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Quality Advocacy and the Code of Professional Responsibility, Conflicts of Interests--A Trial Judge's Notes

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Cover Page Footnote

Judge Judd is United States District Court Judge for the Eastern District of New York.

CONFLICTS OF INTEREST—A TRIAL JUDGE'S NOTES

*THE HONORABLE ORRIN G. JUDD**

The quality of representation is undermined when a client's interests conflict with those of a third party, another client, a former client, or the attorney himself. In addition, a criminal defendant's interest in acquittal or a civil litigant's desire to vindicate his claim may run afoul of a court's search for truth. The Code of Professional Responsibility addresses the conflicts of interest problem directly and indirectly in a number of disciplinary rules and ethical considerations. Judge Judd enumerates these provisions in his reflections on some of the conflicts he has witnessed from the bench, and he outlines the judiciary's role in safeguarding the client's interest in effective, independent representation.

I. INTRODUCTION

NO code of rules can eliminate questions of interpretation and implementation. This has proven true in the field of legal ethics, despite the adoption by the American Bar Association in 1969 of the new *Code of Professional Responsibility*. The *Code* consists of just nine one-sentence canons, each elaborated by a number of ethical considerations and mandatory disciplinary rules. Although many specific prohibitions are laid down by the disciplinary rules, not all ethical problems are expressly covered by the *Code,* leaving questions of interpretation for the courts to resolve.[1] Moreover, even when the *Code's* mandates are unequivocal, there remains the problem of how to insure that the profession complies with these mandates.

Although it is primarily the attorney's responsibility to avoid real and apparent conflicts of interest, this responsibility often is not lived up to. Various bar groups have assumed this responsibility and have addressed some aspects of the problem; however, there have been very few disciplinary proceedings founded on charges of conflicts of interest. Because these efforts are inadequate, it follows that the courts cannot hold themselves wholly aloof from the conflicts of interest problem,[2] which is perhaps the most common ethical problem a trial judge

* Judge Judd is United States District Court Judge for the Eastern District of New York.

1. "No code of ethics could establish unalterable rules governing all possible eventualities. Ultimately, therefore, the resolution of these problems rests in the reasoned discretion of the court." Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 215 (N.D. Ill. 1975).

2. "The trial court clearly does have an obligation, whether counsel is appointed or retained, to be alert for indicia of conflict at all stages of the proceeding . . . ." United States v. Gaines, No. 75-1466, at 8 (7th Cir., Feb. 13, 1976). "When an actual conflict appears, the court must bring [it] and the resulting dangers which are reasonably foreseeable to the attention of each affected defendant so he can make an informed judgment at that time as to whether he wishes new counsel or wishes to continue with present counsel." Id. at 9.

confronts. Judges must be more than umpires, for they have a responsibility to see that the civil and criminal litigation before them is conducted with full regard to the standards and requirements of professional ethics.

This writer does not wish to imply, however, that the judiciary is not already involved in this area to some extent. The writer recognizes that, in addition to the role of the judiciary in grievance procedures initiated by bar groups,[3] courts have, and do exercise, particularly in conflicts of interest cases, the discretionary power to disqualify attorneys.[4] The purpose of this Article is to emphasize the importance of, and the need for, the judiciary's exercise of its power to supervise the conduct of attorneys appearing before it.[5] Hopefully, the basis for this

3. For a discussion of the New York City Bar Association grievance procedure see The Association of the Bar of the City of New York, Ad Hoc Comm. on Grievance Procedures, Report on the Grievance System (1976); 175 N.Y.L.J., Feb. 4, 1976, at 1, col. 2; N.Y. Times, Feb. 4, 1976, at 1, col. 1.

4. E.g., Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); Handelman v. Weiss, 368 F. Supp. 258, 261 n.4, 263 (S.D.N.Y. 1973); Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 95 n.1 (S.D.N.Y. 1972); Empire Linotype School, Inc. v. United States, 143 F. Supp. 627, 631 (S.D.N.Y. 1956) (sua sponte); Laskey Bros. v. Warner Bros. Pictures, Inc., 130 F. Supp. 514, 519 (S.D.N.Y.), aff'd, 224 F.2d 824 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 271 n.15 (S.D.N.Y. 1953). In Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136 (2d Cir. 1975) and Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975), the Second Circuit recognized that it had the power to disqualify attorneys, but declined to exercise it under those circumstances.

The granting or denying of a motion to disqualify an attorney is subject to interlocutory appeal. In re Investigation Before the April 1975 Grand Jury, No. 75-2109, at 9 n.8 (D.C. Cir., Feb. 3, 1976) (per curiam); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc). In United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) (per curiam), the Second Circuit granted interlocutory appeal of the district court's disqualification of an attorney without even discussing the appealability of the interlocutory order.

