Conflicts of Interest Arising from Multiple Representation of Criminal Codefendants

It is not inherently improper for one attorney to represent two or more clients in the same action.[1] If conflicting interests exist between the codefendants in a criminal trial then such representation may well be both unethical according to the guidelines of the American Bar Association Code of Professional Responsibility[2] and unconstitutional as a violation of the defendant's sixth amendment right to effective assistance of counsel.[3] These twin evils place the attorney who represents multiple defendants in a delicate position and surface in various fact situations that may or may not be readily apparent to the defense attorney.

For example, unethical conduct was found in *State v. Hilton*,[4] in which the attorney had represented two accused arsonists through the preliminary hearing stage, after which one defendant retained, on the advice of his original attorney, separate counsel. The Supreme Court of Kansas publicly censured the attorney for representing conflicting interests. The court held that the attorney

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1. United States v. Bentiena, 319 F.2d 916, 937 (2d Cir. 1963) (no merit to three defendants' assertion of error arising from multiple representation); Commonwealth v. Burch, 374 A.2d 1291, 1293 (Pa. Super. Ct. 1977) (Joint representation of defendants convicted of violation of narcotics laws was without error.). *See* AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Disciplinary Rule [hereinafter cited as DR] 5-105(C): "[A] lawyer may represent multiple clients if he reasonably determines that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." ABA CODE, Ethical Consideration [hereinafter cited as EC]: 5-19 "A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty."

2. ABA CODE, Canon 5; EC 5-14 to 5-20; DR 5-105(A), DR 5-105(B): "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests . . . ."

3. The sixth amendment of the U.S. Constitution gives the accused in criminal prosecutions the right to counsel. This requirement has been held to demand "effective" assistance. Powell v. Alabama, 287 U.S. 45, 71 (1932). If counsel represents conflicting interests then there results a denial of this effective assistance of counsel. Glasser v. United States, 315 U.S. 60 (1942).

4. 217 Kan. 694, 538 P.2d 977 (1975).

should have known that a serious conflict of interest would arise at the first indication that one defendant might become a state's witness.[5] The court also noted that defendants were in different positions with respect to the theory of defense, thus precluding the attorney from ethically accepting dual representation.[6]

Upon similar facts, but resulting in constitutionally defective representation, is *Sawyer v. Brough,*[7] where defendant and another were arrested, tried together, and convicted of robbery. The other defendant had made a confession that was used against both defendants. The United States Court of Appeals for the Fourth Circuit, in finding a denial of defendant's sixth amendment rights, held that defendant was entitled to a new trial since

> [a]n obvious divergence of interest exists between a defendant who denies his guilt and a codefendant who not only confesses his own complicity but also accuses the other of participation in the crime. . . . In such a situation the parties are placed in adversary and combative positions. . . . [The attorney] would be rendered impotent to effectively assist one by the necessity of protecting the other.[8]

Although it is generally agreed that in cases such as *Hilton* and *Sawyer* a serious conflict of interest results when one defendant gives evidence inculpating his codefendant, there are other situations in which conflicting interests may arise. In *State v. Sullivan*[9]

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5. *Id.*, 538 P.2d at 980-81.
> Respondent should have withdrawn immediately as Padgett's counsel; and if he had received privileged communication from Padgett that might have been used to Ray's advantage and to Padgett's disadvantage, he should have withdrawn as counsel for both parties . . . . The most serious conflict that might arise is that which occurred in this case—*i.e.*, one defendant takes a plea and becomes a state's witness while the other goes to trial on a plea of not guilty of the same charge.

Id.

6. *Id.*, 538 P.2d at 981.
> [Since both defendants] were caught "redhanded" in possession of arson materials in a building which had been "staked out" . . . entrapment was the only available defense. Since Ray had a previous arson record (of which respondent was aware), he was in a different position from that of Padgett with respect to the defense of entrapment.

Id.

