Prosecutorial Misconduct--Recent Second Circuit Cases
PROSECUTORIAL MISCONDUCT—RECENT SECOND CIRCUIT CASES

In the first ten months of 1973, the United States Court of Appeals for the Second Circuit handed down seven opinions in which it discussed the issue of prosecutorial misconduct. The allegations of prosecutorial misconduct during trial, raised by the appellants among their claims of errors in these seven cases, resulted in only one reversed conviction. Reversal, however, is not the hallmark of importance. The frequency with which this claim is raised, the attention it has been given by the Second Circuit, and the impact of the remedy when applied, combine to make this issue timely and compelling for all participants in the legal profession.

The issue of prosecutorial misconduct arises primarily because of a lack of specific standards relating to the conduct of counsel at trial. What types of misconduct are, in fact, grounds for reversal? When does the accumulation of incidents of misconduct become too much for the reviewing court to allow? Indeed, what conduct constitutes misconduct? To these questions there are no consistent answers. The decision in one case often will not provide any useful guidelines for either counsel or a reviewing court in a subsequent case involving similar facts. Can a prosecutor correct or improve his tactics when the acceptability of those tactics changes from case to case? An examination of these recent Second Circuit cases will point out the extent of the uncertainty and confusion marking this problem.

To begin with, the conduct of counsel never occurs in, and is never viewed in, a vacuum. And, in the first instance, the issue is not what behavior standing alone is or is not acceptable, but

* The author gratefully acknowledges the advice and encouragement of Professor Sybil H. Landau.

what was the impact of that behavior on the fact finding process in this case.

Thus, in reviewing allegations of prosecutorial misconduct, the Second Circuit Court of Appeals seeks to weigh "in the circumstances of the case, the degree of prejudice created in the minds of the jurors the quality and forcefulness of the trial judge's corrective action and the strength of the Government's case." This is the essential threshold framework in which the court reviews appeals alleging misconduct, and the resulting balance or imbalance determines whether the court will find reversible error in any given case.

Turning to the cases themselves, the first to be decided was United States v. Pfingst. On appeal, the defendant alleged several grounds for misconduct. These included the public announcement of a second indictment against the defendant while trial on this indictment was still going on; the divulgence at this trial of a guilty plea by a co-defendant in the second indictment; and a demand at this trial that the defendant produce a document which the prosecutor alleged was in the defendant's possession. Specifically, Pfingst, who had been convicted after a four week jury trial on three out of nine subsequent counts, sought reversal on the ground that these instances of misconduct had deprived him of a fair trial. The first indictment charged Pfingst with transferring and concealing corporate assets in contemplation of bankruptcy and with conspiracy to commit these acts. At the time this bankruptcy case went to trial, Pfingst also faced bribery charges, having subsequently been indicted by a federal grand jury for the crime of having paid a political town leader $50,000 in exchange for Pfingst's judgeship nomination. Pfingst's attorney chose to have the bankruptcy case tried before the bribery charge.


5. 477 F.2d 177 (2d Cir. 1973), cert. denied, 41 U.S.L.W. 3645 (June 11, 1973).

6. Pfingst was acquitted on the bribery charge. The Government's case rested upon the testimony of Ramon N. D'Onofrio who had been a salesman and rose to the vice-presidency of Evans Amityville Dairy, Inc. D'Onofrio had agreed to co-operate with the Government and to testify against Pfingst. However, during the course of the bribery trial, D'Onofrio refused to permit access to his Swiss bank account to either the Government or defense counsel.

D'Onofrio's refusal was based on a claim of self-incrimination. The trial judge rejected D'Onofrio's claim, held him in contempt, and thus discredited the Government's principal witness in the eyes of the jury. When Pfingst attempted to appeal his bankruptcy convic-
The bribery indictment was announced jointly by the United States Attorney and the Suffolk County District Attorney during a televised press conference and appellant claimed that, as a result, the Government had prejudiced his right to a fair trial. The appellant charged that the timing of this announcement had been deliberately manipulated by the prosecutors and that the announcement of the indictment created an atmosphere which "made a fair trial for appellant impossible." The Court of Appeals found no support in the record for this charge.

The timing of the bribery indictment was obviously related to [the] confession and cannot support an inference of deliberate prosecutorial misconduct in connection with the bankruptcy case when the latter's trial date was set for six weeks later and then set only tentatively.

Secondly appellant claimed as misconduct that the Government deliberately arranged for Fellman, the confessing party, to plead guilty to the bribery charge during the course of Pfingst's bankruptcy trial. This charge the Court viewed as "baseless", noting that in fact the defense counsel itself had withdrawn the charge in the court below.

[T]he defense withdrew a charge of deliberate manipulation below, while maintaining that the Government is charged "with knowing the natural consequences of their act. . . ." Rather than being the result of prosecutorial conspiracy the timing of Fellman's plea and sentencing was arranged by the trial judge and Fellman's counsel at the pre-trial conference in the bribery case.

