

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.

John F. Finnegan

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 codefendants¹⁵⁶ is likely to give rise to the ineffective assistance of counsel.¹⁵⁷ 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*.

¹⁵⁶ For a discussion of the types of conflict involved in joint representation of multiple defendants, *see* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 125-35 (1978); Girgenti, *Problems of Joint Representation of Defendants in a Criminal Case*, 54 ST. JOHN'S L. REV. 55, 61-67 (1979); Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 FORDHAM L. REV. 1097, 1099-1107 (1976); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 941-50 (1978). Typically, claims of conflict allege either counsel's failure to act in favor of one defendant in fear of implicating the other, *see, e.g.*, *People v. Coleman*, 42 N.Y.2d 500, 369 N.E.2d 742, 399 N.Y.S.2d 185 (1977), or taking of affirmative steps by counsel which inure to the benefit of one client while severely damaging the case of the other. *See People v. Dell*, 60 App. Div. 2d 18, 400 N.Y.S.2d 236 (4th Dep't 1977). Additionally, many defenses at trial may be lost due to counsel's attempt to minimize the existence of conflict. *See Geer, supra*, at 125-28.

¹⁵⁷ *See Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978); *People v. Gomberg*, 38 N.Y.2d 307, 312, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 773 (1975); Geer, *supra* note 156, at 121; Lowenthal, *supra* note 156, at 939.

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.¹⁵⁹ 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. Arredondo-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*, 423 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, 558 (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.

ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE § 3.4(b) (Draft 1972). For a more comprehensive discussion of the varying approaches adopted in the federal courts, see Girgenti, *supra* note 156, at 58 n.7, 67-72; Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 317-24 (1977); Lowenthal, *supra* note 156, at 970 & nn.101-102; *Conflict of Interests*, *supra*, at 227, 241-47.

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.¹⁶⁰ Recently, in *People v. Lloyd*,¹⁶¹ 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.¹⁶²

In *Lloyd*, the defendant and his codefendant were represented by the same attorney in a joint trial for assault and attempted murder.¹⁶³ Prior to the trial, the court informed both defendants and their attorney that there was a possible conflict of interest be-

ola, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979); *People v. Gomberg*, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975); *People v. Hallett*, 71 App. Div. 2d 815, 419 N.Y.S.2d 397 (4th Dep't 1979); *People v. Caruso*, 68 App. Div. 2d 570, 417 N.Y.S.2d 986 (2d Dep't 1979). In *People v. Gomberg*, three defendants who were charged with arson were represented by the same attorney. 38 N.Y.2d at 310-11, 342 N.E.2d at 552, 379 N.Y.S.2d at 772-73. Although the trial judge informed the defendants that a possible conflict might exist and that they could retain separate counsel, the defendants chose to continue with the same attorney. *Id.* at 314-16, 342 N.E.2d at 555, 379 N.Y.S.2d at 776-77. At trial, all of the defendants sought to discredit the testimony of the state's witnesses, but one of them asserted the additional defense of lack of motive. *Id.* at 310-11, 342 N.E.2d at 552, 379 N.Y.S.2d at 772. The latter defendant was acquitted, but the other two defendants were convicted. *Id.* at 311, 342 N.E.2d at 552, 379 N.Y.S.2d at 772. On appeal, the defendants claimed that they were denied the effective assistance of counsel on the grounds that the acquitted defendant's lack of motive defense shifted the blame to them, that counsel failed to call witnesses in their behalf, and that counsel did not effectively cross-examine the other defendants. *Id.* at 311, 342 N.E.2d at 552, 379 N.Y.S.2d at 773. The *Gomberg* Court noted initially that a trial judge must protect the defendant's right to the effective assistance of counsel, but should not lightly interfere with a defendant's selection of counsel. *Id.* at 312-13, 342 N.E.2d at 553, 379 N.Y.S.2d at 774. The Court emphasized that a defendant might not comprehend fully that a conflict exists and, thus, the court should be satisfied that any decision to proceed with selected counsel was an informed choice. *Id.* at 313, 342 N.E.2d at 554, 379 N.Y.S.2d at 774. The Court further stated that an inquiry may be directed toward counsel to determine whether he has perceived a conflict and has informed his client of the dangers involved. *Id.*; accord, *Lord v. District of Columbia*, 235 A.2d 322, 323 (D.C. 1967). The *Gomberg* Court stated, however, that a trial court may place great reliance upon counsel's representations that he has fully explained the dangers to his clients and has received their approval to continue as counsel. 38 N.Y.2d at 314, 342 N.E.2d at 555, 379 N.Y.S.2d at 775. Based on this reasoning, the *Gomberg* Court held that the trial judge's inquiry was more than adequate to protect the defendants' rights to the effective assistance of counsel. *Id.* at 314-16, 342 N.E.2d at 555, 379 N.Y.S.2d at 776-77.

¹⁶⁰ Compare *People v. Ortiz*, 49 N.Y.2d 718, 402 N.E.2d 139, 425 N.Y.S.2d 801 (1980) and *People v. Gomberg*, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975) with *People v. Baffi*, 49 N.Y.2d 820, 404 N.E.2d 737, 427 N.Y.S.2d 615 (1980) and *People v. Macerola*, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979).

