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PROSECUTORIAL MISCONDUCT: QUELLING THE TIDE OF IMPROPER COMMENT TO THE JURY

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The public prosecutor occupies a difficult dual role in our criminal justice system. While the prosecutor's foremost responsibility is to see that justice is done, he or she is also a key participant in a criminal justice system which is undeniably adversarial in nature. Prosecutorial misconduct, which is the result of the tension between those roles, places our appellate courts in a dilemma. The paradox is that although (ideally) no prosecutorial misconduct should be tolerated, it must be tolerated, for our Constitution guarantees a criminal defendant a fair trial—but not a perfect one. Most recently the United States Supreme Court, in *Darden v. Wainwright*,[1] stated that where the error is forensic in nature,[2] appellate courts should reverse a conviction when the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a

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[1] 106 S. Ct. 2464, *reh'g denied*, 107 S. Ct. 24 (1986).

[2] Forensic misconduct is defined as "any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law." Note, *The Nature and Consequences of Forensic Misconduct in a Criminal Case*, 54 COLUM. L. REV. 946, 949 (1954).

denial of due process."[3] Therefore, except in the most egregious cases, appellate courts are placed in the uncomfortable position of condemning the prosecutor's behavior while affirming the conviction, thus fostering what an appellate judge once called "a deplorably cynical attitude towards the judiciary."[4]

The issue of forensic misconduct by prosecutors has long troubled our courts. Nearly one hundred years ago the California Supreme Court, citing error in the prosecutor's conduct during a capital murder trial, included this admonition in its opinion:

> We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence.[5]

This article will focus on one aspect of prosecutorial misconduct which has been chronicled with alarming regularity in recent state court decisions: improper prosecutorial remarks during argument to the jury in criminal trials.[6] While frustrating, I do not believe the continuing problem of such misconduct is intractable. Appellate courts can deal firmly and fairly with such improper remarks and impose sanctions other than reversal where appropriate. The most effective remedy, however, lies with prompt action by the trial participants, that is, the trial court, defense counsel and the prosecutor. Ultimately, the instances of prosecutorial abuse will be reduced only when informed and educated prosecutors police themselves.

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[3] Darden v. Wainwright, 106 S. Ct. 2464, 2472, *reh'g denied*, 107 S. Ct. 24 (1986)(quoting Donnelly v. DeChristofor, 416 U.S. 637 (1974).

In *Darden*, the prosecutor's closing argument in the capital murder trial included a statement that the defendant "shouldn't be out of his cell unless he has a leash on him. . . ." The prosecutor also remarked at one point that he wished he could see the defendant sitting in the courtroom "with no face, blown away by a shotgun." 106 S. Ct. 2472 at n.12. The Supreme Court strongly condemned these remarks yet found that they had not deprived the defendant of a fair trial.

[4] United States v. Antonelli Fireworks Co., 155 F.2d 631, 666 (2d Cir. 1946)(Frank, J., dissenting).

[5] People v. Lee Chuck, 78 Cal. 317, 328-329, 20 P. 719, 733 (1889).

[6] The problem of such improper prosecutorial argument is acute because of its effect on the jury. In the landmark case of Berger v. United States, 295 U.S. 78 (1935), Mr. Justice Sutherland, writing for the court, explained as follows:

> It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Id. at 88.

I. STANDARDS OF PROPER CONDUCT IN TRIAL ARGUMENT

In addition to obvious constitutional limitations, professional standards and ethical canons specifically govern the proper scope of the prosecutor's argument. The American Bar Association Standards for Criminal Justice: The Prosecution Function, Standards 3-5.5 and 3-5.8,[7] ("ABA Prosecution Standards") address the limits of permissible argument. Further, prosecutors themselves are keenly aware of problems in argument to the jury. In 1977, the National District Attorneys Association ("NDAA") drafted its National Prosecution Standards. NDAA Standards 17.5 and 17.17[8] set forth the boundaries for acceptable argument,

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[7] Section 3-5.5 of the American Bar Association Standards for Criminal Justice: The Prosecution Function provides:

> The prosecutor's opening statement should be confined to a brief statement of the issues in the case and to remarks on evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION § 3-5.5 (1980)(Opening Statement)[hereinafter STANDARDS FOR CRIMINAL JUSTICE]. Standard 3-5.8 reads as follows:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
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> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
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> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
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> (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

Id. at § 3-5.8 (Argument to the Jury).

