

How to Create Reversible Error Without Trying

By Herb Fox

Sometimes, choosing your battle carefully is half the battle, even at the Court of Appeal. That's a lesson learned hard recently by the Santa Barbara County District Attorney.

In two high profile published opinions issued on the same day, the Court of Appeal issued writs of mandate directing the Superior Court to disqualify two seasoned deputy district attorneys from prosecuting two cases. The Court found that the prosecutors' conduct made it unlikely that the defendants could receive a fair trial. It also expressed chagrin that the DA's office picked these battles to fight at all, thereby potentially creating post-judgment appellate issues that would jeopardize a conviction if the matter was not resolved by these writ petitions. That an attorney's personal involvement in a case may create appellate issues that otherwise would not exist is a peril that all trial attorneys should avoid.

The first case challenged the decision of **Superior Court Judge Frank Ochoa** denying a motion to disqualify **Deputy DA Joyce Dudley** from prosecuting a sexual assault case. Dudley is the author of a self-published novel entitled *Intoxicating Agent*, where a fictional Santa Barbara deputy district attorney named Jordan Danner prosecutes a case that bears striking similarities to the real sexual assault case to which Dudley was assigned.

Justice Ken Yegan wrote a stinging opinion, finding, *inter alia*, that Dudley "is using her official position to obtain personal gain", that Dudley's book potentially infects the jury pool with "her views on the righteousness of cases prosecuted" by her office, and that there is a reasonable possibility that Dudley's desire to see her book succeed will trump her duty as a prosecutor to see that "justice is done and to accord to defendants their Constitutional rights."

Not only did the Court of Appeal find that Dudley had a conflict of interest as a matter of law, it found that conclusion so obvious that it questioned why the District Attorney's office would risk reversal of a conviction:

"In the event of conviction, this court will hear the appeal. 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. We are unable to explain why the Office of the District Attorney of Santa Barbara is, apparently, of a different view."

The second Opinion, also written by Justice Yegan, reversed an order by **Superior Court Judge Brian Hill** denying a motion to disqualify **deputy DA Ron Zonen** from prosecuting the very high profile **Jesse James Hollywood** murder case.

Prior to Hollywood's capture in Brazil, Zonen actively provided assistance to filmmaker **Nick Cassavetes**, who was writing a screenplay and directing a movie based on the murder case. Zonen apparently provided to Cassavetes the district attorney's office entire file on the case, and may have unintentionally provided to Cassavetes rap sheets containing criminal offender record information, which could itself be a violation of law.

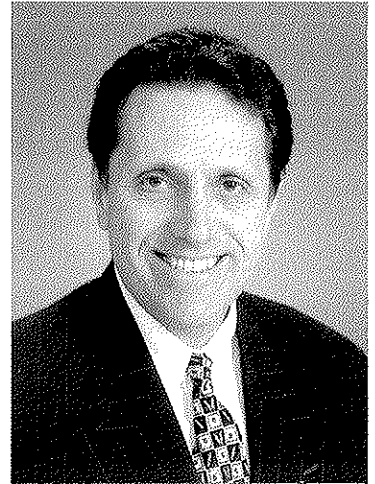
Justice Yegan pointed out that this is (potentially) a death penalty case, and that "death is different", requiring reviewing courts to treat trial court rulings with strict scrutiny. Holding that prosecutors should "try their cases in courtrooms, not in the newspapers, television, or in the movies"; the Court chastised Zonen for being extra zealous:

"We are aware of no authority allowing a public prosecutor to give away, even temporarily, public property, especially when that property contains highly sensitive confidential information in a pending case."

Justice Arthur Gilbert joined in a rare (for Division Six) separate concurrence in which he emphasized that the result would be the same irrespective of whether this was a death penalty case, and that Zonen's conduct allowed "show business" to cast an unseemly shadow over this case. The prosecution of criminal cases and entertainment enterprises are best kept separate.

In this case, too, the Court queried why the District Attorney was resisting the motion to disqualify Zonen, in light of the potential appellate consequences in the event of a conviction:

It should be the goal of any prosecutor to try the case once with as few appellate issues preserved for review as



Herb Fox

Bielaczyc, *continued from page 23*

should understand what increments they are going to attempt to move in corresponding negotiations so to continue the dance. At all times, you should stay within the original strategy plan and keep on negotiating while recognizing concessions may have to be considered that will result in adjustments of this original strategy plan.

All efforts should be undertaken to engage additional discussions with the mediator to facilitate alternatives to overcome a potential negotiation impasse. This may result again in modification of the negotiation strategy plan. However, reaching the bottom line should never be out of focus as that is one of the purposes of the mediation. Being patient with the negotiation will allow the dance to continue if you are still within range of your settlement target.

Conclusion

Using guidelines in the common tort or contract action at mediation can help achieve resolution for a potential settlement. They can be applied to any more complex case

or for any upcoming Mandatory Settlement Conference. These guidelines include 1) being adequately prepared by getting your discovery done well in advance of the scheduled mediation; 2) meeting with your client long before the scheduled mediation in order to fully understand all facts of the case and to confirm settlement strategy; 3) creating a litigation outline that explains the facts regarding an accident or breach of contract with damage claims including applicable law for any liens, credits, offsets, and mitigation; and 4) have a strategy for the negotiation so that the dance that occurs in the dialogue of the mediation results in achieving the magic number for a resolution of the dispute.

Paul Bielaczyc is an attorney/mediator working on all areas of general civil litigation. He is an approved panelist for both the Santa Barbara and Ventura Superior Court Mediation programs. You may call (805) 565-8725 for more information or to view the profile of Mr. Bielaczyc, go on-line to www.tricomediate.com or by going to the Santa Barbara County Superior Court CADRe website at www.sbcadre.org/bielaczyc.htm.

Fox, *continued from page 16*

possible. An appellate ruling at this juncture leaving Zonen in the case might well be a basis for reversal in the future.

There are lessons in these cases for both criminal and civil trial attorneys. In criminal appeals, conflicts of interest such as these can lead to reversal of a conviction for denial of Due Process. While the same would probably not hold true in civil appeals, civil trial attorneys can allow conflicts to cloud their judgment to the detriment of their clients. Sometimes in the zeal to win, civil attorneys create reversible error (such as advocating a position of law that they know to be incorrect, or introducing evidence that they know to be inadmissible).

In all cases, keeping an eye on the long-term appellate consequences can be as important as winning at trial.

The first case is *Haraguchi v. Superior Court (2006) 143 Cal. App.4th 846*. **Bob Sanger** of **Sanger and Swysen** represented the Petitioner. The Attorney General's Office and the District Attorney's Office represented the Real Party in Interest.

The second case is *Hollywood v. Superior Court (2006) 143 Cal.App.4th 858*. **James E. Blatt** of Encino and **former Supreme Court Justice Armand Arabian** represented the Petitioner. The Attorney General's Office and the District Attorney's Office represented the Real Party in Interest.

**CELEBRATING
TIME-HONORED TRADITIONS
MAKES SENSE.**

During your holidays and every day, Edward Jones wishes you all the best.

Daniel John De Meyer
125 E. De La Guerra, Suite 101
Santa Barbara, CA 93101
(805) 564-0011

Edward Jones
MAKING SENSE OF INVESTING

www.edwardjones.com
Member SIPC