court excerpted the following passage:

> Q. So when he testified that you brought the gun down in the shooter's position, he just made that all up, didn't he?
>
> A. He had to have because I didn't do it.
>
> Q. Did you force Karla into that house that night?
>
> A. No, I did not.
>
> Q. Did she lie when she said you did?
>
> A. Obviously she did.
>
> Q. Did she lie when she said you threatened to kill her five or six times?
>
> A. Yes, she did.
>
> . . .
>
> Q. She just made up that whole elaborate story?
>
> A. I'm not accusing her of doing anything but it's on paper and it didn't happen so I'd have to say, yes.
>
> . . .
>
> Q. But you're saying she's lying about pretty much everything else that happened at your house?

121. Bowman v. State, No. 03-1769, 2005 WL 597059, at *3–4 (Iowa Ct. App. Mar. 16, 2005).

122. *Id.* at *3.

> A. Was she was—it was a totally different situation.
>
> . . .
>
> Q. So when Karla and Missy and Theresa said she didn't want to go with you, that wasn't the truth either?
>
> A. All I can say, Mr. Potter, is that I reached my hand out, I said, let's go, honey, and they wouldn't—by they, I don't know who they were.
>
> . . .
>
> Q. Okay. In summary, Mr. Bowman, would it be fair to say that Karla Schwaegler got up here and told a lot of lies?
>
> A. She had to have because it didn't happen that way.[123]

Despite the fact that the prosecutor followed relatively the same line of questioning as the prosecutor did in *Graves*,[124] the court was able to differentiate this opinion by concluding that the evidence of the defendant's guilt was strong.[125] The court found that in order "[t]o prove prejudice, the applicant must show 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[126]

In *State v. McGee*, the Iowa Court of Appeals concluded that certain portions of the prosecutor's closing argument did not amount to prosecutorial misconduct under the *Graves* test because the statement was a "'legitimate inference[] from the evidence.'"[127] During closing argument the prosecutor posed the question: "Does the defendant's version make any sense? That's what you have to decide in determining who to believe in this case."[128] The prosecution went on to say that "every time there's a discrepancy between what a State's witness said and what [the defendant

123. *Id.*

124. State v. Graves, 668 N.W.2d 860, 873–74 (Iowa 2003) (holding that it was inappropriate cross-examination by the prosecutor when he repeatedly questioned the defendant as to whether the State's witness testimony was "made up").

125. *Bowman*, 2005 WL 597059, at *3.

126. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

127. State v. McGee, No. 04-1512, 2005 WL 2508416, at *1, *3 (Iowa Ct. App. Oct. 12, 2005) (quoting *Graves*, 668 N.W.2d at 874).

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

said], because [the defendant does not] like what the State's witness said—He's asking you to believe him . . . . Well, don't do it. Don't do it."[129] The State conceded, in this case, that this line of testimony, although not directly calling the defendant a liar, was commenting on the defendant's veracity.[130] The Iowa Court of Appeals concluded that "this line of questioning served no purpose other than to malign [the defendant]."[131] Yet, the court held that this did not constitute prosecutorial misconduct; the court instead determined that it amounted to legitimate inferences based upon evidence in the case.[132] These decisions by the Iowa Court of Appeals indicate confusion and difficulty when applying the *Graves* doctrine. Questioning and comments by prosecutors in subsequent Iowa Court of Appeals cases are remarkably similar to the testimony in *Graves*, yet different results abound.

IV. OTHER JURISDICTIONAL APPROACHES

Iowa is not alone in its struggles to establish proper closing argument guidelines.[133] *Graves* and subsequent decisions are illustrative of the lack of judicial uniformity surrounding cases where counsel refers to the witness as a liar during closing argument.[134] This issue has been addressed by other state supreme courts along with both federal circuit and district courts.[135] Generally, calling a witness a liar during a closing argument is permissible if the statement is supported by evidence in the record.[136]

129. *Id.*

130. *Id.* at *2 (the State did not explicitly ask the defendant to state directly whether the State's witness had lied but instead the questions may have required the defendant to comment on the witness's credibility).

