Conflict of Interest Problems in Criminal Proceedings

Intrinsic in the attorney's fiduciary duty to his client is the requirement of legal representation unimpaired by conflicting interests. In circumstances where a conflict does appear, or is at least reasonably foreseeable, an essential question that arises is the ability of counsel to deliver competent and complete legal services to his client. Nowhere is this question more crucial than in criminal proceedings, given the constitutional command that a criminal defendant shall be provided with effective assistance of counsel for the preparation of his defense. In the landmark case of *Glasser v. United States*, the Supreme Court ruled that "assistance of counsel," as guaranteed by the sixth amendment, contemplates effective legal assistance free of the entanglements of one lawyer simultaneously representing conflicting interests. Since this decision, two important questions have arisen which require comment. First, what is the criteria to be used in defining or identifying the existence of a conflict of interest in a criminal matter? And, more importantly, when a conflict does become apparent, what are the ethical considerations and duties of an attorney to insure his client receives the type of representation contemplated by the sixth amendment?

In determining the circumstances that give rise to a conflict of interest, the courts have frequently made reference to the standards

2. U.S. Const. amend. VI.
4. 315 U.S. 60 (1942).
5. Id. The Supreme Court also stated at page 76 that "[t]he 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." Some courts, relying on this statement, have held that some prejudice must be shown as flowing from the conflict, but that it is not necessary to delineate the precise manner in which the harm occurred. See, e.g., Zurita v. United States, 410 F.2d 477 (7th Cir. 1969); Butzman v. United States, 205 F.2d 343 (6th Cir. 1953). Other courts have required a strong showing of actual prejudice. See, e.g., Lugo v. United States, 350 F.2d 858 (9th Cir. 1965); Pressely v. State, 220 Md. 558, 155 A.2d 494 (1959). The current trend of thought, however, seems to concentrate, not on the actuality of specific prejudice, but on the posed potential for prejudice. See, e.g., Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); Commonwealth ex rel. Whitling v. Russell, 406 Pa. 45, 176 A.2d 641 (1962).
and guidelines of the American Bar Association. In United States ex rel. Hart v. Davenport, adequate and effective representation was said to be judged in light of a "normal competency" standard, which the court held, requires adherence to the ethical standards with respect to the avoidance of conflicting interests that is ordinarily expected from the bar. The ABA originally provided for this problem in Canon 6 of the American Bar Association's Canons of Professional Ethics. The attorney, under Canon 6, was precluded from representing conflicting interests "except by the express consent of all concerned given after a full disclosure of the facts." Further, a conflict was said to arise in circumstances where it was the attorney's duty to contend for one client what his duty to another client required him to oppose. Initially, it was thought that the primary meaning of this canon was that legal representation was forbidden if it would involve a disclosure of confidential communications. It is now recognized that the problem of conflicting interests encompasses all situations where the attorney's loyalty to his client is called into question. The American Bar Association Code of Professional Responsibility emphasizes this proposition in the Ethical Considerations under Canon 5, stating that the attorney's independent professional judgment should be exercised free of compromising influences and obligations. In addition, the Code accentuates the principle that loyalty to a client must be paramount, regardless of the effect such representation will have on the personal interests of the attorney, the interests of other clients and the desires of third persons. Not only does the Code forbid the representation of conflicting interests, except in emergency conditions, it also warns against the acceptance of employment where

8. Id. at 210.
9. ABA Canons of Professional Ethics No. 6.
10. Id.
11. Id.
13. ABA, Code of Professional Responsibility [hereinafter cited ABA Code], Ethical Considerations 5-1 to 5-24 [hereinafter cited as EC].
14. Id.
15. Id.; see EC 5-1.
16. Id.
there is a reasonable possibility\textsuperscript{17} that a conflict is likely to develop. Thus, not only must existing conflicts be avoided, but also objectionable are those cases where a conflict of interest becomes reasonably foreseeable.\textsuperscript{18}

The fact situations giving rise to a potential conflict of interest are numerous. A common difficulty arises when one attorney represents, either at the same trial or at separate proceedings, two or more defendants charged with a common crime.\textsuperscript{19} In State v. Sullivan\textsuperscript{20} co-defendants were tried jointly and represented by one attorney throughout the entire proceedings.\textsuperscript{21} The evidence of each defendant tended to be self-exonerating and incriminatory of his co-defendant.\textsuperscript{22} Faced with this dilemma, counsel offered the testimony of neither defendant. The court ruled that when counsel has to weigh his trial strategy or is deterred from bringing out facts favorable to one defendant because of the adverse affect that it might have on a co-defendant, then neither party receives the quality of representation he is entitled to expect and the attorney is under an obligation to provide.\textsuperscript{23}

\textsuperscript{17} Id.; see ABA Code, EC 5-2, EC 5-15, EC 5-16, EC 5-17, EC 5-19; ABA Code, Disciplinary Rule 5-101A [hereinafter cited as DR], DR 5-106.

