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Jacob Mishler

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Essays from the Bench and Bar

"ASSISTANCE OF COUNSEL FOR HIS DEFENCE": THE PROBLEM OF CONFLICTS OF INTEREST

Jacob Mishler*

*In all criminal prosecutions, the accused shall enjoy the right . . .
to have the assistance of counsel for his defence.*

—SIXTH AMENDMENT

The right to counsel developed as a colonial concept. English law denied the right to counsel for defendants charged with felonies until 1836.¹ In theory, the judge, who was charged with assuring a fair trial, was considered to be counsel for the defendant. During the reign of Elizabeth I (1558-1603), moreover, persons accused of crimes were confined in secret with no opportunity to prepare for trial.² The only exception to the general denial of the right to counsel was the Trial of Treasons Act,³ enacted in 1696, which gave defendants charged with treason the right to counsel and required the court to appoint counsel.⁴

Under the Massachusetts Bay Charter, granted March 4, 1629, control of the affairs of the Massachusetts Bay Company was transferred to the colonists. The charter gave the colonists the "[p]ower to make laws to erect all sorts of magistracy, to correct, punish, pardon, govern, and rule the people absolutely."⁵ On December 10, 1641, the Massachusetts Bay Colony adopted a "Body of Liberties." Among the rights guaranteed was the right to counsel:

* Chief Judge, United States District Court, Eastern District of New York.

1. W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955). In 1836, English law gave all felony defendants an absolute right to counsel. *See* An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney, 1836, 6 & 7 Will. 4, c. 114, §§ 1-3.

2. I J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 350 (1883).

3. *See* An Act for regulateing of Tryals in Cases of Treason and Misprision of Treason, 1695-96, 7 & 8 Will. 3, c. 3, § 1.

4. The Act provided procedural safeguards against the injustices which occurred in trials for treason during the reigns of Charles II and James II, *see id.* §§ 1-5, 7-12. It also provided that the accused be given a copy of the indictment, *id.* § 1, and be permitted to compel production of witnesses, *id.* § 7. The judge's impartiality was questioned in such politically motivated trials, and thus his function as defendant's counsel was impaired. 4 W. BLACKSTONE, *COMMENTARIES** 355-56.

5. III *The Federal and State Constitutions Colonial Charters, and Other Organic Laws*, at 1846-60 (F. Thorpe ed. 1909).

Every man that findeth himself unfit to plead his owne cause in any Court shall have Libertie to employ any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie himselve from Answering such Questions in person as the Court shall thinke meete to demand of him.⁶

The importance of this right was acknowledged by incorporating it into the Constitution as a part of the Bill of Rights.

One of the more subtle issues involving the sixth amendment's guarantee of assistance of counsel is the problem of conflict of interest. Conflicts of interest affecting the right to effective assistance of counsel can arise from a variety of circumstances and relationships, such as:

- (1) representation of multiple defendants who are related by blood or marriage;
- (2) representation of multiple defendants who have a business relationship;
- (3) representation of multiple defendants who are unrelated;
- (4) representation of a single defendant and prior representation of a Government witness;
- (5) representation of a single defendant where codefendants are represented by partners of the law firm;
- (6) representation of a single defendant where codefendants are represented by associates sharing the same facilities and secretarial services;
- (7) representation of a single defendant, having come into possession of information through representation of a client whose interest is adverse to that of the current client; and
- (8) representation of a single defendant where the fee is paid by a person having an adverse interest.

In one of the earliest Supreme Court cases dealing with a conflict of interest in the representation of multiple defendants, the Court held that the right to the assistance of counsel must include the quality of representation that demands individual loyalty to a client:

[W]e [are] clear that the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the

6. MASSACHUSETTS BODY OF LIBERTIES, RITES RULES AND LIBERTIES CONCERNING JUDICIAL PROCEEDINGS ¶ 26.

right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.⁷

The Court refused to conduct an inquiry into how much prejudice the defendant sustained as a result of the conflict which it found to have resulted from the dual representation, because "[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."⁸

The Court imposed upon the trial judge the duty to protect a defendant's right to counsel.⁹ Thus, the judge is required to conduct a hearing whenever a potential conflict of interest is apparent.¹⁰ The hearing is designed to inform the defendant of the potential conflict and to afford him the opportunity to express his views on the representation.¹¹ The court is able to advise defendants of potential conflicts in, for example, multiple-defendant representation: One defendant may take the witness stand and inculcate either himself or a codefendant; the evidence may require a more favorable summation for one defendant to the detriment of the other; one defendant may plead guilty during the trial and decide to testify for the Government; cross-examination of a prosecution witness may be restricted as to one defendant because it may be damaging to the other. However, the court's inquiry carries with it the risk of violating the privilege of confidentiality between attorney and client and/or intruding into the plan of defense.

7. *Glasser v. United States*, 315 U.S. 60, 70 (1942). In *Glasser* the trial court directed Glasser's attorney to represent his codefendant who had dismissed counsel. The attorney pointed out a possible conflict of interest and objected to the appointment.

8. *Id.* at 76 (citing *McCandless v. United States*, 298 U.S. 342, 347 (1936); *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934); *Patton v. United States*, 281 U.S. 276, 292 (1930); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)).

9. *Id.* at 71. There is a concomitant duty imposed upon the lawyer by ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976) to refrain from representing multiple clients where there exists a potential for conflict of interest. *See id.* DR 5-105(A) to (B); *id.* EC 5-14 to 5-15.

10. The Supreme Court recently observed that "courts have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests." *Holloway v. Arkansas*, 46 U.S.L.W. 4289, 4291 (U.S. Apr. 3, 1978) (No. 76-5856) (citations omitted). *See United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973).