131. *Id.*

132. *Id.* at *3.

133. *See* Montz, *supra* note 1, at 71 n.19, 114 n.362.

134. *See, e.g.*, Nguyen v. State, 707 N.W.2d 317, 326 (Iowa 2005).

135. *See, e.g.*, United States v. Shoff, 151 F.3d 889, 893 (8th Cir. 1998) (holding that it was not improper for the prosecutor to refer to the defendant as a con man); United States v. Peterson, 808 F.2d 969 (2d Cir. 1987) (holding that the prosecutor's characterization of defense witness's testimony as lies was proper).

136. Montz, *supra* note 1, at 116. Montz provides the following examples from *Mason v. Mitchell*, 95 F. Supp. 2d 744, 781 (N.D. Ohio 2000):

> United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999) (not improper for prosecutor to assert that defendant is lying); United States v. Shoff, 151 F.3d 889, 893 (8th Cir. 1998) (not improper for prosecutor to call defendant a "con man" and "liar"); Williams v. Borg, 139 F.3d 737, 744–45 (9th Cir. 1998) (not improper for prosecutor to call defendant "stupid" and to refer to defense counsel's argument as "trash"); United States v. Reliford, 58 F.3d 247, 250 (6th

A. *Appellate Circuit Court Analysis of Prosecutorial Misconduct in the Realm of Closing Arguments*

In *United States v. White*, the Eighth Circuit stated, "[i]t is permissible for a prosecutor to interpret the evidence as indicating that the defendant is not telling the truth" and state this information during closing arguments.[137] In *White*, the prosecutor called the defendant a liar three times during his closing argument.[138] Yet, the Eighth Circuit concluded that "[w]hile the prosecutor's comments are questionable," the court would

---

> Cir. 1995) (not improper for prosecutor to characterize defendant's testimony as "unbelievable," "ridiculous," and "a fairy tale"); United States v. Davis, 15 F.3d 1393, 1402–03 (7th Cir. 1994) (not improper for prosecutor to refer to defendant's case as "trash," "hogwash," and "garbage"); Kellogg v. Skon, 176 F.3d 447, 451–52 (8th Cir. 1999) (improper for prosecutor to call defendant "monster," "sexual deviant," and "liar," but no prejudice shown where weight of evidence against defendant was heavy); United States v. Collins, 78 F.3d 1021, 1039–40 (6th Cir. 1996) (improper for prosecutor to state that defense counsel deserved an Academy Award for keeping a straight face when he made his arguments, but no prejudice shown where weight of evidence against defendant was heavy); United States v. Catalfo, 64 F.3d 1070, 1080 (7th Cir. 1995) (holding that a prosecutor's description of the defendant as a liar was not improper).

Id. at n.375.

137. United States v. White, 241 F.3d 1015, 1023 (8th Cir. 2001). While the Eighth Circuit examined the potential impact of calling the defendant a liar during closing argument, the conduct at trial was not properly preserved for appellate review, and thus the Eighth Circuit lacked the authority to consider the question. *Id.* The Eighth Circuit determined that this case was not such that a miscarriage of justice would result if the court did not rule on the issue and held that White failed to carry the burden of establishing that the district court plainly erred by allowing the prosecutor's comments. *Id.*

138. *Id.* The prosecutor specifically stated during closing argument: "'That's the problem of lies, ladies and gentlemen. Lies are a lot tougher to keep straight and keep coordinated than a simple truth.'" *Id.* at 1022. Additionally, the prosecutor posed the question: "'Is he telling you the truth, ladies and gentlemen, that he never dealt dope . . . ? I submit he is not. I submit he is lying bold face to you when he tells you he knows [about another source for the drugs in question].'" *Id.* at 1022–23. Lastly, the prosecutor stated:

> "[White was unable to remain consistent in his testimony and] tried to deny [his drug usage] to you on the stand under oath, tried to lie to you and tell you he had never used [methamphetamine] since 1961 (sic) through rehab, that goes to his credibility. If he can suggest to the government that witnesses are willing to lie, what kind of lies do you think he would tell in order to evade responsibility entirely?"

