General Admonition to Jointly Represented Defendants Sufficient to Discharge Trial Court's Duty of Inquiry

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dent Investor Court’s conclusion that dissolution should not preclude the institution and prosecution of a derivative suit is consistent with the literal requirements of section 626(b) and, indeed, is necessary in order to provide a remedy for minority shareholders aggrieved by the misconduct of those persons exercising corporate control.

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DEVELOPMENTS IN NEW YORK LAW

**General admonition to jointly represented defendants sufficient to discharge trial court’s duty of inquiry**

Joint representation of criminal defendants is highly suspect because the frequent inability of one attorney to protect the conflicting interests of codefendants is likely to give rise to the ineffective assistance of counsel. Although the sixth amendment however, the appellate division intimated that a direct fiduciary duty was owing to the stockholder from the corporate directors, and, therefore, the shareholder had recourse to a remedy, either a representative or an individual action. 66 App. Div. 2d at 393, 412 N.Y.S.2d at 899. The court, however, did not detail the nature of this fiduciary duty. Id. at 393, 412 N.Y.S.2d at 901. But see note 154 supra.

To hold that a corporate dissolution would have the effect of vitiating a shareholder’s derivative action, thereby leaving the shareholder remediless, see note 154 supra, could induce dishonest corporate directors to arrange for a dissolution and distribution of assets, thereby preventing action against themselves. Holmes v. Camp, 186 App. Div. 675, 679, 175 N.Y.S. 349, 352 (1st Dep’t), aff’d, 227 N.Y. 635, 126 N.E. 910 (1919). See generally note 124 supra.


The right to the effective assistance of counsel is guaranteed to criminal defendants. U.S. Const. amend. VI; N.Y. Const. art. I, § 6; CPL § 210.15(2) (1971). While it is the duty
does not require a trial judge to inquire into the propriety of joint representation absent knowledge of a particular conflict of interest,158 the New York courts have taken a stricter approach. Specifically, it is firmly established in New York that a trial court must ensure, on the record, that each defendant is aware of the risks of joint representation and that the decision to proceed is made knowingly.160 The requisite scope of the Court's appraisal, how-

of the trial court to protect a defendant's right to the effective assistance of counsel, Glasser v. United States, 315 U.S. 60, 71 (1942), this right may be waived. United States v. Armend-Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975) (per curiam). The waiver of such a fundamental right, however, must be scrutinized to assure that it is made knowingly and intelligently. See Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948); Lowenthal, supra note 156, at 969.

158 Cuyler v. Sullivan, 446 U.S. 335 (1980). In Cuyler, the Supreme Court stated: "Absent special circumstances, . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." Id. at 346-47. The Court further stated that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." Id. at 347. The Cuyler dissent, however, contended that the trial judge should play a more active role and, at the very least, should advise the defendants that "joint representation creates potential hazards which the defendants should consider before proceeding . . . ." Id. at 352 (Brennan, J., concurring in part, dissenting in part).

Prior to the Cuyler decision, there had been considerable disagreement within the federal courts concerning the duty of a trial judge in joint representation situations. See Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J. CRIM. L. & CRIMINOLOGY 226, 241 (1977) [hereinafter cited as Conflict of Interests]. Compare United States v. Waldman, 579 F.2d 649, 651-52 (1st Cir. 1978) (trial judge must inform of potential risks and make inquiries of defendants) and United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976) (trial judge must state facts underlying potential conflicts and grant defendants a chance to present their views) and Campbell v. United States, 352 F.2d 359, 360-61 (D.C. Cir. 1965) (trial judge must inquire to determine if decision is informed and "not governed by poverty and lack of information on the availability of assigned counsel") with United States v. Mandell, 525 F.2d 671, 677 (7th Cir. 1975), cert. denied, 429 U.S. 1049 (1976) (defendants' rights are adequately protected by counsel's duty to inform his clients of potential dangers) and United States v. Boudreaux, 502 F.2d 557, 568 (5th Cir. 1974) (court must inform defendant of risks only when it has specific knowledge that effective assistance of counsel may be impaired) and United States v. Christopher, 488 F.2d 849 (9th Cir. 1973) (no inquiry required). The American Bar Association, however, has recommended an affirmative inquiry approach, stating:

Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.


