CRIMINAL PROCEDURE—RIGHT TO COUNSEL—DEFENDANT ALLEGING DENIAL OF RIGHT TO COUNSEL DUE TO CONFLICT OF INTEREST MUST PROVE ACTUAL CONFLICT OF INTEREST AND ITS ADVERSE EFFECT ON COUNSEL'S REPRESENTATION—*United States v. Laura*, 667 F.2d 365 (3d Cir. 1981).

The problems posed by multiple representation have troubled the bench and the bar for years.[1] Recently, the Supreme Court of the United States has clarified the standard which federal courts should employ when reviewing claims of ineffective assistance of counsel allegedly resulting from multiple representation.[2] The Court has also adopted rule 44(c) of the Federal Rules of Criminal Procedure which represents the Advisory Committee's consensus on the duties incumbent upon a federal trial court when faced with joint representation.[3] Although the procedures fashioned by rule 44(c) are a benchmark, other procedures must be adopted in order to achieve the Committee's goal.[4] *United States v. Laura*[5] illustrates the ambiguities inherent in the standard of appellate review, the advantages of the procedures established by rule 44(c), and the necessity of adopting procedures which make the bar sensitive to the possibility that a conflict of interest might emerge when counsel represents more than one party in a criminal proceeding.

In February 1976, a grand jury in the Eastern District of Pennsylvania issued a five-count indictment charging the appellant, Priscilla

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[1] *See* Glasser v. United States, 315 U.S. 60 (1942). The American Bar Association is particularly critical of this practice. The Association's Advisory Committee on Standards for the Administration of Justice has noted:

> 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 codefendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop . . . the several defendants give an informed consent . . . and the consent of the defendants is made a matter of judicial record.

1 STANDARDS FOR CRIMINAL JUSTICE Standard 4, § 3.5 (b) (2d ed. 1980).

[2] *See* Wood v. Georgia, 450 U.S. 261 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

[3] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 77 F.R.D. 507 (1978) [hereinafter cited as Advisory Committee's Comments]. The Committee fashioned rule 44(c) with the intent to establish a procedure which would avoid "the occurrence of events which . . . give rise to a plausible post conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel." *Id.* at 594.

Congressional legislation delayed the implementation of rule 44(c) until December 1, 1980. *See* Act of July 31, 1979, Pub. L. No. 96-42, 93 Stat. 326.

[4] *See supra* note 3; *infra* notes 123-39 and accompanying text.

[5] 667 F.2d 365 (3d Cir. 1981).

Laura, her husband Anthony Laura, and ten others with various degrees of complicity in a cocaine-importing scheme.[6] The bill charged Priscilla Laura with importing cocaine and conspiring to import cocaine.[7] The bill charged Anthony Laura with importing cocaine, conspiring to import and distribute cocaine, and possessing cocaine with the intent to distribute.[8]

The Lauras engaged Robert I. Kalina, Esq., to represent them.[9] Acting at the government's request, however, the trial judge issued an order requiring all the defendants to obtain separate counsel.[10] In opposition to that order, the appellant, her husband, and their attorney each filed affidavits prepared by Kalina.[11] In her affidavit, Mrs. Laura expressed her confidence in Kalina and stated that she perceived no conflict of interest arising from his joint representation of both her and her husband.[12]

At the hearing to determine whether to vacate his order requiring defendants to obtain separate counsel, Judge Huyett directed Kalina to question the Lauras individually.[13] The judge instructed Kalina to

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[6] *Id.* at 367. The Government's indictment indicated that Priscilla Laura, along with several other codefendants, went to an apartment in Miami for the purpose of paying approximately $5,000 to use the apartment to meet their cocaine connection; that they paid $15,000 for the cocaine which they received; and that they tested the cocaine. United States v. Laura, 500 F. Supp. 1347, 1354-55 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981).

[7] 667 F.2d at 367. Mrs. Laura was charged with violating 21 U.S.C. §§ 952, 953 (1976 & Supp. II 1978). 21 U.S.C. § 952 provides in pertinent part that it is "unlawful to import . . . any controlled substance . . . or narcotic drug." 21 U.S.C. § 963 provides in pertinent part that it is unlawful to attempt or conspire "to commit any offense defined in this subchapter . . . the commission of which was the object of the attempt or conspiracy."

[8] United States v. Laura, 500 F. Supp. 1347, 1349 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981). The indictment charged Mr. Laura under all five counts. *Id.*

[9] 667 F.2d at 367. Mrs. Laura later testified that her husband had actually hired Kalina and paid his fees. *Id.* at 369. The Government did not bring forth any evidence to the contrary. *Id.*

[10] United States v. Laura, 500 F. Supp. 1347, 1350 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981).

[11] 667 F.2d at 367. The only differences between the affidavits filed by Anthony Laura and Priscilla Laura were the references to "my wife" in Mr. Laura's affidavit and the references to "my husband" in Mrs. Laura's affidavit. *Id.*

[12] *Id.* Ironically, the appellant's affidavit actually foresaw that a conflict of interest might arise in a plea bargaining situation. *See id.* The affidavit prepared by counsel, however, brushed this potential conflict aside, unequivocally stating that Laura did "not wish to entertain plea bargaining." *Id.*

Given the dynamics of criminal proceedings and counsel's generally limited knowledge of his client's case during its initial phase, such a blanket statement standing alone should be accorded little, if any, probative weight. *See* United States v. Garafola, 428 F. Supp. 620, 626-27 (D.N.J. 1977), *aff'd sub nom.* United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); Geer, *Representation of Multiple Criminal Defendants: Conflict of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 145 (1978); Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1077-80 (1979).