Id. at 1023.

allow such evidence based on the fact that the prosecutor had outlined the evidence and supported reasons as to why White's testimony was not credible.[139]

Similar approaches have been adopted by other appellate circuit courts. In *United States v. Dean*, the D.C. Circuit found that the prosecutor did not act improperly by referring to the defendant as a liar or stating that defendant lied at least thirty-one times during the trial.[140] The court held, "'[l]ies' and 'lying' are hard words. But this was closing argument, not a polite social conversation."[141] The D.C. Circuit further stated:

> [The prosecutor] could have told the jury that the evidence proved [the defendant] had been "untruthful," or that she "fabricated her testimony," or "prevaricated," or that she "bore false witness," "made up her story," "is not to be believed," "violated her oath." These and many other words and phrases would have conveyed the same idea as "lie" and "lying," . . . is there any reason in the law why the words "lie" and "lying" should be banned from the vocabulary of summation, particularly in cases that turn on the defendant's credibility? We conceive of none, so long as the prosecutor sticks to the evidence and refrains from giving his personal opinion.[142]

---

139. *Id.*

140. United States v. Dean, 55 F.3d 640, 665 (D.C. Cir. 1995). The court excerpted the following examples of the prosecutor's closing argument from the trial record:

> What about the defendant's case? What has the defendant shown to you in this trial? Her entire case rests on her credibility, her believability. The first thing you must ask yourselves, ladies and gentlemen, is, is the defendant a credible witness? Did she tell you the truth? . . . She lied to you . . . She lied in this Court before you. Having done that, does anything else make any sense? Can you see her as being a credible witness? . . . Based on her lies you should throw out her entire testimony. Her six days' worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you. But why do we keep going? Why do we keep asking questions? Because it was filtered with lies. Her entire testimony just kept changing.

Id.

141. *Id.*

142. *Id.* The D.C. Circuit then cited several other courts that have reached similar conclusions. *Id.* (citing United States v. Jacoby, 955 F.2d 1527, 1540–41 (11th Cir. 1992); Bradford v. Whitley, 953 F.2d 1008, 1013 (5th Cir. 1991); United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991); United States v. Peterson, 808 F.2d 969, 977 (2d Cir. 1987); United States v. Chaimson, 760 F.2d 798, 811 (7th Cir. 1985); United States v. Birges, 723 F.2d 666, 671–72 (9th Cir. 1984)).

In *Chandler v. Moore*, the Eleventh Circuit found that it was appropriate for the prosecutor, during closing argument, to refer to the defense's witness as "'the biggest liar in Indian River County.'"[143] The court held that the prosecutor's comment on the credibility of the witness was accurate because the witness had told four different stories regarding the defendant's whereabouts.[144]

The Seventh Circuit, in *United States v. Durham*, concluded that referring to the defendant as a "'slick little dope dealer'" who "'uses kids and exploits them to peddle poison'" was appropriate based upon the evidence presented that supported this conclusion.[145] The court stated that it has long recognized and affirmed similar strongly worded descriptions of defendants made by prosecutors.[146] In *Durham*, the court held that:

> The district attorney is quite as free to comment legitimately and speak fully, although harshly, upon the action and conduct of the accused, if the evidence supports his comments, as is the accused's counsel to comment upon the nature of the evidence and the character of the witnesses which the government produces and which is favorable to him.[147]

The *Graves* decision departs from the recognized norm in circuit courts which allows a prosecutor to attack the defendant's credibility and even permits name-calling, so long as the prosecutor's defamatory statements are supported by evidence in the record.[148] The Iowa Supreme Court explicitly recognized that, based upon the evidence in *Graves*, it could be inferred that the defendant had indeed lied.[149] Moreover, the court held that the statement about the defendant's credibility was not

