SUPREME COURT COPY COPY

Supreme Court No. S130263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
Application - FILED
OCT 19 2016
Jorge Navarrete Clerk
Deputy

In re

Kenneth Earl Gay

On Habeas Corpus

CAPITAL CASE

Superior Court, Los Angeles County No. A392702
Honorable Lance Ito

SUPREME COURT
Brief - FILED
OCT 20 2016
Jorge Navarrete Clerk
Deputy

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE AND BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER KENNETH EARL GAY

Lawrence J. Fox
George W. and Sadella D. Crawford
Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-9358
lawrence.fox@yale.edu

Of Counsel

Erin E. McCracken
DRINKER BIDDLE & REATH LLP
1800 Century Park East, Suite 1500
Los Angeles, California 90067
(310) 203-4087
erin.mccracken@dbr.com

Counsel of Record

DEATH PENALTY

Supreme Court No. S130263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Kenneth Earl Gay

On Habeas Corpus

CAPITAL CASE

Superior Court, Los Angeles County No. A392702
Honorable Lance Ito

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE AND BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER KENNETH EARL GAY

Lawrence J. Fox
George W. and Sadella D. Crawford
Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-9358
lawrence.fox@yale.edu

Of Counsel

Erin E. McCracken
DRINKER BIDDLE & REATH LLP
1800 Century Park East, Suite 1500
Los Angeles, California 90067
(310) 203-4087
erin.mccracken@dbr.com

Counsel of Record

Supreme Court No. S130263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Kenneth Earl Gay

On Habeas Corpus

CAPITAL CASE

Superior Court, Los Angeles County No. A392702
Honorable Lance Ito

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.520(f), the Ethics Bureau at Yale respectfully requests leave of this Court to file a Brief of Amicus Curiae in Support of Petitioner Kenneth Earl Gay.

I. Identification and Interest of Amicus

The Ethics Bureau at Yale ("the Bureau") is a student clinic of the Yale Law School composed of fourteen students supervised by an

experienced practicing lawyer, lecturer, and ethics professor. The Bureau drafts amicus briefs in matters involving lawyer and judicial professional responsibility, aids defense counsel in ineffective assistance of counsel claims that implicate professional responsibility issues, and provides assistance and counselling on a pro bono basis to non-profit legal service providers, courts, and law schools.

The Bureau respectfully submits this brief as amicus curiae. First, it has a strong interest in ensuring that the fiduciary duty of lawyers, the applicable rules of professional conduct, and the Sixth Amendment right to counsel protect the right of every criminal defendant to receive competent and conflict-free representation. Second, it seeks to assure that lawyers and courts act forthrightly to prevent conflicts of interest from affecting the representation of criminal defendants, undermining the integrity of the judicial proceedings, and damaging the public's confidence in the fairness of the legal system as a whole. Third, the Bureau believes that its perspective might assist the court in resolving the issues presented in the pending matter.

The proposed brief was authored exclusively by the Bureau. No party or counsel for a party in the case authored any part of the proposed brief, nor did they or any other person or entity make a monetary contribution intended to fund the preparation or submission of the brief. *See* Cal. Rules of Court 8.200(c)(3).

II. The Proposed Brief of Amicus Curiae Will Provide the Court with an Additional Perspective on a Lawyer's Ethical Obligations and Professional Responsibilities.

By drawing on the Bureau's experience and expertise regarding rules of professional conduct and the legal standards for conflicts of interest and ineffective assistance of counsel claims, the proposed amicus brief will assist the Court in evaluating petitioner's request for relief. In particular, the Bureau believes it can assist the Court by explaining why the Referee's findings of fact are not only inconsistent with the applicable rules of professional conduct and other authorities establishing minimum standards of lawyer conduct, but also inconsistent with the prevailing law surrounding conflicts of interest.

