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Multiple Representation and Conflicts of Interest in Criminal Cases

By Peter W. Tague*

Conflicts of interest resulting from multiple representation in criminal cases impose heavy burdens on all the participants in the criminal justice system. Although the Supreme Court in Holloway v. Arkansas refused to hold that joint representation is unconstitutional per se, it recently approved Proposed Rule of Criminal Procedure 44(c), which would require trial courts to protect a defendant's right to counsel in this situation. After discussing the current approaches of the courts to the problems presented by joint representation, Professor Tague analyzes the proposed rule. He criticizes the proposed rule for its failure to define the role of the trial court and counsel and for its failure to address adequately the underlying constitutional conflict between the right to the effective assistance of counsel and the right to select counsel. He concludes that these issues may be resolved only if the defendant is required to make a binding choice between these two rights and suggests several revisions to the proposed rule.

An attorney's simultaneous representation of multiple defendants in a criminal case raises difficult issues concerning counsel's ethical responsibility, clients' sixth amendment rights, and the court's obligation to oversee the fairness of the judicial process. Multiple representation invites postconviction claims of ineffectiveness, and courts frequently have reversed convictions on this basis. These problems indicate that preserving joint representation is of

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1. Although no statistics exist to indicate how frequently defendants claim ineffectiveness based on a conflict, these appeals are probably common. See People v. Baker, 268 Cal. App. 2d 254, 260, 73 Cal. Rptr. 758, 763 (1968) (when two criminal defendants jointly tried and represented by one attorney, question of separate representation frequent issue on appeal; noting four such cases pending consideration in that division of court of appeals). In United States v. Kutas, 542 F.2d 527 (9th Cir. 1976), cert. denied, 429 U.S. 1073 (1977), appellant unsuccessfully raised the issue despite having stated in a pretrial affidavit that no foreseeable conflict existed, that she had discussed with counsel the possibility of a conflict, that she wished joint representation notwithstanding her right to separate counsel, and despite having made no objection to joint representation at trial.

For fiscal year 1969, a preliminary review of habeas petitions from state prisoners showed that, in those petitions that came to hearing (nationally, less than 5.5% of the 6,818 petitions filed), the most frequent allegation was denial of effective assistance. Ineffective representation accounted for 28% of the allegations and the allegation was present in 28% of the petitions granted. Unlike sentencing or indictment irregularities, the problem was not confined to a few districts. Twenty courts granted petitions on this ground. Committee on Prisoner Petitions, Federal Judicial Center, State Prisoner Petitions 2, 8, 9 (1972) (unpublished preliminary report) (copy on file at Georgetown Law Journal). Unfortunately, the Committee did not break down charges of ineffective representation by the specific nature of the allegation. There are no statistics about the nature of the allegations in the approximately 6,500 petitions that never came to hearing.

2. See United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. Gaines, 529 F.2d 1038
questionable benefit to the participants in the criminal justice system. Individual representation would result in better representation for most defendants. Attorneys would not be torn between conflicting obligations to different clients and would not fear possible postrepresentation sanctions. The Government often would have its tactical position improved and would have its convictions protected from postconviction attack on grounds of ineffective assistance. Trial courts would be freed from the obligation to scrutinize vigilantly the proceedings for conflicts. The possibility would be minimized that the unpleasant alternatives of declaring a mistrial or of demanding substitute counsel would surface far into the proceeding when a conflict became apparent. Postconviction courts also would be freed from deciding whether a conflict existed and from the attendant task of defining and apportioning the burden of proof.

To achieve these results, courts might ban multiple representation as unconstitutional per se by interpreting the sixth amendment to require the assistance of separate counsel. That interpretation presently is foreclosed, however, by the Supreme Court's refusal to hold that joint representation is unconstitutional per se in Holloway v. Arkansas. Alternatively, courts might bar multiple representation unless convinced that they had obtained knowing and intelligent waivers from the defendants. This alternative approach has been adopted by a number of courts of appeals. It is also the subject of proposed rule 44(c), a proposed amendment to the Federal Rules of Criminal Procedure offered by the Judicial Conference.

