

---

## VIII. PROSECUTORIAL MISCONDUCT

UNIVERSITY OF LA VERNE COLLEGE OF LAW

*October 24, 2008*

Good morning. It's an honor and a pleasure to be here today. I want to thank Dean Easley and the University of La Verne College of Law for hosting this Symposium on Prosecutorial Misconduct.

As a former deputy city prosecutor for the City of Los Angeles and as a former criminal trial court judge, prosecutorial ethics is a topic that I have over the years become intimately familiar with. I have been in the trenches — along with Professor Ed Perez and defense attorney Sam Eaton, who is on the panel, as young deputy city attorneys prosecuting criminal cases — and I have presided over numerous criminal trials evaluating the practices of prosecuting attorneys. And now in my position as a justice of the Supreme Court, I am a part of a Court charged with resolving conflicts, and clarifying the law — including, on occasion, misconduct by the prosecutor — misconduct that at times erodes the bedrock, the very foundation on which not only the profession stands, but upon which our criminal justice system is based.

You know, our legal profession is vast, and the *role* of the attorney varies, whether it's a specialty in corporate tax or family law, working in a big or small firm, public interest, private practice, civil or criminal. All are bound by our Rules of Professional Conduct.

The one *role* that all attorneys share is the role of guardian — guardian of the public's trust and confidence in of the legal profession and the justice system.

As guardians of the public's trust, members of the bar have agreed to be bound by the most stringent ethical codes within any jurisdiction — and one which arguably sets the highest bar for the standards of ethics in any profession.

For example, we know by looking at precedent, that vital to the integrity of the legal profession is the need for attorneys to maintain this high standard of ethics, civility, and professionalism.<sup>128</sup>

---

<sup>128</sup> *People v. Pigage*, 112 Cal. App. 4th 1359 (2003).

We know by looking at the Rules of Professional Conduct, that offending the professional code does not turn on whether a member of the state bar was acting as a lawyer when the violative conduct occurred.<sup>129</sup>

And finally, we know by looking at the Business and Professions Code that the attorney's duty of honesty and fair dealing is not limited to only those occasions when he is working with his clients — in fact, it is much greater.<sup>130</sup>

And never, never, is the importance of adherence to the code of ethics more heightened, than when the attorney is acting in the role of a prosecutor.

As my esteemed colleague, Justice Carol Corrigan, who was an Alameda County prosecutor for twenty-two years, has so eloquently articulated in her writings on prosecutorial ethics, "The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole."<sup>131</sup> And in representing society as a whole, the duty of the prosecutor is heightened.

The duty is heightened by the responsibility of the prosecutor to the people — acting on behalf of the people of the state of California. Heightened by the prosecutor's obligation to only convict the guilty and never convict the innocent. And finally, heightened by the profound responsibility of the prosecutor to keep safe, in his care and custody, the public's faith and trust in the justice system.

In preserving that faith and trust, it is the responsibility of the leadership in each county, each jurisdiction, when training new prosecutors, to dispel the misconception that a prosecutor's single role is to obtain a conviction.

That should not require a paradigm shift in the thinking and acting of prosecutors. But if the prosecutor views his charge as only one — to obtain a conviction — the likelihood that a prosecutor will cross an ethical line, or deprive the criminal defendant of due process, increases exponentially. And crossing that line, or even testing the contours of the law or pushing the envelope, may not only compromise his case, it may also compromise his job — and crossing that line will certainly always erode the public's trust.

---

<sup>129</sup> Prof. Cond. Rule 5-102(B) interpreted by *William H. Raley Co. v. Superior Court*, 149 Cal. App. 3d 1042 (1983).

<sup>130</sup> Bus. & Prof. Code § 6106.

<sup>131</sup> Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537 (1986).

In preserving the public's trust, there are well-settled principles and guidelines that a prosecutor must follow and that all prosecutors should be aware of. For example, every prosecutor should know unequivocally about his or her obligations under *Brady*, the need to disclose exculpatory evidence.<sup>132</sup>

One pet peeve of mine is that a prosecutor should know it is not permissible to invoke the Bible and other religious authority during argument — because it implies there is a higher law that should be applied by the jury. Nor should he impugn the integrity of defense counsel, or vouch for the credibility of his own witnesses, or imply personal knowledge of the truth or veracity of certain facts.

A prosecutor should know what is permissible cross examination, and a prosecutor should know what are acceptable methods of impeachment.

Finally, a prosecutor should be open to discerning when recusal is warranted. When it comes to matters of recusal — a matter you will be considering today — the prosecutor should always have at the forefront of his mind, the special duty of impartiality that flows from his function as the representative of the people, whose interest in a criminal prosecution is not, again, that it shall win the case, but that justice shall be done.

The statute setting out the standard governing a motion to recuse the prosecutor is clear — but also, in reality, quite difficult to satisfy. The statute articulates a two-part test: first, a motion to recuse requires a showing that there is a conflict of interest; and, second, it requires that the conflict be so severe as to disqualify the prosecutor from acting.

A “conflict” exists, for purposes of the test, if there is a reasonable possibility that the prosecutor may not exercise his discretionary function in an evenhanded manner.

Once the trial court determines that a conflict exists, the court must further determine whether the conflict is so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings, in other words, a disabling conflict.

