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TEST # 58

1 HOUR CREDIT

LEGAL ETHICS

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Holy Hariguchi Hollywood! *Disqualifying a prosecutor just got a little harder, thanks to two rulings by the California Supreme Court*

By **ELLEN R. PECK**

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The guy who is prosecuting my client thinks he's the criminal law version of John Grisham," remarked Meryl Terpitute, sitting with his feet up on his partner California Joan's desk. "We are about to go to trial and he is promoting sales of his first novel about winning a case remarkably like my client's. I want to get him and his entire office recused. Do you think it'll fly?"

"I don't think so, based upon the California Supreme Court's recent prosecutor/novelist disqualification case, *Hariguchi v. Superior Court* (Santa Barbara Co.) (2008) 43 Cal.4th 706 (*Hariguchi*)," Cali said. "Tell me about the case," Meryl replied.

"On Sept. 14, 2005, Massey Hariguchi was charged with rape by intoxicating agent, oral copulation, residential burglary and marijuana possession after allegedly assaulting his victim in her apartment," Cali explained.

"Santa Barbara County Deputy District Attorney Joyce Dudley, the assigned prosecutor, was promoting her first recently published novel, *Intoxicating Agent*, around the time Hariguchi's case was proceeding to trial in April 2006. (*Hariguchi*, p. 583.)

"Hariguchi sought recusal of Ms. Dudley and her entire office arguing: (1) the novel was a fictional account of the rape of an intoxicated person; (2) like Hariguchi's case, the novel's trial was to begin in April 2006; (3) one character in the novel closely resembled Hariguchi; (4) the novel's rape was similar to an unrelated case which Dudley had tried resulting in a hung jury; (5) Dudley was promoting the book in Santa Barbara at the time Hariguchi's trial was set to commence; (6) the book was selling at two local bookstores; (7) Dudley appeared at public 'book signing' events locally; (8) a Santa Barbara television station interviewed her about her book; (9) the Santa Barbara Independent, a

local newspaper, published a complimentary review of the novel; and (10) Dudley's marketing of her book compromised her ability to discharge her prosecutorial duty to seek justice impartially." (*Ibid.*)

Meryl interjected, "I'll just bet Dudley denied that her novel was based on the Hariguchi case; that her promotion of the novel had any connection to the Hariguchi case; or that her decisions in Hariguchi had been affected by the book's publication."

"Correct!" Cali affirmed. "The California Supreme Court reversed the Court of Appeal decision disqualifying Ms. Dudley. It held, pursuant to Penal Code §1424, that there was no conflict and even if there had been, no unlikelihood of a fair trial was proven. (*Id.*, pp. 582-583.)

"Section 1424, the standard governing prosecutorial recusal, calls for a two-part analysis: (1) whether there is a conflict of interest and (2) whether the conflict is so severe as to disqualify the prosecutor. The trial court's decision to order or deny prosecutorial recusal is reviewed for an abuse of discretion; the findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and application of the law to the facts is reversible only if arbitrary and capricious. The court disagreed that the novel circumstances of this case warranted any departure from this standard." (*Hariguchi*, at pp. 584-585.)

"Was there a conflict in these 'novel' circumstances, no pun intended?" Meryl asked.

"No. The court found there was no conflict justifying Ms. Dudley's recusal since the novel's crime described different factual circumstances than those in the Hariguchi case; the publication and promotion of the novel were coincidental to Mr. Hariguchi's trial; and Ms. Dudley's attitudes about her prior case would be the same regardless of the novel," Cali replied. (*Id.*, at p. 586.)

"Didn't publishing a book linked to Hariguchi's case give Dudley a monetary impetus to prosecute the case, since the publicity would increase her book sales?" asked Meryl. "While the Court of Appeal thought so, the Supreme Court disagreed," Cali said. "Hariguchi did not demonstrate any relationship between his case and the marketing of the novel. The novel's different factual circumstances removed the impetus for Dudley to prosecute the Hariguchi case differently than she otherwise would have. Although a prosecutor's literary career could prosper from media publicity about successful prosecutions or plea bargains, the reverse would not be true. Dudley's novel's financial rewards were unlikely to affect her handling of the Hariguchi case." (*Id.*, pp. 586-587.)

"Wasn't the fictional Jordon Danner's voice really Dudley's voice, reflecting attitudes about the criminal justice system (e.g., a world 'where defendants are villainous, defense attorneys are manipulative schemers and prosecutors heroes') that precluded Hariguchi from receiving a fair trial?" Meryl asked.

“The Supreme Court refused to impute the views of her fictional character with Dudley’s real behavior or to presume that her fictional writing affected her ability to discharge her prosecutorial duties professionally,” Cali said. (*Id.* pp. 587-588.)

Meryl pondered, “Assuming there was a conflict, was it severe enough to warrant disqualification?”

