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Ensuring Effective Assistance of Counsel for the Criminal Co-Defendant

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is drafted in a comprehensive manner, after due consideration of all interests involved and with a view toward possible ramifications. Piecemeal legislation necessarily leads to the kind of judicial rule-making which legislators and the public so often criticize.

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ENSURING EFFECTIVE ASSISTANCE OF COUNSEL FOR THE CRIMINAL CO-DEFENDANT

Joint trials of two or more criminal defendants charged with the same offense may jeopardize their individual constitutional rights to a fair trial[1] and effective assistance of counsel[2] due to the possibility of a conflict of interests among them.[3] Conflicts arise in many contexts and, with few exceptions,[4] it is to the advantage of one defendant to cast the blame on his co-defendant. The relative culpability of co-defendants is usually an underlying issue. Thus, the individual defendant is often in the position of defending not only against the charges of the prosecution but also against the innuendoes of his co-defendant.[5]

The United States Supreme Court has effectively dealt with one aspect of the situation in which a joint trial infringed on an individual co-defendant's right to a fair trial. In *Bruton v. United States*[6] the Court held that limiting instructions to the jury are inadequate to protect a non-

1. U.S. CONST. amend. VI.

2. The right to assistance of counsel as secured by the sixth amendment requires *effective* aid in the preparation and trial of the case. Powell v. Alabama, 287 U.S. 45 (1932).

3. "Despite what the appearances may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented." Morgan v. United States, 396 F.2d 110,114 (2d Cir. 1968).

4. For example, if the testimony of co-defendants is reciprocal to the extent that there is no reason for counsel to attack the credibility of either, or restrict his summation as to either, then both might be adequately represented by the same attorney. Also, representation by single counsel would not be ineffective if both defendants seek to blame a third party. *See* People v. Mason, 91 Ill. App. 2d 118, 234 N.E.2d 351 (1968).

5. Whenever the defense hinges on a disassociation of the co-defendants, a conflict of interest arises which will preclude effective representation of all defendants by only one attorney. *See, e.g.*, People v. Chacon, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968).

6. 391 U.S. 123 (1968).

confessing defendant against a co-defendant's extrajudicial confession which incriminates him. Thus, in the limited context of a *Bruton* situation, the courts must grant a severance in order to protect the non-confessing defendant's right to confrontation.[7]

The unfavorable aspects inherent in a joint trial are magnified when co-defendants must share defense counsel.[8] Often the defense strategy will be advantageous to one of the defendants but disadvantageous to the other. For example, if counsel successfully objects to the admission of exculpatory statements, he may substantially injure the declarant in an attempt to protect the other defendant.[9] Moreover, cross examination and impeachment of any testimony is limited when cross examination designed to benefit one defendant requires development of facts which are damaging to the other defendant.[10] Also, the effectiveness of summation is diminished if counsel cannot argue the positions of both defendants with equal zeal.[11] It has even been suggested that the possibility of guilt by association indicated by sharing counsel gives rise to a conflict of interests between co-defendants.[12] Especially adverse to the interest of any defendant is the guilty plea of his co-defendant who agrees, as part of the "bargain," to testify for the prosecution.[13]

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7. *Bruton* has been limited to only those situations "where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination." Nelson v. O'Neil, 402 U.S. 622, 627 (1971).

8. The problems inherent in dual, or multiple, representation arise not only from the court appointing one lawyer to represent two or more indigent co-defendants but also if co-defendants choose to hire the same lawyer.

9. The issue here is not confrontation but lack of the effective assistance of counsel. *See* Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970).

10. *E.g.*, Glasser v. United States, 315 U.S. 60 (1942); White v. United States, 396 F.2d 822 (5th Cir. 1968); Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966); Craig v. United States, 217 F.2d 355 (6th Cir. 1954). *See also* Foster v. United States, 469 F.2d 1 (1st Cir. 1972).

11. "We think that it is a fair assumption that the argument of defense counsel must of necessity have been restricted in its scope and in places restrained in its tone by an ever present concern that his comments on behalf of one defendant did not injure or offend the other." People v. Donohoe, 200 Cal. App.2d 17, 28, 19 Cal. Rptr. 454, 462 (1962). *But see* United States v. Armone, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966) (Court concluded that "brushing off a co-defendant in summation can be effective strategy."). *Id.* at 406.

