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# The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?

*Edward M. Genson\**  
*and Marc W. Martin\*\**

During the trial, the prosecutor referred to defense counsel as "the defendant's mouthpiece" and told the jury that the defense counsel's closing argument was a "lie. A bald face lie." After the jury found the defendant guilty of murder, a death penalty hearing began before the jury. There, the prosecutor conducted a cross-examination in which he asked the defendant's psychiatric witness, "Can the jurors take your condition into account, Doctor?" The prosecutor also asked, "What is the oldest living profession in the world?" The witness responded, "I believe the creation of chaos by Lawyers," to which, the prosecutor responded, "[o]r shrinks." The prosecutor went on to describe the defendant's witness as "a member of the oldest profession known to man," a "liar," and a "fraud." Following the heated cross-examination, the witness approached the prosecutor and whispered something in his ear. With the jury sitting in the box, the prosecutor jumped up and repeated what the Illinois Supreme Court described as an "obscene and disgusting epitaph," too despicable to be repeated in a reported opinion. When called before the bar to explain his conduct, the prosecutor told the judge that he wanted "to deck" the witness. The prosecutor also told the judge that "[t]he man made a circus of this courtroom. He is a whore and conducted himself as a whore." Later, the prosecutor and defense counsel were called into chambers where the prosecutor referred to defense counsel as a "liar" and a "son of a bitch." During another conference in chambers, the prosecutor "took it upon himself to abruptly walk out . . . and in the process he made an obscene gesture at defense counsel."<sup>1</sup>

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1. *People v. Lyles*, 106 Ill. 2d 373, 385-412, 478 N.E.2d 291, 295-308 (1985).

## I. INTRODUCTION

This episode transpired in a Cook County Courtroom.<sup>2</sup> While the conduct at issue above might be outlandish, it is yet another example of improper prosecutorial conduct which often has occurred in this state.<sup>3</sup> Illinois courts have become alarmed at repeated instances of prosecutorial misconduct.<sup>4</sup> Frustrated by the reoccurrences of prosecutorial misconduct, the Illinois Appellate Court has repeatedly asserted that such impropriety should be handled in disciplinary proceedings regardless of whether it prompts reversal.<sup>5</sup> Similarly, the United States Supreme Court has recommended that, rather than reversing a defendant's conviction, a court should address prosecutorial misconduct by instituting disciplinary proceedings or by chastising the guilty prosecutor through identification in a published opinion.<sup>6</sup>

Notwithstanding the suggestions of the courts, Illinois disciplinary authorities rarely have instituted disciplinary proceedings against prosecutors for courtroom misconduct. In fact, Illinois can boast of only one published opinion, albeit an anomalous one at best, pertaining to allegations of prosecutorial misconduct in the disciplinary context.<sup>7</sup> As an alternative to formal disciplinary measures, the Illinois Appellate Court has often reversed a defendant's conviction as a sanction for improper and prejudicial

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2. *Id.* at 382, 478 N.E.2d at 293.

3. The focus of this article shall be primarily on improper trial conduct. Instances of forensic misconduct most often occur during closing argument. Improper prosecutorial conduct however, has not been limited to summation and thus the terms "prosecutorial misconduct" or "courtroom misconduct" used herein embrace improper statements made by prosecutors during any facet of trial.

4. *See, e.g.,* *People v. Robinson*, 125 Ill. App. 3d 1077, 1080-81, 467 N.E.2d 291, 294-95 (1st Dist. 1984). In *Robinson*, the court noted:

This court deals regularly with issues regarding improper and prejudicial prosecutorial comments and the frequency with which such conduct occurs is disturbing. Apparently, some prosecutors have not heeded the warnings of this court and persist in engaging in whatever conduct they believe will assure convictions. However, the manner in which a case is tried is as important as the outcome of the trial. Disparaging remarks and improper arguments only serve to disgrace the attorney making the remarks, tarnish the reputation of the office, and increase the possibility of reversal.

*Id.*

5. *People v. Wilson*, 123 Ill. App. 3d 798, 806, 463 N.E.2d 890, 896 (1st Dist. 1984); *People v. Starks*, 116 Ill. App. 3d 384, 396, 451 N.E.2d 1298, 1306-07 (1st Dist. 1983); *People v. Shepard*, 114 Ill. App. 3d 598, 602, 449 N.E.2d 222, 225 (1st Dist. 1983).

6. *United States v. Hastings*, 461 U.S. 499, 506 n.5 (1983); *Imbler v. Patchman*, 424 U.S. 409, 429 (1976).

7. *See In re Friedman*, 76 Ill. 2d 392, 392 N.E.2d 1333 (1979) (respondent discharged for knowingly creating false evidence for purpose of exposing corrupt attorneys).

prosecutorial conduct.<sup>8</sup> While reversal is necessary to protect the defendant's rights, it fails to address the problem from a professional standpoint. Thus, it is time for the bar to refocus its position on dealing with unethical prosecutors.

This article will examine the problem of prosecutorial misconduct in Illinois. First, the various professional responsibility codifications which regulate prosecutorial conduct will be discussed. Next, the article will note the boundaries of permissible and impermissible prosecutorial conduct as delineated by a multitude of Illinois decisions. After examining how prosecutorial misconduct has been handled outside the context of a direct appeal of a defendant's conviction, the article will conclude by recommending new remedies for this all too frequent problem.

## II. PROFESSIONAL RESPONSIBILITY CODIFICATIONS AND THE ASSESSMENT OF PROSECUTORIAL MISCONDUCT

The prosecutor's duty differs from that of the ordinary advocate — his duty "is to seek justice, not merely convict."<sup>9</sup> As such, the prosecutor owes a duty to the defendant as well as to the sovereign.<sup>10</sup> Accordingly, the prosecutor must avoid any conduct which could impede the defendant's right to a fair trial. Improper prosecutorial comments, however, do nothing but fly in the face of the prosecutor's well-established responsibilities and frustrate the defendant's constitutional right to an impartial trial.<sup>11</sup>

The various codes of professional responsibility aptly put prose-

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8. See *infra* notes 48-51, 54-58, 62-65, 67-70, 72-79, 81-83 and accompanying text.

9. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 3-1.1(b) (1980). See also *Berger v. United States*, 295 U.S. 78 (1935). In *Berger*, Justice Sutherland provided the following often quoted statement:

The United States Attorney 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is 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.

*Id.* at 88.

10. *People v. Oden*, 20 Ill. 2d 470, 483, 170 N.E.2d 582, 589 (1960). In *Oden*, the court stated that a prosecutor "is a representative of all the people, including the defendant, and it is as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen." *Id.*

11. See, e.g., *People v. Ray*, 126 Ill. App. 3d 656, 660, 467 N.E.2d 1078, 1081 (1st Dist. 1984).

cutors on notice of the permissible boundaries of conduct.<sup>12</sup> The most comprehensive promulgations relating to prosecutorial courtroom conduct are the American Bar Association's Criminal Justice Standards (the "Standards").<sup>13</sup> In addition, the American Bar Association's Model Rules of Professional Conduct (the "Model Rules") provide a source of ethical guidelines for the prosecutorial advocate.<sup>14</sup> Finally, the Illinois Code of Professional Responsibility, modeled after the American Bar Association's Code of Professional Responsibility, provides binding ethical guidelines for Illinois prosecutors.<sup>15</sup> Illinois has adopted neither the Model Rules nor the Standards. Consequently, while these provisions may be salutary, they are not specifically enforceable in Illinois disciplinary proceedings.

### A. *The Criminal Justice Standards*

Part V of the Standards furnish guidelines for the prosecutor during all stages of a criminal trial.<sup>16</sup> For example, Standard 3-5.2 governs behavior in the courtroom. This standard provides that a prosecutor should support the dignity of the court by strictly adhering to rules of decorum and maintaining a professional attitude towards all participants in the courtroom.<sup>17</sup> It also instructs a

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12. See generally CODE OF PROFESSIONAL RESPONSIBILITY Rules 1-101 to -102, ILL. REV. STAT. ch. 110A, CANONS 1-101 to -102 (1985); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1984) [hereinafter MODEL RULES]; STANDARDS RELATING TO THE PROSECUTION FUNCTION § 1.1 (1980) [hereinafter STANDARDS FOR CRIMINAL JUSTICE].