“No, the court noted the paucity of local publicity and that Dudley’s self-published novel was not widely purchased (e.g., as of May 12, 2008, *Intoxicating Agent* was No. 1,552,338 on Amazon.com’s sales list). It concluded that the promotion of Ms. Dudley’s novel was not so pervasive or related Hariguchi’s case as to make it unlikely he would receive a fair trial.” (*Id.*, at pp. 588-589.)

“What about the local publicity’s potential taint upon the jury pool?” Meryl asked.

“Any potential adverse influence upon the jury pool resulting from *Intoxicating Agent*’s promotion could be resolved by a sequestered *voir dire* process including questioning prospective jurors concerning their familiarity with counsel’s writings and any possible bias out of the presence of the rest of the jury pool,” Cali said. (*Id.*, p. 589.)

“Permitting Dudley to prosecute Hariguchi seems so ‘unseemly,’” Meryl declared.

“Even so, actual or apparent impropriety is not grounds for recusal under §1424, which requires that there be a ‘reasonable possibility’ that Dudley would fail to exercise the discretionary duties of her office in a fair and evenhanded manner,” Cali replied. (*Ibid.*)

“The court cautioned about prosecutorial conduct which places ‘a prosecutor’s literary career ahead of, or at odds with, her fealty to the fair and evenhanded pursuit of justice and the community interest . . . which may compromise her ability to carry out her duties to represent the People and to seek justice impartially,’” Cali added. “The court also observed that defense counsel should take care that their literary pursuits do not interfere with effective defense of clients, citing cases wherein defense counsel have obtained media rights to their clients’ stories.” (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 616-617 and *People v. Corona* (1978) 80 Cal.App.3d 684, 720.) (*Id.*, pp.589-590.)

Meryl grimaced, “Guess I can’t try that one. I have another case involving a prosecutor who gave his file to and helped a cinematographer to make a film about my client’s alleged crime while my client was a fugitive. Surely that’s cause to recuse the prosecutor?”

“Nope.” Cali shook her head. “In *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 (*Hollywood*), the California Supreme Court also refused to disqualify a prosecutor who helped a filmmaker make a movie about a pending criminal case.”

Cali recited the allegations: Hollywood, a San Fernando Valley drug dealer, and his three cohorts kidnapped 15-year-old Nick, who was a half brother of Ben, with whom

Hollywood had a dispute. After holding Nick hostage for three days, Hollywood ordered his cohorts to kill Nick. They took Nick to the foothills outside Santa Barbara, dug a shallow grave, hit him over the head with a shovel, shot him and buried him.

After Nick's body was discovered in October 2000, the Santa Barbara County District Attorney filed an indictment against Hollywood and others charging them with Nick's murder with a special circumstance (murder during the commission of a kidnapping and kidnapping for ransom or extortion). Deputy D.A. Ronald Zonen prosecuted the cohorts and asked for the death penalty against Hollywood, who remained a fugitive.

In spring 2003, film director and screenwriter Nick Cassavetes contacted Zonen for assistance with a film — 'Alpha Dog' — about Nick's murder. Zonen agreed, turned over his file materials and acted as a consultant in making the film. Zonen hoped that Alpha Dog's publicity would result in Hollywood's apprehension.

After his March 2005 capture, Hollywood filed a motion to recuse both Zonen and his office, based upon an alleged conflict arising from Zonen's cinematic adventures. Hollywood argued (1) Zonen's disclosure of confidential documents, including criminal records, police reports and probation reports, to Cassavetes created a disqualifying conflict; and (2) Zonen sought to enhance his 'legacy' by participating in making a film that portrayed Hollywood adversely, thereby preventing a fair trial. After holding evidentiary hearings, the trial court denied the motion. The California Supreme Court granted review along with the *Hariguchi* case, after the Court of Appeal determined to recuse Mr. Zonen but not his office. (*Hollywood*, pp. 725-727.)

"Death is different!" Meryl objected. "Shouldn't there be closer scrutiny of prosecutorial conflicts in a death penalty case?"

"No, the standard for all prosecutorial conflict cases should be the same under §1424," Cali replied. "A death penalty case does not require a different standard, according to the court." (*Hollywood*, p. 728.)

But, Meryl argued, "Disclosure of confidential records can be sanctionable, result in criminal prosecution and punishment under Penal Code §§11105, 11140-11144 [misdemeanor — regulating dissemination of criminal records], §1203.05 [probation report disclosure], and warrant recusal. (*Id.*, pp. 730-731.) It can also warrant discipline." (Bus. & Prof.C., §6068(e); Rule 3-100, California Rules of Professional Conduct (CRPC.))

