

Four Key Lessons from *Making a Murderer*

By Aaron Keller



In December 2015, Netflix’s *Making a Murderer* took the world by storm. The then-episode docuseries examined the 2007 trials of Steven Avery and Brendan Dassey. Avery, the uncle, and Dassey, the nephew, were convicted by separate Wisconsin juries in the 2005 murder of 25-year-old freelance photographer Teresa Halbach.

Avery had spent 18 years in prison on a 1985 rape charge, even though he had a strong alibi and maintained his innocence. DNA testing finally proved Avery’s innocence in 2003. He was released from prison and became a regional celebrity. His wrongful conviction showcased the power of DNA evidence in exposing wrongful convictions and spurred criminal justice reform.

Avery sued local authorities for \$36 million for mishandling his 1985 case. Just two

years after his release, and with the civil suit looming, Avery was arrested for Halbach’s murder. His nephew, Brendan Dassey, was arrested four months later after being interviewed by the authorities and confessing—albeit questionably—his involvement.

A decade before the docuseries presented the cases to an international audience, the exoneration and the subsequent Halbach murder trials were explosive news in the upper Midwest. As a local journalist in northeastern Wisconsin from 2004 to 2007, I interviewed Steven Avery before his arrest, and covered the volunteer search for Halbach and the trials of Avery and Dassey. Some, though not all, of my reports on the case appear in *Making a Murderer*. The documentary series contains many real legal

lessons for attorneys, some of which are discussed here.

1. Television Access Was Granted

This case was explosive because the parties were familiar with the press. Avery was comfortable talking on camera after his 2003 exoneration, and that did not change. The victim’s brother, family spokesman Mike Halbach, worked as a video analyst. Teresa herself was a photographer. This meant an unprecedented level of access in the early hours of the case. Avery conducted frequent on-camera interviews, even as investigators closed in on him, and he regularly phoned local television stations from jail after his arrest.

Investigators held daily press briefings as they searched for Halbach. The prosecutor

discussed the charges. Television access to courtrooms is rather wide open under Wisconsin court rules. All public court appearances, including hearings, were televised live.

2. Law Enforcement Ethics Were Questioned Early and Frequently

Despite promises to the contrary, the department Avery was suing for his 1985 wrongful conviction searched his property after Halbach disappeared. Indeed, two of the officers who had been deposed in the civil case were the officers who found most of the critical evidence in the Halbach case. I was the first reporter to uncover the depth of the involvement of the conflicted officers and was the first to directly challenge why the public was misled about whether the conflicted department would be screened from the Halbach case. Unfortunately, the most probing of my analyses of these topics did not make it into *Making a Murderer*.

Nearly everyone in a courtroom is governed by a conflict of interest rule. Attorneys are subject to professional conduct rules. Specific conflicts laws further govern judges, prosecutors, and jurors. I have been unable to locate any meaningful authority which addresses conflicts of interest among law enforcement personnel.

Questions remain unanswered surrounding whether law enforcement conflicts of interest should be subject to an exclusionary rule, a due process clause analysis, or otherwise be remedied through legislation or a new rule of evidence.

The Avery case highlights why juries are poorly equipped to judge law enforcement conflicts and why the issue should be addressed as a matter of law, not fact. The Avery prosecutor argued successfully at closing that an acquittal would amount to a public announcement by the jury that its hometown sheriff's department was crooked. The local jury was unwilling to cheer against the hometown team.

3. Professional Conduct Rules Were Tested

Four months after Avery's arrest and days after Dassey's arrest, Special Prosecutor

Ken Kratz repeated before a live television audience on March 2, 2006, one possible—and heinous—version of the crime. Kratz stitched the storyline together based on Dassey's legally-tenuous confession, which was presented back then as iron-clad. The full confession video did not become public until about a year later.

I was sitting in the front row of that press conference. It sickened me. I questioned the ethics of what I watched back when it happened, though my critical reports on this subject also did not make it into *Making a Murderer*. Kratz defended himself at the time by telling me that his comments fit within the rules of professional conduct and, therefore, were ethical.

In almost all Wisconsin criminal cases, a county prosecutor commences a case by writing a criminal complaint. The document is a public record. Under Wisconsin law, the complaint must contain a "statement of the essential facts" of the offenses charged and may be based on "information and belief." In these cases, the complaints were substantially longer than average.

Wisconsin's professional conduct rules track the ABA Model Rules of Professional Conduct. Rule 3.6(a) contains a general prohibition on prejudicial pre-trial statements to the press. However, Rule 3.6(c)(2) provides an exception that allows attorneys to discuss with the press "information contained in a public record." That rule allows an attorney to write a public record and repeat it to the press, defeating Rule 3.6(a). Though a few cases have dealt with this issue in the past, it is relatively novel, and very few authorities truly limit the "public record" exception.

Perhaps recognizing this logical conundrum, Connecticut wisely moved the public records language from the rules to the comments section of Rule 3.6. That distinction is critical. Were Ken Kratz operating under Connecticut's rule, he could have been subject to discipline. In Wisconsin, he was not, nor would he have been subject to discipline in many other states.

Defense attorney Len Kachinsky, who for a brief time represented Brendan Dassey, also tested the rules. Shortly after his ap-

pointment, Kachinsky said on television his client was "legally responsible" for the crimes charged. Kachinsky has been demonized for that, but it's important to remember that Kratz sullied the file six days prior to Kachinsky's appointment during the March 2 press conference referenced above. Dassey was immediately convicted in the court of public opinion, and Kachinsky struggled to respond to that.

Kachinsky faced criticism for allowing interrogators to re-interview Dassey without his attorney's presence. Kachinsky faced even further criticism for the actions of his own investigator, who pressured Dassey to confess. These actions raise serious professional conduct questions.

Eventually, Dassey sought to recant his "confession," wrote to his own trial judge, and asked for a new lawyer. The trial judge eventually rebuked Kachinsky and called his actions "deficient performance," and Kachinsky was decertified by the state public defender's office. However, Dassey's appellate court found that Kachinsky's performance did not rise to the level of ineffective assistance. Volumes could indeed be written about the struggles of this representation from an ethics perspective.

4. Appeals Are in Progress

As of the time of this writing, Dassey has petitioned the US Supreme Court to take his case. If *certiorari* is granted, the Court will tackle whether Dassey's confession was voluntary or coerced. Avery's case is before state appeals courts in Wisconsin. Avery's post-conviction attorney has argued that people lied during the original trial, that Avery's trial attorneys were ineffective, and has insinuated Halbach's ex-boyfriend may have been the true killer. **CL**



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