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Literary-Rights Fee Agreements in California: Letting the Rabbit Guard the Carrot Patch of Sixth Amendment Protection and Attorney Ethics

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LITERARY-RIGHTS FEE AGREEMENTS IN CALIFORNIA: LETTING THE RABBIT GUARD THE CARROT PATCH OF SIXTH AMENDMENT PROTECTION AND ATTORNEY ETHICS?

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I. INTRODUCTION

The criminal escapades of serial killers often make appealing stories for the curious public. Consequently, selling movies or books about such escapades and related criminal trials has created a profitable way for defense attorneys in California to negotiate fee agreements with their clients.[1]

A situation involving a literary-rights fee agreement normally arises when an indigent defendent selects a private criminal defense attorney and assigns to the attorney exclusive publication rights to the defendant's life story in lieu of attorneys' fees.[2] A potential conflict of interest arises, however, betweeen the attorney's interest in securing a handsome fee and the defendant's interest in a vigorous defense.[3]

In *Maxwell v. Superior Court*,[4] the California Supreme Court rebuffed a claim by a defendant that a literary-rights fee agreement violated his sixth amendment[5] right to counsel.[6] The court reasoned that by entering into a literary-rights fee agreement, the defendant waived his right

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1. *See* People v. Bonin, 47 Cal. 3d 808, 836, 765 P.2d 460, 475, 254 Cal. Rptr. 298, 314 (1989), *cert. denied*, 110 S. Ct. 1506 (1990).

2. *Id.* at 836, 765 P.2d at 475, 254 Cal. Rptr. at 313-14; Maxwell v. Superior Court, 30 Cal. 3d 606, 610, 639 P.2d 248, 249-50, 254 Cal. Rptr. 177, 178-79 (1982).

3. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 comment 3 (1989) [hereinafter MODEL RULES]. Defendants enjoy a constitutional right to counsel free from conflicts of interest. Glasser v. United States, 315 U.S. 60, 70 (1942) (interpreting U.S. CONST. amend. VI). However, this right may be waived. *Bonin*, 47 Cal. 3d at 837, 765 P.2d at 476, 254 Cal. Rptr. at 314.

4. 30 Cal. 3d 606, 639 P.2d 248, 254 Cal. Rptr. 177 (1982).

5. U.S. CONST. amend. VI.

6. *Maxwell*, 30 Cal. 3d at 621, 639 P.2d at 257, 254 Cal. Rptr. at 186.

to conflict-free counsel.[7] The court, in reiterating its view from previous cases, held that such waivers are binding so long as they are made knowingly and intelligently.[8]

In California, a defendant appealing a conviction on the grounds that no waiver was sought, or that an invalid one was obtained, must overcome two hurdles.[9] First, the defendant must prove that the trial court knew, or should have known, of a potential conflict of interest between the defendant and his or her attorney, and the court still did not protect the defendant by either eliciting a valid waiver or by offering the defendant substitute counsel.[10] Second, the defendant must prove that an actual conflict of interest existed and that conflict adversely affected the defense counsel's performance.[11] If these two hurdles are overcome, the sixth amendment right to effective assistance of counsel has been violated, and the defendant is entitled to reversal of his or her conviction and a new trial.[12]

Unfortunately, this test for determining whether a defendant's sixth amendment rights have been violated puts the defendant in a very vulnerable position. To begin with, it is extremely difficult to determine whether a defendant who has entered into a literary-rights fee agreement truly waived his or her right to conflict-free counsel in an intelligent manner.[13] Likewise, the fact that the trial court's duty to protect the defendant arises only when the court knew or should have known of a potential conflict saddles the defendant with the additional burden of making the conflict apparent to the court.[14] If neither the defendant nor the defense attorney notifies the trial court of a literary-rights fee agreement, it is likely that the trial court's duty to protect the defendant would never arise, and the defendant could lose this basis for appealing a potential conviction.[15] To compound this problem, an attorney may not feel compelled to notify the court of the agreement because such agreements appear to be permitted by the *California Rules of Professional Conduct*.[16]

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7. *Id.* at 621-22ge; qr /, 639 P.2d at 257, 254 Cal. Rptr. at 187.

8. *Bonin*, 47 Cal. 3d at 837, 765 P.2d at 476, 254 Cal. Rptr. at 314; *Maxwell*, 30 Cal. 3d at 619, 639 P.2d at 256, 180 Cal. Rptr. at 185; *see* Brady v. United States, 397 U.S. 742, 748 (1969).

9. *Bonin*, 47 Cal. 3d at 837-38, 765 P.2d at 476, 254 Cal. Rptr. at 314-15.

10. *Id.* at 836-37, 765 P.2d at 475-76, 254 Cal. Rptr. at 314.

11. *Id.* at 837-38, 765 P.2d at 476, 254 Cal. Rptr. at 315.

12. *Id.*

13. *See infra* notes 134-49 and accompanying text.

14. *Bonin*, 47 Cal. 3d at 836-37, 765 P.2d at 476, 254 Cal. Rptr. at 314.

15. *See id.* at 839 & n.1, 765 P.2d at 477-78 & n.1, 254 Cal. Rptr. at 316 & n.1.

16. CAL. RULES OF PROFESSIONAL CONDUCT Rule 5-210 (1989) [hereinafter CAL. RULES].

In addition, before a court will reverse a conviction and grant a new trial, a defendant must show that an actual conflict existed which adversely affected counsel's performance.[17] This showing does not accurately reflect either the conflict or the prejudice resulting when defendants and their lawyers enter into literary-rights fee agreements.[18] Finally, the present law in California concerning waiver of the right to conflict-free counsel and the standard of reversible error in literary-rights fee agreement cases ignores the public interest in seeing just convictions resulting from effective advocacy.[19]

This Article sets forth the current state of the law regarding literary-rights fee agreements. It then examines policy concerns surrounding a defendant's waiver of conflict-free counsel. The author next discusses the procedure for evaluating a defendant's claim that a literary-rights fee agreement violated his or her right to effective assistance of counsel. The author then suggests that literary-rights fee agreements violate the defendant's sixth amendment right to effective assistance of counsel, as well as the public's interest in the fair and efficient administration of justice.[20] Finally, the author asserts that defendants claiming ineffective assistance of counsel based on a literary-rights fee agreements should benefit from a presumption of prejudice standard, rather than the more difficult to prove standard generally applied to conflicts of interest claims. Accordingly, the author proposes several legislative and judicial remedies to protect defendants and the public from problems arising out of literary-rights fee agreements.[21]

II. THE PRESENT STATE OF THE LAW REGARDING LITERARY-RIGHTS FEE AGREEMENTS AND THE RIGHT TO EFFECTIVE COUNSEL IN CALIFORNIA

This section discusses the defendant's sixth amendment right to conflict-free counsel as defined in *Wood v. Georgia*[22] and applied in a subsequent California literary-rights fee agreement case. Although *Wood* and

17. *Bonin*, 47 Cal. 3d at 837-38, 765 P.2d at 470, 254 Cal. Rptr. at 314-15.

18. See *infra* notes 218-20 and accompanying text for a discussion of the difficulty in proving prejudice and the inability of a trial record to accurately indicate a conflict's impact on counsel's performance.

19. *See infra* notes 85-90 and accompanying text.

20. Other interests may be balanced with the defendant's right to waive conflict-free counsel. *See Maxwell*, 30 Cal. 3d at 634, 639 P.2d at 265, 180 Cal. Rptr. at 194 (Richardson, J., dissenting) ("Although a defendant may waive rights which exist for his own benefit, he may not waive rights which belong also to the public generally."). For a discussion of cases citing this proposition, see Wheat v. United States, 486 U.S. 153, 158 n.2 (1987).

21. *See infra* note 229-33 and accompanying text.

22. 450 U.S. 261 (1981).

the subsequent California cases recognize a defendant's right to conflict-free counsel, such cases do not proscribe literary-rights fee agreements. This section also discusses California's ethical rules regarding literary-rights fee agreements, which similarly do not protect defendants from conflicts arising from such agreements. Finally, this section discusses California's criminal antiprofit statute. Although this statute restricts profits that defendants can earn from literary works involving their crimes, it does not specifically address literary-rights fee agreements.