5. Although the disqualification may be based on a violation of one of the provisions of the applicable Code of Professional Responsibility, the judicial power to disqualify appears to be inherent. See In re Abrams, 521 F.2d 1094, 1101 (3d Cir.), cert. denied, 96 S. Ct. 574 (1975) (There is "an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures of (a) the state courts and (b) this court."); Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975) ("The district court bears the responsibility for the supervision of the members of its bar."); Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964) ("When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct."); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 214-15 (N.D. Ill. 1975) ("Jurisdiction to enforce the [Illinois Code of Ethics] exists by reason of the court's regulatory power over the members of its Bar."); cf. Ex parte Robinson, 86 U.S. (19 Wall.) 505, 512 (1873) ("The power to disbar an attorney . . . is possessed by all courts which have authority to admit attorneys to practice."); Ex parte Burr, 22 U.S. (9 Wheat.) 529, 530 (1824) ("[N]o other tribunal can decide, in a case of removal from the bar, with the same means of information as the court [in which the attorney practices]."). See also Schlesinger v. Teitelbaum, 475 F.2d 137, 141-42 (3d Cir.), cert. denied, 414

position will be elucidated by the discussion of conflicts this writer has witnessed and which have affected his perspective on conflicts of interest.

II. CRIMINAL CASES

Four of the most common conflicts problems in criminal cases involve the conflicting interests of (1) the client and a third party who may pay the attorney's fee, (2) multiple defendants represented by the same lawyer in the same criminal case, (3) a former client whose confidences must be protected and the present client whose representation may suffer if the former client's confidences are protected, and (4) the client's interest in and the attorney's obligation to provide zealous advocacy, versus the attorney's duty to prevent the perpetration of frauds on the court.[6]

The first two types of conflicts undermine the quality of representation because in both situations the attorney may have competing loyalties between the client and the third party hirer, or among multiple clients. These competing interests[7] may interfere with the attorney's fulfillment of his obligation to represent his clients zealously[8] and independently.[9]

The first conflict, that between the rights of the client and the demands of a third party who has retained counsel on the former's behalf, may arise well before trial.[10] Professor Charles Ruff recently

U.S. 1111 (1973) ("The Supreme Court of the United States has recognized the inherent power of [district] courts to take appropriate action to secure the just and prompt disposition of cases.").

6. Another conflict of interest referred to in passing is the conflict that arises when the attorney-advocate assumes the role of witness. See note 41 infra.

7. The term "competing interests" as employed in this Article comprehends the Code's definition of "differing interests" which includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." ABA Code of Professional Responsibility, Definition No. 1 (1975).

8. Canon 7 provides that "[a] lawyer should represent a client zealously within the bounds of the law."

9. Canon 5 provides that "[a] lawyer should exercise independent professional judgment on behalf of a client." EC 5-21 states in part that "[t]he obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment." Similarly, EC 5-23 warns: "Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom." Finally, DR 5-107(B) mandates that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services," and DR 5-105(B) requires that "[a] lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests . . . ."

10. See. e.g., In re Investigation Before the April 1975 Grand Jury, No. 75-2109, at 4-6 n.4

described a typical problem which arises in the investigation of a criminal organization.

> A relatively low-level member of the organization is subpoenaed to testify about the organization's activities or those of his superiors; he himself is not a subject of the investigation, but his testimony is crucial to the development of the case against others; he appears for his grand jury testimony accompanied by a lawyer . . . who has been retained by his employer . . . .[11]

In this third party retainer situation, the attorney's concern for the well-being of the organization that is paying him could lead him to urge the employee to take the fifth amendment, whereas a truly independent lawyer might advise the witness to cooperate.[12] Further, the witness' perception of the attorney's relationship with the organization could intimidate the witness into perjuring himself in order to avoid sanctions by his employer.[13] The lawyer need not actually counsel such perjury; the mere fact that he is an agent of the employer could cause the witness to tailor his testimony.[14]

Another illustration of a conflict caused by a third party retaining the attorney is this situation with which the writer dealt. A Panamanian woman was arrested at John F. Kennedy International Airport

(D.C. Cir., Feb. 3, 1976) (per curiam); Pirillo v. Takiff, 341 A.2d 896 (Pa. 1975), appeal dismissed and cert. denied, 96 S. Ct. 873 (1976) (third party hirer and multiple clients; grand jury proceeding). See also United States v. Bernstein, Nos. 74-2328-29, 74-2462-64, at 6649-51 (2d Cir., Mar. 4, 1976).