12. People v. Prince, 268 Cal. App. 2d 398, 74 Cal. Rptr. 197 (1968).

13. *E.g.*, United States *ex rel.* Robinson v. Housewright, 525 F.2d 988 (7th Cir. 1975). *But see* Giles v. United States, 401 F.2d 531 (5th Cir. 1968). The Fifth Circuit held that when one defendant changes his plea from "not guilty" to "guilty" before the completion of the prosecution's case, any conflict of interest is eliminated because the co-defendant becomes the beneficiary, rather than the victim, of the

It is generally agreed that joint representation does not, in and of itself, deny the sixth amendment right to effective assistance of counsel.[14] In 1942, the United States Supreme Court, in *Glasser v. United States*,[15] dealt with the issue of the effectiveness of joint counsel. It set aside Glasser's conviction because his attorney was appointed to represent another defendant with whom Glasser had a conflict of interest, thus infringing upon Glasser's right to effective assistance of counsel. The Court concluded that the attorney's representation of Glasser was "not as effective as it might have been if the appointment had not been made."[16] Focusing on the conflict of interest between Glasser and his co-defendant, the Court emphasized the prejudice sustained by Glasser as a result of joint representation. Unfortunately the decision establishes no discernible test for "conflict" and only warns against indulging in "nice calculations as to the amount of prejudice"[17] arising from joint representation.

The principle of *Glasser* has been clarified and enacted by a federal statute which requires federal courts to "appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown."[18] However, for the most part, federal appellate courts have ignored this provision,[19] choosing instead to attempt to apply the language of *Glasser*, and the resulting conflicting interpretations have created uncertainty as to circumstances under which joint representation will be considered ineffective. The federal courts are divided on the degree of conflict and prejudice necessary to require separate counsel. The formulae for finding a denial of effective assistance of counsel range from "a showing of a *possible* conflict of interest or prejudice, however remote,"[20] to requiring the defendants to

inconsistent pleas because all the blame could be shifted to the defendant who had pleaded guilty. *Id.* at 532.

14. One attorney may represent more than one defendant as long as his representation is effective. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932). *See generally* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).

15. 315 U.S. 60 (1942).

16. *Id.* at 76.

17. *Id.*

18. 18 U.S.C. § 3006 A(b) (1970).

19. *Compare* Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968) (defendants contended that 18 U.S.C. § 3006 A(b) was violated by thier sharing defense counsel) *with* United States v. Christopher, 488 F.2d 849 (9th Cir. 1973) *and* United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) *and* United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (the court did not even mention 18 U.S.C. § 3006 A(b)).

20. United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973).

demonstrate with a reasonable degree of specificity that a conflict of interest *actually existed* at trial.[21] Although most courts predicate a finding of denial of effective representation on a conflict of interest, either actual or potential,[22] there is no widely accepted definition of "conflict."[23]

Finding that "[a]n individual defendant is rarely sophisticated enough to evaluate the potential conflicts,"[24] some courts require the trial judge to warn the defendants of the possible consequences of dual representation and require an informed waiver of separate counsel by the defendants if they choose to proceed with common representation.[25] Other circuits reject the requirement of affirmative judicial inquiry,[26] while the Seventh Circuit places "the primary responsibility for the ascertainment and avoidance of conflict situations" on the members of the bar.[27]

Although the problems of dual representation usually arise in situations where one attorney is appointed by the court to represent two or more indigent co-defendants, an attorney retained by co-defendants may also find a conflict of interest between his clients. Overall, the courts show

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See also Walker v. United States, 422 F.2d 374, 375 (3d Cir.), *cert. denied*, 399 U.S. 915 (1970).

21. United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), *cert denied*, 423 U.S. 1049 (1976). *See also* United States *ex rel.* Robinson v. Housewright, 525 F.2d 988 (7th Cir. 1975).

22. *E.g.*, United States v. Boudreaux, 502 F.2d 557 (5th Cir. 1974); United States v. Foster, 469 F.2d 1 (1st Cir. 1972). Some courts require a showing of prejudice in addition to a conflict of interest. "Joint representation becomes improper only in those cases where prejudice results so as to deny a defendant the effective assistance of counsel." Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969). *See also* United States v. Smith, 464 F.2d 194 (10th Cir. 1972); Morgan v. United States, 396 F.2d 110 (2d Cir. 1968); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); Note, 58 GEO. L.J. 369 (1969).

23. A "conflict of interests" has been defined as "a situation [where] the parties are placed in adversary and combative positions." Sawyer v. Brough, 358 F.2d 70, 73 (4th Cir. 1966).

24. Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965).

25. *E.g.*, United States v. Foster, 469 F.2d 1 (1st. Cir. 1972); United States v. Miller, 463 F.2d 600 (1st Cir. 1972); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).

26. *E.g.*, United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976); United States v. Boudreaux, 502 F.2d 557 (5th Cir. 1974); United States v. Christopher, 488 F.2d 849 (9th Cir. 1973). The Third Circuit has endorsed the desirability of a rule "which assumes prejudice and nonwaiver if there has been no on-the-record inquiry by the court" but has not adopted this requirement. United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973).