[13] 667 F.2d at 368.

establish on the record that the Lauras knowingly and intentionally waived their sixth amendment right to separate counsel.[14] Nevertheless, the government continued to oppose counsel's joint representation, noting that the degree of culpability of the two defendants differed and an inherent conflict existed.[15] Despite the government's objection, the court found that the Lauras had waived their right to separate counsel and allowed Kalina to continue to represent them.[16]

Before the case went to trial, the government and the defendants entered into a plea bargain agreement.[17] Pursuant to the terms of the plea agreement, all of the defendants withdrew their pleas of not guilty and agreed to plead guilty to the specific counts with which

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[14] *Id.* The manner in which Judge Huyett addressed Kalina is indicative of the *pro forma* nature of the hearing. The judge merely directed Kalina to elicit from the defendants, statements "roughly parallel[ing] the information in the affidavit[s] so there is no question that they understand their rights, that they waive them, that they wish you as their attorney, [and] believe there is no conflict of interest." *Id.* Appellant's responses to Kalina's leading questions consisted almost entirely of affirmative answers:

Q. You have retained me to represent you in this matter?
A. Yes.
Q. Am I the attorney of your choice?
A. Yes.
Q. Are you aware that Anthony Laura retained me?
A. Yes.
Q. We have discussed this case and reviewed the facts of this case?
A. Yes.
Q. Do you perceive a conflict of interests in my representing you both, you and Anthony, in this case?
A. No.
Q. Do you desire to have me represent you while representing Anthony in this case?
A. Yes.
Q. Do you waive the claim to raise the issue at any point in this matter?
A. Yes.
Q. Have I informed you that the Court stated to me in a conference on April 15, 1976, in this Courthouse that either you or Anthony should obtain other counsel and I could not represent both of you?
A. Yes.
Q. Do you believe that would deprive you of counsel of your choice?
A. Yes.
Q. Do you believe I can represent your best interests in this case while representing Anthony?
A. Yes.
Q. Can you afford to retain other counsel?
A. No, I cannot afford it.

Id.

[15] *Id.*

[16] United States v. Laura, 500 F. Supp. 1347, 1351 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981). Judge Huyett, however, did not unequivocally deny the Government's request for separate counsel. 667 F. 2d at 368. He advised the Government that they could file a motion for separate counsel at any time during the trial if they believed that a conflict of interest arose which required separate counsel. *Id.*

[17] 667 F.2d at 368.

they were charged.[18] Judge Huyett accepted the defendants' guilty pleas at an *en masse* hearing in which he read only a fragment of the charges brought against the defendants.[19] Subsequently, he sentenced Priscilla Laura to two concurrent five year terms of probation.[20] Anthony Laura was sentenced to two years imprisonment and a special parole term of three years on each count to run concurrently.[21]

Approximately one year later, a federal court in Florida convicted Priscilla Laura on an unrelated charge of possession and distribution of cocaine and sentenced her to imprisonment.[22] After Laura was sentenced in Florida, her probation officer in Pennsylvania filed a petition seeking the revocation of her probation.[23] Prior to the hearing before Judge Huyett, Laura made a motion to have her 1976 sentence vacated and her plea of guilty withdrawn pursuant to rule 32(d) of the Federal Rules of Criminal Procedure.[24] Laura asserted that the 1976 sentence imposed on her was invalid because counsel's joint representation violated her sixth amendment right to effective assistance of counsel.[25] Laura also asserted that her guilty plea should be withdrawn because the trial judge had failed to comply with the procedural requirements of rule 11(c) of the Federal Rules of Criminal Procedure, when he took appellant's plea of guilty.[26]

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[18] *Id.*

[19] *Id.* at 368-69.

[20] *Id.* at 369.

[21] *Id.*

[22] United States v. Laura, 500 F. Supp. 1347, 1349 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981). Judge Broderick's opinion indicates Laura was sentenced to four years imprisonment for her Florida conviction. *Id.* at 1349. The first Third Circuit opinion in this case, United States v. Laura, 607 F.2d 52 (3d Cir. 1979), indicates that Laura was sentenced to only two years imprisonment. *Id.* at 54.

[23] United States v. Laura, 607 F.2d 52, 54 (3d Cir. 1979).

[24] 667 F.2d at 369. FED. R. CRIM. P. 32(d) provides: "A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." Generally, a defendant seeking to withdraw a plea of guilty after sentencing bears the burden of establishing manifest injustice. United States v. Washington, 341 F.2d 277 (3d Cir. 1965). Where the trial judge has failed to properly scrutinize a defendant's plea of guilty as required by rule 11, manifest injustice need not be proven. United States v. Cantor, 469 F.2d 435 (3d Cir. 1972).

[25] 667 F.2d at 370.

[26] *Id.* FED. R. CRIM. P. 11(c) provides:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
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> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law. . . .

The trial judge ordered Laura to retain local counsel before he heard her motion.[27] Prior to the hearing in December 1978, however, Laura sought a transfer of her case to another judge because her newly retained local counsel had a possible conflict of interest with Judge Huyett.[28] At the hearing Judge Huyett refused to transfer the case.[29] Rather, he dismissed Laura's local counsel; vacated his order requiring local counsel; dismissed appellant's motion to withdraw her plea of guilty and vacate her sentence; revoked appellant's probation; and sentenced appellant to prison.[30] Laura appealed.[31]

The Third Circuit court reversed and remanded, holding that the district court should have either granted Laura's motion to transfer or made specific findings of fact to explain why it had denied the motion.[32] On remand, Judge Huyett vacated all the rulings he had made at the December 1978 hearing and ordered that the case be transferred to another court to be considered *ab initio*.[33]

Judge Broderick conducted the evidentiary hearing. Priscilla Laura, the only witness, testified that her husband had retained and paid Kalina.[34] Although she acknowledged that Kalina had conducted long conferences in the presence of both her and her husband, Laura testified that her individual counselling consisted of merely one ten minute private consultation with Kalina.[35] Laura further testified that Kalina had neither discussed the meaning of the affidavit she signed, which denied that a conflict of interest existed, nor had he bothered to explain the meaning of a conflict of interest or the possible ramifications a conflict of interest would have on his ability to plea bargain effectively on her behalf.[36]

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[27] United States v. Laura, 607 F.2d 52, 54 (3d Cir. 1979). A local court rule required local counsel. *See* E.D. PA. CT. R. 10.

[28] United States v. Laura, 607 F.2d 52, 54 (3d Cir. 1979). Laura asserted that the trial court had an interest in a corporation which had sued individuals who were represented by local counsel. *Id.* Given that the judge was expected to testify in that action, she asserted that the judge might be biased, and therefore sought a transfer of her case. *Id.*

[29] *Id.* at 54-55.

[30] *Id.* at 55. Judge Huyett sentenced Laura to the same term to which her husband had been sentenced. *Id.*

[31] United States v. Laura, 607 F.2d 52, 55 (3d Cir. 1979).