¹⁶¹ 51 N.Y.2d 107, 412 N.E.2d 371, 432 N.Y.S.2d 685 (1980), *aff'g* 70 App. Div. 2d 625, 415 N.Y.S.2d 1017 (2d Dep't 1979) (mem.).

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

¹⁶³ *Id.* at 110, 412 N.E.2d at 372, 432 N.Y.S.2d at 686. The defendant and codefendant were brothers. *Id.*

cause the defendant was at the scene at all times while the codefendant arrived later.¹⁶⁴ In response, the defendants acknowledged their understanding of the possible conflicts and elected to retain the same attorney.¹⁶⁵ Following jury selection, the court repeated its inquiry and informed the defendants of their right to separate counsel.¹⁶⁶ 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.¹⁶⁷ At the trial, the prosecution submitted evidence that the two defendants had inflicted a severe beating upon another man.¹⁶⁸ 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.¹⁶⁹ Subsequently, the defendant was convicted of assault while the codefendant was acquitted.¹⁷⁰ 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.¹⁷¹ The Appellate Division, Second Department, affirmed the assault conviction.¹⁷²

The Court of Appeals affirmed, holding that the court's inquiry was sufficient to protect the defendant's right to effective assistance of counsel.¹⁷³ Writing for a divided Court,¹⁷⁴ 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-

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.

ents.¹⁷⁵ 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 presented¹⁷⁶ and, more importantly, may not inquire into confidential attorney-client communications.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

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.¹⁸⁰ 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.¹⁸¹ 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 990, 992-93, 417 N.Y.S.2d 908, 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 686-87; 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.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.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.¹⁸⁴

Although the standard articulated by the *Lloyd* Court is consistent with recent cases in this area,¹⁸⁵ the decision is indicative of

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," *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." *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. *Id.*

¹⁸³ 51 N.Y.2d at 114, 412 N.E.2d at 375, 432 N.Y.S.2d at 688 (Jones, J., dissenting). The *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. *Id.* at 114, 412 N.E.2d at 375, 432 N.Y.S.2d at 688-89 (Jones, J., dissenting).

¹⁸⁴ *Id.* at 114-15, 412 N.E.2d at 375-76, 432 N.Y.S.2d at 689 (Jones, J., dissenting).

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), *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 *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 *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 *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 *Macerola* decision that suggests that a more probing inquiry than the one sanctioned in *Lloyd* is necessary to discharge the court's duty. Specifically, the *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 counsel¹⁸⁶ and, therefore, the waiver of separate counsel should be scrutinized to ensure that it is made knowingly.¹⁸⁷ 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.¹⁸⁸ Although defense counsel must inform his clients of any possible conflicts of interest,¹⁸⁹ the attorney may not have perceived a conflict or evaluated it properly,¹⁹⁰ 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.

¹⁸⁶ See note 157 *supra*.

¹⁸⁷ *Brady v. United States*, 397 U.S. 742, 748 (1970); *Glasser v. United States*, 315 U.S. 60, 71 (1942); *People v. Macerola*, 47 N.Y.2d 257, 262, 391 N.E.2d 990, 992, 417 N.Y.S.2d 908, 910 (1979); *Geer*, *supra* note 156, at 140; *Lowenthal*, *supra* note 156, at 969; *accord*, *Von Moltke v. Gillies*, 332 U.S. 708 (1948); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The *Von Moltke* Court stated: "A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances . . ." *Von Moltke v. Gillies*, 332 U.S. at 724.

¹⁸⁸ 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.

¹⁸⁹ 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).

¹⁹⁰ 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.¹⁹¹ Thus, it is submitted that the general admonition sanctioned by the *Lloyd* Court is insufficient to provide the basis for an intelligent waiver of the right to separate counsel.¹⁹²

It is hoped that the Court will reconsider its holding in *Lloyd* and adopt a standard which requires the trial judge to point out the potential pitfalls of joint representation.¹⁹³ Although a defendant might not fully comprehend the points raised,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.¹⁹⁵

Ray T. Blank, Jr.

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.¹⁹⁶ A fact admitted by a

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, *supra* note 156, at 971.

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

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, *supra* note 156, at 76. See also *Conflict of Interests*, *supra* note 158, at 246.

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, *supra* note 156, at 141.

¹⁹⁵ See Hyman, *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, *supra* note 1, at 141-42; Lowenthal, *supra* note 156, at 971.

¹⁹⁶ *Thompson v. Postal Life Ins. Co.*, 226 N.Y. 363, 368, 123 N.E. 750, 751 (1919); *Stemmler v. Mayor of New York*, 179 N.Y. 473, 481-82, 72 N.E. 581, 584 (1904); *Clason v. Baldwin*, 152 N.Y. 204, 211, 46 N.E. 322, 324 (1897); *Coffin v. President*, 136 N.Y. 655, 660-61, 32 N.E. 1076, 1078 (1893); *Gill v. Logan*, 62 App. Div. 2d 1029, 404 N.Y.S.2d 28 (2d Dep't 1978) (mem.). W. RICHARDSON, EVIDENCE § 216, at 191-92 (10th ed. J. Prince 1973); 9 J. WIGMORE, EVIDENCE § 2588, at 586 (3d ed. 1940 & Supp. 1970). Admissions may be classified as either