[8] Standard 17.5 of the National District Attorneys Association's NATIONAL PROSECUTION STANDARDS ("NDAA") provides:

> A. The prosecutor should be afforded the opportunity to give an opening statement for the purpose of explaining the issues before the court and the procedures of the particular trial.
>
> B. The prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence at the trial.

NATIONAL PROSECUTION STANDARDS § 17.5 (National Dist. Attorneys Ass'n 1977)(Opening Statement)[hereinafter NDAA STANDARDS].

NDAA Standard 17.17 on Closing Argument reads as follows:

> A. Counsel's closing argument to the jury should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence.
>
> B. Because the prosecution bears the burden of proof, the prosecution should

with detailed commentary. Finally, the Code of Professional Responsibility[9] provides guidance for trial conduct and imposes disciplinary sanctions for improper and unethical conduct.

In reviewing these standards and rules, it is instructive to illustrate them by setting forth specific case examples showing when and how prosecutors have run afoul of these provisions during argument to the jury.

II. Argument Must Be Confined to the Evidence

In *State v. Andreason*,[10] the Utah Supreme Court reversed and remanded the defendant's conviction for theft of electrical services after the prosecutor made prejudicial and improper remarks in his closing argument. In his final appeal, the prosecutor characterized defendant's type of conduct as "pervasive" and told the jury it should be concerned about "how many who aren't innocent are turned loose."[11] The court stated that these remarks were improper because "[w]hat others did or did not do was not in evidence and was certainly not relevant to defendant's guilt or innocence."[12]

The Florida Supreme Court found similar reversible error in *State v. Wheeler*.[13] In this case, the state's high court reversed the defendant's narcotics trafficking and firearm possession convictions after the prosecutor told the jury in closing argument that defendant was selling drugs which could eventually end up on school grounds and in the jurors' own homes.[14] The state supreme court found such remarks highly prejudicial and violative of "the 'golden rule' of prosecutorial argument, that the prosecutor cannot argue to the jury that they may well be victims of the defendant's behavior if they fail to convict him."[15] The court observed

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have the opportunity to open argument and to rebut the defense's closing argument with the order of the closing statements being prosecution, defense, and prosecution again.

C. Counsel should have the discretion to comment upon the substantive law relevant to the case.

D. The prosecution should have the discretion to comment upon the defendant's failure to call witnesses under its control and favorable to its cause, excluding the defendant, when a name has been raised in opening statements or where defense has introduced the name or existence of an individual, the prosecutor should have the discretion to comment upon the defense's failure to call that witness.

Id. at § 17.17 (Closing Arguments).

[9] Model Code of Professional Responsibility (1983).

[10] 718 P.2d 400 (Utah 1986).

[11] *Id.* at 402.

[12] *Id.*

[13] 468 So.2d 978 (Fla. 1985).

[14] *Id.* at 981.

[15] *Id.*

that there was no evidence at trial or in the record that defendant ever sold drugs which ended up in school yards or jurors' homes.

These cases are examples of prosecutorial remarks concerning matters not in evidence. ABA Prosecution Standard 3-5.8(a) states that it is unprofessional for a prosecutor intentionally to misstate evidence or mislead the jury as to the inference it may draw.[16] The commentary explains that closing argument must be confined to record evidence and inferences that can reasonably and fairly be drawn from that evidence.[17] NDAA Standard 17.17A also states that counsel's closing argument should rest on the evidence.[18] Disciplinary Rule 7-106(C)(1) prohibits comment on or allusion to any matter which will not be supported by admissible evidence.[19] Thus, prosecutors should carefully review their planned remarks to be certain their closing arguments are confined to "all reasonable inferences from evidence in the record."[20]