13. See S. Schiller, THE AMERICAN BAR ASSOCIATION STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE: ILLINOIS COMPLIANCE ix (1980). The Standards are not binding in Illinois. *Id.* at xiii. They are useful, however, in evaluating the ethical duties of a prosecutor. Disciplinary tribunals may use them as a reference in examining instances of misconduct. Moreover, a prosecutor's office is free to adopt the Standards as a matter of internal office policy. Many jurisdictions have adopted the Standards. MODEL RULES, *supra* note 12, at Rule 3.8 comment.

14. Like the Standards, the MODEL RULES are not binding in Illinois. The American Bar Association has published two ethics codes, the CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE] and the MODEL RULES, *supra* note 12. The MODEL CODE has been adopted in many states, including Illinois. CODE OF PROFESSIONAL RESPONSIBILITY RULES 1-101 to 9-102, ILL. REV. STAT. ch. 110A, CANONS 1-101 to 9-102 (1985). In 1980, the American Bar Association promulgated the MODEL RULES which purport to update the MODEL CODE.

15. CODE OF PROFESSIONAL RESPONSIBILITY RULE 1-101, ILL. REV. STAT. ch. 110A, CANON 1-101 (1985).

16. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at §§ 5.1 *et seq.* (1980).

17. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.2. This standard provides:

(a) The prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifest-

prosecutor to address the court, rather than opposing counsel, and prohibits any tactics designed to annoy the court or opposing counsel.<sup>18</sup> This standard further states that the prosecutor should be punctual and comply with court orders.<sup>19</sup>

The boundaries in which the prosecutor must remain during opening statements are set forth in Standard 3-5.5.<sup>20</sup> According to this standard, a prosecutor's opening statement should be confined to a brief summary of the issues in the case and good faith remarks about admissible evidence.<sup>21</sup>

The presentation of evidence is governed by Standard 3-5.6.<sup>22</sup>

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ing an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.

(b) When court is in session the prosecutor should address the court, not opposing counsel, on all matters relating to the case.

(c) It is unprofessional conduct for a prosecutor to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel.

(d) A prosecutor should comply promptly with all orders and directives of the court, but the prosecutor has a duty to have the record reflect adverse rulings or judicial conduct which he considers prejudicial. The prosecutor has a right to make respectful requests for reconsideration of adverse rulings.

(e) A prosecutor should be punctual in all court appearances and in the submission of all motions, briefs, and other papers.

(f) Prosecutors should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.

*Id.*

18. *Id.*

19. *Id.*

20. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.5 (1980). This standard 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.

*Id.*

21. *Id.*

22. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.6. This standard provides:

(a) It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

(b) It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) It is unprofessional conduct for a prosecutor to permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) It is unprofessional conduct to tender tangible evidence in the view of the

Under this standard, it is unprofessional conduct for a prosecutor to offer knowingly false evidence or testimony, bring objectionable or inadmissible matters to the attention of the judge or jury, display prejudicial tangible evidence to judge or jury prior to tendering the evidence in good faith, or tender prejudicial tangible evidence absent a reasonable basis for admissibility.<sup>23</sup>

Standard 3-5.7 delineates a prosecutor's ethical duties with respect to the examination of witnesses.<sup>24</sup> This standard states that witnesses should be examined fairly, objectively and with respect for their privacy.<sup>25</sup> If the prosecutor knows that a witness is testifying truthfully, then he should not use cross-examination to discredit the witness.<sup>26</sup> If a prosecutor knows that a witness will invoke his privilege against self-incrimination, then the prosecutor should not call the witness and to do so may constitute unprofessional conduct.<sup>27</sup> Furthermore, a prosecutor should not ask a question for which a good faith factual predicate is lacking.<sup>28</sup>

While closing arguments are a prolific source of instances of improper prosecutorial conduct,<sup>29</sup> the guidelines for ethical behavior in argument are relatively simple. A prosecutor may argue all rea-

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judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence it should be by an offer of proof and a ruling obtained.

*Id.*

23. *Id.*

24. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.7. This standard provides:

(a) The interrogation of all witnesses should be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum.

(b) The prosecutor's belief that the witness is telling the truth does not necessarily preclude cross-examination, but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination to discredit or undermine a witness if he knows the witness is testifying truthfully.

(c) A prosecutor should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in the code of professional responsibility, doing so will constitute unprofessional conduct.

(d) It is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

*Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Crump, *The Function and Limits of Prosecution Jury Argument*, 28 Sw. L.J. 505 (1975); Goodman, *Crisis in Closing Argument*, 73 ILL. B.J. 120, (1985); Merrill, *The Lim-*

sonable inferences from the record.<sup>30</sup> It is considered unprofessional conduct, however, to misstate evidence intentionally, mislead the jury, express a personal belief or make "arguments calculated to inflame the passions or prejudices of the jury."<sup>31</sup> Furthermore, a prosecutor should not inject argument which will divert the jury's attention from the issue of guilt or make predictions about the consequences of the jury's verdict.<sup>32</sup>

Lastly, Standard 3-5.9 regulates a prosecutor's references to matters outside the record.<sup>33</sup> This standard states that it is unprofessional conduct for a prosecutor to refer to facts outside the record except for matters subject to judicial notice.<sup>34</sup>

### B. The Model Rules

The American Bar Association's Model Rules of Professional Conduct (the "Model Rules") also set forth special ethical standards for the prosecutorial advocate. Specifically, Model Rule 3.8 requires a prosecutor to: refrain from pursuing a criminal charge absent probable cause; make reasonable efforts to assure the accused's right to counsel; abstain from securing a waiver of impor-

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*its of Prosecutorial Summation - An Overview of Permissible and Impermissible Final Arguments*, 24 S. TEX. L.J. 867 (1983).

30. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.8. This standard provides:

- (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 personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
- (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
- (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.
- (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper and acceptable bounds.

*Id.*

31. *Id.*

32. *Id.*

33. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.9. This standard provides:

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

*Id.*

34. *Id.*



tant pretrial rights from an unrepresented defendant; disclose all material which may exculpate the accused or be impeaching of a government witness and other unprivileged mitigating information; and exercise reasonable care to prevent investigative subordinates from making prohibited extrajudicial statements.<sup>35</sup> Although Model Rule 3.8 does not govern trial conduct per se, other provisions in the Model Rules do.<sup>36</sup> In short, a prosecutor, like any other litigator, must be candid toward a tribunal.<sup>37</sup> Furthermore, the Model Rules mandate fairness to the opposing party and his counsel.<sup>38</sup> Finally, conduct disruptive of the decorum of a tribunal is prohibited.<sup>39</sup>

### C. *The Illinois Code of Professional Responsibility*

For rules of professional conduct that are enforceable in Illinois, one must turn to the Illinois Code of Professional Responsibility,<sup>40</sup> modeled after the American Bar Association's Model Code of Professional Responsibility. Like the Model Rules and the Criminal Justice Standards, the Illinois Code of Professional Responsibility contains a provision specially pertaining to prosecutors.<sup>41</sup> This provision, on its face, does not regulate trial conduct.<sup>42</sup> It prohibits a prosecutor from instituting charges unsupported by probable cause.<sup>43</sup> It also requires timely disclosure of exculpatory or impeaching material or other mitigating information.<sup>44</sup>

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35. MODEL RULES, *supra* note 12, at Rule 3.8.

