Sidelining the Prosecutor in a Criminal Case

By Daniel E. Monnat and Paige A. Nichols

Once Jake began working with her, he started to experience what a great listener she was, how much she cared about others, how zealous she felt about seeking justice, and how brave she was about stepping up and fighting for it. Jordan … had the poise and sexiness of a dancer, the brains of a scholar, and the protective passion of a mother.[1]

Thus, a Santa Barbara County prosecutor describes her main character in a recently self-published novel—a fictional prosecutor she admitted modeling after herself, in a story bearing a number of similarities to a pending rape-by-intoxication trial.[2] The prosecutor's description of her fictional defense counsel was not quite so generous (he had a "reputation for being both disingenuous and manipulative"), and she characterized her fictional defendant as nothing more than a "vile brute" (he was "despicable," "felony ugly," a "pig," a "heartless bastard," and a "dirt bag").[3]

While the absence of much law on the removal of prosecutors in Kansas suggests that Kansas prosecutors are ordinarily aware of and adhere to their limits, defense counsel should be alert to potential conflicts of interest and other disqualifying circumstances

The *nonfictional* defendant moved to disqualify the prosecutor from his nonfictional trial.[4] The district court denied the motion, and the defendant sought a writ of mandate from the California Court of Appeal.[5] The Court of Appeal granted the writ, concluding that the prosecutor was "using her official position to obtain personal financial gain," as "[h]er connection with the Santa Barbara County District Attorney's Office is a major selling point for the book."[6]

The court observed that the prosecutor was "potentially infecting the jury pool with her views on the righteousness of cases prosecuted by that office."[7] But more importantly, her active promotion of the book while simultaneously prosecuting a case involving an identical charge created a "disabling" conflict of interest:

> Dudley [the prosecutor] will garner no laurels, and this case will not generate favorable media publicity for her book, if she enters into a negotiated settlement with petitioner. If, on the other hand, she tries the case before a jury and obtains a conviction, her victory may be acclaimed in the media. Dudley could expect such acclamation to generate favorable publicity for her book, especially since the defendant in the book is charged with the same crime as petitioner. Thus, Dudley's desire to promote her book could motivate her to try the case even though the matter might be fairly resolved through a negotiated plea to a lesser charge.[8]

The court concluded that the prosecutor should be removed from the case.[9]

In a companion case decided on the same date, the same division of the California Court of Appeal removed another Santa Barbara County prosecutor from a capital-murder trial, this time because of the prosecutor's participation as a volunteer "consultant" on a film by director-screen-

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writer Nick Cassavetes about the case.[10] The prosecutor had given the filmmaker his entire file in hopes that the film's detailed portrayal of events would help law enforcement apprehend the defendant, who had been a fugitive until shortly before the film's release.[11]

Again, the court expressed concern that the prosecutor had "potentially infected the jury pool."[12] Its removal order was intended to caution other prosecutors against "assist[ing] the media in the public vilification of a defendant in a case which is yet to be tried."[13]

While Kansas prosecutors are much farther removed from the siren song of Hollywood's film and publishing industries, they, too, are human. And that means that, occasionally, they are subject to influences or circumstances that call for their removal from a criminal case.

The district court's authority to disqualify a prosecutor "derives from its inherent authority to supervise the professional conduct of attorneys appearing before it."[14] The proper disqualification of a prosecutor—even the sole prosecutor in an isolated rural county—poses no great burden to the state, as Kansas law allows the district court to replace the disqualified prosecutor with a prosecutor from another county, a special prosecutor, or the Attorney General's office.[15]

This article will cover four categories of reasons to sideline a prosecutor from a particular case: (1) for a conflict of interest, (2) because of the prosecutor's prior representation of the accused, (3) because the prosecutor may be a witness, and (4) as a sanction for misconduct.[16] This article will then briefly discuss the right to immediate appellate review of district court orders denying removal.