[32] *Id.* at 58. The court noted that the local counsel might be of "particular assistance to a defendant confronting sentencing, as local counsel may be aware of a local judge's unique approaches or preferences." *Id.* at 57.

[33] 667 F.2d at 369.

[34] United States v. Laura, 500 F. Supp. 1347, 1351 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981).

[35] *Id.*

[36] *Id.* at 1350-51. Laura and her husband were in Florida when the trial court entered the order requiring her and her husband to retain separate counsel. Laura testified that Kalina had telephoned her, informed her of the judge's order, and advised her that he would prepare

Prior to being presented with the plea bargain agreement, Laura testified that counsel had advised her that the government did not have a strong case against her.[37] When a tentative plea bargain agreement had been reached, however, Laura asserted that Kalina had explained that it was an "all or nothing" deal, contingent upon all the defendants accepting it and entering guilty pleas.[38] Laura also testified that when Kalina discussed the plea agreement with her, he noted that if she refused to accept it, her husband could face up to fifteen years imprisonment.[39]

Although Judge Broderick acknowledged that an actual conflict of interest existed, he found that Laura had waived her right to effective assistance of counsel.[40] Judge Broderick also dismissed Laura's contention that Judge Huyett's acceptance of her guilty plea was defective, finding that the hearing essentially conformed to the procedure established by rule 11 of the Federal Rules of Criminal Procedure.[41] Moreover, he found that Laura failed to establish prejudice insofar as she never asserted that her plea would have been different but for the trial court's failure to fully explain the charges.[42]

In a two to one decision, the Court of Appeals for the Third Circuit affirmed Judge Broderick's ruling.[43] Before the court addressed Laura's contention that her sixth amendment rights had been violated, the majority canvassed two recent United States Supreme Court decisions which they maintained established the standard of review appellate courts should employ when reviewing claims alleging ineffective assistance of counsel due to multiple representation.[44]

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affidavits for both her and her husband which would express their desires to waive their right to separate representation and to have Kalina continue as counsel. *Id.* at 1350.

[37] 667 F.2d at 371. At the hearing, Laura testified that counsel had advised her that she would be acquitted if she stood trial. United States v. Laura, 500 F. Supp. 1347, 1352 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981).

[38] United States v. Laura, 500 F. Supp. 1347, 1351 (E.D. Pa. 1980), *aff'd*, 667 F.2d 365 (3d Cir. 1981).

[39] *Id.*

[40] *Id.* Judge Broderick observed that "[t]he trial judge played a positive role in insuring that the defendant's choice was made intelligently." *Id.* He predicated his ruling primarily on the following factors: the examination of appellant by Kalina; the affidavit filed by the appellant; the fact that appellant had attended college; and the fact that although the appellant testified that Kalina had explained neither the contents of her affidavit nor the ramifications of a conflict of interest to her, she never testified that she misunderstood either. *Id.* at 1353. Under those circumstances, to the extent appellant's testimony conveyed that her waiver was neither knowing, voluntary, nor intelligent, Judge Broderick refused to credit it. *Id.*

[41] *Id.* at 1355.

[42] *Id.*

[43] United States v. Laura, 667 F.2d 365 (3d Cir. 1981). Judges Hunter, Gibbons, and Stern heard the appeal. United States District Court Judge Stern sat by designation. *Id.* at 366.

[44] *Id.* at 370. Ironically, Judge Hunter, writing for the majority, relied on two Supreme Court decisions which reversed appellate panels on which he sat. Judge Hunter authored the

Writing for the majority, Judge Hunter observed that the Supreme Court, in *Cuyler v. Sullivan*,[45] held that one initially advancing a claim of ineffective assistance of counsel due to multiple representation had to establish an actual conflict of interest which adversely affected his representation.[46] Recognizing that the *Cuyler* Court stated that in such a situation an appellant need not show prejudice,[47] the majority intimated that the Supreme Court in *United States v. Morrison*[48] had more fully delineated the burden which a defendant has to carry to establish a violation of the right to counsel.[49] Judge Hunter noted that both decisions illustrated the need for a showing of "some adverse effect upon the effectiveness of counsel's representation."[50]

Assessing the actions of Laura's attorney, the court concluded that Laura failed to show that the conflict of interest had adversely affected Kalina's performance.[51] The majority reviewed counsel's actions which preceded Laura's decision to accept the plea agreement and categorized them as "nothing more" than the transmission of

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opinion in United States v. Morrison, 602 F.2d 529 (3d Cir. 1979), *rev'd*, 449 U.S. 361 (1981), and joined in the court's decision in United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512 (3d Cir. 1979), *rev'd sub nom.* Cuyler v. Sullivan, 446 U.S. 335 (1980).

[45] 446 U.S. 335 (1980). In *Cuyler*, Sullivan and two others were indicted and charged with committing two murders. *Id.* at 337. The three defendants were represented by the same two attorneys and tried separately. *Id.* Sullivan, the first defendant to go to trial, rested his case after the state presented its case and was found guilty by the jury solely on the presentation of circumstantial evidence, while his codefendants were subsequently acquitted. Commonwealth v. Sullivan, 446 Pa. 419, 425-27, 286 A.2d 898, 906-07 (1971).

Sullivan appealed his conviction, alleging among other things that he had been denied effective assistance of counsel because his attorneys represented conflicting interests. At a state hearing, one of his attorneys testified that Sullivan's failure to present a defense had been influenced by the attorney's concern for the interests of Sullivan's codefendants. 446 U.S. at 338-39.

The Court of Appeals for the Third Circuit reversed Sullivan's conviction, holding that an appellant had to show only the mere possibility of a conflict of interest to establish a sixth amendment violation. United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512, 511-20 (3d Cir. 1979), *rev'd sub nom.* Cuyler v. Sullivan, 446 U.S. 335 (1980).

[46] 667 F.2d at 370.

[47] 446 U.S. at 349-50.

[48] 449 U.S. 361 (1981).

[49] 667 F.2d at 370-71. In *Morrison*, federal agents met and conferred with the defendant without her counsel's consent or knowledge. The agents cast aspersions on her retained counsel, suggested she seek counsel from the public defender's office, and indicated that if she failed to cooperate she would face a stiff sentence. 449 U.S. at 362.