3. See notes 11-26 infra and accompanying text.
4. See notes 288-95 infra and accompanying text.
5. See notes 296-301 infra and accompanying text.
6. See notes 302-04 infra and accompanying text.
7. These issues, of course, would still arise in other types of ineffectiveness claims. The Supreme Court has not yet established a standard of effective representation, and lower courts are divided. See Maryland v. Marzullo, 435 U.S. 1011, 1011 (1978) (White, J., with Rehnquist, J., dissenting from denial of certiorari) (Court should resolve conflict in circuits). Compare United States v. Joyce, 542 F.2d 158, 160 (2d Cir. 1976) (stringent requirements to establish claim of ineffectiveness) with United States v. Decoster, No. 72-1283 (D.C. Cir. July 10, 1979) (en banc) (no opinion for the court but majority approves standard requiring the reasonably competent assistance of diligent, conscientious advocate). Circuit courts are also divided on the effect of finding ineffective representation. Compare Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (once violation shown, Government can establish lack of prejudice) with Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (adopting rule of Chapman v. California, 386 U.S. 18, 23 (1967); harmless error tests inapplicable to deprivation of procedural right so fundamental as effective assistance of counsel).


9. See notes 227-30 infra and accompanying text.

After introducing the problem of conflicts and discussing the approaches of the federal courts to the problem, this article analyzes proposed rule 44(c). It suggests revisions to the rule, discusses how courts are apt to interpret it if enacted, and questions whether the rule will achieve its goals.

I. THE PROBLEMS WITH CONFLICTS OF INTEREST

A conflict of interest hobbles the defense in a manner distinct from other forms of ineffectiveness. The usual ineffectiveness claim charges inadequacy of counsel based on neglect, lack of insight, bad judgment, or misconception of role. In contrast, an attorney with a conflict may be prepared to provide aggressive, resourceful representation. The conflict, however, prevents such representation, frequently because of the receipt of information, possibly protected by the attorney-client privilege, that would require representation of one client in a way that might disadvantage the other.

Conflicts usually arise because one defendant implicates the other, one defendant's culpability is greater than that of the other, or one defendant's defense is inconsistent with that of the other. To say that some form of conflict will occur whenever counsel represents more than one defendant is probably not an exaggeration. A conflict is likely to arise whether counsel is retained or appointed. A conflict could surface at any stage of the proceedings. A procedure like that of proposed rule 44(c) may help to forestall conflict problems by forcing counsel and clients to assess at an early stage whether a conflict does exist.

11. Disagreement about counsel's role complicates the conflict issue. Under a "positivist" approach to advocacy, counsel is expected to be both partisan and neutral. See generally Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 30 (contrasting "partisan," "purposivist," and "ritualist" conceptions of counsel's role). The ABA Canons of Professional Ethics Nos. 4, 6 & 7 (1970) require him to be loyal, competent, and zealous. A conflict may make it impossible for counsel to adhere simultaneously to such principles of conduct. If counsel tempers the aggressiveness of his representation to accommodate a conflict or to prevent its emergence, he violates principles of partisanship; in deciding to accommodate the conflict by not using an approach that could aid one of the defendants, he abandons neutrality. Although counsel may have made deliberate or unwitting accommodations in attempting to prevent the conflict from emerging, the problem is minimized if an attorney withdraws once the conflict develops.

The most difficult problem arises when an attorney is unaware that a conflict exists or may emerge. See note 13 infra. The chances that a conflict will occur increase as the proceedings advance from stage to stage. A procedure like that of proposed rule 44(c) may help to forestall conflict problems by forcing counsel and clients to assess at an early stage whether a conflict does exist. See notes 106-65 infra and accompanying text.

12. "Conflict" is defined expansively here. It includes any difference in the positions of the defendants that might influence counsel in choosing how to represent either defendant. The aspirational Ethical Considerations of the Code of Professional Responsibility are based on a broader definition of "conflict" than the definitions given for the Disciplinary Rules. Compare ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (representing multiple clients "who may have differing interests, whether such interest be conflicting, inconsistent, diverse, or otherwise discordant") with id., DEFINITIONS No. 1 ("Differing interests' include every interest that will adversely affect either the judgment or the loyalty . . . to a client, whether it be a conflicting, inconsistent, diverse, or other interest."). The Advisory Committee appears to adopt the broader definition for rule 44(c). See 77 F.R.D. at 595-96.