Conflicts of interest generally

The Kansas Rules of Professional Conduct prohibit lawyers from representing clients whose interests conflict with their own or another client's.[17] A prosecutor's client—the state—has perhaps the most diverse interests of any lawyer's clients. The state's interests in a criminal case include the protection of not only the rights of the victim, the police, and "those who support them," but also the rights of the accused.[18] Thus, "[t]he key in deciding whether a prosecutor should be disqualified is whether the prosecutor has a significant personal interest in the litigation which would impair the prosecutor's obligation to act impartially toward both the State and the accused."[19]

The Kansas Court of Appeals most recently discussed the standard for removing a prosecutor from a criminal case in *State v. Cope*.[20] The *Cope* court described a two-part standard that obligates the party seeking removal to establish both (1) the *existence* of a conflict, and (2) the *severity* of the conflict:

> [1] A conflict of interest exists in the prosecution of a criminal case whenever the circumstances of the case evidence a reasonable possibility that the prosecutor's office may not exercise its discretionary function in an evenhanded manner. [2] However, a conflict of interest warrants recusal only if the conflict is so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings.[21]

The *Cope* court cited as the source for this standard a California case, which in turn relied on a California disqualification statute.[22]

The first part of this standard—defining a conflict of interest as a "reasonable possibility" of unfairness—appears slightly at odds with the Kansas Rules of Professional Conduct in effect when *Cope* was decided, as well as with the current rules.[23] When *Cope* was decided, the Comment to Rule 1.7, the general conflict-of-interest rule, stated that "[a] *possible* conflict does not itself preclude representation."[24] This comment is consistent with the Kansas Supreme Court's understanding that the modern rules did away with the "appearance of impropriety" standard, and that only "actual conflicts" will justify removal.[25] As recently amended, Rule 1.7 now describes a conflict of interest as:

> a *substantial risk* that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person; or by a personal interest of the lawyer. [26]

Nonetheless, any difference between the "reasonable possibility" described in *Cope* and the "substantial risk" described in Rule 1.7 is not particularly significant to the final removal analysis. The second part of the *Cope* standard—requiring a likelihood of unfairness—brings the analysis in line with the current rule and ensures that removal will be based on more than a simple appearance or possibility of unfairness.[27]

Two more points must be stressed about the *Cope* standard, assuming that it can and should be interpreted as consistent with Rule 1.7.

First, the California courts from which the *Cope* standard was borrowed have held that the removal analysis does *not* require a finding that the prosecutor's conflict of interest rises to the level of a due-process violation or will in fact create prejudice to the defendant.[28] While the defendant may need to show actual prejudice from the prosecutor's conflict to obtain a reversal on appeal, the defendant need only show a likelihood of prejudice to invoke a right to removal in the trial court.[29]

Second, no finding of intentional misconduct on the prosecutor's part is necessary to establish a conflict of interest.[30]

Prior representation of the accused

Kansas Rule of Professional Conduct 1.9 directs that "[1] a lawyer who has formerly represented a client in a matter shall not thereafter [2] represent another person in the same or a substantially related matter in which [3] that person's interests are materially adverse to the interests of the former client unless [4] the former client gives informed consent, confirmed in writing."[31]

The Kansas Supreme Court examined Rule 1.9 at length in *Chrispens v. Coastal Refining & Marketing, Inc.*[32] In *Chrispens*, the Kansas Supreme Court ordered the disqualification of a lawyer in an opinion that remains the

modern standard for disqualifications under Rule 1.9. Most importantly, the court held that when seeking disqualification under Rule 1.9(a), the movant need satisfy only three basic requirements:

(1) the attorney whose disqualification is sought formerly represented [the movant] in a matter,

(2) the matter is substantially related to a matter in which the attorney now seeks to represent a new client, and

(3) the new client's interest is substantially adverse to the interest of the party seeking disqualification.[33]

