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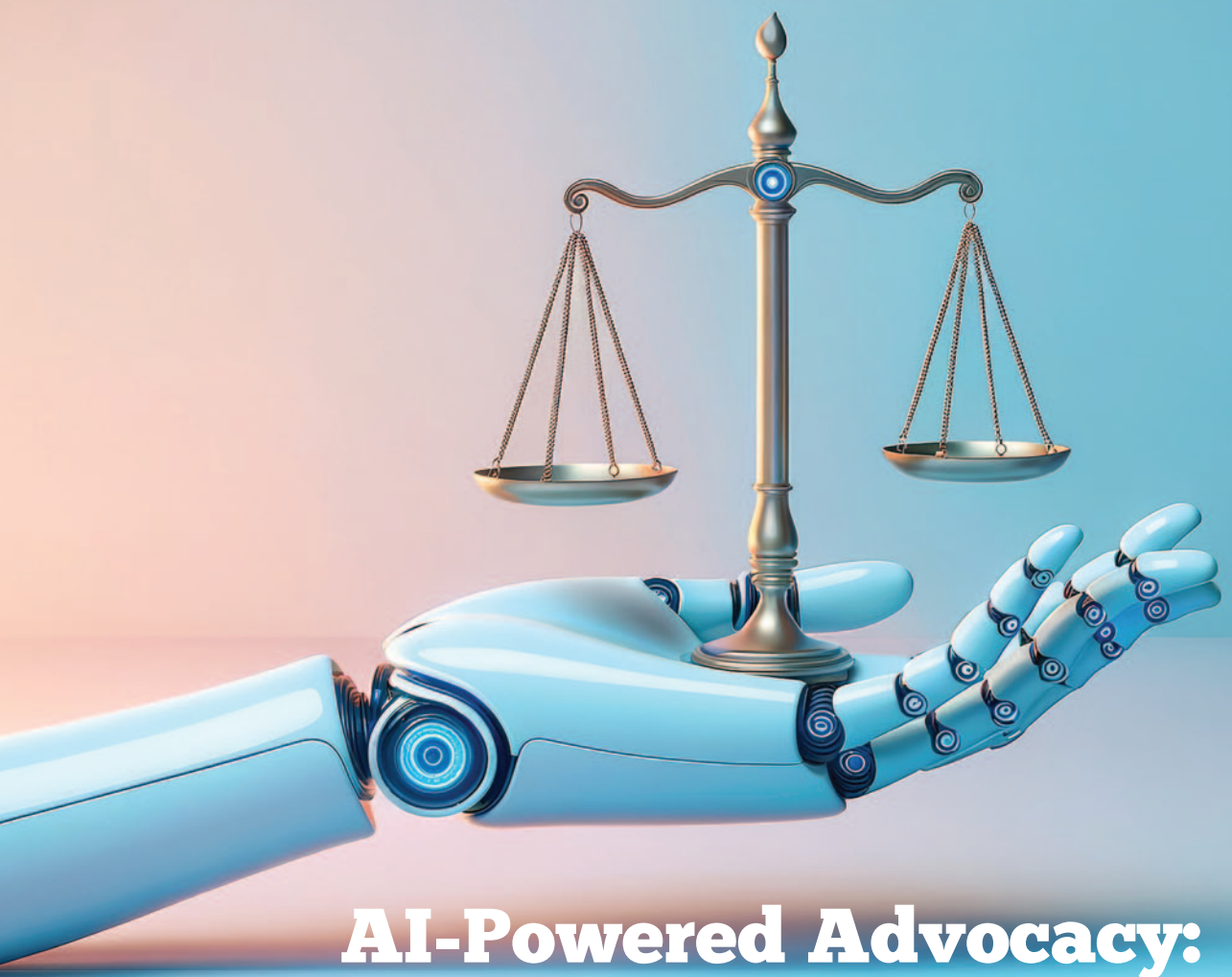

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The Prosecutor's Toxic Objection: 'Defense Counsel Knows That's Improper!'

