Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney

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Reflecting on the limits of the judiciary's power independently to protect liberty, Learned Hand once observed,

'It is idle to look to laws, or courts, or principalities, or powers, to secure [liberty]. You may write into your constitutions not ten, but fifty, amendments, and it shall not help a farthing, for casuistry will undermine it as casuistry should, if it have no stay but law.'

The principle, indeed one may call it a fact, that Judge Hand articulates is hardly limited to liberty. There is much of critical significance to the administration of justice that cannot be effectuated by a rule of law and that ultimately depends for its vitality on the dedication and honor of the lawyers into whose hands the privilege and responsibility of administering the law have been commended. But the practicing bar has often permitted such considerations to be ignored or deemphasized in the natural but ultimately misguided effort to make all decisions conform to the dictates of "practicality."

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2. Cf. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977). Professor Morgan, in a general review of the ABA Code of Professional Responsibility, has concluded that the Code's provisions reflect a consistent misordering of priorities:

[i]n fact, the present [Code] stands the proper priority of . . . interests on its head. The Code makes the interest of the individual attorney primary. In second position is the interest of clients, particularly those client interests which diverge from the interests of the public. The public interest [in a just and expeditious resolution of disputes] comes third and last repeatedly.

Id. at 706. He does not, however, suggest that this lamentable fact results from conscious exercise of self-interest. Rather,

[i]t seems likely that the Code's biases reflect the fact that whenever the ABA or any other ethics body has come upon a tough ethical issue, it has tried to be "practical" in its solution. Because lawyers have consistently been the ones judging "practicality," at points of conflict [their own interests] have repeatedly, albeit nonconsciously, prevailed.

Id. at 740.

This misordering of priorities is also apparent in certain practices of lawyers. For
Where such reordering of priorities occurs, the legal system suffers a harm that is both tangible and metaphysical.  

example, the practice of allowing one attorney to represent more than one criminal defendant unequivocally benefits only the attorney by giving him a greater total fee than he would be able to charge a single client. By contrast, the benefit to the client is equivocal. On the one hand, the per capita cost of representation is likely to be lower and the efficacy of a stone wall defense enhanced. On the other hand, however, the client will often suffer significantly from the potential for divisions of his attorney’s loyalties inherent in such situations. Finally, multiple representation represents an unmitigated disaster in terms of the fair and expeditious resolution of criminal matters. Each of these elements will be explored in some detail below. For the moment, however, suffice it to say that Morgan’s analysis of the way in which priorities are currently ordered appears to be as true of the multiple representation question as it is of legal ethics generally.

3. The fact that the profession’s resolution of ethical controversy so consistently coincides with lawyers’ own self-interests has not gone unnoticed. The ethical standards of the profession are under increasing scrutiny, and neither courts nor commentators have been particularly impressed with what they find. See, e.g., Bates v. State Bar, 433 U.S. 350 (1977) (holding that the ABA Code of Professional Responsibility’s prohibition on advertising routine legal services violated the first amendment); Gofman v. Virginia State Bar, 421 U.S. 773 (1975) (holding that promulgation of a minimum fee schedule by a state bar association violated the antitrust laws); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (holding portions of the ABA Code of Professional Responsibility governing pretrial and trial publicity violative of the first amendment), cert. denied, 427 U.S. 912 (1976); J. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (1976); Verdicts on Lawyers (R. Nader & M. Green eds. 1976); Freedman, Professional Responsibility of the Criminal Defense Lawyer, 64 Mich. L. Rev. 1469 (1966); Morgan, supra note 2; Note, Client Fraud and the Lawyer—An Ethical Analysis, 62 Minn. L. Rev. 89 (1977).

Indeed, some members of the judiciary have not been content to confine their expressions of dissatisfaction to the bench. See, e.g., Burger, Standards of Conduct for Prosecution and Defense Personnel: A Judge’s Viewpoint, 5 Am. C.Rim. Q. 11 (1966); Burger, The State of the Federal Judiciary—1971, 57 A.B.A.J. 855 (1971). In the latter article, after noting the availability of comprehensive standards designed to govern and guide the practicing bar, Chief Justice Burger emphasizes the enforcement responsibilities of state bar associations:

Those standards, taken together, offer the best hope for maintaining an honorable and effective Bar, and every state bar association should move now to establish means to make sure these standards are vigorously enforced.

Without strict enforcement of ethical standards, the Bar will fail in its mission, and it will never have, and it will never deserve, the confidence of the public.

Id. at 857-58. Taking a somewhat more pessimistic view, Judge Bazelon feels that “the bar associations, like most professional societies, have shown themselves unable, or at least unwilling, to police their own members. Our vaunted ‘Code of Professional Responsibility’ has not served as a means of policing the quality of defense counsel.” Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 17 (1973).

Nor are such sentiments limited to those intimately connected with the legal profession. It is not without justification that, in the eyes of many, the legal profession itself has emerged from the Watergate scandal as an unindicted coconspirator.

The breadth and depth of this disillusionment with the profession’s ethical standards and behavior strike at the very foundation of the judicial system: its credibility.
The difficulties that surround an attorney's attempt to simultaneously represent multiple criminal defendants presents exactly this sort of a problem. The sixth amendment's guarantee of "Assistance of Counsel" has been interpreted to embrace a right to legal assistance "untrammeled and unimpaired" by conflicting duties and loyalties.4 The importance of this right to our system of justice is obvious. But the persistent practice of multiple representation and its inevitable potential for conflicts of interest pose a threat to that right for which constitutional and judicial remedies are ill-suited. Ultimately, elimination of the dangers present in multiple representations must depend upon the willingness of the bar to forego certain advantages that the practice offers in an effort to achieve a goal critical to the effective administration of justice. In short, the answer

5. The sixth amendment mandates not merely assistance of counsel, but effective assistance. See Powell v. Alabama, 287 U.S. 45, 71 (1932). It can be argued, and indeed it is the position of this Article, that a lawyer cannot effectively represent two criminal defendants. Thus, it would not be too great a leap simply to read the sixth amendment as guaranteeing a right to separate counsel. This will not, however, solve the problems inherent in multiple representation. It is relatively rare that double representation is imposed upon a defendant, but see Holloway v. State, 260 Ark. 250, 539 S.W.2d 435 (1976), cert. granted, 430 U.S. 965 (1977) (No. 76-5856), and in such cases the existing sixth amendment standards are probably sufficient to safeguard the defendant's interests. See Glasser v. United States, 315 U.S. 60 (1942). Usually the defendants themselves approve of the multiple representation for a variety of reasons. The desires of the client, however, are probably not the most important factor to be considered. The public itself has a significant interest in the just and expeditious disposition of criminal matters that is often frustrated by the possible unfairness to the defendant and the frequent appeals and retrials that arise out of multiple representations. It can and will be argued that separate counsel should be required in spite of the client's wishes. A constitutional remedy is singularly inappropriate to achieving such an end.
6. Though judicially prescribed rules mandating separate counsel are both appropriate and more effective than a constitutional solution, see note 5 supra, in dealing with problems of multiple representation, such rules themselves raise significant problems. First of all, unless the prohibition is absolute, the problem will continue to arise and the courts will be faced with the arduous task of dealing with the exceptions. But courts are understandably and justifiably reluctant to promulgate absolute prohibitions on their own volition. Second, courts can influence practice only before them or before lower courts within their control. Thus judicial rulemaking will inevitably produce a rather disconcerting crazy-quilt pattern of standards. Finally, and perhaps most important, it is both unfair and unwise to thrust upon the courts sole responsibility for regulating what are essentially the ethics of the practicing bar. This the bar should do for itself.
to conflicts of interest in multiple representation lies not in constitutional principle or judicial rulemaking, but in a practicing bar more concerned with an effective, fair, and efficient judicial system than with the narrow self-interest of themselves and their clients. The remainder of this Article represents an effort to demonstrate these assertions.

I. CONFLICTS OF INTEREST
AND THE SIXTH AMENDMENT

A. POINT OF EMBARKATION: Glasser v. United States

The Supreme Court of the United States has only once considered the effect of an attorney's divided loyalties on the sixth amendment rights of those accused of a crime.7 In Glasser v. United States,8 five defendants were prosecuted for conspiracy to defraud the United States. Prior to trial, defendant Kretske informed the court that he was not satisfied with his attorney. The court requested that Stewart, Glasser's attorney, undertake Kretske's defense as well, but both Glasser and Stewart objected, maintaining that potential conflicts existed. Subsequently, however, Stewart informed the court that he would undertake to represent both Glasser and Kretske. Glasser said nothing, and the court allowed the trial to proceed on that basis. Glasser, Kretske, and their three codefendants were subsequently convicted. On appeal, the Supreme Court, in an opinion by Justice Murphy, examined the trial record and found sufficient indication that counsel's representation of Glasser was "not as effective as it might have been if the appointment [of Stewart to represent Kretske] had not been made."9 Specifically, the failure of Glasser's lawyer to cross-examine a prosecution witness adequately and his failure to object to other evidence, arguably inadmissible against Glasser, were held to be sufficient manifestations of a conflict of interest to render Glasser's legal assistance constitutionally defective.10

Lamentably the Glasser opinion lacks clarity on the issue, central to sixth amendment interpretation, of whether a finding of prejudice, in addition to demonstrable conflict, is necessary to sustain the

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8. 315 U.S. 60 (1942).
9. Id. at 76.
10. See id. at 73; note 22 infra. The Court set aside Glasser's conviction and remanded for a new trial. 315 U.S. at 87-88.
constitutional claim. Although the Court did not elaborate on such a requirement in reversing Glasser's conviction, it refused to reverse the conviction of Kretske, a coconspirator, absent a showing that he had been prejudiced. This ambiguity, along with dicta susceptible to competing interpretations, has given rise to varying sixth amendment standards. Though all courts require that a conflict or at least a significant possibility of conflict be shown to have existed, some courts hold that this alone is sufficient to establish a sixth amendment violation while others require that it be coupled with potential or even demonstrable prejudice.

11. See 315 U.S. at 75-76; note 13 infra.
12. But this error [as to Glasser] does not require that the convictions of the other petitioners be set aside. To secure a new trial they must show that the denial of Glasser's constitutional rights prejudiced them in some manner, for where error as to one defendant in a conspiracy case requires that a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them.
13. Some of the dicta in Glasser strongly suggest that a demonstrated conflict of interest is, itself, an infirmity of constitutional dimension: "[It is] clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." Id. at 70. This language has been quoted by various appellate tribunals in support of the proposition that a conflict of interest, without more, constitutes a denial of the sixth amendment rights of the accused. See, e.g., People v. Chacon, 69 Cal. 2d 765, 775, 447 P.2d 106, 111-12, 73 Cal. Rptr. 10, 15-16 (1968).
14. Other dicta in Glasser can be interpreted as eliminating the necessity for any inquiry into the prejudice suffered by an accused as a result of a conflict of interest:
To determine the precise degree of prejudice sustained by Glasser as a result of the Court's appointment of Stewart [Glasser's retained counsel] as counsel for Kretske 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.
15. Some courts appear to use the terms "prejudice" and "conflict of interest" interchangeably. See, e.g., United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).
In fact, *Glasser* should be interpreted as advancing a principle akin to the harmless error rule. The Court pointedly noted the tenuous nature of the Government's case against Glasser and the significance of that fact vis-à-vis his constitutional contentions:

Admittedly, the case against Glasser is not a strong one. The Government frankly concedes that the case with respect to Glasser "depends in large part . . . upon a development and collocation of circumstances tending to sustain the inferences necessary to support the verdict." This is significant in relation to Glasser's contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment.

The Court then proceeded to articulate what appears to be the basis for distinguishing Glasser's case from that of Kretske:

In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.

In concluding that the violation of Glasser's sixth amendment rights required a new trial, the Court also stated that the undiluted loyalty of defense counsel is particularly significant in the context of a conspiracy trial:

In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate


18. 315 U.S. at 67 (emphasis added).

