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PROBLEMS OF JOINT REPRESENTATION OF DEFENDANTS IN A CRIMINAL CASE

RICHARD H. GIRGENTI*

Although there is no per se prohibition against joint representation of criminal defendants, there are many instances where a defendant’s right to effective assistance of counsel is compromised by his attorney’s prior or present representation of another individual with conflicting interests. The difficulty in dealing with this problem arises from the competing interests and rights of the defendant at stake. While a defendant has the right to be protected from ineffective assistance of counsel, he also has the right to counsel of

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If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 5-15; see id., E.C. 5-14 to 5-20; D.R. 5-105.

The ABA Standards also contain no per se prohibition:

Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

ABA STANDARDS, THE DEFENSE FUNCTION § 3.5(B)(1974).

2 Avery v. Alabama, 308 U.S. 444, 450 (1940); Powell v. Alabama, 287 U.S. 45, 71 (1932); see Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). Although the right to adequate representation is well established, it has never been
precisely determined what will amount to inadequate representation. In McMann v. Richardson, 397 U.S. 759 (1970), the Supreme Court characterized effective assistance of counsel as that which is "reasonably competent," id. at 770, and "advice . . . within the range of competence demanded of attorneys in criminal cases," id. at 771; accord, Cooper v. Fitzharris, 561 F.2d 1162, 1164-65 (9th Cir. 1977); Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977); United States v. LaRiche, 549 F.2d 1088, 1095 (6th Cir.), cert. denied, 430 U.S. 987 (1977); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); United States v. Hurt, 543 F.2d 162, 165 (D.C. Cir. 1976). For an excellent discussion of the evolving standards of effective representation, see Wanat, Conflicts of Interest in Criminal Cases and the Right to Effective Assistance of Counsel — The Need for Change, 10 Rut.-Cam. L. Rev. 57, 64-71 (1978). See generally Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289 (1964); Note, Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel, 58 Geo. L.J. 369, 373 (1969) [hereinafter cited as Separate Counsel].

Although defendants have a right to effective assistance of counsel, the sixth amendment also recognizes a defendant's right to representation by counsel of his own choice. See United States v. Valenzuela, 521 F.2d 414, 416 (8th Cir. 1975), cert. denied, 424 U.S. 916 (1976); Ross v. Reda, 510 F.2d 1172, 1173 (6th Cir.)(per curiam), cert. denied, 423 U.S. 892 (1975); United States v. Wisniewski, 478 F.2d 274, 285 (2d Cir. 1973); United States v. Seale, 461 F.2d 345, 358 (7th Cir. 1972); United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), cert. denied, 396 U.S. 825 (1969). It is often recognized that the right to choose one's counsel is justifiably restricted by the court's desire for efficient administration of criminal justice. See Gandy v. Alabama, 569 F.2d 1318, 1329-27 (5th Cir. 1978); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976); United States v. Mardian, 546 F.2d 973, 979-80 (D.C. Cir. 1976); United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970); United States ex rel. Davis v. McMann, 386 F.2d 611, 618-19 (2d Cir. 1967), cert. denied, 390 U.S. 851 (1969); Abraham v. United States, 549 F.2d 1236, 1239 (2d Cir. 1977).

Furthermore, a defendant's right to counsel of his own choice has been restricted by the disqualification of his attorney on the ground that the attorney formerly represented an adverse party or witness. See, e.g., United States v. Ostrer, 597 F.2d 337, 340-41 (2d Cir. 1979); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 574-75 (2d Cir. 1973). The theoretical basis for disqualifying an attorney who formerly represented an adverse party or witness likewise applies to disqualification of an attorney who represents two or more codefendants. The attorney for the codefendants is in a position to use confidential information obtained in the representation of one codefendant to aid the other codefendant.

Since a defendant may waive his right to assistance of counsel altogether, despite likely adverse consequences, United States v. Dougherty, 473 F.2d 1113, 1128 (D.C. Cir. 1972), it is necessary to protect a defendant from indiscriminate waiver of this fundamental right. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court delineated the standard for measuring an effective waiver of a constitutional right, requiring an "intentional relinquishment or abandonment of a known right." Id. at 464. The Court has subsequently refined the standard to require that waivers also be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). When one chooses to be represented by counsel who has a conflicting interest, the right to counsel of one's choosing is, in effect, a waiver of the right to effective assistance of counsel. As the second circuit observed it " 'is not truly a case of waiver of a constitutional right; it is a decision to assert one constitutional right instead of another.' " United States
tion relates to the defendant's right to waive assistance of independent counsel. Courts have taken different approaches in governing the protection of these rights, ranging from total reliance on the bar on one hand to exacting judicial scrutiny on the other. This article will begin with a discussion of the relevant Supreme Court cases. The article then will examine specific areas where conflicts of interests may arise — from the investigative stages through trial. A review of the standards established by the judiciary in attempting to draw the line between the defendant's right to counsel of his own choice and his right to effective assistance of counsel will follow. An analysis of when a trial court's duty to inquire is triggered will precede a consideration of suggested approaches in dealing with the problems of joint representation.

Scope of the Problem

In the landmark case of Glasser v. United States, the Supreme Court held that requiring an attorney to represent codefendants with conflicting interests, over the objections of the attorney, denied one of the defendants the effective assistance of counsel under the sixth amendment because representation was fettered by a conflict of interest.4 While Glasser expanded the sixth amendment right to

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4 315 U.S. 60 (1942).
5 Id. at 76. Glasser and codefendant Kretske were charged with conspiracy to defraud the United States. Id. at 63. Glasser's counsel, Stewart, was appointed to represent Kretske as well. Id. at 68-69. Glasser objected to the appointment and Stewart informed the court of the possibility of a conflict of interest. Nevertheless, Stewart was appointed to represent both defendants and they were ultimately convicted. Id. at 69.

During the trial one witness admitted giving bribe money to Kretske while denying knowing Glasser. Id. at 72. Stewart first delayed and then declined to cross-examine this witness entirely. Id. at 72-73. The Supreme Court noted that "a thorough cross-examination was indicated in Glasser's interest to fully develop [the witness'] lack of reference to, or knowledge of Glasser." Id. at 73. Similarly, Stewart failed to object to evidence that was not admissible against Glasser despite the fact that he had brought this to the court's attention when assigned to represent Kretske. Id. at 73-75. The court stated that this was "indicative of Stewart's struggle to serve two masters," id. at 75, and concluded that the "'assistance
counsel to mean representation free from conflicting interests, its holding was limited to instances where the defendant's counsel objected to the joint representation. It necessarily left unresolved two questions which arise in cases where counsel did nothing to advise the trial court of a possible or actual conflict. The first issue is determining the standard which should be used to discern whether a conflict of interest deprives a defendant of his sixth amendment right to effective assistance of counsel. The second inquiry concerns the duty, if any, imposed on the trial judge in a criminal case to ensure that a defendant is not deprived of his right to effective assistance of counsel by joint representation and the circumstances which should trigger this duty.