The Prosecutor's Toxic Objection

Criminal defense trial lawyers have all been there. Defense counsel is standing in front of a spellbound jury eloquently weaving the client's defense theme, or leaning over the courtroom podium about to plunge home a final impeachment of the prosecution's star witness when the jury hears this piercing exchange:

> **Prosecutor:** Objection, defense counsel knows that's improper! [1]
>
> **Judge:** Sustained.[2]

In the experience of many criminal defense attorneys, such an objection is often prompted by, at best, an evidentiary challenge that could be more accurately described by a familiar one-word objection. Instead, the prosecutor just scolded the defense attorney like a provoked parent or a tattling toddler.[3]

> I recall with chagrin an occasion when, as an inexperienced trial lawyer, I reacted all too hastily to a question asked on cross-examination by my adversary. "I object. The question is improper, and Mr. Jones knows it is improper!" … I can only surmise what effect my ill-conceived combination of confidence and indignation had on the jury.
>
> – D. Brooks Smith, U.S. District Court Judge for the Western District of Pennsylvania[4]

The "effect" of such an objection by a prosecutor in a criminal case is that, in the eyes of the jury, it will adjudicate the defense counsel as dishonest and conniving. This judgment is unfair to both the defense lawyer and the accused and contaminates the accused's right to counsel and a fair trial — the impact of which increases with each additional repetition.

This speaking objection is improper in itself,[5] and it fails to declare the required, valid, substantive legal ground for the prosecutor's objection.[6] In violation of Federal Rules of Evidence 602 and 701(a), the objection also asserts facts the prosecutor is incompetent to know (i.e., what defense counsel knows). In doing so, it also asserts facts that are not in evidence and will likely never "be supported by admissible evidence" in violation of Model Rule of Professional Conduct (MRPC) Rule 3.4(e). But isn't the prosecutor's objection and the judge's subsequent ruling even more toxic than all that?

Such accusations by the prosecutor against the criminal defense lawyer in a criminal jury trial are especially toxic. Significantly, by the phrase, "defense counsel knows," the prosecutor — however inadvertently or deliberately — not only distracted the jury

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from the evidence[7] but transformed the prosecutor's objection into an accusation of intentional professional misconduct by the criminal defense lawyer.[8] This contamination potentially threatens the foundations of the criminal justice system.

The Toxin Permeates

This improper objection is a colorless and odorless toxin often overlooked by attorneys and judges alike[9] — but which potentially corrodes the foundation of the criminal defense lawyer's vital role in the justice system.[10] It can permeate the consciousness of the judge, the jury, any media presence in the courtroom, and the members of the public who may be chosen to serve on future criminal trial juries.

It may have been a fit of pique or mere slip of the tongue, but the prosecutor's objection accused defense counsel of intentional misconduct in front of the jury. Even worse, the judge's automatic or deliberate ruling, "Sustained," authenticated the prosecutor's accusation — again, in front of the jury. Neither the prosecutor nor the judge can see into the mind of the criminal defense lawyer.[11] Yet, the prosecutor without evidence, accused the defense attorney of intentional misconduct, and the judge thoughtlessly ratified this likely baseless accusation.[12] In a criminal jury trial, this apparent agreement between the prosecutor and the judge sent a message to the jurors: In the courtroom there is a dichotomy. The prosecution and judge are the personification of honesty and justice, and the defense lawyer and the client are the embodiment of dishonesty and injustice. What jurors in their right mind would then side with dishonesty and injustice in a palace of justice? "Even subsequent jury instructions … 'may not ensure that [the prosecutor's] disparaging remarks have not already deprived the defendant of a fair trial.'"[13] As courts have cautioned in a variety of contexts, "courts cannot always 'unring the bell.'"[14] "'[A]fter the thrust of the saber it is difficult to say forget the wound. … [I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it.'"[15]

Jurors cannot help but to be drawn to the spectacle: the prosecutor and the judge versus the defense lawyer. The jurors have already felt the frisson of tension in the air. Each repeat of this toxic refrain drives jurors closer and closer to the nearly inevitable, defense-chilling conclusion: "Defense counsel is dishonest, so the client must be *guilty*."

Surely, this is an exaggeration, right?

The defense lawyer's role in the criminal justice system is not that of a villain seeking to obstruct justice.[16] In fact, it enjoys an impressive constitutional pedigree.[17] A close review of the U.S. Constitution reveals that, with the exception of the Article III courts, it does not elevate to express constitutional description the duties of any lawyer *except* that of the "accused['s] … right … to … the assistance of counsel for his defense."[18] The U.S. Supreme Court made clear in *Gideon*, defense lawyers are

> . . . necessities, not luxuries. The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.[19]