In short, there was no causal connection between Fellman's decision and the trial of this indictment. The final claim of prosecutorial misconduct related to the Government's attempt to introduce as an exhibit a conformed copy of a signed agreement concerning the purchase of stock by Pfingst, and one D'Onofrio, the Government's prime witness against Pfingst in both the bankruptcy and bribery actions. This incident arose in the following

---

7. Id.
8. Id.
9. Id. at 186.
way: An understanding had been reached between opposing counsel that objections to the authenticity of documents would be made in writing prior to the trial. Subsequently, during pretrial discovery proceedings, the Government made known to the defense that it intended to introduce this exhibit. Nevertheless, when the Government sought to introduce this exhibit into evidence, the defense objected to its admission on the ground that, as a conformed copy, it was not the best evidence of the document.

The Government sought to meet this objection by laying a foundation for the introduction of the conformed copy of the document. The Government claimed that the copy had been made from an original which D'Onofrio had returned to Pfingst. The prosecutor, in what this Court condemned as an “excess of zeal”, "ask[ed] the defendant to produce the [original] signed agreement.” Immediately, the trial court instructed the jury that:

The demand should not have been made, the defendant does not have to turn over anything. There is no indication the defendant has any such document in its [sic] possession.

Following this instruction, a recess was declared and the defense moved for a mistrial. It was denied, but the trial judge again criticized the Assistant United States Attorney who acknowledged his error and offered an apology. When the trial resumed, the judge, at the request of the defense counsel, addressed the jury:

Ladies and gentlemen, it was improper for the Government attorney to make any such demand on the defendant, as I told you earlier, not only for the reasons I indicated, that is that the defendant is not obligated to produce anything, which I indicated at the outset of the case, and no inference against a defendant may be drawn from the fact that he doesn’t produce anything. It is not his obligation.

But more important, in this particular instance, there is no evidence at all that the defendant had the original of these documents.

Under these circumstances, the Second Circuit Court of Appeals found that the prejudice flowing from the error was mini-

10. Id. at 187.
11. Id.
12. Id.
Prosecutorial Misconduct

mal: the incident was an isolated mistake and one, moreover, that had occurred near the "beginning of a long and complex trial." In this context, the court found apt the words of District Judge Weinstein in the case below:

It is impossible to try any case, particularly a case of this nature, without having things occur which others might prefer not to have occur . . . [In a] case as complex and well tried as this, and tried over as many days, all of these minor things just wash out.

The prompt curative instruction was regarded as strong and effective; the evidence against the appellant was clear and convincing. There was, the appellate court concluded, no reason to "fear that the prosecutor's improper conduct may have tipped the scales of justice against appellant." The court also stated:

Finally, we consider the need for deterring the Assistant United States Attorney from making a similar demand in the future. We reject out of hand appellant's contentions that the demand was part of a deliberate plot by the prosecutor to prejudice the jury against him. The demand was made—whether out of incognizance, anger or, indeed, frustration—spontaneously under the pressure of an unexpected best evidence objection. Despite appellant's other contentions of misconduct by the prosecutor, we see no support in the record for appellant's insinuations of a pattern of deliberate prosecutorial misconduct with a cumulative prejudicial effect on his trial.

The Court of Appeals thus saw no need for further action against the Assistant United States Attorney who had been warned by the trial court and who had acknowledged his error.

After Pfingst's conviction was affirmed, a series of three cases caused the Second Circuit to review the conduct of a particular Assistant United States Attorney. The challenged conduct included appealing to the jury's prejudices in an opening state-

---

13. Id. at 188.
16. 477 F.2d at 188.
17. Objections to the prosecutor's summation were also rejected by the appellate court. The trial judge had described the summations by counsel on both sides as "highly professional and restrained". Id. at 189.
ment, raising inferences of guilt by association, making derogatory comments concerning the defendant and his witnesses, and attempting to give unwarranted additional veracity to the Government’s witnesses. By the time the third case reached the Second Circuit, the court was no longer looking exclusively at whether a particular defendant had been prejudiced by the conduct. With the involvement of the same prosecutor in all three cases, something more was at stake. Somehow the Court had to reach this prosecutor, perhaps even at the expense of overturning the conviction of a possibly guilty defendant. In the end, the court simply had to say this much misconduct was too much.10

United States v. Miller19 was the first of the three cases in which the conduct of the same prosecutor was challenged. Miller was convicted on two substantive counts and one conspiracy count in an indictment arising from the September, 1970, robbery of a Queens, New York bank. The trial, held before a judge and jury in the Eastern District of New York, lasted seven days and resulted in a concurrent sentence for Miller of seven years on each of the substantive counts and five years on the conspiracy count.