\textsuperscript{18} See State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), where the court ruled that an attorney may in good faith represent a client until a conflict arises or can be reasonably foreseen.

\textsuperscript{19} See, e.g., Glasser v. United States, 315 U.S. 60 (1942); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).

\textsuperscript{20} 210 Kan. 842, 504 P.2d 190 (1972).

\textsuperscript{21} The fact that there is joint representation by one attorney does not ipso facto constitute a conflict of interest. See United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (no conflict where the testimony of the two defendants were mutually exculpatory and consistent in every respect). See also Lugo v. United States, 350 F.2d 858 (9th Cir. 1965); Chavera Gonzales v. United States, 314 F.2d 750 (7th Cir. 1963); Blakely v. State, 43 Ala. App. 654, 198 So. 2d 803 (Crim. App. 1967); State v. Reppin, 35 Wisc. 2d 377, 151 N.W.2d 9 (1967).

\textsuperscript{22} State v. Sullivan, 210 Kan. 842, 504 P.2d 190 (1972). See People v. Ware, 39 Ill. 2d 66, 233 N.E.2d 421 (a conflict arose when one defendant claimed the other was the instigator of the crime); People v. Bopp, 279 Ill. 184, 116 N.E. 679 (1917) (a conflict existed when the alibi of one defendant would disprove the other’s alibi); United States ex rel. Watson v. Myers, 250 F. Supp. 292 (E.D. Pa. 1966) (a conflict existed when one defendant’s case required that the other defendant be impeached).

\textsuperscript{23} 18 U.S.C. § 3006A(b) (1968); State v. Sullivan, 210 Kan. 842, 504 P.2d 190 (1972). See also Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968), wherein the court warned that the assignment of counsel for multi-defendants should never be a routine matter and where the trial judge assigns the same attorney to represent
In *Whitaker v. Warden of Maryland Penitentiary* the defendant was charged with the statutory rape of his stepdaughter. Counsel for the defendant was obtained by the child's aunt and the attorney looked to her for his fees. Because of the nature of the offense, the aunt requested that the matter be disposed of quickly, quietly, and without publicity. The conduct of the attorney indicated that he had followed the instructions of the aunt. The court, in granting a new trial, ruled that the pressure from the aunt and the desire to retain her as a client, materially restricted the nature and extent of counsel's effort to present an adequate defense for the defendant.

In *United States ex rel. Miller v. Myers*, defendant, charged with burglary, was represented by a lawyer who also had as a client the victim of the burglary. The court found this situation to be intolerable, stating that it takes no great understanding of human nature to recognize the burden such representation places on the attorney's judgment.

Another common situation where a conflict arises is when an attorney represents an accused and also is, or was at one time, counsel for a prosecution witness. In *Scott v. District of Columbia* it was held that counsel had not given the accused the undivided fidelity to which he was entitled where the attorney admitted that he had also represented a prosecution witness and that, "I do know some things which I cannot divulge to the court." A common dilemma in these particular cases is that the cross-examination of the witness-client is often impeded by the fact that the attorney has

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24. 362 F.2d 838 (4th Cir. 1966).
25. Id.
26. Id.
27. Id. See American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function §§ 3.5(c), 6 (Approved Draft Feb. 8, 1971) [hereinafter cited as The Defense Function] (unless otherwise noted, all citations to sections are to The Defense Function standards).
29. Id. at 57.
32. 99 A.2d 641, aff'd, 214 F.2d 860 (D.C. Cir. 1953).
33. Id. at 642.
learned confidential information which, although favorable to the defendant, cannot be disclosed because of the attorney-client relationship.34

There are also many subtle conflicts that can arise in a criminal proceeding. Ethical Consideration 5-435 warns the attorney not to negotiate with his client for the ownership of certain publication rights relating to the subject matter of the defendant's case, pending the complete termination of the matter giving rise to his employment.36 The temptation in such cases is for the attorney to act to enhance the value of these publication rights to the detriment of his client.37 The Standards Relating to the Prosecution Function and the Defense Function of the American Bar Association Project on Minimum Standards for Criminal Justice (hereinafter referred to as The Defense Function or ABA standards),38 another source of guidance on conflicting interest problems, points out several instances in which a conflict can unexpectedly arise. First, there is the situation in which a lawyer frequently appears before a certain court or a particular prosecutor and he is reluctant to actively pursue his present defendant's case for fear it might jeopardize future settlements with these individuals.39 Second, a conflict may occur when the attorney accepts a retainer with the expectation that it will generate publicity for him and he acts in furtherance of this goal without concern for the effect it will have on his client.40 Finally, there is the case in which counsel wishes to become involved in a landmark case and therefore tests the constitutionality of the law under which his client is accused, though an available plea to a minor offense would be in the best interests of his client.41