Criminal defense lawyers exist to keep the prosecutorial powers of government honest. Supreme Court Justice Hugo L. Black observed that the defense lawyer "must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty."[20] Further, "[t]he trial judge has the responsibility for safeguarding … the rights of the accused"[21] including by "be[ing] sensitive to the function[] of the … defense counsel."[22] "It is impermissible for a prosecutor to discredit defense counsel in front of the jury."[23] "[T]he prosecutor is expected to 'refrain from impugning, directly or through implication, the integrity of or institutional role of defense counsel.'"[24] "[W]hen a prosecutor denigrates defense counsel, it directs the jury's attention away from the evidence and is therefore improper."[25] At least one appellate court has commented that such express and even implicit accusations that the defendant and defense counsel were dishonest constituted "serious breaches of the standard of fair comment."[26]

When did fulfilling this vital check on expansive governmental power and prerogative to prosecute[27] equate to criminal defense counsel protecting dishonesty and injustice?

Media and Popular Culture Contaminate the Criminal Justice System with Negative Stereotypes

Despite the intentions of the Founding Fathers, the criminal justice system today favors the prosecution. The presumption of innocence has become a *de facto* presumption of guilt.[28] Media and popular culture often inform the public that criminal defense lawyers are dishonest — criminals representing criminals. Often in this instant-gratification era, the public sees a news story or TikTok post accusing someone of a heinous crime or accusing a defense lawyer of misconduct and rushes to judgment. The die is cast. The court of public opinion is set.[29] The accused is "guilty" — long before the case ever reaches a courtroom. Sure, it is a great plot point in a favorite primetime television or Netflix series,[30] but offering to defend someone accused of a crime does not make defense lawyers dishonest or "criminal." These negative stereotypes undermine the presumption of innocence and the accused's right to a fair trial.

The meager remedies? Some statutes warn jurors who know material facts about a case that they may be in contempt if they share that knowledge.[31] Courts might even sequester or partially sequester juror pools and impaneled juries to prevent them from being swayed by media, popular culture, or other members of the public during trial — although this happens rarely[32] and does not erase their pretrial memories.

The Prosecutor's Toxic Objection Exacerbates Contamination from Media and Popular Culture

In front of a jury primed for bias, the above-described prosecutor — however inadvertently or deliberately — then accused the criminal defense lawyer of being dishonest by claiming the defense attorney intentionally used words or conducted themselves in a way that defense counsel knew violates substantive or procedural law, or the principles of ethics and professional conduct. The judge then authenticated this accusation by sustaining the prosecutor's "objection." And it does not stop there. If the media is present in the courtroom and chooses to disseminate that toxic accusation to the public, then that one toxic accusation — and the judge's authentication of it — potentially taints future jury pools and reinforces the negative stereotypes portrayed in media and popular culture.

The O.J. Simpson trial of the 1990s illustrated how quickly the media, and

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The prosecutor's speaking objection is improper and is especially toxic because it paints defense counsel as dishonest and conniving.

now popular culture, can disseminate such prosecutorial accusations to the public — even those made outside the presence of the jury. This prosecutor's toxic objection made national and international news:

> Mr. Scheck knows it's improper because there is no lawyer with half a brain, with an IQ above five, who would not have known that such a question was improper.
>
> — Prosecutor Marcia Clark.[33]

Antitoxins and Antidotes

As members of a self-governing profession,[34] lawyers and judges have a professional duty to police each other's language and snap judgements to avoid contributing to the disintegration of the foundations of criminal justice.[35] What can the three separate participants in the trial do to combat this toxic tactic?

Prosecutors are "administrators of justice."[36] "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[37] Ultimately, prosecutors will want to remember that "while [they] may strike hard blows, [they are] not at liberty to strike foul ones. It is as much [their] 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."[38] "It is the county attorney [the prosecutor], not the defendant, who holds a position of quasi-judicial authority and who is held to a higher standard and required to protect the fair trial rights of the defendant."[39] To help "eliminate any implicit biases" and "act to mitigate any improper bias or prejudice,"[40] prosecutors must mind their words and teach those newly joining the profession not to make such accusations in their objections — whether deliberately or not. Making such an objection is, at best, a form of "retaliatory conduct" discouraged by the ABA Standards for the Prosecution Function.[41]

Not all prosecutors use this toxic tactic. As with any bush-league ploy, veteran, professional prosecutors discard and ridicule this tactic. Regrettably, however, this toxic objection is still frequently seen in criminal jury trials. Prosecutors have a duty to "seek to reform and improve the administration of criminal justice"[42] and to "stimulate and support efforts for remedial action." It is those honorable, professional prosecutors who can help detoxify the criminal justice system by rooting out use of this toxic tactic by their less scrupulous colleagues and training incoming young prosecutors not to make such accusatory objections.[43]