The Court recognized that joint representation is not per se violative of the constitutional right to effective counsel, see note 1 supra, and only because so when it creates a conflict of interest which causes the defendant to be prejudiced. See Glasser, 315 U.S. at 75. The Court went on to caution that due to the significance of the right involved, once a conflict is demonstrated, a court is not to attempt a calculation of the "precise degree of prejudice sustained." Id. "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." Id. at 76. The courts, however, have been unable to agree on a coherent and uniform standard for determining what constitutes a conflict of interest serious enough to warrant reversal. Dictum in Holloway v. Arkansas, 435 U.S. 475 (1978), suggests that the standard should be "whether the risk was too remote to warrant separate counsel." Id. at 484. Two circuits have held that even a slight conflict of interest, however remote, is constitutionally offensive in the situation where one attorney is representing several codefendants. See United States v. Dicarlo, 575 F.2d 952, 957 (1st Cir.), cert. denied, 439 U.S. 834 (1978); United States v. Dolan, 570 F.2d 1177, 1180 (3d Cir. 1978). Other circuits have held that a conflict of interest is shown only by the existence of specific actual prejudice. See United States v. DeFillipo, 590 F.2d 1228, 1237 (2d Cir.), cert. denied, 99 S. Ct. 2844 (1979); United States v. Cox, 580 F.2d 317, 320 (5th Cir.), cert. denied, 99 S. Ct. 851 (1978); United States v. Eagli, 571 F.2d 1069, 1088 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978); United States v. Johnson, 569 F.2d 269, 271 (6th Cir.), cert. denied, 437 U.S. 907 (1978); Ray v. Rose, 535 F.2d 966, 974 (9th Cir.), per curiam, cert. denied, 429 U.S. 1026 (1976). See also People v. Cook, 13 Cal. 3d 663, 552 P.2d 148, 119 Cal. Rptr. 500 (1975); People v. Miller, 27 Ill. App. 3d 415, 384 N.E.2d 1010 (1975); Commonwealth v. Davis, 384 N.E.2d 181 (Mass. 1978); People v. Macerola, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979).

While the Supreme Court has said that it is the duty of the trial court to protect the defendant's right to effective assistance to counsel, see Glasser, 315 U.S. at 71, the lower appellate courts have not agreed on the necessary or proper degree of involvement in light of a defendant's constitutional right to choice of counsel. See generally notes 49-68 and accompanying text infra. The Supreme Court requires that a waiver be made knowingly and intelligently, but only some courts mandate that the trial judge take an active part in this procedure. In United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), the court required that a federal district court "actively participate in the waiver decision," id. at 277, and determine if the defendant is aware that a conflict of interest exists, realizes the consequences of such a defense, and is aware of his right to obtain other counsel. Id. at 278. Yet in the
After Glasser, the state and federal appellate courts continuously were faced with appeals raising various aspects of the conflict of interest question. More than 35 years passed from the time Glasser was decided before the Supreme Court again addressed the conflict of interest issue in Holloway v. Arkansas.6 In Holloway, repeated assertions were made by trial counsel before and during trial that his representation was fettered by a conflict of interest between his clients.7 For example, when each of the three defendants decided to take the stand, the appointed counsel informed the courts that he would be unable to cross-examine the defendants.

fifth circuit, such a duty does not arise until a conflict is brought to the attention of the court. "Absent some notice that the [defendant's] right to effective counsel could be jeopardized by joint representation, the Court does not bear the responsibility of informing co-defendants of possible problems of joint representation." United States v. Boudreaux, 502 F.2d 557, 558 (5th Cir. 1974)(per curiam); accord, United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978); United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976); United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); United States v. Christopher, 488 F.2d 849 (9th Cir. 1973). See generally Hyman, supra note 3, at 324-34. The Court of Appeals for the District of Columbia, however, would require the trial judge to make an affirmative determination concerning the presence or absence of a waiver, Campbell v. United States, 352 F.2d 359, 360-61 (D.C. Cir. 1965), thus imposing a serious and weighty responsibility upon the trial judge. Similarly, the first circuit requires that a judge must comment upon the risks of joint representation and make inquiries of the defendant. See United States v. Waldman, 579 F.2d 649, 651-52 (1st Cir. 1978); United States v. Foster, 469 F.2d 1, 4-5 (1st Cir. 1972). The second circuit requires trial judges to conduct a hearing on possible conflicts of interest and fully advise the defendant of his rights while giving him an opportunity to express his views. Salomon v. LaVallee, 575 F.2d 1051, 1054 (2d Cir. 1978); United States v. Alberti, 470 F.2d 878, 881 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973); accord, United States v. Lawriw, 568 F.2d 98, 103-06 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978). See generally ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE § 3.4(B) (1974).

The duty of the attorney to maintain the confidences and secrets of his client necessarily restricts the inquiry of the trial court. The New York Court of Appeals has stated that "extensive judicial inquiry into privileged matter would 'virtually... outlaw joint representation.' " People v. Gomberg, 38 N.Y.2d 307, 313, 342 N.E.2d 550, 554, 379 N.Y.S.2d 769, 775 (1975) (quoting United States v. Wisniewski, 478 F.2d 274, 285 (2d Cir. 1973)). In United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978), the court noted that the many problems inherent in joint representation may preclude a judge from giving a defendant adequate warning about possible dangers because the problems themselves are unforeseeable. As the Dolan court noted:

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 defendant'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.

Id. at 1181-82 (quoting Geer, supra note 3, at 141-42). See generally Hyman, supra note 3, at 330-43; Lowenthal, supra note 3, at 968-72.

7 Id. at 484.
because he held the confidence of all three. The trial judge refused to appoint separate counsel, and all three defendants were found guilty. The Supreme Court held that in such a case the trial judge's failure to appoint separate counsel or take adequate steps to determine whether the risk of a conflict existed deprived the defendants of effective assistance of counsel under the sixth amendment.

The rule emerging from Holloway is that reversal of a conviction is automatic where a trial court improperly required joint representation despite a timely objection by the defendants' attorney. Since the issue did not arise, the Supreme Court specifically declined comment on the problems raised when trial counsel fails to advise the court of a possible or actual conflict. Thus, the Holloway decision failed to address itself to the unresolved question of how strong a showing of conflict must be made and what role counsel and the trial judge must assume to ensure that a defendant is not deprived of effective assistance of counsel by a conflict of interest resulting from joint representation. The significant and controlling

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10 Id. at 480.
11 Id. at 481.
12 Id. at 484.
13 See id. at 488. The Court reviewed the Glasser decision and its subsequent interpretation by various courts and found that the rights protected by the sixth amendment are "so basic to a fair trial that their infraction can never be treated as harmless error." Id. at 489 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)).

