‘Confirmation Bias’ and the Criminal Litigator

In his column on Ethics and Criminal Practice, Joel Cohen writes: Are prosecutors or defense counsel ethically obligated to stifle their predispositions, proneness or susceptibility to a favorable view of a witness’s account of the facts when carrying out their professional responsibilities?

By Joel Cohen

Years ago, I attended a court-ordered proceeding with an extremely avuncular state trial justice, since deceased, before whom I was prosecuting a corrupt judge. (One could say) I whined about the invective my adversary, a distinguished lawyer who primarily litigated in the civil arena, used to describe the prosecutorial conduct engaged in by myself and my colleagues that led to the indictment. The bemused judge asked whether I had ever seen (the now late) Roy Cohn’s typical motion papers in a divorce case in which he blithely swore to accounts given by his client. No, I hadn’t. Intending to pacify me, he explained: “You’ll come to learn, young man, that most criminal practitioners on both sides of the aisle are far more cautious than their civil counterparts, particularly in how easily they form, and articulate, conclusions about their opponents or their clients.” Maybe so (although I expect to receive some emails about this from the civil bar.)

Let’s assume that the judge was right — that we, criminal litigators on both sides, are more circumspect about what we’re willing to say in court or even think. Or even conclude. Would it also be true, then, that we are more cautious about the negative things we’re willing to “accept” about the individual we are investigating, or the exculpatory contentions we hear from our client or witnesses whom our client might present to us (“I swear on my mother’s eyes”)? Put differently: we might be predisposed as a prosecutor about the guilt of the target or, alternatively, as a defense lawyer about our client’s innocence.
Of course, idiosyncratically, some prosecutors, or some defense lawyers, far more readily reach a belief as to the merits of his case — the ease with which one concludes or believes in the righteousness of one’s cause (or side) in a dispute will often vary depending on the mindset of the litigator. Some lawyers tend to be more easily convinced than their colleague down the hall — and, often others can see the bias more clearly than the dug-in attorney can. Even judges are not immune — a “hangman” judge sitting non-jury will likely more readily convict than the “bleeding heart” down the hall.

President Trump complains in tweets about the “witch hunt” — Democrat-voting prosecutors are out to get him and willing to believe anything. Special Counsel Robert Mueller is of course silent, but antagonists of the president see his arch-defender, counsel Rudy Giuliani, as willing to see nothing wrong in anything the president or his campaign may have done. Is this apparent predisposition an ethics matter? Meaning, are prosecutors or defense counsel ethically obligated to stifle their predispositions, proneness or susceptibility to a favorable view of a witness’s account of the facts when carrying out their professional responsibilities?

Bias

Lawyers — primarily prosecutors, but defense attorneys as well — often spend a great deal of time investigating their case. Particularly in white-collar scenarios, by the time of an indictment, prosecutors have spoken to numerous people, reviewed volumes of documents and have developed their sense of the case. Or look at a sting operation, where a prosecutor, based on some investigative work, irretrievably believes a target will do something improper and makes the substantial commitment of time and resources to give the target just that opportunity. A lawyer will have formulated his theory of the crime — he sees it in his mind. Once a lawyer continues down his chosen path, is objectivity lost? Will a lawyer — after all that work and time — see his case through clean windows? Or does the dirt of his now dug-in assumptions obstruct his view?

The problem — that is, a litigator’s “willingness to believe”; to drink the Kool-Aid as it were — is far broader and is based on the mindset that the litigating attorney may have about the case or about the defendant. If a prosecutor sees the defendant as guilty, she is far more likely to accept a witness’s accusatory claims about the defendant — it’s simple human nature. The same if the defense attorney believes his client innocent. See, Joel Cohen, The New York Law Journal, “Can We Simply Drink the Kool-Aid?”, April 24, 2008. Indeed, “First impressions make a big cognitive difference. Lawyers must exercise great care in offering early evaluation of their clients’ legal situations because that assessment will likely become the benchmark against which subsequent events will be measured.” Ian Weinstein, Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making, Fordham Law School, 2002, 9:783, 796.
The issue of an attorney’s “predisposition” has, surprisingly, entered the lexicon in terms of a broader psychological phenomenon — “Confirmation Bias” or “Myside Bias”, i.e., “a tendency to search for or interpret information in a way that confirms one’s preconceptions” Science Daily, “Confirmation Bias”. In lay terms, “[w]hen people would like a certain idea/concept to be true, they end up believing it to be true. They are motivated by wishful thinking. This error leads the individual to stop gathering information when the evidence gathered so far confirms the views (prejudices) one would like to be true.” Shahram Heshmat, “What is Confirmation Bias”, Psychology Today, April 23 2015.

The Rules

All lawyers must “exercise independent professional judgment and render candid advice.” NY Rules of Professional Conduct 2.1; ABA Model Rules 2.1. Now, of course, in presenting the contrasting obligations of attorneys on the opposite side of the “v”, it goes without saying that a prosecutor has a seriously higher responsibility to “truth” than does a defense attorney: “A prosecutor has the responsibility as 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 and that guilt is decided upon the basis of sufficient evidence.” (NY Rules 3.8, c. 1; ABA Rules 3.8, c. 1; ABA Criminal Justice Standards for the Prosecution Function 3-1.2.) A prosecutor simply has a “heightened duty of candor” and may not “offer evidence that the prosecutor does not reasonably believe to be true …” Pros. Function 3-1.4 (although who knows what “believe” may mean in this context).

Stated perhaps most famously in Berger v. U.S., 295 U.S. 78 (1935), a prosecutor does not represent an ordinary party, but rather a sovereignty. His interest “is not that it shall win a case, but that justice shall be done … 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.”

Voiced 48 years ago, but as relevant today (perhaps more so), then Attorney General Robert H. Jackson reminded a conference of U.S. Attorneys that, a prosecutor “has more control over life, liberty and reputation than any other person in America.”

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.
Defense lawyers, too, have a duty to not allow untrue statements. Yet, while it is up to defense counsel to decide whether to call a witness, the decision of whether to call the defendant is the defendant’s alone. Defense attorneys are ethically obligated to allow the defendant to testify on his own behalf if he insists on doing so. NY Rule 3.3 (a)(3) and ABA Rule 3.3(b) make clear “...[a] lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.” However, an attorney who has strong reason to believe that his defendant-client will commit perjury, would be required to at least let the defendant testify in the narrative, rather than answer specific questions posed to him by his attorney, lest counsel suborn perjury. NY and ABA Rule 3.3, c. 7. See People v. DePallo, 96 N.Y.2d 437 (2001); Nix v Whiteside, 475 U.S. 157 (1986). Parenthetically, the late Monroe Freedman and Abbe Smith challenge whether lawyers can ever meet their ethical obligations when a client permits perjury. Understanding Lawyers’ Ethics, 4th ed. Chapter 6—“The Perjury Trilemma”.

**Conclusion**

Is an attorney’s predisposition an ethical matter? Surely, no ethics rule can fairly draw foul lines for attorneys on such amorphous ingredients as human bias in reaching determinations about guilt or innocence, and none presumptuously seek to. On some ethical considerations, professionals need instead to introspectively assess whether they are being fair — professionally fair — to the array of objective facts that have been or will be presented to them. We all have a confirmation bias — just consider your own thinking or musings before you ever heard the testimony of Brett Kavanagh or Christine Blasey Ford. When thinking about them, we wouldn’t need to keep our confirmation biases in check. Not so, though, when we’re the lawyers investigating or litigating a criminal case, on either side of the v.

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