Although the defendant neither cooperated with the government agents nor incriminated herself, *id.* at 362-63, the Court of Appeals for the Third Circuit ruled that the agents' egregious violation of the defendant's sixth amendment rights could not be countenanced and dismissed the indictment. United States v. Morrison, 602 F.2d 529, 533 (3d Cir. 1979), *rev'd*, 449 U.S. 361 (1981). A unanimous Court reversed. United States v. Morrison, 449 U.S. 361 (1981).

[50] 667 F.2d at 371 (quoting *Morrison*, 449 U.S. at 365).

[51] *Id.*

information and advice.[52] Commenting upon Kalina's remarks to Laura regarding the value of the plea agreement to her husband, the court observed that the information was "relevant to appellant's plea decision."[53]

In determining whether Laura actually waived separate counsel, Judge Hunter found that the inquiry concerning the waiver of her sixth amendment right to counsel had commenced in a timely fashion.[54] The majority noted that although the judge did not personally inform Laura of the dangers inherent in multiple representation,[55] the government had noted them.[56] Stressing that two trial judges had heard Laura testify and concluded that she had waived her right to separate counsel, the majority emphasized that her failure to testify that "she did not *understand* the hazards of joint representation" militated against finding that she had not waived her right to separate counsel.[57] Finally, the majority found it important that Laura had brought the matter before the court on the eve of her probation revocation.[58] Under the circumstances, Judge Hunter concluded that the record supported the determination that Laura had entered a valid waiver.[59]

The court summarily dismissed Laura's contention that her sentence should be vacated because the trial court accepted her guilty plea without personally informing Laura of the charges to which she was about to plead guilty.[60] Although the court acknowledged that Judge Huyett had not strictly adhered to the requirements of rule 11, it found that Laura had "failed to allege or prove any specific prejudice resulting from the technical non-compliance with Rule 11."[61]

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[52] *Id.* The majority observed that Laura had not alleged that Kalina conveyed the information to her in a "coercive manner" nor had he suggested that she accept the Government's offer. *Id.*

[53] *Id.*

[54] *Id.* In United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973), the Court of Appeals for the Third Circuit fashioned a rule requiring trial courts to warn defendants about the dangers of multiple representation "at the earliest stage of the criminal justice process."

[55] 667 F.2d at 368.

[56] *Id.* The Government opposed Kalina's representation of both Laura and her husband because their interests were "completely different" and their culpability was "somewhat different." *Id.*

[57] *Id.* at 372.

[58] *Id.* Presumably, the majority found that this factor was relevant to the court's waiver inquiry. *See id.*

[59] *Id.*

[60] *Id.*; *see supra* note 26.

[61] 667 F.2d at 372. The *Laura* majority relied heavily on United States v. Timmreck, 441 U.S. 780 (1981). In *Timmreck*, a unanimous Court dismissed an appeal based solely on a formal violation of rule 11. *Id.* at 785.

Thus, under the circumstances, Judge Hunter held that Laura had failed to establish manifest injustice, and refused to vacate the judgment.[62]

In a caustic dissent, Judge Stern noted his distaste and dismay concerning the "unwholesome" procedures accepted by the majority.[63] Criticizing what he perceived to be the majority's result-oriented analysis, he declared that the "appellant, while waiving nothing, was permitted to bargain herself into a conviction in order to save a co-defendant represented by the same lawyer, culminating in a proceeding in which the requirements of Rule 11 were brushed aside."[64] The rift between the majority and the dissent extended to: the resulting effect a defendant must establish when asserting that a conflict of interest has violated the right to effective assistance of counsel; the role of a federal judge at a waiver hearing; and the extent to which a judge must ensure that a defendant understands the charges to which he is pleading guilty.[65]

Reviewing the record below, Judge Stern found that Laura had not waived her right to the assistance of counsel "singly devoted" to her interests.[66] The dissent stated that Laura's affidavit and testimony at the waiver hearing demonstrated that she never perceived a conflict of interest and never understood the adverse consequences which might result.[67] Judge Stern attributed Laura's failure to appreciate the hazards of multiple representation to the trial court's passive role at the hearing.[68] He observed that the trial court had not personally questioned Laura and had not advised her of the dangers of her course of action or of her right to separate counsel at no expense.[69] Judge Stern also criticized the trial judge for accepting Laura's "mechanical"

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[62] 667 F.2d at 372-73.

[63] *Id.* at 380 (Stern, J., dissenting).

[64] *Id.* at 373 (Stern, J., dissenting). Judge Stern indicated that counsel's representation of Priscilla Laura and her husband violated professional ethics. *Id.* at 379 (Stern, J., dissenting).

[65] *Id.* at 373-80 (Stern, J., dissenting).

[66] *Id.* at 373 (Stern, J., dissenting) (quoting United States v. Levy, 577 F.2d 200, 211 (3d Cir. 1978)). In *Levy*, the Court of Appeals for the Third Circuit explicitly recognized that the sixth amendment right to counsel encompassed "the right to the effective assistance of an attorney who is singly devoted" to his client. 577 F.2d at 211.

[67] 667 F.2d at 373-74 (Stern, J., dissenting).

[68] *Id.* at 374 (Stern, J., dissenting). Acknowledging that United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978), had not been decided prior to the hearing, Judge Stern nevertheless noted that the trial court's failure to follow procedures "even remotely" similar to those mandated by *Dolan* demonstrated the *pro forma* nature of the hearings conducted by the trial court. 667 F.2d at 374 n.3 (Stern, J., dissenting). In *Dolan*, the Court of Appeals for the Third Circuit held that trial courts must personally advise defendants of the potential dangers of multiple representation. 570 F.2d at 1181.