Judges will also want to resist being lured into this toxic Constitution-bashing trap. The ABA Criminal Justice Standards exhort the trial judge "not [to] permit any person in the courtroom to embroil [them] in conflict"[44] and "otherwise avoid personal conduct which tends to demean the proceedings. …"[45] "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."[46] These rules and restrictions on judicial speech "are essential to the maintenance of the independence, integrity, and impartiality of the judiciary."[47] "When it becomes necessary during the trial for the judge to comment upon the conduct of … [defense] counsel, … the judge should do so outside the presence of the jury, if possible."[48]

"Any such comment should … refrain[] from unnecessary disparagement of persons"[49] — especially criminal defense counsel.[50] The judge absolutely should *not* follow the example of one California appellate judge who "instructed the jury that defense counsel's comments … were '[i]mproper' and admonished it to '[c]ompletely disregard that remark. Counsel knows it is not proper. Disregard it for all purposes.'"[51] Rubbing salt in the wound, "[t]he court then directed defense counsel not to 'do it again.'"[52] — still in front of the jury.

Instead, judges "ha[ve] the obligation to use [their] judicial power to prevent distractions from and disruption of the trial."[53] For example, in response to the district attorney accusing defense counsel of "know[ing] it's very unethical to just bring names out of a clear blue sky and ask unless he intends to put this evidence on":[54]

> The trial court immediately instructed the jury "to disregard words spoken by attorneys in the heat of trial, you are not to consider the words unethical or any reference thereto by the attorneys."[55]

The court reviewing this matter further admonished, "We do not condone remarks casting reflections upon opposing counsel."[56] Even if the criminal defense lawyer does not object to the prosecutor's toxic objection, the trial judge may have a duty to respond *sua sponte* to the prosecutor's accusatory objection.[57] A simple ruling of, "Overruled," or "That is not a legal objection. Overruled," may be a sufficient deterrent. On the other hand, an immediate recess and a prompt hearing on the objection and future such objections might be in order.

Criminal defense lawyers must be bold and proactive to help judges, prosecutors, and other defense lawyers recognize the problem.[58]

Even before a criminal jury trial begins, defense lawyers can voir dire prospective jurors. The meaning of objections and how the jurors might perceive the judge's rulings on lawyers' objections has always been a proper aspect for trial counsel to discuss in voir dire. In a case where defense counsel has reason to fear the prosecutor will use this toxic objection, defense counsel may find it wise to discuss more pointedly with the venire the meaning of the objection and ruling at issue in this article.

Should the prosecutor utter this toxic objection during the trial, defense counsel should consider immediately asking the judge for a hearing outside the presence of the jury and the opportunity to argue the implications of such an objection. Once out of the jury's hearing, defense counsel should, if needed, educate the judge about the toxic effects of this objection and try to learn the judge's position on such objections, including the judge's likely ruling.

Another possible antitoxin in the defense lawyer's first-aid kit is to file trial briefs or motions in limine, thereby attempting to describe and deter this ubiquitous pernicious practice. Grounds for these filings could include that it is not

a proper objection that declares a valid, specific, substantive reason; it asserts facts not in or supported by evidence;[59] and, as discussed throughout this article, it undermines the accused's Sixth Amendment right to criminal defense counsel and a fair trial. At the very least, defense counsel should bring this prejudicial accusation and its equally prejudicial ruling to the judge's attention. The ABA Standards require that "[t]he trial judge … respect the obligation of counsel … to have the records show adverse rulings and reflect conduct of the judge which [defense] counsel considers prejudicial."[60] Respected or not, such obligations and confrontations with authority are uncomfortable, even hazardous, for defense counsel. However, as eloquently memorialized in Henry Lord Brougham's defense of Queen Caroline, such "hazards and costs" are bedrock duties of conscientious criminal defense counsel.[61] "To save that client by all means and expedients … [they] must go on reckless of the consequences."[62]

