COURTROOM CONDUCT

Judge Michael D. Marcus (Ret.)
ADR Services, Inc.
1900 Avenue of the Stars, Suite 250
Los Angeles, California 90067

INTRODUCTION

Civility has been defined as "well-mannered behavior toward others," "good manners" and "A courteous act that contributes to smoothness and ease in dealings and social relationships with others." In the legal context, uncivil behavior (sometimes boorish, sometimes rude – but always over-the-top, unnecessary and often prejudicial) is the cause for war stories as well as anger, frustration and disappointment among the attorneys on the receiving end.

There are probably many reasons why attorneys engage in ill-mannered behavior. *Townsend v. Superior Court* (1998) Cal.App.4th 1431, 1436 observed that it can, at least in a deposition context, be because of ego and emotion. ("Like Hotspur on the field of battle, counsel can become blinded by the combative nature of the proceeding and be rendered incapable of informally resolving a disagreement.")

But discovering the cause of uncivil conduct is not the issue; more important is knowing that there are existing standards in the Rules of Professional Conduct, the State Bar Act, local court rules the case law for appropriate attorney conduct during litigation, including trial. (While there are no specific rules that define uncivil behavior [the "offensive personality" prohibition in Business and Professions Code section 6068, subdivision (f) was held to be unconstitutionally vague in *United States v. Wunsch* (9th Cir. 1995) 84 F.3d 1110, 1119-1120], the law still provides sufficient authority to sanction and discipline out-of-control lawyers.) This discussion covers that law in a linear fashion – from the filing of the complaint to final argument, and everything in between.

ATTORNEYS ARE OBLIGATED TO TREAT EACH OTHER WITH RESPECT

All lawyers, both in the civil and criminal arenas, have an obligation to treat one another with respect:

> To begin with, it is widely held that "An attorney has an obligation not only to protect his client's interests but also to *respect the legitimate interests of fellow members of the bar*, the judiciary, and the administration of justice." (Citations omitted; emphasis in the original.) … (E)ven if a legal step taken or legal procedure pursued has justification in law, the timing thereof may be oppressive and may constitute harassment if it unjustifiably neglects or

> ignores the legitimate interest of a fellow attorney." (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 306.)

See also *In re S.C.* (2006) 138 Cal.App.4th396, 412 holding that "'[I]t is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law.' (*People v. Chong* (1999) 76 Cal.App.4th 232, 243.)"

Prosecutors, because of their awesome responsibilities, have an even greater duty to make certain that they act appropriately:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States (1935) 295 U.S. 78, 88. See also *People v. Hill* (1998) 17 Cal.4th 800, 820 holding that "Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve."

LITIGATION SHOULD NOT BE CONDUCTED FOR THE PURPOSE OF HARASSMENT

Rule of Professional Conduct 3-200, subdivision (A) states that an attorney shall not "assert a position in litigation ... without probable cause and for the purpose of harassing or maliciously injuring any person." Business and Professions Code section 6068, subdivision (c) provides that attorneys shall only "counsel or maintain those actions, proceedings, or defenses (that) appear to him or her legal or just, except the defense of a person charged with a public offense. Subdivision (g) holds that attorneys shall "Not … encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest."

Sorenson v. State Bar (1991) 52 Cal.3d 1036, 1042-1043 provides a good example of the type of conduct prohibited by the above standards. In that matter, Sorenson's associate and employee ordered a copy of a deposition transcript which was then mailed c.o.d. After the associate refused to accept the transcript, the reporting service mailed another copy and enclosed a bill for $94.05. On the associate's recommendation that the

bill was excessive, the client issued and mailed a check for only $49 to the service. The service deposited the check but was not able to determine the account it pertained to because it was from an east coast firm, did not match any pending invoices, failed to identify the account on which it had been sent and did not indicate it was a partial payment.

Thereafter, the deposition company requested that the associate pay for the transcript copy. In turn, the associate responded falsely that the bill had been forwarded that day to the client for payment. After some time had passed and the $94.05 payment had still not been received, the service wrote Sorenson requesting payment. Still hearing nothing after half a year, the service filed a small claims action against the associate, seeking recovery of $94.05 plus costs and interest.