[69] 667 F.2d at 373-74 (Stern, J., dissenting). Judge Stern noted that the trial court's failure to question Laura about the discrepancy between the statement in her affidavit that she could

waiver of her sixth amendment right.[70] Positing that her waiver was not valid if it were predicated solely upon her erroneous belief that her defense was "financially" bound to her husband, the dissent concluded that the record did not reveal that Laura had made a knowing and intelligent relinquishment of her right to separate counsel.[71]

Judge Stern rejected the majority's holding that *Cuyler* required one alleging a sixth amendment violation arising out of a conflict of interest to establish that the conflict adversely affected his counsel's performance.[72] Equating the majority's requirement of an adverse effect with prejudice, Judge Stern noted that the Supreme Court in *Holloway v. Arkansas*[73] explicitly recognized the unique dangers posed by a conflict of interest and ruled that a showing of prejudice "would not be susceptible of [an] intelligent, even-handed application."[74] Judge Stern initially declined to engage in "nice calculations" to determine the extent to which Laura's defense had been prejudiced; rather, he observed that "[e]ach and every decision made by Mrs. Laura's attorney was tainted by the presence of an actual conflict of interest," and concluded that appellant had therefore been denied effective assistance of counsel.[75]

In a footnote, Judge Stern declared that the majority had also misread *Morrison*.[76] He commented that *Morrison* did not concern a conflict of interest. Rather, it concerned impermissible governmental interference with the right to counsel.[77] In *Morrison*, the Court assumed, without actually deciding, that the defendant had been denied effective assistance of counsel.[78] Accordingly, the dissent continued, it was specious for the majority to interpret *Morrison* as holding that a defendant must prove an actual adverse effect on representation to establish ineffective assistance of counsel since this was precisely what the *Morrison* Court had assumed.[79] Additionally, Judge Stern stressed that the language in *Morrison* merely required "that the

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afford to retain another attorney but preferred her present counsel and her testimony at the waiver hearing that she could not bear the expense of separate counsel indicated that Laura did not knowingly waive her right to effective assistance of counsel. *See id.* at 374 (Stern, J., dissenting).

[70] *Id.* at 373 (Stern, J., dissenting).

[71] *Id.* at 374 (Stern, J., dissenting).

[72] *Id.* at 376 n.6 (Stern, J., dissenting).

[73] 435 U.S. 475 (1978).

[74] 667 F.2d at 375 (Stern, J., dissenting) (quoting *Holloway*, 435 U.S. at 490).

[75] *Id.* at 375 (Stern, J., dissenting).

[76] *Id.* at 376 n.6 (Stern, J., dissenting).

[77] *Id.*

[78] 449 U.S. at 364.

[79] 667 F.2d at 376 n.6 (Stern, J., dissenting).

constitutional infringement identified has had *or threatens* some adverse effect upon the effectiveness of counsel's representation."[80]

Even if one accepted the majority's standard, Judge Stern asserted, Laura's conviction should have been vacated because the record demonstrated that the conflict of interest had adversely affected her counsel's representation.[81] Judge Stern found that Laura's attorney had ceased advocating her interest when a plea favorable to his other client had been arranged.[82] Criticizing the trial court for the tenor of the plea hearing, Judge Stern emphasized that the procedures utilized below clearly violated rule 11.[83] The dissent termed the majority's discussion of the trial court's "technical" noncompliance with rule 11 "unsettling."[84] Judge Stern noted that the rule safeguards against "perhaps the supreme instance of waiver known to our system of justice, one by which all of its trial rights and safeguards are voluntarily foregone, and the defendant deliberately submits himself to conviction."[85] Judge Stern underscored that the rule required the trial court to inform Laura of the nature of the charges to which she was about to plead guilty and to determine that she understood them.[86] He also extracted the minutes of the plea hearing and implicitly challenged the majority to find that they demonstrated that Laura understood the charges against her.[87] Asserting that the record clearly indicated that her decision to plead guilty was tainted by a lawyer serving dual interests, Judge Stern concluded that Laura's sentence should be vacated.[88]

Although the Constitution does not explicitly provide that a defendant in a criminal proceeding has a right to the *effective* assistance of counsel,[89] that principle is firmly embedded in constitutional juris-

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[80] *Id.* (quoting *Morrison*, 449 U.S. at 365).

[81] *Id.* at 376 (Stern, J., dissenting). The dissent scrutinized counsel's advice to appellant before and after plea bargaining had begun and noted that the actual conflict arose when Kalina's advice to her changed. *Id.*

[82] *Id.* (Stern, J., dissenting).

[83] *Id.* at 377-78 (Stern, J., dissenting).

[84] *Id.* at 379 (Stern, J., dissenting).

[85] *Id.* (quoting United States v. Dayton, 604 F.2d 931, 935 (5th Cir. 1979))

[86] *Id.* at 377 (Stern, J., dissenting).

[87] *Id.* at 377-78 (Stern, J., dissenting).

[88] *Id.* at 380 (Stern, J., dissenting). Judge Stern dismissed the majority's reliance on United States v. Timmreck, 441 U.S. 780 (1979), and maintained that the *Timmreck* Court had observed that collateral relief might be available "if a violation of Rule 11 occurred in the context of other aggravating circumstances." 667 F.2d at 379 (Stern, J., dissenting) (quoting *id.* at 784-85). Judge Stern argued that the all-or-nothing plea offer coupled with counsel's conflicting interest constituted such aggravating circumstances. *Id.*

[89] The sixth amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

prudence.[90] Cognizant that effective representation is necessary to preserve the delicate balance of the adversarial process and to ensure just adjudications,[91] the Supreme Court has held that the right is fundamental and has fashioned procedures and prophylactic rules to safeguard it.[92]

The sixth amendment right to effective assistance of counsel consists of two correlative rights: the right to counsel of reasonable competence[93] and the right to counsel's undivided loyalty.[94] Apparently convinced that the matter is best left to the trial courts, the Supreme Court has established only the most general guidelines for the appellate review of claims alleging incompetent representation.[95] With respect to claims alleging constitutional violations due to counsel's conflicting loyalties, however, the Court has taken a far more active role.[96] Their recent opinions in *Cuyler* and *Wood v. Georgia*[97] evidence the Court's intent to frame the guidelines for appellate review.

In *Cuyler*, the Court resolved a split in the circuits concerning how concrete the showing of a conflict of interest must be before a

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[90] *See* McMann v. Richardson, 397 U.S. 759 (1970); Von Moltke v. Gillies, 332 U.S. 708 (1948); Powell v. Alabama, 287 U.S. 45 (1932). *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

[91] The need for effective assistance of counsel is eloquently stated below:

> For when an adversary proceeding, in our enlightened system of justice, is used as the sole means of putting relevant data before a court, every rational assumption underlying the system makes it essential that all parties be effectively represented by competent counsel. To allow the prosecutorial apparatus to operate against persons who do not have equally adequate representation is to allow the system to operate at odds with the very theory on which it rests. Without defense representation, society itself would be deprived of valuable assistance and of information necessary to deal rationally and fairly with its members.

Meador, *The Need for Effective Assistance of Counsel*, 28 NLADA BRIEFCASE 75, 76-77 (1970).