On appeal, the defendant’s first claim of prosecutorial misconduct was that in his opening address, the Assistant United States Attorney appealed to the public’s law and order prejudices by “asking the jury to do him, the prosecutor, ‘a favor’ by being ‘fair to the public’s interest in law enforcement; that is, be fair to yourselves.’”12 The Second Circuit disposed of this claim by characterizing the prosecutor’s statement as an isolated appeal, albeit “ill-conceived”, to the jurors’ role as representatives of the public, and not as a part of the broader scheme calculated to inflame the passions of the jury. The appellate court also viewed any possible prejudice from the remark as being cured by the trial judge’s instruction to the jury which was made shortly after the prosecutor’s statement. The trial judge stated that: “No favors [are] granted here in this court. We try the case on the evidence, only upon the evidence.”22

Thus, even if limited error had occurred, this prompt instruc-

19. An index of an appellate court’s displeasure with the conduct of an attorney may be seen in whether or not his or her name is mentioned in the opinion. In this series of three cases, the prosecutor’s name does not appear in the text of the court’s opinion until the third case was decided. See United States v. Drummond, 481 F.2d 62 (2d Cir. 1973).
21. Id. at 1317.
22. Id. at 1318.
tion by the trial judge cured it.\textsuperscript{23} Appellant’s second claim of misconduct by the prosecutor was based upon the attorney’s alleged attempt to raise an inference of guilt by association. The appellant argued that this was promoted by the Assistant United States Attorney’s cross-examination of the defendant. He included questions as to whether Miller knew the other members of the robbery team. This error was compounded, according to the appellant, by the prosecutor’s argument in summation “that because the testimony of the coconspirators had convicted other members of the robbery team, it should also be sufficient to convict appellant.”\textsuperscript{24} The Court of Appeals viewed the prosecutor’s argument as merely being responsive to the appellant’s attempt on direct examination to show a limited involvement in the robbery and the appellant’s attempts to impugn the credibility of key Government witnesses. The appellant’s counsel had argued in summation:\textsuperscript{25}

\begin{quote}
[A]nd what you have to consider is whether they are accomplices, whether they are persons who were slightly involved in the crime and they are testifying against the people more seriously involved in the crime or whether it’s exactly the opposite: Whether they are the persons most seriously involved who are looking to exculpate themselves and help themselves by bringing other people in.
\end{quote}

The appellate court disposed of this claim by holding that:\textsuperscript{26}

\begin{quote}
In context, the remarks in summation . . . while close to the line, do not warrant, much less require, reversal.
\end{quote}

The Court of Appeals quickly disposed of the two other instances of allegedly prejudicial conduct by the prosecutor. In the first, he made references during testimony and summation about appellant’s participation in prior bank robberies constituting crimes with which appellant had not been charged. The court noted that the appellant could have been charged with these instances of prejudicial conduct by the prosecutor, but the appellate court was not persuaded.

\begin{footnotes}
\footnote{23. In support of this proposition, the court cites United States v. Pfingst, 477 F.2d 177, 188 (2d Cir.) \textit{cert. denied}, 41 U.S.L.W. 3645 (June 11, 1973); United States v. Sawyer, 469 F.2d 450 (2d Cir. 1972).
\footnote{24. 478 F.2d at 1318.
\footnote{25. 478 F.2d at 1318 n.1. Although the Court of Appeals does not dwell upon the conduct of defense counsel, the language quoted might well be viewed as a violation of the ABA STANDARDS, THE DEFENSE FUNCTION (Approved Draft 1971) \S 7.8 (b):
It is unprofessional conduct for a lawyer . . . to attribute the crime to another person unless such an inference is warranted by the evidence.
\footnote{26. 478 F.2d at 1318.}}}
\end{footnotes}
robberies and the Government could have obtained an opportunity to prove the appellant’s involvement in these to show the organization and structure of a larger conspiracy. The appellate court noted that “[W]hile it would have been better had a limiting instruction on the use of prior crime evidence been given” 27 none was requested and objection was not made to the charge given by the trial court. The appellant’s failure to object at trial to an attempt by the prosecutor to shift the burden of proof of an alibi to him disposed of that claim of prosecutorial misconduct. 28

Many problems of conduct and potential misconduct were raised in United States v. Fernandez, 29 the second case of this trilogy. Fred Fernandez had been tried twice before for the armed robbery of the First Federal Savings & Loan Association, and at each of the trials, the Government’s case rested on identification testimony. The first trial ended in a hung jury, and the conviction reached in the second trial was reversed because of “the combined effect of the error in admitting the [impermissibly suggestive] photographic identification testimony, in failing to give a cautionary instruction on the danger of misidentification and in requiring defense counsel to make her objections to the charge in the presence of the jury. . . .” in clear violation of Rule 30 of the Federal Rules of Criminal Procedure. 30 The third trial also resulted in a conviction, but the Court of Appeals for the Second Circuit reversed that conviction because “of what we think some jurors could well have considered partisan conduct by the judge on the core issue [identification] in the case.” 31 Specifically, the court found that the trial judge in Fernandez’s third trial was most discourteous to the defense’s expert witness and expressed disbelief as to testimony after questioning the witness himself. 32 That conduct, the Court of Appeals found, did “not jibe with our notion of the proper role of a federal judge in a criminal trial.” 33