36. See MODEL RULES, *supra* note 12, at Rule 3.3.

37. MODEL RULES, *supra* note 12, at Rule 3.4.

38. MODEL RULES, *supra* note 12, at Rule 3.5.

39. *Id.*

40. CODE OF PROFESSIONAL RESPONSIBILITY Rule 1-101, ILL. REV. STAT. ch. 110A, CANON 1-101 *et seq.* (1985).

41. *Id.* at CANON 7-103.

42. *Id.* Other rules promulgated under Canon 7, requiring zealous representation within the bounds of the law, govern the courtroom conduct of all attorneys as well other ethical dilemmas which may arise in a prosecutor's practice. *Id.* at CANON 7-101 to -102 (delineating the boundaries of zealous representation); *Id.* at CANON 7-104 (regulating communications with adverse witnesses); *Id.* at CANON 7-105 (specifically governing trial conduct); *Id.* at CANON 7-107 (governing extrajudicial statements); *Id.* at CANON 7-108 (regulating attorney-juror communications); *Id.* at CANON 7-109 (forbidding suppression of evidence and contingent payment of witnesses); *Id.* at CANON 7-110 (proscribing *ex parte* communications and gifts and loans to judges or other court personnel).

43. *Id.* at CANON 7-103(a).

44. *Id.* "[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1967). See also *United States v. Agurs*, 427 U.S. 97 (1976). In addition, due process requires the government to disclose to the defendant evidence that may impeach its witnesses or evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985) (plurality opinion).

### III. JUDICIAL RECOGNITION OF PROSECUTORIAL MISCONDUCT

Disciplinary sanctions are rarely imposed against prosecutors.<sup>45</sup> Consequently, the question of whether a prosecutor's conduct is unethical must be resolved by analyzing judicial treatment of prosecutorial misconduct in appeals of criminal convictions. Because of the frequency of allegations of prosecutorial misconduct in state criminal cases and the scarcity of disciplinary cases against prosecutors, it can be said that the common law dispenses a more prolific source of practical ethical guideposts for prosecutors than the professional responsibility codes. The categories of improper prosecutorial trial conduct are quite vast. As noted by one commentator, "[t]he list of possible errors . . . is limited only by the imagination of trial lawyers."<sup>46</sup> Nonetheless, the varieties of improper prosecutorial remarks which have culminated in *reversible* error in Illinois are generally grouped below.<sup>47</sup>

#### A. *Attacking the Defense*

Illinois prosecutors' verbal attacks directed at the defense have often supplied grounds for reversal in Illinois. While it hardly needs saying that a prosecutor should refrain from assailing the defense, prosecutors continue to do so. Hence, many of the reversals in Illinois cases occurred when the prosecutor improperly abused the accused,<sup>48</sup> denigrated the defendant's expert witnesses,<sup>49</sup> verbally attacked defense counsel<sup>50</sup> and pitted the reputa-

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45. B. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13-6 (1985); Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 670 (1972). See also *supra* note 8 and accompanying text.

46. Goodman, *supra* note 29, at 120.

47. Admittedly, the categories sometimes overlap. As a practical matter, it should be noted that Illinois courts usually have not reversed for an isolated prejudicial prosecutorial remark; reversal has been mandated only when repeated improper prosecutorial comments appear in the record. See, e.g., *People v. Weathers*, 62 Ill. 2d 114, 118-20, 338 N.E.2d 880, 882-84 (1975); *People v. Strange*, 125 Ill. App. 3d 43, 47, 465 N.E.2d 616, 620 (1st Dist. 1984).

48. *People v. Weathers*, 62 Ill. 2d 114, 118, 338 N.E.2d 880, 882-83 (1975) (although the defendant had not been arrested previously, the prosecutor stated that he was a "pretty smart cookie" who was too smart to get caught, but got caught this time); *People v. Sales*, 151 Ill. App. 3d 226, 231, 502 N.E.2d 1221, 1224 (1st Dist. 1986) (absent an evidentiary foundation, prosecutor argued that defendant's crime was motivated by homosexuality); *People v. Strange*, 125 Ill. App. 3d 43, 46, 465 N.E.2d 616, 619 (1st Dist. 1984) (prosecutor called defendant a "liar" and stated that he wished the jury had a "built-in shockproof B.S. detector"); *People v. Scaggs*, 111 Ill. App. 3d 633, 636, 444 N.E.2d 674, 676 (1st Dist. 1982) (prosecutor referred to defendant's sexual immorality).

49. *People v. Lyles*, 106 Ill. 2d 373, 398-414, 478 N.E.2d 291, 301-08 (1985) (during the death penalty phase of a jury trial the prosecutor asked the defendant's expert witness whether the jury could take his [the expert's] condition into account and stated that the

tion and integrity of the prosecutor's office against that of the defendant and his counsel.<sup>51</sup>

### B. *Appeals to Improper Considerations*

Criminal trials, with a man's liberty or life at stake, are highly charged emotional affairs.<sup>52</sup> Consequently, lawyers may be prone to appeal to the jury's sympathies, prejudices, and emotions. Such

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expert was a member of the "oldest profession known to man," that the expert was a "whore," a "liar," and a "fraud"); *People v. Thomas*, 37 Ill. App. 3d 320, 327, 346 N.E.2d 190, 195 (3rd Dist. 1976) (in an obscenity prosecution, the prosecutor called the defendant's expert witness a "nut" and sarcastically stated that the jury could "consider psychiatrists in and of themselves [as having] done great service to the community. *They release murderers from institutions.*") (emphasis in original).

50. *People v. Bean*, 109 Ill. 2d 80, 101, 485 N.E.2d 349, 359 (1985) (prosecutor suggested that the defense attorney deliberately introduced reversible error into the record and "without any basis for doing so, discredited [the defendant's] attorney"); *People v. Lyles*, 106 Ill. 2d 373, 398-414, 478 N.E.2d 291, 301-08 (1985) (prosecutor referred to the defense attorney as a "mouthpiece" during closing argument and told the jury the defense counsel's closing argument was a "bald face lie"; in chambers, the prosecutor termed the defense lawyer as a "liar" and a "son-of-a-bitch" and directed an obscene gesture at defense counsel); *People v. Weathers*, 62 Ill. 2d 114, 118-120, 338 N.E.2d 880, 882-84 (1975) (the prosecutor accused defense counsel of lying and stated that the defense attorney knew that his client was guilty, but was attempting to create reasonable doubt by confusion); *People v. Beringer*, 151 Ill. App. 3d 558, 562, 503 N.E.2d 778, 781 (1st Dist. 1987) (prosecutor accused defense counsel of deception); *People v. Ray*, 126 Ill. App. 3d 656, 660, 467 N.E.2d 1078, 1081 (1st Dist. 1984) (sixteen times, the prosecutor accused defense counsel of lying; the prosecutor also stated that defense counsel was attempting to "confuse" and "intimidate" the jury); *People v. Clark*, 114 Ill. App. 3d 252, 253-56, 448 N.E.2d 926, 927-29 (1st Dist. 1983) (prosecutor repeatedly asserted that defense counsel was playing "tricks," employing "sleight of hand," "dirtying the victim" and implied that defense counsel was hiding evidence); *People v. Brown*, 113 Ill. App. 3d 625, 628-31, 447 N.E.2d 1011, 1013-15 (1st Dist. 1983) (prosecutor declared that defense counsel was a "mouthpiece," a "slickster," a "liar," and "had unmitigated gall"); *People v. Weinger*, 101 Ill. App. 3d 857, 868-71, 428 N.E.2d 924, 932-34 (1st Dist. 1981) (prosecutor implied that defense counsel was preventing the state from eliciting evidence damaging to the defendant and that defense counsel, a former law school professor, had taught his students, one of whom testified at trial and was now disbarred, how to subvert a police investigation); *People v. Suggs*, 50 Ill. App. 3d 778, 783, 365 N.E.2d 1118, 1121 (1st Dist. 1977) (prosecutor admonished defense counsel to act like a lawyer, accused counsel of perpetrating a lie, acting unethically and playing "tricks"); *People v. Thomas*, 37 Ill. App. 3d 320, 327, 346 N.E.2d 190, 195 (3rd Dist. 1976) (prosecutor called defense counsel a liar); *People v. Weller*, 123 Ill. App. 2d 421, 427-28, 258 N.E.2d 806, 810 (4th Dist. 1970) (prosecutor stated that defense attorney could qualify as a "S.S. trooper"); *People v. Glickman*, 27 Ill. App. 2d 379, 384, 169 N.E.2d 815, 818 (1st Dist. 1960) (prosecutor stated that defense attorney was seeking an acquittal for purely personal mercenary reasons).