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Notes

1. This accusation masquerading as a prosecutorial objection is ubiquitous in American jurisprudence although not always recorded in the annals of law. *See, e.g.*, People v. Fielding, 158 N.Y. 542, 544, 53 N.E. 497 (N.Y. 1899) ("The purpose is to break the effect of anything I may say to you. *He knows it is improper.*") (emphasis added); State v. Garcia, 419 P.2d 121, 122 (Wash. 1966) ("I will object, Your Honor, to this line of questions. *I think it is improper and I think counsel knows it.*") (emphasis added); People v. Hahn, 350 N.E.2d 839, 847 (Ill. App. Ct. 1976) ("Your Honor, I object to any such reference. *It's improper. Counsel knows it's improper.*") (emphasis added); Bloxham v. State, 600 P.2d 341, 343 (Okla. Crim. App. 1979) ("*defense counsel, 'knows it's very unethical* to just bring in names out of clear blue sky and ask unless he intends to put this evidence on.'") (emphasis added); Wright v. State, 421 So.2d 1324, 1326 (Ala. 1982) ("We object to any further questioning on this matter. Mr. Whitesell *knows it is not proper.*") (emphasis added); State v. Shipley, No. CA-8062, 1990 WL 187075, at *4 (Ct. App. Ohio Nov. 26, 1990) ("Objection, Your Honor, *that is improper, and he knows it is improper.*") (emphasis added); State v. Fulton, 269 Kan. 835, 848 (2000) ("Objection, Your Honor, misstatement of fact *and defense counsel knows it.*") (emphasis added); People v. Tran, No. H021861, 2002 WL 1042324, at *14 (Ct. App. Cal. May 22, 2002) ("*She knows it's improper* to do that in front of the jury. She's a veteran attorney and *she knows it's improper*.") (emphasis added).

2. *See, e.g.*, State v. Bozovich, 259 P. 395, 396 (Wash. 1927) ("Mr. Sullivan: I certainly object to that, and counsel knows it is not proper … The Court: *Objection sustained.*") (emphasis added); O'Laughlin v. Superior Court In & For San Diego Cnty., 318 P.2d 39, 40 (Cal. Dist. Ct. App. 1957) ("By Mr. Low (Deputy District Attorney): … 'Objected to as immaterial and highly improper. Counsel knows it'. … The Court: '*Sustain the objection*.'") (emphasis added); Jones v. State, 677 S.W.2d 211, 214 (Tex. Ct. App. 1984) ("Mr. McCarthy: … That is improper and he knows there is no evidence to support what he said. … The Court: … Mr. McCarthy's objection will be *sustained*.") (emphasis added); Mays v. State, 726 S.W.2d 937, 953 (Tex. Crim. App. 1986) (en banc) ("Mr. Oliver [prosecutor]: Objection. He knows that is improper. The Court: *Sustained.* Mr. Oliver: I would ask that the jury be instructed to disregard that also. The Court: The jury is instructed to disregard that.") (emphasis added); State v. Shipley, No. CA-8062, 1990 WL 187075, at *4 (Ohio Ct. App. Nov. 26, 1990) (unpublished) ("Mr. Nicodemo: Objection, Your Honor, that is improper, and he knows it is improper. The Court: *Sustained*.") (emphasis added); People v. Loggins, 629 N.E.2d 137, 143 (Ill. App. Ct. 1993) ("[Prosecutor]: Counsel knows that is improper, Judge. [The Court]: The jury is instructed to disregard that. *[Defense counsel], that is absolutely an improper question*.") (emphasis added); People v. Edwards, 306 P.3d 1049, 1111 (Cal. 2013) ("The prosecutor interrupted, and said 'That is not true, your honor, and in fact … unconsciousness is irrelevant and [defense counsel] knows it.' … *The trial court sustained the prosecutor's objection*.") (emphasis added).

3. Some prosecutors even go as far as to request the court to admonish defense counsel — in the presence of the jury. *See, e.g.*, People v. Tran, No. H021861, 2002 WL 1042324, at *14 (Cal. Ct. App. May 22, 2002). In many ways, the prosecutor's "scolding" defies the standards of professionalism. "As an officer of the court, the prosecutor should … manifest[] a professional and courteous attitude toward the judge [and] opposing counsel. …" ABA Criminal Justice Standards for the Prosecution Function

("Standards for the Prosecution Function") § 3-6.2(a) (4th ed. 2017).