In a footnote to the opinion, the appellate court noted that in light of its holding that a reversal was required by the conduct

27. Id.
28. Id.
29. 480 F.2d 726 (2d Cir. 1973).
30. Id. at 729.
31. Id.
32. The questions posed to the witness by the trial judge are reprinted in an Appendix to the opinion, 480 F.2d 726, 742-46.
33. 480 F.2d at 737.
of the trial judge, it need not pass on the prosecutor's conduct at
the trial.\textsuperscript{34}

However, the summation by the Assistant [United States At-
torney] who tried the case surely went to the verge and perhaps
beyond it. As this court warned only last year, the use of "first-
name epithets at a defendant that might be commonplace in a
second-rate movie or television script" is "beneath the dignity
of the United States Attorney's office and of the United States
as a sovereign,"\textsuperscript{35} notwithstanding the sincerity of the prosecu-
tor's belief that the defendant is guilty or that perjury has been
committed.\textsuperscript{36}

Another problem in the case arose from the handling of the
physical exhibits during the interval between the second and
third trials. The Government had introduced a diagram of the
bank at the first, second and third trials and had even used the
same exhibit in the trial of another robber. Marks made by a
witness had been "whitened" to allow the re-use of the exhibit.
The Government conceded that this "was an inexcusable breach
of the duty of counsel to keep exhibits left in their custody inviol-
ate so long as there is any possibility of need for their reuse."\textsuperscript{37} In
reading the opinion, the author gets the impression that the prob-
lem with the exhibits only served to exacerbate a certain distrust
that had arisen between the prosecutor and defense counsel. After
two error-ridden trials, each had apparently grown suspicious of
the good faith of the other. The Court of Appeals addressed this
problem with an appeal to both counsel to lower their "tempera-
tures".\textsuperscript{38} It noted that:\textsuperscript{39}

Defense counsel seems to have been convinced that the govern-
ment was pursuing a studied course of balking at the disclosure
of evidence to which the defense was entitled; the prosecution
seems to have been equally convinced that all this was a ploy
designed to prevent a trial or make a record for appeal. We
suggest that counsel put away such ideas, no matter how sin-
cerely held, and recognize that while each has a task to perform

\textsuperscript{34} Id. at 741 n.23.
\textsuperscript{35} The language cited is a quote from United States v. Benter, 456 F.2d 1174, 1177
(2d Cir. 1972) in which the prosecutor referred to the defendant as "Honest Phil".
\textsuperscript{36} 480 F.2d at 742 n.23.
\textsuperscript{37} Id. at 740.
\textsuperscript{38} Id. at 741.
\textsuperscript{39} Id.
with vigor and determination, this is not inconsistent with due regard and cooperation.

The Second Circuit opined that “it is important to the interests of justice that, whatever the outcome, Fernandez’s fourth trial should be the last.” 40 While it had found no necessity to pass on the prosecutor’s conduct, 41 it noted that:

[M]ethods . . . popularized by television should not be the norm for the court room; while cross-examination may be vigorous, witnesses deserve to be treated with proper respect.

Unfortunately, Fernandez was not the last occasion in which the conduct of this particular prosecutor was to come to the attention of the Court of Appeals. In United States v. Drummond, 43 the Second Circuit was asked for the third time within three months to review his conduct. The appeal arose from Drummond’s conviction in the United States District Court for the Eastern District of New York for conspiracy to possess and distribute heroin. Drummond’s claims on appeal were that there was error at trial in the introduction of cash seized from his person at the time of his arrest, that his counsel was improperly restricted during cross-examination, and that the conduct of the prosecutor denied him a fair trial. The appellate court dismissed the first two claims but agreed that the third claim, that of prosecutorial misconduct, presented a substantial issue:

The record clearly shows a consistent pattern of misconduct by the prosecutor in the case before us. Moreover, this court has noticed incidents of this prosecutor’s misconduct in the past. Because of the repeated misbehavior of this prosecutor in this and prior cases, we feel compelled to reverse the decision of the trial court on the sole ground of prosecutorial misconduct.

In spite of being warned several times by the trial judge, 45 the

40. Id.
41. Id. at 741 n.23.
42. Id. at 741.
43. 481 F.2d 62 (2d Cir. 1973).
44. Id.
45. For example, at the close of the first trial, the judge warned the prosecutor: [Y]ou just reach too far and one day the Court of Appeals, like it has on occasion said about [Assistant United States Attorneys], it’s improper, don’t ever do it again . . . you could possibly be overturned . . . you offered questionable evidence, you asked questionable questions, and I think if there is a conviction, the conviction is going to be questionable.
481 F.2d at 63.
prosecutor persisted in his pattern of improper conduct. Examples of misbehavior included the prosecutor's manifesting his disbelief of the defendant's witnesses with remarks such as:

[W]ere you lying then or now?
Were you lying at that time?
Was that the truth or is this the truth?
Have you now changed your story three times?
You were arrested last night and you don't remember what you were wearing?
You remember then but you don't remember now?