159 See, e.g., People v. Baffi, 49 N.Y.2d 820, 404 N.E.2d 737, 427 N.Y.S.2d 615 (1980); People v. Ortiz, 49 N.Y.2d 718, 402 N.E.2d 139, 425 N.Y.S.2d 801 (1980); People v. Macer-
ever, has been unclear. Recently, in People v. Lloyd, the Court of Appeals held that the trial court's duty of inquiry was satisfied when the defendants and their attorney, in response to the court's warning against the potential dangers of joint representation, gave assurances that the defendants' waiver of the right to separate counsel was made knowingly.

In Lloyd, the defendant and his codefendant were represented by the same attorney in a joint trial for assault and attempted murder. Prior to the trial, the court informed both defendants and their attorney that there was a possible conflict of interest be-

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cause the defendant was at the scene at all times while the codefendant arrived later. In response, the defendants acknowledged their understanding of the possible conflicts and elected to retain the same attorney. Following jury selection, the court repeated its inquiry and informed the defendants of their right to separate counsel. In addition to receiving the defendants' consent to joint representation, the court was assured by defense counsel that the potential conflicts of interest had been discussed with his clients. At the trial, the prosecution submitted evidence that the two defendants had inflicted a severe beating upon another man. While the defendant had been present on the scene from the outset of the incident, there was conflicting evidence concerning the involvement of the codefendant who had arrived at the scene when the fight was nearly over. Subsequently, the defendant was convicted of assault while the codefendant was acquitted. The defendant appealed, claiming that the pretrial inquiry by the trial court did not sufficiently ensure that his waiver of the right to separate counsel was made knowingly and intelligently. The Appellate Division, Second Department, affirmed the assault conviction.

The Court of Appeals affirmed, holding that the court's inquiry was sufficient to protect the defendant's right to effective assistance of counsel. Writing for a divided Court, Judge Wachtler initially observed that in cases of multiple representation, the trial judge's duty to warn the defendants of potential conflicts of interest is independent of the attorney's obligation to warn his cli-

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164 Id.
165 Id. at 110, 412 N.E.2d at 373, 432 N.Y.S.2d at 686.
166 Id.
167 Id.
168 Id.
169 Id. The incident which culminated in the arrests of the defendant and his codefendant allegedly began when the defendant followed a young woman who refused to accept a ride with him. An acquaintance of the woman attempted to drive her home, but they were followed by the defendant. Id. When both cars stopped at a traffic light, the defendant got out of his car carrying either a stick or a bat, and an altercation ensued. Id. The codefendant then arrived upon the scene and allegedly joined in the beating. Id.
170 Id. at 110-11, 412 N.E.2d at 373, 432 N.Y.S.2d at 686.
171 70 App. Div. 2d at 625, 415 N.Y.S.2d at 1017.
172 Id.
173 51 N.Y.2d at 112, 412 N.E.2d at 374, 432 N.Y.S.2d at 687.
174 The majority consisted of Judges Wachtler, Jasen, Gabrielli, and Chief Judge Cooke. Judge Jones wrote a dissenting opinion in which Judges Fuchsberg and Meyer concurred.
The majority reasoned, however, that the judge's warning need not be as thorough as the attorney's, since the court may not be cognizant of the evidence to be presented and, more importantly, may not inquire into confidential attorney-client communications. The Lloyd Court stated, therefore, that the trial court's obligation is fulfilled when it warns the defendant that a conflict of interest might arise from the joint representation, informs the defendant that he has a right to separate counsel, and receives the defendant's assurance that he wishes to proceed with the joint representation. Judge Wachtler noted, however, that the precise format of the inquiry necessarily involves judicial discretion because of the restrictions on the court imposed by the attorney-client privilege and the desire not to disclose defense strategies.