Sorenson and his associate concluded that the bill was unreasonably high and, because the deposition service had already been paid $49 by their client, that the suit for the full amount was "wrongful." Instead of explaining their views to the deposition company owner or attempting to reconcile their dispute in the context of the small claims matter, they filed on the associate's behalf a municipal court complaint for fraud and deceit against the owner for "damages according to proof," as well as $14,000 in punitive damages.

The associate failed to appear at the small claims trial. Sorenson, however, was present in court and saw the service owner obtain a judgment of $123.94, including costs and interest. As she left the courtroom, Sorenson served her with the complaint.

The owner obtained counsel, who answered the complaint and noticed the associate's deposition, which was set for January 24, 1984. The associate, "cleverly noting that the year was 1985, and realizing that he could not travel back in time, simply failed to appear." (*Id*. at p. 1039.) Sorenson, meanwhile, refused to return opposing counsel's calls. Eventually the associate was ordered to appear for his deposition and sanctions were imposed against him. The fraud action was eventually dismissed on the owner's unopposed motion for summary judgment. In the process, she had incurred well over $4,000 in legal fees and expenses. Not surprisingly, the Supreme Court found the above scenario to constitute violations of section 6068, subdivisions (c) and (g).

ATTORNEYS SHOULD NOT ENGAGE IN FRIVOLOUS AND OPPRESSIVE DISCOVERY

The facts in *Tenderloin Housing Clinic, Inc. v. Sparks*, *supra,* 8 Cal.App.4th 299, 302-306 are a text book example of how attorneys should not conduct themselves in discovery. In that matter, the respondents' attorney (Grayson), a sole practitioner, advised appellant's trial counsel (Lee) that she would be away from San Francisco for two and one-half weeks, first at an arbitration proceeding in New York, then on a long-planned vacation in England. Shortly after this conversation, Lee set three discovery motions for hearing during the time he knew Grayson would be away. Grayson was forced to move the court to continue the matters until her return. Thereafter, Lee served two of Grayson's

clients with trial subpoenas requiring them to appear as witnesses in an unrelated third party action while Grayson was in London. Grayson was compelled to conduct a telephone hearing from London to quash the subpoenas to protect the interests of her clients. Additionally, several days after Grayson had left San Francisco, Lee set three depositions for days which he knew to be the last two weekdays of Grayson's vacation. When Lee refused to continue the depositions until Grayson's return, a contract attorney moved, on her behalf, for a continuance. The motion was denied on procedural grounds. Grayson then called Lee from England begging him to continue the depositions. Lee refused. Immediately thereafter, Grayson arranged a transatlantic conference call with Lee and a court commissioner at which she repeated that the deposition of one of the witnesses required her personal attendance because he was a key hostile witness whose cross-examination was critical in the case.

After the commissioner refused to continue the deposition, Grayson had no choice but to return to San Francisco before her scheduled departure to safeguard her clients' interests. As a result, she incurred extra expense in purchasing a one-way ticket from London to San Francisco and lost, as well, four days of a prepaid vacation.

Upon arriving in San Francisco, Lee advised Grayson that the deposition she was concerned about had been cancelled. She also learned that appellant, contrary to a previous written stipulation, had reset its demurrer earlier than agreed upon, which required the filing of the opposition papers at a time when Grayson was still supposed to have been in England. Had she not returned earlier than expected, her clients would have defaulted in opposing the demurrer.

The appellate court, in *Tenderloin*, found the timing of Lee's discovery was in bad faith and harassing, even if procedurally appropriate, because "it unjustifiably neglect(ed) or ignore(d) the legitimate interest of a fellow attorney." (*Id*. at p. 306.)

See also Los Angeles Superior Court Local Rule 7.12 setting standards for the taking of depositions.

ATTORNEYS SHOULD HONOR AGREEMENTS BETWEEN THEMSELVES

Understandings or agreements that attorneys enter into, such as the calendaring of depositions, ordinarily should not have great significance and should be honored because, otherwise, the practice of law becomes one long unpleasant skirmish. Two reported cases serve as example of what not to do in this area.

