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Constraining Opinions and the Ethics of 'I Believe'

By Joel Cohen

"What one believes is irrelevant in physics"[1]

This tenet doesn't only exist in the world of Stephen Hawking or those of his ilk. In the law, too, the personal beliefs of a lawyer (whose role it is to advocate) have no place in the courtroom. This said, some weeks back, Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit guest lectured a class on "How Judges Decide," which I co-teach at Fordham Law School. While discussing the role of the clerk in the judge/clerk relationship, he described the duties of the clerk, once the judge decides how he intends to rule in a written opinion.

For Leval, the duty of the clerk in initially drafting an opinion (which will go through many versions and invariably be stripped apart by the judge), is to write the best draft given the judge's direction as to how he wants to rule—for, after all, in that process the clerk is truly the judge's advocate. As Leval articulated it, being that advocate is indeed the role of any lawyer, whether employed by a private litigant, the government or, in this instance, the judge for whom he clerks.

Moreover, the clerk's personal "beliefs" as to the correctness of how the judge intends to vote or author his opinion are irrelevant (other than, perhaps, in a private conversation with the judge). As Leval stated it, and as he explained to the class of future lawyers, there is similarly no place for a lawyer to argue before a judge or, even more so, a jury, "I believe." The lawyer's personal beliefs are flatly irrelevant. More to the point here, the pronouncements by a litigating

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[1] *The Theory of Everything*, attributed to Stephen Hawking, Working Title Films, 2014.

lawyer of those beliefs in open court are verboten. The lawyer's appropriate articulation must be "Our position is…." Nothing less, and indeed nothing more!

Ethics Rules

A lawyer most clearly has an ethical obligation to avoid sharing her personal beliefs in argument to the court or jury. Whether couched in "I believe" or "I am telling you" or "I know" or "I guarantee" or other similar language, the fundamental rule—that a lawyer must not insert her opinion into the proceedings— is found not only in civil and criminal case law, but is a matter of black letter pronouncement in Rule 3.4 (d) of the New York Rules of Professional Conduct. Stated there,

> A lawyer shall not…(d) in appearing before a tribunal on behalf of a client:
>
> (2) assert personal knowledge of facts in issue except when testifying as a witness;
>
> (3) assert 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 but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein…"[2]

But why shouldn't lawyers insert their beliefs into the proceedings? Can't an argument be made that is precisely what lawyers should do in order to fiercely advocate for the client? In a word, "no," and for myriad reasons.

A Prosecutor's Special Duty

A prosecutor has a special duty to the truth—he "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….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."[3]

That a prosecutor, cloaked with the authority of the government,[4] must not insert her personal belief or opinion into proceedings is manifest and the "policies underlying this proscription go

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[2] 22 N.Y.C.R.R. 1200, Rule 3.4 (d) (emphasis added); see also ABA Model Rule of Professional Conduct 3.4(e); *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, 3d Ed., Standards 3-5.8 (for prosecutors) and 4-7.7 (for defense counsel).

[3] *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

[4] *U.S. v. Modica*, 663 F.2d 1173, 1178 (2d Cir. 1981).

to the heart of a fair trial."[5] The Supreme Court has described the mischief a prosecutor's vouching can bring:

"such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence."[6]

A prosecutor's "belief" puts her own credibility at issue and can act as "unsworn, unchecked testimony," exploiting the tremendous influence of the prosecutor's office.[7] "[I]mproper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."[8] Accordingly, case law finds it particularly improper to discuss one's own beliefs if "phrased to leave the impression that the prosecutor's opinion is based on matters in the investigative file and not in the trial evidence."[9]

Defense Counsel

Defense counsel is not shrouded in governmental authority, nor is he duty-bound to seek justice—his role is to advocate for his client. Nonetheless, he too is prohibited from interjecting personal beliefs into argument.[10]

Defense counsel, however, is typically afforded somewhat more leeway. In *U.S. v. Spinelli*,[11] the government attempted to defend patently indefensible statements made by the prosecutor during rebuttal summation (counsel argued that none of the cooperating witnesses "ever lied under oath or perjured themselves"[12]) by asserting that the challenged statement was in response to defense counsel's "persistent attacks on the credibility of the government's

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5 *Id.*

6 *U.S. v. Young*, 470 U.S. 1, 18 (1984).

7 *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, 3d Ed., Standard 3-5.8 Commentary; Bennett L. Gershman, "Prosecutorial Misconduct," 2d ed., §11.22.

8 *Id*; *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

9 *Modica* at 1178; *U.S. v. Spinelli*, 551 F 3d 159, 168 (2d Cir. 2008) ("*Spinelli*").

10 *U.S. v. Young*, 470 U.S. 1, 8 (1984); *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, 3d Ed., Standard 4-7.7.

11 *See 8, supra*.

12 *Id. 168-169*.

witnesses."[13] Criticizing the prosecutor's comments (although ultimately holding the statements did not require a reversal), the court recognized that defense counsel had the right to argue that a cooperating accomplice falsely accused the defendant in order to get a better deal. Such frankly typical arguments could not justify the prosecutor's personally vouching for a witness' veracity.[14]

However, defense counsel cannot insert his personal beliefs into an argument to bait a prosecutor into vouching for a witness and expect that a conviction will be reversed.[15] The "invited response" or "invited reply" rule was discussed in *Lawn v. U.S.*[16] There, the Supreme Court easily rejected defendant's argument that the prosecutor's closing summation—which included: "[w]e vouch for [witnesses] because we think they are telling the truth"[17]—was prejudicial as it was defense counsel who opened the door when he argued that those same witnesses were admitted perjurers. Because a prosecutor's conduct must be evaluated in the context of the totality of the proceeding, courts have generally "refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray."[18]

Case Law

In *U.S. v. Modica*,[19] the Second Circuit considered a prosecutor's improper comments to the jury, suggesting that a witness was "scared" because of some mysterious third person and his use of the word "I," as in "I'm telling you" more than 60 times during summation. (In other words, the prosecutor relied on "I believe…") In considering whether to reverse the conviction, the court looked to the totality of the circumstances and concluded that the prosecutor's improper and uncorrected remarks "did not result in substantial prejudice…."[20]

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13 *Id.*

14 *Id.*

15 *U.S. v. Young*, 470 U.S. 1, 8 (1984); *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, 3d Ed., Standard 4-7.7, Commentary.