A. The Federal Constitution: Wood v. Georgia

The sixth amendment to the United States Constitution[23] guarantees a criminal defendant the right to effective counsel,[24] and, to a certain extent, counsel of choice.[25] The United States Supreme Court held in *Wood v. Georgia*[26] that the right to "effective" assistance of counsel includes "a correlative right to representation that is free from conflicts of interest."[27] This right to effective assistance of counsel free from conflicts of interest raises two distinct issues. The first is how to determine whether a violation of that right has occurred; the second, assuming there has been such a violation, is how to determine whether the defendant is entitled to reversal of a trial court's decision.[28]

The *Wood* Court outlined an approach that all trial courts must use to determine potential conflicts at the pretrial stage.[29] Initially, when "the *possibility* of a conflict of interest is sufficiently apparent," the trial court must inquire into the matter.[30] If the court's initial inquiry reveals that an actual conflict existed and that there was no valid waiver of the right to conflict-free counsel, a new trial may be ordered.[31] On the other hand, a trial court's failure to inquire into the potential existence of a conflict when it had a duty to do so requires that the case be remanded back to the trial court for a determination of whether an actual conflict

23. U.S. CONST. amend. VI.

24. Strickland v. Washington, 466 U.S. 668, 686 (1984). The sixth amendment right to counsel has been applied to the states through the due process clause of the fourteenth amendment. Gideon v. Wainright, 372 U.S. 335, 340 (1963); U.S. CONST. amend. XIV.

25. People v. Robinson, 42 Cal. 2d 741, 746, 269 P.2d 6, 9 (1954).

26. 450 U.S. 261 (1981).

27. *Id.* at 271. In *Wood*, the defendants were convicted of distributing obscene materials and sentenced to probation on the condition that they make regular payments toward the fines. *Id.* at 262. The defendants failed to make these payments, and their probations were revoked. *Id.*

28. *See id.* at 273-74.

29. *Id.*

30. *Id.* at 272.

31. *Id.* at 273-74.

existed.[32]

B. *California's Application of* Wood v. Georgia

In 1989, the California Supreme Court, in *People v. Bonin*,[33] addressed the issue of what constitutes sufficient inquiry by a trial court into potential conflicts of interest between an attorney and a criminal defendant.[34] In *Bonin*, the defendant, otherwise known as the "Freeway Killer,"[35] was charged with fourteen murders.[36] Before the trial began, Bonin moved to have his court-appointed counsel, Earl L. Hansen, substituted with William T. Charvet, a private attorney.[37] Bonin stated that he felt he could not discuss certain matters with Hansen because of "personal vibes."[38]

The prosecution opposed the defendant's request on four separate grounds.[39] One of these grounds was the prosecution's fear that any retainer agreement between Bonin and Charvet might have involved book rights, thereby creating a conflict of interest.[40] The court responded by asking Charvet about the existence of any literary-rights fee arrangement.[41] Charvet replied that the prosecution had no right to probe into any fee arrangements between Charvet and his clients.[42] Charvet further expressed his view that the United States Supreme Court would not declare a literary-rights fee agreement unlawful per se.[43] The trial court inquired no further.[44]

On appeal, Bonin claimed that his representation by Charvet was tainted by a conflict of interest.[45] The California Supreme Court held that given the fact that no actual evidence of a literary-rights fee agreement was presented to the trial court, the court's duty to inquire into the possibility of a conflict had not been triggered.[46] The California Supreme

32. *Id.* at 273.

33. 47 Cal. 3d 808, 765 P.2d 460, 254 Cal. Rptr. 298 (1989), *cert. denied*, 110 S. Ct. 1506 (1990).

34. *Id.* at 838-43, 765 P.2d at 476-80, 254 Cal. Rptr. at 315-19.

35. *Id.* at 820, 765 P.2d at 465, 254 Cal. Rptr. at 304.

36. *Id.* at 819, 765 P.2d at 465, 254 Cal. Rptr. at 303.

37. *Id.* at 825, 765 P.2d at 469, 254 Cal. Rptr. at 307.

38. *Id.* at 826, 765 P.2d at 469, 254 Cal. Rptr. at 308.

39. *Id.* at 825, 765 P.2d at 469, 254 Cal. Rptr. at 307.

40. *Id.*

41. *Id.* at 828, 765 P.2d at 470-71, 254 Cal. Rptr. at 309.

42. *Id.*

43. *Id.*, 765 P.2d at 471, 254 Cal. Rptr. at 309.

44. *Id.* at 829, 765 P.2d at 471, 254 Cal. Rptr. at 309.

45. *Id.* at 824-25, 765 P.2d at 468, 254 Cal. Rptr. at 307.

46. *Id.* at 838, 765 P.2d at 476-77, 254 Cal. Rptr. at 315. The court, however, found that the trial court failed to discharge its duty of inquiry under *Wood* regarding the possibility of a

Court held:

> The court cannot be deemed to have known, or have had reason to know, of the possibility of a conflict in this regard. In our view, a court can be held to have knowledge or notice of the possibility of a conflict only when, as in *Wood* itself, it is provided with *evidence* of the existence of a conflict situation—a circumstance not present here.[47]

Therefore, despite the facts that (1) Bonin was indigent at the time the court appointed Hansen, and apparently remained so; (2) the case had an extraordinarily high profile; and (3) Charvet gave a non-responsive reply when asked about the existence of a literary-rights fee agreement, the court found the evidence was insufficient to trigger the duty of inquiry.[48]

As Justice Broussard pointed out in a separate opinion, however, "It is difficult to understand what 'evidence' the majority would require."[49] Justice Broussard observed that the duty of inquiry arises when the court knows or has reason to know that a potential conflict exists.[50] Furthermore, he urged that *Wood v. Georgia*[51] established a duty to inquire even when there is simply a "suggestion" of conflict.[52] The trial court knew that the defendant was indigent from the fact that he qualified for a court-appointed attorney.[53] Given this knowledge, the trial court should have questioned how Bonin, an indigent, could afford a private defense counsel.[54] Thus, Justice Broussard found that the *Bonin* trial court failed to fulfill its *Wood* duty of inquiry.

C. *California Ethical Rules*

Although Disciplinary Rule (DR) 5-104(B) of the American Bar Association (ABA) *Model Code of Professional Responsibility* (the *Model*

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conflict of interest arising out of a former attorney-client relationship between Charvet's law firm and a key prosecution witness. *Id.* at 838, 765 P.2d at 477, 254 Cal. Rptr. at 315. Ultimately, the California Supreme Court found that Bonin failed to establish any adverse effect on Charvet's performance resulting from the alleged conflict. *Id.* at 843, 765 P.2d at 480, 254 Cal. Rptr. at 318. Accordingly, the *Wood* error did not warrant reversal. *Id.*

47. *Id.* at 838, 765 P.2d at 476-77, 254 Cal. Rptr. at 315 (construing Wood v. Georgia, 450 U.S. 261 (1981)).

48. *Id.* at 838, 765 P.2d at 477, 254 Cal. Rptr. at 315.

49. *Id.* at 859, 765 P.2d at 491, 254 Cal. Rptr. at 329 (Broussard, J., concurring and dissenting).

50. *Id.* (Broussard, J., concurring and dissenting).

51. 450 U.S. 261 (1981).

52. *Bonin*, 47 Cal. 3d at 859, 765 P.2d at 491, 254 Cal. Rptr. at 329 (Broussard, J., concurring and dissenting) (citing Wood v. Georgia, 450 U.S. 261, 272-73 (1981)).

53. *See id.* at 825, 765 P.2d at 468, 254 Cal. Rptr. at 307.

54. *See id.* at 860-61, 765 P.2d at 492, 254 Cal. Rptr. at 330 (Broussard, J., concurring and dissenting).

Code) and Rule 1.8 of the ABA *Model Rules of Professional Conduct* (the *Model Rules*) expressly prohibit literary-rights fee agreements,[55] the *California Rules of Professional Conduct* do not.[56] DR 5-104(B) of the *Model Code* prohibits any literary-rights fee agreement prior to the complete termination of the subject litigation.[57] This rule provides:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.[58]

Similar language, prohibiting or condemning such transactions, is also found in both Rule 1.8 of the *Model Rules*,[59] as well as in the ethical considerations of the *Model Code*.[60] These provisions presume a conflict of interest between the defense attorney and the client whenever they enter into a literary-rights fee arrangement, because "[m]easures suitable in the representation of the client may detract from the publication value of an account of the representation."[61] Unfortunately, California has not followed the ABA's approach.

Rule 3-300 of the *California Rules of Professional Conduct* provides:

> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:
>
> (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and trans-

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55. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(B) (1981) [hereinafter MODEL CODE]; MODEL RULES, *supra* note 3, Rule 1.8.

56. *See* CAL. RULES OF PROFESSIONAL CONDUCT (1989).

57. MODEL CODE, *supra* note 55, DR 5-104(B).

58. *Id.*

59. MODEL RULES, *supra* note 3, Rule 1.8(d). Rule 1.8(d) provides: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." *Id.*

60. MODEL CODE, *supra* note 55, EC 5-4. Ethical Consideration (EC) 5-4 provides:

> If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. . . . To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment . . . .

MODEL CODE, *supra* note 55, EC 5-4.

61. MODEL RULES, *supra* note 3, Rule 1.8 comment 3.

mitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.[62]

Thus, California permits literary-rights fee agreements between a criminal defense attorney and his or her client. Yet, it can be argued that literary-rights fee agreements violate, at least in spirit, the *California Rules of Professional Conduct*. Specifically, Rule 3-300 allows an attorney to acquire a possessory interest adverse to his or her client; however, it requires that the terms be "fair and reasonable."[63] It seems questionable whether an agreement to give away literary rights can ever be fair because the typical defendant who enters into such an agreement has no other way to attain his or her counsel of choice.[64]

D. California's Criminal Antiprofit Statute

In addition to constitutional and ethical issues, California courts must also consider section 2225 of the California Civil Code,[65] which subjects to a constructive trust "[a]ll proceeds from the preparation for the purpose of sale, the sale of rights to, or the sale of materials that include or are based on the story of a felony for which a convicted felon was convicted."[66] A superior court then may distribute such proceeds to persons whom the felon physically, mentally or emotionally injured.[67]

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62. CAL. RULES, *supra* note 16, Rule 3-300.

63. *Id.*

64. *See* Maxwell v. Superior Court, 30 Cal. 3d 606, 615 n.4, 639 P.2d 248, 253 n.4, 180 Cal. Rptr. 177, 182 n.4 (1982).

65. CAL. CIV. CODE § 2225 (West Supp. 1990).

66. *Id.* § 2225(b). The federal government and some states have statutes similar to section 2225. *See, e.g.*, 18 U.S.C. § 3681 (1988) (court has discretion to order defendants to forfeit proceeds received from literary-rights fee agreements); ARIZ. REV. STAT. ANN. § 13-4202 (1989) (literary-rights fee agreements void unless contract provides for payment of money received under agreement to be placed into crime victim account); GA. CODE ANN. § 17-14-31(a)(2)-(3) (1982) (consideration received for contract by accused or person convicted of crime must be deposited in escrow account and payable to his or her victims); N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1990) (proceeds from literary-rights fee agreements must be submitted to escrow account for benefit of crime victims).

67. CAL. CIV. CODE § 2225(c). The court may also distribute up to 90% of the proceeds to pay reasonable attorney's fees. *Id.* § 2225(d). All persons seeking proceeds under this statute must bring an action in superior court within five years after the later of: (1) the time payment of the proceeds to the felon, or (2) the date of conviction. *Id.* § 2225(b), (c).

This statute does not specifically address literary-rights fee agreements,[68] and California courts have not yet applied this statute to any such agreement. Therefore, the effect of section 2225 on such agreements is unclear.[69]

III. POLICY CONSIDERATIONS

Although the United States Constitution and California's ethical rules do not proscribe literary-rights fee agreements, such agreements pose serious obstacles to a defendant's ability to enjoy his or her right to conflict-free counsel.[70] If, however, a defendant wants to assume the risk of conflicted counsel by waiving his or her sixth amendment rights, courts may allow such a waiver. Under such circumstances, however, the defendant's personal interest in waiving his or her constitutional rights may compete with the public's interest in preserving the integrity of the judicial system.[71] In these cases, courts may separate and balance these two interests.[72]

A. The Defendant's Rights

1. The right to waive counsel

All criminal defendants have a right to counsel.[73] In 1975, the United States Supreme Court, in *Faretta v. California*,[74] decided that criminal defendants are entitled to waive their sixth amendment right to

68. *See id.* § 2225. Arguably, however, section 2225 does not proscribe literary-rights fee agreements. See section 2225, which states: "Prior to any distribution of any proceeds to a [victim], the court shall determine whether . . . a portion of the proceeds is needed to cover [the defendant's] reasonable attorney's fees . . . ." *Id.* § 2225(d); *accord* Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of their Constitutionality*, 76 CAL. L. REV. 1353, 1365 (1988). "A criminal may also enter a contract to raise money for her most pressing need, her criminal defense. The California statute allows the criminal to use her crime story profits to pay private counsel fees." Okuda, *supra*, at 1365.

69. It is clear, however, that the purpose of section 2225 is different from the purpose of the *Model Rules* proscribing literary-rights fee agreements. *Compare* Act of Sept. 21, 1983, ch. 1016, § 1, 1983 Cal. Stat. 3581, 3581 (codified as amended at CAL. CIV. CODE § 2225 (West Supp. 1990)) (purpose of California's criminal antiprofit statute is to compensate victims of felonies) *with* MODEL RULES, *supra* note 3, Rule 1.8 comment 3 (purpose of *Model Rules* is to protect defendants from conflicted counsel).

70. Maxwell v. Superior Court, 30 Cal. 3d 606, 616-18, 639 P.2d 248, 253-55, 180 Cal. Rptr. 177, 182-84 (1982).

71. *Id.* at 616, 639 P.2d at 253, 180 Cal. Rptr. at 182.

72. *See id.*

73. U.S. CONST. amend. VI. The sixth amendment right to counsel has been applied to the states through the fourteenth amendment. Gideon v. Wainright, 372 U.S. 335, 340 (1963); U.S. CONST. amend. XIV.

74. 422 U.S. 806 (1975).

legal counsel and represent themselves.[75] In *Faretta*, the Court held that a defendant's choice of self-representation is a personal right that is "necessarily implied by the structure of the [Sixth] Amendment."[76]

Faretta, however, may not be applicable to waivers of conflict-free counsel. When defendants give up their right to counsel and represent themselves, they give up many of the benefits associated with the right to counsel.[77] In contrast, when defendants exercise their right to counsel, they automatically gain the additional sixth amendment protections of conflict-free counsel and effective assistance of counsel.[78]

If a defendant exercises his or her right to counsel, but waives the right to conflict-free counsel, the waiver must be made competently and intelligently.[79] Several larger questions regarding waiver remain, including: (a) whether courts should be left with the exclusive burden of determining the adequacy of such waivers; (b) whether the defendant alone should make the decision; (c) whether certain waivers should be declared invalid by statute; and, (d) whether certain waivers should simply be declared per se unconstitutional.[80]

2. The right to counsel of choice

The concept of effective representation contemplates that a defendant should have counsel of choice.[81] A lack of rapport and mutual confidence between clients and lawyers may severely undermine the quality of representation.[82] The United States Supreme Court, however, has held that criminal defendants have no absolute constitutional right to counsel of their choice.[83] The Supreme Court has interpreted the sixth amend-

75. *Id.* at 821. *Pro se* is defined as "[a]ppearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

76. *Faretta*, 422 U.S. at 819.

77. *Id.* at 835. For example, such defendants give up their right to claim ineffective assistance of counsel and possibly gain a reversal on appeal. *Id.* at 834-35 & n.46.

78. *See* Cuyler v. Sullivan, 446 U.S. 335, 3444-45 (1980) (constitutional safeguard of effective assistance applies whether counsel appointed or retained); Holloway v. Arkansas, 435 U.S. 475, 484 (1978) (defendants entitled to counsel free from conflicts of interest arising from multiple representation); People v. Ledesma, 43 Cal. 3d 171, 215, 729 P.2d 839, 858, 233 Cal. Rptr. 404, 432 (1987) (defendant entitled to effective assistance, not bare assistance of counsel).

79. Brady v. United States, 397 U.S. 742, 748 (1970); Von Moltke v. Gillies, 332 U.S. 708, 724 (1948).

80. For a discussion of possible remedies to protect defendants' sixth amendment rights, see *infra* notes 229-33 and accompanying text.