The Holloway decision put to rest the recurring question whether joint representation where a conflict of interest existed could ever be harmless error. While the language in Glasser clearly indicated that such representation required reversal even in the absence of prejudice, the Glasser Court did not reverse the conviction of another defendant, Kretiske, apparently on the ground that the denial of Glasser's constitutional rights did not prejudice the other defendant, and overwhelming evidence existed against him. See Holloway, 435 U.S. at 488. This inconsistency had lead some courts to rule that prejudice is required. See, e.g., United States v. Smith, 464 F.2d 194, 197 (10th Cir. 1972); Baker v. Wainwright, 422 F.2d 145, 148 (5th Cir.), cert. denied, 399 U.S. 927 (1970). See generally Wanat, supra note 2, at 79-82.

The Holloway opinion reaffirmed the automatic reversal standard by distinguishing Glasser's reversal from Kretiske's, stating: "Kretiske did not raise his own Sixth Amendment challenge to the joint representation." 435 U.S. at 489 (emphasis in original). Holloway thus makes it clear that, although a conflict of interest is required, a showing of prejudice is not.

14 435 U.S. at 484. Since Holloway, several circuit courts have addressed the issue of the duty of a trial judge, absent notice of some conflict from the parties involved. The eighth circuit had previously required the trial judge to make a careful inquiry, see Austin v. Erickson, 477 F.2d 620, 623 (8th Cir. 1973), while still contending that the responsibility for avoiding risks of conflict rests with both the trial judge and counsel. See United States v. Lawriw, 568 F.2d 98, 101 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978). Recently, however, the eighth circuit referred to the affirmative duty of a trial judge to make a detailed inquiry whether there is a conflict of interest, see United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), cert. denied, 99 S. Ct. 851 (1979), although a district court generally can rely on the attorney for such information. Id. at 321-22. But see United States v. Waldman, 579 F.2d 649, 652 n.6 (1st Cir. 1978)(citing United States v. Donahue, 560 F.2d 1093, 1043 (1st Cir. 1977)).
factor in *Holloway* was defense counsel's repeated warning that his representation was impeded by a conflict of interest. In many instances, however, counsel is either unaware or unwilling to recognize and admit that a conflict exists, and the courts themselves might not have sufficient information to make this determination, thus presenting the more difficult conflict of interest problems.

**DETERMINING WHETHER JOINT REPRESENTATION CAUSES A CONFLICT OF INTEREST**

In a criminal case, potential conflicts of interest can emerge in a variety of ways and at various stages of a criminal proceeding. The most common and obvious conflicts of interest arise when an attorney represents more than one defendant, but this is by no means the only manner. For example, conflicts can occur between a client and a third party who may pay the attorney's fee. Similarly, an attorney's loyalties can easily become divided between a former client whose confidences must be protected and the present...

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The second circuit, which had disfavored joint representation prior to *Holloway*, see Kaplan v. Bombard, 573 F.2d 708, 715 (2d Cir. 1978)(Mansfield, J., concurring); United States v. Mari, 526 F.2d 117, 119-21 (2d Cir. 1975)(Oakes, J., concurring), *cert. denied*, 429 U.S. 941 (1976); United States v. Carrigan, 543 F.2d 1053, 1058 (2d Cir. 1976)(Lumbard, J., concurring), reiterated its mandate that a trial judge conduct a hearing wherein he can fully advise the defendant of his rights and give the defendant an opportunity to express his views. *Salomon v. LaVallee*, 575 F.2d 1051, 1054 (2d Cir. 1978); *see* note 63 and accompanying text infra.

*15* *See*, e.g., United States v. Gaines, 529 F.2d 1038, 1045 (7th Cir. 1976); United States v. Marshall, 488 F.2d 1169, 1191 (9th Cir. 1973); Holland v. Henderson, 460 F.2d 978, 981 (5th Cir. 1972). *See generally* Geer, *supra* note 3, at 145-46. These examples are disturbing, especially in light of Disciplinary Rule 5-105(C) of the American Bar Association Code of Professional Responsibility which 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 full disclosure of the possible effect of [multiple] . . . representation. . . ."

One reason attributed to defense counsel's failure to perceive or prevent a conflict of interest in joint representation is the monetary interest the attorney has at stake. Since an attorney representing two defendants rarely charges each defendant as little as half the fee he would charge if he represented one, his fee increases with the number of defendants represented. *See* Geer, *supra* note, 3 at 163.


client whose interests might suffer if the former client’s confidences remain protected.\footnote{18}{See generally ABA Code of Professional Responsibility, E.C. 4-6; D.R. 4-101(B)(1); Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977).}

Although the bar and the courts have focused primarily on the scope and nature of conflicts arising during the course of a criminal trial, many conflicts appear prior to trial\footnote{19}{See, e.g., United States v. Wade, 388 U.S. 218 (1967) (post-indictment lineup); Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (police interrogation); White v. Maryland, 373 U.S. 59 (1963) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment).} and even after trial. Too little attention has been directed to the potential for conflict in the pre-indictment stage of the criminal process,\footnote{20}{The decision in Holloway leaves unresolved whether the failure to have the assistance of counsel undisturbed by a conflict of interest at pre-indictment stages of a proceeding would result in a reversal, although the Court made clear that “when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.” 435 U.S. at 489. The failure to focus on the potential for conflicts during the pre-indictment stage may be the result of the fact that this stage is often not viewed as a critical stage in a criminal prosecution. See Kirby v. Illinois, 406 U.S. 682, 689 (1972).} yet conflicts at the investigative stage often can have significant and irreparable effects on the outcome of a criminal proceeding. The most typical problem occurs during the criminal investigation of the members of an organization, such as a union, an agency or organized crime.\footnote{21}{See Randazzo v. United States, 339 F.2d 79, 80-81 (5th Cir. 1964); In re Investigation Before the April 1975 Grand Jury, 403 F. Supp. 1176, 1182-83 (D.D.C. 1975), vacated, 551 F.2d 600 (D.C. Cir. 1976) (per curiam); Proceedings of the Thirty-Sixth Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 550-53 (1975).} Similar problems exist during the investigation into the activities of individuals engaged in a joint criminal enterprise.\footnote{22}{See Judd, supra note 16, at 1100-01.} Often, a low-level member of the organization or a marginal participant in a criminal enterprise is subpoenaed by a grand jury to testify about the criminal activities of the organization or enterprise, his or her superiors, or fellow members. Although the witness may not be the target of the investigation, his testimony may be crucial to the development of the case against the others. When called to testify, however, the witness frequently will appear before the grand jury with a lawyer who has been retained by the organization or other members of the enterprise.\footnote{23}{See Proceedings of the Thirty-Sixth Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 550-51 (1975).} In this situation, not only are the defendants’ rights to effective assistance of counsel in jeopardy, but both the secrecy of grand jury investigation and the attorney-client privilege are com-
promised. In dealing with cases in which one attorney represents a grand jury witness and a target, the courts often face a dilemma when deciding whether to disqualify an attorney. The Court of Appeals for the Second Circuit, for example, recently reversed a disqualification order on the ground that the public's interest in grand jury secrecy and a thorough investigation were subordinate to the defendant's right to counsel of his choice.\textsuperscript{24}