In *Bryant v. State Bar* (1942) 21 Cal.2d 285, Bryant was disciplined for violating his agreement not to commence any action on a note and chattel mortgage until opposing counsel had returned from out-of-town. Bryant claimed that he had promised only that he would not begin any action without notifying opposing counsel's office, which he did and got no response. In finding opposing counsel's version of the facts more credible, the Court found that Bryant had "violated his word given to another attorney" and, in so

doing, took advantage of that attorney. (*Id.* at pp. 293-294; [It should be noted that no existing ethical rule prohibits the breach of such a promise.].)

In *Grove v. State Bar* (1965) 63 Cal.2d 312, on the day of a calendared motion in a family law matter in Hayward, California, the husband's attorney called the secretary of Grove, the wife's attorney, to ask for a week's continuance because he could not get a plane out of Los Angeles in time for the hearing. The secretary gave this information to Grove who, nonetheless, did not advise the court of the call. As a result, the judge treated the cause as a default matter.

Grove's failure to advise the court of opposing counsel's request violated both Business and Professions Code sections 6068, subdivision (d) (attorneys must "never … seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law") and 6106 (moral turpitude). "The concealment of a request for a continuance misleads the judge as effectively as a false statement that there was no request. No distinction can therefore be drawn among concealment, half-truth, and false statement of fact." (*Id*. at p. 315; in this instance, unlike in *Bryant*, the conduct was disciplinable because it involved a misrepresentation to the court.)

ATTORNEYS MUST RESPECT THE COURT

There is an intricate balance between the rights of attorneys to represent their clients' interests and their concomitant obligation to respect the judiciary. Attorneys are not without recourse when judicial rulings do not meet their expectations. They "must be accorded substantial freedom of expression in representing their clients" and have "the right to present legitimate argument and to protest an erroneous ruling." (*Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, 795-796 [requesting repeatedly to be allowed to question a witness during the court's investigation of jury tampering]; see also *In re Buckley* (1973) 10 Cal.3d 237, 249, holding that "the system is built upon the belief that the truth will best be served if defense counsel is given the maximum possible leeway to urge in a respectful but nonetheless determined manner, the questions, objections, or argument he deems necessary to the defendants' case …")

Nonetheless, attorney advocacy also has its limitations. "When, however, aggressive advocacy gives way to insolence and disrespect towards the court and particularly when it degenerates into 'impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court' (citation) it is the trial judge's 'bounden duty to protect the integrity of his court.' (Citations)." (*Id.* at pp. 249-250; see also Business and Professions Code section 6068, subdivision (b), requiring attorneys to "maintain the respect due to the courts of justice and judicial officers and *People v. Massey* (1955) 137 Cal.App.2d 623, 625, holding that attorneys, as officers of the court, owe a duty of respect to the court.)

The duty of respect towards the court includes the obligation "'to respectfully yield to the rulings of the court, *whether right or wrong*.'" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1370, citing *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126; emphasis in the original); see also *People v. Ward* (2009) 173 Cal.App.4th 1518, 1550

("appellant was no longer engaged in advocacy. He had argued his position and received adverse rulings, preserving the matter for appeal. His comment could not further his client's case. It was a gratuitous and deliberate violation of a lawful court order.")

Aggressive Advocacy is Permitted - Disrespectful Comments are not

There is more than a fine line between permissible, aggressive advocacy and disrespectful remarks. The former allows an attorney, in protecting the interests of her client, "to press legitimate argument and to protest an erroneous ruling." (*Gallagher v. Municipal Court*, *supra*, 31 Cal.2d 784, 796; see also *In re Hallinan* (1969) 71 Cal.2d 1179, 1181 holding that something more is required for a direct contempt than a contemptuous tone of voice when the words themselves are not insolent, contemptuous or disorderly.)

A corollary to the principle that an attorney should be allowed to be an aggressive advocate for her clients is that judges, at the same time, "must be long of fuse and somewhat thick of skin." (*De George v. Superior Court* (1974) 40 Cal.App.3d 305, 312; see also *In re Buckley*, *supra*, 10 Cal.3d 237, 257, n. 27, observing that "a judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws ... ") Accordingly, "It has been suggested that a judge contemplating a summary contempt order (for a direct contempt) might do well to declare a recess and, in the serenity of his chambers, reflect whether the conduct in question is truly so aggravated as to constitute contempt or whether his reaction to it is simply one of judicial nerves on edge." (*In re Grossman* (1972) 24 Cal.App.3d 624, 628.)