[92] *See, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

[93] McMann v. Richardson, 397 U.S. 759, 761-64 (1970) (certain level of competence necessary to constitute performance within range of effective assistance of counsel).

[94] Wood v. Georgia, 450 U.S. 261, 271 (1981) (conflict-free counsel is essential part of right of effective assistance of counsel).

[95] *See, e.g.*, McMann v. Richardson, 397 U.S. 759 (1970). In *McMann* the majority opined that the standards defining competent counsel

> should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

Id. at 771.

[96] *See, e.g.*, Wood v. Georgia, 450 U.S. 261 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

[97] 450 U.S. 261 (1981).

reviewing court should conclude that a defendant was deprived of his right to effective assistance of counsel.[98] Writing for the majority, Justice Powell fashioned a two tiered test, requiring a "defendant who raised no objection at trial . . . [to] demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[99] While the Court reiterated that prejudice need not be shown, the majority failed to draw a line between an "adverse effect" and prejudice.[100]

Justice Marshall dissented from the majority's formulation of the standard of review.[101] He observed that if the majority intended to require an appellant to establish specifically how his attorney's performance differed due to his representation of conflicting interests, the Court's test was "unduly harsh" and undercut the rationale underpinning the prophylactic rule which the Court had adopted in *Holloway*.[102] Justice Marshall tempered his dissent, however, noting that

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[98] *See* Thacker v. Bordenkircher, 590 F.2d 640 (6th Cir.), *cert. denied*, 442 U.S. 912 (1979); United States v. Cox, 580 F.2d 317 (8th Cir. 1978); United States v. Atkinson, 565 F.2d 1283 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); United States v. Kutas, 542 F.2d 527 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977); United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976); Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975); United States v. Lovano, 420 F.2d 769 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970) (majority view that actual conflict of interest is necessary to establish sixth amendment violation due to conflict of interest). *Contra* United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) (minority view that mere possibility of conflict is sufficient to establish sixth amendment violation due to conflict of interest).

[99] 446 U.S. at 348 (footnote omitted).

[100] *See id.* at 348-49. Several courts have commented on the problematic nature of the Court's language. *See* Baty v. Balkcom, 661 F.2d 391, 396 n.9 (5th Cir. 1981) (court noted ambiguous nature of language used in *Cuyler*); Camera v. Fogg, 658 F.2d 80, 86 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 981 (1982) (court noted Supreme Court had not made clear what showing of adverse effect entailed); Parker v. Parratt, 504 F. Supp. 690, 698 (D. Neb.), *modified*, 662 F.2d 479 (8th Cir. 1981) (court noted language used in *Cuyler* was vague as to difference between adverse effect and presumably higher degree of material prejudice).

[101] 446 U.S. at 354 (Marshall, J., concurring in part, dissenting in part). Justice Marshall concurred with the Court's decision that retained counsel's failure to provide effective assistance of counsel constituted state action. *Id.*

[102] *Id.* at 355 (Marshall, J., concurring in part, dissenting in part). In *Holloway*, the Court held that whenever defense counsel makes a timely motion for separate counsel, the trial court has a duty either to appoint separate counsel or to undertake an appropriate inquiry to determine the merits of counsel's contentions. 435 U.S. at 488-89. If under such circumstances a trial judge failed to act, the Court ruled reversal would be mandated. *Id.*

Relying on *Holloway*, Justice Marshall advanced two reasons why it was unfair to require one to prove specifically how the conflict had impaired his attorney's representation. First, because multiple representation inhibits counsel's representation of his client's interest, the record will generally be barren of any demonstrable actions by counsel which adversely affected appellant's interest. 446 U.S. at 356-57 (Marshall, J., concurring in part, dissenting in part). Second, attorneys are unlikely to provide testimony which impugns their professional efforts and which conceivably may subject them to sanctions. *Id.* at 358 (Marshall, J., concurring in part, dissenting in part).

the degree of proof required by the majority arguably was unclear.[103] He opined that if the majority's requirement of an "adverse effect" were satisfied when counsel made decisions which compromised his client's interests, then "the Court's view and mine may not be so far apart after all."[104]

In *Wood* the Court accommodated many of the concerns expressed by Justice Marshall. Raising the conflict of interest issue *sua sponte*, the Court vacated a probation revocation order because the defendants may have been denied effective assistance of counsel.[105] Framing the issue for the court on remand, Justice Powell observed that if the court found an actual conflict and no waiver of the right to conflict-free counsel, a rehearing would be mandated.[106] Significantly, the Court retreated from the *Cuyler* requirement that the defendant show specifically how the actual conflict impacted upon his representation. The tenor of the opinion indicates that the Court adopted a presumption that an actual conflict of interest adversely affects counsel's performance.[107]

Cuyler and *Wood* indicate that the Supreme Court has fashioned an effective analysis for evaluating claims of ineffective assistance of counsel. They conclusively establish that the defendant must shoulder the burden of establishing a *prima facie* conflict of interest.[108] Thus, the defendant must prove that counsel actively represented defendants in a situation where counsel's actions or inactions could conceivably benefit the interests of one defendant while damaging the interests of another defendant whom counsel was also representing.[109] Although

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[103] *Id.*

[104] *Id.*

[105] 450 U.S. at 272-73.

[106] *Id.* at 273-74.

[107] *See id.* at 271-74. The *Wood* Court did not find that an actual conflict existed since the issue had not been briefed or argued. The Court noted, however, that there was substantial evidence present permitting one to conclude that "the possibility of a conflict of interest was sufficiently apparent." *Id.* at 272.

After *Cuyler*, the majority of circuit courts which have found actual conflicts of interest, have not required defendants to show a specific adverse effect. Rather, they have required the defendant to establish an actual conflict of interest and have assumed an adverse effect except if the conflict resulted in clearly harmless error. *See* United States v. Unger, 665 F.2d 251 (8th Cir. 1981); Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981); Camera v. Fogg, 658 F.2d 80 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 981 (1982). *Contra* United States v. Laura, 365 F.2d 365 (3d Cir. 1981).

[108] *See Wood*, 450 U.S. at 273; *Cuyler*, 446 U.S. at 348. Whether the defendant has to shoulder the burden of persuasion depends on the circumstances which give rise to the conflict. *See Holloway*, 435 U.S. at 492 (Powell, J., dissenting).

[109] Noting that the dangers of multiple representation are "both ubiquitous and insidious," the Second Circuit court in United States v. Curcio, 680 F.2d 881 (2d Cir. 1982), recently catalogued situations which may give rise to a conflict of interest when counsel represents more than one defendant. The court observed that counsel may abdicate his duty to one client for the benefit of another in deciding

Cuyler is cryptic as to what an adverse effect actually entails,[110] and given a cursory glance *Wood* seemingly abandons the requirement altogether,[111] the adverse effect requirement remains viable. *Wood* and *Cuyler* establish that an adverse effect will be presumed whenever a defendant establishes an actual conflict of interest. While a presumption of adverse effect arises when a defendant is represented by counsel with divided loyalties, the government may rebut that presumption by establishing that the defendant actually was the beneficiary of counsel's conflict-tainted performance.[112]

Laura represents the court's reluctance to conceptualize the difficult problems of proof facing defendants denied effective assistance of counsel. The majority's *post hoc* rationalization of Laura's decision to plead guilty evidences that relief for defendants denied their right to counsel's undivided loyalty will be denied in all but the most egregious cases.[113] Their failure to employ an analysis analogous to the one above is unsettling,[114] especially given the Supreme Court's admoni-

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> whether to accept or reject a plea bargaining offer to one defendant conditioned on that defendant's testifying against the other; whether or not to present a defense that helps one defendant more than the other; whether or not to cross-examine a witness whose testimony may help one defendant and hurt the other; whether to have one defendant testify while the other remains silent; whether to have neither defendant testify because one would be a poor or vulnerable witness; whether or not to emphasize in summation that certain evidence is admitted only against (or is less compelling against) one defendant rather than the other; whether or not to argue at sentencing that one defendant's role in the criminal enterprise was shown only to be subordinate to that of the other defendant.

Id. at 887; *see also* Parker v. Parratt, 662 F.2d 479, 484 (8th Cir. 1981); Camera v. Fogg, 658 F.2d 80, 88-89 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 981 (1982); State v. Olsen, ___ Minn. ___, ___, 258 N.W. 2d 898, 905 (1977). *See generally* Geer, *supra* note 12; Tague, *supra* note 12.

[110] *See supra* notes 99 & 100 and accompanying text.

[111] The *Wood* Court did not mention *Cuyler's* requirement that an "adverse effect" be shown. *See supra* note 107 and accompanying text; *infra* note 112 and accompanying text.

[112] The requirement that an adverse effect be shown is essentially a means to prohibit defendants who receive the benefit of counsel's conflict-tainted representation from successfully asserting that their sixth amendment rights were denied. *See* Glasser v. United States, 315 U.S. 60, 76-77 (1942); Camera v. Fogg, 658 F.2d 80, 89 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 981 (1982).

[113] The degree by which the *Laura* majority actually increased the burden an appellant who has proven an actual conflict must carry is not merely an academic question.

[114] Equally unsettling is the majority's finding that Laura validly waived her right to the effective assistance of counsel. While a defendant may relinquish his right to effective assistance of counsel, the Supreme Court has held that the waiver of such a fundamental right should not be lightly presumed. Brookhart v. Janis, 384 U.S. 1, 4 (1966). A waiver is effective only if it is executed with "sufficient awareness of the relevant circumstances and likely consequences," Brady v. United States, 397 U.S. 742, 748 (1970) (footnotes omitted), and it is the trial court's duty to determine if the proferred waiver meets these requirements. Glasser v. United States, 315 U.S. 60, 71 (1942). The circumstances surrounding Laura's waiver evidence that she was unaware of the significance of her acts and was merely following counsel's conflict-tainted advice. *See supra* notes 10-16 and accompanying text; *see also supra* notes 66-71 and accompanying text.

tion in *Holloway* that it is virtually impossible "to assess the impact of a conflict of interest on the attorney's . . . decisions in plea negotiations."[115]

Before *Laura* the Third Circuit court had not only taken an active approach toward remedying the actual and potential abuses of the criminal justice process resulting from multiple representation,[116] but had also approved action which would prevent abuses.[117] In *United States v. Dolan*,[118] the Third Circuit court upheld a district court's order disqualifying counsel despite the defendant's proffered waiver of his right to separate representation.[119] The *Dolan* court emphasized that many times a defendant will be unable to intelligently waive his right to effective assistance of counsel because of his inability to discover or understand "the foreseeable prejudices multiple representation might entail."[120] Recognizing that the defendant's right to effective assistance of counsel was not the only consideration present, the court stressed that when examining the propriety of multiple representation, important societal interests are also involved.[121] The *Laura* court has seemingly abandoned this progressive approach by failing to adequately analyze the multiple representation issue. Ironically, the Third Circuit court's metamorphosis occurred after strict prophylactic standards had been made applicable to federal courts analyzing multiple representation situations.[122]

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[115] 435 U.S. at 491. Currently, over two-thirds of all the individuals charged with federal crimes enter pleas. 1978 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 114. Defendants entering pleas must rely on counsel's undivided loyalty since the attorney and the prosecutor are the architects of plea agreements. *See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

[116] *See, e.g.*, United States v. Levy, 577 F.2d 200 (3d Cir. 1978) (defendant's right to unfettered representation violated when codefendant previously represented by same counsel disclosed defense strategy to Government); United States v. DeYoung, 523 F.2d 807 (3d Cir. 1975) (per curiam) (defendant's right to counsel violated when differing degrees of culpability existed among codefendants and counsel representing all defendants failed to focus jury's attention on this); Virgin Islands v. John, 447 F.2d 69 (3d Cir. 1971) (defendant's right to effective assistance of counsel breached when counsel represented codefendant with conflicting interests).

[117] *See infra* notes 118-21 and accompanying text.

[118] 570 F.2d 1173 (3d Cir. 1978).

[119] *Id.* at 1184.

[120] *Id.* at 1181; *accord* United States v. Garafola, 428 F. Supp. 620, 623 (D.N.J. 1977).

[121] 570 F.2d at 1182. The *Dolan* court pointed out that multiple representation impedes the government's search for the truth in the grand jury context. *Id.* Multiple representation also impedes the fact-finding process at trial, places prosecutors in a dilemma whether to offer immunity to a defendant who is represented by an attorney who also represents other codefendants, results in delay and mistrials, and adds to the already overburdened appellate dockets. *See generally* Tague, *supra* note 12, at 1122-30.