III. Expressions of Personal Belief or Opinion Are Improper

The prosecutor's personal opinions are not properly a part of closing argument. The Ohio Supreme Court has recently reversed a criminal conviction in a case where the prosecutor repeatedly injected his own views into summation. In *State v. Smith*,[21] the prosecutor characterized defense evidence as, *inter alia*, "lies," "garbage," "a well rehearsed lie" and implied that defense counsel had conceived lies to be presented to the court.[22] The state supreme court held that such remarks prejudicially affected the defendant's right to a fair trial.[23]

ABA Prosecution Standard 3-5.8(b), the commentary to NDAA Standard 17.17 and DR 7-106(C)(4) all forbid such statements of personal belief or knowledge. It is thus wise for prosecutors to eliminate the first person singular from their closing arguments as well as to refrain from giving their personal opinions as to the credibility of witnesses or the defendant's case. As the commentary to the ABA Prosecution Standard 3-5.8(b) states, "[t]his kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as 'The evidence shows . . .' or something similar."[24]

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[16] Standards for Criminal Justice, *supra* note 7, at § 3-5.8(a).

[17] Standards for Criminal Justice: The Prosecution Function § 3-5.8(a) Commentary (1980).

[18] NDAA Standards, *supra* note 8, at § 17.17A.

[19] Model Code of Professional Responsibility DR 7-106(c)(1)(1983).

[20] Standards for Criminal Justice, *supra* note 7, at § 3-5.8(a).

[21] 14 Ohio St.3d 13, 470 N.E.2d 883 (1984).

[22] *Id.* at 14, 470 N.E.2d at 885.

[23] *Id.* at 13, 470 N.E.2d at 883.

[24] Standards for Criminal Justice: The Prosecution Function § 3-5.8(b) Commentary (1980).

IV. Remarks Should Not Be Calculated to Inflame the Passions or Prejudices of the Jury

The prosecutor's closing argument is often emotional. Certainly, impassioned argument on both sides of the aisle is heartfelt, effective and a hallmark of our criminal trials. Unfortunately, the boundary between impassioned argument and improper argument which inflames the passions or prejudices of the jury is sometimes crossed by prosecutors in summation.

One unusual case, *Hawthorne v. United States*,[25] involved a murder trial. Most of the closing argument by the prosecutor was delivered in the first person voice of the deceased victim. The prosecutor told the jury that "I on behalf of Mr. Alameda [the victim] have an opportunity to speak to you."[26] The prosecutor, evidencing a power to communicate with those in the hereafter, even described to the jury how the victim felt about his murderers after he died.[27] This argument had creative show quality and was undoubtedly impressive, but it was also a basis of reversal of the defendant's conviction. The District of Columbia Court of Appeals found the prosecutor's remarks to be inflammatory and pervasive, resulting in substantial prejudice to the defendant.[28]

In *State v. Couture*,[29] the state's opening summation in a murder trial was found to be highly inflammatory. The prosecutor referred to the co-defendants as, *inter alia* "murderous fiends," "rats" and "inhumane, unfeeling and reprehensible creatures."[30] The Connecticut Supreme Court, calling the remarks "egregious," rejected the state's harmless error contention and reversed the defendant's conviction.[31] The court's opinion stated as follows: "The prosecutor cannot pollute the waters and then claim that we should ignore his actions because the fish are not worth saving. . . . [A] failure on our part to reverse . . . would suggest that in a strong case the defendant is not entitled to a fair trial and therefore anything goes."[32]

Name-calling as in *Couture* and invitations to the jury members to put themselves in the victim's place are improper devices for use in closing argument. Such remarks run afoul of ABA Prosecution Standard 3-5.8(c) and NDAA Standard 17.17A. The commentary to NDAA Standard 17.17,

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[25] Hawthorne v. United States, 476 A.2d 164 (D.C. App. 1984).

[26] *Id.* at 170.

[27] *Id.* at 171 n. 17.

[28] *Id.* at 171.