Where an attorney representing a witness is paid by an organization, the attorney's loyalties also can become easily divided. This problem is compounded by the fact that during the grand jury stages of the criminal process frequently defense counsel has insufficient information about the nature of the investigation to appreciate fully the possibilities of a conflict of interest. Thus, when a truly independent attorney might urge the witness to cooperate, the attorney retained by a third party might advise against cooperation in order to protect the organization and urge the witness to exercise his privilege against self-incrimination.\textsuperscript{25} Here, the attorney might be concerned about the potential damage the witness' testimony could have for the organization or its other members, and there is always the latent danger that the attorney's divided loyalties could encourage or intimidate the witness to perjure himself.\textsuperscript{26} Not only

\textsuperscript{24} \textit{In re Taylor}, 567 F.2d 1183, 1188-89 (2d Cir. 1977).

\textsuperscript{25} See \textit{Randazzo v. United States}, 339 F.2d 79, 80-81 (5th Cir. 1964); \textit{In re Investigation Before the April 1975 Grand Jury}, 403 F. Supp. 1176, 1182-83 (D.D.C. 1975), \textit{vacated}, 531 F.2d 600 (D.C. Cir. 1976) (per curiam). In \textit{Randazzo}, a witness was convicted of contempt for refusing to testify after a grant of immunity. This witness was represented by the same attorney who had represented one of the targets of the investigation. The Court of Appeals for the Fifth Circuit granted the government's motion to strike the attorney's appearance and appointed other counsel. 339 F.2d at 81. \textit{In re Investigation Before the April 1975 Grand Jury} involved a grand jury investigation of an incident in which the presses of the Washington Post were damaged and an employee beaten. Counsel for the Pressmen's Union had appeared at the grand jury on behalf of 21 witnesses alleged to have been present during the incident. All but two of the witnesses invoked the fifth amendment privilege. The district court had disqualified the attorney for the 21 union members because he could not provide each witness with adequate and independent substantive advice and could not determine if immunity was appropriate. The district court also was concerned that the joint attorney would disclose secret grand jury testimony to his other client-witnesses. 403 F. Supp. at 1179. The court of appeals vacated this order, conceding that potential conflicts of interest were inherent in the multiple representation, but holding that the traditional methods of dealing with "blind indiscriminate and legally unwarranted assertions" of the fifth amendment privilege should have been attempted before disqualifying counsel. 531 F.2d at 608. The issue of the attorney's conflict of interest could be appropriately dealt with at the hearing on whether the privilege applied. \textit{Id.}

does the conflicting representation present a danger of injury to the witness, it also tends to impede the investigation.\textsuperscript{27}

Additional conflict problems may arise after indictment but prior to trial. A defendant, recognizing his guilt, may wish to pursue the possibility of disposing of the charges against him without a trial. It is often in the defendant’s best interest to cooperate with the prosecution as a witness against a codefendant in exchange for a reduced plea or recommendation of more lenient treatment at sentencing. The assistance of independent counsel in making this decision is vital if the defendant is to make an intelligent choice.\textsuperscript{28} An attorney representing codefendants or associates who would be damaged by the defendant’s testimony would necessarily find himself in an untenable position. To advise a defendant-witness to cooperate would hurt his other clients. To advise a defendant-witness not to cooperate, when his best interests dictate otherwise, would be to render ineffective assistance.\textsuperscript{29}

Even if he withdraws from the case without giving any advice after learning that the prosecution was interested in having one of his clients cooperate, the attorney still would be in an untenable

\textsuperscript{27}See note 25 supra.

\textsuperscript{28}See United States v. Alvarez, 580 F.2d 1251, 1258 (5th Cir. 1978). In a typical plea bargaining situation, a prosecutor may be willing to accept one defendant’s plea of guilty to a lesser charge in return for testimony against other defendants. Even more devastating is the chance that a lawyer may urge one defendant to accept the proffered bargain of the prosecution in order to protect a codefendant when the bargain is not in the best interests of that defendant. See, e.g., United States v. DeBerry, 487 F.2d 448, 454 (2d Cir. 1973); Mone v. Robinson, 430 F. Supp. 481, 486-88 (D. Conn.), aff’d, 573 F.2d 1293 (2d Cir. 1977). A plea of guilty in return for leniency, though widely accepted, see Santobello v. New York, 404 U.S. 257, 260-61 (1971), is not to be taken lightly. See Goldstein, \textit{For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain}, 84 \textit{Yale L. J.} 683, 699-702 (1975). The consequences of a plea of guilty demand that counsel give his undivided interest to each defendant when contemplating acceptance of the prosecutor’s offer to bargain. Such individualized attention necessarily is vitiated with multiple defendants, who bring with them different records and involvement in the crime, and varying degrees of incriminating evidence.

\textsuperscript{29}If a prosecutor is willing to bargain with only one defendant, promising leniency in return for testimony against a codefendant, the untenable position of an attorney becomes clear. Realizing that such testimony could be harmful to the other defendants, an attorney may advise against acceptance of the prosecutor’s bargain. See United States v. Alvarez, 580 F.2d 1251, 1257 (5th Cir. 1978); United States v. Mahar, 550 F.2d 1005, 1007 (5th Cir. 1977); Alvarez v. Wainwright, 522 F.2d 100, 105 (5th Cir. 1975). Similarly, a prosecutor may be willing to offer a lesser sentence to one defendant if the “more culpable” defendant pleads guilty to a more serious charge. See United States v. Truglio, 493 F.2d 574, 579 (4th Cir. 1974); Mone v. Robinson, 430 F. Supp. 481, 485-86 (D. Conn.), aff’d, 573 F.2d 1293 (2d Cir. 1977). As one commentator has noted, “[t]he result may be that one or more of the defendants will be the sacrificial lambs of a package deal.” Geer, supra note 3, at 126.
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position. Would counsel now ethically be bound to disclose to his non-cooperating clients that one of their codefendants was cooperating with the prosecution? To so disclose, counsel could well be jeopardizing both the confidence and the physical safety of his client who might only be considering whether he should testify. The potential problems of a conflict of interest arising during plea negotiations is especially acute because the conflict rarely, if ever, is detectable upon appellate review. As the Supreme Court recognized in Holloway, "to assess the impact of a conflict of interests on the attorney's options, tactics and decisions in plea negotiations would be virtually impossible."