19. Id. (emphasis added).

20. One court has noted more recently that cautious practice should lead to separate counsel in conspiracy cases "where the very nature of the charge suggests the desirability of disassociation." *Fryar v. United States*, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969).
unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance.\textsuperscript{21}

Thus, in view of the nature of the charge against Glasser and the gossamer-like fabric of the Government's case, the diluted loyalty of counsel was prejudicial. By contrast, the conduct of counsel actually favored Kretske,\textsuperscript{22} and the Court did not find the attorney's divided allegiance inherently prejudicial to him. Kretske was therefore required to prove prejudice, and he failed to do so. The Court's mode of analysis clearly indicates that a conflict of interest, although violative of the constitutional rights of the accused, may not require reversal in all cases. A showing of prejudice is also required.\textsuperscript{23}

B. Conflicts in Context

A conflict of interest may surface at one or more stages of a criminal proceeding and in various aspects of trial representation. Although state and lower federal courts have been somewhat inconsistent in applying the rule of Glasser to conflicts situations,\textsuperscript{24} their decisions are useful for isolating those areas in which conflicts develop.

1. Pleas and Plea Bargaining

Plea bargaining is such a pervasive practice\textsuperscript{25} that experience and skill in that context are as important to the criminal defense function as courtroom advocacy. When one attorney represents multiple defendants, however, plea bargain negotiations are fraught with danger of conflicts of interest. For example, where an attorney represents two clients, one of whom is substantially more culpable than the other, he may forego altogether an attempt to bargain for the less culpable defendant out of a fear that the defendant's cooperation with the prosecution may undermine the defense of his more culpable client.

Similarly, a prosecutor may be willing to bargain with only one defendant, promising a lesser sentence in exchange for testimony

\textsuperscript{21} 315 U.S. at 76.
\textsuperscript{22} The Court specifically noted that counsel's failure to cross-examine a prosecution witness fully was probably motivated by a desire to protect Kretske. \textit{Id.} at 73.
\textsuperscript{23} Despite its admonitions against indulging in nice calculations as to the amount of prejudice arising from impairment of effective assistance of counsel, \textit{see id.} at 75-76, the \textit{Glasser} court itself engaged in a detailed analysis of the nature of the alleged offense and the sufficiency of the evidence against each petitioner, \textit{see id.} at 77-83.
\textsuperscript{24} \textit{See} notes 14-16 \textit{supra} and accompanying text.
against codefendants. A deal offered to one defendant and not to others places counsel in an untenable position. If he deems the government's offer to be in the best interests of the defendant and advises him to accept it, he may later confront that defendant as a prosecution witness at trial. Recognizing this potential detriment to the interests of other defendants, the attorney may be inclined to dissuade him from accepting the proffered bargain. But if his advice to one defendant is influenced by concern for other defendants, the lawyer suffers an impairment of loyalty violative of the former's sixth amendment rights.

Even where the government is willing to negotiate with all defendants, the spectre of a deal that works to the detriment of one or more of them remains. For example, the prosecutor may be amenable to a lesser sentence for some defendants if the "more culpable" defendants plead guilty to more serious charges. The result may be that one or more of the defendants will be the sacrificial lambs of a package deal. Again, counsel's loyalties are irreparably divided. To further the interests of some defendants, others must be convinced to acquiesce. In such cases, the guilty pleas of one or more of the defendants may be held to have been involuntarily entered.

Notwithstanding the importance of plea negotiations, the terms and circumstances of a plea bargain may often be totally or partially obscured from appellate review. In federal cases, the court must require disclosure of a plea bargain in open court. In many states, however, the factors that counsel takes into account in determining the desirability of a plea bargain are unlikely to appear in the trial record. In fact, the nature of the agreement itself may not be disclosed.

Whether or not a bargain is struck with the prosecution, there is significant pressure on the attorney to keep his clients' pleas consistent with each other despite potential differences in their situations. For example, if one defendant pleads guilty and implicates a codefendant who pleads not guilty, the attorney is in an unenviable position.

26. Representation of a defendant who becomes a prosecution witness against another client-defendant involves a clear conflict of interest. See United States v Mahar, 550 F.2d 1005 (5th Cir. 1977). See also United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975) (possible conflict of interest where government witness had previously been represented by defense counsel's firm), cert. denied, 423 U.S. 1066 (1976); Commonwealth v. Geraway, 364 Mass. 168, 301 NE.2d 814 (1973).

27. See, e.g., Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975). Even in the absence of a sixth amendment violation, counsel may be in violation of ethical duties. See notes 100-50 infra and accompanying text.


As an advocate for both, counsel is obliged simultaneously to seek a minimal sentence on behalf of the defendant who pleads guilty and to attack his credibility on behalf of the codefendant. In such situations, courts have found little difficulty in concluding that the interests of the defendants are antagonistic.

2. **Inconsistent Defenses**

Conflicts may also develop between the interests of defendants when, although their pleas are consistent, their defenses are not. Assume, for example, that defendant A claims that at the time of the alleged offense he was in the company of defendant B and others. Defendant B's defense, on the other hand, is that he was in the company of others, but that defendant A was not present. In this case, a lawyer representing both A and B is placed in the anomalous position of attacking the credibility of one client to further the interests of the other. Whenever one defendant incriminates or impairs the defense of a codefendant, a clear conflict of interest exists that renders trial advocacy constitutionally defective.

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A related conflict of interest problem arises when one defendant makes a pretrial confession implicating other defendants represented by the same attorney. If the confessing defendant does not testify at trial, his extrajudicial confession will be inadmissible because of the implicated codefendant's sixth amendment right to confront witnesses. See Bruton v. United States, 391 U.S. 123 (1968). If the confessing defendant testifies, however, and affirms his prior statement, counsel is not only obliged to cross-examine him fully but also to protect his interests and preserve his confidences. See ABA Code of Professional Responsibility DR 4-101. If the attorney exercises restraint in cross-examination to avoid areas of confidential communication, his cross-examination may be constitutionally defective. Cf. State v. Coleman, 9 Ariz. App. 526, 454 P.2d 196 (1969) (counsel did not adequately cross-examine defendant who denied pretrial confession).
In general, conflicts stemming from inconsistent pleas or defenses will be readily apparent to a trial judge or reviewing court from the conduct of counsel. A much less evident conflict of interest may develop, however, when defenses available to a defendant are not asserted. If a defense is available to one defendant, but not to another, or if it would conflict with the defense of another, the attorney might seek to avoid weakening the defense of the latter by imposing an enforced harmony of defenses for the benefit of all defendants, rather than asserting a separate defense for each. What may then emerge is a collective defense with no appearance of inconsistency on the trial record. As a result, one defendant is deprived of a potentially meritorious defense solely because of the multiple representation.

A "lost" defense of this kind is easily asserted on appeal but difficult to prove. From the perspective of an appellate tribunal, the possibility that other defenses might have been raised is highly speculative and difficult to assess on the basis of a trial record. For this reason, a number of courts have found allegations of lost defenses insufficient to demonstrate a deprivation of constitutional rights. In cases where an assertible defense is obvious to the reviewing court, but conspicuously absent from the trial record, the detriment to the defendant may be plain enough to warrant a finding of constitutionally inadequate representation. But in less blatant cases, counsel's failure to assert a potentially beneficial defense may be a dear and unanticipated cost of multiple representation.

Some courts have found that such a conflict of interest can be "cured" if a defendant who makes a pretrial statement incriminating a codefendant later denies the truth of the statement on the witness stand. See, e.g., United States ex rel. Morgan v. Keve, 425 F. Supp. 685 (D. Del. 1976). The interests of codefendants will not be in conflict if their defenses are different, but not mutually exclusive. See, e.g., United States v. Lovano, 420 F.2d 769 (2d Cir.), cert. denied, 397 U.S. 1071 (1970); People v. Sanchez, 2 Cal. App. 3d 467, 82 Cal. Rptr. 582 (1969).

32. As a practical matter, even readily apparent conflicts may not arise or be reasonably anticipated at the beginning of trial. See text following note 97 infra. But if a conflict of interest becomes apparent after trial is underway, the adversarial process will be compromised, and the trial judge would invite reversible error by permitting counsel to continue representing defendants in combative positions.


34. In Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973), Austin and her boyfriend, Goode, were charged with first degree manslaughter in the death of Austin's infant son. Although the child died as a result of being throttled by Goode while Austin was out of the house, the attorney who represented both defendants failed to assert the defense of lack of responsibility on behalf of Austin. Austin's legal representation at trial was held constitutionally defective. Id. at 626.

3. **Defendants as Witnesses**

In each criminal trial, defense counsel must make a strategic judgment as to whether the defendant should take the witness stand in his own defense. A variety of considerations must be taken into account, including the substantive content of the defendant’s potential statements, the weight and sufficiency of the government’s evidence, the probable demeanor of the defendant on the witness stand, and the vulnerability of the defendant to impeachment. The decision to put a defendant on the witness stand or to advise against testifying is doubtless one of the criminal trial lawyer’s most crucial decisions.\(^{35}\)

As a matter of trial strategy, this decision is further complicated when defense counsel represents multiple defendants.

The anticipated content of a defendant’s testimony may be either detrimental or beneficial to codefendants. For example, a defendant’s testimony might serve to exonerate him but implicate a codefendant. The lawyer is therefore faced with a choice between the conflicting interests of two clients and may advise against testifying to eliminate potentially inconsistent defenses from the trial record. Alternatively, a defendant may wish to take the stand and admit the offense charged, exonerating the codefendant. If separately represented, the defendant’s proposal would probably be vigorously opposed by his lawyer, but in the multiple representation situation, opposition might be less vigorous, in view of the obvious benefit to the codefendant. In either case, defective assistance of counsel is an obvious danger, yet it may be difficult to discern on appeal.\(^{36}\)

Aside from the anticipated content of a defendant’s statements, other factors that the attorney must consider as relevant to the advisability of testifying may also weigh differently for different defendants. One defendant may be more susceptible to impeachment than another;\(^{37}\) similarly, one defendant’s demeanor may be likely to con-
vey an impression of truthfulness to the trier of fact, while another’s might have the opposite effect. In such cases, counsel is faced with a difficult determination. He must evaluate the overall impact of each defendant’s testimony, taking into account both positive and negative factors. Given the differences that will inevitably exist between his clients, the lawyer may well determine that it is strategically undesirable for one defendant to testify but beneficial, and perhaps necessary, for another to do so.

The decision to advise one client to testify and another to remain silent is not without attendant problems, however. If, for example, only one of an attorney’s two clients takes the witness stand, the attorney must contend with the inevitable question in the minds of the jurors as to why the other defendant refused to testify. Although it is constitutionally impermissible for the court or counsel to comment on the defendant’s refusal to testify, the jury may infer that the defendant who remains silent has something to hide. Perhaps even more damaging, a subtle impression may be conveyed to the jury that the defendants’ own lawyer finds significant differences between them. The prejudicial impact may be almost inescapable.

In order to avert unfavorable inferences by the jury, defense

and another may also influence defense counsel’s decision to advise the defendant to testify because a substantial criminal record may be employed by the prosecutor to impair a defendant’s credibility.


39. For a defense attorney to convey to the trier of fact, even by implication, the impression that one of his clients is more culpable than another may have disastrous consequences. See Freedman, supra note 3, at 1471-72:


Criminal defense lawyers do not win their cases by arguing reasonable doubt. Effective trial advocacy requires that the attorney’s every word, action and attitude be consistent with the conclusion that his client is innocent. As every trial lawyer knows, the jury is certain that the defense attorney knows whether his client is guilty. The jury is therefore alert to, and will be enormously affected by, any indication by the attorney that he believes the defendant to be guilty.

Even if this pitfall is avoided, counsel’s decision whether his clients should testify will still be fraught with dangers of prejudice. See Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968):

This kind of decision, difficult enough where two defendants at the same trial are represented by different counsel, is made doubly difficult where they are represented by the same counsel. The decision whether a defendant should testify may be unduly affected by the risk that his testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant’s story. The attorney’s freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are represented by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable.
counsel may choose either of two options. First, he may refrain from putting either client on the stand. In this case, the jury would not look askance at the nontestifying defendant, but the other defendant would be deprived of the potential benefits of testifying. In other words, the interests of the more vulnerable defendant would become the common cause of both defendants. Alternatively, the lawyer might advise both clients to testify. In this case, the defendant whose credibility, demeanor, or substantive statements would tend to damage his defense would suffer a detriment because of the collective advocacy.