81. Maxwell v. Superior Court, 30 Cal. 3d 606, 613, 639 P.2d 248, 251, 180 Cal. Rptr. 177, 180-81 (1981).

82. *Id.*

83. Morris v. Slappy, 461 U.S. 1, 13-14 n.6 (1983).

ment narrowly—to serve primarily as a guardian of the defendant's right to effective advocacy rather than as a guarantor of choice of counsel.[84]

B. The Public's Interests

The public has a legitimate interest in the fair administration of justice. This interest, however, may be threatened by literary-rights fee agreements.[85] In evaluating the validity of a literary-rights fee agreement, Justice Richardson of the California Supreme Court stated:

> Contracts of the type herein presented will appear to the eye and ear of the average layman as indistinguishable from run-of-the-mill commercial or public relations agency agreements. . . . [T]he engrafting of this device on the judicial process will inevitably dilute public acceptance and understanding of legal advocacy founded on a fiduciary relationship of complete trust and confidentiality between attorney and client which is directed solely toward the advancement and vindication of the *client's* legal rights, not counsel's fiscal advantage. Counsel cannot simultaneously wear the hat of a literary or theatrical agent whose goal is commercial promotion and the hat of a counselor at law who is guided by strict ethical constraints.[86]

Furthermore, the public, as a body of taxpayers, has an interest in the efficient operation of the courts.[87] On one hand, if a court accepts a defendant's waiver of conflict-free counsel and the defendant is convicted, such a defendant will likely appeal the adequacy of that waiver,

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84. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984); United States v. Cronic, 466 U.S. 648, 657 n.21 (1984) ("The appropriate [sixth amendment] inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such."). The limit upon choice of counsel is reinforced indirectly in other areas of the law as well. For example, a defendant may not be represented by an advocate, other than himself, who is not a member of the bar. Wheat v. United States, 486 U.S. 153, 159 (1988); United States v. Whitesel, 543 F.2d 1176, 1180 (6th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977); United States v. Cooper, 493 F.2d 473, 474 (5th Cir.), *cert. denied*, 419 U.S. 859 (1974); Turner v. ABA, 407 F. Supp. 451, 477 (N.D. Tex. 1975). Furthermore, a defendant needing a public defender has counsel appointed by the trial court and receives no opportunity to influence the court's choice of counsel. Tibbett v. Hand, 294 F.2d 68, 73 (10th Cir. 1961); *see* Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 79-80 (1974). Finally, a court may recuse a defendant's counsel of choice if such representation somehow interferes with the effective administration of justice. *Wheat*, 486 U.S. at 160; United States v. Poulack, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977).

85. Maxwell v. Superior Court, 30 Cal. 3d 606, 632, 639 P.2d 248, 264, 180 Cal. Rptr. 177, 193 (1982) (Richardson, J., dissenting).

86. *Id.*

87. *See* United States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980) (recognizing the public's interest in the economical administration of criminal law).

thereby creating additional costs for the taxpayers.[88] On the other hand, if a trial court denies a defendant's waiver and appoints conflict-free counsel over that defendant's objections, the defendant may challenge the propriety of the trial court's actions in denying the waiver.[89] Moreover, recent United States Supreme Court decisions suggest that challenging the denial of defendants' waivers of their rights to conflict-free counsel will not prove fruitful.[90]

C. *Balancing the Defendant's Rights Against the Public's Interests*

In *Wheat v. United States*,[91] the United States Supreme Court attempted to balance the criminal defendant's right to waive the sixth amendment[92] right to conflict-free counsel against the public's interest in the fair administration of the judicial system.[93] Wheat was convicted in a United States district court of conspiracy to possess large quantities of marijuana with intent to distribute.[94] The trial court denied his request to waive conflict-free counsel and be represented by the same attorney as his co-defendant, and Wheat appealed.[95] Affirming the conviction, the Supreme Court held that trial courts possess broad discretion to refuse waivers of conflict-free counsel.[96] The Court stated:

> [W]e think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.[97]

Drawing upon precedent, the Court noted that " 'the appropriate [sixth amendment] inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.' "[98] Therefore, "trial courts . . . have an independent duty to ensure that criminal defendants

88. *See* United States v. Vowteras, 500 F.2d 1210, 1211 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974).

89. *Maxwell*, 30 Cal. 3d at 634, 639 P.2d at 265, 180 Cal. Rptr. at 194 (Richardson, J., dissenting).

90. *See* Wheat v. United States, 486 U.S. 153 (1988); Wood v. Georgia, 450 U.S. 261 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

91. 486 U.S. 153 (1988).

92. U.S. CONST. amend. VI.

93. *Wheat*, 486 U.S. at 160.

94. United States v. Wheat, 813 F.2d 1399, 1400-01 (9th Cir. 1987).

95. *Wheat*, 486 U.S. at 156.

96. *Id.* at 163.

97. *Id.*

98. *Id.* at 159 (quoting United States v. Cronic, 466 U.S. 648, 657 n.21 (1984)).

receive a trial that is fair and does not contravene the Sixth Amendment."[99]

The trial court's power and duty to deny a waiver of conflict-free counsel stems from the same power courts have long enjoyed to disqualify conflicted counsel.[100] The question that remains unclear after *Wheat*, however, is when, if ever, the trial court has a duty to deny a waiver of conflict-free counsel to protect the public's interest. *Wheat* granted courts broad permission to deny waivers to fulfill a public duty,[101] but was silent regarding what circumstances might *require* denial of a waiver. Arguably, when present or potential conflicts of interest obviously threaten the public confidence in the judicial system, the trial court must deny a waiver.

One federal court, in *United States v. Hobson*,[102] articulated a test for determining when counsel should be disqualified for public interest reasons.[103] In *Hobson*, the defendant, Hobson, was charged with drug trafficking.[104] Two witnesses informed Hobson's attorney that his client was guilty,[105] and because they were expected to testify on that issue, the trial court disqualified the attorney and denied Hobson's waiver of a conflict.[106] The defendant appealed the disqualification.[107]

The Court of Appeals for the Eleventh Circuit believed the proposed testimony would create an appearance of impropriety that would violate the state's ethical rules and erode public confidence in the judicial system.[108] Affirming the trial court's decision, the court of appeals held that an attorney should be disqualified if: (1) a real possibility of impropriety exists, and (2) the likelihood of public suspicion outweighs the social interests which will be served by the lawyer's continuing representation in

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99. *Id.* at 161.

100. *See In re* Paradyne Corp., 803 F.2d 604, 611 n.16 (11th Cir. 1986) ("right to counsel . . . does not override the broader societal interests in the effective administration of justice . . . or in the maintenance of 'public confidence in the integrity of our legal system' " (quoting United States v. Hobson, 672 F.2d 825, 828 (11th Cir. 1982))); *In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 251 (2d Cir. 1985) ("courts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right"), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986); United States v. Silva, 611 F.2d 78, 79 (5th Cir. 1980); United States v. Carrigan, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring).

101. *Wheat*, 486 U.S. at 162.

102. 672 F.2d 825 (11th Cir. 1982).

103. *Id.* at 828.

104. *Id.* at 826.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 828-29.

the case.[109]

Applying the test to Hobson's situation, the court found both elements fulfilled.[110] The court further ruled that "the defendant is not free to waive the problem presented here . . . because the ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation of Hobson."[111]

California courts have acknowledged that waivers of a potential conflict of interest may pose a threat to the public's confidence in the criminal justice system.[112] They have been unwilling, however, to deny a waiver of conflict-free counsel on public interest grounds.[113]

IV. PROBLEMS WITH EXISTING LAW

In order to obtain a reversal of a conviction based on conflicted representation, a criminal defendant in California must prove that: (1) the trial court knew or should have known of a potential conflict; (2) the trial court failed to inquire into and resolve the conflict either by assigning substitute counsel or obtaining a valid waiver; and, (3) the defendant was actually prejudiced by the conflict.[114] Each of these proof requirements poses a substantial hurdle for defendants to overcome and, therefore, undermines the defendant's constitutional right to effective assistance of counsel.

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109. *Id.* at 828.

110. *Id.* at 828-29.

111. *Id.* at 829.

112. *See, e.g.*, Maxwell v. Superior Court, 30 Cal. 3d 606, 627, 639 P.2d 248, 261, 180 Cal. Rptr. 177, 190 (1982) (Richardson, J., dissenting) (defendant needs "counsel, not only of unquestioned professional competence, but also counsel whose allegiance to him is total and unalloyed" (citation omitted)); People v. Barboza, 29 Cal. 3d 375, 379, 627 P.2d 188, 190, 173 Cal. Rptr. 458, 460 (1981) (public defender required to avoid " 'any relation which would prevent him from devoting his entire energies to his client's interests' " (quoting Anderson v. Eaton, 211 Cal. 113, 116, 293 P. 788, 790 (1930))); People v. Pope, 23 Cal. 3d 412, 422-23, 590 P.2d 859, 864-65, 152 Cal. Rptr. 732, 737-38 (1979); People v. Corona, 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894, 915 (1978).

113. *See Maxwell*, 30 Cal. 3d at 615, 639 P.2d at 253, 180 Cal. Rptr at 182. The *Maxwell* court recognized that an argument may be made that literary-rights fee agreements are against the public interest, but did not find the public interest to be a factor in analyzing the validity of literary-rights fee agreements. *See id.* at 616-22, 639 P.2d at 253-58, 180 Cal. Rptr. at 182-87. Other states have taken an approach to literary-rights fee agreements that requires proceeds from such agreements to be deposited in an escrow account and payments made from that account to the victims of the crimes. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-4202, 27-3401 (1989); GA. CODE ANN. § 17-14-31(a)(2)-(3) (1982); ILL. ANN. STAT. ch. 70, para. 403 (Smith-Hurd 1989); N.Y. EXEC. LAW § 632-a (McKinney 1983 & Supp. 1989).