When our Court reviews a challenge for recusal, we review under the abuse of discretion standard. However, the abuse of discretion standard is not a unified standard; the deference it calls for varies according to the

---

<sup>132</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

nature of a trial court's ruling under review. Moreover, reviewing under the abuse of discretion standard should not be interpreted as insulating trial court recusal orders from meaningful appellate review. After all, deference does not equal abdication, but it is a tough standard to meet.

We give strong deference to the trial court because the trial court is in the best position for factfinding and in assessing how great a conflict exists. It is genuinely in the best position to assess witness credibility, make findings of fact, determine which matters can be adequately addressed through jury voir dire, and evaluate the consequences of a potential conflict in light of the entirety of a case.

In reviewing a challenge to recuse the prosecutor, the Court asks whether the trial court's findings of fact are supported by substantial evidence, whether the trial court's rulings of law are correct, and whether the trial court's application of the law to the facts is or is not arbitrary and capricious.

Moreover, when our Court reviews a challenge to recuse — or any other conduct of the prosecutor for that matter — that review may lead to a more serious finding, such as a due process violation or a finding of outrageous conduct, which review may lead to a reversal of the conviction along with a bar to retrying the case because of double jeopardy. Not all error is harmless.

Now I can't address two of the cases you will be discussing today, *Hollywood*<sup>133</sup> and *Haraguchi*,<sup>134</sup> both decided on pretrial writs, since there is still a possibility those cases might come before our Court again in the future.

But in some other recent cases decided by our Court, the prosecutor unfortunately made himself vulnerable to recusal — testing the contours of the law — by not appropriately dealing with the appearance of conflict.

I should also note first that many conflicts suggesting or warranting recusal do not involve misconduct at all. The typical case is where D.A. employees are victims or witnesses to a crime. Usually the trial court can fashion a remedy short of full recusal of the entire D.A.'s office.

Although the cases I will mention were decided in favor of the prosecutor (over my dissent) — and the Court clarified the law — one cannot

---

<sup>133</sup> *Hollywood v. Super. Ct.*, 43 Cal. 4th 721 (2008).

<sup>134</sup> *Haraguchi v. Super. Ct.*, 43 Cal. 4th 706 (2008).

help but think that these cases were not resolved without some compromise of the public's trust.

For example, in *People v. Vasquez*,<sup>135</sup> charges were brought against an individual whose parents were both employed by the district attorney's office. The office considered recusing itself, but its tender to the Attorney General's Office was rebuffed. In an effort to give the victim's family the impression that the defendant would not get off lightly because of his ties to the office, the prosecutor, I believe, overcompensated, and, arguably, made no pretrial settlement offer it might have made in a routine case. The prosecutor departed from the obligation to be fair and impartial — and to act only in the interest of serving justice — and by doing so (in my mind) denied the defendant his right to due process under the law. A neutral and detached prosecution office might have dealt differently with the case. The majority found that the D.A.'s Office should have been recused, but the error was harmless in light of the strength of the case against the defendant. I dissented on due process grounds.

In *People v. Hambarian*,<sup>136</sup> the defendant was charged with crimes related to defrauding a city in connection with trash disposal contracts. During the investigation, the prosecutor relied on the findings of an audit conducted by a forensic accountant, whose services were paid for by the city. The city, also the victim in the case, provided the data and the expertise needed for the prosecution. Not surprisingly, the defendant moved for the prosecutor's recusal. Although it was a close case decided in favor of the prosecutor, the prosecutor might have avoided the issue of recusal by erring on the side of caution — by being the first to acknowledge the appearance of a conflict and by offering to recuse itself, or at least pay for the expert's services out of its own coffers, and not the victims'.

As a final word of caution, I note that it bears reminding that, although individual instances of unfairness or misconduct in a proceeding may not merit reversal, the accumulation of those instances may, depending on the severity of the violations and the strength of the prosecution's case, warrant reversal.

I want to close by commending those who are working as prosecutors — a truly honorable job, as prosecutors do truly serve the public's interest — and again remind prosecutors that you are the guardians of the public's trust.

---

<sup>135</sup> 25 Cal. 4th 1225 (2001).

<sup>136</sup> 31 Cal. App. 3d 643 (1973).

We are very fortunate to have in our country a justice system that strives to achieve justice without the corruption and undue influence we see in other systems of justice.

So, Convictions or search for Truth?

In the United State Supreme Court case, *United States v. Wade*, Justice White along with Justices Harlan and Stewart set out the guidelines for what I believe to be the suggested prosecutorial paradigm — a shift in focus from one of obtaining a conviction — to directing the focus toward ascertainment of the truth.

The three justices wrote in their concurring and dissenting opinion that a prosecutor “must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime”<sup>137</sup> — convicting the guilty but not the innocent.

Or as the court said in *People v. Kelley*: the prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>138</sup>

To quote my esteemed colleague, Justice Corrigan, a final time: “The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.”<sup>139</sup>

Certainly, when I joined the Office of the City Attorney over thirty years ago, I was convinced that I could do more for the cause of justice for victims as well as the accused by being a just and fair prosecutor.

By seeking and bringing light to the truth — that the truth might be revealed — showing mercy and compassion when it was warranted, but balancing that with the requirements of the law. In that way, the people would be served — and, in that way, justice too would prevail.

Thank you.

★ ★ ★

---

<sup>137</sup> 388 U.S. 218, 256 (1967).

<sup>138</sup> 75 Cal. App. 3d 672, 680 (1977).

<sup>139</sup> Corrigan, *supra* at 537.