11. *See, e.g., In re Grand Jury Subpoena Directing Edward Taylor to Appear and Testify*, No. 77-1353 (2d Cir. Dec. 12, 1977); *Abraham v. United States*, 549 F.2d 236, 239 (2d Cir. 1977); *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976).

Where defendants are represented individually by different members of a law firm or by lawyers who are associated, the fact of such partnership or association and the probability of the exchange of information between lawyers by reason of their relationship should be brought to the defendant's attention.¹²

The representation of a defendant by a lawyer who previously represented a Government witness is troublesome. Often it works to the defendant's advantage, and at times, the lawyer is not aware of the conflict until the Government offers the witness at trial. The knowing waiver of any claim of the attorney-client privilege by the witness (the former client) avoids the problem. Where the witness does not waive, however, the lawyer should turn the cross-examination over to a lawyer who is not privy to the witness's communications.

On the other hand, if the defendants themselves recognize that the evidence is overwhelming against one of them and weak against the others, should the court nonetheless advise the defendant, who is knowingly and voluntarily about to testify to his culpability and exculpate his codefendants, to seek other counsel? Although the right to assistance of counsel does not include an absolute right to choose counsel, the court should not interfere unnecessarily with a defendant's choice.¹³ Such interference would arise where the court orders representation by independent counsel despite an unquestioned valid election by the defendant to be jointly represented. It is well-settled that the right to the assistance of counsel may be waived if the waiver is knowing, intelligent, and voluntary.¹⁴ A logical concomitant of the right to waive the assistance of counsel is that a defendant "may waive the right to have [his] retained counsel free from conflicts of interest."¹⁵ The only

12. At times, a notice of appearance is filed in the name of the attorney and not in the name of the firm.

13. See, e.g., *In re Grand Jury Subpoena Directing Edward Taylor to Appear and Testify*, No. 77-1353, slip op. at 663, 673 (2d Cir. Dec. 12, 1977); *Abraham v. United States*, 549 F.2d 236, 239 (2d Cir. 1977); *United States v. Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975).

14. *Faretta v. California*, 422 U.S. 806 (1975); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).

15. *United States v. Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975) (quoting *United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975)). In a very recent case decided by the Second Circuit involving a claim of prejudice by reason of joint representation in a state trial, Judge Mansfield, in a concurring opinion, stated: "Although we have not held that joint representation of two defendants in a criminal case amounts to a per se denial of effective assistance of counsel, I view it as some-

limitation on the right and the choice is where the waiver is not knowing and voluntary.¹⁶

An unusual conflict of interest case was presented in *In re Grand Jury Subpoena Directing Edward Taylor to Appear and Testify*.¹⁷ In *In re Taylor*, the Government moved to disqualify Taylor's lawyer from representing him in connection with his grand jury appearance on the ground that a conflict of interest existed between such representation and the lawyer's previous representation of the targets of the investigation.¹⁸ The Government claimed that Taylor, who was related by business and family ties to the suspects, had information which, when elicited before the grand jury, would incriminate them.¹⁹ It claimed that it was about to grant Taylor use immunity and that retention of the same lawyer would result in Taylor's refusal to testify even under a grant of immunity.²⁰ The district court granted the motion after an in camera inspection of an affidavit submitted by the Government.

The issue on appeal was framed as "Taylor's constitutional right to counsel of his choice."²¹ In the course of its opinion, the court referred to the "valuable rights of both appellant and [his lawyer] . . . with respect to Taylor's right to counsel of his choice, . . . his right to associate for the purpose of retaining legal representation, . . . and, the right of [his lawyer] to practice one's chosen profession" ²² In reversing, the Second Circuit Court

thing to be frowned upon" *Kaplan v. Bombard*, No. 77-2034, slip op. at 1598 (2d Cir. Feb. 15, 1978) (Mansfield, J., concurring). See also *Glasser v. United States*, 315 U.S. 60, 70 (1942); *In re Grand Jury Subpoena Directing Edward Taylor to Appear and Testify*, No. 77-1353, slip op. at 663, 673 (2d Cir. Dec. 12, 1977). The ABA Code of Professional Responsibility appears to incorporate this waiver notion. DR 5-105(C) states:

In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1976); see also *id.* EC 5-16.

16. *E.g.*, where a defendant through physical or psychological coercion or threats of economic pressure is directed to engage counsel.

17. No. 77-1353 (2d Cir. Dec. 12, 1977).

18. *Id.*, slip op. at 660-61.

19. *Id.*

20. *Id.* at 660, 663-64.

21. *Id.* at 662 (footnote omitted).

22. *Id.* at 668 (citations omitted).

of Appeals held that the motion was premature.²³ It observed, however:

A clash of interests, if any, has been created by the Government's desire to compel the appellant to give particular testimony before the grand jury. The Government possesses the power to create such a "conflict" in all situations in which targets of a grand jury investigation or defendants at trial are represented by a single attorney. This court has on numerous occasions declined to adopt a rigid "single representation" rule in situations of actual, as well as potential conflict, in favor of allowing a client to retain counsel of his choice with full knowledge of the potential adverse consequences of such representation.²⁴

The right to the assistance of counsel at every critical stage of a criminal proceeding is a necessary adjunct to the protection of other constitutional safeguards. The right is secure so long as the court stands ready to oversee any impairment of this right resulting from a lawyer's divided loyalty.

23. *Id.* at 664. The court concluded that a hearing on the conflict-of-interest issue could be held only after Taylor had been questioned before the grand jury, had been offered immunity, and had refused "on the advice of counsel to answer a proper question." *Id.*

24. *Id.* at 673 (citations omitted). In the context of this case, the adverse consequences would be possible confinement for contempt if appellant had refused to answer a proper question while under a grant of immunity. In the usual conflict-of-interest case, the court is concerned with possible prejudice to the conduct of the defendant's trial on substantive charges.