Significantly, the court concluded that once these requirements are satisfied, "an irrebuttable presumption arises that the attorney acquired confidential information in the former representation and is disqualified from representing the latter client."[34] In other words, "[t]he court need not inquire into whether the confidential information was actually revealed or whether the attorney would be likely to use the information to the disadvantage of the former client," because "[t]o conduct such an inquiry would frustrate the former client's interest in the confidential information."[35] The court explained that "[t]he reason for this irrebuttable presumption … is rooted in the idea of attorney loyalty":

> [MRPC 1.9(a)] is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second, the rule is important for the maintenance of public confidence in the integrity of the bar. [Citation omitted.] Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.[36]

For these reasons, a court faced with a Rule 1.9(a) disqualification motion must consider only whether the movant has satisfied the three requirements of the rule, and "should not hold a hearing" on the question of what, if any, confidential information was disclosed to the attorney subject to disqualification.[37] "To hold a hearing when disqualification is sought solely under MRPC 1.9 would be to frustrate the reason underlying the rule, which is to prevent disclosure of the confidential information the rule is designed to protect."[38]

The *Chrispens* court discussed the meaning of "substantially related" at length, rejecting a narrow approach and concluding that each case must be decided on its own unique facts, taking into account all relevant factors:

> Factors which courts have considered in making a determination under MRPC 1.9(a) … include: (1) The case involved the same client and the matters or transactions in question are relevantly interconnected or reveal the client's pattern of conduct; (2) the lawyer had interviewed a witness who was key in both cases; (3) the lawyer's knowledge of a former client's negotiation strategies was relevant; (4) the commonality of witnesses, legal theories, business practices of the client, and location of the client were significant; (5) a common subject matter, issues and causes of action existed; and (6) information existed on the former client's ability to satisfy debts and its possible defense and negotiation strategies. This is by no means an exhaustive list but merely reflects that the determination is oftentimes an evaluative determination by the trial court based upon the unique facts of the case.[39]

The court emphasized that a single significant factor may be sufficient to establish a substantial relationship: "For example, if the former representation involved defending the client on a criminal charge and the attorney is thereafter elected as a prosecutor and then seeks to prosecute the same client upon a charge connected with the prior defense, the former representation alone makes the disqualification an easy question."[40]

Other jurisdictions have applied similar "substantially related" factors in criminal cases, and have reversed serious convictions on grounds that the prosecutor should have been removed because of his or her previous representation of the defendant in a civil case, without requiring the defendant to show actual prejudice.[41]

Finally, it should be noted that the passage of time between the prior civil case and the pending criminal case does not lessen the prosecutor's duty of loyalty and confidentiality to his former client.[42]

The prosecutor as a necessary witness

Kansas Rule of Professional Conduct 3.7 prohibits a lawyer from acting "as an advocate at a trial in which the lawyer is likely to be a necessary witness," except where

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.[43]

This rule allows a non-witness lawyer to "act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so" by other conflict-of-interest rules.[44]

It does not appear that the Kansas appellate courts have ever approved or ordered the disqualification of a prosecutor under this rule—perhaps because Kansas prosecutors are wise enough to bow out of cases in which they anticipate testifying. The Washington Court of Appeals applied this rule to approve the disqualification of a prosecutor who had personally investigated the defendant's case and whose testimony was "material, unobtainable elsewhere, and key to the defense's theory."[45]

The Washington prosecutor might have avoided making herself a necessary witness had she relied on law enforcement to investigate the case or simply involved a third party in her interviews with other witnesses:

> It is easy for a prosecutor to end up as a witness in his or her own case if the prosecutor is not careful. The

> ethical rules warn against a prosecutor taking too active a role in the investigative phase of a case. ABA Prosecution Standard 3-3.1(a) begins, 'A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts … .' It is only when those agencies cannot or will not do their job properly that a prosecutor should become more active. However, even when a prosecutor becomes active in an investigation, it is important for a prosecutor not to create a situation where he will become a witness in his own case … . As ABA Prosecution Standard 3-3.1(g) states, 'Unless a prosecutor is prepared to forego impeachment of a witness by the prosecutor's own testimony … or to seek leave to withdraw from the case … a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.'[46]