51. *People v. Janes*, 138 Ill. App. 3d 558, 566, 486 N.E.2d 317, 324-25 (2d Dist. 1985) (trial prosecutor testified on behalf of state's case).

52. *Dunlop v. United States*, 165 U.S. 486, 498 (1897); *United States v. Wexler*, 79 F.2d 526, 530 (2d Cir. 1935).

appeals are improper.<sup>53</sup> Although the prosecutor should be acutely aware of his duty to remain fair and impartial and to refrain from improper arguments, a litany of Illinois cases exist in which the courts reversed because of improper prosecutorial appeals. The courts have reversed when the prosecution improperly alluded to: law and order ideals,<sup>54</sup> the jurors as parents,<sup>55</sup> and racial, socioeconomic, or ethnic prejudices.<sup>56</sup> In addition, the prosecution's knowing elicitation of inflammatory testimony<sup>57</sup> and references to victims or the impact of the defendant's crime upon the victim's family<sup>58</sup> have culminated in reversal.

### C. *References to the Defendant's Invocation of the Fifth Amendment Right to Remain Silent*

Under the United States Supreme Court's interpretations of the fifth amendment right against self-incrimination as applied to the states by the fourteenth amendment,<sup>59</sup> the state is prohibited from drawing attention to the accused's failure to testify at trial.<sup>60</sup> Simi-

53. See, e.g., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.8.

54. *People v. Holman*, 103 Ill. 2d 133, 469 N.E.2d 119 (1984).

55. *Id.* at 169, 171-72, 469 N.E.2d at 136, 138 (prosecutor related how he took his seven-year-old son to see the death chair and compared the death penalty to a parent justifiably using force to avenge an attack on a son or daughter).

56. *People v. Romero*, 36 Ill. 2d 315, 319-20, 223 N.E.2d 121, 124 (1967) (prosecutor appealed to the religious and social mores of the jury by noting that defendant had lived with his girlfriend and had not married her); *People v. Lurry*, 77 Ill. App. 3d 108, 113-14, 395 N.E.2d 1234, 1237 (3rd Dist. 1979) (prosecutor discussed black crimes, and the problem of black crimes in our society; he also called Detroit the "murder capital" of the world where the black man has more of a chance of dying by murder as opposed to accident and stated that he hoped that the jury did not want Joliet to become like Detroit); *People v. Blackman*, 44 Ill. App. 3d 137, 140-41, 358 N.E.2d 50, 52-53 (1st Dist. 1976) (prosecutor told the jury that if they acquitted the defendant they better beat the defendant back to their autos and that they better not frequent the defendant's neighborhood).

57. *People v. Whitlow*, 89 Ill. 2d 322, 338-40, 433 N.E.2d 629, 636-37 (1982).

58. *People v. Holman*, 103 Ill. 2d 133, 166-67, 469 N.E.2d 119, 133 (1984); *People v. Ramirez*, 98 Ill. 2d 439, 452-54, 457 N.E.2d 31, 37-39 (1983); *People v. Littlejohn*, 144 Ill. App. 3d 813, 827, 494 N.E.2d 677, 686-87 (1st Dist. 1986).

The United States Supreme Court recently ruled that it was a violation of due process for the state to introduce victim impact statements during the death penalty phase of a capital case. *Sumner v. Shuman*, 107 S. Ct. 2716 (1987); *Booth v. Maryland*, 107 S. Ct. 2529 (1987).

59. *Malloy v. Hogan*, 378 U.S. 1 (1964).

60. *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin*, the Court held that any comment directing the jury's attention to the defendant's right not to testify violates the fifth and fourteenth amendments to the United States Constitution. *Id.* at 615. The state, however, may properly argue that its case is unrebutted notwithstanding the fact that the defendant would be the only person who could rebut it. *People v. Mills*, 40 Ill. 2d 4, 8, 237 N.E.2d 697, 700 (1968).

larly, the state cannot impeach a defendant with his post-arrest silence.<sup>61</sup> Despite these bright line rules, Illinois prosecutors have sometimes improperly commented on the defendant's silence. The courts have reversed when a prosecutor has commented on the accused's failure to call witnesses,<sup>62</sup> the accused's failure to testify,<sup>63</sup> and the accused's post-arrest silence or failure to produce a defense at an earlier date.<sup>64</sup>

#### D. *Misstating the Law*

A prosecutor is charged with knowledge of the law, especially the law applicable to the case on trial. Thus, a prosecutor's misstating the law may be viewed as inexcusable, and such misstatements have resulted in reversal.<sup>65</sup> Although our criminal justice system presumes the defendant's innocence, gives the state the burden of proving each and every element of a crime beyond a reasonable doubt, and does not require the defendant to prove anything in his defense,<sup>66</sup> most reversals in the misstatement of law area have been ordered because the prosecution misstated rudimentary due process considerations relative to the burden of proof. Specifically, reversal has been decreed where the prosecution has argued that reasonable doubt merely is a formality,<sup>67</sup> diminished the pre-

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61. *Doyle v. Ohio*, 426 U.S. 610 (1976) (state's use for impeachment of the defendant's failure to tell an exculpatory story at the time of arrest violated the due process clause).

62. *People v. Scaggs*, 111 Ill. App. 3d 633, 636-37, 444 N.E.2d 674, 677 (1st Dist. 1982) (prosecutor told the jury that a certain witness did not "show" because he would not "lie" for the defendant); *People v. Evans*, 78 Ill. App. 3d 996, 1000, 398 N.E.2d 326, 328-30 (3rd Dist. 1979) (prosecutor told the jury that the defendant's case was "not supported by any witnesses"). Notwithstanding the defendant's right to compulsory process, the prosecution cannot comment on the defendant's failure to call a witness when a witness who did not testify at trial was equally available to the state and the defendant. *See, e.g., People v. Holman*, 103 Ill. 2d 133, 151, 469 N.E.2d 119, 128 (1984).

63. *Williams v. Lane*, 826 F.2d 654, 664-66 (7th Cir. 1987) (prosecutor's indirect reference to defendant's failure to testify); *People v. Ramirez*, 98 Ill. 2d 439, 451, 457 N.E.2d 31, 37 (1983) (during the death penalty phase in a jury trial, the prosecutor stated that the defendant had "sat silent" before his accusers and the trier of fact and had failed to offer an explanation for the murder).

64. *See People v. Stack*, 112 Ill. 2d 301, 304-07, 493 N.E.2d 339, 341-42 (1st Dist. 1986); *People v. Suggs*, 50 Ill. App. 3d 778, 781-83, 365 N.E.2d 1118, 1120-21 (1st Dist. 1977); *People v. Patterson*, 44 Ill. App. 3d 894, 896-97, 358 N.E.2d 1164, 1166-68 (1st Dist. 1976).

65. *People v. Estes*, 127 Ill. App. 3d 642, 649, 469 N.E.2d 275, 281 (3rd Dist. 1984); *People v. Ray*, 126 Ill. App. 3d 656, 661, 467 N.E.2d 1078, 1082 (1st Dist. 1984); *People v. Eckhardt*, 124 Ill. App. 3d 1041, 1042-43, 465 N.E.2d 107, 109 (2nd Dist. 1984); *People v. Scaggs*, 111 Ill. App. 3d 633, 637, 444 N.E.2d 674, 677 (1st Dist. 1982); *People v. Johnson*, 102 Ill. App. 3d 122, 128, 429 N.E.2d 905, 910 (3rd Dist. 1981).