4. D. Brooks Smith, *The Art and Etiquette of Stating Objection*, 16-MAY Pa. Law. 18, 23-24 (1994).

5. Speaking objections are generally disfavored. *See, e.g.*, Kan. R. 24 Dist. Rule 202; Kan. R. 19 Dist. Rule 5 ("Argument or a 'talking objection' is improper."); *see also* Standards for the Prosecution Function § 3-6.6(d) ("The prosecutor should not bring to the attention of the trier of fact matters that the prosecutor knows to be inadmissible" including by "making impermissible comments or argument."). "[T]he trial judge has a right to preclude 'speaking' objections, in which under the guise of objecting the objector endeavors to make a speech to the jury." 1 Robert P. Mosteller, Kenneth S. Broun, George E. Dix, Edward J. Imwinkelried, David H. Kaye, Eleanor Swift, McCormick on Evidence "("McCormick on Evidence") §52, at 429 (8th ed. 2020). "If [] counsel is foolish enough to attempt such an objection, the judge might admonish counsel in the jury's hearing." *Id*. at 436.

6. "Proper objections must be timely and *specific* in order to preserve an issue for appeal." State v. Gilbert, 272 Kan. 209, 212 (2001) (citing State v. Sims, 265 Kan. 166, 174-75 (1998)) (emphasis added); *see also* Fed. R. Evid. 103(a)(1)(A)-(B). "To help the judge make an intelligent ruling on the merits, the opponent should make a specific objection." McCormick on Evidence §52, at 424. "The prosecutor should not make objections without a reasonable basis, or for improper reasons such as to harass or to break the flow of opposing counsel's presentation." Standards for the Prosecution Function § 3-6.6(e).

7. This effect is not limited to the jury. As an Alabama civil case shows, such childish bickering might even distract or otherwise inopportune the witness on the stand. Somach v. Norris, 361 So.2d 1005, 1006 (Ala. 1978) ("Mr. Phelps: Now, we move to strike that for the record, and ask the jury to disregard that statement, and move for a mistrial. He knows that is improper, and he knows. Mr. Nichols: You know this is improper, too. … The Witness: *Can I tell you what Dr. Shamblin told me about it?* The Court: *No, ma'am. You just be quiet, please*.") (emphasis added).

8. *See* MRPC 8.4(a), (c).

9. *See, e.g.*, *Fielding*, 158 N.Y. 542, 544, 53 N.E. 497 (N.Y. 1899) (The judge: "I am going to permit [the district attorney] to sum up his case."); *Hahn*, 350 N.E.2d 839, 847 (Ill. App. Ct. 1976) (The court: "The objection is sustained. This is improper. The jury should disregard that and pay no attention to it."); *Shipley*, No. CA-8062, 1990 WL 187075, at *4 (Ct. App. Ohio Nov. 26, 1990) ("The Court: Sustained."); *Tran*, No. H021861, 2002 WL 1042324, at *14 (Ct. App. Cal. May 22, 2002) ("The trial court informed defense counsel that her motion was overruled and then asked defense counsel not to 'make such motion in front of the jury in the future.").

10. "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." MRPC, *Preamble: A Lawyer's Responsibilities* [5] (ABA 2024). "[A] lawyer should further the public's understanding of and confidence in a rule of law and the justice system …," not disintegrate it by an inadvertent or intentional accusation. *Id*. at [6].

11. *See, e.g.*, *Garcia*, 419 P.2d at 122 (Wash. 1966) ("Mr. Glein: I will object, Your Honor, to this line of questions. I think it is improper and I think counsel knows it. Mr. Paul: Well, it may be improper, Your Honor, but I sure don't know it.").

12. Should the judge honestly and reasonably believe and agree that the criminal defense lawyer is knowingly violating rules of professional conduct, the judge should not take up the issue in front of the jury or even the prosecutor. Rather, the judge should "communicat[e] directly with the lawyer who may have committed the violation, or report[] the suspected violation to the appropriate authority," e.g., the disciplinary authorities. Kan. R. Judicial Conduct 2.15 & cmts. *See also* MRPC 8.3.

13. Hunter v. State, 815 A.2d 730, 736 (Del. 2002) (quoting Walker v. State, 790 A.2d 1214, 1219-20 (Del. 2002)) (discussing prosecutor's comment re: defense counsel's "gall").

14. Maness v. Meyers, 419 U.S. 449, 460 (1975) (discussing a witness complying with the trial court's order to reveal information).

15. Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

16. "It is, of course, improper for the prosecutor 'to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case.'" ["A criminal defense lawyer may properly attack a witness' credibility even though that witness is also the [alleged] victim of the crime. The prosecutor, however, commits misconduct when, through careful use of words, [they] label[] defense counsel as an additional attacker in a prosecution of a violent offense."]. People v. Nieto, 2023 WL 4247460, at *14 (Cal. Ct. App. 1st Jun. 29, 2023) (internal citations omitted).

17. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

18. U.S. Const. Amend. VI.

19. *Gideon*, 372 U.S. at 344.