Of course, as with all of the rules discussed above, a cautious prosecutor who may be called as a witness will voluntarily remove himself or herself from the case to avoid even the appearance of impropriety—if not also to avoid being upbraided by an appellate court. Both the prosecutor and the defense lawyer in a recent federal case suffered this latter consequence when the Tenth Circuit suggested that it might have been inconsistent with the spirit of Rule 3.7 for the lawyers to argue the case on appeal after testifying as witnesses in the district court.[47]

Misconduct

The court's removal of a prosecutor for any of the above reasons is justified as an effort to forestall misconduct, enforce the rules of ethics, and protect both the profession and the defendant. But if the prosecutor has already committed misconduct, the court may be justified in sanctioning the prosecutor with removal as both a punishment and a deterrent to others.[48]

Courts have found removal especially appropriate when the prosecutor obtained privileged information through his or her misconduct.[49] But courts have also found removal to be an appropriate sanction for other egregious misconduct, including misconduct during discovery, lack of candor with the court, and making inappropriate extrajudicial statements.[50]

Immediate appellate review

It does not appear that the Kansas courts have ruled on the question whether a criminal defendant has the right to immediate appellate review of an order denying removal of a prosecutor. But the Kansas appellate courts have entertained interlocutory appeals from orders disqualifying counsel in civil cases.[51] And in *State ex rel. Stephan v. O'Keefe*, the Kansas Supreme Court held that a petition for writ of mandamus was an appropriate method for the state to challenge a trial court's appointment of nonlegal counsel to represent prisoners in a series of civil lawsuits.[52] Other jurisdictions have found appellate review of orders on disqualification motions proper in the form of mandamus.[53]

These authorities all suggest that a petition for writ of mandamus would be an appropriate means by which to gain immediate appellate review of an order denying removal of a prosecutor.

Conclusion

There are many reasons a particular prosecutor might not be suited to try a particular criminal case. While the absence of much law on the removal of prosecutors in Kansas suggests that Kansas prosecutors are ordinarily aware of and adhere to their limits, defense counsel should be alert to potential conflicts of interest and other disqualifying circumstances. And district courts should not hesitate to invoke their inherent authority and replace a prosecutor whose involvement in a criminal case would be unprofessional. ❖

Endnotes

[1] Joyce Dudley, Intoxicating Agent 150 (2006).

[2] *Haraguchi v. Superior Court*, 49 Cal. Rptr. 3d 590 (Cal. App. 2 Dist.), *rev. granted on court's own motion*, 149 P.3d 737 (Cal. 2006).

[3] 49 Cal. Rptr. 3d at 593, 596-97.

[4] *Id*. at 593-94.

[5] *Id*.

[6] *Id*. at 596.

[7] *Id*. at 597.

[8] *Id*. at 597, 598.

[9] *Id*. at 598.

[10] *Hollywood v. Superior Court*, 49 Cal. Rptr. 3d 598, 607 (Cal. App. 2 Dist.), *rev. granted* 149 P.3d 737 (Cal. 2006).

[11] 49 Cal. Rptr. 3d at 603-04, 607.

[12] *Id*. at 606.

[13] *Id*. at 606.

[14] *LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 743 (1994), *quoting United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir.1980).

[15] *See* K.S.A. 19-711 (allowing court to appoint attorney to act as county attorney in county attorney's absence); K.S.A. 22-2202(17) (allowing prosecution by assistant attorney general and "any special prosecutor whose appearance is approved by the court"); *State v. Rollins*, 24 Kan. App. 2d 15, 23-24 (1997) (approving appearance of one county attorney in another county under K.S.A. 22-2202(17)), *rev'd on other grounds*, 264 Kan. 466 (1998).