Other instances of misconduct included the prosecutor's characterization of testimony by defense witnesses as "preposterous." Especially objectionable was his attempt to bolster the credibility of prosecution witnesses with the suggestion that their association with the Government offered an assurance of their veracity.

Detective Bernhardt was cross-examined. He came here to be evaluated by you, and I think, I submit to you, that the testimony of Bernhardt and the government agent here is certainly worthy of the highest credibility.

The Court of Appeals, in its opinion, also refers at length to the manner in which the prosecutor injected his own beliefs regarding the credibility of the defendant's interpretation of the evidence introduced at trial.

He [appellant] was arrested at 8:55, when his car was blocked on Corneli[a] Street.

Now, I suppose according to defense counsel's theory, the government is lying about that, too. Why the government would do that, I don't know. It is a very complete scenario to convict this poor man, according to Mr. Krinsky.

I image [sic] there is a big conspiracy between Manning, Bernhardt, myself, Jones, Miller. Everyone got together, including the people who make up the money lists and the government spent money to buy narcotics and try to concoct enough evidence to convict this poor defendant.

46. Id. at 63.
47. Id.
48. Id. at 64.
49. The prosecuting attorney had been warned of the impropriety of such a remark during the first trial. 481 F.2d at 63 n.2. Such conduct is violative of Disciplinary Rule 7-106 (c)(4).
Well, this is preposterous. Now, let's get back to reality and facts. The evidence shows that he is not only a narcotics dealer but a liar of the first order. The defendant calls the detectives a liar; Detective Bernhardt, Manning, Miller and Jones—all liars. According to him, he is the only honest man in the courtroom, and the testimony of all the agents is a pack of lies. His testimony is so riddled with lies it insults the intelligence of 14 intelligent people sitting on the jury.

The Second Circuit held that it need not decide whether any single act of prosecutorial misconduct would require reversal of the conviction and a remand of Drummond’s case for a third trial. The combination of the various acts of misconduct by the prosecutor, coupled with his recalcitrance in the face of earlier warnings, left the court “no other course.”

Two other cases, decided by the Second Circuit during this period, involve what might be considered misconduct on the part of defense counsel and attempts by the prosecutor to respond.

In United States v. La Sorsa, the defendants-appellants were convicted after a five day jury trial in the United States District Court for the Southern District of New York of conspiracy to sell heroin without the buyer's written order form.

The defense in the case was based on an attempt to impeach the credibility of the Government's star witness, Brown, and to show the bias of another witness, who had been beaten by the defendants when he had failed to make an over-due payment for narcotics. In its argument to the jury, the defense insinuated that the Government’s case was a “frame-up”. Defense counsel characterized the Government’s witnesses as “stars of a little play”, “creeps”, “the gem of gems” and “what a beauty”. The suggestion was made in summation that prosecution witnesses had received favors from the Government in exchange for their testimony at trial. The decision to prosecute La Sorsa and his co-defendant was, in defense counsel’s terminology, a “desperate act”. The defense also argued to the jury that the Government

50. 481 F.2d at 64.
51. Id.
53. Defendants had been tried once before on the same indictment. A mistrial was declared in the first trial when the jury was unable to reach a verdict. 480 F.2d 522, 524 n.1.
had used Brown to entrap the defendants because the public's concern about narcotics required the Government to obtain more convictions of heroin dealers: 54

Narcotics is the biggest thing there is in the country right now. And all of us share the same concern for it. All of us share that concern. What does that force the Government to do? It forces the Government to barter and exchange and deal with people like McMillan and Hazel and Brown, and if you do not believe a deal was made in this case with James Brown, then we failed here as attorneys.

In response to these arguments by defense counsel, the prosecutor argued in summation that the jury should vote for an acquittal if it believed that the Government "framed" the defendants: 55

Is that what you believe happened? Do you believe Governmental agencies went around and told these people to frame up innocent men? That is an outrageous charge, and if you believe it, acquit, acquit with the Government's blessing, because that is an outrageous thing to do, and nobody in this court, in the House of America, should be convicted on a frame-up of evidence put together in that way.

On appeal, this argument was characterized by the defense as an attempt by the prosecution to bolster the credibility of its witnesses by placing behind them the prestige of the United States Government. 56 The Court of Appeals agreed that if the Government had devised its summation to introduce this prejudicial argument, appellants' claim would have merit. Even a "casual reading" of the summations disclosed that the prosecution was merely meeting an argument which the defense itself had raised. 57 The attacks made by the defense upon the integrity of the prosecution justified the language used by the Government in response. 58 Accordingly, the Court of Appeals held the allegation