Examples of Impermissible Conduct that Impugns the Integrity of the Court

"This court obviously doesn't want to apply the law," by a deputy public defender following a lengthy colloquy between that attorney and a judge concerning the former's desire to call a prosecutor as a witness, where the judge wanted an offer of proof before the prosecutor could be called. (*In re Buckley*, *supra*, 10 Cal.3d 237, 248-251.)

Stating that a client has not received a fair trial. (*Hanson v Superior Court* (2001) 91 Cal.App.4th 75, 84-85.) Contrast that holding to asserted inadequacies in a court's rulings which, if made respectfully, are not contemptuous. (*In re Hallinan*, *supra*, 71 Cal.2d 1179, 1184.)

Loudly stating "Haw" or "Hah," with accompanying laughter, in the jury's presence, to the court's valid rulings. (*DeGeorge v. Superior Court*, *supra*, 40 Cal.App.3d 305, 313-314.)

After the judge had advised the attorney to "move on" to a new point in his cross-examination of a witness, the attorney replied, **"I will not move on…I will not move on until you haul me away. This is the most important issue of the case and you're not going to convict my client. (The judge) "Mr. McCann, I talked to you at length before we started." (The attorney) "You're not my mother."** (*McCann v. Municipal Court* (1990) 221 Cal.App.3d 527.)

A prosecutor, despite being ordered by the court not to comment on the defendant's absence, did so in final argument "because I can, and I'm within the rules of doing it." (*People v. Pigage, supra*, 112 Cal.App.4th 1359, 1370-1374.)

A deputy public defender used the term "prosecutorial misconduct" in front of the jury after having been ordered not to do so. Then, after the court advised the jury to disregard the statement and that there was no evidence of any misconduct, the public defender remarked "."Ladies and gentlemen, we are here. We should all play by the rules." *People v. Ward, supra*, 173 Cal.App.4th 1518.

Appearing in court under the influence of alcohol or other intoxicating substance. (*Ridge v. State Bar* (1989) 47 Cal.3d 952, 960 [petitioner had a .17 percent blood alcohol level].)

ATTORNEYS SHOULD NOT MAKE MISREPRESENTATIONS TO THE COURT

Both the Business and Professions Code and the Rules of Professional Conduct prohibit attorneys from making misrepresentations to a judicial officer. As discussed previously, Business and Professions Code section 6068, subdivision (d), provides that attorneys shall never "seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Rule of Professional Conduct 5-200(B), which adds jurors to this prohibition, states that an attorney "Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." These standards reflect the policy that "Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense." (*DiSabatino v. State Bar* (1980) 27 Cal.3d 159, 162-163, quoting *Paine v. State Bar* (1939) 14 Cal.2d 150, 154); see also *Daily v. Superior Court* (1935) 4 Cal.App.2d 127, 132, quoting *Furlong v. White* (1921) 51 Cal.App. 265, 271 that attorneys are "officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice.")

Deceit may be committed by an outright affirmative falsehood or by concealment of a material fact. (*Daily v. Superior Court, supra*, 4 Cal.App.2d 127, 131 ["Deceit…may consist in suppression of that which it is one's duty to declare…"]; see also *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709 ["…concealment of a material fact 'misleads the judge as effectively as a false statement…'"], quoting, in part, *Grove v. State Bar, supra*, 63 Cal.2d 312, 315 ["No distinction can therefore be drawn among concealment, half-truth, and false statement of fact."].)

It is not necessary that the court be deceived by the misrepresentation (*Davis v. State Bar* (1983) 33 Cal.3d 231, 240 ["…it is sufficient that the attorney knowingly presents a false statement which tends to mislead the court"] or that the misrepresentation caused no harm. (*Scofield v. State Bar* (1965) 62 Cal.2d 624. 628 ["The suppression of that which is true, by one having knowledge or belief of the fact, to deceive another, or to induce him to enter into a contract, constitutes actual fraud."]) because "it is the endeavor

to secure an advantage by means of falsity which is denounced." (*Pickering v. State Bar* (1944) 24 Cal.2d 141, 145.) It is also not a defense that the attorney believed it was necessary to lie to protect her client. (*Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 193 ["Nor can we accept the proposition that (the attorney's) duty to his client relieved him of the responsibility to tell the court the truth, particularly where the representation was made under penalty of perjury."].)