20. United States v. Wade, 388 U.S. 218, 257 (1926) (Black, J., concurring in part and dissenting in part).

21. ABA Criminal Justice Standards: Special Functions of the Trial Judge ("Standards for the Trial Judge") § 6-1.1(a) (3d ed. 2000).

22. Standards for the Trial Judge § 6-1.1(b).

23. *Hunter*, 815 A.2d at 736 (Del. 2002).

24. State v. Lockhart, 24 Kan.App.2d 488, 491-93, *rev. den.* (1997).

25. *Nieto*, 2023 WL 4247460, at *14 (Cal. Ct. App. 1st Jun. 29, 2023).

26. *Lockhart*, 24 Kan.App.2d at 491-93.

27. *See* Standards for the Prosecution Function § 3-4.2, 3-4.3, 3-4.4.

28. *See, e.g.*, Ariana Tanoos, *Shielding the Presumption of Innocence from Pretrial Media Coverage*, Indiana L. Rev. 50:997 (2017), accessed at https://journals.iupui.edu/index.php/inlawrev/article/view/21528/20760; Patricia J. Williams, *The Nation: Media Give No Presumption Of Innocence*, NPR, https://www.npr.org/2011/07/18/138464822/the-nation-media-give-no-presumption-of-innocence (Jul. 18, 2011, 10:11 a.m. ET).

29. *See, e.g.*, Bruce Schneier, *The Court of Public Opinion Is About Mob Justice and Reputation as Revenge*, Wired, https://www.wired.com/2013/02/court-of-public-opinion/ (Feb. 26, 2013, 9:30 a.m.); Madison Gesiotto, *Does innocent until proven guilty mean anything in public opinion?* The Hill, https://thehill.com/opinion/judiciary/429478-does-innocent-until-proven-guilty-mean-anything-in-public-opinion/ (Feb. 11, 2019, 6:00 p.m. ET).

30. It is not unusual for TV series and films to portray criminal defense lawyers as slimy, unethical, or even criminal. *Spoiler Alert: *See, e.g.*, "Tabula Rasa," Criminal Minds, S.3 E.19, CBS (2008) (criminal profiler on the stand verbally tears apart a visibly disheveled criminal defense lawyer, accurately accusing him of a gambling problem as his phone buzzes in court to announce the next round of horse racing results); "Mind Games," NCIS S.3 E.3, CBS (2005) (The serial killer's criminal defense lawyer becomes his protégé and commits copycat murders.); *See also generally*, How to Get Away with Murder, ABC (2014-2020); Law & Order, NBC (1990-2022); Law & Order: Special Victims Unit (1999-present); The Lincoln Lawyer, Netflix (2022-present). Strikingly, while these authors searched for citations to specific examples, it was not uncommon to see a criminal defense lawyer instead referred to as a "criminal lawyer." *See, e.g.*, "Better Call Saul," Sony Pictures: About, https://www.sonypictures.com/tv/bettercallsaul (2023) ("*Better Call Saul's* final season concludes the complicated journey and transformation of its compromised hero, Jimmy McGill (Bob Odenkirk), into *criminal lawyer* Saul Goodman.") (emphasis added).

31. *See, e.g.*, Fed. R. Crim P. 42; United States v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011).

32. "Jury sequestration is rare, and is usually reserved for high-profile criminal cases." Sequestration, Westlaw Practical Law Glossary Item 0-508-2439.

33. Terri Vermeulen, *O.J. Lawyer: No Plea-Bargain Discussions*, United Press Int'l (May 30, 1995) (emphasis added); Chicago Tribune, *Defense Ordered Not to Ask About a Statement Simpson Gave Police* (May 30, 1995); Kenneth B. Noble, *Simpson's Lawyers Press Attacks on Blood Evidence*, N.Y. Times (May 31, 1995).

34. "The legal profession is largely self-governing. … [T]he legal system is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement." MRPC, *Preamble: A Lawyer's Responsibilities* [10].

35. "Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." MRPC, *Preamble: A Lawyer's Responsibilities* [12] (ABA 2024); *see also* KBA Pillars of Professionalism, https://ksbar.org/?pg=pillars ("Be mindful that, as members of a self-governing profession, lawyers have an obligation to act in a way that does not adversely affect the profession or the system of justice."). These Pillars of Professionalism have been adopted by the Kansas Supreme Court, U.S. District Court for the District of Kansas, the Kansas Association of Defense Counsel, the Kansas Trial Lawyers Association, the Wichita Bar Association, and the Kansas Women Attorneys Association.