The most prevalent area of potential conflict of interest arising from joint representation occurs at the trial stage of a criminal proceeding. At trial, codefendants frequently will find themselves with different, and at times actually conflicting defenses. Some instances of conflicts of interest are obvious, as where one defendant testifies, gives statements, or presents evidence tending to exculpate himself but inculpate his codefendants, or where evidence presented on behalf of codefendants is materially inconsistent. Other

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30 According to the Code of Professional Responsibility a lawyer must protect the confidences of a client even after the professional relationship is at an end. See ABA Code of Professional Responsibility, E.C. 4-6. Thus, despite an attorney's withdrawal from representation of an individual defendant, his ability to cross-examine such a codefendant should he become a witness for the prosecution, would be severely limited in light of confidential information previously revealed to him. See United States v. Levy, 577 F.2d 200, 211 (3d Cir. 1978); Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977); United States v. Gaines, 529 F.2d 1038, 1044 (7th Cir. 1976).


32 See 435 U.S. at 491.


35 See, e.g., Peterson v. Estelle, 446 F.2d 53 (9th Cir. 1971). In such a situation defense counsel may have to emphasize the fact that the testimony does not relate to one defendant, thus implicitly showing that it does relate to the other defendant. Alternatively, he may fail to distinguish between the defendants at all. See Glasser, 315 U.S. at 72-73. See also State
instances are not so obvious and involve either going outside the
record or speculating about counsel’s conduct. Examples of these
include tactical decisions involving admission of evidence favorable
to one defendant but inculpative to another, impeachment and
cross-examination of witnesses, calling of witnesses, particularly a
codefendant, and arguing during summation the relative involve-
ment and culpability of his clients. Determining precisely when a
defendant has been prejudiced by a conflict is often difficult. Con-
figurations may not appear clearly on the record, because an attorney may
have been prevented from doing certain things in defense of his
client which he might otherwise do if he did not represent more than
one defendant.


Some courts have held that the interests of codefendants will not conflict if their defenses
are different, as distinguished from mutually exclusive. See United States v. Smith, 550 F.2d
277, 286 (5th Cir.), cert. denied, 434 U.S. 841 (1977); United States v. Lovano, 420 F.2d 769
(2d Cir.), cert. denied, 397 U.S. 1071 (1970); United States ex rel. Morgan v. Keve, 485 F.

11 Most tactical decisions of an attorney will not appear on the record and few courts
would require that upon review a judge invent possible defenses that might have been avail-
able to an individual defendant. See United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972).
But see People v. Chacon, 69 Cal. 2d 766, 447 P.2d 106, 73 Cal. Rptr. 10 (1968).

27 See, e.g., Glasser v. United States, 315 U.S. 60, 73-76 (1942); State v. Tapia, 75 N.M.

28 See, e.g., United States v. Jeffers, 520 F.2d 1053 (7th Cir. 1975), cert. denied, 423 U.S.
1066 (1976); Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967); People v. Gomberg,

31 See, e.g., Craig v. United States, 217 F.2d 355 (6th Cir. 1954); People v. Gomberg, 38

41 When clients are jointly represented, counsel is precluded from highlighting the weak-
nesses of the government’s case against individual defendants since a jury may well conclude
that the state’s strong points apply to another defendant. When this occurs a defense attorney
may be assuming the role of the prosecutor. See United States v. Carrigan, 543 F.2d 1053
(2d Cir. 1976); People v. Keesee, 250 Cal. App. 2d 794, 58 Cal. Rptr. 780 (1967). More
common, but no less devastating, is a defense counsel’s failure to distinguish between clients
in his final argument in an attempt to reconcile the conflict. See Austin v. Erickson, 477 F.2d
620 (8th Cir. 1973); People v. Chacon, 69 Cal. 2d 766, 776, 447 P.2d 106, 113, 73 Cal. Rptr.
10, 17 (1968).

41 See, e.g., Holloway v. Arkansas, 435 U.S. 475 (1978). As the Court noted: “Joint
representation of conflicting interests is suspect because of what it tends to prevent
the attorney from doing.” Id. at 489-90. “It may be possible in some cases to identify from the
record the prejudice resulting from an attorney’s failure to undertake certain trial
tasks. . . .” Id. at 490.

Cases in which either possible plea bargains were rejected, see Alvarez v. Wainwright,
522 F.2d 100 (5th Cir. 1975), or defenses lost, see Salomon v. LaVallee, 575 F.2d 1051 (2d Cir.
1978), are often too subtle and speculative for most appellate courts to consider, see United
States v. Foster, 469 F.2d 1 (1st Cir. 1972). But see People v. Chacon, 69 Cal. 2d 766, 447
P.2d 106, 73 Cal. Rptr. 10 (1968). Furthermore, once an attorney recognizes an existing
Largely as a result of the difficulty in determining when a conflict of interest exists, the Supreme Court in *Glasser* and *Holloway* found that precise calculations of prejudice were unnecessary; prejudice would be assumed. The Supreme Court, however, has yet to delineate the standards for determining when a conflict of interest exists. The courts have continued to struggle to formulate a workable test and have dealt with each fact pattern of joint representation on a case-by-case basis.

**TRIAL COURT'S RESPONSIBILITY WHERE THERE IS JOINT REPRESENTATION**

In order to avoid the possibility of a conflict where there is joint representation, trial courts have adopted varying approaches to ensure that a defendant is adequately apprised of a potential conflict of interest. It is generally accepted that a defendant has the power to waive his right to effective assistance of counsel or, for purposes of this discussion, the power to waive his right to representation unfettered by a conflict of interest. On appellate review, therefore, when it has been determined that joint representation has resulted

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*conflict of interest he may attempt to overcompensate in an effort to reconcile the conflict; thus, as one court has noted, "the conflict does not always appear full-blown upon the record . . . ." *Austin v. Erickson*, 447 F.2d 620, 626 (8th Cir. 1973). The *Glasser* Court's caveat against nice calculations of prejudice, 315 U.S. at 76, then becomes clearly warranted. As stated by the District of Columbia circuit:

> 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 record which suggest codefendants' conflicting interests may well be the telltale signs of deeper conflict. Because of this, and because of the fundamental nature of the right involved, when there are . . . doubts about the effectiveness of joint representation, those doubts should be resolved in favor of the defendant . . . .


*Holloway*, 435 U.S. at 488-89; *Glasser*, 315 U.S. at 74-76; see note 13 *supra*.

*See Holloway*, 435 U.S. at 492-93.


*See United States v. Garcia*, 517 F.2d 272, 276 (5th Cir. 1975); note 3 *supra*.