Dissenting, Judge Jones maintained that the obligation of the trial court extends beyond establishing that each defendant is aware of the possibility of a conflict of interest. In the dissent's view, the court must further ensure that the defendants were cognizant of the specific risks inherent in a joint representation situation. Judge Jones emphasized that the court should "explain the particulars or potential pitfalls of joint representation" necessary

175 51 N.Y.2d at 111, 412 N.E.2d at 373, 432 N.Y.S.2d at 686. Judge Wachtler noted that in New York, the trial judge has the independent duty to ensure that the codefendants are "aware of the potential risks involved in joint representation." Id.; see People v. Macerola, 47 N.Y.2d 257, 263, 391 N.E.2d 390, 392-93, 417 N.Y.S.2d 906, 910 (1979); People v. Gomberg, 38 N.Y.2d 307, 313-14, 342 N.E.2d 550, 554, 379 N.Y.S.2d 769, 775 (1975). But cf. Cuyler v. Sullivan, 446 U.S. 335, 346-48 (1980) (ordinarily federal district court has no obligation to warn of the risks of multiple representation). A defense attorney representing multiple defendants also has an ethical obligation to explain potential conflicts to his clients and to procure their consent to continued representation. See ABA Code of Professional Responsibility, EC 5-16, DR 5-101(A), DR 5-105(B), (C); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function § 3.5(A), (B) (1974).

176 51 N.Y.2d at 111, 412 N.E.2d at 373, 432 N.Y.S.2d at 686; see People v. Gomberg, 38 N.Y.2d 307, 314, 342 N.E.2d 550, 554, 379 N.Y.S.2d 769, 775 (1975); Geer, supra note 156, at 141-42; Girgenti, supra note 156, at 58-59 n.7; Lowenthal, supra note 156, at 970-71.

177 51 N.Y.2d at 111, 412 N.E.2d at 373, 432 N.Y.S.2d at 687; see People v. Gomberg, 38 N.Y.2d 307, 313, 342 N.E.2d 550, 554, 379 N.Y.S.2d 769, 775; Geer, supra note 156, at 128.

178 51 N.Y.2d at 111, 412 N.E.2d at 373-74, 432 N.Y.S.2d at 687.

179 Id. at 112, 412 N.E.2d at 374, 432 N.Y.S.2d at 687.

180 Id. at 113, 412 N.E.2d at 374, 432 N.Y.S.2d at 688 (Jones, J., dissenting). Judge Jones opined that the Court had determined previously that the obligation of the trial court extended beyond establishing an awareness of a possibility of a conflict to establishing an awareness of each defendant "of the potential risks inherent in the simultaneous representation of codefendants." Id. (Jones, J., dissenting) (quoting People v. Macerola, 47 N.Y.2d 257, 262, 391 N.E.2d 990, 992, 417 N.Y.S.2d 908, 910 (1979)).

181 51 N.Y.2d at 113, 412 N.E.2d at 374, 432 N.Y.S.2d at 688 (Jones, J., dissenting).
to a determination that an informed decision had been made.\textsuperscript{182} Judge Jones reasoned that while there may be no intrusion into confidential communications, the protection afforded by the attorney-client privilege should not be used to justify a limited inquiry unless such inquiry is specifically opposed by the defendant.\textsuperscript{183} Finding the trial judge's inquiry insufficient, the dissent concluded that a reversal was warranted since a significant possibility of prejudice to the defendant had been shown.\textsuperscript{184}

Although the standard articulated by the \textit{Lloyd} Court is consistent with recent cases in this area,\textsuperscript{185} the decision is indicative of