Appellate decisions construing the sixth amendment have evinced no uniformity on this aspect of inadequate legal representation. Nevertheless, it should be apparent that a single legal representative of multiple defendants too often may be compelled to choose between the interests of one client and another. The existence of such a choice evidences an impairment of counsel's independent professional judgment, however subtle the impairment and however difficult to discern on appeal.

4. Evidence Proffered by the Prosecution

Not all evidence introduced by the government will be equally incriminating to all defendants in multiple defendant cases. When a witness for the prosecution gives testimony incriminating only one of defense counsel's clients, counsel must tread a perilous path. He must vigorously question the witness' testimony and credibility on behalf of the client against whom it is offered. To best serve the interests of other defendants, however, he should also underscore the fact that the testimony does not relate to or implicate those defendants. By doing so, the lawyer may implicitly highlight the incriminating nature of the testimony as to the defendant against whom it is offered. To avoid this negative implication, defense counsel may simply refrain from distinguishing among his clients. The failure to

40. In some cases the existence of pretrial statements by one defendant but not by another has been held to produce a conflict of interest. See, e.g., People v. Donohoe, 200 Cal. App. 2d 17, 19 Cal. Rptr. 454 (1962). In other instances, substantial differences in the criminal records of multiple defendants have been held to impair counsel's obligation of undivided loyalty to each defendant. See, e.g., People v. Douglas, 61 Cal. 2d 430, 392 P.2d 964, 38 Cal. Rptr. 884 (1964); People v. Gallardo, 269 Cal. App. 2d 86, 74 Cal. Rptr. 572 (1969). A defense advocate's decision as to which of the defendants should take the witness stand has not always been held to constitute reversible error, however, despite disparities in the criminal record of each. See, e.g., Fryar v. United States, 404 F.2d 1071, 1074 (10th Cir. 1968) (conflict of interest contention found to be "subjective speculation"), cert. denied, 395 U.S. 964 (1969); People v. DeShannon, 11 Cal. App. 3d 982, 90 Cal. Rptr. 300 (1970) (actual conflict constituted harmless error under the circumstances), cert. denied, 404 U.S. 833 (1971).
draw such distinctions exhibits a division of loyalty that violates the sixth amendment.\textsuperscript{41}

Defense counsel must confront a similar problem when evidence is admissible against one defendant but not another. The advocate may be reluctant to object to the admissibility of evidence proffered against one defendant because of the negative implication that might be created against another defendant. Failure to make timely objections or request limiting instructions as to the admissibility of such evidence has been held to evince a violation of the sixth amendment rights of a defendant.\textsuperscript{42} A limiting instruction given by the trial court \textit{sua sponte} has been held to alleviate the conflict of interest,\textsuperscript{43} but in fact such an instruction eliminates only an indicium of the conflict, not the conflict itself.\textsuperscript{44}

5. \textit{Closing Argument}

The defense counsel’s summation at the close of a criminal trial is his last and perhaps best opportunity to influence the deliberations of the jury. In preparing a closing argument, the attorney must consider the weight and sufficiency of the evidence against the defendant to determine what matters to emphasize. In a multiple defendant case, a lawyer who represents only one defendant may take advantage of favorable comparisons between his client and other defendants by pointing out the greater weight of evidence against the others. When multiple defendants are represented by a single attorney, however, counsel must approach comparisons among defendants with the utmost caution, and the greater the difference in evidence against each defendant, the more serious is counsel’s problem.

For example, the evidence introduced against one defendant may be insubstantial and replete with potentially reasonable doubts, but emphasis upon its weaknesses may create an adverse implication that the government’s case against other defendants is stronger. The trier of fact may draw the inference that defense counsel himself

\textsuperscript{41} See Glasser v. United States, 315 U.S. 60, 76 (1942). Other courts have expressed divergent views. Compare Craig v. United States, 217 F.2d 355 (6th Cir. 1954) (holding that cross-examination that fails to highlight the differences among multiple defendants manifests a constitutionally impermissible conflict of interest), with United States v. Gallagher, 437 F.2d 1191 (7th Cir.) (holding that a similar constitutional claim involved matters of trial strategy too speculative for redress), cert. denied, 402 U.S. 1009 (1971).

\textsuperscript{42} See Glasser v. United States, 315 U.S. 60, 73-76 (1942).

\textsuperscript{43} See, e.g., Watkins v. Wilson, 408 F.2d 351 (9th Cir. 1969).

\textsuperscript{44} In Glasser v. United States, 315 U.S. 60, 75-76 (1942), the Court’s purported refusal to indulge in nice calculations as to the amount of prejudice sustained by Glasser may have been an implicit recognition that it is unlikely that all consequences of a conflict of interest will be evident from the trial record.
believes that the government has a substantially better case against the other defendants. Thus, the spectre of these negative implications may cause counsel to forego the opportunity to highlight weaknesses in the government’s case. Defense lawyers who have chosen this approach have been held to have rendered constitutionally deficient legal assistance. Where weaknesses in the evidentiary showing against a defendant are not glaring and omissions in closing arguments are not blatant, however, convictions may well survive appellate review.

Alternatively, a defense lawyer may attempt to avoid conflicts by using his summation to comment fully on all the evidence produced at trial. In doing so, he may differentiate between the defendants, consciously or unconsciously making statements detrimental to one of his clients. Thus, he may convey to the jury the impression that the evidence is stronger against, and justifies the conviction of, one of the persons he is trying to serve. Closing arguments that are actually detrimental to a defendant’s cause are more consistent with the prosecutorial than the defense function. In such cases, an actual conflict of interest is apparent in the record and has been held to violate the affected defendant’s constitutional rights.

45. See, e.g., Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965):
The problems inherent in joint representation are illustrated in this case. Defense counsel stated that he had virtually ignored Glenmore and "unwittingly . . . made all comments with reference to the Defendant Campbell." In his argument to the jury, defense counsel did not once mention the special problems presented by the case against Glenmore. . . . Furthermore, defense counsel made no effort to dissociate Glenmore from Campbell, against whom the Government presented a strong case. See also Sanchez v. Nelson, 446 F.2d 849 (9th Cir. 1971).

46. Disparities in the weight and sufficiency of evidence against multiple defendants arguably produce some degree of conflict in every case. A significant number of appellate courts have stated, however, that such circumstances are not, without more, violative of defendant’s sixth amendment rights. See, e.g., United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); United States v. Miller, 463 F.2d 600 (1st Cir.), cert. denied, 409 U.S. 956 (1972); United States ex rel. Ross v. LaVallee, 448 F.2d 552 (2d Cir. 1971); United States v. Gallagher, 437 F.2d 1191 (7th Cir.), cert. denied, 402 U.S. 1009 (1971); Englehart v. Commonwealth, 353 Mass. 561, 233 N.E.2d 737, cert. denied, 393 U.S. 886 (1968); Holloway v. State, 32 Wis. 2d 559, 146 N.W.2d 441 (1966). To hold otherwise would, as a practical matter, require appellate tribunals to find sixth amendment violations whenever two defendants of unequal culpability were represented by the same counsel. See United States v. Mandell, 525 F.2d 671, 678 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976).

6. Sentencing

In many jurisdictions, evidence may be admitted solely for the purpose of establishing an appropriate sentence for convicted defendants. Defense counsel is given an opportunity to introduce and argue matters personal to the defendant that would otherwise be irrelevant to the merits of the criminal case. In such cases, comparisons between defendants are not simply a matter of preferred trial strategy but are vital to the interests of convicted defendants. Factors such as a defendant's character, age, criminal record, military service, employment history, and cooperation with police, although not germane to guilt or innocence, may strongly influence sentencing, particularly when contrasted to the characteristics of the other defendants. Furthermore, a showing that a defendant took a lesser role in commission of the crime, or was merely a follower in criminal activity, may also prove beneficial.

In this phase of a criminal proceeding the interests of multiple defendants will almost invariably diverge. Few criminal acts are committed by persons whose participation in the planning and commission of the offense is identical. Nor are many convicted defendants likely to possess identical or substantially similar backgrounds. Even when the hazards of multiple representation have been scrupulously avoided throughout trial, any unity of interests among multiple defendants almost inevitably deteriorates at the sentencing stage. To illustrate, assume that defendants A and B have been convicted of aggravated assault. Defendant A, age 42, has been convicted of two prior criminal offenses, robbery and assault with a deadly weapon. Defendant B, however, is twenty years old with only a juvenile record. In representing defendant B, counsel would attempt to assert that defendant B deserves a lesser sentence than the older and more experienced defendant. If one attorney represents both defendants, however, this argument is likely to be avoided.


49. See generally text preceding note 56 infra.


Appellate tribunals have not been unmindful of these difficulties.\textsuperscript{52} In cases where counsel has, in effect, played one client off against another by sacrificing the interests of one in an attempt to secure lesser punishment for the other, the courts have ruled that the sixth amendment rights of the adversely affected defendant were violated.\textsuperscript{53} On the other hand, the failure of counsel to draw distinctions between defendants for the purpose of sentencing has also been held to deprive a convicted defendant of the effective assistance of counsel.\textsuperscript{54}

C. Conflicts and Appellate Review

From the foregoing, two points should be apparent. First, the possibility of a defense lawyer being called upon to make choices between the interests of one client and another looms at every stage of a criminal proceeding. In mapping out a trial strategy that advances the best interests of each defendant, the attorney must be ever cognizant of defenses and strategies that may impair the position of the others. Differences in the weight and sufficiency of the evidence against the defendants may produce less than zealous advocacy on behalf of one of the accused. Differences in the demeanor and personal background of defendants may provoke even more subtle impairments of counsel's assistance. The greater the number of defendants simultaneously represented by a single attorney, the greater

\textsuperscript{52} In a frequently quoted opinion, the California Supreme Court held that a conflict of interest necessarily exists when a jury must fix the penalty for more than one defendant. The court stated,

He [defense counsel] cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty. Moreover, the conflict is not limited to the trial on the issue of penalty, for normally the same jury determines both the issue of guilt and the issue of penalty. Counsel must therefore conduct the defense throughout the entire trial to stress evidence and considerations to support the lesser penalty. Counsel appointed to represent more than one defendant when the jury must fix the penalty for each is forced . . . to treat his clients as a group and to abandon arguments which would apply to each separately.


the possibility that conflicts will arise. In fact, in every case of multiple representation, there exists a likelihood, if not a certainty, that the strategic maneuvers of the criminal defense attorney will adversely affect the interests of at least one defendant at some point in the trial process.55

In this context, it is appropriate to note another danger inhering in multiple representation cases that is present at every stage of the trial: the perhaps irrational notion of guilt by association. A lawyer who represents one defendant in a multiple defendant trial will generally take pains to disassociate his client from the others. For a single defense lawyer with multiple clients, such disassociation will be extraordinarily difficult. The view from the jury box may be that birds of a feather flock to the same lawyer. When multiple defendants are represented by the same lawyer, they may be perceived as a group defendant and may survive or perish depending upon the effectiveness of common denominator defenses advanced by their collective counsel. In drawing legal distinctions among defendants, a jury simply may not be reliable.56

Appellate review of the constitutional adequacy of legal assistance does not fully safeguard the interests of jointly represented defendants. When a sixth amendment violation is alleged, the appellate tribunal must scrutinize the trial conduct of the appellant's counsel. If the court finds a divergence from accepted principles of criminal trial advocacy vis-à-vis one defendant that is causally related to the advancement of the interests of another defendant, a constitutionally impermissible conflict will be held to exist.57 This manner of review indicates that, although courts periodically state that inquiry into the strategies of a trial lawyer is beyond the scope of appellate review,58 exactly that sort of inquiry will inevitably be the basis of their sixth amendment scrutiny.59

55. See, e.g., People v. Odom, 236 Cal. App. 2d 876, 878-79, 46 Cal. Rptr. 453, 454-55 (1965) (enumerating several situations in which conflicts of interest are likely to arise); AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 213-14 (Approved Draft 1971) [hereinafter cited as ABA DEFENSE STANDARDS] (describing various situations in which multiple representation may involve conflicts of interest).
57. See, e.g., United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976).
58. See, e.g., United States v. Foster, 469 F.2d 1 (1st Cir. 1972).
59. In McMann v. Richardson, 397 U.S. 759 (1970), the United States Supreme Court described the caliber of legal representation required by the sixth amendment as "reasonably competent," id. at 770, and "advice . . . within the range of competence demanded of attorneys in criminal cases," id. at 771. Cf. United States ex rel.
In many cases, however, a criminal defendant undertakes a difficult if not impossible task in attempting to establish that a selected trial strategy resulted from the conflicting interests served by his lawyer. A criminal trial inevitably bears the mark of the defense attorney involved since two experienced criminal trial lawyers are likely to try the same case differently. Thus, differences in trial strategy, even though erroneous or ineffective when viewed retrospectively, are not necessarily tantamount to constitutionally ineffective assistance. Absent a demonstration of conflict by the appellant, an appellate court may refuse to speculate as to the reasons for a certain trial strategy, even though an alternative approach might have proven more beneficial to the appellant.

