

Court Shouldn't Have Tossed Novelist DA Off Case

Forum Column

By Jeremiah Reynolds

In recent years, attorneys' free speech rights have been curtailed by ethical rules and court orders that prohibit attorney speech regarding pending cases. For example, California Rule of Professional Conduct Rule 5-120(a) prohibits attorneys from making public statements that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding ..." Likewise, gag orders are routinely issued in high-profile cases, such as the Michael Jackson child molestation case, which prevent lawyers from publicly discussing the case.

A recent decision by the California Court of Appeal is yet another restriction on attorney speech. In *Haraguchi v. Superior Court*, 2006 DJDAR 13458, the court held that a prosecutor who wrote a fictional novel that bore minor similarities to a "rape by intoxication" case she was prosecuting had a "disabling conflict of interest" which required her withdrawal. Although *Haraguchi* focused on the prosecutor's conflict of interest, it appears that the court's real concern was the content of the novel. The court avoided a First Amendment analysis by framing the issue in terms of a conflict of interest.

Moreover, in determining that a conflict of interest did exist, the court went too far in suggesting that it is unethical for a public official to feature their official position in connection with the publication of a book. For this reason, *Haraguchi* should either be depublished by the state Supreme Court or construed as holding only that a government prosecutor may have a conflict of interest where he or she publishes a novel that includes actual details from a currently pending case.

The defendant in *Haraguchi* was charged with rape of an intoxicated person by the Santa Barbara County district attorney. Haraguchi moved to recuse prosecutor Joyce Dudley and the entire district attorney's office because she had self-published a novel about a rape by intoxication case that, according to Haraguchi, included details from his case. Specifically, Haraguchi claimed that a character in Dudley's book, who was not the perpetrator, had the same profession as Haraguchi (photographer) and bore a physical resemblance to him (skinny and facial hair). Haraguchi argued that the conflict of interest caused Dudley to refuse to enter into plea bargaining negotiations with him.

Dudley denied that her novel was based on Haraguchi's case and said that it had not influenced her decisions in the case. Haraguchi lost the motion in the trial court, but the Court of Appeal granted a writ of mandate and directed the trial court to recuse Dudley.

The court chastised Dudley for "using her official position to obtain personal financial gain" because her novel's cover and acknowledgements noted that she was a deputy district attorney. "No current public employee should be permitted to exploit his or her official position as a lever to earn extra private income," the court said. This would be news to U.S. Supreme Court Justices William H. Rehnquist, Stephen G. Breyer, and Sandra Day O'Connor, all of whom published books while on the bench with their official positions prominently advertised. In fact, the Supreme Court has specifically held that the First Amendment protects speech by government employees on matters of public concern. *Pickering v. Board of Education*, 391 U.S. 561 (1968).

While the government may have a legitimate interest in limiting certain types of speech by public employees, the Court of Appeal went too far in suggesting that it is somehow unethical for public employees to publish books that feature their official positions.

Dudley's book is a work of fiction, yet the court still criticized her for "present[ing] a biased, black-and-white view of the participants in the criminal justice system." The court harshly condemned her portrayals of the defendant in the novel as "despicable" and "felony ugly" and the defense counsel as "disingenuous and manipulative." According to the court, these "stereotypical generalizations have no place in a current public prosecutor's thinking processes even if they are uttered in a fictional account." The court concluded that "Dudley is potentially infecting the jury pool with her views on the righteousness of cases prosecuted by that office."

By framing the issue as whether Dudley's novel created a conflict of interest, the court was able to denounce the content of her speech while ignoring her First Amendment protections. The court made an end run around *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which held that attorney speech

about pending cases is protected by the First Amendment and can be punished only if it poses a substantial likelihood of materially prejudicing an adjudicative proceeding.

It is unlikely that the speech in Dudley's novel could have met the *Gentile* standard. First, the book is fiction; there are not enough similarities between the book and the *Haraguchi* case to cause material prejudice to the defendant. As the trial court pointed out, "[i]t's noted that [Haraguchi] may have a physical resemblance to a character in the book, who happens not to have been the perpetrator of the crime in the book, and that certainly, in my view, doesn't implicate any prejudice to [Haraguchi's] right to a fair trial."

It is also unlikely that a self-published novel with a tiny sales (at the time of this writing, it was ranked No. 1,588,785 on the Amazon.com best-seller list) would have any real impact on the large juror pool in Santa Barbara County.

After determining that Dudley did have a conflict of interest, the Court of Appeal concluded that Dudley's conflict was too grave to allow the defendant a fair trial. The court focused on Dudley's alleged refusal to enter into plea bargain negotiations with the defendant: "Dudley 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."

The court reached this conclusion without conducting any analysis of the strength or weakness of the case against Haraguchi; a factor the state Supreme Court said should be evaluated in determining pretrial prejudice. *People v. Eubanks*, 14 Cal.4th 580 (1997). Perhaps the case against Haraguchi was so strong that Dudley was justified in refusing to consider a plea bargain. Prosecutors are under no duty to offer plea bargains. Moreover, it is too much of a stretch to suggest that the conviction of Haraguchi would impact book sales.

The *Haraguchi* court was clearly offended by the content of Dudley's novel. However, courts should not be able to punish attorneys for their speech without first analyzing whether that speech is protected. Moreover, in determining that Dudley had a conflict of interest, the court went too far in suggesting that it is unethical for public officials to publish novels that advertise their official positions.

The state Supreme Court, therefore, should consider depublishing *Haraguchi* or limiting it to hold that prosecutors may have conflicts of interest if they publish a novel that includes actual details from a pending case.

Jeremiah Reynolds is an attorney at Kinsella Weitzman Iser Kump & Aldisert in Santa Monica. He is a member of the Los Angeles County Bar Association's professional responsibility and ethics committee. The views expressed are his own and not those of his law firm or the committee.