The Bureau believes that the Referee's finding that no actual conflict of interest was present in this case is erroneous. The Bureau's argument is supported by the American Bar Association's Model Rules of Professional Conduct, which establish an objective test for determining when an actual conflict of interest is present. The proposed brief will explain both why an objective test is required and how, under an objective test, petitioner's trial counsel clearly labored under a profound conflict of interest. The Bureau further contends that conflicts of interest that arise from a lawyer's personal interests are one of the most serious conflicts contemplated by rules of professional conduct.

The proposed brief of Amicus Curiae also draws on the Bureau's extensive knowledge of the law surrounding ineffective assistance of counsel claims. Specifically, the Bureau believes that it can aid the Court in determining the correct legal standard for evaluating when a lawyer's conduct deprives a defendant of his Sixth Amendment right to effective assistance of counsel.

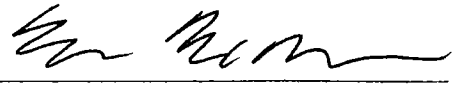
Finally, the proposed brief of Amicus will also assist the Court by highlighting the dangerous ethical and professional implications of allowing the Referee's findings and conclusions to stand uncorrected.

For these reasons, the Bureau respectfully requests that the Brief of Amicus Curiae submitted concurrently with this application be accepted for filing and considered by this Honorable Court.

Dated: October 18, 2016

Respectfully submitted,

ETHICS BUREAU AT YALE

By: 

ERIN E. MCCRACKEN
Counsel of Record for Amicus Curiae

Supreme Court No. S130263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Kenneth Earl Gay

On Habeas Corpus

CAPITAL CASE

Superior Court, Los Angeles County No. A392702
Honorable Lance Ito

BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER KENNETH EARL GAY

Lawrence J. Fox
George W. and Sadella D. Crawford
Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-9358
lawrence.fox@yale.edu

Of Counsel

Erin E. McCracken
DRINKER BIDDLE & REATH LLP
1800 Century Park East, Suite 1500
Los Angeles, California 90067
(310) 203-4087
erin.mccracken@dbr.com

Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Supreme Court No. S130263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Kenneth Earl Gay

On Habeas Corpus

CAPITAL CASE

Superior Court, Los Angeles County No. A392702
Honorable Lance Ito

BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER KENNETH EARL GAY

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.520(f) of the California Rules of Court, the Ethics Bureau at Yale hereby offers the following amicus curiae brief in support of petitioner Kenneth Earl Gay.

INTRODUCTION

A lawyer who operates under a conflict of interest violates his fiduciary duty of loyalty to his client, perhaps the most fundamental aspect of the attorney-client relationship. *Strickland v. Washington*, 466 U.S. 668,

692 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). "It is well-established that a conflict of interest may arise where defense counsel is subject to a criminal investigation." *Moss v. United States*, 323 F.3d 445, 472 (6th Cir. 2003). The reason is simple: when faced with the threat of criminal prosecution, a lawyer is inevitably forced to choose between protecting his own liberty and defending his client.

In this case, Daye Shinn violated his fiduciary duty to his client, Kenneth Gay, by concealing the fact that Mr. Shinn was being criminally investigated for embezzlement by the same District Attorney's Office that was prosecuting his client. Never once did Mr. Shinn disclose this fact to Mr. Gay, even though this conflict created a grave risk that Mr. Shinn was incapable of providing the competent and diligent representation required in a capital case. Throughout the representation, Mr. Shinn had every incentive to place his personal interests ahead of his client's. Neither the Sixth Amendment nor the applicable rules of professional conduct tolerate such a conflicting circumstance.

Nevertheless, the Referee found that Mr. Shinn's misappropriation of client funds, while "unprofessional," did not "constitute a viable criminal prosecution and was therefore not the basis for an actual conflict of interest." Rpt. at 61.[1] This conclusion ignored clear law regarding conflicts

[1] Citations to the Referee's Report and Findings of Fact dated November 16, 2015 are denominated "Rpt. at ___."

of interest and invented a new subjective standard: whether, in hindsight, a concurrent criminal prosecution of counsel turned out to be viable. This test places an impossible burden on defendants, to contest an irrelevant fact—how the counsel's prosecution turned out—when the only relevant fact was the threat of prosecution at all.