143. Chandler v. Moore, 240 F.3d 907, 914 (11th Cir. 2001).

144. *Id.*

145. United States v. Durham, 211 F.3d 437, 440 (7th Cir. 2000).

146. *Id.* at 440–41 (citing United States v. Spivey, 859 F.2d 461, 466 (7th Cir. 1998) ("finding that the prosecutor's characterization of the defendants as 'con men' was not improper")); United States v. Catalfo, 64 F.3d 1070, 1080 (7th Cir. 1995) ("holding that a prosecutor's description of the defendant as a liar was not improper"); United States *ex rel.* Clark v. Fike, 538 F.2d 750, 758 (7th Cir. 1976) (finding that the prosecutor's statement that the defendant "has committed a dastardly crime, he should be punished" was not improper).

147. *Id.* at 441 (quoting United States v. Cook, 432 F.2d 1093, 1106–07 (7th Cir. 1970)).

148. State v. Graves, 668 N.W.2d 860, 874 (Iowa 2003).

149. *Id.* at 875.

merely the personal opinion of the prosecutor.[150] However, the Iowa Supreme Court still concluded that the prosecutor's statements constituted misconduct.[151]

B. *State Court Analysis of Prosecutorial Misconduct in the Realm of Closing Arguments*

Recently, a Florida Supreme Court case, *Murphy v. International Robotics Systems, Inc.*, held that during both civil and criminal trials, an attorney may refer to the defendant or witness as a liar so long as such characterizations are supported by the record.[152]

Illustrative of jurisdictions rejecting the holding in *Murphy* is *Combined Communications Corp. v. Public Service Co. of Colorado*, where the Colorado Court of Appeals held that counsel's reference to witnesses as having lied was an impermissible expression of personal opinion.[153] Even more emphatic is the language in *Olenin v. Curtin & Johnson, Inc.*, a 1968 opinion, in which the court stated that "[i]t is unprofessional conduct, meriting discipline by the court, for counsel either to vouch for his own witnesses or to categorize the opposing witnesses as 'liars'; that issue is *for the jury*."[154]

Contrary to these opinions, in *People v. Hinton*, the California Supreme Court concluded that it was not improper for the prosecutor to call the defendant a liar based on the defendant's admitted lies to the police.[155] In *State v. Blakney*, the New Jersey Superior Court found that the prosecutor's comment, during closing argument, that the defendant was a "habitual liar" did not constitute prosecutorial misconduct.[156] These cases are just two examples of the numerous state court rulings that have held it is permissible for a prosecutor to refer to the defendant as a liar during closing arguments.[157]

---

150. *Id.*

151. *Id.* at 876.

152. Murphy v. Int'l Robotics Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000).

153. Combined Commc'ns Corp. v. Pub. Serv. Co. of Colo., 865 P.2d 893, 899–900 (Colo. Ct. App. 1993).

154. Olenin v. Curtin & Johnson, Inc., 424 F.2d 769 (D.C. Cir. 1968).

155. People v. Hinton, 126 P.3d 981, 1007 (Cal. 2006).

156. State v. Blakney, 2006 WL 163566, at *22–25 (N.J. Super. Ct. App. Div. Jan. 24, 2006).

157. *See, e.g.*, Wess v. State, 926 So. 2d 930, 935 (Miss. Ct. App. 2005) (finding that the prosecutor did not unduly prejudice the defendant by implying the defendant lied because the prosecutor's argument was based in testimony); Commonwealth v.

V. *STATE V. GRAVES*: POSSIBLE IMPACT UPON IOWA CIVIL ATTORNEYS

At issue in *Graves* was whether the prosecutor acted improperly in referring to the defendant as a liar.[158] Although the Iowa Supreme Court discussed in detail the special role of a prosecutor at trial,[159] the *Graves* decision has possible repercussions both for prosecutors and civil attorneys alike. In explaining the inappropriateness of expressing personal opinion during closing argument, the Iowa Supreme Court cited to the Iowa Code of Professional Responsibility DR 7-106(C)(4), which has been superseded by the Iowa Rules of Professional Conduct 3.3 and 3.4.[160] The current Iowa Rule of Professional Conduct 3.8 deals specifically with trial behavior.[161] The rule states that while before a tribunal, a lawyer shall not: "[S]tate a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."[162] Note that this rule applies to all trial attorneys in the state of Iowa, not solely prosecutors.[163] As previously explained, the ABA Model Rules of Professional Conduct devote a rule specifically to the roles and duties of a prosecutor.[164] Similarly, the Iowa Code of Professional Conduct has a comparable rule dealing explicitly with prosecutorial conduct.[165] Even though the Iowa Supreme Court clearly could have chosen to cite to this Iowa ethical rule which deals exclusively with prosecutorial conduct, the court instead chose to cite to an ethical rule which applies universally to both civil and criminal trial lawyers.[166] This merits concern because civil attorneys are typically afforded wide latitude in the rhetoric they use during trial.

Very few jurisdictions limit the language that civil attorneys may use

---

Chmiel, 889 A.2d 501, 543 (Pa. 2005) (concluding that it was not improper for the prosecutor to refer to the defense witnesses as liars during closing argument after the defense counsel had attacked the credibility of the State's witnesses during defense's closing argument); State v. Brown, 124 P.3d 663, 664–65 (Wash. Ct. App. 2005) (holding that it was permissible for the prosecution to refer to the defendant as a liar during closing arguments because the evidence in the record supported this inference).

158. State v. Graves, 668 N.W.2d 860, 874 (Iowa 2003).
159. *Id.* at 870.
160. *Id.* at 874; IOWA RULES OF PROF'L CONDUCT R. 32:3.3–3.4 (2005).
161. IOWA RULES OF PROF'L CONDUCT R. 32:3.3–3.4.
162. IOWA RULES OF PROF'L CONDUCT R. 3.8.
163. Blane II & Blink, Address, *supra* note 5, at 1-10.
164. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2005).
165. IOWA RULES OF PROF'L CONDUCT R. 3.8.
166. State v. Graves, 668 N.W.2d 860, 874 (Iowa 2003).

during closing arguments.[167] In civil cases where it has been held to be improper for an attorney to refer to a defendant as a liar or attack credibility, courts have been less concerned with the word "liar" and focused more upon whether the attorney is personally vouching for the witness or defendant.[168] Judicial precedent for calling a witness a liar during closing argument in a civil case is scarce in both state and federal courts. However, as previously explained, the majority of appellate circuit courts allow prosecutors to call a witness or a defendant a liar during closing arguments. Analogously, because a prosecutor is held to a higher professional standard than other trial attorneys, appellate courts would be even more likely to allow civil or criminal trial attorneys to call a witness a liar or the like during closing argument.

VI. CONCLUSION

The Iowa Supreme Court's opinion in *Graves* must be revisited in light of the difficulty in application and the confusion surrounding this decision. As previously noted, the majority of appellate courts allow prosecutors wide latitude and discretion during cross-examination and closing arguments. Furthermore, the majority of state courts also allow a prosecutor to attack a defendant's credibility so long as such attacks have a foundation in the evidence presented. The Iowa Supreme Court has limited a prosecutor's ability to dramatically and persuasively present a closing argument to the jury. Moreover, the Iowa Court of Appeals has inconsistently applied the *Graves* decision. It appears that prosecutors are able to circumvent the ruling by merely using metaphors or similes when addressing a defendant or witness's credibility or lack thereof.

*Claire Gagnon**

167. *See, e.g.*, Combined Commc'ns Corp. v. Pub. Serv. Co. of Colo., 865 P.2d 893, 900 (Colo. Ct. App. 1993) (holding that counsel's reference to witnesses having lied was an impermissible expression of personal opinion).

168. *See id.* (holding "plaintiff's counsel did more than comment upon these defense witnesses' credibility; he exposed his personal opinion in an impermissible manner").

* B.A., University of Wisconsin Madison, 2004; J.D. Candidate, Drake University Law School, 2007.