Courts define conflict more restrictively for constitutional purposes. See, e.g., United States v. Donahue, 560 F.2d 1039, 1045 (1st Cir. 1977) (alternative strategy available for X but inconsistent with position of Y; conflict because defendant and codefendant represented by members of same firm); Robinson v. Parratt, 546 F.2d 764, 767 (8th Cir. 1976), aff'd 421 F. Supp. 664, 671 (D. Nev. 1976) (independent antagonistic defenses); People v. Anderson, 59 Cal. App. 3d 831, 834, 131 Cal. Rptr. 104, 111 (1976) (conflict must be demonstrable reality; ineffectiveness must result in withdrawal of crucial defense and reduce trial to farce).

13. Courts that usually apply a less rigorous standard of review in judging ineffectiveness claims against
Proceedings—plea bargaining, investigation and preparation of a defense, the decision whether to have the defendants testify, the final argument, or allocution at sentencing. Courts and commentators have documented the many ways that an attorney can find himself in the bind of a conflict.14 Probably every defense attorney who has represented more than one defendant in a multiple defendant proceeding has experienced the gripping fear of an emerging conflict,15 and probably every judge who has watched counsel represent more than one client has considered ways to extricate counsel without declaring a mistrial.

A simple example illustrates the likely occurrence and probable effect of a conflict. Assume that X and Y are charged with robbery and that both have the same defense—a common alibi established by the same witnesses. This situation is perhaps the best for a joint defense presented by a single attorney. The attorney begins his preparation on the assumption that the defendants will both be acquitted or both be convicted; logically, he believes that they will stand or fall together.16 He must decide whether one or both will testify and in what order each will testify. Although the alibi could be presented completely through the alibi witnesses, most attorneys prefer to have one or both defendants testify to confirm the testimony of the alibi witnesses and to show the jury what each defendant is like as a person.17 This decision, however,
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usually cannot be made until far into the case. The attorney rarely learns about the criminal records of his clients until the prosecution produces them during discovery.\textsuperscript{18} Until he has interviewed his clients at length, the attorney does not know whether their stories conflict, whether one client remembers what the other does not,\textsuperscript{19} or whether he can unite the testimony of one with that of the other and their combined story with that of the alibi witnesses.\textsuperscript{20}

Even if the stories of his clients match, the attorney's problems are not over. Does one client appear to be more credible than the other? More willing to follow counsel's lead? Less likely to react abrasively to cross-examination? If he represented only one defendant, counsel might decide that his client had to testify, regardless of whether the defendant appeared unsavory or his story unsatisfactory. In representing both defendants, the attorney's choice is not so clear. If X testifies, will he drag down Y, the better witness?\textsuperscript{21} If only Y testifies, X may not be sufficiently protected, especially if evidence against Y is greater than that against X. Because juries frequently discount alibi witnesses, a jury in a separate trial might have acquitted X on the ground that the Government failed to prove him guilty. Even in the face of an instruction not to infer guilt from failure to testify,\textsuperscript{22} the jury in a joint trial is puzzled by X's failure to testify. If Y was willing to testify in spite of the evidence against him,

\textsuperscript{18} Defendants frequently have a distressing inability to remember whether they have a record of convictions and, if so, whether those convictions were misdemeanors or felonies. This information is vital for assessing the Government's chances of impeaching a testifying defendant. In addition, information about other crimes, wrongs, or acts is admissible for limited purposes under Fed. R. Evid. 404(b) and can be extremely damaging to the defense. The possibility that the Government may be able to circumvent discovery by introducing such information in rebuttal complicates an early decision whether to have a defendant testify.

\textsuperscript{19} On cross-examination, the Government frequently compares the testimony of one defendant with that of another to establish inconsistencies in memory and story as a basis for attacking the credibility of each. Defense counsel frequently view these inconsistencies, even if minor or understandable, as damaging to the case.

\textsuperscript{20} Prompting techniques such as informing a defendant of possible defenses before asking for his version of the facts are of questionable propriety. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION § 3.2(a) (1974) (attorney should probe for all relevant facts without seeking to influence direction of client's response) [hereinafter ABA DEFENSE STANDARDS]. But defense counsel can try to dissuade one client from obstinately claiming that some "fact" occurred that the other client does not remember or disputes. Marrying the stories of his two clients is one of counsel's greatest obstacles to successful representation.