If the Referee had focused as an objective matter on the relevant facts, the Referee could have only concluded that Mr. Shinn faced a conflict of interest by virtue of the fact that he misappropriated over $120,000 from client funds, Rpt. at 61; that, accordingly, he was the target of a criminal investigation by the same office prosecuting his client; that the conflict could not be waived, because Mr. Shinn could not possibly have provided competent and diligent representation under these circumstances; that, in any event, Mr. Shinn did not seek the informed consent required to waive the conflict; that the conflict continued throughout the representation of Mr. Gay; and that Mr. Shinn's conflicted conduct prejudiced Mr. Gay's case. Under threat of criminal prosecution and disbarment, Mr. Shinn had every incentive to place his interests ahead of his client's.

As a result, the Referee's analysis must be corrected. If allowed to stand, it would render the constitutional right to conflict-free counsel an empty promise. After reviewing the uncontested facts of Mr. Gay's representation, the only conclusions one can reach are that Mr. Shinn's conflict of interest was profound, infecting every aspect of the

representation, and that the Referee's handling of the conflict was so inconsistent with the rules of professional conduct that this case cries out for intervention by this Honorable Court. This Court should feel compelled to disapprove of Mr. Shinn's conduct, and, moreover, should use these terrible facts to clarify that this type of conflict is unacceptable and inconsistent with a lawyer's ethical duties.

ARGUMENT

When properly analyzed under the standards established by *Cuyler v. Sullivan*, 446 U.S. 335, Mr. Shinn's conduct violated Mr. Gay's Sixth Amendment right to conflict-free counsel. The Referee's conclusion to the contrary resulted from his application of an improper, subjective standard. This standard is inconsistent with the law governing lawyers. The Referee's error not only deprived Mr. Gay of his constitutional rights, but also creates serious consequences for criminal defendants and the adversarial system upon which our criminal justice system depends.

I. The Referee Failed To Apply the Appropriate Objective Standard To Determine Whether Kenneth Gay's Lawyer Was Operating Under a Profound Conflict of Interest.

The first step in adjudicating Mr. Gay's claim of ineffective assistance of counsel involves an inquiry into whether Mr. Shinn labored under an actual conflict of interest. In the view of *Amicus*, courts will benefit greatly by referring to the ethical and professional standards that

govern the legal profession to guide the conflict of interest inquiry.[2] The California Rules of Professional Conduct—just like the ABA Model Rules of Professional Conduct and Restatement of the Law Governing Lawyers—provide clear guidance to courts in identifying conflicts of interest. These ethical rules consistently dictate that courts must apply an objective standard in evaluating whether a conflict existed. The court must ask what a reasonable lawyer would believe in the given situation, not what the individual lawyer subjectively believed at the time.

Under an objective standard, the lawyer's own belief about the existence of a conflict is irrelevant. Rather, if the reasonably available facts suggest a significant risk that the lawyer's personal interests will adversely affect the representation, the lawyer is conflicted.

The Referee in this case failed to conduct such an objective inquiry. Instead, the Referee drew repeated, unsupported inferences about Mr. Shinn's state of mind. He concluded, without grounds, that Mr. Shinn did not subjectively believe he was conflicted and therefore was conflict-free. Not only are the Referee's findings unsupported by the factual record, but

---

[2] Indeed, the Referee stated that "attorneys and trial courts would benefit from clear guidance from the appellate courts" in determining whether a conflict exists where a lawyer is under investigation by the same prosecution agency that has formally charged the lawyer's client. Rpt. at 59-60. The California and Model Rules of Professional Conduct, in fact, provide clear and precise guidance in identifying such conflicts. The Referee thus would have benefitted from reference to the ethical rules in identifying Mr. Shinn's conflict of interest.

his reliance on a subjective standard to resolve a conflict of interest claim also ignores the prevailing standards established by the ethical rules.

