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APPELLATE TIP: OBJECT TO ATTORNEY MISCONDUCT DURING TRIAL TO PRESERVE THE ISSUE FOR APPEAL

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Prejudicial attorney misconduct during trial can be grounds for a new trial motion and subsequent appeal. Typically, the misconduct occurs during closing argument or, less frequently, opening statement. Although courts give counsel "wide latitude in closing argument to comment on the evidence and argue all reasonable inferences from it," *State v. Moody*, 208 Ariz. 424, 464, ¶ 180 (2004), that latitude is bounded by ethical obligations and legal limitations. For example, Arizona ethical rules provide that during trial, a lawyer must not: (1) "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence"; (2) "assert personal knowledge of facts in issue except when testifying as a witness"; or "state 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." ER 3.4(e), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

Trial courts may grant a motion for a new trial based on attorney misconduct only in "the most serious cases in order to prevent a miscarriage of justice." *Ritchie v. Krasner*, 221 Ariz. 288, 303, ¶ 52 (App. 2009). Misconduct alone will not warrant a new trial, but the trial court can find prejudice when:

(1) "the misconduct is significant," especially if it involves knowing, deliberate violations of rules or court orders; (2) "the misconduct is prejudicial in nature because it involves essential and important issues, but the extent is impossible to determine in a close case"; and (3) "the misconduct is apparently successful in achieving its goals." *Leavy v. Parsell*, 188 Ariz. 69, 73 (1997). In cases where these factors are present, "prejudice should be inferred" absent evidence to the contrary. *Id.*

To preserve the issue of attorney misconduct for appeal, counsel generally must object to the misconduct when it occurs and seek a curative instruction or a mistrial. *See Grant v. Arizona Pub. Serv. Co.*, 133 Ariz. 434, 451 (1982); *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 305, ¶ 16 (App. 1999). Otherwise, the objection is waived absent "serious misconduct" that "actually influence[d] the verdict." *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 364, ¶ 56 (App. 2014). An objection may be appropriate when, for example, opposing counsel:

- Invites jurors to place themselves or a family member in the shoes of one of the litigants (i.e., makes a "golden rule" argument);
- Personally attacks you, your client, or a witness;
- Asks the jury to "punish" the defendant or "send a message" in cases that do not include a punitive damages claim;
- "Vouches" for the veracity of a witness or otherwise refers to his or her own personal beliefs about the evidence or witness testimony;
- Misstates the evidence, asserts "facts" not in evidence, or draws unsupported inferences;
- Mischaracterizes a ruling by the court, such as arguing that the refusal to direct a verdict for the defendant indicates that recovery is warranted;
- Refers to impermissible matters such as insurance or remarriage of a wrongful death plaintiff;
- Refers to a party's wealth (unless punitive damages are at issue), poverty, or ability to satisfy a judgment;
- Refers to other verdicts; or
- Appeals to racial, ethnic, or religious prejudices.

Whether to object to attorney misconduct during opening statement or closing argument is one of the more difficult tactical choices to be made during trial and is outside the scope of this tip. But trial counsel should always remain alert for improper statements and be prepared to object when appropriate.