"Recusal is not mandatory," Cali reminded him. "Zonen's disclosure of confidential documents to filmmakers was found to be inadvertent or negligent, not intentional. While his actions could have been affected by fear of sanctions, the court determined that the disclosure of confidential documents did not prevent Zonen from acting fairly toward Hollywood. Thus there was no conflict. (*Id.*, p. 731.)

“What about Zonen trying his case in the movies?” Meryl asked. “Inflammatory portrayals of Hollywood, which might have a substantial likelihood of materially prejudicing a trial, are in violation of the trial publicity rule and warrant recusal.” (*Id.*, p. 732; CRPC 5-120(A).)

“The court found no conflict because (1) Zonen’s participation in the film making preceded Hollywood’s capture, was before his continued prosecution and was solely motivated by Zonen’s desire for Hollywood’s capture; and (2) Zonen desired that the film be as accurate as possible,” Cali said. “Moreover, jury *voir dire* could manage any potential influence on the jury pool. (*Id.*, pp. 732-733.)

“The Supreme Court also rejected claims that Zonen had any present or future interest in Alpha Dog. He was not compensated for his assistance and any future publicity was ‘endemic’ to high-profile cases. Recusal is not warranted since any replaced prosecutor in a high-profile case will face the same challenges,” Cali added. (*Id.*, pp. 733-734.)

The Supreme Court noted that while these facts do not warrant Zonen’s recusal, if his disclosure of confidential documents was illegal or unethical, Zonen may face censure in another forum. (*Id.*, p. 736.)

“What about recusal based upon the grounds that a son of a deceased victim was a deputy DA with whom the assigned prosecutor had no relationship?” Meryl wondered.

“No,” Cali said. “In *People v. Petrisca* (2006) 138 Cal.App.4th 189, 196, the court found that because there was no personal or professional relationship between the deputy DA and the assigned prosecutor, no conflict of interest existed that would render it unlikely that the defendant would receive a fair trial.”

“What if a D.A.’s employee is a parent of one of my client’s co-defendants? Should my motion to recuse the entire office be granted?” Meryl asked.

“Probably. In *People v. Vasquez* (2006) 39 Cal.4th 47, 55, 63, the California Supreme Court held that because of the family relationship there was a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner and that its severity required recusal. Note, however, that the court declined to overturn the conviction finding harmless error,” Cali smiled.

Meryl took his feet off Cali’s desk, got up to go and mused, “I have led such an exciting life — I might just write the great American novel and then sell it to the movies!”

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Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. Prosecutor, promoting sales of his first novel about a prior case involving the same charges against the defendant in a case that he is currently trying, will be recused.
2. The sole standards for disqualification of state prosecutors can be found in the California Rules of Professional Conduct.
3. A prosecutor may not be recused solely upon a finding of conflict of interest.
4. To recuse a prosecutor, a trial court must find a conflict of interest that is so severe as to make it unlikely the defendant would receive a fair trial.
5. If a trial court errs on a question of law regarding prosecutorial recusal, its conclusions of law are reviewed de novo.
6. For purposes of conflict analysis, a prosecutor-author's fictional attitudes are imputed to the prosecutor.
7. Potential taint upon a jury pool from publicity surrounding publication of a prosecutor's fiction that is linked to a pending prosecution can be resolved by a sequestered *voir dire* process.
8. A prosecutor may be recused solely for the appearance of impropriety.
9. In a pending criminal proceeding, it is unlikely that a court would order recusal of the prosecutor who, prior to apprehension of the defendant, gave his file to and helped a cinematographer to make a film about that fugitive's alleged crime.
10. A death penalty case requires a different standard of recusal, requiring closer scrutiny of prosecutorial conflicts.
11. A prosecutor's public disclosure of confidential records may result in criminal prosecution and punishment.
12. A prosecutor's public disclosure of confidential records may be unethical and may warrant discipline.
13. Recusal is mandatory for a prosecutor's public disclosure of confidential records if the disclosure is illegal or unethical.
14. A prosecutor's inflammatory portrayals of a criminal defendant may be unethical if they have a substantial likelihood of materially prejudicing a trial.

- 15.** In a novel case, involving a question of first impression, an appellate court is permitted to depart from the statutory prosecutorial disqualification standards.
- 16.** A prosecutor ethically may discuss information necessary to aid in the apprehension of fugitives.
- 17.** Recusal is warranted in a murder case where a victim's son is a deputy DA even if the office's assigned prosecutor has no personal or professional relationship with the deputy.
- 18.** Recusal of the entire district attorney's office is warranted where an employee is the parent of a defendant in a criminal case being prosecuted by the office.
- 19.** There are no ethical implications arising from a defense attorney's acquisition of media rights from a high-profile defendant.
- 20.** High-profile criminal cases are presumed to adversely affect prosecutors' discharge of their duties, contrary to evenhanded dispensation of justice.

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