\textsuperscript{21} If counsel calls X to testify, cross-examination of X on behalf of Y might strike jurors as inconsistent with counsel's belief in the truth of X's testimony. See Holloway v. Arkansas, 435 U.S. 475 (1978), discussed at text accompanying notes 34-70 infra. Even if X had told counsel something that would not hurt X but would help Y, counsel might be barred by the attorney-client privilege from eliciting X's testimony in this situation. Counsel's cross-examination of a Government witness also could create a conflict. See Buffalo Chief v. South Dakota, 425 F.2d 271, 277 (8th Cir. 1970) (when several individuals killed victim, counsel unable to press Government's eyewitness concerning dress of assailants because testimony would have benefited one client but hurt another).

\textsuperscript{22} If one client testifies, counsel cannot hope for any effect from the self-serving announcement made by many defense attorneys whose single client does not testify, "I see no reason to have my client testify; we will put the Government to its burden of proving guilt beyond a reasonable doubt."
the jury wonders, what damaging information would X have revealed if he had testified?\textsuperscript{23}

The attorney faces the same difficult decisions at final argument. Y has testified, but X has not. If counsel argues that Y's testimony proves that both X and Y are innocent, he prods the jury into wondering again why X himself did not testify and invites the Government to retort in its rebuttal.\textsuperscript{24} But counsel also cannot isolate X from Y. If he represented only X, he could stress the lack of prosecution evidence against his client even if he did not directly contrast the evidence implicating X with that implicating Y.\textsuperscript{25} In representing both X and Y, however, counsel cannot risk compromising Y's position by contrasting the evidence against each defendant. At best, counsel may argue that, because the prosecution's evidence against X is inconclusive, the jury should acquit Y on the strength of X's position. But that approach risks compromising X.

The attorney may or may not recognize these dilemmas. If he does, he should notify the court, and the court should require separate counsel.\textsuperscript{26} If he does not, the conflict probably will be detected and brought to the attention of the postconviction courts by each defendant's new counsel on appeal.

\textsuperscript{23} Counsel may be unable to prevent the court from highlighting the defendant's silence with an instruction to the jury not to infer anything adverse to the defendant from his failure to testify. See Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978) (such instruction even over defense objection does not violate constitutional guarantee against compulsory self-incrimination).

The impact on the jury of a defendant's failure to testify may not create a conflict warranting reversal. Compare Kaplan v. Bombard, 573 F.2d 708, 713 (2d Cir. 1978) (reversal not warranted because not clear that defendant's testimony would "add anything new" and defendant would have been subject to cross-examination on criminal record) with United States v. Donahue, 560 F.2d 1039, 1044 (1st Cir. 1977) (if counsel decides that to avoid this impact neither defendant should testify, conflict exists for defendant who could have testified).

\textsuperscript{24} Although Griffin v. California, 380 U.S. 609 (1965), precludes direct comment by the Government on a defendant's failure to testify, this rule has been narrowly construed. See Lockett v. Ohio, 438 U.S. 586, 595 (1978) (Government's reference to "uncontradicted" evidence harmless when defendant refused to testify after counsel told jury client would take stand). Similarly, the false contention by the Government that the evidence implicates both defendants, although clearly improper, may not constitute reversible error. See United States v. Mitchell, 556 F.2d 371, 380-81 (6th Cir.), cert. denied, 434 U.S. 925 (1977) (no prejudice even when Government's failure to exclude inference that defendant participated in codefendant's plot to kill Government witness exceeded "outer bounds of proper advocacy"). Furthermore, an objection by defense counsel to such tactics would emphasize the significance of that evidence to Y while eliminating its application to X.

\textsuperscript{25} Counsel risks damming both his client X and codefendant Y if he argues that the jury should acquit X regardless of whether Y is guilty. When counsel represents both X and Y, however, he is absolutely foreclosed from asking the jury to split the defendants.