A. Courts Must Apply an Objective Standard To Determine Whether a Conflict of Interest Exists.

Authorities on legal ethics consistently evaluate possible conflicts of interest by using an objective standard. The California Rules of Professional Conduct restrict representation where the lawyer has a personal "interest in the subject matter of the representation." Cal. Rules of Prof'l Conduct r. 3-310(B)(4). This Court has recognized that the "primary purpose" of rule 3-310(B)(4) "is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the attorney's own financial or personal interests." *Santa Clara Cty. Counsel Attys. Ass'n v. Woodside*, 7 Cal. 4th 525, 546 (1994). Rule 3-310(B)(4) makes no reference to the lawyer's subjective beliefs in determining whether a conflict exists. Rather, the rule identifies a conflict where there is an objective risk that the lawyer's personal interests will be adverse to the best interests of the client.

Similarly, rule 3-310(B)(3) employs an objective standard in determining the existence of conflicts of interest. This rule restricts representation where a lawyer "knows *or reasonably should know*" that the lawyer's personal interests would be "affected substantially" by the representation of a client. Cal. Rules of Prof'l Conduct r. 3-310(B)(3)

(emphasis added). Thus, rule 3-310(B)(3) recognizes that a conflict of interest may exist even if the conflicted lawyer subjectively believes that he is conflict-free. As long as the lawyer "reasonably should know" under the circumstances that the lawyer's personal interests are adverse to the client's interests, the California Rules of Professional Conduct recognize that the lawyer is operating under a conflict of interest. *Id.*

The California Rules of Professional Conduct are similar to the ABA Model Rules of Professional Conduct in this regard.[3] Under ABA Model Rule 1.7, a lawyer is conflicted if "there is a significant risk" that his personal interests will interfere with a representation. Model Rules of Prof'l Conduct r. 1.7(a)(2). Rule 1.7 also imposes on lawyers an affirmative duty to promptly resolve conflicts of interest if and when they arise. *Id.* cmt. 3.

Under the Model Rules, it is the objective existence of risk—not the lawyer's subjective appreciation of it—that infects the representation. Rule 1.7(a)(2) makes no reference to the lawyer's subjective beliefs in diagnosing the existence of a conflict of interest. Moreover, while rule 1.7(b) contains a narrow exception for waiving conflicts of interest, this

---

[3] We analyze the conflict in this case using the ABA Model Rules of Professional Conduct because these are nationally recognized standards. Currently, 49 states and the District of Columbia have adopted the ABA Model Rules, including 40 states that have adopted both the ABA Model Rules and the Comments. *See State Adoption of the ABA Model Rules of Professional Conduct and Comments*, Am. Bar Ass'n (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf.

exception requires, among other things, that the lawyer "*reasonably* believe" that there will be no adverse effects on the representation. *Id.* 1.7(b)(1) (emphasis added). Thus, the test requires the court to evaluate conflicts from the perspective of a disinterested and reasonably prudent lawyer. *See id.* 1.0(h) (defining "reasonable" as the conduct of a "reasonably prudent and competent lawyer").

The Restatement of the Law Governing Lawyers, a product of the American Law Institute, similarly concludes that there must be an objective, not subjective, determination of whether a conflict exists. *See* Restatement (Third) of the Law Governing Lawyers § 121 (identifying a conflict whenever "there is a substantial risk" that a representation will be adversely affected by the lawyer's personal interests). A comment clarifies that the propriety of a representation must be determined by the "facts and circumstances that the lawyer knew *or should have known* at the time of undertaking or continuing a representation." *Id.* § 121, cmt. c(iv) (emphasis added). Therefore, if the information reasonably available to the lawyer indicates a substantial risk that the lawyer's interests will interfere with his representation, the lawyer is conflicted regardless of his subjective beliefs.