*See, e.g.*, United States v. *Sheiner*, 410 F.2d 337 (2d Cir. 1968). The *Sheiner* court indicated that the right to representation by counsel of one's own choice, notwithstanding a conflict of interest, is a right of constitutional dimension. *Id.* at 342. The right to counsel of one's choosing is not tantamount to the right to waive the assistance of counsel completely. *See Geer, supra* note 3, at 158-59; Lowenthal, *supra* note 3, at 967.
in a denial of effective assistance of counsel, courts will attempt to determine whether a defendant has consented to joint representation or waived his right to effective assistance of counsel.\textsuperscript{47} Lacking guidance from the Supreme Court,\textsuperscript{48} appellate courts have adopted differing and confused approaches to this problem.

At the very minimum, a defendant must be made aware of the potential risks of a conflict of interest.\textsuperscript{49} In fulfilling this mandate, some courts have taken a rather passive, non-interventionist approach to the conflict of interest issue,\textsuperscript{50} following the fifth circuit in \textit{United States v. Boudreaux}.\textsuperscript{51} These courts have held that, unless there is some specific indication that the right to effective assistance would be jeopardized, joint representation alone does not place upon trial courts the responsibility of informing codefendants of any potential problems.\textsuperscript{52} Other courts, especially the seventh circuit, similarly have concluded that a defendant’s sixth amendment

\textsuperscript{47} E.g., \textit{United States v. Lawriw}, 568 F.2d 98, 102 (8th Cir. 1977), \textit{cert. denied}, 435 U.S. 969 (1978). Since the Supreme Court’s decision in \textit{Holloway}, most circuit court decisions have centered around the validity of the defendant’s waiver and the duty of the trial court to insure that the waiver is “knowingly and intelligently” given. When a conflict of interest is brought to the attention of the court either through the inquiry process or on notice from the parties, \textit{Holloway} requires the trial judge to participate in the waiver procedure. \textit{Id.} at 484. The Supreme Court has stated that a court should “indulge every reasonable presumption against . . . waiver.” \textit{Glasser}, 315 U.S. at 70 (citations omitted); \textit{see United States v. Lawriw}, 568 F.2d 98 (8th Cir. 1977), \textit{cert. denied}, 435 U.S. 969 (1978); \textit{United States v. Garcia}, 517 F.2d 272 (5th Cir. 1975); \textit{United States v. Foster}, 469 F.2d 1 (1st Cir. 1972). \textit{See also Johnson v. Zerbat}, 304 U.S. 458 (1938); \textit{United States v. Eaglin}, 571 F.2d 1069 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 906 (1978).

\textsuperscript{48} Although the Court in \textit{Glasser} found that the defendant did not waive his right to independent counsel, no standard was enunciated for waivers in this area, except in stating that “[the Court] indulge[s] in every reasonable presumption against the waiver of fundamental rights.” 315 U.S. at 70.

\textsuperscript{49} \textit{Brady v. United States}, 397 U.S. 742, 748 (1970).

\textsuperscript{50} For cases favoring the non-injury approach, \textit{see United States v. Williams}, 429 F.2d 158 (8th Cir. 1970), and \textit{Fryar v. United States}, 404 F.2d 1071 (10th Cir. 1968).

\textsuperscript{51} \textit{Fryar v. United States}, 429 F.2d 557 (5th Cir. 1970).

rights are sufficiently protected by imposing the duty of apprising a defendant of the possible problems of joint representation on the attorneys, as officers of the court, and by warning trial judges to be mindful of any indication of possible conflicts during the course of trial. On the other hand, some courts have taken a more affirmative and interventionist role in the conflict of interest issue. In the leading case espousing the affirmative inquiry approach, Campbell v. United States, the Court of Appeals for the District of Columbia theorized that a defendant "is rarely sophisticated enough to evaluate the potential conflicts." Accordingly, the Campbell decision requires a trial judge to make an "affirmative determination that codefendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel." In a similar manner, the Supreme Court recently has approved a proposed amendment to the Federal Rules of Criminal Procedure which would require an inquiry by the trial court. The proposed amendment, while "generally consistent with the current state of

34 352 F.2d 359 (D.C. Cir. 1965).
35 Id. at 360.
36 Id.

Proposed Rule 44(c) provides:
Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

the law in several circuits,” would eliminate much of the inconsistency existing in the courts of appeals.

Although many courts have recognized that a trial court has an affirmative duty to determine whether joint representation causes a conflict of interest and to assure that the defendants are aware of the risks involved, there has not been universal agreement on the precise form this determination should take. Some of these courts have found that a trial court can fulfill its responsibilities by merely inquiring of counsel whether he has perceived the possibility of a conflict and apprised his client of the potential risks involved. This approach discourages extensive and probing personal inquiry of the defendant and places considerable weight on counsel’s ability to detect possible conflicts and respond in an ethical manner. While it properly may be assumed that reliance on defense counsel to detect and report a possible conflict is sufficient in most instances, there are also many situations where an attorney has been wrong in his evaluation, unaware of the problem, or unethical in his response.

It is precisely because some courts have found that reliance on
counsel to detect and report a possible conflict is insufficient protection of a defendant's right to effective representation that these courts have imposed a more exacting standard on a trial court's affirmative inquiry. Under this approach, anything less than a personal inquiry of a defendant is insufficient protection. In the second circuit, for example, trial judges are required not only to advise defendants fully of the facts underlying a potential conflict, but they also must give defendants the opportunity to express their views. In those jurisdictions which have adopted the more stringent affirmative inquiry standard, the burden of showing prejudice on a direct or collateral appeal of a judgment of conviction is placed on the defendant. If the trial court failed to inquire of jointly represented defendants, however, the burden shifts to the prosecution.

The primary reason why courts can easily justify taking such varied approaches to the conflict of interest question is because there has been little or no guidance from the Supreme Court. Consequently, the lower courts' approaches differ even on the issue whether the conflict question is of constitutional dimensions or

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See, e.g., United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), cert. denied, 99 S. Ct. 2827 (1979); United States v. DeBerry, 487 F.2d 448, 453-54 (2d Cir. 1973); United States v. Foster, 469 F.2d 1, 4-5 (1st Cir. 1972); Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965); Mone v. Robinson, 430 F. Supp. 481, 484-85 (D. Conn.), aff'd, 573 F.2d 1293 (2d Cir. 1977).

1 It is apparent that the second circuit has increasingly disfavored joint representation. Initially, the court expressly rejected the affirmative inquiry approach in United States v. Paz-Sierra, 367 F.2d 930 (2d Cir. 1966), cert. denied, 386 U.S. 935 (1967), preferring to rely on the ethical judgment of the attorney, see id. at 932. A slow evolution in the second circuit towards an affirmative inquiry approach began in Morgan v. United States, 395 F.2d 110 (2d Cir. 1968), wherein the court required trial courts to make "the most careful inquiry" and be alert for indicia of conflict. Id. at 114; see United States v. Lovano, 420 F.2d 769 (2d Cir.), cert. denied, 397 U.S. 998 (1970). The rule today requires

the trial judge . . . to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views. United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976); see Salomon v. LaVallee, 575 F.2d 1051, 1055 (2d Cir. 1978); Kaplan v. Bombard, 573 F.2d 708, 714-15 (2d Cir. 1978); United States v. Bernstein, 533 F.2d 775, 778 (2d Cir.), cert. denied, 429 U.S. 998 (1976). 2 See Salomon v. LaVallee, 575 F.2d 1051, 1055 (2d Cir. 1978); United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975), cert. denied, 429 U.S. 941 (1976); United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972). See also Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).