[29] State v. Couture, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied*, 469 U.S. 1192 (1985).

[30] *Id.* at 561, 482 A.2d at 317.

[31] *Id.* at 561, 482 A.2d at 317.

[32] *Id.*

directed to inflammatory remarks, is particularly appropriate to include here:[33]

> Melodramatic and lurid rhetoric 'is especially likely to stick in the minds of the jury and influence its deliberation.'[34] The prosecutor's role is one of impartiality; his vigor must be directed solely toward the attainment of justice. Moreover, remaining within the boundaries of fair argument need not minimize the prosecutor's effectiveness.

V. The Prosecutor Should Not Raise Issues Broader Than the Guilt or Innocence of the Accused

It is likewise improper for the state to inject extraneous issue into closing argument, such as comments on the likelihood of appeal or parole, for these references can bring erroneous considerations to the jurors' decisions or diminish their sense of responsibility. Further, prosecutorial closing arguments which stress "law and order" themes, urging jurors to send a message to the community or telling jurors that the people of a community desire or expect a conviction, have both been held improper. Both ABA Standard 3-5.8(c) and NDAA Standard 17.17[35] forbid such remarks, yet recent cases evidence their continuing use.

In *Lucas v. United States*,[36] the prosecutor told the jury that if the defendant were found not guilty by reason of insanity, he would seek release from a psychiatric facility within fifty days.[37] The state's attorney in *People v. Holt*[38] claimed in closing argument that if defendant's theory as to the degree of his offense were accepted, the jury would have "guaranteed him a parole date."[39]

In *Bell v. State*,[40] the prosecutor urged the jurors to remember that, unlike the defendant in the murder trial, the victims "could not appeal their death sentence to a higher court."[41] Although not finding reversible error, the appellate court strongly disapproved of the prosecutor's re-

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[33] National Prosecution Standards § 17.17 Commentary (National Dist. Attorneys Ass'n 1979).

[34] Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969).

[35] The commentary to NDAA Standard 17.17 states in part that "the prosecutor may not relate the public sentiment regarding the case nor hypothesize concerning the effect of the verdict on society or the accused."

[36] Lucas v. United States, 497 A.2d 1070(D.C. App. 1985), *cert. denied*, 106 S. Ct. 1523 (1986).

[37] *Id.* at 1075.

[38] People v. Holt, 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984).

[39] *Id.* at 457 n. 14, 690 P.2d at 1219 n. 14, 208 Cal. Rptr. 559 n. 14.

[40] Bell v. State, 707 S.W.2d 52 (Tex. Crim. App. 1986), *withdrawn*.

[41] *Id.* at 75.

marks.[42] Likewise, in *Bertolotti v. State*,[43] where the defendant was convicted of capital murder, the prosecutor appealed to the jury to consider the message its verdict in the penalty phase would send to the community. The prosecutor urged the death sentence by stating in closing argument that "[a]nything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is, that only the victim gets the death penalty."[44] The Florida Supreme Court did not consider these comments to be reversible error, but did warn that "[t]his [court] considers this sort of prosecutorial misconduct, in the fact of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings."[45]

VI. Suggested Remedies

It is the rare case in which the prosecutor maliciously or deliberately uses improper argument to secure a conviction. Yet the fact that such excesses are unintentional does not mitigate the prejudicial effect of an improper summation, nor did it prevent reversal in many of the cases previously discussed. Reviewing courts have evidenced their appreciation of the prosecutor's predicament. The ABA Prosecution Standards, the NDAA Standards and the Code of Professional Responsibility do not provide easy-to-follow "bright line" rules. Indeed, one commentator has referred to the prosecutor's closing argument as "walking a tightrope."[46]

The foregoing cases demonstrate, however, an increasing judicial impatience with such blatantly offensive remarks. Courts and commentators have proposed various measures to reduce the instance of improper conduct in closing argument.