The objective test exists for good reason. First, lawyers jeopardize their clients whenever they work under a conflict of interest—not merely when they consciously acknowledge the conflict. Second, a lawyer operating under a personal conflict of interest is the *last* person capable of

reliably determining its impact on his performance and the client's interests. Indeed, this is why a lawyer must alert the court of any potential conflict—so that the court can make an objective determination as to its existence. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978). Third, the objective test facilitates review of a lawyer's ethical decision-making. If lawyers could absolve themselves of responsibility by simply denying their subjective awareness of the conflict, lawyer ethics—and all of the client's substantive rights that the ethical rules help to secure—would become effectively voluntary. Violators could—and surely many would—successfully avoid disciplinary proceedings by refusing to acknowledge ethical defects in their conduct.

These concerns become especially serious in the context of a criminal defendant's Sixth Amendment right to effective assistance of counsel. This right is violated when a defense lawyer's personal interests adversely affect his representation, regardless of whether the lawyer recognizes the conflict. Moreover, habeas courts applying a subjective test face the same evidentiary problem as their professional discipline counterparts. Only petitioners with conscientious and contrite trial lawyers would have any hope of establishing ineffective assistance predicated on a conflict of interest because lawyers could brazenly deny the existence of a conflict in order to terminate the inquiry to avoid discipline and malpractice

claims. In the view of *Amicus*, courts reviewing Sixth Amendment claims simply cannot rely on the subjective conclusions of conflicted lawyers.

B. The Referee Failed To Apply the Proper Objective Standard To Evaluate Mr. Shinn's Conflict of Interest.

The Referee failed to apply the proper objective standard to evaluate Mr. Shinn's conflict of interest. On the one hand, the Referee ignored the objective circumstances surrounding Mr. Shinn's representation of Mr. Gay. On the other hand, the Referee repeatedly relied on inferences about Mr. Shinn's subjective beliefs regarding the conflict. Further, the Referee failed to cite to any legal authority supporting his approach. Because the Referee failed to apply the appropriate standard, this Court should reject the Referee's conclusions.

The Referee failed to recognize that the objective circumstances surrounding Mr. Shinn's representation of Mr. Gay created a serious conflict of interest. Instead, the Referee relied heavily on his finding that the criminal investigation "did not constitute a viable criminal prosecution and therefore was not the basis for an actual conflict of interest." Rpt. at 61. The Referee focused on Mr. Shinn's subjective beliefs about the prosecution's viability, concluding that Mr. Shinn was unconcerned about the criminal investigation into his activities. Rpt. at 56-57.

The evidence cited for this conclusion is weak at best. For example, the Referee quoted Mr. Shinn's statement made after being confronted by

the Deputy District Attorney Albert MacKenzie to ask about missing client funds. Mr. Shinn stated, "I've got the money, but I can't get Oscar to take the money." Rpt. at 56. Without further analysis, the Referee summarily concluded that "[t]he tenor of Shinn's comment does not suggest concern about a criminal prosecution." *Id.* The Referee then quoted a conversation between Mr. Shinn and the defense investigator, where Mr. Shinn discussed that his client "had showed up and was upset that there was a mall where his house used to be and refused to accept the check or the money." Rpt. at 57. Without scrutiny, the Referee immediately accepted this conversation as evidence that Mr. Shinn was not worried about a criminal prosecution. *Id.* ("Similar to the first comment Shinn made to MacKenzie, the tenor of this comment does not suggest concern about criminal prosecution.").

Based on the evaluation of these two statements alone, there is no reason to credit the Referee's inference that Mr. Shinn was unconcerned about criminal prosecution. In fact, one could just as easily draw the opposite inference: as a person who knew he was under investigation by the District Attorney, Mr. Shinn had every incentive to portray himself as unconcerned, and thus innocent, to the prosecutor and investigator. It is equally, if not more likely that Mr. Shinn's comments reflected his desire to appear calm and aloof in order to give the impression of innocence. Furthermore, the Referee's whole line of reasoning assumes—without any basis—that Mr. Shinn was in a position to assess the viability of a potential

criminal prosecution. Even if Mr. Shinn sincerely believed that he would avoid prosecution, that belief would have been totally uninformed.