7. 358 F.2d 70 (4th Cir. 1966).
8. *Id.* at 73.
9. 210 Kan. 842, 504 P.2d 190 (1972) (reversed and remanded convictions of

the evidence of each defendant tended to be self-exonerating and incriminating of his codefendant. Placed in this dilemma, counsel tried to avoid the conflict by offering the testimony of neither defendant. The court ruled that when counsel has to weigh his trial strategy or when he is deterred from bringing out facts favorable to one defendant because of the adverse effect that it might have on a codefendant then neither party receives the quality of representation he is entitled to expect and the attorney is under an obligation to provide.[10] In addition to the above examples, conflicting interests have been held to exist where the defendants were in different circumstances with respect to mitigating or aggravating circumstances as to the crime,[11] where they had different degrees of involvement in the crime,[12] where they had factually inconsistent alibis,[13] where there were differences in the codefendant's prior criminal records,[14] and even where the jury must fix the penalty for more than one defendant.[15]

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defendants for possession of illegal firearms for error arising from joint representation).

10. *Id.*, 504 P.2d at 193-94. *Cf.* ABA CODE, Canon 7, EC 7-1: "The duty of a lawyer, both to his client and to the legal system is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations."

11. *See, e.g.*, United States *ex rel.* Michelotti v. Price, 230 F. Supp. 505 (W.D. Pa. 1964) (One counsel represented two defendants on a burglary charge. Error for severance not to be consented to, after one defendant escaped from jail while awaiting trial, incurring widespread unfavorable publicity.).

12. *See, e.g.*, People v. Kerfoot, 184 Cal. App. 2d 622, 7 Cal. Rptr. 674 (1960) (Joint representation in prosecution for murder was improper where only one defendant was seen with a gun and identified by an eye witness.). *See generally* Annot., 34 A.L.R.3d 470 (1970).

13. *See, e.g.*, People v. Donohoe, 200 Cal. App. 2d 17, 28, 19 Cal. Rptr. 454, 462 (1962) (Where one defendant gave three statements to the police, and the other defendant denied all connection with the offenses, there existed a conflict of interest resulting in reversal of conviction of two defendants represented by one appointed counsel.).

14. *See, e.g.*, Peoplee v. Douglas, 61 Cal. 2d 430, 436, 392 P.2d 964, 968, 38 Cal. Rptr. 884, 888 (1964) (error for court to refuse to appoint separate counsel for codefendants charged with robbery and assault where one had prior felony conviction).

15. *See, e.g.*, People v. Chacon, 69 Cal. 2d 765, 447 P.2d 106, 112, 73 Cal. Rptr. 10, 16 (1968) (reversed convictions of three defendants charged with malicious assault by a life prisoner and represented by one attorney).

> Conflicts of interest among codefendants may arise when it would profit one defendant to attack the credibility of another [citations

Possibly as a result of the pervasiveness of the problem, the legal profession's primary concern has been in discouraging the practice of multiple representation. The American Bar Association in their standards for the criminal defense attorney has said that multiple representation should definitely be the exception:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.[16]

Similarly, the ABA Code of Professional Responsibility (hereinafter referred to as ABA Code) provides that multiple representation should be avoided,[17] except in cases in which the lawyer "determines that he can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation."[18] The Code, however, further provides that the lawyer "should resolve all doubts against the propriety of the representation" if there is even a possibility "that his judgment may be impaired or his loyalty divided" if he accepts representation of multiple clients.[19]

While the ABA standards seem to suggest that any representation of conflicting interests is unethical, the courts have taken seemingly divergent views concerning the degree of conflicting interests from multiple representation that will result in constitutionally inadequate representation. The sixth amendment states that "in all criminal prosecutions the accused shall enjoy the right . . . to have

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omitted]; when counsel would be restricted in final summation becaue he might injure one defendant by arguments in favor of another [citations omitted]; when one defendant has a record of prior felony convictions and the others do not [citations omitted]; when the defenses of codefendants are factually inconsistent [citations omitted]; or when appointed counsel believes a conflict of interest may exist [citations omitted].

People v. Odom, 236 Cal. App. 2d 876, 878, 46 Cal. Rptr. 453, 454-55 (1965).