27. United States *ex rel.* Robinson v. Housewright, 525 F.2d 988, 994 (7th Cir. 1975).

more concern over the burden that dual representation places on court-appointed defense counsel, but retained counsel for criminal co-defendants should recognize and evaluate the myriad problems presented by multiple representation. The risk of unforeseen and sometimes unforeseeable conflicts create ethical considerations which should be resolved in favor of separate counsel unless there is no other way to provide adequate representation for the defendants.[28] Joint representation itself denies any assurance that the statements made by a defendant to his lawyer are made in full confidence. Any conflicting statements would necessitate confrontation of both defendants and may put the defense counsel in the position of "judging" which defendant is telling the truth.[29] The American Bar Association Standards place the primary responsibility for ascertaining the possibility of conflict on the attorney and advise that a "lawyer . . . 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."[30] Dual representation should be undertaken only in unusual situations and then only after informed consent by the several defendants.[31]

The Louisiana judicially developed standard for the appointment of separate counsel requires factual allegations of "antagonistic defenses."[32] Ignoring the dictates of *Glasser* and its emphasis on *possible* conflict, Louisiana's standard has the effect of denying separate counsel even in the face of substantial conflict between defendants. It is consistently held that "the mere assertion that the defenses in a joint trial are antagonistic, or that a substantial conflict exists, is not sufficient to require the appoint-

28. ABA STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE DEFENSE FUNCTION, § 3.5(b), comments (1970) [hereinafter cited as ABA STANDARDS].

29. *Id.*

30. *Id.*, § 3.5(b) provides: "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." (Emphasis added).

31. *Id.*

32. State v. Finley, 341 So. 2d 381, 383 (La. 1976); State v. Alexander, 334 So. 2d 388, 391 (La. 1976); *See also* State *ex rel.* Thompson v. Henderson, 306 So. 2d 713 (La. 1975) (court did not apply the antagonistic defenses standard but did require a showing of actual conflict).

ment of separate counsel."[33] The most recent application of the "antagonistic defenses" standard is in *State v. Alexander*.[34] Alexander and his co-defendant, Wilson, were charged with distribution of heroin and an attorney was appointed to represent both defendants. On the day of the trial, defendant Alexander, not the court-appointed attorney, urged that separate counsel be appointed for both defendants and requested a continuance, stating that a friend had hired an attorney to represent him in the case. The Louisiana Supreme Court affirmed the trial judge's denial of the request for separate counsel on the ground that no specific facts were developed at trial to indicate "that antagonism or conflict between the defenses does in fact exist."[35]

As in prior decisions, the court required specific facts to demonstrate the actual existence of antagonism but did not outline what constitutes "antagonism" or "substantial conflict." This requirement frustrates appellate inquiry into the denial of effective assistance of counsel because, as in *Alexander*, once a motion for separate counsel has been denied and counsel represents all defendants equally at trial, the result will be a record lacking the necessary antagonism for reversal on appeal. In reviewing the effect of the denial of a motion for separate counsel, the supreme court has not been concerned with the prejudice that the defendants *might* have sustained, or the possible outcome had each defendant been individually represented.

The problems of joint trials in Louisiana are further compounded by liberal joinder provisions and a strict severance policy. Recent legislation provides for joinder of offenses[36] as well as joinder of defendants.[37] Read together, these provisions allow two or more defendants alleged to have

33. State v. Baker, 288 So. 2d 52, 57 (La. 1973).

34. 334 So. 2d 388 (La. 1976).

35. *Id.* at 391. The court affirmed the denial of the motion for continuance on different grounds, citing *State v. Austin*, 258 La. 273, 246 So. 2d 12 (1971): "A denial of a motion for a continuance made on the day of trial on grounds that the defendant is dissatisfied with his attorney has been held to be proper." 334 So. 2d at 391.

36. LA. CODE CRIM. P. art. 493 provides: "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial."

37. *Id.* art. 494: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

participated in the same act to be charged in the *same* indictment or information "in one or more counts together or separately and all of the defendants need not be charged in each count."[38] Thus it would be possible for co-defendants to find themselves in a joint trial for a common offense with *additional similar offenses*[39] charged against one of the defendants *separately*.[40] This scheme complicates the already complex problems inherent in joint trials and is magnified when the court appoints the same attorney to represent both defendants.

Louisiana's liberal joinder provisions are patterned after the Federal Rules of Criminal Procedure,[41] but Louisiana's severance policy is much more restrictive.[42] In order to obtain a severance in Louisiana, co-defendants must allege specific facts which indicate antagonistic defenses.[43] Severance is the exception rather than the rule. The granting or denial of a motion for severance is within the discretion of the trial judge, and, unless there is a clear abuse of discretion, his ruling will not be disturbed on appeal.[44]

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38. *Id.*

39. *See id.* art. 493 (requiring the offenses be of the same or similar character).

40. Such a trial could very easily result in prejudice to the defendant who is charged only in the common offense but whose guilt is judged by a jury which is also considering the evidence of the other defendant's separately charged offenses.