11. Proceedings of the Thirty-Sixth Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 550 (1975).

12. Id. at 551; see In re Investigation Before the April 1975 Grand Jury, No. 75-2109, at 4-6 n.4 (D.C. Cir., Feb. 3, 1976) (per curiam). This case dealt with a grand jury investigation of an incident in which the presses of the Washington Post were damaged and an employee beaten. Counsel for the Pressman's Union had appeared at the grand jury on behalf of twenty-one witnesses alleged to have been present during the incident. All but two of the witnesses invoked the fifth amendment privilege. The district court had disqualified the attorney because of the risk of conflicts among the multiple clients, including the possibility of disclosure to other clients of the grand jury testimony of the two clients who did not invoke the fifth amendment. In re Investigation Before the April 1975 Grand Jury, 403 F. Supp. 1176 (D.D.C. 1975). The court of appeals vacated this order, conceding that potential conflicts of interest were inherent in the multiple representation (and the third party retainer arrangement), but holding that other means of accommodating the various interests should have been attempted before disqualifying counsel. In re Investigation Before the April 1975 Grand Jury, No. 75-2109, at 14-18 (D.C. Cir., Feb. 3, 1976) (per curiam).

13. Proceedings of the Thirty-Sixth Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 551 (1975).

14. An example of such witness intimidation is Randazzo v. United States, 339 F.2d 79 (5th Cir. 1964), where a witness was convicted of contempt for refusing to testify even after a grant of immunity. The witness was represented by the same attorney who had previously represented in a criminal action the person about whom the witness was being asked to testify. The Fifth Circuit Court of Appeals granted a government motion to strike the attorney's appearance and appointed other counsel.

for possession of a kilogram of cocaine. When she was arraigned, the magistrate appointed a Legal Aid attorney to represent her. Shortly thereafter, another attorney, not known by the woman, visited her in jail, procured a substitution, and entered a guilty plea for her to one count of the indictment. Before sentencing, the woman learned from fellow inmates on Rikers Island that the government would welcome cooperation, and so she asked to have the Legal Aid attorney reinstated as her counsel. She then undertook to cooperate with the government, and her subsequent testimony before the grand jury resulted in the indictment of a woman who had provided her with the cocaine and the airplane tickets, had travelled on the plane with her, and had retained the attorney for her.

The above case illustrates the overreaching by a third party hirer interested in the outcome of the litigation that the *Code* forbids.[15] The third party hirer may well have desired the courier to plead guilty so as to prevent her from giving testimony that would implicate others, particularly the third party hirer. In procuring this plea, the first attorney obviously was not providing independent, zealous representation of the client for whom he had been retained.

The duty of the court to correct or prevent violations of the *Code* frequently arises in the second conflict situation where one attorney undertakes to represent two defendants simultaneously in a criminal trial.[16] The conflicting interests of the two defendants may be such that joint representation will deprive both defendants of effective advocacy. For an attorney to persist in the joint representation under such circumstances is not only improper under the *Code,*[17] but is an unconstitutional deprivation of the defendants' right to a fair trial as well.[18] Even in the case of closely associated defendants who have discussed the possibility of prejudice with their counsel and have told the court that they are satisfied with joint representation,[19] a guilty

15. See DR 5-107(B), quoted in note 9 supra.

16. See also In re Investigation Before the April 1975 Grand Jury, No. 75-2109 (D.C. Cir., Feb. 3, 1976) (per curiam).

17. See DR 5-105(B), quoted in note 9 supra.

18. United States v. Gaines, No. 75-1466, at 7 (7th Cir., Feb. 13, 1976) ("The sixth amendment guarantee of the assistance of counsel includes the right to counsel whose loyalty is not divided between clients with conflicting interests."); Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962) ("The Constitution assures a defendant effective representation by counsel . . . . Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having a single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others."). See also Note, Criminal Defendants and the Sixth Amendment: The Case for Separate Counsel, 58 Geo. L.J. 369 (1969).

