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Counsel vouches for client with personal story, throws away a win

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Like peppering a taut direct examination with a few leading questions or throwing some argument into a dramatic opening statement, an attorney vouching for a client or witness before the jury is improper, but rarely does it lead to much trouble.

The rule against vouching is easily understood. Cases should be decided on the evidence, and juries ought not consider the personal views of attorneys on any testimony. Courts consider this "vouching" for a witness, which improperly introduces unsworn testimony not subject to cross-examination.

Disfavor of vouching dates back at least to Shakespeare's "Othello," when the Duke of Venice warned:

> "To vouch this is no proof /
> "Without more certain and more overt tests /
> "Then these thin habits and poor likelihoods /
> "Of modern seeming do prefer against him."

Commenting on witness credibility is fair game for closing argument, but attorneys may not interject their personal beliefs on the veracity of testimony. *People v. Townsend*, 136 Ill.App.3d 385, 394 (1st Dist. 1985). When the prosecutor in *Townsend* told the jury he "believed both" state witnesses, the court deemed it improper but not so prejudicial as to warrant a new trial.

This proves a common outcome in appellate decisions regularly denouncing vouching but usually deeming it harmless error.

The Illinois Supreme Court, finding prosecutorial vouching had occurred in *People v. Adams*, 2012 IL 111168, ¶16, issued the usual rejoinder that the state's comments "were improper and are to be avoided in the future" but reversed the appellate ruling that this amounted to plain error.

The 7th U.S. Circuit Court of Appeals likewise found improper and prejudicial vouching by a prosecutor who argued the testifying police officer had no incentive to lie and would dishonor himself by lying, yet concluded the vouching "was not seriously prejudicial" to the defendant. *U.S. v. Alexander*, 741 F.3d 866, 872 (7th Cir. 2014).

Vouching by counsel is equally improper in civil cases, and the Illinois appellate court's response to such misconduct is usually just as tepid. When defense counsel in *Northern Trust Bank v. Carl*, 200 Ill.App.3d 773, 775 (1st Dist. 1990), closed by telling the jury he believed his client's testimony and did not think he was lying — classic vouching — the court found mere harmless error.

Likewise, counsel's description of the defendant's president as "an honest person" who "has become a good friend of mine" and whom he is "proud to have the opportunity to represent" and to have known personally comprises "clearly improper" vouching. *Canada Dry Corp. v. Nehi Beverage Company Inc.*, 723 F.2d 512, 526 (7th Cir. 1983).

Yet, the court viewed these "improper and erroneous" remarks as harmless error.

In the relatively few cases where improper vouching was not dismissed as harmless, the presence of other trial misconduct often led the court to determine the cumulative effect was the denial of a fair trial.

For example, the evidence was close in *Koonce v. Pacilio*, 307 Ill.App.3d 449, 456 (1st Dist. 1999), when defense counsel closed with his opinion that the defendants were "basically honest people" and offered his personal belief that defendants were "not responsible for this accident."

Such overt vouching proved enough to upset the jury verdict only where counsel also commented falsely on the defendants' financial resources, improperly summarized other evidence and wrongly asked jurors to put themselves in the defendants' place.

So when the 8th Circuit recently reversed a $900,000 judgment solely over attorney vouching, one would expect to find some unusually spectacular vouching. And the rebuttal closing argument in *Gilster v. Primebank*, 2014 WL 1356814 (8th Cir. 2014), does not disappoint.

Mindy Gilster, Primebank's credit administrator in Sioux City, Iowa, filed an internal complaint with her employer alleging sexual harassment by the branch's market president, Joseph Strub. After Primebank investigated the complaint and found it had substance, it disciplined Strub and ensured the harassment ceased.

Gilster then reported retaliation by Strub, including the denial of a promised promotion. This time, Primebank's investigations led to no action taken, prompting Gilster to bring a federal Title VII claim. Her case proceeded to trial, where conflicting evidence was presented on the extent and nature of the harassment, whether any retaliation occurred and the extent and cause of Gilster's emotional distress.

The jury awarded Gilster $900,000, including $600,000 in punitive damages, after finding both Strub and Primebank liable for unlawful sexual harassment and retaliation. Their appeal focused on Gilster's counsel's rebuttal.

After expressing admiration for Gilster bringing the harassment complaint, counsel brought up her own sexual harassment as a Drake University law student. Unlike Gilster, "I refused to stand up for myself," she told the jury. "It takes great strength and fearlessness to make a complaint against your supervisor."

She continued: "Given my calling as a civil rights lawyer, I am constantly amazed by the strength and courage that my clients have when facing their employers and supervisors, the people who hold all the power. … I am fortunate that in the course of my life and in my work, I've had the opportunity to represent these women who are so strong to make these complaints."

The trial court recognized, in denying defendants' post-trial motion, that the objection to these remarks should have been sustained but found no "concrete showing of prejudice" from this improper argument. The 8th Circuit disagreed.

Counsel's recounting an experience from her own life was an improper appeal to the jury's sympathy and relied on facts not in evidence in an effort to enhance Gilster's credibility "by telling the jury that counsel, too, had endured similar misconduct." Referring to other clients' experiences also improperly ventured beyond the trial record.

Further, counsel made the "deliberate strategic choice" to offer these "emotionally charged comments" at the end of rebuttal, "when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond."

In reversing and remanding, the court cited the punitive damages awarded in what was a close case and found the attorney's "vouching and sympathy-arousing personal experience were directly aimed at enhancing" the damages award.

Gilster illustrates the high standard in place for vouching to independently qualify as reversible error. The decision suggests only equivalently egregious conduct will inspire courts to pay more than lip service to the rule against vouching.