66. *In re Winship*, 397 U.S. 358 (1970).

67. *People v. Starks*, 116 Ill. App. 3d 384, 394-95, 451 N.E.2d 1298, 1306 (1st Dist.

sumption of innocence,<sup>68</sup> attempted to shift the burden of proof,<sup>69</sup> and defined reasonable doubt.<sup>70</sup>

### *E. Referring to Matters Not in the Record*

Again, it is elementary that a lawyer should not introduce or make references to matters which are not in the record or factually supported or precluded per court order.<sup>71</sup> Nonetheless, violations of the foregoing ideal have been a prolific source for reversal. For instance, Illinois courts have reversed because the prosecution asked questions without a factual basis,<sup>72</sup> defied motions in limine,<sup>73</sup> failed to support its opening statement with evidence,<sup>74</sup>

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1983) (prosecutor argued that the burden of proof in this case was the same burden as that in thousands of cases across the country, was no different from any other case and that the defendant did not stand on a pedestal); *People v. Scaggs*, 111 Ill. App. 3d 633, 637, 444 N.E.2d 674, 677 (1st Dist. 1982) (prosecutor asserted that every defendant who has ever been convicted had been found guilty beyond a reasonable doubt and that reasonable doubt was "not some impossible thing floating up there in the air. It is a burden that is met every day."); *People v. Johnson*, 102 Ill. App. 3d 122, 125, 429 N.E.2d 905, 908, 910 (3rd Dist. 1981) (prosecutor stated that burden of proof beyond a reasonable doubt applied in every criminal case in the history of the United States, that the burden was met every day and was not beyond reach).

68. *People v. Thomas*, 146 Ill. App. 3d 1087, 1089, 497 N.E.2d 803, 804 (1986) (court concluded that prosecutor's closing remark that a defense witness had "trumped up" her story and that there was "nobody here for the People, just you" diminished the presumption of innocence).

69. *People v. Harbold*, 124 Ill. App. 3d 363, 371-72, 464 N.E.2d 734, 741-42 (1st Dist. 1984) (prosecutor repeatedly argued that there was no proof that the defendant was not guilty, thus implying that the defendant was required to prove his innocence); *People v. Giangrande*, 101 Ill. App. 3d 397, 402, 428 N.E.2d 503, 507 (1st Dist. 1981) (during closing argument, prosecutor exhorted, "[W]here's the evidence that the defendant didn't do it?").

70. See *People v. Jenkins*, 89 Ill. App. 3d 395, 398, 411 N.E.2d 1047, 1048-49 (1st Dist. 1980). See also *People v. Faysom*, 131 Ill. App. 3d 517, 524, 475 N.E.2d 945, 951 (1st Dist. 1985) (prosecutor defining reasonable doubt held to be harmless error); *People v. Garcia*, 103 Ill. App. 3d 779, 784-85, 431 N.E.2d 1234, 1239 (1st Dist. 1981) (same). A prosecutor should refrain from defining reasonable doubt because there is no better definition of reasonable doubt than the words themselves. *Jenkins*, 89 Ill. App. 3d at 398, 411 N.E.2d at 1048-49.

71. See, e.g., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at §§ 3-5.6. to 3-5.9 (1980).

72. *People v. Nuccio*, 43 Ill. 2d 375, 381, 213 N.E.2d 353, 356 (1969) (state failed to perfect impeachment and asked questions absent an evidentiary basis); *People v. Beringer*, 151 Ill. App. 3d 558, 560-61, 503 N.E.2d 778, 780 (1st Dist. 1987) (prosecutor asked questions absent an evidentiary foundation); *People v. Strange*, 125 Ill. App. 3d 43, 47, 465 N.E.2d 616, 620 (1st Dist. 1984) (prosecutor improperly suggested that defendant had used an alias); *People v. Giangrande*, 101 Ill. App. 3d 397, 405, 428 N.E.2d 503, 509 (1st Dist. 1981) (prosecutor insinuated that main defense witness had not gotten along with her mother).

73. *People v. Emerson*, 97 Ill. 2d 487, 496-97, 455 N.E.2d 41, 44-45 (1983) (after trial court barred prosecution from mentioning fact that defendant was carrying a revolver on his person at the time of his arrest and defense counsel argued that his client had not

and misstated the facts.<sup>75</sup> In addition, more culpable instances of misconduct can be found in the cases. Many convictions have been reversed because the prosecutor suggested that the defendant manufactured a defense or was attempting to escape a guilty verdict by trickery, intimidation, or by hiding behind constitutional rights,<sup>76</sup> insinuated that the prosecution had evidence available but could not use it because of defense objections,<sup>77</sup> referred to the accused's other crimes,<sup>78</sup> and suggested that witnesses were afraid to testify

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acted like a guilty person when he was arrested, the prosecutor told the jury that he could not tell everything that the defendant had done subsequent to his arrest); *People v. Whitlow*, 89 Ill. 2d 322, 340-41, 433 N.E.2d 629, 637 (1982) (despite fact that trial court had granted defendants' motions in limine seeking to exclude any reference of past criminal activity of unrelated pending charges, prosecutor "made questionable reference to 'defendants' backgrounds' during rebuttal argument"); *People v. Sales*, 151 Ill. App. 3d 226, 233, 502 N.E.2d 1221, 1225 (1st Dist. 1987) (although court, on state's motion, had precluded defense from arguing that the crime was racially motivated, the state did so); *People v. Campbell*, 115 Ill. App. 3d 631, 634-38, 450 N.E.2d 1318, 1321-22 (1st Dist. 1983) (prosecutor, in express defiance of the trial court's order and the rule of *Bruton v. United States*, 391 U.S. 123 (1968), repeatedly informed the jury that the defendant's accomplice had implicated the defendant).

74. *People v. Whitlow*, 89 Ill. 2d 329, 337-38, 433 N.E.2d at 636 (1982); *People v. Weinger*, 101 Ill. App. 3d 857, 866-67, 428 N.E.2d 924, 934 (1st Dist. 1981).

75. *People v. Linscott*, 159 Ill. App. 3d 71, 511 N.E.2d 1303 (1st Dist. 1987); *People v. Giangrande*, 101 Ill. App. 3d 397, 428 N.E.2d 503 (1st Dist. 1981).

76. *People v. Emerson*, 97 Ill. 2d 487, 497, 455 N.E.2d 41, 45 (1983) (prosecutor suggested during closing argument that defense had "laid down a smokescreen 'composed of lies and misrepresentations and innuendoes'" and that all defense attorneys attempt to discredit the victim so as to distract the jury from the defendant's crime); *People v. Weathers*, 62 Ill. 2d 114, 118-121, 338 N.E.2d 880, 883 (1975) (during closing argument, prosecutor stated that defense attempted to create "confusion, indecision and misrepresentation"); *People v. Stock*, 56 Ill. 2d 461, 468-73, 309 N.E.2d 19, 23-25 (1974) (prosecutor suggested that defendant was attempting to win acquittal through trickery); *People v. Ray*, 126 Ill. App. 3d 656, 662-63, 467 N.E.2d 1078, 1083 (1st Dist. 1984) (prosecutor argued that defendant was hiding behind his rights and stated that "[i]t's about time the Constitution that this man is hiding behind is put in back of him"); *People v. Clark*, 114 Ill. App. 3d 252, 253-56, 448 N.E.2d 926, 928-29 (1st Dist. 1983) (prosecutor implied that defendant was hiding evidence and that he was trying to escape conviction by trickery); *People v. Witted*, 79 Ill. App. 3d 156, 167-68, 398 N.E.2d 68, 76-78 (1st Dist. 1979) (prosecutor accused defense of hiding behind "technicalities in the law," urged the jury not to let defendant sell them a "bad bill of goods").