19. EC 5-16 cautions: "[B]efore a lawyer may represent multiple clients, he should explain

verdict must be reversed if there was prejudice. For example, in *United States v. DeBerry,*[20] one defendant testified and on cross-examination incriminated his non-testifying co-defendant, represented by the same attorney. The United States Court of Appeals for the Second Circuit held that under these circumstances, the failure of the trial court to inquire into the propriety of joint representation constituted reversible error.[21] The court did not preclude the possibility of joint representation if there has been appropriate questioning by the trial court, but stated:

> [I]t is in the best interests of justice, we think, to reverse and remand for a new trial as to both parties after the court has ascertained that each either has separate counsel or that, *from the beginning,* each understands clearly the possibilities of a conflict of interest and waives any rights in connection with it.[22]

The *DeBerry* situation is not unique; convictions frequently have been challenged on the basis of prejudice resulting from joint representation of two defendants.[23] A seminal case on the subject is *Glasser v. United States.*[24]

In *Glasser,* one defendant discharged his attorney at the beginning of a conspiracy trial. The court then appointed the attorney for a co-defendant to represent the defendant. The Supreme Court found that as a result of the dual representation the attorney's representation of his original client was less effective. Thus, the court held that multiple representation denied the original client the effective assistance of counsel guaranteed by the sixth amendment.[25] Moreover, the Court said that the trial judge has a duty "to see that an accused has the

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fully to each client the implications of the common representation and should accept or continue employment only if the clients consent." See DR 5-105(C).

20. 487 F.2d 448 (2d Cir. 1973).

21. Id. at 452-53.

22. Id. at 454 (emphasis in original).

23. See Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975), granting habeas corpus relief from a state court conviction and sentence of twenty years, where the defendant had refused an offer of a six-month sentence in exchange for a guilty plea and testimony against his co-defendant because his counsel, who was also counsel for the co-defendant, had advised against the plea. The court held that the defendant had been denied his sixth amendment right to effective assistance of counsel. Id. at 105. For cases where the defendant's claim of prejudice was rejected see Courtney v. United States, 486 F.2d 1108 (9th Cir. 1973); United States v. Irons, 475 F.2d 40 (8th Cir.), cert. denied, 412 U.S. 951 (1973); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973); United States v. Horne, 423 F.2d 630 (9th Cir. 1970) (per curiam); Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967). In Sanchez v. Nelson, 446 F.2d 849 (9th Cir. 1971) (per curiam), a habeas corpus proceeding, the court remanded for a hearing on whether there had been prejudice.

24. 315 U.S. 60 (1942).

25. Id. at 76.

assistance of counsel."[26] "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[27]

Most dual representation cases require the defendant to show prejudice in order to obtain a reversal of conviction.[28] However, the United States Court of Appeals for the District of Columbia Circuit requires that each defendant in a joint trial must have separate counsel unless each makes an informed decision in favor of joint representation; and on appeal, unless the record reveals an informed decision, the government must show that the joint representation was harmless error.[29] Such a rule can be enforced readily with respect to the indigent defendant for whom the court appoints counsel.[30] With respect to the defendant who retains counsel, however, the court must reconcile the need for independent and effective representation with the defendant's limited constitutional right[31] to counsel of his own choice, which right "should not unnecessarily be obstructed by the court."[32]

In *United States v. Vowteras,*[33] two brothers, principals in the same business, were indicted for bribery of an Internal Revenue Service agent. When the same counsel appeared for both defendants, the trial judge inquired whether they desired joint representation, pointing out

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26. Id.; accord, Porter v. United States, 298 F.2d 461, 464 (5th Cir. 1962).

27. 315 U.S. at 76.

28. See cases cited in note 23 supra.

29. Ford v. United States, 379 F.2d 123, 125 (D.C. Cir. 1967).

30. The Criminal Justice Act of 1964 provides that in the case of indigent defendants "[t]he United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown." 18 U.S.C. § 3006A(b) (1970). The United States Court of Appeals for the District of Columbia Circuit has interpreted this statute to require that "separate counsel . . . should be appointed initially in every case, with an instruction that if counsel conclude, after fully investigating the case and consulting with their clients, that the interests of justice and of the clients will best be served by joint representation, this conclusion with supporting reasons shall be communicated to the court for such on-the-record disposition as the court deems appropriate in the circumstances." Ford v. United States, 379 F.2d 123, 126 (D.C. Cir. 1967).

31. United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) (per curiam); United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970); United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), cert. denied, 396 U.S. 825 (1969); United States ex rel. Davis v. McMann, 386 F.2d 611, 618 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968). But cf. Faretta v. California, 422 U.S. 806, 819 (1975) (right to proceed pro se based on sixth amendment right to manage one's own defense). See also United States v. Gaines, No. 75-1466, at 7-8 (7th Cir., Feb. 13, 1976).

32. United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), cert. denied, 396 U.S. 825 (1969) (where defendant is clearly informed of possible prejudice from sharing counsel with co-defendant and freely makes a considered choice in favor of joint representation, he is not denied effective assistance of counsel).