\textsuperscript{26} The worst result of a conflict, from counsel's point of view, is that he may be required to withdraw from representing both defendants. In our two-person robbery, for example, assume that X tells counsel that he is guilty but Y is innocent; Y claims to lack any knowledge of the crime. With this information, counsel could represent X but not Y. Counsel has learned nothing from either X or Y that would compromise his representation of X. He must use X's admission to help Y, but cannot because of X's attorney-client privilege. Assume, however, that during the interview Y admits that on the day of the robbery he had worn a red hat matching the victim's description of the hat worn by the robber who pistol-whipped him. With that additional fact, counsel must withdraw from representing X as well. He now has information showing X's lesser culpability that he cannot use because it is protected by Y's attorney-client privilege. See United States v. Garafola, 428 F. Supp. 620 (D.N.J. 1977) (disqualifying attorney from representing either defendant), aff'd sub nom. United States v. Dolan, 570 F.2d 1178 (3d Cir. 1978). If required to withdraw, counsel may also be required to repay part of his fee to his clients. See Loffelt v. Shell, 577 F.2d 30, 31-32 (8th Cir. 1978) (per curiam) (counsel ordered to reduce fee from $1000 to $100).
II. CURRENT LEGISLATIVE AND JUDICIAL APPROACHES TO MULTIPLE REPRESENTATION

The current federal rule, rule 44 of the Federal Rules of Criminal Procedure, implicitly authorizes the appointment of one attorney for two or more indigent defendants. To implement rule 44, Congress enacted 18 U.S.C. § 3006A(b), which orders the trial court to “appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.” Unfortunately, Congress did not explain these limitations on joint representation or give any guidance to trial courts regarding the procedures for determining whether separate counsel is required.

No court has yet condemned multiple representation as unconstitutional per se. In Ford v. United States, however, the United States Court of Appeals for the District of Columbia Circuit approached this position by exercising its supervisory power to require initial appointment of separate counsel for each indigent defendant. According to that court, if, after each attorney consults with his client and investigates the case, counsel decide that the defendants would benefit from joint representation, they must notify the court and explain the reasons for their recommendation. The court can then take whatever action it “deems appropriate in the circumstances.” The court adopted this approach because it thought that, despite the mandate of 18 U.S.C. § 3006A(b), a trial court could not determine before trial whether separate counsel are required and because the effect on his fee may influence an appointed attorney’s decision whether joint representation might prejudice his clients.

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27. Rule 44 of the Federal Rules of Criminal Procedure covers the right to and assignment of counsel and provides that an indigent defendant is entitled to have counsel assigned at every stage of the proceedings.

28. 18 U.S.C. § 3006A(b) (1976). As originally enacted, it ordered separate counsel “for defendants who have such conflicting interests that they cannot be represented by the same counsel . . . .” The 1970 amendment does not explain the change in language, but the explanation may lie in the heightened concern for conflicts that developed in the interim between the promulgation of the Canons of Professional Ethics and its replacement by the Code of Professional Responsibility. The Code defines a conflict in terms of “differing interests.” See note 12 supra. The Canons defined a conflict as when, “in behalf of one client, it is [counsel’s] duty to contend for that which duty to another client requires him to oppose.” ABA CANONS OF PROFESSIONAL ETHICS No. 6 (1937). The author has been unable to determine what Congress intended by “other good cause is shown,” and apparently no case has interpreted that clause. See also 7 ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES: APPOINTMENT OF COUNSEL IN CRIMINAL CASES, § 2.10 (Aug. 3, 1978) (separate counsel should “normally” be appointed unless “good cause is shown” or the defendants waive personal counsel) (unpublished internal manual) (copy on file at Georgetown Law Journal) [hereinafter GUIDELINES].

29. 379 F.2d 123 (D.C. Cir. 1967)

30. Id. at 126. The federal district court in Vermont usually appoints separate counsel, but has not drafted a specific rule on this practice. Conversation with Clerk’s Office, Vermont District Court (Jan. 4, 1979). At least one state court has urged appointment of separate counsel, but apparently does not reverse automatically when the trial court has failed to do so. See McFarland v. Indiana, 359 N.E.2d 267, 268-69 (Ind. App. 1977) (adopting Ford rule, but proof of conflict required for reversal).

