

Reviewing Standards of Review

BY HERB FOX

The Santa Barbara District Attorney's office garnered national attention in May when the state Supreme Court undid recusals in two high-profile criminal cases. But for appellate lawyers, the real story wasn't the Hollywood drama, but was instead the Court's scolding of the Court of Appeal for applying the wrong standard of review.

The first case concerned prosecutor Joyce Dudley, who wrote and published a crime novel that bore a resemblance to an actual case that she was prosecuting. The defendant brought a motion to recuse, which was denied by Superior Court Judge Frank Ochoa. The Court of Appeal, in an opinion by Justice Ken Yegan, asserted a *de novo* standard of review and reversed the trial court, granting the recusal.

The second case concerned the prosecution of the infamous former fugitive Jesse James Hollywood, who was charged with masterminding the kidnapping and killing of Nicholas Markowitz. While Hollywood was on the lam, prosecutor Ron Zonen disclosed confidential documents to filmmaker Nick Cassevetes, who made a movie about the killing called *Alpha Dog*. Superior Court Judge Brian Hill denied Hollywood's recusal motion, and the Court of Appeal, also in an opinion by Justice Yegan, reversed, again citing a *de novo* standard of review.

Then the Supreme Court stepped in, and in a unanimous opinion written by Justice Kathryn Werdegar, reversed both Court of Appeal decisions. But the Supreme Court did not rule that the prosecutors were free from disqualifying conflicts as a matter of law. Instead, the two opinions rested largely on the erroneous standard of review adopted by the Court of Appeal in reviewing the Superior Court's rulings.

In applying the *de novo* standard of review, Court of Appeal provided little to no deference to the factual findings of the Superior Court. In the Dudley matter, the Court of Appeal found that the novel (ahem) circumstances of the matter and the Court of Appeal's interest in eliminating bias before trial justified the heightened standard of review. In the Zonen case, the Court of Appeal further justified *de*

novo review on the ground that it was a capital murder case.

But the Supreme Court rejected this high standard, finding instead that it (and the Court of Appeal) could only review the trial court's decisions for substantial evidence and abuse of discretion – standards that almost guarantee affirmance of the lower court.

In the Dudley matter, the Supreme Court conceded that if the standard of review were *de novo*, it might have agreed with the Court of Appeal that the publication of the novel created a conflict. But the only issue for review was whether substantial evidence supported Judge Ochoa's factual conclusion that there was no conflict, and that is the end of the inquiry. As Justice Werdegar wrote, "The trial court's role, and the Court of Appeal's and ours, is to examine the record for evidence of a disqualifying conflict, not to act as a literary critic."

In the Zonen matter, the Supreme Court also found that while "death is different," there is no authority or reason for a heightened standard of review in reviewing recusal motions in capital cases.

In both cases, the Supreme Court was careful to state that it was not condoning the conduct of either prosecutor. The issue was not whether there were conflicts as a matter of law, but whether the trial court's findings deserved deference by the reviewing courts.

These companion cases are strong reminders of the fundamental importance of understanding and fighting for the proper standard of review on appeal. More often than not, that standard will determine the outcome of the appeal.

The Dudley case is *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706. The Defendant (Petitioner) was represented by Robert M. Sanger and Stephen K. Dunkle of Sanger & Swysen. The People were represented by the Attorney General's office, and by Jerry McC. Franklin of the DA's office.

The Zonen case is *Hollywood v. Superior Court* (2008) 43 Cal.4th 721. The Defendant (Petitioner) was represented by James E. Blatt, Michael G. Raab and retired Supreme Court Justice Armand Arabian. The People were represented by the Attorney General's office, and by Jerry McC. Franklin of the DA's office. ■