3 See cases cited in notes 62-64 supra. The shifting of burden approach adopted by some courts "is a logical counterpart to the affirmative inquiry approach." Hyman, supra note 3, at 343. "In this way it is less likely that an uninformed defendant will be held to have unwittingly waived his right to effective counsel, even where the full extent of the conflict may not be apparent on the record." Id. But see Geer, supra note 3, at 143.
merely one of supervisory concern.\textsuperscript{64} While some circuit courts have expressly stated that the approach to joint representation is not constitutionally mandated,\textsuperscript{67} others appear less certain.\textsuperscript{68} Assuming the issue is one of constitutional dimension, a further inquiry would be to determine the procedures for protecting a defendant’s sixth amendment right where there is joint representation.

\textbf{WHEN THE DUTY TO INQUIRE IS Triggered}

Notwithstanding that the primary duty to alert the defendant and the court to conflict of interest problems should be placed on the prosecutor and defense counsel, the events or circumstances which should trigger the trial court’s duty of inquiry in the absence of an objection remain unclear. While the Supreme Court has not given any explicit ruling,\textsuperscript{69} it has used broad language to suggest that a duty of inquiry arises regardless of defense counsel’s silence.\textsuperscript{70} In Holloway, the Court quoted from Glasser: “Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . . The trial court should protect the right of an accused to have the assistance of counsel.”\textsuperscript{71} Such broad language contemplates more than the narrow construction courts have given to Holloway in limiting the trial court’s duty to cases where counsel raises the conflict of interest question.\textsuperscript{72} The

\textsuperscript{64} The Supreme Court’s reluctance to impose a constitutional duty of affirmative inquiry on the trial judge is most likely due to the resultant clash of overlapping constitutional rights. A substantial investigation by the judge into the facts might itself raise constitutional problems. For example, it might encroach on an accused’s fifth amendment protections against self-incrimination. The suggestion has also been made that a substantive inquiry would actually interfere with the sixth amendment right to counsel which it seeks to protect by impairing defense strategy and compelling disclosure of confidential information.

Comment, \textit{Conflict of Interests in Multiple Representation of Criminal Co-defendants}, 68 J. CRIM. L. \& CRIMINOLOGY 226, 242 (1977) (footnotes omitted); see United States v. DeBerry, 487 F.2d 448, 455 (2d Cir. 1973) (Moore, J., dissenting). In addition, any action taken as a result of the inquiry might encroach on the defendant’s right to choice of counsel. See note 81 infra. See generally United States v. Cox, 580 F.2d 317 (8th Cir. 1978), cert. denied, 99 S. Ct. 2827 (1979); Kaplan v. Bombard, 573 F.2d 708, 715 n.9 (2d Cir. 1978).

\textsuperscript{65} See United States v. Mandell, 525 F.2d 671, 677 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); Mone v. Robinson, 430 F. Supp. 481, 483-84 (D. Conn.), aff’d, 573 F.2d 1293 (2d Cir. 1977).

\textsuperscript{66} See Salomon v. La Vallee, 575 F.2d 1051 (2d Cir. 1978); cf. United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), cert. denied, 99 S. Ct. 2827 (1979) (affirmative inquiry approach goes beyond the constitutional requirements for waiver).

\textsuperscript{67} Holloway, 435 U.S. at 490-91; see note 12 and accompanying text supra.

\textsuperscript{68} Holloway, 435 U.S. at 487-88; see note 71 and accompanying text infra.

\textsuperscript{71} Holloway, 435 U.S. at 484 (quoting 315 U.S. at 71).

\textsuperscript{72} See cases cited in note 14 supra.
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Holloway decision should not be so limited. Rather, the Supreme Court requires that in any case of joint representation, the court must be cognizant of and seek to determine whether there is a potential or actual conflict of interest.\(^7\) The rule laid down in Holloway appears to lower the standard for finding the requisite conflict of interest,\(^8\) and hence the prejudice presumed from the conflict.\(^9\) As noted in the dissenting opinion in Holloway, the Glasser Court relied on support from the record for the conflict of interest claim,\(^10\) whereas the Holloway majority found conflicting interests from defense counsel’s assertions that conflicts existed.\(^11\) It seems that rather than making counsel’s assertions of conflict a prerequisite to a finding of conflict, the assertions merely are typical of the manner in which the requisite conflict may be established. Absent counsel’s objections, it follows that slight evidence of a conflict of interest in the record should trigger the trial court’s duty of inquiry.

Suggestions in Dealing with the Problems of Joint Representation

In dealing with joint representation it cannot be overemphasized at the outset that any legal or judicial formulation for resolving the problems cannot replace, or succeed in the absence of, a greater awareness and sensitivity by the bar to the potential problems.\(^12\) Defense attorneys and judges cannot be satisfied in limiting their focus on the problems of a conflict to the more obvious problems which can occur during the trial stages of a criminal proceeding.\(^13\) As we have seen, potential conflicts of interest can arise in many ways and at any stage of the criminal process. A defendant’s effective representation can be compromised as early as the investigative stages of the criminal process, and many of the dangers of

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\(^7\) See Holloway, 435 U.S. at 482.
\(^8\) See id. at 492 (Powell, J., dissenting).
\(^9\) Id.
\(^10\) Id. at 492 (Powell, J., dissenting) (citing Glasser, 315 U.S. at 75).
\(^11\) Id. at 485.
\(^12\) See United States v. Davis, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973); accord, United States ex rel. McClendon v. Warden, 575 F.2d 108, 114 (7th Cir. 1978); Porter v. United States, 298 F.2d 461, 464 (5th Cir. 1962); note 4 supra. See generally ABA Code of Professional Responsibility, E.C. 5-16. But see Judd, supra note 16, at 1097.
joint representation exist in what an attorney refrains from doing. As a result, the most serious conflict problems are not necessarily the most detectable. Thus, any solution to the conflict question must begin with the vigilance of lawyers themselves.

Until the Supreme Court squarely addresses the problems of joint representation, no real solution is possible aside from a greater awareness by the bar. Nevertheless, the courts can take several steps to prevent prejudice to jointly-represented defendants. During the pre-indictment or investigative stages of the criminal process, as well as the plea bargaining process, a large portion of the responsibility for detecting and avoiding a possible conflict of interest should rest with the prosecutor. Of course, this is not to suggest that a defense attorney who represents members of an organization or individuals engaged in a criminal conspiracy or enterprise should not be acutely sensitive of potential conflicts. It is the prosecutor, however, who will have the best sense of who the targets of an investigation may be and whether the cooperation or testimony of a particular individual would be desirable. It is in these instances that the prosecutor can initiate the process of apprising the court of the possibility of a conflict so that the court can inform a defendant-witness of the potential problems.