[122] *See, e.g.*, FED. R. CRIM. P. 44(c) (effective December 1, 1980).

Rule 44(c),[123] which did not become effective until after Laura's hearing, was drafted with both the defendants' and society's interests in mind. The rule requires trial courts to take an active role whenever confronted with multiple representation.[124] The Advisory Committee's comments explicitly recommend *in camera* hearings whenever the judge requires more particularized information to decide whether to accept the defendant's proffered waiver.[125] Citing *Dolan* with approval, the Committee's comments also alternatively recommend that district courts exercise their supervisory powers and disqualify counsel when they are not satisfied that a defendant's waiver is valid.[126]

Taking the Advisory Committee's cue, district courts have recently evidenced an enhanced willingness to prohibit multiple representation in certain situations.[127] Cognizant of the defendant's right to counsel of his choice,[128] district courts generally have disqualified one's chosen counsel only when the societal interests in conflict-free counsel outweighed the defendant's interest in representation by a particular attorney.[129] These disqualifications have been based on either the district court's supervisory power to enforce the professional

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[123] FED. R. CRIM. P. 44(c) provides:

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

[124] The Advisory Committee observed that the manner of the hearing should be left to the trial court's discretion. Advisory Committee's Comments, *supra* note 3, at 600.

[125] *Id.* at 599.

[126] *Id.* at 602-03.

[127] *See* United States v. Sullivan, 529 F. Supp. 646 (S.D.N.Y. 1982) (counsel disqualified because of defendant's inability to give valid waiver due to close personal relationship with more culpable codefendant and lack of knowledge concerning dangers of multiple representation); United States v. Agosto, 528 F. Supp. 1300 (D. Minn. 1981) (counsel disqualified due to defendants' inability to knowingly waive right to effective assistance of counsel); United States v. Flanagan, 527 F. Supp. 902 (E.D. Pa. 1981) (counsel disqualified due to strong potential that conflict would emerge).

[128] Although defendants do not have an absolute constitutional right to a particular attorney, *see* United States *ex rel.* Carey v. Rundle, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970), they are entitled within certain limits to be represented by the counsel of their choice. *See* Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981).

[129] *See infra* notes 130 & 131 and accompanying text. *But cf.* United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982) (defendant's interest in being represented by counsel who had represented defendant for six years in substantial number of investigations, prosecutions, and related litigations outweighed Government's interest in disqualifying attorney).

rules of ethics[130] or their recognition that the defendant is unable to make a knowing and intelligent waiver.[131]

While rule 44(c) and recent district court action represent a significant step towards eradicating the problems posed by multiple representation, these developments only focus on the trial court's role in lessening the possibility of ineffective assistance of counsel. Additional reforms must be directed at the defense bar—the group of individuals "in the best position professionally and ethically to determine when a conflict exists or will probably develop."[132]

Although the Supreme Court has held that multiple representation is not per se unconstitutional,[133] a categorical rule prohibiting such representation should be adopted by the state bar associations.[134] The costs of multiple representation simply far outweigh any imagined benefits.[135]

In the absence of an explicit rule prohibiting multiple representation, defendants should either be supplied with sufficient knowledge to make informed decisions concerning their waiver of the right to counsel or discouraged entirely from choosing multiple representation.[136] Trial courts should appoint separate counsel for individuals represented by the same attorney prior to the waiver hearing in order to discuss the hazards of multiple representation. This not only would allow defendants to discuss their case with an attorney who has no financial interest in continuing joint representation, but also would give them some understanding of the weighty decision which they are about to make. Pursuant to their supervisory powers, trial courts

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[130] *See, e.g.*, United States v. Miller, 624 F.2d 1198 (3d Cir. 1980); United States v. Dolan, 570 F.2d 1173 (3d Cir. 1978); United States v. Sullivan, 529 F. Supp. 646 (S.D.N.Y. 1982); United States v. Flanagan, 527 F. Supp. 902 (E.D. Pa. 1981).

[131] *See, e.g.*, United States v. Agosto, 528 F. Supp. 1300 (D. Minn. 1981).

[132] *Holloway*, 435 U.S. at 485 (quoting State v. Davis, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973)).

[133] *Cuyler*, 446 U.S. at 348; *Holloway*, 435 U.S. at 482.

[134] *See* Geer, *supra* note 12, at 157-58; *cf. Laura*, 667 F.2d at 379 n.13 (3d Cir. 1981) (Stern, J., dissenting); United States v. Carrigan, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring); United States v. Mari, 526 F.2d 117, 119-21 (2d Cir.) (Oakes, J., concurring), *cert. denied*, 429 U.S. 941 (1976) (judges asserting that per se rule barring multiple representation should be adopted).

[135] *See supra* notes 113-22 and accompanying text; *cf. Laura*, 667 F.2d at 379 n.13 (Stern, J., dissenting) ("two lawyers may offer a common defense . . . as easily as one"). *But see* Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting) (joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack"); Note, *Developments in the Law—Conflicts Of Interest In The Legal Profession*, 94 HARV. L. REV. 1244, 1381 (1981) (multiple representation reduces cost each defendant must bear).

[136] Advisory Committee's Comments, *supra* note 3, at 598-603.

should also require attorneys representing more than one defendant to file an affidavit detailing the general contours of counsel's discussions with his clients regarding joint representation.[137] Courts should also prevent attorneys from representing multiple defendants unless their affidavits discuss all the conceivable contexts in which conflicts could emerge given the particular facts of the case.[138] Finally, courts should impose sanctions upon attorneys when warranted.[139]

Multiple representation adversely affects the interests of both defendants and society. While appellate review of claims alleging ineffective assistance of counsel due to multiple representation is fraught with difficulty, it is an essential task. Although rule 44(c) lessens the probability that conflicts will occur, other preventative procedures should be adopted to prevent or discourage defense counsel from representing more than one defendant in criminal proceedings.

John J. Scaliti

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[137] *See* United States v. Garafola, 428 F. Supp. 620, 627-28 (D.N.J. 1977).

[138] Such affidavits would, of course, have to be tailored to protect the defendant's fifth amendment right against self-incrimination.

[139] Imposition of sanctions would undoubtedly have a deterrent effect.