16. ABA Standards, The Defense Function § 3.5(b) (1971).

17. ABA Code, DR 5-105(A): "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests . . . ."

18. ABA Code, DR 5-105(C).

19. ABA Code, EC 5-15.

the assistance of counsel for his defense." This requirement has been held to demand "effective aid in the preparation and trial of the case."[20] The United States Supreme Court has considered the problem of conflicting interests arising from multiple representation only once, in the case of *Glasser v. United States,*[21] and held that such representation was a denial of defendant's right to effective counsel. In *Glasser* five defendants were charged with conspiracy to defraud the government. Glasser had retained a Mr. Stewart as his counsel. Before trial one of the codefendants, Kretske, dismissed his counsel and the court appointed Stewart to represent Kretske without objection from Glasser. On appeal, Glasser argued that he was deprived of effective assistance of counsel because at trial Stewart declined to cross-examine a witness, the decision not to cross-examine being influenced by a decision to protect Kretske. Glasser also argued that certain testimony was inadmissible hearsay as to him but that it was allowed in without objection by Stewart because of his desire to avoid prejudice to Kretske. After finding a conflict of interest, the Court stated that "[t]o determine the precise degree of prejudice sustained by Glasser . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[22] [Citations omitted.]

While *Glasser* seems to stand for the proposition that if a conflict of interest is found, the representation is improper, and thus there is no need to determine the amount of prejudice sustained by the criminal defendant, the courts of the several circuits have variously stated their interpretation of the decision. For example, in *United States ex rel. Hart v. Davenport*[23] where one defense attorney represented petitioner and five other codefendants on charges concerning alleged betting activities at a bar and grill where petitioner worked as a bartender, where defense strategies adopted were not always in the best interests of petitioner, and where no attempt was made to differentiate petitioner's position from that of his codefendants, the Court of Appeals for the Third Circuit found that petitioner was denied the effective assistance of counsel. In reaching this conclusion, the court noted that the sixth amendment

20. Powell v. Alabama, 287 U.S. 45, 71 (1932).
21. 315 U.S. 60 (1942).
22. *Id.* at 75-76.
23. 478 F.2d 203 (3d Cir. 1973).

> contemplates the service of an attorney devoted solely to the interests of his client. The right to such untrammelled and unimpaired assistance applies both prior to trial in considering how to plead and during trial . . . . [U]pon a showing of a possible conflict of interest or prejudice, however remote, we will regard joint representation as constitutionally defective.[24] [Citation omitted]

In *United States v. Lovano,*[25] the Court of Appeals for the Second Circuit rejected a claim of denial of sixth amendment rights since defendant had showed only a theoretical conflict of interest. The court further held that joint representation of defendants convicted under the federal counterfeiting statute, when one of the defendants admitted existence of the conspiracy but claimed entrapment and the other denied guilt, was not prejudicial on the theory that counsel would not adequately present conflicting positions since defendants were involved in different aspects of the conspiracy. In reaching their decision the court said that "[t]he rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel."[26]

The Court of Appeals for the Fifth Circuit requires an "actual, significant" conflict, as opposed to one which is "irrelevant or merely hypothetical" to establish a sixth amendment violation.[27] In *United States v. Huntley*[28] the court found no such conflict arising from the joint representation by retained counsel of two defendants convicted of interstate transportation of stolen securities. The court noted that when the purported conflict is that multiple representation "restricted counsel in selecting trial defenses and strategies, the requisite 'actual significant' conflict of interest is present 'whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of the codefendant whom counsel is also representing.' "[29] Defendants in *Huntley* argued that the conflict existed in that their trial counsel failed to exploit possible differences in the

24. *Id.* at 209-10.
25. 420 F.2d 769 (2d Cir.), *cert. denied,* 397 U.S. 1071 (1970).
26. *Id.* at 773.
27. Foxworth v. Wainwright, 516 F.2d 1072, 1077 (5th Cir. 1975).
28. 535 F.2d 1400 (5th Cir. 1976).
29. *Id.* at 1406.

degree of their criminal intent. The court found, however, that defendants failed to point to any specific evidence which was or might have been introduced to show lack of criminal intent on the part of either of them and concluded that for the foreclosure of an alternate strategy of defense to be an "actual significant" conflict of interest, the defense must at least be plausible.[30]

In reality there is probably little difference between these various expressions of the standards for a denial of sixth amendment rights. The key to each is "prejudice." If either defendant was actually prejudiced by the multiple representation then there is a denial of effective assistance of counsel and, to be sure, a conflict of interest. The existence of either the conflict of interest or any prejudice resulting therefrom is a factual question to be determined on a case by case basis.[31]

The primary responsibility is on the lawyer to inform his clients of the dangers of multiple representation. The lawyer "should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."[32] In some jurisdictions, however, there is also an affirmative duty placed on the court to inquire into possible conflicts of interest and to warn defendants whenever they are confronted with multiple representation.[33] This approach was first espoused in *Campbell v. United States*[34] in which the District of Columbia Court of Appeals stated:

> When two or more defendants are represented by a single counsel the District Court has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it. . . .
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> The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be

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30. *Id.* at 1406-07.