Judicial reluctance to second-guess the motivation of defense counsel is not without justification. In making such assessments, appellate tribunals are faced with a cold record, from which they must attempt to establish whether advocacy during a distant trial was constitutionally deficient. Counsel may have made specific trial judgments based in whole or in part upon facts and circumstances that are not in the trial record and are entirely unrelated to a conflict of interest. Even when a serious conflict of interest existed at trial, impaired advocacy may not be evident from a reading of the transcript. Thus, after-the-fact reconstruction of trial strategy and the reasons therefor is exceedingly difficult, and judicial frustration in attempting to make such determinations is apparent in many opinions.

Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) (applying a standard of "normal competency").


See, e.g., United States v. Foster, 469 F.2d 1 (1st Cir. 1972); United States v. Gallagher, 437 F.2d 1191 (7th Cir.), cert. denied, 402 U.S. 1009 (1971). In Foster, the Court noted,

Of course, Foster might have tried a very different line of defense under the guidance of separate counsel, but this is merely to say that one lawyer may try a case quite differently from another. The possibility here that another approach might have been used, with better results for the defendant, exists in every case and is very far indeed from making out a deprivation of constitutional right.

469 F.2d at 4.

In Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967), the court stated,

The obvious reason against insisting on a precise delineation of the prejudice suffered is that such a task is made very difficult when one must rely on a cold, printed record for reconstruction of the manifold and complex dynamics of the trial process, including reasons for trial tactics which may have been dictated by the joint representation. Like the famous tip of the iceberg, the record may not reveal the whole story; apparently minor instances in the
Even if some evidence of the divided loyalties of counsel is apparent from the record, the obstacles that a convicted defendant must hurdle to obtain reversal are greater in some jurisdictions than others. Varied interpretations of the Supreme Court's ambiguous decision in Glasser account for much of this disparity. If the decision is correctly interpreted to embody a harmless error standard, the defendant will be required to demonstrate both a conflict of interest and prejudice to obtain reversal. Regardless of the standard employed, record which suggest co-defendants' conflicting interests may well be the telltale signs of deeper conflict.

Id. at 246-47. See United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972); Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969); United States ex rel. Miller v. Myers, 253 F. Supp. 55, 57 (E.D. Pa. 1966); People v. Odom, 236 Cal. App. 2d 876, 880, 46 Cal. Rptr. 455 (1965).

In view of the inherent limitations of appellate review, some courts have recognized that an "informed speculation" of prejudice would justify reversal of a defendant's conviction. See, e.g., United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973); Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967). Indeed, Glasser itself required no more than demonstrable indicia of divided loyalties. See notes 8-23 supra and accompanying text. But the necessity of reliance on a search of the trial record to uncover such indicia only underscores the weakness of appellate review of multiple representation cases because many of the detravements following from an attorney's conflict of interest may be imperceptible in the record. See Austin v. Erickson, 477 F.2d 620, 626 (8th Cir. 1973); People v. Gallardo, 269 Cal. App. 2d 86, 90, 74 Cal. Rptr. 572, 575 (1969); notes 25-54 supra and accompanying text. Moreover, any determination of what will suffice as indicia of ineffective counsel is, at least in part, the product of the appellate court's understanding of basic principles of trial advocacy. It is at least notable that not all appellate judges were experienced trial lawyers before assuming the bench, and they may, therefore, be ill-equipped to make such a determination.

63. See notes 14-16 supra and accompanying text. Some courts have also drawn a distinction between retained and appointed counsel. This distinction is based upon the notion that the state is not an active participant in the selection of counsel when a defendant freely selects a lawyer who also represents codefendants in the same matter. Thus, state action does not exist, and the sixth amendment standard may not be applied. See generally Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975). The Court of Appeals for the Third Circuit, however, has criticized the distinction:

A rule which would apply one fourteenth amendment test to assigned counsel and another to retained counsel would produce the anomaly [sic] that the non-indigent, who must retain an attorney if he can afford one, would be entitled to less protection from the trial court. The effect upon the defendant—confinement as a result of an unfair state trial—is the same whether the inadequate attorney was assigned or retained.

United States ex rel. Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973). Other courts have simply rejected the distinction altogether. See, e.g., United States ex rel. Robinson v. Housewright, 525 F.2d 988, 994 n.8 (7th Cir. 1975); United States v. Foster, 469 F.2d 1, 4 n.2 (1st Cir. 1972); Lollar v. United States, 376 F.2d 243, 245-46 (D.C. Cir. 1967); Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954). See generally Waltz, supra note 16, at 296-301.

64. See notes 17-23 supra and accompanying text.

65. The Circuit Court of Appeals for the District of Columbia has relied upon Supreme Court decisions on harmless error to shift to the government the burden of
however, an examination of results actually reached reveals that some courts are less disposed to reversing convictions in multiple representation cases than are others. For example, some courts confronted with a record containing substantial or overwhelming evidence against an appellant have concluded that defense counsel's multiple representation did not result in a demonstrable conflict; others have rejected the notion that the substantiality of the government's case renders a defendant's constitutional claim less compelling. These disparities suggest that a defendant's fortunes in a sixth amendment appeal may hinge, in large part, on the fortuity of a sympathetic appeals court.

proving that the appellant's rights were not prejudicially affected. See, e.g., Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967) (citing Chapman v. California, 386 U.S. 18 (1967)).

For the most part, however, harmless error is not discussed in multiple representation cases. In jurisdictions where prejudicial effect must be proven, courts have simply concluded that constitutional error does not exist absent a showing of conflict and prejudice. See, e.g., Haggard v. Alabama, 550 F.2d 1019 (5th Cir. 1977); United States v. LaRiche, 549 F.2d 1088 (6th Cir.), cert. denied, 430 U.S. 987 (1977); United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973); Watkins v. Wilson, 408 F.2d 351 (9th Cir. 1969); Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969); United States v. Burkeen, 355 F.2d 241 (6th Cir.), cert. denied, 384 U.S. 957 (1966). In other jurisdictions, a showing of actual prejudice is not required. See notes 14-15 supra and accompanying text.

66. See, e.g., United States v. Valenzuela, 521 F.2d 414 (8th Cir. 1975), cert. denied, 424 U.S. 916 (1976). One eminent and outspoken judge has suggested that the reluctance of some appellate courts to reverse for inadequate representation when convictions are based on firm evidence may have a pragmatic underpinning:

It is the belief—rarely articulated, but, I am afraid, widely held—that most criminal defendants are guilty anyway. . . . This may be an important reason why appellate courts commonly require appellants to show not only that their constitutional right to effective counsel was denied but also that the denial was prejudicial. Bazelon, supra note 3, at 26.

67. See, e.g., United States v. Carrigan, 543 F.2d 1053, 1057 (2d Cir. 1976) ("We cannot accept the proposition that the more potent the Government's case, the less compelling the criminal defendant's constitutional right to independent counsel.").

68. These differences in the significance that various courts attach to similar factual situations may to some extent reflect their differing conceptions of the minimal level of representational competence that can be tolerated consistent with the sixth amendment.

For example, the Tenth Circuit consistently holds that trial representation satisfies sixth amendment competency requirements unless tantamount to a sham or pretense, see, e.g., United States v. Riebold, 557 F.2d 697 (10th Cir.), cert. denied, 98 S. Ct. 186 (1977); United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976), while the Third Circuit holds that adequate representation in a constitutional sense requires adherence to a normal competency standard, see, e.g., United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); United States ex rel. Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970). Thus, when presented with a possible conflict in the context of a multiple representation, a court's views on the degree of effectiveness required by the sixth amendment may affect its willingness to find that the alleged conflict was of
Finally, apart from problems of effectiveness, relying on appellate review to correct the problems of multiple representation is misguided. Because of its retrospective, remedial view of the problem, appellate review can do nothing to prevent the waste of judicial resources and the burden on the parties made necessary by the appeal and new trial.69

The inadequacy and inappropriateness of appellate review as a remedy for conflicts of interest dictate that attempts be made to resolve such questions at the trial level. The trial court is better situated to discern the existence and effect of a conflict as well as the defendants' appreciation of potential and actual conflicts. It is therefore appropriate to consider the effectiveness of measures that have been employed to resolve conflicts at trial.

D. Resolution of Conflicts at Trial

1. Waiver

Since an accused may waive his right to protections guaranteed by the Constitution,70 a conflict of interest, although violative of a defendant's sixth amendment rights, is subject to waiver.71 The trial court, however, bears significant responsibility for safeguarding the essential rights of the accused by ensuring that the waiver is voluntarily and intelligently made with an awareness of relevant circumstances and likely consequences.72

At least some courts have recognized the difficulties involved in obtaining an intelligent waiver of constitutional rights from a defendant who lacks the sophistication to appreciate fully the significance of such a waiver.73 A waiver will be ineffective unless the defendant fully understands the manifold circumstances in which a conflict may develop. A generalized admonition by the trial court that counsel's duties to one client may conflict with duties to another is hardly sufficient magnitude to constitute a violation of defendant's sixth amendment right to effective representation.

69. See generally notes 100-07 infra and accompanying text.
71. See Glasser v. United States, 315 U.S. 60 (1942).
73. See, e.g., Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965) ("An individual defendant is rarely sophisticated enough to evaluate the potential conflicts . . . ."); United States v. Garafola, 428 F. Supp. 620, 623-24 (D.N.J. 1977). Other courts, however, have found adequate waivers despite only cursory supervision by trial courts and without regard to the number of defendants represented by one lawyer. See, e.g., United States v. Woods, 544 F.2d 242 (6th Cir. 1976), cert. denied, 430 U.S. 969 (1977); United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973).
sufficient to supply this knowledge, nor is the significance of potential conflicts likely to be understood. Abstract cautions are unlikely to be meaningful unless they are related to the specific problems that may arise in the defendant's particular case. Even if some of these circumstances are brought home to a defendant, his appreciation of their potential impact will be minimal unless he understands the niceties of trial dynamics and the effect that various trial strategies may have upon the outcome.

Moreover, even where the defendant is sophisticated enough to appreciate the general implications of possible conflicts, the difficulty of an a priori assessment of the likelihood of conflict or the contexts in which conflicts might arise raises serious questions about the effectiveness of prospective waivers. Conflicts that were not reasonably foreseeable or that may not even have existed at the start of trial often develop as trial proceeds. In such a situation, holding the defendant to his pretrial waiver in effect forces him to waive his right to object to unknown contingencies. On the other hand, to allow him to raise the objection seriously undermines the effectiveness of waiver as a mechanism for preventing significant waste of judicial resources.

A meaningful pretrial assessment of the possibilities for conflict is especially difficult for the court. At the start of the trial, the judge will not know the defenses to be raised on behalf of each defendant, the potential defenses to be foregone, the weight and sufficiency of the evidence to be adduced against each defendant, or each defen-

74. Courts in a number of jurisdictions have recognized the inability of many defendants to appreciate fully the significance of conflicts and have found no waiver, despite explicit or implicit consent to multiple representation. See, e.g., United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976) (no waiver despite defendant's consent to multiple representation), cert. denied, 429 U.S. 998 (1977); United States v. Gains, 529 F.2d 1038 (7th Cir. 1976) (defendant was not specifically warned of the risks of multiple representation).

75. It is worthy of note that in Glasser the Supreme Court found no waiver of Glasser's sixth amendment rights, despite the fact that Glasser was an experienced trial lawyer who had served for more than four years as an Assistant United States Attorney prosecuting criminal cases. See 315 U.S. at 70-72. In view of the conclusion in Glasser, it is difficult to imagine a case in which a waiver would be invulnerable to challenge.