77. *Ray*, 126 Ill. App. 3d at 661, 467 N.E.2d at 1082 (prosecutor told jury that he wished he could show them his file but that he could not because of the law that the defendant was hiding behind); *People v. Weinger*, 101 Ill. App. 3d 857, 871, 428 N.E.2d 924, 934 (1st Dist. 1981) (on twenty occasions, prosecutor asked questions after the trial court had already sustained the defendant's objection to the question; the appellate court concluded that this was a tactic designed to cast the defense attorneys as obstructionists); *People v. Lopez*, 89 Ill. App. 3d 456, 457, 411 N.E.2d 1071, 1072 (1st Dist. 1980) (during closing argument, the prosecutor stated that although the state had evidence to back up its inferences, defense counsel had prevented the evidence from being admitted).

78. *People v. Whitlow*, 89 Ill. 2d 322, 340-41, 433 N.E.2d 629, 637 (1982); *People v. Ray*, 126 Ill. App. 3d 656, 662, 467 N.E.2d 1078, 1083 (1st Dist. 1984); *People v. Dace*,

because the defendant has threatened them.<sup>79</sup>

### F. *Stepping Outside of a Professional Role*

An attorney should not interject his personal opinions into a case.<sup>80</sup> This proscription is especially relevant in a criminal case tried before a jury because the jurors tend to view the prosecutor as their representative and as having superior knowledge of the facts of the case and the criminal justice system. Consequently, it is imperative that the prosecutor present the appearance of objectivity. Notwithstanding those clear proscriptions, Illinois prosecutors have caused reversal by assuming personal responsibility if the death penalty is imposed,<sup>81</sup> expressing personal opinions about the defendant's guilt and the credibility of witnesses,<sup>82</sup> and making personal predictions of the consequences of the verdict or failure to render the death penalty.<sup>83</sup>

### G. *Ramifications of the Reversal Remedy*

The foregoing classifications are not exhaustive.<sup>84</sup> They do not

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114 Ill. App. 3d 908, 920, 449 N.E.2d 1031, 1038 (3rd Dist. 1983); *People v. Patterson*, 44 Ill. App. 3d 894, 899-900, 358 N.E.2d 1164, 1168-69 (1st Dist. 1976).

79. *People v. Ray*, 126 Ill. App. 3d at 656, 467 N.E.2d at 1081-82; *People v. Dace*, 114 Ill. App. 3d 908, 920, 449 N.E.2d 1031, 1038 (3rd Dist. 1983); *People v. Brown*, 113 Ill. App. 3d 625, 627-30, 447 N.E.2d 1011, 1015 (1st Dist. 1983).

80. See, e.g., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at § 3-5.9.

81. *People v. Yates*, 98 Ill. 2d 502, 536-38, 456 N.E.2d 1369, 1386-87 (1983) (during rebuttal closing argument in the death penalty phase of a jury trial, the prosecutor stated that jury should condemn the defendant to death because there was no doubt that he had committed the crime at issue and that if somebody later came forward and admitted to the defendant's crime the jury could blame the prosecutor and the prosecutor would take "all the responsibility" if the defendant was unjustifiably convicted).

82. *People v. Whitlow*, 89 Ill. 2d 322, 341, 433 N.E.2d 629, 637-38 (1982) (prosecutor expressed personal belief of defendant's guilt and based this belief on grounds which not in evidence); *People v. Monroe*, 66 Ill. 2d 317, 323-24, 362 N.E.2d 295, 298 (1977) (prosecutor stated that defense was "preposterous" and has never heard a "weaker defense in five years of practicing in criminal law"); *People v. Turner*, 127 Ill. App. 3d 784, 792, 469 N.E.2d 368, 374 (1st Dist. 1984) ("A prosecutor's statements implying that charges would not have been placed against the defendant unless the prosecutor thought he was guilty are improper and prejudicial error."); *People v. Clark*, 114 Ill. App. 3d 252, 256, 448 N.E.2d 926, 929 (1st Dist. 1983) (prosecutor improperly stated that he "believe[d] that this case [was] overwhelming").

83. *People v. Lyles*, 106 Ill. 2d 373, 411, 478 N.E.2d 291, 306-07 (1985) (prosecutor stated that defendant would be released on parole in eight years if jury did not condemn defendant to death); *People v. Holman*, 103 Ill. 2d 133, 161-63, 469 N.E.2d 119, 134-53 (1984) (prosecutor predicted that defendant would commit other crimes if not executed); *People v. Szabo*, 94 Ill. 2d 327, 366-67, 447 N.E.2d 193, 212 (1983) (prosecutor improperly speculated that defendant might be paroled if not sentenced to death); *People v. Walker*, 91 Ill. 2d 502, 515, 440 N.E.2d 83, 88 (1982) (same).

84. For other categorizations of improper prosecutorial remarks, see Balske,



note every Illinois case in which prosecutorial misconduct resulted in reversal.<sup>85</sup> Nor do they note the litany of cases in which the court found that improper prosecutorial conduct constituted harmless error.<sup>86</sup> Nor does the categorization reveal instances in which the appellate court determined that the issue of prosecutorial misconduct had been waived.<sup>87</sup> Finally, the foregoing list does not mention cases in which the prosecutorial misconduct did not amount to reversible error because of the invited response doctrine.<sup>88</sup>

Hopefully, the above categorization illustrates the sheer magnitude of the problem. It is realized that the stakes are high in a criminal trial, resulting in sometimes excusable displays of emotion.<sup>89</sup> In most instances, however, the prosecutor simply has no excuse for committing the forms of misconduct noted in the cases. The Code of Professional Responsibility, the case law, and common sense supply the prosecutor with ample notice of what is permissible and what is not. Nonetheless, despite rebukes from the

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*Prosecutorial Misconduct During Closing Argument: the Arts of Knowing When and How to Object and of Avoiding the 'Invited Response' Doctrine*, 37 MERCER L. REV. 1033, 1034-56 (1986); Merrill, *supra* note 29, at 868-78 (1983); Crump, *supra* note 29, at 509-31.

85. For a listing of additional Illinois cases in which prosecutorial misconduct caused reversal, see Chicago Lawyer, August, 1987, at 23.

86. See, e.g., *People v. Alexander*, 127 Ill. App. 3d 1007, 1014, 470 N.E.2d 1071, 1077 (1st Dist. 1984) (prosecutor declared to the jury that the defendant was an "animal" and a "beast"); *People v. Robinson*, 125 Ill. App. 3d 1077, 1081, 467 N.E.2d 291, 295 (1st Dist. 1984) (prosecutor told jury that the defendant's attorney spoke with a "forked tongue," was using tricks "to beat this rap" and was a "pretty dirty trial lawyer" for such a small woman); *People v. Wilson*, 123 Ill. App. 3d 798, 804, 463 N.E.2d 890, 894 (1st Dist. 1984) (prosecutor accused defendant and his lawyer of lying and not wanting the jury to hear the truth); *People v. Shepard*, 114 Ill. App. 3d 598, 602, 449 N.E.2d 222, 225 (1st Dist. 1983) (prosecutor asserted that the defense attorney was attempting to free an "animal").

87. See, e.g., *People v. Buckner*, 121 Ill. App. 3d 391, 396-97, 459 N.E.2d 1102, 1107 (1st Dist. 1984). To preserve the issue of prosecutorial misconduct, defense counsel must make a contemporaneous objection and then raise the issue in post-trial motions. Despite the frequent failure to follow these procedural steps, Illinois courts may nonetheless review issues of prosecutorial misconduct for plain error. See, e.g., *People v. Whitlow*, 89 Ill. 2d 322, 341-42, 433 N.E.2d 629, 638 (1982); *People v. Strange*, 125 Ill. App. 3d 43, 46, 465 N.E.2d 616, 619 (1st Dist. 1984). Cf. *United States v. Young*, 470 U.S. 1, 16 (1985) (in order to reverse under the plain error standard, the prosecutor's improper remarks must "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice").