31. *See, e.g.*, United States *ex rel.* Robinson v. Housewright, 525 F.2d 988, 992 (7th Cir. 1975).

32. ABA Code, EC 5-16.

33. *See, e.g.*, United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973); United States v. Foster, 469 F.2d 1, 4-5 (1st Cir. 1972); Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965).

34. 352 F.2d 359 (D.C. Cir. 1965).

> determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Consideration of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel.[35]

In rejecting the "affirmative inquiry" approach, the court in *United States v. Mandell*[36] recognized that the primary responsibility for the ascertainment and avoidance of conflicting interests was with the members of the bar. The court stated that:

> [W]ithout a showing of conflicting interests, [joint representation] is not in itself a violation of the Sixth Amendment, and that there may be excellent reasons for preferring the use of a single attorney in a particular case. We think the Sixth Amendment rights of defendants are adequately safeguarded by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys, as officers of the court, and by admonishing the trial judge to be watchful for indicia of conflict during trial.[37]

Although the "affirmative inquiry" approach is probably more effective in preventing denials of sixth amendment rights,[38] it does little to relieve the ethical burden on the lawyer. As in *State v. Hilton*,[39] although the attorney withdrew as counsel for one of the defendants before the trial began, he was still subject to disciplinary action. The Kansas Supreme Court held that under the circumstances "respondent could not ethically accept dual representation. Actual prejudice to [defendant] is immaterial except as to its bearing on the degree of discipline."[40] This is the proper result, especially in light of ABA Code, Ethical Consideration 9-6:

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35. *Id.* at 360.

36. 525 F.2d 671 (7th Cir.), *cert. denied*, 423 U.S. 1049 (1975). *See also* United States v. Boudreaux, 502 F.2d 557 (5th Cir. 1974).

37. 525 F.2d at 677.

38. *See* Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315 (1977).

39. 217 Kan. 694, 538 P.2d 977 (1975). *See* notes 4-6 *supra* and accompanying text.

40. *Id.*, 538 P.2d at 981.

> Every lawyer owes a solemn duty to . . . conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public, and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Even though there is such a strong presumption against the propriety of multiple representation, the courts have held that there can be no absolute ban on joint representation.[41] This is based on the defendant's ability to make an "intentional relinquishment or abandonment of a known right,"[42] *i.e.*, a waiver, which must be made "with sufficient awareness of the relevant circumstances and likely consequences."[43] Similarly, the ABA Code provides in Disciplinary Rule 5-105(C) that a lawyer may represent multiple clients if each consents to such representation after full disclosure.[44] It has been argued, however, that such consent does not of itself accord complete exoneration, because "the consent does not relieve the attorney of searching his conscience to discover any latent impropriety not readily perceptible to the consenting laymen."[45]

Thus, it is up to the practicing attorney to protect himself and his clients from such conflicts by refusing employment in such situations. Even though there may be times when it might be beneficial to the defendants to have a single lawyer to represent them, the risk of an unforeseen or even unforeseeable conflict of interest developing is so great that a lawyer should decline multiple representation unless there is no other way in which adequate representation can be provided to the defendant.[46]

The attorney owes his client a fiduciary duty that cannot be waived or delegated and that demands undivided loyalty.[47] By making a practice of refusing multiple representation in any case involving criminal codefendants, an attorney resists the danger that in his attempts to avoid "the Scylla of conflict, the defense attorney with

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41. *See, e.g.*, United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).
42. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
43. Brady v. United States, 397 U.S. 742, 748 (1970).
44. *See* note 1 *supra*.
45. R. WISE, LEGAL ETHICS 142 (1966).
46. ABA STANDARDS, THE DEFENSE FUNCTION 214 (1971).
47. R. WISE, *supra* note 45, at 140.

multiple clients will likely become engulfed in the Charybdis of ineffective assistance of counsel."[48]

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48. Cole, *Time For A Change: Multiple Representation Should Be Stopped,* 2 NAT'L J. CRIM. DEF. 149, 155 (1976).