Even more troubling than the Referee's lack of evidence is the total absence of any legal authority for his approach. The Referee did not cite a single legal authority for the proposition that a criminal investigation that does not ultimately "constitute a viable criminal prosecution" cannot serve as the "basis for an actual conflict of interest." Rpt. at 61. Moreover, the Referee failed to explain why the viability of the prosecution against Mr. Shinn should in hindsight have any bearing on the existence of a conflict of interest at the time the District Attorney's Office was investigating Mr. Shinn's conduct, which was also the time during which Mr. Shinn was providing Mr. Gay with a defense. If anything, the fact that the District Attorney's Office was actively investigating Mr. Shinn suggests that it was entirely reasonable for all parties involved to believe that the District Attorney's Office might file criminal charges against Mr. Shinn during his representation of Mr. Gay. The conflict was not created by the ultimate viability of the claim based on hindsight, but by Mr. Shinn's inevitable anxiety while the result was unknown. Mr. Shinn was incentivized to do anything he could to ensure that the criminal investigation into his embezzlement scheme did not lead to an indictment.

The Referee's analysis reveals the danger of relying on a subjective test to determine if a conflict of interest exists. Instead of objectively

analyzing the risks posed by the District Attorney's investigation of Mr. Shinn, the Referee attempted to access Mr. Shinn's state of mind by evaluating out-of-context statements that Mr. Shinn made over thirty years ago. Ultimately, the Referee engaged in nothing more than guesswork in determining Mr. Shinn's supposed belief that he was conflict-free. But even if the Referee is correct that Mr. Shinn subjectively believed he was conflict-free, that subjective belief should have no bearing on the resolution of Mr. Gay's claims. There is no reason to rely on Mr. Shinn's subjective appraisal of the investigation against him in determining whether his representation of Mr. Gay was conflicted.

C. Under the Proper Objective Standard, Mr. Shinn's Representation of Kenneth Gay Was Profoundly Conflicted.

The objective facts surrounding Mr. Shinn's representation of Mr. Gay demonstrate a plain conflict of interest. During the entire representation, Mr. Shinn was facing an investigation into serious criminal charges by the same District Attorney's Office that was prosecuting his client. At any moment during the representation, Mr. Shinn might have been charged with a felony, and if so, he would have been prosecuted by the same office that was prosecuting Mr. Gay. As long as the threat of prosecution loomed over him, Mr. Shinn was severely conflicted.

No lawyer in Mr. Shinn's position could ignore the fact that he might soon be sitting in a prison cell. No lawyer in his position could be

expected to place the zealous representation of his client before his own physical liberty. The conflict in this case thus arose from "the existence of this undeniable uncertainty regarding [the lawyer's] own liberty and financial interests before and during Petitioner's trial and [the lawyer's] knowledge of this uncertainty." *Rugiero v. United States*, 330 F. Supp. 2d 900, 907 (E.D. Mich. 2004); *see also United States v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) ("[When] the criminal defendant's lawyer himself [is] under criminal investigation . . . [i]t may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered . . . and retaliate against the lawyer.").

The California Rules of Professional Conduct identify a conflict when a lawyer's interests might compromise his representation of a client. *See* Cal. Rules of Prof'l Conduct r. 3-310(B)(3)-(4). The Model Rules of Professional Conduct similarly recognize that a lawyer is conflicted when there is a risk that the lawyer's personal interests would materially limit the lawyer's representation of his client. *See* Model Rules of Prof'l Conduct r. 1.7(b). As noted above, *see supra* Part I.A, the objective existence of this risk—rather than the lawyer's subjective beliefs—infects the representation. Mr. Shinn was clearly conflicted under the rules of professional conduct. Once Mr. Shinn knew he was under investigation by the District Attorney's Office's—the same office prosecuting his client—