31. Ford v. United States, 379 F.2d at 126. Under Faretta v. California, 422 U.S. 806 (1975), it is unclear whether it is constitutional to condition appointment of one attorney on a showing of benefit to the defense, as Ford does. For a discussion of Faretta, see text accompanying notes 231-41 infra.

32. Ford v. United States, 379 F.2d at 125. Concern for a fee may lead retained attorneys, whose
Courts that have not adopted the Ford approach face difficult issues. What does the trial court do if an attorney declares that a conflict may emerge or does exist? If counsel does not raise the issue, must the trial court nonetheless ask counsel whether he perceives a conflict? Must the court itself determine whether a conflict may or does exist? Must the court inform the defendants of the risk of conflict? When postconviction attack is based on conflict, how does the appellate court define and apportion the burden of showing conflict and the resultant prejudice?

A. WHEN THE DEFENSE OBJECTS TO JOINT REPRESENTATION

In Holloway v. Arkansas, the Supreme Court reversed the convictions of defendants Holloway, Campbell, and Welch on charges of rape and robbery because the trial court improperly required joint representation over claims of potential conflict. The trial court had appointed one public defender, Harold Hall, to represent all three defendants. Several weeks before trial, the trial court denied Hall’s motion for appointment of separate counsel. The court subsequently refused to suppress Campbell’s oral confession, although it ordered deletion of references to his codefendants. Before the jury was empaneled, Hall renewed his motion for appointment of separate counsel on the ground that “one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.” The court again denied the motion, commenting that “I don’t know why you wouldn’t.”

After the state rested, Hall told the court that all three defendants had decided to testify against his recommendation and that the conflict would

representation is not covered by rule 44 as presently enacted, to overlook conflicts more frequently than would public defenders or appointed private counsel. See Cole, Time for a Change: Multiple Representation Should be Stopped, 2 NAT. J. CRIM. DEF. 149 (1976) (fee considerations contribute to making multiple representation a “defense lawyer’s dream”); Lowenthal, supra note 17 (noting questionnaire responses indicate that 70% of public defenders have strong preference against joint representation and 49% refuse to represent more than one defendant in multiple defendant cases under any circumstances).

33. See United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (rejecting Ford rule of automatic reversal; requiring court to conduct early inquiry into possible conflicts and ensure that defendants aware of risks).


35. Hall made the motion because “the defendants had stated to him that there is a possibility of a conflict of interest in each of their cases . . . .” 435 U.S. at 477. The motion did not explain further the nature of the conflict. Id. at 481. Although the Supreme Court indicated that a hearing was held, id. at 479, Hall states that the trial court refused to hear oral argument or receive evidence of the existence and nature of the conflict. Conversation with Harold Hall (Jan. 5, 1979). Hall believes that the correct procedure would have been for the court to permit him to withdraw from representing all three defendants and to appoint separate counsel for each. Id.

36. Campbell allegedly admitted entering the restaurant and remaining at the top of the stairs as a lookout while his codefendants went downstairs and performed the rape. 435 U.S. at 477-78. Campbell later claimed that he had never made the oral confession. Id. at 481. Hall does not think that suppressing the confession would have eliminated the conflict. Conversation with Harold Hall (Jan. 5, 1979). This conclusion seems to be correct because the Government could have used the confession to impeach Campbell on cross-examination. See Harris v. New York, 401 U.S. 222 (1971).

37. 435 U.S. at 478.