33. 500 F.2d 1210 (2d Cir.) (per curiam), cert. denied, 419 U.S. 1069 (1974).

that conflicts might arise which could not be foreseen at the outset. The judge spoke with each defendant separately out of the presence of counsel, repeated the inquiry after the luncheon recess, and permitted the trial to proceed only after he was satisfied that both defendants had knowingly waived any right to separate representation. The defendants nevertheless appealed their convictions on the ground that their joint representation was improper. On appeal, both were represented by one lawyer, a different attorney. The United States Court of Appeals for the Second Circuit sustained the conviction, holding:

> The defendants, as well as their attorney, were fully advised of the facts underlying the potential conflict and they cannot now repudiate their choice *in the absence of a credible showing of "some specific instance of prejudice, some real conflict of interest,* resulting from a joint representation. . . ."[34]

Thus, under the *Vowteras* decision, a trial court still takes a calculated risk in permitting two criminal defendants to be represented by the same counsel. Even if the defendants insist on such representation and expressly waive any rights to separate counsel, on appeal they still may seek to show "some specific instance of prejudice."

Like that of Gilbert and Sullivan's policeman, a trial judge's "lot is not a happy one." If he refuses to let two defendants be represented by the same attorney, he may be reversed,[35] and if he permits the defendants to be represented by the same counsel, he also may be reversed.[36] The risk of reversal is not essentially different, however, from that which a judge faces every time he must decide a contested matter.

A third, common conflict of interest arises when an attorney accepts a case which requires him to choose between his obligation to represent his client zealously[37] and his obligation to preserve the confidences of

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34. Id. at 1211, quoting United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970) (emphasis added; footnote omitted).

35. E.g., United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) (per curiam); cf. United States v. Irons, 475 F.2d 40, 43 (8th Cir.), cert. denied, 412 U.S. 951 (1973), and United States v. Williams, 429 F.2d 158, 160-61 (8th Cir.), cert. denied, 400 U.S. 947 (1970), affirming convictions and holding that joint representation of co-defendants is not per se violative of sixth amendment.

A similar dilemma exists when the trial judge must decide whether a defendant's waiver of any possible prejudice resulting from dual representation is knowingly and intelligently made. Judge Travia's refusal to accept a waiver and his disqualification of counsel and appointment of new counsel were approved in United States v. Bernstein, Nos. 74-2328-29, 74-2462-64, at 6649-51 (2d Cir., Mar. 4, 1976).

36. E.g., United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

37. It should be recalled that this obligation stems both from the disciplinary rules under canon 7 and from the sixth amendment right to a fair trial, which encompasses a right to effective representation in criminal cases.

his former client.[38] Such a conflict arose in the courier case previously discussed.[39]

In that case the courier's grand jury testimony also led to the indictment of a man who had provided the courier with false identification. The man was represented by the attorney who had initially represented the courier and had entered the guilty plea for her. The attorney denied having received from the courier during his short representation of her any privileged communications[40] that would restrict his cross examination of her when she later testified against his present client. However, the court recognized the risk that the scope of the cross examination might either be limited unfairly, possibly denying the criminal defendant his constitutional right to effective representation, or broadened unfairly by the defense counsel's unethical use of the witness' confidences.[41]

The fourth type of conflict, prevalent in criminal cases, is the conflict between the attorney's obligation to represent his client effectively and preserve the secrets of his client and his obligation as an officer of the court not to mislead the court.[42] This conflict may occur,

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38. EC 4-6 states in part that "[t]he obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." DR 4-101(B)(1) forbids a lawyer to "[r]eveal a confidence or secret of his client."

39. See text accompanying note 15 supra.

40. DR 4-101(A) states that " '[c]onfidence' refers to information protected by the attorney-client privilege . . . and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." EC 4-4 provides in part that "[t]he attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

41. The attorney ultimately withdrew from the case because of the possibility that he might be called as a witness to show the source of his fee for representing the courier. The source of a retainer apparently is not protected by the attorney-client privilege. See Colton v. United States, 306 F.2d 633, 637-38 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); 3 Jones on Evidence § 21:13, at 781 (S. Gard ed. 1972); C. McCormick, Evidence § 90 (2d ed. 1972).

DR 5-102(B) requires that "[i]f, after undertaking employment in . . . pending litigation, a lawyer learns or it is obvious that he . . . may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client." EC 5-9 states that "[t]he roles of an advocate and of a witness are inconsistent . . . ," and EC 5-10 provides that when the attorney is faced with deciding whether to decline employment or resign employment all "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate." Thus, the advocate and witness roles of an attorney are another potential conflict of interest which can arise in either civil or criminal litigation. See, e.g., International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975).