54. Id. at 526 n.3.
55. Id. at 526 n.2.
56. Id. at 526; cf. United States v. Puco, 436 F.2d 761, 762 (2d Cir. 1971).
57. In United States v. Benter, 457 F.2d 1174, 1175 (2d Cir. 1972), cert. denied, 409 U.S. 842 (1972), the Court of Appeals "examined the final arguments of both counsel to determine the extent, if any, to which the prosecutor was provoked by the defense into making . . . characterizations . . . that—unprovoked—would be improper and prejudicial." (footnotes omitted).
of prosecutorial misconduct to be without merit. Finding no merit in appellants’ other contentions as well, the appellate court affirmed the defendants’ convictions.59

The other case concerned with this type of interaction between the prosecutor and defense counsel was United States v. Santana,60 an appeal from a judgment of the United States District Court for the Southern District of New York in which the appellant had been convicted of possession and possession with intent to distribute approximately 34 grams of cocaine. On appeal, Santana challenged the lawfulness of the seizure of the cocaine and the conduct of the prosecutor at his trial. Notwithstanding these challenges, the Court of Appeals affirmed Santana’s conviction.

Santana had been indicted with Alfredo Aviles, who was later severed and tried separately from Santana. During defense counsel’s summation, it was suggested to the jury that Aviles had framed Santana. Defense counsel called the attention of the jurors to the fact that Aviles was not on trial with Santana, “implying that Aviles, who did not testify, received preferential treatment for his cooperation in ‘getting’ Santana.”61 The Assistant United States Attorney replied to that implication:62

He [Aviles] was indicted. So, if all that is a big setup, it means the United States Attorney’s office is also participating in it. We are going around indicting people who we know didn’t have anything to do with it, to put up a front for you, which of course, would be unethical and illegal. We don’t know about that.

The Court of Appeals described this statement by the prosecutor as “unduly rhetorical” but “not so unfair an answer as to call for reversal, particularly in the absence of objection.”63

59. The other allegations of error raised by appellant were (1) that the lower court, in failing to charge the jury that accomplice testimony should be “scrutinized with care and caution”, committed plain error, (2) that the defense had been unduly restricted in its cross-examination of Brown and Hazel and was thereby prevented from establishing the bias of these co-conspirators and that the lower court erred in permitting Brown to invoke his privilege against self-incrimination when asked about prior criminal acts for which he had not been prosecuted during cross-examination; and (3) that the defendant’s sixth amendment right to a jury trial was affected by the substitution of Judge Bauman for Judge Gagliardi on the final day of the trial without the defendants’ prior consent. See 480 F.2d 522, 525 (1973).
61. Id. at 37.
62. Id.
63. Id.
The second claim of prosecutorial misconduct was that the prosecutor had revealed Santana’s unsuccessful attempt to move for suppression of the cocaine. The Court of Appeals disagreed with defendant’s argument. It noted that defense counsel had attempted to suggest to the jury on several occasions that Santana’s arrest was unlawful and that the seizure of the cocaine had followed this unlawful arrest. The prosecutor’s response to this argument was:

"It was claimed that the police officers unlawfully seized this stuff, perhaps they even unlawfully searched the car. There is, of course, a difference between searching something and seizing it.

Put yourself in the position of a policeman, the middle of the night, out on the street, he is working narcotics cases. He makes an approach, ladies and gentlemen, on people who he thinks are engaged in narcotics traffic. What’s the guy supposed to do? Let them go? Let them walk away with this garbage? What would you have done? I mean the police officers would have been damned if they didn’t stop them, they are being damned because they did. What are you going to do?"

The Court of Appeals dismissed this second claim, noting that it saw “nothing wrong” in the prosecutor’s response.

Appellant’s third challenge to the conduct of the prosecutor was regarded more seriously. Defense counsel had persistently suggested that the investigating officers were lying about “critical facts”. To this the prosecutor replied that the investigator “knows the underworld of narcotics. He knows what illegal trafficking in narcotics is!” Later in summation, the prosecutor remarked:

"They arrest people all the time, they do dangerous undercover work, they are in and out of courts a lot. Couldn’t they come up with a better lie if they were lying? They were telling the truth, ladies and gentlemen. You heard it, just what happened.

The Court of Appeals noted that the Government had conceded that “it would have been better if the reference to the ‘underworld of narcotics’ had not been made.” The court opined

---

64. Id. at 38.
65. Id.
66. Id.
67. Id. 38-39.
68. Id. at 39.
that the remark was not so prejudicial as to require reversal, especially in light of the physical evidence and admissions of guilt volunteered by the defendant.

What makes the Santana opinion of particular interest in this series of cases on prosecutorial misconduct is the Court of Appeals’ analysis of the problem. The court points out that where the defendant’s guilt is plain, and defense counsel chooses, nevertheless, to go to trial, there is little that counsel can do aside from attempting to attack the credibility of law enforcement officers, and the prosecutor should be prepared for such tactics:60

While prosecutors would be wiser not to take such attacks too seriously, they can hardly be censured for responding sharply to criticisms they believe to be wholly unjustified, and courts should not be overly nice in such cases in scrutinizing the give-and-take of summation. Save in extreme instances, the judge’s charge and the jury’s good sense can be counted on to set things right.