88. For an in depth discussion of the invited response doctrine, see generally Balske, *supra* note 84, at 1056-60. See also *United States v. Young*, 470 U.S. 1, 11-14 (1985).

89. *Dunlop v. United States*, 165 U.S. 486, 498 (1897); *United States v. Wexler*, 79 F.2d 526 (2nd Cir. 1935). In *Wexler*, Judge Learned Hand remarked, "It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion." *Id.* at 530.

bench and bar, misconduct continues to occur, with no end being in sight. As a result, judicial and prosecutorial resources are being wasted, the public's confidence in the criminal justice system is being diminished, and the rights of the accused are being ignored and trampled.

Some view the current remedy of reversing a conviction because of prosecutorial misconduct as being insufficient.<sup>90</sup> The standards for determining whether misconduct warrants reversal are much too subjective.<sup>91</sup> Thus, a lack of consistency exists among the cases, and verdicts will not be reversed with predictability when prosecutorial misconduct is found.<sup>92</sup> Despite these deficiencies, it is not suggested that the reversal remedy should be abandoned. Reversal still serves a salutary punitive purpose in light of grossly uncalled for and unexcusable prosecutorial conduct.<sup>93</sup> Moreover, when the prosecutor impedes the defendant's right to a fair trial, the defendant's interest in receiving a trial untainted by prosecutorial misconduct obviously outweighs any countervailing concerns.

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90. See, e.g., Singer, *Forensic Misconduct by Federal Prosecutors - and How It Grew*, 20 ALA. L. REV. 227, 237 (1968); Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 487 (1959); Note, *Misconduct of Judges and Attorneys During Trial: Informal Sanctions*, 49 IOWA L. REV. 531, 543 (1964). From the prosecutorial perspective it might be argued that reversal is insufficient because it gives a defendant an unnecessary windfall when there is overwhelming evidence of guilt.

91. Illinois courts have articulated various tests to determine whether improper prosecutorial remarks warrant reversal. For example, a defendant's conviction will be reversed when the remarks constitute a "material factor" in the defendant's conviction. *People v. Duckett*, 56 Ill. 2d 432, 443, 308 N.E.2d 590, 596 (1974). Similarly, some courts have claimed that a conviction ordinarily should not be reversed for prosecutorial remarks unless the remarks result in "substantial prejudice to the accused." *People v. Pittman*, 93 Ill. 2d 169, 176, 442 N.E.2d 836, 839 (1982); *People v. Giangrande*, 101 Ill. App. 3d 397, 403, 428 N.E.2d 503, 508 (1st Dist. 1981). Courts have stated also that a defendant's conviction will be reversed on the basis of a prosecutor's improper remarks only if "the verdict would have been different had the objectionable remarks not been made." E.g., *People v. Hastings*, 72 Ill. App. 3d 816, 824, 390 N.E.2d 1273, 1279 (1979). In a close case, instances of prosecutorial misconduct are more likely to tip the scales toward reversal. *People v. Johnson*, 102 Ill. App. 3d 122, 129, 429 N.E.2d 905, 911 (3rd Dist. 1981). See also *supra* note 47 and accompanying text.

92. Alschuler, *supra* note 45, at 638; Goodman, *supra* note 29, at 120. Professor Alschuler noted:

The sense that most clearly emerges from the decisions is that of unpredictability. Cases proceed on an ad hoc basis, and results do not follow a consistent pattern. Even if the alleged misconduct in one case seems similar to the alleged misconduct in another, the procedural context is invariably different. The force of precedent is therefore slight. The courts seem to enjoy an almost total freedom to reach any result on any given set of facts.

Alschuler, *supra* note 45, at 638.

93. See Alschuler, *supra* note 45, at 646-47 (arguing that reversal is effective and operates much like the exclusionary rule in fourth amendment jurisprudence).

While reversal remedies misconduct with respect to the defendant's rights, it does not cure the problem from a *professional* standpoint. A reversal, unlike disciplinary proceedings, does not protect the public from the unethical prosecutor. In addition, reversal does not directly deal with the problem of prosecutorial misconduct. The frequency of prosecutorial misconduct indicates that reversal, standing alone, has not acted as a sufficient deterrent. Thus, something *in addition to* reversal is needed.

#### IV. DISCIPLINARY ACTIONS AGAINST PROSECUTORS

The first avenue of remedy might be disciplinary proceedings. On the national level, however, it appears that there is only one reported case in which a court imposed disciplinary sanctions against a prosecutor for forensic misconduct.<sup>94</sup> Indeed, it seems that disciplinary authorities have condoned courtroom misconduct by prosecutors.<sup>95</sup> The bar's reluctance to institute disciplinary proceedings against prosecutors may be unjustified in light of the fact that attorneys other than prosecutors regularly have been called before disciplinary tribunals for courtroom misconduct.<sup>96</sup>

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94. See B. GERSHMAN, *supra* note 45, at § 13-6 (citing *In re Maestretti*, 30 Nev. 187, 191, 93 P. 1004, 1005 (Nev. 1908) (30 day suspension imposed against a prosecuting attorney in a murder case, for criticizing, in open court, a Nevada Supreme Court decision reversing the defendant's murder conviction)); Alschuler, *supra* note 45, at 670-71 (same).

95. Alschuler, *supra* note 45, at 670 (stating that authorities have failed to discipline prosecutors for courtroom misconduct or other forms of misconduct). It is not implied that prosecutors never face disciplinary proceedings. See generally Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney*, 10 A.L.R. 4th 605 (1981) (listing of citations to cases in which discipline has been imposed against prosecutors). When prosecutors have been disciplined for misconduct other than courtroom misconduct, however, the sanctions have been slight. See *Price v. State Bar*, 30 Cal. 3d 537, 638 P.2d 311, 179 Cal. Rptr. 914 (1982) (prosecutor placed on probation for five years for intentionally altering evidence in order to place a murder defendant at the crime scene and thereafter secretly meeting with the defendant, confessing and promising to seek leniency if the defendant kept mum); *In re McGowen*, 177 Cal. 93, 170 P. 1100 (1917) (prosecutor suspended for one year for calling a superior court judge "nothing but a crook" at a private dinner conversation, improper conduct before a grand jury, and exerting influence to place a rape defendant on probation in return for the defendant's payments to the victim); *State v. Socolofsky*, 233 Kan. 1023, 666 P.2d 727 (1983) (prosecutor censured for anonymously mailing to the jury members whom had acquitted a defendant, a newspaper clipping depicting the acquitted defendant's later plea of guilty to a misdemeanor drug charge); *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971) (prosecutor reprimanded for publicly criticizing a Nevada Supreme Court opinion); *Matter of Shafir*, 92 N.J. 138, 455 A.2d 1114 (1983) (prosecutor reprimanded for falsifying his superior's signature on plea bargain forms and untruthfully representing, to another prosecutor's office, the disposition of criminal charges).