In order to protect the defendant’s rights at the pre-indictment or investigative phase, it is suggested that the prosecutor, upon first becoming aware of a potential conflict, move the court to conduct an inquiry of each defendant-witness for the purpose of ascertaining whether the defendant has discussed with counsel the possible pitfalls of joint representation. Specifically, the court should determine whether the defendant-witness has discussed the possible benefits of cooperating with law enforcement authorities and whether he or she would like to discuss these matters with another attorney. If necessary, this inquiry should take place in the absence of the defense counsel and the prosecutor. If a defendant is aware of a potential conflict and still expresses a desire to retain the same attorney, however, his decision should be honored.

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80 See text accompanying note 6 supra.

For a discussion of the defendant’s right to counsel of his own choosing, see note 3 supra. The right to counsel of one’s own choice recently has been constricted. The second circuit has taken the position that “defendants are not entitled to joint representation as a matter
tings, whether or not constitutionally mandated, trial courts should be required to inquire personally of defendants whether they are aware of the possibilities of a potential conflict of interest and whether they wish to employ separate counsel. If in either the pre-indictment or post-indictment stage of the proceedings a defendant is advised of, and understands, the dangers of joint representation and retains the same counsel, he has waived his right to effective counsel if he is later prejudiced by the joint representation. The constitutional standard for an effective waiver of right to counsel long has been an "intentional relinquishment or abandonment of a known right." Moreover, it is generally a determination of the trial court whether the defendant properly waived his right, "and it would be fitting and appropriate for that determination to appear on the record." In a different context, the Supreme Court has stated that where a defendant waives his right to counsel, "he should be made aware of the dangers and disadvantages . . . , so that the record will establish that he knows what he is doing and his choice is made with eyes open." While reliance on counsel to so advise a client would in many instances suffice for assuring that a defendant was properly aware of the potential pitfalls of his representation and the alternatives available, the numerous reported cases in which attorneys were wrong in their evaluation of right." Abraham v. United States, 549 F.2d 236, 239 (2d Cir. 1977) (per curiam). In United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), the court disqualified the defendant’s counsel due to an actual conflict of interest. The defendant’s waiver of her right to independent counsel “was not without strings,” as “she was not prepared to have the court stand by and do nothing in the event an actual prejudicial action on the part of her lawyer arose.” Id. at 788; see United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978); Van Graafeiland, Lawyer's Conflict of Interest — A Judge’s View, 50 N.Y.S.B.J. 101, 144 n.76 (1978). A recent decision in the Southern District of New York, United States v. Helton, 471 F. Supp. 397 (S.D.N.Y. 1979)(mem.), embodies the strict rule against waiver of right to separate counsel. In Helton, the court stated that waiver of the sixth amendment right to independent counsel could be precluded by a finding that defendants cannot “knowingly and intelligently [wish] to proceed with joint representation.” Such a finding may be indicated 1) where, as in this case, the indicia of conflict are too strong at the threshold to permit a knowing and intelligent choice of joint representation; 2) where important “knowledge” indicating the ineffectiveness for at least one of the defendants of joint representation is likely to surface at trial despite its absence as of the hearing date, or 3) where there is a combination of the two. Id. at 401; see People v. Huggard, N.Y.L.J., June 21, 1979, at 7, col. 3 (Sup. Ct. N.Y. County). For a full discussion of the duty of trial courts to ensure a defendant’s right to effective assistance of counsel, see Hyman, supra note 3, at 324-30. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Id. at 465. Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)) (self-representation).
or unaware of the problem are testimony to the need for judicial inquiry.\textsuperscript{86} In order to ensure that a defendant has intelligently waived his right to separate counsel, any judicial inquiry, whether conducted in the presence of counsel or the prosecution, should at a minimum include an inquiry into the reasons why defendants and counsel want joint representation, whether the possibility of a conflict has been discussed, what the defense would be and how the defense would propose to avoid or prevent any conflict.

Reliance upon post-trial review as protection of defendants' rights to effective and separate counsel is markedly inadequate because it is after the fact, and a method designed to prevent, rather than simply cure, the problem is obviously more desirable. Furthermore, many serious conflicts are not readily apparent and therefore not susceptible to appellate review of a trial transcript.\textsuperscript{87} Finally, post-trial review of a potential conflict places great reliance on the attorney who may have caused or been a part of the very conflict being reviewed.\textsuperscript{88}

CONCLUSION

Some courts now require that before there is a judicial inquiry an attorney or defendant must give some notice or objection about the possibility of a conflict.\textsuperscript{89} The Supreme Court, in Holloway, has mandated such an inquiry, or separate counsel, only where defense counsel objects to the conflict of interest in representation.\textsuperscript{90} This should not be the sole basis for the court's initiating an inquiry. It cannot be presumed that every defendant will be as sophisticated as Glasser or that every attorney will be as conscientious and aware as the one in Holloway.

The only approach to the conflict issue which sensibly balances

\textsuperscript{86} See note 15 supra.
\textsuperscript{87} See note 41 and accompanying text supra.
\textsuperscript{88} See Hyman, supra note 3, at 327-28. As stated by the ninth circuit court of appeals, post-trial review may force [the defendant's] attorney into a new conflict of interest in which his own personal and professional interest would be in conflict with his client's interest. While we should not presume that the attorney's testimony would be influenced by such a conflict, the appearance of justice would be ill-served by making [the defendant's] right to a new trial by reason of his attorney's conflict of interest perhaps dependent on whether that same attorney can rise above a new conflict involving his own interest.
United States v. Gaines, 529 F.2d 1038, 1045 (7th Cir. 1976).
\textsuperscript{89} See case cited in note 13 supra.
\textsuperscript{90} 435 U.S. at 485.
both the defendant's right to counsel of his choice and the right to effective assistance is a judicial inquiry of the defendant which apprises the defendant of the risks of a conflict and permits him to make a knowing and voluntary choice of counsel.\footnote{Simple reliance on a per se rule prohibiting joint representation is not an adequate solution to the problems caused by joint representation. But see Geer, supra note 3, at 157-62; Lowenthal, supra note 3, at 983-89; Separate Counsel, supra note 2, at 389-90. A per se rule would interfere with a defendant's constitutional right to counsel, see note 3 and accompanying text supra, and would be largely unenforceable in those situations where a conflict develops prior to trial, see notes 16-43 supra.} At all stages of a criminal case, both the prosecutor and defense counsel should be sensitive to the possibility of a potential conflict. When either party suspects conflict, the court should be informed of this possibility. It would go a long way toward alleviating the problems of joint representation.