16 355 U.S. 339 (1958).

17 *Id.* at 360, fn 15.

18 *U.S. v. Young*, 470 U.S. 1, 12 (1984); see also, *Lawn v. U.S.*, 355 U.S. 339 (1958).

19 *See 3, supra*.

20 *Modica* at 1182 (acknowledging that the court "has often brandished the sword of reversal only to resheath it in the absence of substantial prejudice").

True, courts do not take the drastic step of reversing convictions lightly.[21] And absent substantial prejudice, courts will not order a new trial. But the court can address ethical violations (even creatively) and take steps to insure that counsel does not insert his beliefs into argument. The Modica court reminded judges that "[t]he ABA Standards for Criminal Justice recognize that '[i]t is the responsibility of the [trial] court to ensure that final argument to the jury is kept within proper bounds'"[22] and called for courts to mete out alternate deterrents where warranted. It thus warned counsel that the court could (perhaps should) exercise one or more available options: At the trial level, a court can strike the remark, instruct the jury, cut off an improper argument, or—in a particularly egregious circumstance—grant a motion for a mistrial.[23] The court can also identify and reprimand the prosecutor by name in a published opinion and even initiate disciplinary action.[24]

Something else. In *People v. Moye*,[25] defense counsel made improper arguments to the jury, but the prosecutor's response went too far—the prosecutor vouched for a police witness telling the jury that if the officer lied, the District Attorney should fire him (i.e., the prosecutor) as he was present when the officer acted.[26] According to the Appellate Division, First Department's 3-2 majority, as affirmed by the Court of Appeals, this behavior amounted to "an egregious violation of the unsworn witness rule" and required that the conviction be vacated and remanded.[27]

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[21] *Modica* at 1181 ("…determining the existence of substantial prejudice involves three factors: the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements.") Courts will vacate or reverse convictions, however, when the facts (often concerning multiple failures by the prosecution) warrant. *See, e.g.*, *People v. Puglisi*, 44 N.Y.2d 748 (1978) (vouching for witness and agreeing to take a lie detector test); *People v. Lee*, 79 A.D.2d 641 (2d Dept. 1980) (stating that only a "nut" on the jury would believe defendant's "cock and bull story"); *People v. McReynolds*, 175 A.D.2d 31, 32 (1st Dept. 1991); *People v. Frederick*, 53 A.D.3d 1088 (4th Dept. 2008); *U.S. v. Grunberger*, 431 F.2d 1062, 1068 (2d Cir. 1970) ("I don't know of a case where the evidence has been as strong as it has been in this case to establish" guilt); *U.S. v. Drummond*, 481 F.2d 62, 64 (2d Cir. 1973) ("I submit to you that the testimony [of witnesses] was to be believed" and "Why the government would do that, I don't know"); *Floyd v. Meachum*, 907 F.2d 347, 351 (2d Cir. 1990) (among others, "if you believe I've intentionally put on any perjured testimony…that even though…I am here as the prosecutor for…Connecticut…acquit this man"); *U.S. v. Certified Environmental Services*, 753 F.3d 72, 95 (2d Cir. 2014) (arguing, among other things, that there are things "you don't know about and we can't go into").

[22] *Modica* at 1185 citing ABA Standard 3-5.8.

[23] *Id.*

[24] *Id.* at 1186.

[25] 52 A.D. 3d 1 (1st Dept. 2008), aff'd 12 N.Y.3d 743 (2009).

[26] *Moye*, 52 A.D. 3d 1,5.

[27] *Id.* at 1, 2. The D.A. ultimately dismissed the case. 2012 WL 2569085*3 (S.D.N.Y.)

Not only was the offending trial prosecutor identified in the First Department's published decision, he, along with New York City and several police officers, was sued by Moye in federal court under 42 U.S.C. §1983.[28] The suit was dismissed as against the prosecutor based on immunity, but maybe, just maybe, the suit acted as a wake-up call so that he, and others, will think twice before inserting personal beliefs into argument.

Conclusion

Still, Judge Leval perhaps expressed it best. He included a footnote in *Spinelli*, although speaking for himself alone and not for the panel. As he put it, in his 30 years on the bench, he had seen too many prosecutors overreact emotionally to defense arguments. In particular, they may react that way because they genuinely believe in the truthfulness of a witness with whom they have worked over long periods of time and who has been the subject of vigorous attack by the defense. Because of that they sometimes make serious errors in rebuttal summation which, he explained, may sometimes result in mistrials or imperil the record of guilty defendants. To avoid such consequences, Leval proposed the useful precaution before delivering the rebuttal summation to review the arguments a prosecutor plans to make with an experienced prosecutor uninvolved in the trial who will therefore provide unemotional counsel.[29]

Such a step will help to insure that the prosecutor recognize and comply with his legal and ethical obligations to refrain from "I believe…." Most important, as Leval explained at Fordham, it's best for an advocate to always remember what her role is, and what it is not. That is, an advocate acting properly keeps her personal views to herself in court and does not, in what amounts to unsworn testimony, vouch for the testimony or credibility of an actual sworn witness.

[28] 2012 WL 2569085 (S.D.N.Y.)

[29] *Spinelli*, at fn 5.