[16] This article will not cover imputed disqualification, i.e., the removal of an entire prosecutor's office because of an individual prosecutor's conflict, but will focus instead on the legal bases for removing the individual prosecutor.

[17] KRPC 1.7, 1.8. The Kansas Rules of Professional Conduct were extensively amended this year, effective July 1, 2007. This article will refer to the new version of the rules unless otherwise noted.

[18] *State v. Cope*, 30 Kan. App. 2d 893, 895, *rev. den.* (2002).

[19] 30 Kan. App. 2d at 897.

[20] 30 Kan. App. 2d 893 (2002).

[21] *Id*. at 895-96.

[22] *Id*. at 896, *citing People v. Eubanks*, 14 Cal. 4th 580, 590-92 (Cal. 1996); *see also* Cal. Penal Code § 1424(a)(1).

[23] The issue in Cope was whether the Johnson County District Attorney's office should have been disqualified from prosecuting a defendant for allegedly threatening to blow up the Johnson County courthouse. The defendant argued that the office's status as an object of the defendant's threat created an impermissible conflict of interest. Curiously, the *Cope* court believed that there was "no disciplinary rule that deals with the issue raised in the instant case." 30 Kan. App. 2d at 896. But surely when a prosecutor is the victim of a crime, that prosecutor has a "personal interest"

in the case that might limit his or her representation of the state's interests, and such a conflict is cognizable under Rule 1.7.

24 KRPC 1.7 cmt. (1988 version) (emphasis added).

25 *State v. Dimaplas*, 267 Kan. 65, 68 (1999).

[26] KRPC 1.7 cmt. (2007 version) (emphasis added).

[27] *See Eubanks*, 14 Cal. 4th at 592 (recognizing that first part of standard describes only apparent conflict, rather than actual conflict; holding that "however the conflict is characterized," the second part of the standard requires more than an appearance of impropriety, and is thus in line with the modern view).

[28] *See People v. Vasquez*, 39 Cal. 4th 47, 59 (Cal. 2006) ("We disagree, as well, with the suggestion that under the actual likelihood standard every erroneous denial of a recusal motion … is also a deprivation of due process.").

[29] *See Vasquez*, 39 Cal. 4th at 68 (holding that while trial court erred in refusing to disqualify prosecutor's office, error neither rose to the level of a due-process violation nor resulted in actual prejudice to the defendant necessitating reversal on appeal). *Compare Haraguchi*, 49 Cal. Rptr. 3d at 598 (applying trial, not appellate, standard to order removal pretrial).

[30] *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 n.18, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) ("An arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination whether there is an actual conflict of interest is therefore distinct from the determination whether that conflict resulted in any actual misconduct.").

[31] KRPC 1.9(a).

[32] 257 Kan. 745 (1995).

[33] *Id*. at 756.

[34] *Id*. at 757.

[35] *Id*. at 758, *quoting Koch v. Koch Industries*, 798 F. Supp. 1525, 1536 (D. Kan. 1992).

[36] *Id*., *quoting Koch v. Koch Industries*, 798 F. Supp. at 1532 (in turn quoting *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 162 (3d Cir. 1984)).

[37] 257 Kan. at 759.

[38] *Id*.

[39] *Id*. at 753-54 (internal citations omitted).

[40] *Id*. at 754.