36. Standards for the Prosecution Function § 3-1.2(a); *See also* MRPC 3.8, cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with [it] specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

37. Standards for the Prosecution Function § 3-1.2(b).

38. Berger v. United States, 295 U.S. 78, 88 (1935).

39. State v. Gray, 25 Kan.App.2d. 83, 86 (1998); *See also* State v. Manning, 270 Kan. 674, 701 (2001).

40. Standards for the Prosecution Function § 3-1.6(a).

41. *Id*. at § 3-6.6(b) ("If the prosecutor reasonably believes there has been misconduct by opposing counsel, … the prosecutor should … not [] engag[e] in retaliatory conduct that the prosecutor knows to be improper.").

42. *Id*. at § 3-1.2(f).

43. *See id*. at § 3-1.12, 3-1.13. As shown at the beginning of this article, at least one federal court judge confesses using this toxic tactic as a young lawyer and advises other lawyers against it. D. Brooks Smith, *The Art and Etiquette of Stating Objection*, 16-MAY Pa. Law. 18, 23-24 (1994).

44. Standards for the Prosecution Function § 6-3.4(a).

45. *Id*.

46. Model Code of Judicial Conduct: Canon 2, Rule 2.10(a).

47. Model Code of Judicial Conduct: Canon 2, Rule 2.10(a), cmt. 1.

48. Standards for the Prosecution Function § 6-3.5(b).

49. Standards for the Prosecution Function § 6-3.5(b).

50. *See, e.g.*, State v. Plunkett, 257 Kan. 135, 139-41 (1995) (trial judge's response to counsel's objection was discourteous and disparaging because it "implied to the jury that counsel was acting unprofessionally.").

51. People v. Watson, No. B163931, 2003 WL 23028881, at *11 (Cal. Ct. App. Dec. 30, 2003).

52. *Id.*

53. Standards for the Prosecution Function § 6-3.5(a).

54. Bloxam v. State, 600 P.2d 341, 343 (Okla. Crim. App. 1979).

55. *Id*.

56. *Id*.

57. *See, e.g.*, State v. Sperry, 267 Kan. 287, 308 (1999).

58. Even though it is much less perilous to the administration of justice for criminal defense lawyers to injudiciously exclaim that the prosecutor knows something is improper, defense lawyers should set an example for the prosecution and courts by not making this objection. *Contra*, State v. Lanos, 223 P. 1065, 1067 (Utah 1924); Houlton v. State, 48 So.2d 11 (Ala. Crim. App. 1950); State v. Kahalewai, 516 P.2d 336, 341 (Haw. 1973); Eddy v. State, 353 So.2d 67, 73 (Ala. Crim. App. 1977); Perkins v. State, 630 S.W.2d 298, 303 (Tex. Ct. App. 1981); Marrero v. State, 478 So.2d 1155, 1156 (Fla. Dist. Ct. App. 1985); State v. Sellers, 710 S.W.2d 398, 401 (Mo. Ct. App. 1986); Lanier v. State, 533 So.2d 473, 487 (Miss. 1988); Ciak v. United States, 59 F.3d 296, 300 (2d Cir. 1995); Jenkins v. State, 959 S.W.2d 57, 61 (Ark. Ct. App. 1997); Jefferson v. State, 276 S.W.3d 214, 226 (Ark. 2008); Cunningkin v. State, 2009 Ark. App. 136, at *2 (Ark. Ct. App. Feb. 25, 2009) (not published in Southwestern Reporter).

59. Standards for the Prosecution Function § 3-1.4(b); MRPC 3.4(e).

60. Standards for the Prosecution Function § 6-2.4.

61. Monroe H. Freedman, *Henry Lord Brougham and Resolute Lawyering*, 37 Advoc. Q. 403 (2011) (publication of Hofstra University Law School) (quoting 2 The Trial of Queen Caroline 3 (1821)); *see also* defense counsel's duty to object to questions the court puts to witnesses (Fed. R. Evid. 614(c); United States v. Latimer, 548 F.2d 311 (10th Cir. 1977); United States v. Albers, 93 F.3d 1469 (10 Cir. 1996)); and defense counsel's duty to request recusal of the judge (United States v. Cooper (in re Zalkind), 872 F.2d 1, 5 (1st Cir. 1989)).

62. *Henry Lord Brougham and Resolute Lawyering*, at 403.

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