76. See text following note 97 infra.

77. See, e.g., United States v. Armone, 363 F.2d 385, 406 (2d Cir.), cert. denied, 385 U.S. 957 (1966); People v. George, 259 Cal. App. 2d 424, 66 Cal. Rptr. 442, cert. denied, 393 U.S. 941 (1968). The serious difficulties involved in attempting to anticipate the course that a criminal trial may take have not escaped notice. See Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969). In some cases, courts have refused to find a waiver of conflicts of interest that were unanticipated and developed during the trial. See, e.g., Larry Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970); Craig v. United States, 217 F.2d 355 (6th Cir. 1954).
dant's personal history and past criminal record. Without such information, the trial judge cannot impress upon a defendant the significance of waiver, nor can he evaluate the defendant's appreciation of it.  These considerations recently prompted one trial judge to characterize the trial court's inquiry as an "ineffective charade" and a "futile exercise."

The subtleties involved in conflicts of interest, the inability of most defendants to grasp the significance of conflicts, the unforeseeability of many conflicts, and the fact that the trial judge is poorly situated to explain the dangers of the conflicts combine to suggest the inadequacy of waiver and its vulnerability on appeal. In many cases, therefore, the insufficiency of waiver of a defendant's sixth amendment rights will loom as a potentially successful ground for reversal.

2. Shifting the Burden of Proof

In the First and Second Circuits, the trial judge in a multiple representation case is obliged by appellate court rule to "comment on some of the risks" that defendants may confront when jointly represented and to inquire diligently into whether the defendants have discussed such risks with their attorney. The trial judge must point out to the defendants that, by virtue of multiple representation, each of them foregoes the right to representation by a lawyer whose exclusive loyalty would be to him alone and that, while particular defenses and strategies may be in one defendant's best interest, they may not be in the other's. If the comments and inquiry made to the

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78. The Fifth Circuit Court of Appeals requires, inter alia, that the trial judge in a multiple representation case elicit a narrative statement from the defendants that they have been advised of their right to effective assistance of counsel and that they understand the details and potential perils of their counsel's possible conflict of interest. See United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975). Although this narrative enables the trial court to assess a defendant's general understanding of the problem, the "details" of possible conflicts are unspecified. Moreover, the trial judge lacks sufficient information concerning any given case to assure that a defendant actually appreciates the risks that he is running.

Trial judges are not only disadvantaged by ignorance of a variety of significant facts and circumstances; they also lack the power to obtain that information by inquiry because of the accused's fifth amendment privilege against self-incrimination and the evidentiary privilege between attorney and client. See United States v. Paz-Sierra, 367 F.2d 930, 932 (2d Cir. 1966), cert. denied, 386 U.S. 935 (1967); United States v. Garafola, 428 F. Supp. 620, 626 (D.N.J. 1977). See also People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975).

80. Id. at 624.
81. United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972).
82. See United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973); United States v. Foster, 469 F.2d 1 (1st Cir. 1972).
83. See United States v. Donahue, 560 F.2d 1039, 1043-44 (1st Cir. 1977).
defendants are unsatisfactory to the appellate courts, the burden of proof shifts to the government to demonstrate that prejudice to any convicted defendant was improbable.84

Shifting the burden of proof to the government in the absence of a satisfactory inquiry at the trial level evinces some sensitivity to the legitimate interests of criminal defendants and the difficulties inherent in proving a conflict of interest.85 In this respect, the rule is more solicitous of the interests of the defendant than that employed in other jurisdictions. However, it also suffers many of the inadequacies of waiver.86 The trial court's comments are necessarily generalized and are unlikely to satisfactorily apprise a defendant of the real hazards involved in his particular case. Moreover, many conflicts will not become apparent until trial proceeds. Finally, when trial level inquiry is adequate, the requirement that the defendant satisfy a "heavy burden of proof"87 to obtain reversal places an additional and substantial obstacle in the path of successful appeal. Thus, this measure is inadequate to safeguard fully defendants' rights in a multiple representation situation.

3. Severance

Another possible approach to the conflict of interest problem is to grant the defendants separate trials. A severance may be ordered by the trial court in its discretion if, inter alia, a defendant is or may be prejudiced by a joint trial.88 Clearly, some aspects of the conflict of interest problem may be alleviated by separate trials. For example, if severance were granted, counsel could call the defendant with no prior criminal record to the witness stand without fearing that the trier of fact would draw a negative inference from the silence of a codefendant.89 In other respects, however, severance may not affect a conflict of interest situation. For example, conflicts stemming from division of loyalty at the plea bargaining stage and at sentencing remain unaltered by severance. Indeed, a number of sixth amend-

84. Although no particular form of inquiry is prescribed, the First Circuit in Donahue found the trial court's inquiry insufficient and concluded that the government had failed to sustain its burden of proof. From the trial record, the court of appeals could not conclude with certainty that the potential conflict had not influenced counsel's choice of strategies. See id. at 1044.


86. See notes 70-80 supra and accompanying text.

87. See United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972). Although the precise nature of this burden has not yet been adjudicated, presumably a defendant will be required to prove, from the record, that an actual conflict existed.


89. See generally notes 35-40 supra and accompanying text.
ment cases involve situations in which severance was in fact granted, but a conflict of interest nevertheless required reversal.90

4. Initial Appointment of Separate Counsel

The Circuit Court of Appeals for the District of Columbia has devised a rule, apparently as a matter of statutory construction, requiring that separate counsel for indigent codefendants be appointed initially in every case.91 If, after fully investigating the case, counsel concludes that both the interests of justice and the interests of the client will best be served by joint representation, the trial court may allow it.92

Certainly the interests of neither justice93 nor the defendants are well served if there remains a substantial possibility that a conflict will develop during the course of trial. Consequently, in order to satisfy the District of Columbia standard, counsel must presumably convince the court that a conflict of interest does not exist and is unlikely to arise during the trial. In view of the numerous ways in which such conflicts may arise94 and the inability of even experienced counsel to predict the course that a trial will take,95 it would appear to be unlikely that a conscientious attorney will be able to provide the court with an assurance of unimpaired advocacy. Nevertheless, multiple representation has not been eliminated from the District of Columbia. Thus, despite its obvious merits, the rule is inadequate. Although it discourages multiple representation, it does not proscribe it, and problems with conflicts of interest will, therefore, inevitably remain.96

90. See, e.g., Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973); United States v. Pinc, 452 F.2d 507 (5th Cir. 1971). Even assuming, arguendo, that severance may in some cases alleviate a defense lawyer's conflict of interest, the solution may be costly. Severance is particularly burdensome to an already over-taxied criminal trial system. Thus there may be a strong public interest favoring joint trial in order to conserve the time of the courts, prosecutors, witnesses, and jurors. See, e.g., United States v. Mardian, 546 F.2d 973, 980 (D.C. Cir. 1976); United States v. Hines, 455 F.2d 1317, 1334 (D.C. Cir.), 406 U.S. 975 (1972).

91. See Ford v. United States, 379 F.2d 123, 126 (D.C. Cir. 1967). The court's rule is fashioned to achieve compliance with the Criminal Justice Act, 18 U.S.C. § 3006A(b) (1964) ("[T]he court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel . . . ."), as amended, 18 U.S.C. § 3006A(b) (1970).

92. See 379 F.2d at 126.

93. See note 122 infra; notes 141-50 infra and accompanying text.

94. See notes 24-54 supra and accompanying text.

95. See text following note 97 infra.

96. Some courts outside the District of Columbia Circuit have suggested that separate counsel should be used in multiple defendant cases, but none has required separate counsel. See State v. Robinson, 271 Minn. 477, 481, 136 N.W.2d 401, 405, cert.
5. Responsibility of the Defense Attorney

In a number of jurisdictions, courts have placed significant responsibility for safeguarding the sixth amendment rights of multiple defendants upon the defense attorney. The allocation of responsibility to trial advocates is premised on a judicial recognition of the inadequacy of appellate review with respect to conflicts problems and the inability of trial courts to conduct meaningful inquiries into the existence of facts and circumstances that may produce conflicts. It presupposes, however, that defense counsel is able to determine whether a conflict exists or is likely to arise during trial.

Even the most experienced and diligent advocates may not be able to anticipate conflicts before they develop. By its nature, the criminal trial is a dynamic process, laden with variables and unforeseeable contingencies. Extensive trial experience and preparation provide only limited vision; an advocate can guarantee neither the course of trial nor its outcome. Three examples are illustrative. First, unexpected testimony and other evidence introduced by the prosecutor may require a shift in defense strategies that creates inconsistencies among defenses available to each accused. Second, defendants are usually ill-equipped to assess which facts are relevant to their case and may fail to disclose vital information to their attorney. Unless the lawyer asks the right question initially, he may not discover material facts creating a conflict among his clients until mid-trial. Third, it is hardly uncommon for a defendant to attempt, at least initially, to protect a codefendant. After extensive trial preparation, however, a defendant may perceive that his initial version of the facts, protective of the interests of others, is injurious to his own cause. At that point, his instinct for self-preservation may exceed his loyalty, and he may change his story, producing a conflict of interest not previously perceived or anticipated.

Despite these difficulties, however, reliance upon the attorneys themselves is clearly a step in the right direction. Many conflicts that undermine a defendant's sixth amendment rights may escape detection on review. Moreover, the appellate court's only remedy—to remand for a new trial—is extremely costly in terms of the public's interest in a just, expeditious, and inexpensive disposition. Although

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denied, 382 U.S. 948 (1965); May v. Commonwealth, 386 S.W.2d 731, 733 (Ky. 1965).

the remedy for these problems must come at the trial level, it is not possible for the trial courts adequately to distinguish those few cases in which conflicts will not arise from the great mass of those in which they may. The legal system must rely, therefore, upon the defense attorney to prevent the problems of conflict.

Few courts that have placed reliance upon the bar to avoid conflicts of interest have delineated the defense advocate’s particular responsibilities in a multiple representation situation. Some, however, have relied upon the ethical responsibilities contained in the ABA Code of Professional Responsibility and the ABA Defense Standards. The following sections will explore the dictates of these standards in a multiple representation context.

II. RESPONSIBILITIES OF THE LEGAL PROFESSION
A. ETHICAL AND SIXTH AMENDMENT STANDARDS COMPARED

The allegation of a conflict of interest in the concurrent representation of two or more criminal defendants presents a problem that impinges not only upon the defendants’ constitutional rights but
upon the attorney's ethical responsibilities.\textsuperscript{100} Beyond the general obligation of an attorney to assure that his performance is not so inadequate as to violate his client's sixth amendment rights,\textsuperscript{101} the ABA Code of Professional Responsibility explicitly requires the attorney to avoid accepting or continuing 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 the employment.\textsuperscript{102} These two dimensions of the problem are not coextensive in either theory or practice.\textsuperscript{103} Sixth amendment analysis focuses upon the performance of counsel after multiple representation commences to determine the constitutional sufficiency of that representation. The ethical obligations of the defense lawyer, on the other hand, address the propriety of undertaking multiple representation in the first place. Thus, while the constitutional analysis is result oriented, concentrating upon the discernible effects of multiple representation,\textsuperscript{104} the ethi-

\textsuperscript{100} See generally notes 4-6 supra and accompanying text.

\textsuperscript{101} The ABA Code of Professional Responsibility does not explicitly require an attorney to safeguard the constitutional rights of his client, but a lawyer is precluded from handling a legal matter that he knows or should know is beyond his competence. See ABA Code of Professional Responsibility DR 6-101(A)(1). Similarly, an attorney may be disciplined for handling a legal matter without adequate preparation, see id. DR 6-101(A)(2), or for neglecting a legal matter entrusted to him, see id. DR 6-101(A)(3).

\textsuperscript{102} Id. DR 5-105(A), (B) (emphasis added). DR 5-105(C) provides what purports to be an exception to this rule:

\textsuperscript{103} In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious 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.

It is unclear how section (C) constitutes anything more than an affirmative paraphrase of the prohibitions in sections (A) and (B). It is difficult to conceive of a situation where a lawyer's "independent professional judgment . . . is likely to be adversely affected" by multiple employment but where it is nevertheless "obvious that he can adequately represent the interest" of each client. Despite the apparent redundancy, the "exception" does serve a significant function. It provides explicit assurance that multiple representation is not prohibited and deprives sections (A) and (B) of all objectivity, allowing the attorney himself to be the judge of the "obvious."