42. Judge Weinstein has referred to the "tensions between the obligations of attorneys to their individual client and their obligation to the legal structure." Weinstein, Educating Ethical Lawyers, 47 N.Y.S.B.J. 260, 262 (1975).

for example, when a defendant insists on taking the stand and giving testimony that his attorney knows to be false. The American Bar Association resolves the issue in favor of the lawyer's obligation not to conceal the truth. Thus, although canon 7 counsels an attorney to "represent a client zealously within the bounds of the law,"[43] and canon 4 admonishes the lawyer to "preserve the confidences and secrets of a client,"[44] the attorney should not present evidence if "he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent or perjured."[45] Furthermore, disciplinary rule 7-102(A)(4) mandates that "[i]n his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence."[46]

This disciplinary rule is embodied in one of the ABA Standards Relating to the Defense Function.[47] Section 7.7 of the Defense Function provides that when a defendant admits his guilt, "and the lawyer's independent investigation establishes that the admissions are true,"[48] if the defendant nevertheless insists on taking the stand and testifying falsely, the lawyer must either withdraw from the case or, if that is not feasible, at least not "lend his aid to the perjury."[49]

Although the ABA contends that its resolution of the problem is favored by experienced criminal lawyers with whom the committee consulted at length,[50] other highly respected counsel have told this writer that they would feel obligated to argue the defendant's case fully, including his perjured testimony. The spokesman for the latter point of view is Dean Monroe Freedman of Hofstra Law School, who argues that under our adversary system the client has a right to an

43. ABA Code of Professional Responsibility Canon 7 (1975).

44. Id. Canon 4.

45. Id. EC 7-26.

46. Id. DR 7-102(A)(4).

47. ABA Standards Relating to the Administration of Criminal Justice: The Defense Function § 7.7 (1974 Comp.).

48. Id. § 7.7(a).

49. "Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument." Id. § 7.7(c). See also American College of Trial Lawyers, Code of Trial Conduct ¶ 4(a) (1972 rev.) (a lawyer "should never offer testimony which he knows to be false").

50. ABA Standards Relating to the Prosecution Function and the Defense Function: The Defense Function § 7.7, Commentary (1971).

attorney who will represent him without any reservation, and that that right is seriously prejudiced by the ABA prohibition.[51] He maintains that

> the criminal defense attorney, however unwillingly in terms of personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.[52]

III. CIVIL CASES

As in criminal litigation, civil attorneys may face conflicts between (1) the interests of the real client and the third party hirer, (2) the interests of multiple clients, and (3) the interest of former clients in having their confidences protected versus the interest of the present client in zealous advocacy of his claim. In addition, the attorney's own self-interest may conflict with the best interests of his client.

The following federal diversity action for rescission of an irrevocable trust illustrates the potential conflict between the interests of the real client and the third party hirer.

The younger brother of a prosperous and successful man was confined in a mental institution. The older brother asked his attorney to prepare for the younger brother a trust instrument whereby the younger brother's considerable assets, including a one-third interest in the family business, would be placed in an irrevocable trust with the older brother serving as a trustee. The instrument was executed in the mental hospital shortly before the younger brother was to be released. Although the younger brother, the real client, was billed for the preparation of the trust, the attorney did not confer with him in preparing the document and did not attend the execution. Sometime later the two brothers quarreled and the younger brother, represented by new counsel obtained on his own, sued to rescind the trust. The

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51. M. Freedman, Lawyers' Ethics in an Adversary System 35-36 (1975).

52. Id. at 40-41. But see Meagher, A Critique of Lawyers' Ethics in an Adversary System, 4 Fordham Urban L.J. 289 (1976); Greenberg, Book Review, 59 Judicature 357 (1976). Opponents of the ABA position cite statements such as Mr. Justice White's separate opinion in United States v. Wade: "[A]s part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth." 388 U.S. 218, 258 (1967) (White, J., concurring in part and dissenting in part). See also Miranda v. Arizona, 384 U.S. 436, 516 n.12 (1966) (Harlan, J., dissenting).

The merits of the "sporting" theory of advocacy continues to be the subject of vigorous debate. E.g., Damaska, Presentation of Evidence and Factfinding Precision, 123 U. Pa. L. Rev. 1083 (1975); Frankel, The Search for Truth: An Umpireal View, id. at 1031; Freedman, Judge Frankel's Search for Truth, id. at 1060; Uviller, The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea, id. at 1067.

complaint alleged that he was incompetent at the time he signed the trust and that he was under duress because he could not be released from the institution unless he signed it. The litigation, which resulted in six-figure expenses to the two brothers, could have been avoided by the attorney's taking the time to find out what his real client desired, instead of taking instructions solely from the brother who procured his services.