35. ABA Code, EC 5-4.
36. Id.
37. Id. See The Defense Function, supra note 27, at §§ 3, 4, 6.
38. Id. at § 3.5 (commentary).
39. Id.
40. Id.
Given the existence of a conflict of interest, what are the ethical duties of the attorney? The Disciplinary Rules under Canon 5 indicate that the representation of adverse interests is forbidden unless the client consents to such representation after being fully appraised of the facts creating the conflict. A full disclosure of the facts necessarily includes a determination of the exact nature of the conflict, an explanation of the potential dangers resulting from the conflict and a review of the alternatives available to the client. In *Lyrick v. Walcom*, full disclosure was said to include all the facts and circumstances which a lawyer of ordinary competency would consider necessary to enable his client to make a free and intelligent decision regarding the subject matter of the conflict. *The Defense Function* similarly requires that the attorney disclose to his client all matters connected with the criminal proceeding which would be relevant to the defendant in his selection of an attorney to represent him. In *State v. Ebinger*, co-defendants were represented by the same attorney. Prior to the trial one of the defendants entered a plea of guilty and turned state's evidence. The remaining defendant, in discussing the plea change, asked his attorney "what it meant in regard to my trial" and the attorney replied that it made no difference. The court ruled that based on these facts defendant

42. Courts will not create a conflict where none exists. *State v. Kruchten*, 101 Ariz. 186, 417 P.2d 510 (1966). *See also State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974) (Here defendant maintained his attorney was burdened by two conflicts. First, he claimed his attorney was a personal friend of the police officer the defendant was accused of slaying, and, second, he claimed the attorney belonged to the same law firm as a state representative and mayor who would be harmed by their association with an unpopular client. The court, at 872, stated that there was no conflict and the record showed that counsel was not fettered by divided loyalties.).

43. ABA Code, Disciplinary Rules 5-10(A), 5-104(A), 5-105(C), 5-106(A), 5-107(A).


47. See *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972).


49. See *The Defense Function*, supra note 27, at ¶ 3.5(A).


51. *Id.* Of course the defendant may waive his right to be represented by
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could not be said to have given his knowledgeable assent to such representation and, in effect, he had little or no choice in the selection of his counsel.\textsuperscript{52}

Can there ever be a full disclosure and a knowledgeable consent by a defendant in a criminal case? How free and voluntary can the defendant’s consent be, assuming he has a limited knowledge of the courts and criminal proceedings? The defendant’s confrontation with the criminal law will usually loom so large before him that he is less likely to understand the full significance of the possible dangers of his attorney’s representation of adverse interests.\textsuperscript{53} Frequently, the defendant will be eager to obtain any counsel regardless of the attorney’s disclosure of circumstances which would make his employment undesirable.\textsuperscript{54} In \textit{Holland v. Boles}\textsuperscript{55} the court determined that it was clear that defendant had never requested the appointment of disinterested counsel, had willingly accepted and followed the lawyer’s advice, knew of the circumstances creating the conflict, and had not expressed discontentment with his attorney until five years after the trial. Nevertheless, the court ruled for all practical purposes defendant had not been given a reasonable choice in the selection of counsel.\textsuperscript{56} Even though it was clear the accused had full knowledge of the facts giving rise to the conflict, the court commented it could not be assumed he had full knowledge of the “legal effects” of such representation.\textsuperscript{57} It would thus appear that any disclosure giving the defendant less than a full appreciation of the legal ramifications of the conflict would not be considered full disclosure.\textsuperscript{58}

Even assuming that the attorney can make a full disclosure and defendant gives his knowledgeable consent to the representation, the attorney will only rarely be justified in representing conflicting interests. Only in the clearest cases should counsel hazard to represent interests which are adverse, even after disclosure. The \textit{Code of Professional Responsibility} emphasizes that there are few situations

\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{See The Defense Function, supra note 27, at § 3.5 (commentary).}
\textsuperscript{54} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
in which an attorney can in good faith represent clients with opposing interests. Commentators point out that the representation of conflicting interests is not sanctioned in every case where there is full disclosure and consent, but merely forbidden except in such cases. There have been cases where the interests were judged to be so antagonistic that representation was improper under any circumstances. It would thus seem that an attorney in a criminal matter should avoid conflicting interests very carefully. Not only does the accused have a great stake in the outcome of a criminal case, but also there is the important interest of society in terms of confidence in our system of criminal justice. At stake also is the image of the legal profession which demands that the client shall have the undivided loyalty of his advocate.

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59. ABA Code, EC 5-15, 5-17.
60. H. Drinker, Legal Ethics 120 (1953).