Insofar as DR 5-105 addresses potential as well as actual conflicts, it appears to be more stringent than prevailing interpretations of the sixth amendment. See notes 104-06 infra and accompanying text.

\textsuperscript{104} The practical difference is well illustrated by jurisdictions that require a showing of prejudice to justify reversal of a conviction for a conflict of interest. See note 16 supra. In such jurisdictions, a lawyer may violate his professional duties to a client, yet if his impairment of loyalty is not sufficiently egregious to create demonstrable prejudice, the conviction will stand.

\textsuperscript{104} Some courts have exercised their supervisory responsibilities to prevent conflicts before they develop. See Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967) (providing for initial appointment of separate counsel in all indigent cases); United
cal rules specifically confront the conflict of interest issue at the time the lawyer accepts employment. Because the ethical standard embraces conflict avoidance, it is more protective of both the clients' and society's interests than is the remedial standard of the sixth amendment. Although the importance of sixth amendment appellate scrutiny should not be disparaged, it is appropriate to look to the professional responsibility of lawyers themselves for a solution to multiple representation problems.

**B. THE ETHICAL STANDARD: PROSPECTIVE AVOIDANCE OF CONFLICTS**

Largely because of the fiduciary character of the relationship between attorney and client, an attorney is precluded from representing clients whose interests are likely to conflict as well as those whose positions are actually antagonistic. Under the ABA Canons of Professional Ethics, the predecessor of the current ABA Code of Professional Responsibility, the prohibition on representation of conflicting interests was literally limited to situations where the interests were actually antithetical. Nevertheless, the provision

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105. See ABA Code of Professional Responsibility DR 5-101(A), (B), DR 5-105(A).

106. The obligation of counsel to safeguard the rights of a client is, at least in part, subsumed under the ABA Code of Professional Responsibility. See note 101 supra.

107. In one recent case, a court "constitutionalized" the ethical responsibilities of attorneys by defining effective assistance of counsel to include "such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar." United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973). Other courts have expressly avoided this approach. See, e.g., United States ex rel. Robinson v. Housewright, 525 F.2d 988, 994 (7th Cir. 1975).

108. The granting of a license to practice law accords to the recipient a right to represent others. Because he possesses this right, a lawyer is held to strict ethical standards that are fiduciary in nature. See Cord v. Smith, 338 F.2d 516 (9th Cir. 1964); Kelly v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); ABA Code of Professional Responsibility EC 4-1; H. Drinker, Legal Ethics 89-96 (1953); R. Wise, Legal Ethics 276 (2d ed. 1970). The fiduciary character of the relationship requires a scrupulous adherence to the duty of undivided loyalty that will be carefully scrutinized and strictly enforced by the courts. See Smoot v. Lund, 13 Utah 2d 168, 369 P.2d 933 (1962); ABA Code of Professional Responsibility EC 5-1; cf. Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) (defining the fiduciary duties of business partners).


110. ABA Canons of Professional Ethics No. 6 provided in part, "It is unprofessional to represent conflicting interests, except after full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."
was consistently interpreted to require lawyers to avoid not only the representation of obviously incompatible interests but also the "probability or possibility that such a situation may develop."\ ammonium\ At each instance, the Code explicitly precludes representation of a client whenever a lawyer's professional judgment is likely to be adversely affected.

A lawyer's professional obligation, therefore, is not limited to withdrawal from representation once a conflict of interest develops. An attorney must anticipate potential conflicts and decline employment in situations likely to impede the exercise of disinterested judgment on behalf of his client. Of course, a lawyer need not decline employment in every situation where a conflict might conceivably arise, but he may not await the development of an actual conflict.

112. ABA Code of Professional Responsibility, Canon 5.
113. The Code addresses conflicts between a client and his attorney, see id. DR 5-101(A); conflicts between the attorney's litigative role as advocate and as trial witness, see id. DR 5-101(B), DR 5-102; and conflicts between the client's interests and those of counsel in litigation, see id. DR 5-103, or in business transactions, see id. DR 5-104. The Code also sets forth rules governing conflicts between or among clients, see id. DR 5-105(A)-(D), and conflicts between a client and third parties, see id. DR 5-107.
114. A lawyer is prohibited from accepting employment where his professional judgment reasonably may be affected by his own interests: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." Id. DR 5-101 (A). The ethical considerations corroborate the requirement that a lawyer shall decline employment if there exists a reasonable likelihood or probability that a conflict will arise. See, e.g., id. EC 5-2, EC 5-3.
Similarly, a lawyer is obliged to refuse employment if his independent professional judgment on behalf of a client is likely to be adversely affected by the interests of the new client. "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 . . . except to the extent permitted under DR 5-105(C)." Id. DR 5-105(A).
Once multiple employment is undertaken, an attorney must disengage if his judgment is likely to be adversely affected. "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 . . . except to the extent permitted under DR 5-105(C)." Id. DR 5-105(B).
115. It has been suggested that the mere possibility of a conflict developing at some future point does not prevent a lawyer from representing a client. See State v. Garaygordobil, 89 Ariz. 161, 359 P.2d 753 (1961).
of interest before declining, or withdrawing from, employment. The test for determining whether an alleged conflict impedes the performance of a lawyer's duties is probability, not certainty. A trial court is not, therefore, obliged to wait until conflict is certain before it may disqualify a lawyer from a representation.

The duty to avoid representing conflicting interests is intimately related to the lawyer's obligation to preserve and protect the confidences and secrets of a client "without regard to the nature or source of information or the fact that others share the knowledge." An attorney, therefore, may not represent adversaries in litigation, not only because their interests are directly combative, but also because he is privy to their confidences and could use them to their detriment during the course of litigation. Moreover, the very nature of an adversary proceeding suggests the inability of a lawyer to function adequately as the advocate of each.

Thus, a likelihood of conflict is inherent in certain kinds of situations, and the lawyer is ethically obligated to avoid them. He may


118. See ABA Code of Professional Responsibility DR 4-101.


120. See, e.g., Hall v. Shippers Express, Inc., 234 N.C. 38, 65 S.E.2d 333 (1951); Jedwabny v. Philadelphia Transp. Co., 390 Pa. 231, 135 A.2d 252 (1957), cert. denied, 355 U.S. 966 (1958). A distinction has been drawn, however, between litigative and nonlitigative matters. See ABA Code of Professional Responsibility EC 5-15. The distinction is presumably based upon the notion that the parties are not necessarily adversaries in matters not involving litigation. Although a number of jurisdictions allow a lawyer to represent both parties to a contract, for example, the practice must be cautiously undertaken. See, e.g., Stump v. Flint, 195 Kan. 2, 402 P.2d 794 (1965). Moreover, the attorney should withdraw completely once a dispute arises. See, e.g., Craft Builders, Inc. v. Ellis D. Taylor, Inc., 254 A.2d 233 (Del. 1969).

121. The lawyer is ethically obliged to decline employment in a number of situations where conflicts and abuses of confidence are likely to occur. For example, counsel may not successively represent one party in an adversary proceeding and the opposing party in a subsequent proceeding concerning the same subject matter. See, e.g., In re Maltby, 68 Ariz. 153, 202 P.2d 902 (1949); In re Blatt, 42 N.J. 522, 201 A.2d 716 (1964); Northeastern Okla. Community Dev. Corp. v. Adams, 510 P.2d 939 (Okla. 1973); cf. In re Braun, 49 N.J. 16, 227 A.2d 506 (1967) (counsel had previously advised opposing party). Nor may he oppose a former client on a matter substantially related to the subject matter of a prior representation. See, e.g., Kreda v. Rush, 550 F.2d 888 (3d Cir. 1977); Schloetter v. Railoc of Ind., Inc., 546 F.2d 706 (7th Cir. 1976); In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); Redd v. Shell Oil
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properly be disqualified before a potential, but reasonably foreseeable, conflict culminates in a clear impairment of his independent professional judgment. The requirements that a lawyer avoid conflicts and preserve confidences are attempts to protect and advance the interests of the client and the public in the fair and expeditious administration of justice. A defense counsel's ethical duties in the course of representing criminal codefendants should be reviewed with no less concern for the interests of clients and of justice and should reflect the legitimate interests served by the ethical rules.

Co., 518 F.2d 311 (10th Cir. 1975); American Roller Co. v. Budinger, 513 F.2d 982 (3d Cir. 1975); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Cord v. Smith, 338 F.2d 516 (9th Cir. 1964). See generally Note, Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client, 55 B.U.L. Rev. 61 (1975). In both situations, it is likely that counsel would possess confidential information that could be employed to advance the cause of the other client. Counsel is subject to judicial disqualification in such instances without proof of an actual conflict or a demonstration that he has access to client confidences that may be relevant to the current matter. See, e.g., Schloetter v. Railoc of Ind., Inc., 546 F.2d 705, 710 (7th Cir. 1976); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 885 (1965). See also Cord v. Smith, 338 F.2d 516 (9th Cir. 1964).

In several jurisdictions, courts have also held that an attorney who represents a client in one matter may not concurrently oppose that client in another matter, even in the absence of any relationship between the two cases. See, e.g., Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); In re Evans, 113 Ariz. 458, 556 P.2d 792 (1976); Grievance Comm. v. Rottner, 152 Conn. 59, 203 A.2d 82 (1964); In re Kushinsky, 53 N.J. 1, 247 A.2d 665 (1968).

In no case will a conflict of interest for one lawyer be removed when the case is transferred to another lawyer in his firm. The ethical obligations of the lawyer preclude substituting any member of his firm as counsel. See Laskey Bros. v. Warner Bros. Pictures, 224 F.2d 894 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956); Commonwealth v. Geraway, 364 Mass. 168, 301 N.E.2d 614 (1973); Kurbitz v. Kurbitz, 77 Wash. 2d 943, 468 P.2d 673 (1970); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D). The vicarious disqualification of an entire firm is predicated in part upon a client's reasonable expectations that he has effectively retained the entire firm, and it is further justified by the reasonable possibility or inference that members of the same firm will exchange confidences and have access to information contained in firm files. This inference may, however, be rebutted. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

Judicial efforts to avoid actual and potential conflicts of interest are motivated, at least in part, by the belief that the public interest in the proper administration of justice requires vigilance. See Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973). See generally Morgan, supra note 2. In certain cases concern for the maintenance of public confidence in the bar has also played a significant role in judicial assessments of the propriety of representation. See, e.g., Grievance Comm. v. Rottner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).
C. CONFLICTS AND PROFESSIONAL ETHICS

It has been demonstrated that multiple representation presents a situation in which the lawyer's independent professional judgment is likely to be adversely affected. In such circumstances, the ABA Code of Professional Responsibility purports to compel the lawyer to decline employment. Given the plethora of appellate decisions sustaining challenges to the adequacy of representation, however, it appears that Judge Judd's observation that lawyers have often failed to fulfill their responsibility to avoid real and apparent conflict is, if anything, an understatement.

The specific causes of this failure are several, but they are all generally rooted in the significant qualification that the ABA Code of Professional Responsibility puts on the duty to avoid situations that are likely to produce conflicts. Disciplinary Rule 5-105 of the ABA Code of Professional Responsibility provides that a lawyer may represent multiple clients only “if it is obvious that he can adequately represent the interest of each and if each consents to the representation after a full disclosure of the possible effect of [multiple] representation.” Although the dimensions of the required disclosure are not enumerated in the Disciplinary Rule, a generalized explanation that an attorney’s obligation to other clients may impair his represen-

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123. See notes 25-54 supra and accompanying text.
124. See ABA Code of Professional Responsibility DR 5-105(A). In addition, the ABA Defense Standards, designed to provide guidance to the criminal trial bar, explicitly note that 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 . . . .” ABA Defense Standards, supra note 55, Defense Function § 3.5(b).
125. See generally notes 25-54 supra and accompanying text.
126. See Judd, Conflicts of Interest—A Trial Judge’s Notes, 44 Fordham L. Rev. 1097 (1976).
127. In this context it is, or should be, surprising that, despite the apparent frequency of conflicts in multiple representation situations, remarkably few disciplinary actions have ever been brought against attorneys for representing conflicting interests. It is simply inconceivable that none of these cases involved situations where the lawyer did not at some point realize that his independent professional judgment was likely to be adversely affected by accepting or continuing multiple representation. In one of the few reported cases of such disciplinary action, an attorney was censured for continuing to represent one defendant after withdrawing as counsel for a codefendant who testified for the state. See State v. Hilton, 217 Kan. 694, 538 P.2d 977 (1975). See generally Annot., 17 A.L.R.3d 835 (1968); see also State v. Sullivan, 20 Kan. 842, 504 P.2d 190 (1972).
128. ABA Code of Professional Responsibility DR 5-105(C). See also ABA Canons of Professional Ethics No. 6 (The Canons were the predecessor of the Code of Professional Responsibility.).
129. But see ABA Code of Professional Responsibility EC 5-16 (the lawyer should fully explain to each client the implications of common representation).
tation of a particular client is hardly sufficient to fully acquaint a lay-
person with the potential implications of multiple representation. Judicial interpretations of the disclosure requirement oblige the law-
ner to explain potential impairments of professional judgment with
specific reference to conflicts that may foreseeably arise in the con-
text of the particular case. From plea bargaining to sentencing, the
defense lawyer must detail the significance of potential conflicts and
bring home to the clients why it may be desirable for them to be
independently represented.