As stated earlier, the second conflict—between the interests of multiple clients—is similar to the first conflict—between a third party hirer and the client—in that the attorney may be confronted with adverse interests. This may cause the attorney to be less zealous or independent. Although this problem is perhaps less severe in civil litigation than criminal litigation because the effect of the conflict on the quality of civil advocacy does not raise constitutional problems, it is nonetheless a serious problem if only because of the frequency with which it arises.[53]

The third type of conflict often arises as a result of the general career-building practice of specializing in one side of a type of litigation and then subsequently becoming an advocate for the opposite point of view. Plaintiffs' lawyers in tort cases, for example, often gain experience doing defense work for insurance companies, and defense attorneys in criminal cases often sharpen their skills by working as prosecutors. No conflict arises when an attorney uses merely the skills that he learned on the other side of the field. Many cases have arisen, however, where an attorney has had the opportunity to use specific confidences of a former client in subsequent litigation against the former client. The use of such information obviously violates the provisions under canon 4.[54] Moreover, the mere opportunity to use such information, which is often determined by whether there is a

53. See, e.g., International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975); Yablonski v. UMW, 448 F.2d 1175 (D.C. Cir.), petition for enforcement granted per curiam, 454 F.2d 1036 (D.C. Cir. 1971), cert. denied, 406 U.S. 906 (1972); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975).

54. See Chugach Elec. Ass'n v. United States Dist. Ct., 370 F.2d 441, 443 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967) (decided under canons 6 and 37 of ABA Canons of Professional Ethics, predecessors of canon 4 of the ABA Code of Professional Responsibility): "[The attorney's] knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events . . . and offer a promising source of discovery." Cases where disqualification has occurred because counsel has actually used inside information are rare because the inquiry into whether such information had been used would "require the revelation of those confidences which the Canon is designed to protect." Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156, 157 (S.D.N.Y. 1973). For this reason the "substantially related" test was developed.

"substantial relationship" between the present case and the previous case,[55] violates canon 4's provisions, as well as the "appearance of impropriety" standard of canon 9.[56]

A variation of this conflict arose in a case this writer recently confronted involving a paralegal.[57] The paralegal and a partner in a firm defending a corporation against a securities complaint examined the corporate client's records. The paralegal spent many days, frequently unsupervised, reviewing these records to obtain material useful to the corporation's defense. After another similar civil Securities Act complaint was filed against the same corporation, the paralegal left the employ of the defendant's counsel and joined the firm representing the plaintiff in the second action. Her new position was that of secretary to the partner in charge of the action. After extensive depositions were taken, it was discovered that the new boss, a bachelor, had been in daily telephone contact with the paralegal at her former place of employment and had visited her while she was working unsupervised on the defendant's records.

This case involved undisputed opportunity for access to confidential materials, which would be grounds for disqualification under canon 4's "substantial relationship" test and canon 9's "appearance of impropriety" test. However, plaintiff's attorneys were reluctant to withdraw because, as a senior partner stated, the complaint was "a very valuable cause of action." Nonetheless, plaintiff's counsel ultimately withdrew, and to insure that no privileged information was being used the court

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55. E.g., Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 925 (2d Cir. 1954); Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156, 158 (S.D.N.Y. 1973).

56. E.g., Gas-a-Tron v. Union Oil Co., Nos. 74-3287 to -3290 (9th Cir., Jan. 14, 1976) (per curiam); Hull v. Celanese Corp., 513 F.2d 568, 571-72 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639, 648-52 (2d Cir. 1974); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973). See also Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (dictum). For a discussion of a new emphasis on factual analysis under canon 4 rather than relying on the vague ethical precept under canon 9 ("appearance of impropriety") see Oken v. C & S Securities, Inc., Civil No. 73-2712, at 9 (S.D.N.Y., Feb. 25, 1976); Note, The Second Circuit and Attorney Disqualification—Silver Chrysler Steers in a New Direction, 44 Fordham L. Rev. 130 (1975).

57. See also ABA Comm. on Professional Ethics, Informal Opinions, No. 1092 (1968) (former law clerk cannot represent an intervenor in an action with which he was involved while clerking; the former clerk's firm is also prohibited from this representation); H. Drinker, Legal Ethics 107 (1953) ("A lawyer who was a student in a lawyer's office may not accept a retainer against his former employer involving matters of which he might have obtained knowledge while in such employment, and by reason thereof . . . .").

inspected all the documents that withdrawing counsel turned over to new counsel.

While it is crucial that any attorney's judgment be exercised free of the influence of third parties—the classic conflict of interest situation—it is equally important that a lawyer not allow his judgment to be colored by his own interests. Thus, a final type of conflict of interest which merits brief mention is the potential adversity between the attorney's own economic interest and his client's interest.

The *Code* provides that "adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession."[58] However, the pursuit of compensation must never interfere with the attorney's "exercise [of] independent professional judgment on behalf of a client."[59] Therefore, as the *Code* provides, a lawyer should refuse employment where his own interests will impair his independent judgment,[60] unless the client consents to continued representation after full disclosure;[61] and, by extension, a lawyer should not permit the course of his representation to be dictated by his own financial interests.

The problem posed by a lawyer's financial interest in the method of representation frequently arises in trust and estate matters. An attorney has a natural desire to represent the whole family and not have another lawyer share in the fee or complicate the work. Since multiple representation is more economical than hiring a separate attorney for each family member and legatee, parties usually will be satisfied with joint representation. The lawyer must recognize that his own interest is not paramount, however, and so to avoid depriving some party of proper representation and to prevent future problems for himself and his clients he should, as required by the *Code,* explain the implications of common representation, and give each client the opportunity to evaluate his need for separate representation.[62]

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58. EC 2-17.

59. Canon 5.

60. Cf. Cinema 5, Ltd. v. Cinerama, Inc., No. 75-7185 (2d Cir., Jan. 27, 1976) (the court, discussing the "substantial relationship" test, the "duty of undivided loyalty" and "the appearance of impropriety," disqualified plaintiff's attorneys where a partner in the firm representing plaintiff was also a partner in a firm in another city representing defendant in a substantially similar suit).

61. DR 5-101(A).

62. DR 5-105(C); see EC 5-16, quoted in note 19 supra. No consideration seems to have been given to this problem in the new "Principles Regarding Probate Practices and Expenses" adopted by the House of Delegates of the American Bar Association at its 1975 Annual Meeting. 62 A.B.A.J. 348-51 (1976).

Similarly, the conflict between the client's best interests and the lawyer's desire to enlarge his fee may occur at various stages of a class action. One of the first steps in a class action is to define the class. It may be in the interest of the named plaintiffs to keep the class small so as to maximize their own recovery. It is in the economic interest of the plaintiffs' lawyer, however, to enlarge the class so as to maximize his fee. Under these circumstances, the responsible, ethical lawyer will not allow his financial interest to overcome his clients' right to the best possible representation of their claims.

Potential conflicts between an attorney and the class members may also arise at the settlement stage, for the attorney's right to assert a claim for fees against the entire settlement fund would give him a greater stake in the settlement than any individual, including his original client.[63] A judge's supervision of the details of a class action settlement gives him some control over the fair dealing of the attorneys, but also imposes a substantial burden on his good judgment. For this reason the Manual for Complex Litigation prepared by the Judicial Panel on Multidistrict Litigation suggests that an agreement that counsel fees be paid separately over and above the settlement amount should not be permitted. It states that "[w]hen counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest."[64]

IV. CONCLUSION

Neither the *Code of Professional Responsibility* nor decisions by the courts can resolve completely all questions which may arise concerning attorneys' conflicts of interests. There will always be questions which evoke disagreement among attorneys with the highest professional standards, and ultimately, the consciences of individual lawyers will determine the ethical conduct of the profession.[65] Nevertheless, particularly in the area of conflicts of interests, where the vital interests of civil and criminal litigants may be sacrificed, the court has a duty to assure effective representation. Accordingly, to the degree that sub-

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63. See Wolfram, The Antibiotics Class Actions, in 1 American Bar Foundation, Research J. 251, 358-59 (1976).

64. Manual for Complex Litigation § 1.46 (rev. ed. 1973). Professor Richard B. Stewart has pointed out in another connection that "[t]he interests of the attorneys in fees and of the members of the class in advancing their interests may . . . often conflict." Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1743 n.354 (1975).

65. Porter v. United States, 298 F.2d 461, 464 (5th Cir. 1962) ("[T]he place to stop [conflicts of interest] is the professional conscience of the advocate involved.").

stantial justice requires, a judge must exercise his power to enforce ethical standards through disqualification of attorneys. No judge properly can disregard this responsibility to enforce respect for the judicial process where the very integrity of that process is threatened by an attorney's conflict of interest.