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\textsuperscript{182} Id. (Jones, J., dissenting). Relying on People v. Baffi, 49 N.Y.2d 820, 404 N.E.2d 737, 427 N.Y.S.2d 615 (1980), wherein the Court declared that the trial judge had a duty "to probe the defendants' awareness of the risks," \textit{id.} at 822, 404 N.E.2d at 738, 427 N.Y.S.2d at 616, the dissent observed that the statements by counsel that he had notified his clients of the potential conflicts and had procured their consent to continued representation did not relieve the court of its independent duty of inquiry. 51 N.Y.2d at 113, 412 N.E.2d at 375, 432 N.Y.S.2d at 688 (Jones, J., dissenting). The dissent further noted that although the trial court had alerted the defendants to the fact that a possible conflict might exist, "there could be no assurance that the details of the potential risks involved had been described to them or that they had each made an informed decision to proceed with a single attorney." \textit{id.} at 113, 412 N.E.2d at 375, 432 N.Y.S.2d at 688 (Jones, J., dissenting). For example, the dissent indicated that the defendants' counsel may not have comprehended fully that the defendants had a right to separate counsel since he considered that having his father-partner represent one of the defendants was an acceptable alternative. \textit{id.}

\textsuperscript{183} 51 N.Y.2d at 114, 412 N.E.2d at 375, 432 N.Y.S.2d at 688 (Jones, J., dissenting). The \textit{Lloyd} dissent declared that although the trial judge should remain sensitive to possible intrusion upon attorney-client confidentiality, the judge should not be precluded from making a thorough inquiry, since the defendant may assert his attorney-client privilege if he feels that his other rights are adequately protected. \textit{id.} at 114, 412 N.E.2d at 375, 432 N.Y.S.2d at 688-89 (Jones, J., dissenting).

\textsuperscript{184} \textit{id.} at 114-15, 412 N.E.2d at 375-76, 432 N.Y.S.2d at 689 (Jones, J., dissenting).

\textsuperscript{185} See, e.g., People v. Baffi, 49 N.Y.2d 820, 404 N.E.2d 737, 427 N.Y.S.2d 615 (1980); People v. Ortiz, 49 N.Y.2d 718, 402 N.E.2d 139, 425 N.Y.S.2d 801 (1980); People v. Macerola, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979), \textit{discussed in The Survey}, 54 St. John's L. Rev. 428 (1980); People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975). In \textit{Baffi}, the trial court did not independently examine the defendants as to whether they understood that conflicts of interest might arise from joint representation. Rather, the court merely relied upon the assurances made by the defense counsel. 49 N.Y.2d at 822, 404 N.E.2d at 738, 427 N.Y.S.2d at 616. The Court held that under these circumstances the trial judge did not adequately discharge his duty of inquiry, stating that "[a]lthough the trial court may place some reliance on the statement by counsel . . . such a statement alone does not relieve the trial court of the obligation 'to probe the defendants' awareness of the risks in the manner suggested . . . in \textit{Macerola}." 49 N.Y.2d at 822, 404 N.E.2d at 738, 427 N.Y.S.2d at 616.

The scope of inquiry was not in issue in \textit{Macerola}, however, since the trial court had failed to make an inquiry. People v. Macerola, 47 N.Y.2d at 264, 391 N.E.2d at 99, 417 N.Y.S.2d at 911. There is, nonetheless, language in the \textit{Macerola} decision that suggests that a more probing inquiry than the one sanctioned in \textit{Lloyd} is necessary to discharge the court's duty. Specifically, the \textit{Macerola} Court stated:
the inadequacy of such a limited judicial inquiry. The purpose of the inquiry is to protect a defendant’s constitutional right to the effective assistance of counsel and, therefore, the waiver of separate counsel should be scrutinized to ensure that it is made knowingly. The Lloyd Court, in failing to require the trial judge to point out the specific deficiencies of joint representation essentially permits a court to rely on the attorney’s evaluation of the situation as he related it to his clients. Although defense counsel must inform his clients of any possible conflicts of interest, the attorney may not have perceived a conflict or evaluated it properly, and it is unlikely that a defendant will discern a conflict which his attor-

While a defendant may choose to retain his attorney, such choice may be made only after the defendant is informed of the possible ramifications which joint representation might spawn when conflicting interests arguably exist. Only after sufficient admonition by the trial court of the potential pitfalls of joint representation can it be said that a defendant’s right to the effective assistance of counsel is adequately safeguarded.