In the most recently decided of these cases, United States v. White,70 the character of the prosecutor’s remarks in summation was the sole ground upon which appellant sought reversal of his conviction. White had been convicted after a two day jury trial of assault with a dangerous weapon within the special jurisdiction of the United States. The assault had taken place in the locker room of the United States Post Office.

The Court of Appeals, speaking through Chief Judge Kaufman, found the remarks of the prosecutor that the defendant was “lying” and that his defense was “fabricated” to be unwise and unnecessary tactics. Specifically the prosecutor had told the jury:71

One final word in this case: You must, when you enter your deliberations, decide which of the witnesses is telling the truth. The evidence in this case shows that at least one of them is lying. I suggest to you, ladies and gentlemen, that the evidence in this case shows that that man [indicating the defendant] is that one.

What is the evidence that shows he is lying? Well . . .

Chief Judge Kaufman noted that “[a] few injudicious words

69. Id.
71. Id.
uttered in the heat of battle by an Assistant United States Attorney may undo months of preparation by police, prosecutorial, and judicial officers.\textsuperscript{72} In the instant case, the Court of Appeals affirmed the conviction, finding that the proof of guilt was clear and convincing. The remarks of the prosecutor, while “intemperate”, were not so egregious as to taint the integrity of the jury’s verdict and to require a new trial.

These seven cases clearly set out the dimensions of the problems caused by prosecutorial misconduct. The prosecutor is expected to convict the guilty, yet as the “representative of the government” he has an obligation to see that “justice is done”,\textsuperscript{73} which makes him chargeable with a standard of conduct which is higher than defense counsel’s. Nowhere have the specifications of this conduct been laid down.\textsuperscript{74} Nor have appellate courts been helpful in establishing guidelines which might put conscientious prosecutors on notice.\textsuperscript{75}

While the unwillingness of appellate courts to establish “per se rules”\textsuperscript{76} allows for flexibility in review, it also fosters difficult problems for prosecutors and promotes frivolous appeals of criminal convictions. Appellate courts are wont to make use of this “flexibility” in a “harmless error” review of prosecutorial misconduct.\textsuperscript{77} The objectionable remark will be weighed in the balance against the prejudice to the defendant. Relevant criteria include the weight of the evidence of defendant’s guilt,\textsuperscript{78} whether defense counsel objected to the remark,\textsuperscript{79} whether that objection caused

\textsuperscript{72} Id.

\textsuperscript{73} Berger v. United States, 295 U.S. 78, 88 (1935).

\textsuperscript{74} “To attempt to spell out in detail what can and cannot be said in argument is impossible, since it will depend largely on the facts of the particular case.” ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, 127 (1971) [hereinafter ABA STANDARDS].

\textsuperscript{75} The United States Court of Appeals for the Second Circuit wrote in its opinion in United States v. White, No. 73-1597 (2d Cir. Oct. 11, 1973):

[W]e do not intend to formulate per se rules or declare that certain words will automatically trigger mistrials or reversals of convictions.

The only case found in which specific guidance was given to the prosecutor was Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968).

\textsuperscript{76} See ABA STANDARDS, supra note 74, at 12.


\textsuperscript{78} United States v. White, No. 73-1597 (2d Cir. Oct. 11, 1973).

\textsuperscript{79} United States v. Aadal, 368 F.2d 962, 965 (2d Cir. 1966) cert. denied, 386 U.S.
the trial judge to issue a curative instruction to the jury,\textsuperscript{88} whether that curative instruction was forceful enough to outweigh any possible prejudice stemming from the prosecutor's comment\textsuperscript{89} and whether the curative instruction was given by the trial judge within a short time after the objectionable comment was made.\textsuperscript{82} Other factors examined by reviewing courts are the length of the trial,\textsuperscript{83} and at what point during the trial the alleged error occurred,\textsuperscript{84} whether defense counsel invited the prosecutor's "misconduct",\textsuperscript{85} and whether the prosecutor's misconduct was deliberate.\textsuperscript{88}

The primary problem that arises from the absence of "per se" rules is that misconduct which might not lead to reversal in one trial situation, because of a combination of the variables mentioned above, may be viewed as so prejudicial to defendant in another trial as to require reversal because of the absence of any countervailing factors.\textsuperscript{87} The "equation" for prosecutorial misconduct thereby changes from one trial to the next with the result that the reviewing Court often fails to focus on the misconduct itself and the prosecutor is not always put on notice that a certain form of behavior constitutes reversible misconduct.

Some examples of this inconsistency may be found in the cases discussed above. The appeal to the "public's interest in law and order" in \textit{Miller}\textsuperscript{88} was labeled "ill-conceived" whereas in \textit{LaSorsa},\textsuperscript{89} scarcely any mention was made of defense counsel's reference to the public's concern regarding narcotics. If it is un-

\begin{itemize}
\item \textsuperscript{87} Or, as in \textit{Drummond}, reversal may occur because the prosecutor had previously been warned. \textit{United States v. Drummond}, 481 F.2d 62 (2d Cir. 1973).
\item \textsuperscript{88} \textit{United States v. Miller}, 478 F.2d 1315, 1317 (2d Cir. 1973).
\item \textsuperscript{89} \textit{United States v. LaSorsa}, 480 F.2d 522 (2d Cir. 1973).
\end{itemize}
professional conduct for an attorney to attempt to influence the jury with references to events and concerns unrelated to the trial itself, this should hold true from one case to another and for prosecutor and defense counsel alike.