Examples of Misrepresentations to the Court

Signing a declaration on behalf of a declarant. (*Garlow v. State Bar* (1982) 30 Cal.3d 912.)

Making false statements in an effort to disqualify a judge. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37.)

Filing a false statement regarding a client's financial condition. (*Dixon v. State Bar, supra,* 32 Cal.3d 728, 738-739. [In a note collection matter, an attorney filed a declaration in support of a request to set aside an order vacating his client's default in which he falsely stated that the instant judgment was the client's major asset, that the client was relying on it to support herself and her daughter and that the client was living on borrowed funds.].)

Falsely representing unawareness of the date and time of a court proceeding of which the attorney had notice and an obligation to appear. (*In re Aguilar* (2004) 34 Cal.4th 386, 393-394 [An attorney told a Supreme Court clerk/administrator he was unaware his firm's case was scheduled for oral argument on the calendared date when his associate had previously advised him of the date and time of the argument and the attorney had reviewed a copy of the Court's oral argument calendar.].)

Misrepresenting grounds for a continuance. (*Vaughn v. Municipal Court* (1967) 252 Cal.App.2d 348, 354 [the attorney misrepresented that he had to be in a civil matter in Illinois and then in Washington, D.C. to apply for a bank charter.].)

Concealing an opposing counsel's continuance request which led to the entry of the opposing party's default. (*Grove v. State Bar, supra,* 63 Cal.2d 312, 315.)

Not advising the court where a client could be reached. (*Davidson v. State Bar* (1976) 17 Cal.3d 570, 574.)

Representing to a mandatory settlement judge that his client, a defendant, who had been subject to a conservatorship, did not believe he was responsible for the accident or the resulting injuries and wanted the matter to be tried, when the attorney knew that the client was dead. (*In the matter of Jeffers* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 211.)

ATTORNEYS SHOULD NOT MAKE MISLEADING STATEMENTS TO OPPOSING COUNSEL

The failure to be truthful to opposing counsel can result in a violation of Business and Professions Code section 6068, subdivision (d), which requires attorneys to employ only such means as are consistent with the truth when representing their clients. (See *In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 435 [attorney violated section 6068, subdivision (d), by endorsing his client's false financial statements and representing one of the client's businesses as successful to an eventual buyer and the buyer's attorney).

The court may also give the jury an appropriate instruction if the misrepresentation to opposing counsel arguably was part of a plan to destroy relevant evidence. (See *Bihun v. AT&T Information Systems, Inc*. (1993) 13 Cal.App.4th 976, 992 where defense counsel objected to the production of an employee's personnel file on the grounds of privacy and relevancy although he had never seen the file and had been advised it could not be located. At the trial, after he told the court that the file was lost, the court properly gave an instruction that the jury could draw an inference that there was something damaging to defendant's case in the personnel file if it found that the file had been willfully suppressed.)

ATTORNEYS SHOULD NOT MAKE STATEMENTS BEFORE A JURY THAT MIGHT PREJUDICE THE CASE

An all-too common ploy, that usually results in angry recriminations and heated side-bar conferences, takes place when attorneys attempt to introduce irrelevant facts and argument while the jury is present. Speaking objections, offers of proof, offers to stipulate, requests for an order, motions to amend a pleading and claims of misconduct are some of the means attorneys have used to improperly influence a jury.

Speaking objections are improper: *People v. Pitts* (1990) 223 Cal.App.3d 606, 722.

Offers of proof are improper: *Kenworthy v. State of California* (1965) 236 Cal.App.2d 378, 397-398.

Offers to stipulate are improper: *Augustus v. Shaffer* (1959) 171 Cal.App.2d 160, 167.

Requesting an order is improper: *People v. Ah Len* (1891) 92 Cal. 282, 284-285.

Moving to amend a complaint is improper: *Sanguinetti v. Moore Dry Dock Co*. (1951) 36 Cal.2d 812, 819.

Claim that the opponent had suppressed evidence is improper: *Keena v. United Railroads* (1925) 197 Cal. 148, cited with approval in *Gackstetter v. Market Street Railway Co*. (1933) 130 Cal.App. 316, 327.

ATTORNEYS SHOULD NOT INCITE OR INTIMIDATE EITHER OPPOSING COUNSEL OR A PARTY

Attempts to harass, intimidate or annoy the opposition by physical conduct or the making of faces is improper.

In *People v. Bradford* (1997) 15 Cal.4th 1229, the defendant claimed that one of the prosecutors and a police detective repeatedly "stared (him) down" to intimidate, provoke, or induce him to "blow up" before the jury. In return, the prosecution pointed out that the defendant regularly had mouthed the phrase "fuck you" to the two prosecutors, had given "the finger" to one of them on a daily basis and in excess of twenty times to the other. The Supreme Court found that the prosecution's conduct was not prejudicial because there was nothing in the record to suggest that it had been observed by the jury. (*Id*. at pp. 1337-1338.) The prosecutor in *People v. Hill* (1998) 17 Cal.4th 800 was criticized, in a long litany of complaints, for staring at defense counsel and making faces at him while he was cross-examining witnesses. (*Id*. at p. 834.)

In *People v. Kelley* (1977) 75 Cal.App.3d 672, the same prosecutor as in *People v. Hill*, told one of the defense attorneys that if he interrupted her again, "I'm going to kick you in the ankle." On another occasion, after the defendants made a mistrial motion, she said "If I had been a male lawyer, someone would have hit each one of you … right square in the face." This prosecutor also engaged in a shoving match with a defense attorney while the latter was addressing the court. Not surprisingly, this conduct was found to be unprofessional, especially since it had been committed by a prosecutor. (*Id*. at p. 688.)

The plaintiff's lawyer in *Love v. Wolf* (1964) 226 Cal.App.2d 378 was just as combative. When defense counsel objected to an obviously improper reference to the defendant's "astronomical profits," he replied: "Can I make a statement or two without being interrupted, or do I have to floor you, Mr. Dyer?" On another occasion, opposing counsel were invited to "step outside and do something about it." (*Id*. at pp. 391-392.)

ATTORNEYS SHOULD NOT DENIGRATE ONE ANOTHER

The disparagement or denigration of opposing counsel has been roundly condemned. In *Love v. Wolf, supra,* 226 Cal.App.2d 378, which reversed a judgment for the plaintiff because of the misconduct of his counsel in several phases of the trial, the attorney referred to the defendant pharmaceutical company's lawyer as "an idiot" (several times), a "smart guy" and a "laughing hyena." He characterized the defendants' objections as "asinine" and as "hogwash." He also accused the attorneys of suborning perjury.

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. (Citations omitted.) 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation omitted], it is never excusable.' (Citation omitted.)" (*People v. Hill, supra,* 17 Cal.4th 800, 832.) In

People v. Pitts (1990) 223 Cal.App.3d 606, the prosecutor's argument that defense counsel called his client as a witness "so she could betray herself in court" could "reasonably be interpreted as a subtle accusation that defense counsel knowingly presented perjured testimony. Such an accusation is clearly misconduct." (*Id.* at p. 706.)

Note, however, that an attorney may argue, when supported by the evidence and reasonable inferences, that testimony and a defense have been fabricated. Such a characterization, without more, is not an attempt to impugn the honesty and integrity of counsel. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1303, n. 49; *People v. Pitts, supra*, 223 Cal.App.3d 606, 706 ["There was nothing improper about (the prosecutor's) arguing, based on (the defendant's) demeanor and her manner of testifying, as well as the evidence contrary to her testimony, that her denials of molestations lacked credibility."]) See also *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, where, in final argument, the attorney for the buyers of a shopping center accused the attorney for the sellers with trying to suppress evidence by introducing an edited version of a letter, attempting to keep a witness from testifying and not being forthright concerning his involvement in drafting a pleading and propounding certain interrogatories. As to that last matter, he argued:

> But when you're caught lying or you're caught cheating or you're caught stealing, it's real hard to look cool. That's when you start to stutter and stammer, and you look unorganized and you can't put it together, and you just end up looking stupid. ... [¶] It's simply because it's hard to look good when you have to uphold the lies of your client. [¶] And then you can add insult to injury by continuing to outright tell lies to you, for example, over the last three weeks. [¶] It's probably fairly clear to you that I've been pretty angry in this case.