Id. at 263, 391 N.E.2d at 993, 417 N.Y.S.2d at 911. Any suggestion in Macerola that the trial court must describe the potential pitfalls of joint representation was impliedly repudiated, however, by the Court of Appeals in People v. Ortiz, 49 N.Y.2d 718, 402 N.E.2d 139, 425 N.Y.S.2d 801 (1980). In Ortiz, the Court held that the trial judge fulfilled his obligation when he merely alerted the defendants to the possibility of a conflict of interest and informed them of their right to separate counsel. Id. at 718-19, 402 N.E.2d at 140, 425 N.Y.S.2d at 801.

188 See note 157 supra.


180 Without the guidance of the trial court, the defendant has only the statement of counsel to rely on. Since the defendant might be oblivious to any conflicts which his attorney does not perceive, see note 190 and accompanying text infra, the defendant can indicate his understanding of only those potential conflicts which his attorney has explained to him.

181 See ABA Code of Professional Responsibility, EC 5-16, DR 5-101(A), DR 5-105(B), DR 5-105(C); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function § 3.5(B) (1974).

182 See, e.g., United States v. Gaines, 529 F.2d 1038, 1045 (7th Cir. 1976); People v. Byrne, 17 N.Y.2d 209, 215, 217 N.E.2d 23, 25, 270 N.Y.S.2d 193, 196 (1966); Geer, supra note 156, at 145; Lowenthal, supra note 156, at 970-71; The Survey, 54 St. John’s L. Rev. 428, 433 (1980). In addition to failing to recognize a conflict or to evaluate it properly, counsel may be unwilling to recognize or admit that conflicts exist due to economic interests. See Geer, supra note 156, at 153; Girgenti, supra note 156, at 61 & n.15. Indeed, “the numerous reported cases in which attorneys were wrong in their evaluation or unaware of the problem are testimony to the need for judicial inquiry.” Id. at 75-76.
ney has not foreseen.\textsuperscript{191} Thus, it is submitted that the general admonition sanctioned by the \textit{Lloyd} Court is insufficient to provide the basis for an intelligent waiver of the right to separate counsel.\textsuperscript{192}

It is hoped that the Court will reconsider its holding in \textit{Lloyd} and adopt a standard which requires the trial judge to point out the potential pitfalls of joint representation.\textsuperscript{193} Although a defendant might not fully comprehend the points raised,\textsuperscript{194} this would alert both counsel and client to consider the problem in greater depth. Thus, the defendant would be better informed and more capable of making an intelligent decision.\textsuperscript{195}

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\textit{Testimonial admissions do not preclude a party from the benefit of more favorable, contradictory testimony by his adversary}

It is well settled in New York that a formal admission of an alleged fact made by a party in the pleadings or by stipulation in court is conclusive upon that party and precludes him from offering or relying on contradictory evidence.\textsuperscript{196} A fact admitted by a

\textsuperscript{191} See People v. Macerola, 47 N.Y.2d 257, 263, 391 N.E.2d 990, 992, 417 N.Y.S.2d 908, 910 (1979); Lowenthal, \textit{supra} note 156, at 971.

\textsuperscript{192} See United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), \textit{cert. denied}, 429 U.S. 998 (1977); Geer, \textit{supra} note 156, at 140-41; Hyman, \textit{supra} note 158, at 332.

\textsuperscript{193} It has been suggested that the trial court's inquiry should address why the defendants and their attorney desire joint representation; whether potential conflicts have been discussed; what defenses will be raised at trial; and whether the proposed defenses will present conflicts. Girgenti, \textit{supra} note 156, at 76. See also \textit{Conflict of Interests}, \textit{supra} note 158, at 246.

\textsuperscript{194} One commentator has stated that "[a]bstract cautions are unlikely to be meaningful unless they are related to the specific problems that may arise in the defendant's particular case." Geer, \textit{supra} note 156, at 141.

\textsuperscript{195} See Hyman, \textit{supra} note 158, at 344. Notably, some commentators have expressed doubt about whether a defendant is capable of making an informed decision despite the trial court's inquiry since many defendants, regardless of their degree of sophistication, do not understand the consequences of joint representation. See Geer, \textit{supra} note 1, at 141-42; Lowenthal, \textit{supra} note 156, at 971.