In Drummond, characterization of a witness’s testimony as “preposterous” by the prosecutor caused the Court of Appeals to find that such a comment, combined with other acts of misconduct, and made more reprehensible by two previous warnings constituted reversible error. In contrast, in White, when the prosecutor described defense counsel’s theory of the case as a “fabrication”, that remark was considered to be merely “intemperate” by the Court of Appeals. The lesson to be drawn from Drummond and White is that characterizing the defense’s theory either as a “fabrication” or as being “preposterous” constitutes some sort of misconduct. Yet notice to the prosecutor of the full gravity of this misconduct is muted by consideration of the other variables discussed above.

The drafters of the American Bar Association Standard recognized

a need for some central professional body in each community to which a lawyer can turn in confidence for guidance and advice and where, when necessary, a record may be made of his anguish and choice.

Bar associations have been active in advising practitioners as to what constitutes ethical conduct in given situations. A practical solution to the dilemma of the prosecutor forced to walk “the fine line which distinguishes permissible advocacy from improper excess” might be found in the publication by bar associations of the elements of permissible comment. Appellate courts, which are obviously most familiar with the claims of prosecutorial mis-

---

90. See cases collected in note 1 supra.


94. But also note that defense counsel in LaSorsa characterized the Government’s witnesses in extreme terms without any reprimand, 480 F.2d at 526.

95. For other examples of inconsistent treatment of similar conduct compare the discussion of the prosecutor’s statement regarding the credibility of Government witnesses in Drummond, 481 F.2d at 63 with LaSorsa, 480 F.2d at 526 n.2.

96. ABA Standards, supra note 74, at 12.

97. See generally, Ethical Opinions published in each volume of Record of N.Y.C.B.A.
conduct, might also undertake to offer counsel similar enlighten-
ment.98 Similarly, trial judges, who have a unique opportunity to
correct inappropriate remarks when they are made, have a para-
mount duty not to countenance forensic impropriety.99

The very fact that the United States Court of Appeals for the
Second Circuit has been forced to rule seven times on the issue
of prosecutorial misconduct in the past ten months, indicates
that attorneys and jurists are faced with a serious problem. Prose-
cutors do not engage in misconduct intentionally;100 in the end,
with the threat of reversal of even a strong case against a defen-
dant, nothing is accomplished by any sort of misconduct.101 Yet,
often a prosecutor does not know beforehand that his conduct will
be found to be improper. Prosecutors need to know, need to be
told by courts what conduct is permissible and what is not. The
recent and recurring opinions of the Court of Appeals on prosecu-
atorial misconduct should be viewed as indicia of the lack of com-
munication between the court and practitioners as to what consti-
tutes permissible conduct. We are clearly faced with a significant
problem, but it is not an insurmountable one. Good faith efforts

98. See ABA Standards, supra note 74, at 23.
99. The Introduction to the ABA Standards at 10 states that in the opinion of the
drafters:

The judiciary can make little claim to clarifying or adequately enforcing
appropriate standards of professional and ethical standards. In the last analysis,
failure in this area rests broadly upon the bar, but specifically upon judges—and
upon trial judges the more so.

100. Whitney North Seymour, Jr., the former U.S. Attorney for the S.D. of N.Y.,
explained the situation as follows:

When we decide to prosecute, it is because we decide that this is how justice
will be done. The decision is reached only after we are satisfied ourselves of the
defendant's actual guilt. When our belief in the defendant's guilt is fortified by
the Grand Jury's decision that he be held for trial, we become fledgling advoca-
tes, and our judicial function is relinquished to the judges who will sit on the
various stages of the case. Then as trial approaches and we see justice fighting
a losing battle as the evidence is whittled away, we become more and more
aggressive in our protection of the case that we believe to be right. Finally, at
trial, when false issues are injected, unfair attacks are made on the witnesses,
or perjured testimony is given by a defendant trying to lie his way out of a just
conviction, the prosecutor becomes the most zealous champion of justice you
can imagine. He is then a full-fledged fighting advocate; and he should be. He
must act with candor and fairness, but he must also fight for his cause. To do
otherwise would be to violate his duty in the most real sense. His job is now to
fight fairly and firmly with all his might to see that truth and justice prevail.

Seymour, Why Prosecutors Act Like Prosecutors, Record of N.Y.C.B.A. 302, 312-13
(1956).

by prosecutors, the bench and the bar to enunciate more clearly the standards expected of prosecutors, and of defense counsel, as well, ought to go far toward remedying the difficulty.