A. The Role of Appellate Courts

One sanction, suggested by several commentators, is more frequent reversal of criminal convictions.[47] Nevertheless, appellate courts are justifiably reluctant to overturn convictions, unless there has been substantial prejudice to the defendant, because of an unwillingness to impose on society the added expense of money and resources involved in

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[42] *Id.* at 76.

[43] Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

[44] *Id.* at 133 n.3.

[45] *Id.* at 133.

[46] Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. Crim. L. & Criminology 22, 22 (1973).

[47] *See, e.g.*, Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 658-68 (1972); Note, *Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role As An Advocate*, 14 Suffolk U.L. Rev. 1095, 1133-34 (1980); Singer, *Forensic Misconduct by Federal Prosecutors - and How It Grew*, 20 Ala. L. Rev. 227, 262-69 (1968).

a retrial.[48] This is especially so where the evidence of guilt is overwhelming.

Short of reversal, one court has stated that misconduct might be deterred by "[a] reprimand in a published opinion that names the prosecutor . . . ."[49] It has also been suggested that appellate courts could require the offending prosecutor to defend his or her trial conduct by arguing the case on appeal.[50] Two courts have indicated that they might refer prosecutors who make improper and unethical remarks for disciplinary proceedings under the Code of Professional Responsibility.[51]

B. The Roles of Trial Participants

1. Defense Counsel

There are a number of ways in which defense counsel can act to avert instances of improper argument by a prosecutor. First, defense counsel must ensure that his or her own argument is within permissible limits so as not to invite an improper response. In this regard, defense counsel must be familiar with and adhere to the American Bar Association Standards for Criminal Justice: The Defense Function, Standards 4-7.4 and 4-7.8[52] governing opening argument and summation.

Secondly, defense counsel could offer a motion *in limine* prior to closing argument if it is anticipated that the prosecutor is bent on making improper remarks. This would serve to bring to both the prosecutor's and the trial court's attention the boundaries of acceptable argument and stress compliance with the standards. It could also avert an unwitting prejudicial remark at a point in time when the state could still effectively redraft its argument.

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[48] The difficulty of reversal is compounded by the fact that defense attorneys often do not raise objections to improper remarks, for "tactical" reasons or otherwise. *See* Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.14, *reh'g denied*, 107 S. Ct. 24 (1986). In the absence of plain error, many appellate courts will not consider an assignment of error predicated on such misconduct if there has been no objection.

[49] United States v. Modica, 663 F.2d 1173, 1185 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[50] *See* Note, *supra* note 38, at 1133.

[51] United States v. Modica, 663 F.2d at 1185 n. 9; Bertolotti v. State, 476 So. 2d at 133. *See also* United States v. Hasting, 461 U.S. 499, 506 n. 5 (1983). One former prosecutor and now legal scholar has suggested that because neither opposing counsel nor the trial courts can realistically be expected to initiate disciplinary action for unethical remarks in argument by attorneys, enforcement of disciplinary sanctions should be initiated by the appellate courts. This commentator has urged adoption of a disciplinary rule that any allegations of professional misconduct (whether by prosecution or defense) coming to the attention of appellate courts be automatically referred to the Disciplinary Counsel for investigation. 6 J. PALMER, OHIO EVIDENCE REVIEW 890 (1986).

[52] STANDARDS FOR CRIMINAL JUSTICE, *supra* note 7, at §§ 4-7.4, 4-7.8.

Defense counsel must also preserve error for appeal. This conclusion is based on frequent review of cases in which the defense attorney, whether for tactical reasons or otherwise, failed to object to improper prosecutorial argument.[53] It is this author's view that the risks of objection[54] are most often outweighed by the benefits of preserving error for appeal. In the absence of an objection, defense counsel faces the daunting task of proving that improper prosecutorial remarks resulted in plain error, requiring reversal.

2. The Trial Court

Both judges and commentators have urged trial courts to become more active in supervising the conduct of counsel. The trial judge can interrupt if he anticipates an improper line of argument and cut it off.[55] If improper remarks are made, the judge can order them stricken and, if a new trial is not called for, a forceful curative or limiting instruction can be given.[56] The trial court may caution the prosecutor on the spot or, if warranted, reprimand him or her after the jury has been excused.[57] In extreme or continuing cases of flagrant misconduct in violation of court order, a contempt citation could be issued or a mistrial declared.[58] Counsel should also be forewarned that arguments must be kept within bounds.[59] Finally, trial courts have been urged to curtail the fair reply doctrine. If defense counsel makes an improper remark in argument, it has been suggested that judges minimize the effect of the remark rather than granting license to the prosecutor to retaliate in kind.[60]

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[53] *See, e.g.*, Darden v. Wainwright 106 S. Ct. at 2473 n. 14, where the court noted that defense counsel made a tactical decision not to object to the prosecutor's improper remarks in hopes of encouraging the prosecutor to commit reversible error.

[54] It has been suggested that the decision to object can sometimes be risky. Juries may view objections, especially during closing argument, as rude or may regard objections as a tactic to obscure the fact that the defense's case is weak. Objections may also call the jury's attention to an improper remark it otherwise might have ignored. Thus, defense counsel may, at times, be reluctant to object. *See* Note, *supra* note 38, at 1129-30.

[55] United States v. Modica, 663 F.2d at 1185.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See* Note, *supra* note 38, at 1133.

[60] *Id.* at 1132-33. This approach has also been endorsed by the United States Supreme Court. In United States v. Young, 470 U.S. 1 (1985), the defendant claimed that certain improper prosecutorial remarks in closing argument, made in response to improper comments by defense counsel, rose to the level of plain error, requiring reversal. Although rejecting defendant's claim, the Court's majority opinion called this invited response situation "an all too common occurrence in criminal trials. . . ." *Id.* at 11. As the Court observed "[p]lainly the better remedy in this case, . . . would have been for the District Judge

3. The Prosecutor

Those few prosecutors who repeatedly transgress the limits of proper argument must be condemned by their peers. Ultimately, prosecutors must make clear within their own ranks that abuse of the rules of argument is unacceptable conduct. One way in which this can be achieved is by continuing legal education, stressing the proper and improper bounds of trial argument. Instruction can and should be given to new prosecutors by seasoned attorneys. Moreover, education should start while a potential prosecutor is still in law school.[61] The legal and ethical limits of argument to the jury can be explored in clinical programs, criminal law or procedure classes and in ethics studies. Increased emphasis by law schools on trial ethics could be complemented by inclusion on state bar examinations of pertinent ethical questions. The ABA Prosecution Standards, NDAA Standards and the Code of Professional Responsibility should be required reading for each prosecutor as he or she prepares the argument for trial.

It would be a disservice to the profession to give any credence to a suggestion that most prosecutors are ruthless avenging angels who would go to any length for a guilty verdict. It has been my experience, both as a trial and appellate judge, that the overwhelming majority of prosecutors are hardworking, deeply conscientious attorneys who desire to see that justice is done, rather than to add another conviction to their record. These prosecutors are undoubtedly dismayed when the reputation of their profession is diminished by rebukes for improper or unethical argument.

Such prosecutorial misconduct need not be an inevitable byproduct of our criminal justice system. Through education, diligence and vigilance at trial, the bench and bar must encourage respect for the standards which guide responsible argument. Prosecutors must stress that proper argument is the most effective and efficient means to the ends of justice and a fair trial. Preventing the occurrence of improper argument is far preferable to leaving it to the courts to reverse convictions or impose sanctions after the damage has already been done.

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to deal with the improper argument of the defense counsel promptly and thus blunt the need for the prosecutor to respond." *Id.* at 13.

[61] For example, one law professor states that he devotes the first ten minutes of each criminal procedure class to discussion of an assigned ethics problem. Each student is required to prepare a written memorandum concerning that problem. The need for such ethics study is apparent. As the professor writes, "[m]ost of the ethical standards for young law students come from television and movies, with the emphasis on winning at all costs. Some of the attitudes expressed, . . . are quite distressing. Indeed, it takes some time to change attitudes." 6 J. PALMER, *supra* note 42, at 908.