In practice, the probable sufficiency of disclosure and consent is
open to serious question. It is ironic that the attorney, whose in-
dependent professional judgment is or may be impaired, is charged
with the responsibility of obtaining the informed consent of his
clients to continued representation. Insofar as an attorney's fees
increase with the number of defendants simultaneously repre-
sented, the irony is compounded by the obvious economic interest
the attorney has in obtaining and retaining multiple defendants. The
lawyer's pecuniary interest, therefore, may influence his estimation
of the significance of the conflict situation and the content of his dis-
closure.

The sufficiency of disclosure may be questioned for other rea-
sons. At least one empirical study of lawyers' ethics suggests that
avoiding conflicts of interest is not a high priority among practicing
attorneys. Another study indicates that lawyers are ignorant of all
but the most basic rules encompassed by the Code of Professional
Responsibility and apply their personal standards rather than those
required by the Code in making ethical decisions. It is doubtful

130. See, e.g., In re Lanza, 65 N.J. 347, 352-53, 322 A.2d 445, 448 (1974); In re
Kamp, 40 N.J. 588, 595-96, 194 A.2d 236, 240 (1963); In re Sedor, 73 Wis. 2d 629, 639,
245 N.W.2d 895, 900 (1976).
131. See, e.g., In re Kamp, 40 N.J. 588, 595-96, 194 A.2d 236, 240 (1963); In re
132. See Gibson, ABA Code Canon 5—Professional Judgment, 48 Tex. L. Rev.
351, 364 (1970) (commenting on the deficiencies of the Code's consent provision: "If
the lawyer has proceeded to the stage of full disclosure, it would seem that he has
already determined that he desires to represent the client and, therefore, desires the
client's consent.").
133. One eminent criminal attorney has observed that multiple representation
of criminal defendants is a defense counsel's dream, in part owing to the larger fee that
such representation will justify. See Cole, Time for a Change: Multiple Represen-
tation Should Be Stopped, 2 Nat'l. J. Crim. Der. 149, 149 (1976). See also note 165 infra and
accompanying text.
134. See J. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 48,
50, 53, 144 (1966).
135. See Burbank & Duboff, Ethics and the Legal Profession: A Survey of
Boston Lawyers, 9 Suffolk L. Rev. 66, 92-93 (1974) (only sixteen percent of the Boston
that a criminal defense attorney who has neither a sophisticated knowledge of conflicts of interest nor a particularly strong concern for them can adequately apprise defendants of the potential risks involved in multiple representation.

Even assuming adequate disclosure by counsel, one must seriously question the ability of most criminal defendants to appreciate fully the significance of conflicts of interest.\(^{136}\) Because of the relationship of trust between attorney and client and the defendant's relative ignorance of criminal trial dynamics, a defendant is likely to defer to the judgment of his counsel\(^ {137}\) and rely upon counsel's representation that he can adequately serve the interests of all defendants.

The consent of criminal defendants, even if properly obtained, is not sufficient to justify multiple representation under Disciplinary Rule 5-105; counsel must also satisfy a second criterion.\(^ {138}\) Employment by multiple clients may not be accepted unless it is "obvious that [the lawyer] can adequately represent the interests of each [client]."\(^ {139}\) Given the manifold circumstances under which a de-

\(^{136}\) Courts in a number of jurisdictions have questioned the reliability of consent given by a client who is likely to be lacking the sophistication necessary to understand fully the ramifications of conflicts. See, e.g., In re Westmoreland, 270 F. Supp. 408 (M.D. Ga. 1967); In re Lanza, 65 N.J. 347, 353, 322 A.2d 445, 449 (1974) (Pashman, J., concurring); Kelly v. Greason, 23 N.Y.2d 368, 370, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968). See generally Los Angeles County Bar Ass'n Comm. on Legal Ethics, Opinions, No. 207 (1953). The obstacles to obtaining informed consent to multiple representation present the same kinds of difficulties that courts have encountered in the context of intelligent waivers of sixth amendment rights. See notes 73-80 supra and accompanying text.

\(^{137}\) See United States v. Donahue, 560 F.2d 1039, 1044 (1st Cir. 1977); Gibson, supra note 132, at 363-64.

\(^{138}\) Under the ABA Canons of Professional Ethics, it was recognized that, in certain cases, representation was unwise or improper even with the consent of affected clients. See H. Drinker, supra note 108, at 120; R. Wise, supra note 108, at 258. As Drinker observed,

Canon [6] does not sanction representation of conflicting interests in every case where such consent is given, but merely forbids it except in such cases. The American Bar Association has acquiesced in the numerous decisions of its Ethics Committee construing the exception as not exclusive, and consent as unavailable where the public interest is involved.

H. Drinker, supra note 108, at 120. Indeed, in construing Canon 6, the ABA Ethics Committee found consent insufficient in the circumstances involved. See ABA Comm. on Professional Ethics, Opinions, No. 112 (1934); accord, New York City Bar Ass'n Comm. on Professional Ethics, Opinions, No. 71 (1926-1927), No. 223 (1932), No. 235 (1932), reprinted in O. Maru, Digest of Bar Association Ethics Opinions (1970).

\(^{139}\) ABA Code of Professional Responsibility DR 5-105(C). New Jersey has modified the ABA Code to allow an attorney to represent consenting clients "if he believes that he can adequately represent the interests of each." Rules Governing the
defense lawyer's professional trial judgment may be impaired, however, it would seem that it could never be obvious that a defense attorney can adequately represent the interests of codefendants in a criminal case. It is submitted, therefore, that multiple representation in a criminal matter presents a situation that this aspect of the Code rule is designed to prevent and that the professional responsibilities of the attorney are unfulfilled regardless of consent.

Ultimately, however, a focus solely upon the interests of the client is entirely too narrow and reflects the misordering of priorities that Professor Morgan suggests is characteristic of the Code of Professional Responsibility generally. Treating multiple representation problems with reference only to the interests of the client ignores totally the substantial public interests that are at stake. The problems that arise in the context of multiple representation impinge so substantially upon these public interests that the consent of the client should often, if not always, be insufficient to justify multiple representation.

It is well established that a lawyer may not represent conflicting or potentially conflicting interests, even with the clients' consent, where the public interest is involved. In criminal cases, the public interest in the fairness of the criminal process and its expeditious administration are substantial. Clearly, the administration of justice may be adversely affected by multiple representation.

Courts of the State of New Jersey, Code of Professional Responsibility DR 5-105(C) (West 1977).

140. See notes 25-54 supra and accompanying text.

141. See note 2 supra.

142. See note 2 supra; note 122 supra and accompanying text.

143. See, e.g., In re Abrams, 56 N.J. 271, 266 A.2d 275 (1970); In re A & B, 44 N.J. 331, 209 A.2d 101 (1965) (municipal attorney may not represent land and building developers even though no actual conflict shown and consent of clients obtained); Ahto v. Weaver, 39 N.J. 418, 189 A.2d 27 (1963) (dicta); Kelly v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968) (dicta); In re Themelis, 117 Vt. 19, 83 A.2d 507 (1951) (prohibiting successive representation of consenting husband and wife in divorce proceedings); State v. Collentine, 39 Wis. 2d 325, 169 N.W.2d 50 (1968) (attorney should not undermine public confidence in the legal profession through conduct appearing to exert undue influence).

144. Potential detriment to the public interest in the administration of justice is perhaps best illustrated in the context of conflicts of interest that develop either after or shortly before trial has begun. Assume that defendant A and defendant B are charged with first degree murder and are represented by a single defense counsel. After extensive trial preparation, and immediately prior to trial, the defense attorney learns certain facts that create serious inconsistencies between the defenses available to each of the codefendants. At this juncture, counsel has undoubtedly interviewed, and acquired substantial confidential information from, each defendant as part of his trial preparation. Consistent with his ethical obligations, the defense attorney is obliged to withdraw from the representation of both defendants. See State v. Hilton, 217 Kan.
the notoriously overcrowded condition of criminal trial dockets throughout the country and the frequency with which multiple representation cases form the basis of appeals and habeas corpus petitions, the administration of criminal justice is largely disserved when an attorney represents multiple defendants regardless of whether actual conflict or prejudice exists.\textsuperscript{145}

It may also be argued that a discernible public interest exists in assuring that the prosecutorial function is not frustrated. For example, the interests of a defendant who is either innocent or less culpable than another may lie in cooperation with governmental authorities. If, however, one attorney represents all defendants accused of a criminal offense, this cooperation will be made much more difficult to obtain since it is likely to involve testimony against other defendants. Thus collective advocacy may frustrate the interests of both the individual defendant and the public by allowing the defendants collectively to construct a stone wall to obstruct governmental attempts at achieving cooperation.\textsuperscript{148} The hazards of this phenomenon have been held sufficient to justify disqualification of counsel.\textsuperscript{147}

\textsuperscript{694}, 538 P.2d 977 (1975); cf. \textit{In re Lanza}, 65 N.J. 347, 322 A.2d 445 (1974) (representation of buyer and seller in real estate transaction); \textit{In re Braun}, 49 N.J. 16, 227 A.2d 506 (1967) (counseling husband on marital matters subsequent to representation of wife in divorce). If the lawyer attempts to withdraw from representation of defendant \textit{A}, while continuing to represent defendant \textit{B}, confidences and secrets obtained from defendant \textit{A} may consciously or unconsciously be employed to \textit{A}'s detriment. Although this situation has rarely been confronted in the context of criminal litigation, continued representation of either client seems clearly precluded, at least absent full disclosure and consent. \textit{See State v. Hilton}, 217 Kan. 694, 538 P.2d 977 (1975). \textit{See generally} notes 108-22 \textit{supra} and accompanying text. In short, a serious risk is run in every such trial that each jointly represented defendant will be compelled to retain new counsel once a serious conflict of interest surfaces. The impact upon the efficiency of criminal justice is obvious: trials of the affected defendants, and perhaps those of other defendants awaiting trial, will be postponed.

145. The costs of multiple representation can be substantial, even where the sixth amendment challenge is unsuccessful. First, even a futile appeal imposes substantial burdens on both the defendant and the efficient administration of justice. Second, and perhaps more significant, the fact that an appeal is unsuccessful is in no way a guarantee that actual prejudice did not, in fact, exist. As noted earlier, the adequacy of the trial record as a basis for determining the existence of a conflict is dubious at best, and many conflicts may not be apparent on appellate review. \textit{See} notes 57-69 \textit{supra} and accompanying text. Consequently, multiple representation imposes upon the judicial system the not inconceivable prospect of imposing punishment upon a person who has, in fact, not been adequately represented by counsel.

146. \textit{See generally} Cole, \textit{supra} note 133.

147. \textit{See In re Abrams}, 56 N.J. 271, 266 A.2d 275 (1970) (impermissible conflict of interest where attorney was paid by defendant's employer, who allegedly participated in illegality, because public interest in disclosure of employer's criminal enterprise was frustrated); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975) (multiple
The public interest is perhaps most significantly offended when multiple representation prevents the defense attorney from fulfilling his vital role in assuring the fairness of the criminal process. The adversarial system of criminal justice is predicated upon the unbridled combative zeal of the advocates. But a criminal defense attorney whose trial conduct is affected by conflicts among his clients ceases to be a true advocate for any of them. Since multiple representation makes loyalty to the best interests of each client difficult, if not impossible, it must inevitably compromise the integrity of the adversarial system of criminal justice. Thus, the lawyer's professional duty to the courts and the administration of justice remains unfulfilled whether or not he obtains the consent of his clients.