[41] *See, e.g., Nunn v. Commonwealth*, 896 S.W.2d 911 (Ky. 1995) (reversing arson conviction where prosecutor represented defendant in bankruptcy proceedings, and then successfully prosecuted her for arson in her own apartment—prosecutor's theory in criminal case was that defendant wanted to collect insurance on her renter's policy to solve her financial problems); *Sharplin v. State*, 330 So.2d 591 (Miss. 1976) (reversing defendant's conviction for murdering his wife, where prosecutor had previously represented defendant in divorce and custody proceedings against his wife); *State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (W. Va. 1993) (reversing defendant's conviction for assaulting her husband where prosecutor had previously represented defendant in divorce proceeding against her husband). *See also State v. Crepeault*, 704 A.2d 778 (Vt. 1997) (reversing conviction on other grounds, but suggesting that prosecutor should have been disqualified from sexual assault case where he previously represented defendant in child-in-need-of-support proceeding involving defendant's daughter, the criminal complainant's sister; reviewing caselaw from other jurisdictions applying Rule 1.9(a))

[42] *See State v. Jones*, 429 A.2d 936 (Conn. 1980) (disqualifying prosecutor from murder case, on grounds that prosecutor represented defendant in civil suit ending *eight years earlier*; civil suit involved head injuries defendant received in automobile accident, and was thus substantially related to defendant's proposed mental-health defense in criminal case), *rev'd on other grounds by State v. Powell*, 442 A.2d 939 (Conn. 1982).

[43] KRPC 3.7(a). *See also LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740 (1994) (examining provision at length).

[°] KRPC 3.7(b).

[45] *State v. Schmitt*, 102 P.3d 856, 859 (Wash. Ct. App. Div. 2 2004) (but reversing trial court's order disqualifying entire prosecutor's office).

[46] Laurie L. Levenson, *High Profile Prosecutors & High Profile Conflicts*, 39 Loy. L.A. L. Rev. 1237, 1244 (2006).

[47] *United States v. Berger*, 251 F.3d 894, 906 (10th Cir. 2001).

[48] The Kansas appellate courts have assumed the appropriateness of using removal as a sanction for misconduct. *See LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 743 (1994) (noting in passing the standard of review for "the trial court's use of disqualification as a sanction").

[49] *See, e.g., Shillinger v. Haworth*, 70 F.3d 1132, 1143 (10th Cir. 1995) (prosecutor intentionally intruded upon attorney-client relationship by soliciting deputy to reveal what deputy witnessed of incarcerated defendant's trial preparation with defense counsel; remanding case for trial court to determine proper remedy, including whether prosecutor should be removed from case upon any retrial); *United States v. Horn*, 811 F.Supp. 739 (D. N.H. 1992) (removing prosecutor who placed paralegal in private document-management company to secretly access defense counsel's work-product while counsel reviewed discovery), *rev'd on other grounds*, 29 F.3d 754 (1st Cir. 1994).

[50] *See, e.g., United States v. Omni Int. Corp*., 634 F.Supp. 1414, 1440 (D.C. Md. 1986) (disqualifying prosecutors from further involvement with case after finding "entrenched and flagrant misconduct"); *State v. Hohman*, 420 A.2d 852, 855 (Vt. 1980) (trial court should have disqualified prosecutor who stated during campaign his intent to convict defendant; referring prosecutor to Professional Conduct Board), *rev'd on other grounds by Jones v. Shea*, 532 A.2d 571 (Vt. 1987).

[51] *See, e.g., Chrispens v. Coastal Refining & Mktg., Inc*. 257 Kan. 745, 749 (1995) (allowing civil interlocutory appeal under K.S.A. 60-2102(b) from order disqualifying counsel); *LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 743 (1994) (same).

[52] 235 Kan. 1022 (1984).

[53] *See, e.g., Haraguchi*, 49 Cal. Rptr. 3d at 596 (granting writ of mandate and directing trial court to grant defendant's motion to recuse prosecutor: "One of our goals is to timely remove problematic appellate issues, not perpetuate them so that they may be considered on direct review and on collateral attack."); *In re Goodman*, 210 S.W.3d 805, 814-15 (Tex. Ct. App. 2006) (granting writ of mandamus and ordering trial court to remove prosecutor, because "requiring the parties to proceed through a lengthy litigation process, just so Goodman could later obtain reversal on appeal, would be a tremendous waste of the parties' (and the judicial system's) financial and temporal resources").