114. *See Maxwell*, 30 Cal. 3d at 616-22, 639 P.2d at 253-54, 80 Cal. Rptr. at 182-83.

A. The Procedure for Responding to a Discovered Conflict

1. General procedures

Even where a trial court fulfills its duty to inquire into the possibility of a conflict of interest, the procedures to remedy the conflict may be inadequate. If a court learns that the potential for a damaging conflict exists, the court must approach the defendant with its findings and offer the defendant a choice of waiving the right to conflict-free representation or requesting substitute counsel.[115] Before a waiver will be effective, however, the trial court must find that the waiver was made in a knowing and intelligent manner.[116]

2. Procedures as applied to literary-rights fee agreements in California

In *Maxwell v. Superior Court*,[117] the California Supreme Court upheld a waiver of an alleged literary-rights fee agreement.[118] In *Maxwell*, the defendant, charged with ten murders and four robberies, sought representation by private counsel with whom he had negotiated a literary-rights fee agreement.[119] Counsel and Maxwell entered into a detailed and comprehensive waiver and fee contract, which made clear all possible dangers of such an agreement.[120] Specifically, the agreement disclosed possible conflicts and prejudice to Maxwell's right to counsel and included a "catch-all" paragraph stating that when unforeseen conflicts arise, counsel will act in Maxwell's best interest.[121]

The trial court, *sua sponte*, questioned Maxwell at length about his understanding of all the terms of the agreement and the dangers of conflict therein.[122] The court then concluded that literary-rights fee agreements, by their nature, are inherently prejudicial to criminal defendants.[123] The court recused Maxwell's private counsel and appointed a substitute counsel.[124] Maxwell then obtained review of the

115. People v. Bonin, 47 Cal. 3d 808, 837, 765 P.2d 460, 476, 254 Cal. Rptr. 298, 314 (1989), *cert. denied*, 110 S. Ct. 1506 (1990); *see* Wood v. Georgia, 450 U.S. 261, 273-74 (1981).

116. Brady v. United States, 397 U.S. 742, 748 (1970) (waivers of constitutional rights must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

117. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).

118. *Id.* at 621, 639 P.2d at 257, 180 Cal. Rptr. at 186.

119. *Id.* at 610, 639 P.2d at 249-50, 180 Cal. Rptr. at 178-79.

120. *See id.* at 610-11, 639 P.2d at 250, 180 Cal. Rptr. at 179.

121. *Id.*

122. *Id.* at 611-12, 639 P.2d at 250-51, 180 Cal. Rptr. at 180.

123. *Id.* at 612, 639 P.2d at 251, 180 Cal. Rptr. at 180.

124. *Id.*

recusal decision by seeking a writ of mandate.[125] The California Supreme Court overturned the trial court's order recusing the chosen counsel, holding that the trial court had erred in finding Maxwell's initial waiver invalid.[126]

In reaching its decision, the supreme court weighed the defendant's right to be represented by counsel of his choice against the probable conflict of entering into a literary-rights fee agreement with his chosen private attorney.[127] The court held that given Maxwell's insistence on being represented by his chosen counsel, any possible conflict arising from the fact that counsel and Maxwell had entered into a literary-rights fee agreement was outweighed by the defendant's right to counsel of his choice.[128] In so holding, the court noted that the literary-rights fee agreement may have improved representation of the client.[129] The court also surmised that private defense counsel might conduct a "careful, diligent defense that avoids conviction" because a "quiet strategy that succeeds may well make a better story than a flamboyant failure."[130] Therefore, after *Maxwell*, a defendant who validly waives his sixth amendment right to effective counsel cannot subsequently claim ineffective assistance of counsel in California courts.[131]

B. The Requirement of Knowing and Intelligent Waiver is Inadequate to Protect a Defendant's Right to Conflict-Free Counsel

1. General requirements of knowing and intelligent waiver

Although defendants have no constitutional right to counsel of

125. *Id.* A mandate is defined as "[a] precept or order issued upon the decision of an appeal or writ of error, directing action to be taken, or disposition to be made of case, by inferior court." BLACK'S LAW DICTIONARY 867 (5th ed. 1979).

126. *Maxwell*, 30 Cal. 3d at 622, 639 P.2d at 257, 180 Cal. Rptr. at 187. Vigorous dissents in the *Maxwell* decision raised some valid arguments as to the validity of removing counsel over defendant's objection. *See id.* at 623, 639 P.2d at 258, 180 Cal. Rptr. at 187 (Bird, C.J., concurring and dissenting). Justice Bird felt that a criminal defendant might not be capable of understanding the full implications of a waiver. *Id.* at 624, 639 P.2d at 259, 180 Cal. Rptr. at 188 (Bird, C.J., concurring and dissenting). She further pointed out that, as part of the literary-rights fee agreement, Maxwell had agreed to waive all attorney-client privileges once the trial had concluded. *Id.* at 625, 639 P.2d at 259, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting). Therefore, if the defendant decided to appeal a conviction, the prosecution could then call the defense attorney as a witness against the defendant, and the attorney could be compelled to testify. *Id.*, 639 P.2d at 260, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting).

127. *Id.* at 612-15, 639 P.2d at 251-53, 180 Cal. Rptr. at 180-82.

128. *Id.* at 615, 639 P.2d at 253, 180 Cal. Rptr. at 182.

129. *Id.* at 618 n.8, 639 P.2d at 255 n.8, 180 Cal. Rptr. at 184 n.8.

130. *Id.*

131. *Id.* at 622, 639 P.2d at 257-58, 180 Cal. Rptr. at 187.

choice, they may waive their right to effective representation.[132] For such waivers to be valid, however, defendants must waive their rights knowingly and intelligently.[133] This requirement raises several potential problems. First, the United States Supreme Court has not defined precisely the procedure for obtaining a competent and intelligent waiver.[134] Second, defendants waiving their right to effective representation not only agree to be represented by counsel who may otherwise be "ineffective" under the sixth amendment, but they may do so without appreciating the complexity and significance of conflicts of interest.[135] The logic in finding that a defendant can waive unforeseeable conflicts knowingly or intelligently has been questioned by at least two federal courts, which have invalidated waivers of conflicts when the conflict became apparent only during trial.[136]

In addition to the problems inherent in defendants waiving conflict-free counsel, the trial court must also fulfill its duty to ensure the ade-

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132. *See* Faretta v. California, 422 U.S. 806, 835 (1975).

133. People v. Bonin, 47 Cal. 3d 808, 837, 765 P.2d 460, 476, 254 Cal. Rptr. 298, 314 (1989); *see* Brady v. United States, 397 U.S. 742, 748 (1969). Most cases addressing a defendant's ability to waive conflict-free counsel knowingly and intelligently involve situations in which one attorney represented more than one defendant. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 76 (1942); United States v. Woods, 544 F.2d 242, 268-89 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); United States v. Bernstein, 533 F.2d 775, 787-88 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976); United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975); United States v. Garafola, 428 F. Supp. 620, 623-24 (D.N.J. 1977), *aff'd sub nom.* United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978). Multiple representation raises such concerns as the attorney's ability to act in the best interest of each defendant without sacrificing the best interests of the other defendants. People v. Mroczko, 35 Cal. 3d 86, 103-04, 672 P.2d 835, 844-45, 197 Cal. Rptr. 52, 62 (1983). For example, it may be in the best interest of one defendant (D1) to enter into a plea agreement to get a lighter sentence and avoid trial, but the co-defendant (D2) may need D1's testimony to prove D2's alibi. *See* MODEL RULES, *supra* note 3, Rule 1.7 comment 7 ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.").