III. A PROPOSAL

The ABA Code of Professional Responsibility, as written, should be interpreted to prohibit an attorney from representing multiple defendants in a criminal matter. The Code does not explicitly proscribe the practice, but it does strongly admonish against multiple representation, urging lawyers to resolve all doubts against the propriety of representation and suggesting that "there are few situations in which [an attorney] would be justified in representing in litigation multiple clients with potentially differing interests." Despite representation of witnesses before grand jury disallowed on grounds of public interest in secrecy of grand jury proceedings), aff'd per curiam on rehearing, 466 Pa. 172, 352 A.2d 11, cert. denied, 423 U.S. 1083 (1976).

In other recent opinions, however, courts have not been persuaded by the argument that grand jury functions are necessarily frustrated by multiple representation of witnesses. See In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976) (dicta); In re Investigation Before the April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976) (dicta).

148. The public interest in criminal justice is particularly substantial since the criminal law by its nature addresses wrongs against society as a whole. See ABA Code of Professional Responsibility EC 7-21. As Professor Wechsler has eloquently put it, [W]hatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. . . . If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.


149. See, e.g., ABA Code of Professional Responsibility EC 7-19.

150. See notes 25-54 supra and accompanying text.

151. ABA Code of Professional Responsibility EC 5-15. The ABA Standards Relating to the Defense Function advise the criminal defense attorney to decline to act
these admonitions, however, the ultimate determinations of the existence of conflicts, the adequacy of disclosure, and the sufficiency of consent are left to the attorney involved. Furthermore, it does not appear that the Code's ethical cautions have been heeded since the representation of codefendants by a single lawyer remains a widespread and lucrative practice. These factors suggest the need for an explicit disciplinary prohibition against multiple representation.

Arguments may, of course, be advanced against such a prohibition, but they are either inaccurate or insufficient to overcome the individual and public interests served by the proposal. For example, it might be argued that the proposal would be an unconstitutional deprivation of the defendant's constitutional right to representation by the attorney of his choice. In *Faretta v. California*, the United States Supreme Court held that a defendant has a sixth amendment right to waive counsel altogether. At least one court has suggested that a defendant therefore has a constitutional right to waive the effective assistance of counsel and choose a lawyer who serves conflicting interests. The latter, however, does not follow ineluctably from the former. An accused does not have an automatic constitutional right to the antithesis of a constitutional right. In *Faretta* the Court found an independent right of self-representation and stated that it did not arise mechanically from a defendant's power to waive the right to assistance of counsel. Thus, if an accused has a sixth...

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for more than one of several codefendants "except in unusual situations." ABA Defense Standards, supra note 55, Defense Function § 3.5(b). The ABA Standards enumerate a variety of situations in which conflicts of interest may develop, see id. at 213-14, and conclude that "the risk of an unforeseen and 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 defendants." *Id.* at 214.

152. Conflicts are, of course, less likely to arise in some cases than in others, but it is submitted that the potential for substantial conflict that exists in every case of multiple representation justifies a blanket prohibition. See notes 25-54 supra and accompanying text. Although it may be suggested that some defendants are capable of giving informed consent to multiple representation, truly informed consent is nevertheless likely to be rare. Moreover, the clients' consent is an insufficient consideration in view of the substantial public interests involved in the trial of criminal cases. See notes 142-50 supra and accompanying text.

153. 422 U.S. 806 (1975).
154. See *id.* at 807, 836.
156. Although a defendant may waive his right to a jury trial, for example, he has no correlative right to a bench trial. See Singer v. United States, 380 U.S. 24 (1965). In so holding, the Supreme Court observed that the "ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 34-35.
157. See 422 U.S. at 832.
amendment right to be represented by counsel of his choice, that right must arise independently; the power to waive assistance of counsel does not in itself imply a right to constitutionally defective legal assistance.

There is, however, no such independent, absolute right to counsel of choice. The right to choose one's legal representative is limited by several qualifications. An indigent defendant, for example, does not have an absolute right to be assigned counsel of his choice; the appointment of counsel is left to the sound discretion of the trial court. In addition, no defendant may select an attorney in a manner that will obstruct the administration of the judicial process or frustrate the judicial function. Finally, courts have consistently spurned defendants' constitutional arguments that they have a sixth amendment right to be represented by laymen, attorneys not li-

158. The right to counsel of choice and an attorney's right to practice his profession are not absolute and may be impaired, inter alia, by "state regulation which is designed to provide for overriding state interests." Pirillo v. Takiff, 462 Pa. 511, 521, 341 A.2d 896, 901 (1975), aff'd per curiam on rehearing, 466 Pa. 172, 352 A.2d 11, cert. denied, 423 U.S. 1083 (1976); accord, Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976); Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976); United States ex rel. Carey v. Rundle, 409 F.2d 1210 (2d Cir. 1969), cert. denied, 397 U.S. 946 (1970).

Undeniably, various courts have suggested that defendants who retain counsel have a right of constitutional dimension to representation by counsel of their own choosing. See, e.g., United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), cert. denied, 396 U.S. 825 (1969). But see Abraham v. United States, 549 F.2d 236, 239 (2d Cir. 1977). Indeed, some have suggested that defendant's right to counsel of choice is absolute. See, e.g., Reickauer v. Cunningham, 299 F.2d 170 (4th Cir. 1962); People v. Walsh, 28 Ill. 2d 405, 409, 192 N.E.2d 843, 845 (1963); People v. Friedrich, 20 Ill. 2d 249, 251, 169 N.E.2d 752, 758 (1960). But see People v. Felder, 22 Ill. App. 3d 737, 317 N.E.2d 595 (1974). At least some of these statements, however, should only be considered in context. In Reickauer, for example, the court held that a defendant who was held incommunicado and was refused permission to call his attorney had a right to retain counsel of choice, rather than accept a lawyer sent by the sheriff. See 299 F.2d at 172.

159. See Tibbetts v. Hand, 294 F.2d 68, 73 (10th Cir. 1961); State v. Hollins, 512 S.W.2d 835, 838 (Mo. App. 1974) ("It is well settled that the constitutional right to counsel does not mean that the accused is entitled to any particular attorney.").


161. See Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (trial court need not tolerate unwarranted delays and may, at some point, require a defendant to go to trial even if he is not entirely satisfied with his counsel).

censed to practice in the forum state, or attorneys who have been disbarred. Thus, there are many limitations upon the ability of a defendant to choose counsel under current law. The suggested disciplinary rule simply imposes one more: if an attorney represents one defendant in a particular criminal matter, the other defendants would have to find legal representation elsewhere.

In the absence of a constitutional right to multiple representation, it may still be argued that a significant monetary saving to the defendants would be lost as a result of the proposed ethical prohibition. A defense lawyer may reduce his fee to each defendant in a multiple representation case since many facets of his investigation and research will be common to all of them. One may therefore argue that the proposed proscription of multiple representation eliminates an important cost savings to defendants and precludes them from collectively retaining more competent counsel than any of them could individually afford.

This argument is an inadequate justification for multiple representation. Although significant individual economies are possible when one attorney represents multiple clients, the hidden costs of potential conflict are likely to make the benefits of the bargain illusory. Thus, a short-sighted emphasis on immediate monetary considerations may obscure the client's perception of the potential detriments of collective advocacy. Moreover, the pooling of resources is often merely incidental to the maintenance of a united front. Defendants often fear that to be divided is to be conquered and hope that by retaining common counsel, they can keep potential antagonists in a friendly camp.

One must also question the premise that competent legal counsel

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Taylor v. Montgomery, 539 F.2d 715 (7th Cir. 1976), aff'd sub nom. Pilla v. ABA, 542 F.2d 56 (8th Cir. 1976). Whitesel does contain dictum, however, that a trial court would not abuse its discretion by allowing a qualified layperson, under certain circumstances, to represent another. See 543 F.2d at 1180.


165. This argument may be initiated by attorneys as often as defendants, but one can hardly overlook the fact that, unless the attorney reduces his standard fee by at least fifty percent for each of the defendants, his total fee will be greater than if he represented only one. As a result, both counsel and defendants may consciously or unconsciously tend to minimize the dangers of potential conflict in order to obtain the pecuniary advantage that multiple representation offers.

is not available to codefendants unless they pool their resources. Although criminal trial lawyers who are experienced and well-established may charge higher fees than other attorneys, legal fees vary even among more seasoned practitioners. Competent trial lawyers whose fees are more affordable are more readily available than the argument suggests, and the recent removal of proscriptions against fee advertising may well facilitate access to lawyers whose fees are within a defendant's price range. The monetary savings argument, therefore, is overdrawn and overworked. In light of the public interest involved in multiple representation cases, the availability of wholesale pricing of legal services hardly countermands the lawyer's ethical obligations.

Finally the costs to the government of compelling separate counsel for indigent defendants must also be considered. It is worthy of note that indigent defendants have initially been provided separate counsel in all federal cases in the District of Columbia for ten years. The costs of the proposal therefore should not be deemed prohibitive. More important, the appointment of separate counsel for codefendants may actually be cost efficient since government expenses involved in appeals and habeas corpus petitions based on alleged

169. This argument, perhaps more than any other, illustrates the validity of Professor Morgan's contention that the legal profession consistently ignores the interests of the public, and even their clients, whenever they conflict with the interests of the lawyer. See note 2 supra. Since lawyers benefit financially from multiple representation, they will emphasize the benefits of the practice to defendants—the possible cost savings and the defendant's freedom of choice—but largely ignore the burdens that multiple representation imposes upon the public and defendants.
170. In indigent cases, the proposed prohibition arguably disqualifies an entire public defender agency since a conflict of interest for one member of a "firm" disqualifies all other lawyers in the "firm." See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D). The rule, therefore, may present an acute problem for the only available public defender in a particular jurisdiction. At least one court, however, has concluded that lawyers in a public defender organization may overcome the inference that the knowledge of an attorney is obtained by his associates. See People v. Wilkins, 28 N.Y.2d 53, 56-57, 268 N.E.2d 756, 757-58, 320 N.Y.S.2d 8, 10-11 (1971). The harshness of the vicarious disqualification rule could be averted in public defender cases by isolating the defenders involved in the case from each other in a manner satisfactory to the court. The attorneys could affirm that they would not discuss the matter with other defenders involved in the case and that access to the files pertaining to each case would be carefully limited. Although an isolation rule has never been applied in public defender cases, it has been advocated in the context of conflicts involving former government attorneys who join law firms engaged in suit against the government. See Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342 (1975); NEW YORK CITY BAR ASS'N COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 889 (1976).
violations of the sixth amendment would be saved and the substantial costs of new trials avoided.

Stirrings of dissatisfaction with present multiple representation practices are widespread\(^{172}\) and eminently justified:

The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

Our burgeoning criminal calendars and the need to try a larger percentage of criminal cases under the provisions of the Speedy Trial Act and court rules for the prompt disposition of criminal cases have made it all the more necessary for our federal trial courts to take all measures to avoid the necessity for the retrial of multi-defendant cases. One such measure is to require separate counsel for each defendant in a multi-defendant case.\(^{173}\)

Unless an absolute ban on these practices is promulgated, conflicts will continue to arise, defendants' interests will continue to be prejudiced, and society itself will suffer. The proposed rule would effectively bring to an end these recurring problems. Rather than impairing the right of defendants to effective legal assistance, it would promote it.

\(^{172}\) See, e.g. United States v. Mari, 526 F.2d 117, 119-21 (2d Cir. 1975) (Oakes, J., concurring), cert. denied, 429 U.S. 941 (1976); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) (Bazelon, C.J., dissenting); People v. Morga, 273 Cal. App. 2d 200, 216-17, 78 Cal. Rptr. 120, 131 (1969) (Kaus, J., dissenting). In Mari Judge Oakes observed, "The time is rapidly approaching . . . when, in light of more exacting standards of the Bar and the decisions of other leading courts, we may have to reexamine our rule." 526 F.2d at 119.

\(^{173}\) United States v. Carrigan, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring).