

PROFESSIONAL LIABILITY UPDATE

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CONFLICTS OF INTEREST

California Law

By Jennifer A. Becker

*People v. Baylis* (2006) 139 Cal.App.4th 1054

*The First District precludes an attorney from defending brothers in successive sexual assault prosecutions based on the substantial relationship test.*

The victim of a rape that took place in Hayward was influenced by the police to identify Rodney Baylis as her assailant and he was charged with the crime. DNA evidence ruled Rodney out and pointed to his brother Patrick. Other evidence also implicated Patrick. At his preliminary hearing, Patrick attempted to implicate Rodney.

Patrick sought permission to substitute in attorney Richard Hove. The trial court denied the motion due to conflict of interest concerns. Hove had previously represented Rodney in a sexual assault case that occurred in Oakland. In the Oakland case, Hove raised a mistaken identity defense and pointed to Patrick as the assailant. However, Rodney was convicted.

The trial court found that an actual conflict of interest would exist were Hove to represent Patrick. Rodney was originally identified as the perpetrator of the crimes for which Patrick was charged. The Oakland sexual assault occurred within a few months of the Hayward incident. Notwithstanding the

DNA evidence, mistaken identification remained a potentially viable defense in the Hayward case. Patrick conceded that he might introduce evidence that Rodney was the perpetrator. Hove would thus be placed in the untenable position of presenting evidence inculcating his former client, Rodney, directly contradicting the position taken at Rodney's trial where Hove attempted to prove that Patrick committed the Oakland assault. Double jeopardy had not yet attached to Rodney in the Hayward case. The District Attorney asserted that he might call Hove as a witness because he had non-privileged communications with Patrick while representing Rodney.

A conflict of interest may arise from an attorney's concurrent or successive representation of clients with adverse interests. Where an attorney seeks to represent multiple clients with potential or actual conflicts in a single matter, or clients with adverse interests in separate matters, the Rules of Professional Conduct require the client's informed written consent. Patrick's request

clearly implicated ethical concerns applicable to the successive representation of clients with adverse interests.

In the successive representation context, the chief fiduciary value jeopardized is client confidentiality. The former client's expectation of confidentiality must be preserved to ensure the client's right to freely and fully confer and confide in his attorney. The attorney's duty to maintain client confidences is jeopardized by the attorney's duty to zealously represent the successor client using all material information at the attorney's disposal.

In the successive representation context, disqualification turns on whether there is a substantial relationship between the former and the current representation. There is a substantial relationship where the nature of the former representation is such that confidential information material to the current representation would normally have been imparted to the attorney. Where there is a substantial relationship the attorney's access to confidential information is presumed and disqualification is mandatory.

Both cases involved the Hayward assault; the subsequent police investigation; the misidentification by the victim; and the legal strategy of mistaken identity between the brothers. Rodney would normally have imparted confidences to Hove such as his whereabouts at the time of the Hayward kidnapping and rape; any involvement he had before, during, or after the crime; his knowledge of any of the persons or locations involved in the crime; any information inculcating or exculpating Patrick in the offenses; and any insights

he had about mounting a defense based on the physical similarities between the brothers.

Because of the substantial relationship between the former representation of Rodney and the proposed representation of Patrick, Hove was disqualified from representing Patrick, absent an effective waiver of the conflict by Rodney. Rule 3-310 requires the former client's informed written consent following the attorney's written disclosure of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the former client. An effective waiver exists where the client has discussed the potential drawbacks of joint representation with his attorney or outside counsel; the client has been made aware of the dangers and possible consequences of joint representation; the client knows of the right to conflict-free representation; and the client voluntarily wishes to waive that right. This exacting standard ensures a legitimate waiver of a criminal defendant's constitutional right to conflict-free counsel and to insulate any conviction from a later challenge on appeal.

Although Patrick presented a waiver signed by Rodney, it did not acknowledge the possibility that Patrick would seek to implicate him as the perpetrator; did not mention that the District Attorney might call Hove as a witness; and did not mention that Hove could be forced to disclose privileged attorney-client communications. The waiver did not acknowledge the possibility that information Hove acquired while representing Rodney could be used to assist Patrick, to Rodney's possible detriment. There was no evidence that Rodney was aware of the drawbacks of the waiver.

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.

A defendant in a criminal case has a federal and state constitutional right to the assistance of counsel of his or her choice, within limits. Under the federal Constitution, trial courts are allowed substantial latitude in refusing a defendant's waiver of a conflict of interest. Some California decisions broadly protect a defendant's right to waive a conflict of interest on the part of retained counsel. Even assuming that California is more protective of a defendant's right to choose counsel, disqualification was appropriate. Hove's representation of Patrick would have created an actual and substantial conflict of interest, implicating Hove's duty of confidentiality to Rodney who had not adequately waived the conflict.

Denial of Patrick's motion did not disrupt an ongoing attorney-client relationship. In any event, a trial court cannot disregard defense counsel's serious ethical conflicts affecting former clients. The preservation of public trust in the scrupulous administration of justice and in the integrity of the bar outweighed Patrick Baylis's right to chosen counsel.

*Comment:* This case is a good example of the application of the substantial relationship test to separate matters in the criminal context. Attorneys considering representation of relatives in sequential matters should always consider the implications for the former client.