134. *See* Wheat v. United States, 486 U.S. 153 (1988) (waiver of right to conflict-free counsel); *Faretta*, 422 U.S. 806 (waiver of right to counsel); *Brady*, 397 U.S. 742 (waiver of right to jury trial); Singer v. United States, 380 U.S. 24 (1965) (waiver of right to jury trial); Von Moltke v. Gillies, 332 U.S. 708 (1948) (waiver of right to counsel); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel). One lower federal court has developed a wide range of standards. In United States v. Donahue, 560 F.2d 1039 (1st Cir. 1977), the First Circuit held that if the appellate court believes the trial judge failed to "comment" sufficiently on the dangers facing the defendant in a multiple representation case, the burden shifts to the government on appeal to show that prejudice to the defendant was unlikely. *Id.* at 1044. The conviction in *Donahue* was reversed because the appellate court could not conclude with certainty that the potential conflict had not influenced counsel's choice of strategies. *Id.*

135. Maxwell v. Superior Court, 30 Cal. 3d 606, 630, 639 P.2d 248, 262, 180 Cal. Rptr. 177, 191 (1982).

136. *See* Buffalo Chief v. South Dakota, 425 F.2d 271, 280 (8th Cir. 1970); Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954).

quacy of the defendant's waiver from a position of ignorance.[137] In these instances, the trial judge will probably be uninformed about the attorney's theories of defense.[138] Even if the court has access to such information, however, the judge is precluded from making inquiries which compromise the defendant's right against self-incrimination or the attorney-client privilege.[139] As a result, trial courts make decisions regarding waivers of conflict-free counsel without fully considering the defendant's understanding of the conflict.[140]

2. Requirement of knowing and intelligent waiver as applied to literary-rights fee agreements in California

Although courts have applied the general waiver analysis to waivers of conflicts arising out of counsel with literary-rights fee agreements, literary-rights fee agreements raise additional conflict of interest problems. First, unlike the typical conflict of interest case where the attorney's loyalty is divided between two defendants, loyalty in literary-rights fee agreements is divided between the attorney and the client.[141] This may make it more difficult for a defendant to waive the right to conflict-free representation "knowingly and intelligently."[142] When the attorney's fee may rise in proportion to public exposure arising from the trial, the attorney's primary interest may not reside with the client.[143] In fact, attorneys may benefit greatly from losing cases involving literary-rights fee agreements, since it is probable that the public will find that defendants' convictions provide more interesting reading than their acquittals.[144]

Second, as the *Maxwell v. Superior Court* [145] decision illustrates, the terms of literary-rights fee agreements may themselves present problems for the defendant. In *Maxwell*, the defendant assigned to his private defense attorney all publication rights to his murder trial in return for legal

137. *See* Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978); United States v. Paz-Sierra, 367 F.2d 930, 932 (2d Cir. 1966), *cert. denied*, 386 U.S. 935 (1967); *Garafola*, 428 F. Supp. at 624; W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 11.9, at 520 (1985).

138. *See Holloway*, 435 U.S. at 484; *Paz-Sierra*, 367 F.2d at 932; *Garafola*, 428 F. Supp. at 624.

139. *Paz-Sierra*, 367 F.2d at 932; *see also Mroczko*, 35 Cal. 3d at 114, 672 P.2d at 853, 197 Cal. Rptr. at 70 (trial judge cannot conduct meaningful inquiry without violating defendant's fifth and sixth amendment rights).

140. *Mroczko*, 35 Cal. 3d at 114-15, 672 P.2d at 853, 197 Cal. Rptr. at 70.

141. *See Maxwell*, 30 Cal. 3d at 616, 639 P.2d at 253, 180 Cal. Rptr. at 182.

142. A valid waiver is more difficult under such circumstances because the defendant no longer has an independent advisor.

143. *Maxwell*, 30 Cal. 3d at 622, 639 P.2d at 257, 180 Cal. Rptr. at 187.

144. *See id.* at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.

145. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).

representation.[146] The terms of the literary-rights fee agreement resulted in a waiver of conflict-free counsel.[147] The California Supreme Court held that the trial court established Maxwell's competence in waiving his rights, and that his insistence on proceeding with his chosen counsel, despite extensive disclosures made on the record, constituted an adequate waiver of conflict-free counsel.[148]

This result seems undesirable, however, because the literary-rights fee agreement itself revealed the unequal bargaining power between the attorney and Maxwell.[149] First, the agreement specifically stated that Maxwell's attorney may have had an interest in creating trial publicity, even if such publicity was at Maxwell's expense.[150] Second, the agreement warned that the attorney could have avoided raising a viable insanity defense because to do so may have called into question Maxwell's capacity to enter into the agreement, thereby voiding it.[151] Third, the agreement provided that the attorney may have had an interest in seeing Maxwell sentenced to death because that result might have increased publicity.[152] Fourth, the agreement stated that the attorney's services did not include representation on appeal.[153] Fifth, Maxwell also agreed to waive upon demand his attorney-client privilege, as well as his fifth amendment right against self-incrimination.[154] The practical result of this waiver was that if Maxwell's case were reversed on appeal and retried, his counsel undertook no obligation to represent him and was free to publish incriminating information about Maxwell, and could have even been subpoenaed to testify against Maxwell.[155]

C. Difficulties in Establishing Prejudice

Even if a defendant demonstrates that the waiver of conflict-free counsel was not made knowingly and intelligently, the defendant must still demonstrate that the attorney's conflict prejudiced him at trial.[156]

146. *Id.* at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179.
147. *Id.* at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.
148. *Id.* at 621, 639 P.2d at 257, 180 Cal. Rptr. at 186.
149. *Id.* at 610-11, 639 P.2d at 250, 180 Cal. Rptr. at 179.
150. *Id.* at 628, 639 P.2d at 261, 180 Cal. Rptr. at 190 (Richardson, J., dissenting).
151. *Id.* (Richardson, J., dissenting).
152. *Id.* (Richardson, J., dissenting).
153. *Id.* at 626, 639 P.2d at 260, 180 Cal. Rptr. at 189 (Richardson, J., dissenting).
154. *Id.* (Richardson, J., dissenting).
155. *Id.* at 625, 639 P.2d at 259-60, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting).
156. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). The appeals process for claims of ineffective assistance of counsel differs somewhat between courts; generally, both state and

This presents a formidable obstacle for a defendant attempting to establish a conflict of counsel claim.

1. The general duty of inquiry

When reviewing conflict of counsel claims, appellate courts first determine whether the trial court had an initial duty to make an inquiry into the conflict.[157] Such a duty should be found where the trial court knew or reasonably should have known of a potential or actual conflict.[158] If the appellate court finds that such a duty existed and that the trial court breached the duty, the case should be remanded to the trial court for a determination on whether a conflict adversely affected his lawyer's performance.[159] On the other hand, if the trial court had no initial duty to inquire, the case should not be remanded.[160] The defendant, however, must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.[161] After this inquiry, if the reviewing court believes that a conflict of interest existed and prejudiced the defendant, the case should be reversed.[162]

In *Wood v. Georgia*,[163] the United States Supreme Court found that the trial court failed in its initial duty of inquiry.[164] The conflict in *Wood* arose because the defense attorney represented multiple defendants.[165] The defendants stated that their employer paid for the attorney, who was representing all three defendants.[166] The defendants further revealed that their employer had promised to pay for any fines and post any necessary bonds.[167] The employer failed, however, to pay the fines assessed against his employees, leading to the employees' probation revocations.[168]

In reviewing the record, the Supreme Court found that the trial court had a duty to inquire because the attorney's conflict of interest was evident—the employer's decision not to pay the fines subjected the de-

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federal courts follow their own methods of dividing the responsibility for ensuring effective counsel. *See infra* notes 161-78 and accompanying text.

157. *Sullivan*, 446 U.S. at 347.
158. Wood v. Georgia, 450 U.S. 261, 273-74 (1981); *Sullivan*, 446 U.S. at 347.
159. *Wood*, 450 U.S. at 273-74.
160. *See Sullivan*, 446 U.S. at 349-50.
161. *Id.* at 348.
162. *Id.* at 348-50.
163. 450 U.S. 261 (1981).
164. *Id.* at 272.
165. *Id.* at 266.
166. *Id.*
167. *Id.*
168. *Id.* at 267.

fendants to the probation revocation charges.[169] Accordingly, the Court remanded the case for a determination of whether the possible conflict of interest actually existed at the time of the probation hearing or earlier.[170]

2. The duty of inquiry as applied to literary-rights fee agreements in California

California's approach to the duty of inquiry, articulated in *People v. Bonin*,[171] sharply departs from the framework of *Wood*.[172] In *Bonin*, the California Supreme Court initially found that the trial court had no duty to inquire into Bonin's literary-rights fee agreement with his attorney.[173] Upon finding that no duty existed, the California Supreme Court ceased investigation of the alleged conflict based on the literary-rights fee agreement.[174] The *Bonin* court's failure to inquire further is inconsistent with the United States Supreme Court's precedent requiring the appellate court to review the trial record to determine if an actual conflict existed that prejudiced the defendant at trial, even absent a duty of inquiry.[175]

A finding of no duty to inquire should not alone determine a defendant's right to relief for ineffective counsel.[176] While the attorney bears partial responsibility for disclosing conflicts, the court must also share part of that responsibility.[177] Indeed, if defense counsel is so ineffective that he or she fails to bring conflicts to the court's attention, the defendant should not be denied the opportunity to prove that ineffectiveness on appeal.

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169. *Id.*

170. *Id.* at 273-74.

171. 47 Cal. 3d 808, 765 P.2d 460, 254 Cal. Rptr. 298 (1989), *cert. denied*, 110 S. Ct. 1506 (1990).