41. Rule 13 of the Federal Rules of Criminal Procedure provides: "The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information." *See also* Comment, *Joinder of Offenses: Louisiana's New Approach in Historical Perspective*, 37 LA. L. REV. 203 (1976).

42. *Compare* FED. R. CRIM. P. 14 ("if it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.") *with* LA. CODE CRIM. P. art. 704 ("Jointly indicted defendants shall be tried jointly unless: (1) The state elects to try them separately; or (2) The court . . . is satisfied that justice requires a severance."). Article 704 provides for severance of defendants only, without adopting the broader federal provision for severance of offenses. *See* comment (b). Although article 704 permits the trial judge to grant a severance when *justice* requires it, the article sets no standards for the exercise of this authority; and as a result the jurisprudence developed the "antagonistic defenses" test. *See* State v. McSpaddin, 341 So. 2d 868 (La. 1977); State v. Jenkins, 340 So. 2d 157 (La. 1976); State v. Thibodeaux, 315 So. 2d 769 (La. 1975).

43. *E.g.*, State v. Thibodeaux, 315 So. 2d 769 (La. 1975); State v. Baker, 288 So. 2d 52 (La. 1973).

44. *See, e.g.*, State v. Williams, 250 La. 64, 193 So. 2d 787 (1967); State v. Mack, 243 La. 369, 144 So. 2d 363 (1962), *cert. denied*, 373 U.S. 917 (1963).

Barring a relaxation of Louisiana's stringent policies on severance, appointment of separate counsel is the most feasible mechanism to protect the individual co-defendant's constitutional right to a fair trial. The only legitimate justification for denying a request for separate counsel is judicial efficiency and economy. While judicial efficiency may be a valid reason for joint trials and conservative severance policies, the argument has no force with respect to the denial of a request for separate counsel. Such a denial may result in a delay of the trial for application for supervisory writs, or require appellate review of the denial with the possibility of a vacated conviction and retrial. Viewed in this light, separate counsel may prove to be more efficient. Also, an absolute rule requiring separate counsel on request would free the courts from "the impossible task of speculating about what might have happened at a trial in which each defendant had his own lawyer."[45]

To ensure effective representation of each defendant, the trial court should have the duty to inform the defendants and counsel of the possible consequences of joint representation.[46] This procedure would meet the requirement of *Glasser* that trial courts "refrain from embarrassing counsel in the defense of an accused by insisting, or . . . suggesting that counsel undertake to concurrently represent [divergent] interests."[47] Once the trial court has informed the co-defendants, the responsibility for the decision to proceed with only one defense counsel should rest with the defendants and their attorney.[48]

Attorneys, retained or appointed to defend more than one criminal defendant, should, as a matter of ethics, evaluate the *possibility* of conflict. Even though the present Louisiana standard demands *actual* conflict or antagonism, the ABA Standards suggest, and the Louisiana Code of Professional Responsibility[49] requires, that the attorney decline represen-

45. Lollar v. United States, 376 F.2d 243, 248 (D.C. Cir. 1967) (Bazelon, C.J., dissenting).

46. *See, e.g.*, United States v. Foster, 469 F.2d 1 (1st Cir. 1972); United States v. Miller, 463 F.2d 600 (1st Cir. 1972); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).

47. 315 U.S. at 76.

48. *See* ABA STANDARDS, *supra* note 28, § 3.5(b); LA. CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 5-15 to 5-17, D.R. 5-105 (found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XVI; LA. R.S. 37, ch. 4, app.).

49. E.C. 5-15: "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

tation if there is a *possibility* of conflict. If the attorney's honest evaluation of the case is that the best interests of all defendants would be advanced by common representation, then the defendants would have the option to waive separate counsel.[50] If, on the other hand, the attorney or the defendants feel that effective representation demands separate counsel, that request should be respected by the trial court.[51] In any case, co-defendants should be informed of the possible consequences of joint representation and given the opportunity to have individual assistance of counsel if they choose.[52]

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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."

E.C. 5-16: "[I]t is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. . . ."

E.C. 5-17: "Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case. . . . Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little change [sic] of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely."

D.R. 5-105(C): "[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." *See also* State v. Baker, 288 So. 2d 52, 58 (La. 1973) (Barham, J., dissenting).

50. *See, e.g.*, Glasser v. United States, 315 U.S. 60 (1942); Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965). It should be noted that the issue of valid waiver presents distinct problems: for example, if both defendants waive an opportunity for separate counsel at the outset and during trial a conflict of interest arises, will the initial waiver be binding?

51. *See, e.g.*, People v. Gallardo, 269 Cal. App. 2d 86, 74 Cal. Rptr. 572 (1969).

52. The recent indigent defense legislation should insure that there will be enough lawyers to provide individual defense counsel for criminal co-defendants. LA. R.S. 15:141-49 (1976).