96. See, e.g., *State v. Turner*, 217 Kan. 574, 538 P.2d 966 (1975); *In re Elam*, 357 Mo. 922, 211 S.W.2d 710, *cert. denied*, 335 U.S. 872 (1948); *Leimer v. Hulse*, 352 Mo. 451,

It should be noted, however, that the Illinois Attorney Registration and Disciplinary Commission (the "ARDC") has not been entirely lax in investigating prosecutorial misconduct.<sup>97</sup> The ARDC appears to be aware of the problem and has undertaken steps to cure it. The ARDC will investigate any and all allegations of prosecutorial misconduct that comes to its attention.<sup>98</sup> ARDC representatives scrutinize the advance sheets and investigate instances of prosecutorial misconduct mentioned in the cases.<sup>99</sup> The ARDC also investigates allegations of prosecutorial misconduct surfacing in the media.<sup>100</sup> Finally, if a judge, another attorney, or a litigant reports an occurrence of prosecutorial misconduct, the ARDC will initiate an investigation.<sup>101</sup>

Disciplinary proceedings against prosecutors for courtroom misconduct might prove to be an effective solution to the problem. Such proceedings, however, have disadvantages. First, the ARDC already is overworked.<sup>102</sup> Thus, because of the frequency of allegations of prosecutorial misconduct, the ARDC simply does not possess the resources to combat prosecutorial misconduct effectively. Second, disciplinary proceedings do not serve a punitive purpose;<sup>103</sup> they function only to safeguard the public and maintain the integrity of the profession.<sup>104</sup> Hence, professional sanctions for prosecutorial misconduct meted out under the cloak of "protecting the public" actually may be punishing rather than protecting. Third, although the Code of Professional Responsibility is violated by prosecutorial misconduct, such ethical violations probably are not the most serious of violations transpiring in this state.<sup>105</sup> Fourth, because prosecutors often are overworked and underpaid,

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178 S.W.2d 335, *cert denied*, 323 U.S. 744 (1944); *In re Castellano*, 46 A.D. 792, 361 N.Y.S.2d 23 (N.Y. App. Div. 1974).

97. For instance, the conduct described before the introduction of this article, *see supra* note 1 and accompanying text, resulted in a hearing panel of the ARDC recommending censure. *Chicago Lawyer*, August, 1987 at 14, col. 3. The Illinois Supreme Court accepted that recommendation. *Id.*

98. Interview with Commissioner of the ARDC, in Chicago (Sept. 21, 1987).

99. *Id.*

100. *Id.*

101. *Id.*

102. *See Chicago Daily Law Bulletin*, Dec. 11, 1986, at 1, col. 3.

103. *Alschuler, supra* note 45, at 673.

104. *See, e.g., In re Kesler*, 89 Ill. 2d 151, 161, 433 N.E.2d 643, 648 (1982); *In re Neff*, 83 Ill. 2d 20, 25, 413 N.E.2d 1282, 1284-85 (1980).

105. Discussion of attorney misconduct that is more serious than prosecutorial misconduct is beyond the scope of this article. It cannot be said, however, that conduct such as stealing a client's money, passing bribes and committing crimes of moral turpitude warrants less professional discipline than a prosecutor making improper and inflammatory arguments in the heat of battle.

the expense and time consumption involved in responding to disciplinary proceedings against prosecutors may seem unequitable. Hence, disciplinary proceedings against prosecutors may not be the most effective forum to remedy the problem.

## V. SUGGESTED SOLUTIONS

Despite the perceived inadequacies of disciplining prosecutors, one cannot deny that the problem exists and must be rectified. The problem of courtroom misconduct can be effectively cured in two places — in the courtroom and in the prosecutor's office. Hence, the following solutions are offered.

The courts repeatedly have stressed that "the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; 'the judge is not a mere moderator, but is a governor of the trial for purpose of assuring proper conduct.'" <sup>106</sup> Thus, in a sense, a trial judge, remiss to preventing prosecutorial misconduct, is also responsible for instances of prosecutorial misconduct. Moreover, judges can control courtroom misconduct. An educated judge who runs a tight ship simply will not tolerate a prosecutor misbehaving in the courtroom. Consequently, prosecutors will not engage in deplorable antics or commit misconduct in front of a strict judge.

More importantly, the trial judge has an arsenal of remedial weapons to curb instances of prosecutorial misconduct. When confronted with misconduct, the judge, *sua sponte* or pursuant to a ruling on an objection, can harshly reprimand the prosecutor. A reprimand in front of a jury would be quite effective in preventing misconduct because a prosecutor does want to be perceived by the jury as being at odds with the judge. In addition, the trial court also can rely on its contempt powers to sanction prosecutorial misconduct. Like disciplinary proceedings, however, courts have rarely instituted contempt proceedings for the forensic misconduct of a prosecutor.<sup>107</sup> Nonetheless, resort to contempt powers may be a constructive alternative to formal disciplinary proceedings or the reversal sanction. Finally, when a prosecutor commits misconduct, the judge can notify disciplinary authorities. In fact, under

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106. *United States v. Young*, 470 U.S. 1 (1985) (quoting *Quercia v. U.S.*, 289 U.S. 466, 469 (1933)). See also *People v. Lyles*, 106 Ill. 2d 373, 413-14, 478 N.E.2d 291, 309 (1985); *People v. Ray*, 126 Ill. App. 3d 656, 664, 467 N.E.2d 1078, 1084 (1st Dist. 1984).

107. B. GERSHMAN, *supra* note 45, at § 13-6. Cf. *Brutkiewicz v. State*, 280 Ala. 218, 191 So.2d 222 (1966) (reversing trial court's contempt finding against a prosecutor for courtroom misconduct).

the new Illinois Rules of Judicial Conduct, it might be argued that the trial judge has a duty to report instances of prosecutorial misconduct.<sup>108</sup>

Notwithstanding the fact that a judge can prevent prosecutorial misconduct, he should not be confronted with such conduct in the first place. Many of the ethical dilemmas facing the legal profession today can be solved through education. Many times, an attorney who has conducted himself unethically did not initially realize that his actions were violative of the Code of Professional Responsibility. Absent blatant improper behavior, the same probably is true in instances of prosecutorial misconduct. Surely, a prosecutor does not seek reversal by making an intentionally improper argument. In a close case, however, the prosecutor may make an improper argument in an effort to win. In such a case, the prosecutor's strategy decision would pay off if the appellate court affirms because of a failure to object, the harmless error doctrine, or the invited response doctrine. Likewise, in a case where the evidence strongly favors the state, the prosecutor can hope for affirmance because of overwhelming evidence against the defendant.

In any event, a definite need to educate prosecutors on the bounds of permissible courtroom behavior exists. It is incumbent upon the office of the prosecutor to implement mandatory continuing education programs designed to educate its attorneys about prosecutorial misconduct. Such programs could feature lectures by judges, veteran prosecutors, disciplinary authorities, and others active in the field of professional responsibility.<sup>109</sup> In addition, the education process should require prosecutors to become familiar with various professional responsibility codes, especially the Standards for Criminal Justice. The office could also adopt an internal policy manual, akin to the Criminal Justice Standards, providing guidelines for proper courtroom behavior. Finally, the education should include circulation of substantial doses of court opinions in which prosecutorial conduct was found to be improper.

Prosecutors' offices also could invoke formal intra-office investigatory and disciplinary procedures. The Office of the Cook County States Attorney, for example, currently has no such program.<sup>110</sup> Under current procedures, when an instance of serious

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108. See ILL. S. CT. R. 63(B)(3), ILL. REV. STAT. ch. 110A, para. 63(b)(3) (1985) (requiring judges to report violations of the code of professional responsibility).

109. The Cook County States Attorney's Office, for example, has instituted such a program. See *Chicago Lawyer*, August, 1987, at 18, cols. 2-3.

110. *Id.* at col. 4.

misconduct arises and comes to the attention of a supervisor, the case might be investigated.<sup>111</sup> In most cases, however, it appears that the office has found the charges to be unfounded.<sup>112</sup> Obviously, because of the repeated occurrences of misconduct, the current internal office practices of prosecutors' offices are inadequate and a more rigid internal disciplinary structure is needed.

## VI. CONCLUSION

The problem of prosecutorial misconduct is prevalent in Illinois. To date, the manner in which the bar and courts have treated the problem has been ineffective from a professional standpoint. The dilemma can be attacked effectively on three fronts: in the courtroom, in the classroom, and by instituting intra-office investigatory and disciplinary procedures. Although suggestions in this article may be rudimentary and require further analysis and discussion, they do provide a starting point for pondering the problem. Hopefully, if the bar constructively reexamines the manner in which it manages the problem of prosecutorial misconduct, one will read future opinions without finding a case reversed because of a prosecutor's courtroom misconduct.

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111. *Id.*

112. *Id.*