172. *Compare Wood*, 450 U.S. at 273 (court has duty to recognize possibility of disqualifying conflict of interest) *with Bonin*, 47 Cal. 3d at 838, 765 P.2d at 477, 254 Cal. Rptr. at 315 (court "cannot be deemed to have known, or to have had reason to know, of the possibility of a conflict in this regard").

173. *Bonin*, 47 Cal. 3d at 838, 765 P.2d at 476, 254 Cal. Rptr. at 315.

174. *Id.*, 765 P.2d at 476-77, 254 Cal. Rptr. at 315. Ultimately, the *Bonin* court found that the trial court failed to follow through on investigating a second conflict—prior representation. *Id.*, 765 P.2d at 477, 254 Cal. Rptr. at 315. The prosecution intended to call a witness who had formerly been represented by the same law firm that was representing Bonin in his trial. *Id.* at 825, 765 P.2d at 469, 254 Cal. Rptr. at 307. Although the trial court had inquired into the potential conflict created by such prior representation, upon finding such conflict likely, the court did not recuse the conflicted counsel. *Id.* at 838-39, 765 P.2d at 477, 254 Cal. Rptr. at 315. This failure to act appropriately in the face of a potential conflict constituted error under *Wood*. *Id.* at 839, 765 P.2d at 477, 254 Cal. Rptr. at 316.

175. *See Sullivan*, 446 U.S. at 348-49.

176. *See id.*

177. *See id.* at 346-47.

D. Problems of Proof

Ineffective assistance of counsel cases are evaluated pursuant to one of two standards of review.[178] In most instances, the defendant receives a limited presumption of prejudice. In such cases the defendant must demonstrate that an actual conflict of interest existed and that the conflict adversely affected counsel's performance at trial.[179] Under the second standard, the court presumes prejudice without inquiry into counsel's actual performance at trial.[180] California courts have not yet addressed which standard applies to cases involving literary-rights fee agreements. Ineffective assistance of counsel claims based upon an established conflict of interest, however, have been subject to the first standard, which requires that the defendant prove that an actual conflict adversely affected counsel's performance at trial.[181] An examination of these two standards of review, however, indicates that a conflict of interest based on a literary-rights fee agreement should fall into the second category.[182] This section reviews the two standards of review and then concludes that the presumed prejudice standard should apply in literary-rights fee agreement cases.

1. Limited presumption of prejudice: *Strickland v. Washington*

In *Strickland v. Washington*,[183] the United States Supreme Court applied the limited presumption of proof standard to an ineffective assistance of counsel claim.[184] In *Strickland*, the defendant was convicted of committing three brutal murders during a three-day period.[185] At Strickland's sentencing hearing, his counsel argued that the defendant had no history of criminal activity and that he had committed the crimes under extreme mental or emotional disturbance.[186] However, counsel failed to introduce character witnesses or evidence concerning Strickland's character and emotional state.[187] He also failed to obtain a presentencing report.[188] Strickland pleaded guilty against his attorney's wishes

178. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984).
179. *Id.*
180. *Id.*; *see* United States v. Cronic, 466 U.S. 648, 662 & n.31 (1984).
181. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980).
182. *See infra* notes 214-28 and accompanying text.
183. 466 U.S. 668 (1984).
184. *Id.* at 693.
185. *Id.* at 671-72.
186. *Id.* at 673-74.
187. *Id.* at 673.
188. *Id.*

and was sentenced to death.[189] Strickland appealed, but the United States Supreme Court rejected Strickland's claim that he had been denied effective assistance of counsel.[190] In reaching its holding, the Court reasoned that, under the principle of reversible error, the defendant has the burden of showing by a preponderance of the evidence that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[191]

Counsel's error, according to the Court, should not be judged by looking objectively at a checklist of basic requirements of attorney competency.[192] The Court noted that the right to effective counsel cannot be violated for its own sake, but only to the extent that denial of the right deprives the defendant of a fair trial.[193] Applying this standard, the Court examined the attorney's performance and found that Strickland's attorney's conduct was not unreasonable, but even if it were, that Strickland suffered insufficient prejudice to reverse his death sentence.[194]

The *Strickland* Court pointed out that a reviewing court must not judge counsel's trial tactics with hindsight; instead, it should focus on counsel's perspective at the time of the trial court's decision.[195] The Court further noted that a reviewing court must presume that counsel's choice of trial tactics falls within "the wide range of professionally competent assistance."[196] A presumption of effective assistance is required because assessment of a trial counsel's performance after the fact is extremely difficult for the reviewing court.[197] Also, absent this presumption, counsel may be discouraged from selecting a defense strategy which may best suit the facts.[198]

2. Presumed prejudice: *United States v. Cronic*

Generally, a defendant claiming a violation of his or her right to effective assistance of counsel bears the burden of demonstrating a constitutional violation.[199] Accordingly, the *Strickland* Court stated that conflicts of interest create a limited presumption of prejudice.[200] Under this

189. *Id.* at 672.
190. *Id.* at 700.
191. *Id.* at 694.
192. *Id.* at 688.
193. *Id.* at 689.
194. *Id.* at 698-99.
195. *Id.* at 689.
196. *Id.* at 690.
197. *Id.* at 689.
198. *Id.* at 690.
199. *Cronic*, 466 U.S. at 658.
200. *Strickland*, 466 U.S. at 692.

approach, prejudice is presumed only after the defendant demonstrates that counsel established an actual conflict of interest existed and that the conflict adversely affected counsel's performance.[201] In *United States v. Cronic*,[202] however, the United States Supreme Court enumerated certain circumstances that are so likely to prejudice the defendant that prejudice could be presumed without requiring any further showing by the defendant.[203]

In *Cronic*, the defendant was an alleged "check-kiter" whose retained counsel withdrew shortly before the trial date.[204] The trial court appointed a young lawyer with a real estate practice to represent Cronic, but allowed him only twenty-five days for pretrial preparation.[205] It had taken the government over four and one-half years to investigate the case.[206] Cronic was convicted and appealed his conviction on an ineffective assistance of counsel theory.[207]

In analyzing Cronic's ineffective assistance of counsel claim, the Court listed circumstances that are so likely to prejudice a defendant that prejudice is presumed without any additional showing by the defendant.[208] Such circumstances include instances where counsel is denied completely, or denied at a critical stage of the proceedings.[209] Additionally, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then the adversary process is presumptively unreliable.[210] Further, the Court commented that:

> Circumstances [reaching constitutional error of the first magnitude] may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of trial.[211]

The Court found that Cronic's case was not one in which the surrounding circumstances made it unlikely that he received effective assistance of counsel.[212] Thus, Cronic bore the burden of proving the sixth amend-

201. *Id.*
202. 466 U.S. 648 (1984).
203. *Id.* at 658-59.
204. *Id.* at 649.
205. *Id.*
206. *Id.*
207. *Id.* at 652.
208. *Id.* at 658-59 & n.25, 662 & n.31.
209. *Id.* at 658-59 & n.25.
210. *Id.* at 659.
211. *Id.* at 659-60.
212. *Id.* at 666.

ment violation.[213]

3. The better standard for literary-rights fee agreement cases

Unfortunately, the limited presumption of prejudice requirement sidesteps the fact that a defendant is claiming violation of a fundamental constitutional right—the right to effective assistance of counsel.[214] Despite the *Strickland* Court's statement to the contrary, courts and commentators have argued that the right to effective counsel deserves protection in and of itself[215] because the public maintains an interest in a minimum standard of effective advocacy.[216] Thus, whether or not the error prejudiced the defendant, a new trial should be granted when counsel falls below a minimum standard of competency.[217]

Strickland's limited presumption of prejudice analysis raises several issues. First, in conflict of interest situations, establishing that a conflict affected counsel's performance is virtually impossible to prove because

213. *Id.*

214. *Strickland*, 466 U.S. at 686.

215. *See, e.g.*, United States v. Decoster, 624 F.2d 196, 214 (D.C. Cir. 1976); Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 200 (1984); Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369, 387 (1969).

216. *See Decoster*, 624 F.2d at 214. In *Decoster*, Judge Leventhal placed all ineffectiveness claims on a continuum. *Id.* at 201-03. Categorical violations comprising state-sanctioned "structural and procedural" impediments to effective representation lay at one end of the continuum. *Id.* at 201. Such violations require automatic reversal. *Id.* At the other end of the continuum lay judgmental violations, comprising cases where attorney incompetence constitutes the violation. *Id.* at 202. In such cases, reversal must be determined after a fact-specific inquiry reveals a showing of prejudice. *Id.* at 203. Finally, claims of ineffective counsel due to conflicts of interest lay in the middle of the continuum. *Id.* at 202. A conflict must be shown to exist, based upon specific facts. *Id.* However, once the court finds a conflict, prejudice is presumed. *Id.* A subsequent United States Supreme Court case demonstrated that, even in conflict cases, a defendant must prove prejudice on the facts. *See* Wood v. Georgia, 450 U.S. 261, 272 (1981).

Dissenting in *Decoster*, Judge Bazelon argued that a reversible violation of the sixth amendment should be established merely by showing a departure from one of a set of guidelines governing a minimum level of attorney competency. *Decoster*, 624 F.2d at 264 (Bazelon, J., dissenting). Thus, Bazelon asserted that the following tasks can never be ignored: (1) conferring with the client without delay and as often as necessary; (2) fully discussing potential strategies and tactical choices; (3) advising the client of his rights and taking all actions necessary to preserve them; and (4) conducting appropriate factual and legal investigations. *Id.* at 276 (Bazelon, J., dissenting). Once the reviewing court determines the substantial violation of one of these specified duties, the burden shifts to the government to prove, beyond a reasonable doubt, that the error was harmless. *Id.* at 275 (Bazelon, J., dissenting).

Others have agreed with Judge Bazelon that any judgmental approach is erroneous in evaluating sixth amendment claims of ineffective assistance. *See* Smithburn & Springman, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOREST L. REV. 497, 523 (1981).

217. *See supra* notes 214-16 and accompanying text.

one cannot surmise the subjective reasoning of counsel in implementing or forgoing a trial strategy.[218] Thus, a defendant faces a formidable task in proving that a particular conflict led to a certain strategy.[219] Second, even a trial record containing overwhelming evidence of guilt may not accurately indicate a conflict's impact on counsel's performance, because a claim of prejudice based on a conflict of interest is "based on a circumstance not appearing in the record, that allegedly affect[ed counsel's] judgment."[220]

Considering these problems raised by the *Strickland* standard, the conflict presented by a literary-rights fee agreement fits more appropriately into the presumed prejudice standard articulated in *Cronic*. In *Maxwell v. Superior Court*,[221] the California Supreme Court assessed the validity of a literary-rights fee agreement, which arguably presents circumstances posited by the *Cronic* Court, where the likelihood of any lawyer providing effective assistance "is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct at trial."[222] The literary-rights fee agreement in *Maxwell* expressly warned the defendant that the agreement may result in possible conflicts and prejudice.[223] Specifically, it declared that counsel may wish to (1) create damaging publicity to enhance exploitation value; (2) avoid mental defenses; and (3) see the defendant convicted and even sentenced to death for publicity value.[224] In addition, although Maxwell's counsel promised in the agreement to provide the best defense possible,[225] the promise lacked real meaning because counsel merely pledged a pre-existing duty.[226] Finally, literary-rights fee agreements contemplate that the attorney will conduct the defense with an eye toward earning his or her livelihood, rather than the defendant's best interests.[227] Accordingly, the circumstances in *Maxwell* presented a situation where applying the presumption of prejudice standard may have been appropriate.[228]

218. *See* Glasser v. United States, 315 U.S. 60, 75-76 (1942).
219. *Id.*
220. United States v. Hearst, 638 F.2d 1190, 1195 (1980), *cert. denied*, 451 U.S. 938 (1981).
221. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).
222. *Cronic*, 466 U.S. at 660.
223. *Maxwell*, 30 Cal. 3d at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.
224. *Id.*
225. *Id.*
226. *Id.* at 628, 639 P.2d at 261, 180 Cal. Rptr. at 191 (Richardson, J., dissenting).
227. People v. Corona, 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894, 915 (1978).
228. *See Cronic*, 466 U.S. at 659-60.

V. POSSIBLE REMEDIES

Several possible solutions may be appropriate to protect defendants from conflicts of interest arising from literary-rights fee agreements. The most drastic measure to avoid the problems raised by such agreements would be to outlaw them entirely, either by legislative enactment[229] or a judicially established rule of criminal procedure.[230] Prohibiting literary-rights fee agreements would shift responsibility for avoiding conflicts back to the attorney and the trial court. This remedy would best protect the sixth amendment rights of criminal defendants by eliminating potential conflicts of interest caused by defense attorneys obtaining a financial interest in the defendant's literary-rights. Similarly, the California courts or legislature could require counsel to submit an affidavit pledging the nonexistence of any literary-rights fee agreements.

As an alternative, the California State Bar could adopt DR 5-104(B) of the *Model Code*,[231] which expressly prohibits literary-rights fee agreements. This alternative, however, would be less effective than a legislative response because disciplining attorneys for ethical violations is merely discretionary with the courts.[232]

Another possible remedy to protect a defendant from conflicts of interest arising from literary-rights fee agreements is a law allowing such agreements, but requiring that the attorney charge a reasonable fee rather than a percentage of future profits and collect that fee from publication proceeds after exhausting all levels of defense. Such a law would minimize the attorney's interest in sensationalizing the defendant's trial because any profits in excess of the established fees would go to the de-

229. California has a statute focusing on literary rights. CAL. CIV. CODE § 2225 (West Supp. 1990). This statute, however, focuses on compensating victims and not protecting defendants. *See supra* notes 65-69 and accompanying text. The author, therefore, proposes enactment of an additional statute to specifically proscribe literary-rights fee agreements.

230. Rules to protect against similar conflict of interest situations currently exist. *See, e.g.*, FED. R. CRIM. P. 44(c). Rule 44(c) provides in pertinent part:

> [T]he court shall personally inquire with respect to such joint representation and shall promptly advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe that 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.

Id; *accord* People v. Barboza, 29 Cal. 3d 375, 381, 627 P.2d 188, 190, 173 Cal. Rptr. 458, 461 (1981) (public defenders should refrain from entering into any contract linking attorney compensation to representation in manner that attorney would possess interest adverse to client's). Similarly, Judge Richardson, dissenting in *Maxwell v. Superior Court*, advocated that all literary-rights fee agreements be banned under a court-drafted rule of criminal procedure. 30 Cal. 3d 606, 636, 639 P.2d 248, 266, 180 Cal. Rptr. 177, 196 (1982) (Richardson, J., dissenting).

231. MODEL CODE, *supra* note 55, DR 5-104(B).

232. Weir v. State Bar, 23 Cal. 3d 564, 576, 591 P.2d 19, 24, 152 Cal. Rptr. 921, 927 (1979).

fendant. In addition, the legislation should require the attorney to abstain from any disclosure of information regarding the subject matter of the litigation until all appeals have been exhausted. The law should provide that defendants cannot waive the attorney-client privilege until such time.

At a minimum, courts sahould make it less difficult for defendants claiming ineffective assistance of counsel based on literary-rights fee agreements to establish their claims by applying the presumption of prejudice standard articulated in *United States v. Cronic*, rather than the limited presumption of prejudice set forth in *Strickland v. Washington*. The former standard is appropriate because the conflict of interest problems that literary-rights fee agreements raise make it highly unlikely that any lawyer could render effective assistance.[233]

VI. CONCLUSION

In the area of literary-rights fee agreements, California arguably diverges from both the constitutional principles governing claims of effective assistance of counsel and the guidelines embodied in the ABA ethical rules. Under the existing case law, however, California courts rarely find that a defendant's sixth amendment right to counsel has been violated by a literary-rights fee agreement.[234] Moreover, reversible error appears virtually impossible to prove.[235]

Cases such as *People v. Bonin*[236] and *Maxwell v. Superior Court*[237] reveal a trend of relaxation from earlier California law governing conflicts of interest. Given the conservative idealogy dominating the present California Supreme Court, this trend may go unchecked until stopped by constitutional barriers or, more likely, until the legislature enacts a statute prohibiting literary-rights fee agreements.

When conflicted counsel is prohibited from representing a defendant, both the defendant and the public benefit.[238] The defendant benefits by better representation; the public benefits by having its faith in the judicial system preserved. On the other hand, where the defendant waives his or her right to conflict-free counsel, it is not only the defendant who suffers, but the public as well. The defendant may receive inadequate

233. *See supra* notes 221-28 and accompanying text.

234. *See supra* notes 128-31 and accompanying text.

235. *See supra* notes 221-23 and accompanying text.

236. 47 Cal. 3d 808, 765 P.2d 460, 254 Cal. Rptr. 298 (1989), *cert. denied*, 110 S. Ct. 1506 (1990).

237. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).

238. *See supra* notes 73-89 and accompanying text.

representation,[239] while the public may incur the expense of processing appeals based on the conflicted representation,[240] in addition to losing confidence in the judicial process.[241]

239. *Maxwell*, 30 Cal. 3d at 616, 639 P.2d at 253-54, 180 Cal. Rptr. at 182-83.
240. *See supra* note 86 and accompanying text.
241. *See supra* notes 87-90 and accompanying text.