The appellate court in *Las Palmas*, while not condoning the above personal attacks on opposing counsel, whether outright or by insinuation (at p. 1246), was still "left unconvinced that, on the whole, (the buyer's attorney had) exceeded his right to comment on the state of the evidence. Here, the facts surrounding the making of (the seller's) letter, and the way those events were portrayed to the jury, represented highly relevant circumstantial evidence of whether sellers ever intended to honor the lease guaranties. Buyers also had the right under the facts to comment on why sellers suddenly attempted to suppress the testimony of one of their scheduled witnesses." (*Id*.)

HOW TO RESPOND TO MISCONDUCT

Since two wrongs do not make a right (*Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407, 410; *People v. Bain* (1971) 5 Cal.3d 839, 849 ["A prosecutor's misconduct cannot be justified on the ground that defense counsel 'started it' with similar improprieties."]), "(t)he proper way … to correct misconduct … is to object and have the trial judge reprimand the misbehavior and admonish the jury to disregard such remarks." (*Ibid*.)

MAKING AND PRESERVING OBJECTIONS TO MISCONDUCT

The law as to the right to appeal misconduct in criminal and civil jury trials is generally unforgiving: unless a timely objection and a request for an admonition to the jury have been made, the issue has been waived. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1236-1237; *Horn v. Atchison, Topeka, Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610; *Sabella v. Southern Pacific Co*. (1969) 70 Cal.2d 311, 318-319.) An objection by itself, without a request for an admonition, does not preserve the issue for appeal. (*People v. Monteil* (1993) 5 Cal.4th 877, 914.)

A request for an admonition is excused if the court overruled the objection so that there was no opportunity to make the request that the jury be admonished to disregard the wrong. (*People v. Hill, supra,* 17 Cal.4th 800, 820.) Also, a request for an admonition is probably not required where the trial court, after a timely objection and on its own, indicates that the jury will be instructed to disregard the misconduct. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130 ["Because the trial court indicated that the jury would be instructed 'not to be guided by passion or sympathy,' the defense may have concluded that the instruction would function as an admonition."]) An admonition request is not needed where the case is tried to the court. (*People v. Scott* (1997) 15 Cal.4th 1188, 1217.)

A failure to object or request an admonition is excused in both criminal and civil matters if it could not have cured the alleged harm. (*People v. Price* (1991) 1 Cal.4th 324, 447.) The futility of making any objections to the prosecutor's multiple acts of misconduct was quite obvious in *People v. Hill, supra,* 17 Cal.4th 800. As the Supreme Court observed:

> (The prosecutor's) continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous that (defense counsel) was thrust upon the horns of a dilemma. On the one hand, he could continually object to (the prosecutor's) misconduct and risk repeatedly provoking the trial court's wrath, which took the form of comments before the jury suggesting (that defense counsel) was an obstructionist, delaying the trial with "meritless" objections. These comments from the bench ran an obvious risk of prejudicing the jury towards his client. On the other hand, (defendant's counsel) could decline to object, thereby forcing defendant to suffer the prejudice caused by (the prosecutor's) constant misconduct. Under these unusual circumstances, we conclude defense counsel) must be excused from the legal obligation to continually object, state the grounds of his objection, and ask the jury be admonished. On this record, we are convinced any additional attempts on his part to do so would have been futile and counterproductive to his client.

(*Id*. at p. 821.) *Sabella v. Southern Pacific Co., supra*, 70 Cal.3d 311, 319 recognizes that, in some instances in civil litigation, an objection and request for admonition would have been equally ineffective. ("This case is neither precisely like … *Love v. Wolf* (1964) 226 Cal.App.2d 378, in which admonition of the jury

was requested several times but disregarded by the trial court.".) Also, attorney misconduct that was not objected to may be considered as a grounds for a new trial. (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.)