38. As the Holloway majority opinion noted, the trial judge’s statement is unclear. If the judge meant that Hall would be able to cross-examine the testifying defendant on behalf of his other two clients, his response conflicts with his subsequent refusal to permit counsel to “cross-examine”—that is, to challenge the credibility of each defendant’s testimony as he testified. 435 U.S. at 478 n.3.
probably surface as a result.\footnote{435 U.S. at 478. Hall did not explain why he had made this recommendation. The recommendation itself could have presented a conflict if Hall had urged his clients not to testify because he believed himself prohibited from cross-examining each on behalf of the other two, rather than as a tactical decision that it would be in each defendant's best interest not to testify. One also wonders what effect Hall's in-court announcement of his recommendation might have had on the jury.} After cavalierly noting that conflicts exist in every multiple defendant case, the court told Hall to let the defendants testify and indicated satisfaction "that each understood the nature and consequences of his right to testify on his own behalf."\footnote{435 U.S. at 479. The trial judge compounded the damage when he prefaced the testimony of two of the defendants by asking whether each understood that he was testifying against counsel's advice. Appendix to Petitioners' Brief in the United States Supreme Court at 28, 30 [hereinafter Appendix].} Hall shifted ground at this point. He argued first that he could not cross-examine the testifying defendant because he had received information from each individually and second, that he could not even ask questions of each on direct examination.\footnote{435 U.S. at 479. Both arguments were grounded on Hall's belief that anything he did to aid the testifying defendant would injure the nontestifying defendants. Appendix, supra note 40, at 26. Hall apparently did not know what each defendant would say while testifying. Conversation with Harold Hall (Jan. 5, 1979). Although this tends to raise questions about Hall's preparation, in the absence of a conflict Hall would have been able to examine each defendant without any concern for their attorney-client privilege.} The court countered Hall's first objection by stating that counsel had no right to cross-examine his own witness. Even if that conclusion were technically correct under the state's evidentiary rules,\footnote{The State noted that Arkansas law prohibited cross-examination of one's own witness unless that witness was hostile. Transcript of Oral Argument in United States Supreme Court at 25 (Nov. 2, 1977) [hereinafter Oral Argument].} it ignored counsel's obligation to protect nontestifying defendants while a codefendant testified. The court apparently interpreted Hall's reservations concerning direct examination as a reference to the possibility that one or more of the defendants would perjure himself and instructed Hall to "tell [each defendant] to go ahead and relate what he wants to. That's all you need to do."\footnote{435 U.S. at 480 & n.4. Hall considers risking contempt by refusing to proceed, but decided that his obligation to his clients required him to represent them as best he could, given the conflict. Conversation with Harold Hall (Jan. 5, 1979). Other attorneys might disagree. Compare People v. Kor, 129 Cal. App. 2d 436, 447, 277 P.2d 94, 101 (1954) (Shinno, J., concurring) (suggesting that counsel should choose to go to jail rather than disclose privileged matters) with ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(2) (attorney shall withdraw if to continue would violate disciplinary rule, as long as permission received from court if required).}

Hall dutifully followed the instructions.\footnote{Hall dutifully followed the instructions. When Holloway and later Welch took the stand, Hall advised each that "I cannot ask you any questions that might tend to incriminate any one of the three of you . . . . Now, the only thing I can say is tell these ladies and gentlemen of the jury what you know}
about this case..."

At least one of the defendants understandably was confused, commenting that he had no "speech" prepared and had expected to answer counsel's questions. Each defendant then testified that he was not guilty because he was elsewhere at the time of the crime, although not with the other two.

In a split decision, the Arkansas Supreme Court refused to reverse on the ground of a conflict of interest. Although the court apparently would have reversed automatically if a conflict had existed, it limited its review to the testimony given by the three defendants, rather than considering the testimony that they might have given if Hall had asked questions to elicit or to challenge their stories. The court concluded that no conflict had emerged. It reasoned that Campbell's confession had been introduced only against him, that Campbell was guilty of rape as an accessory even though he had not participated, that each defendant had denied involvement while testifying, and that each had received the same sentence. Equally important, the Arkansas Supreme Court thought that Hall's various attempts to withdraw were inadequate. The court recommended that an attorney specifically outline the nature of the conflict and, if necessary, ask the trial court to permit him to identify the conflict in chambers, out of the hearing of the prosecution.

On certiorari to the Arkansas Supreme Court, the United States Supreme Court reversed, 6-3, in an unfortunately vague opinion by Chief Justice Burger. The Court did not reverse because it believed that multiple

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46. 435 U.S. at 480.
47. Id.
48. Id. at 480-81. It is not clear whether the Government used Campbell's unredacted confession in cross-examining him. If so, that use would have increased the necessity of Hall's cross-examining Campbell to protect the other two defendants. Cf. Bruton v. United States, 391 U.S. 123, 128-29 (1968) (impermissible to assume jury will ignore confessor's inculpation of codefendant in determining latter's guilt; codefendant's confrontation rights denied when confessor did not take stand).
49. 260 Ark. 250, 539 S.W.2d 435 (1976) (4-3 decision).
50. Id. at 256, 539 S.W.2d at 439.
51. Id. at 259-60, 539 S.W.2d at 441. The court appeared to define conflict as a situation in which the inconsistencies were visible to the jury rather than one in which the attorney was foreclosed from some action, an interpretation more restrictive than that suggested in this article. See note 12 supra.
52. 260 Ark. at 255-56, 539 S.W.2d at 438-39.
53. Id. at 259, 539 S.W.2d at 440-41. The Arkansas Supreme Court neither explained how detailed counsel's presentation would have to be nor acknowledged that Hall might have violated the attorney-client privilege and compromised his clients' fifth amendment rights if he had disclosed the details of the conflict. According to Hall, he would not have informed the trial court of the nature of the conflict, even if that discussion would have occurred in camera and even if his refusal to disclose would have resulted in a contempt citation. Conversation with Harold Hall (Jan. 5, 1979). Hall thought his discussion might have been disclosed to the press. Id. He did not inform the Arkansas Supreme Court of the nature of the conflict because that court held no oral argument. Oral Argument, supra note 42, at 11. Hall did discuss, in general, the conflict during oral argument before the United States Supreme Court by explaining that he knew, through conversations with his clients, which defendants had gone downstairs where the rape had occurred. Id. When asked whether his disclosure to the Supreme Court violated the attorney-client privilege, Hall replied that he thought not, contending that if he did not name which individuals did not participate in the rape, he would not breach the privilege. Id.
54. Holloway v. Arkansas, 435 U.S. 475 (1978). Justice Stevens joined the majority, without opinion, although as a circuit judge he had written the opinion in United States v. Jeffers, 520 F.2d 1256 (7th Cir.) (counsel's effectiveness not affected by possible conflict when Government called witness who had previously been represented by defense counsel's firm), cert. denied, 423 U.S. 1066 (1976). The Arkansas
representation was unconstitutional per se,55 or because it concluded that, on the record, a conflict had existed and that the defendants had been prejudiced thereby.56 Instead, the Court scored the trial judge for his brusque dismissal of Hall's objections. Because the trial judge had failed to credit Hall's claim that a conflict had existed or to inquire into the nature of Hall's allegations, the trial judge had "improperly require[d] joint representation over timely objection . . . ."57

Reversal followed automatically. The defendants, who had not established how they had been prejudiced by the alleged conflict, were excused from that burden, and the state was not permitted to argue that the putative conflict was harmless error on the facts of the case.58 In so ruling, the Court settled one question about the proper interpretation of Glasser v. United States,59 the only other case in which the Court has faced a challenge to a jury verdict of guilt based on an alleged conflict of interest. Glasser included language suggesting that reversal should be automatic when the trial court had forced counsel to represent two defendants with potentially conflicting defenses,60 but also included language suggesting that some form of the harmless error rule might apply.61 Holloway rejected the latter possibility.

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55. 435 U.S. at 482 & 483 n.5.
56. Id. at 490-91. Hall said that he had had to change his "plans" after the trial court barred him from cross-examining each defendant as he testified. Oral Argument, supra note 42, at 4. He did not explain what that change was or how his initial plan might have better aided the defendants. During oral argument one Justice (the transcription does not identify a Justice who asks a question) suggested how prejudice could have existed: despite equal guilt under substantive law, the jury, which fixed the penalty in Arkansas at that time, might have given a lighter sentence to the defendant who did not participate in the rape. Id. at 28.
57. 435 U.S. at 488 (interpreting Glasser v. United States, 315 U.S. 60 (1942)).
58. Id. at 491. The defendants have not yet been retried. On remand, the trial of each was severed and separate counsel appointed. Hall was not reappointed to represent any defendant and would not have accepted reappointment if he had been asked. Conversation with Harold Hall (Jan. 5, 1979).
60. The Court in Glasser used the word "insist," 315 U.S. at 76; in Holloway, the word "forced," 435 U.S. at 488. The trial court's "insistence" in Glasser was milder than that in Holloway. Glasser and Kretske, two assistant United States attorneys, were charged with fraud. Glasser had retained Stewart; Kretske, the firm of Harrington & McDonnell. On the day of trial, Harrington's motion for a continuance was denied, and McDonnell, Harrington's partner, was ordered by the trial court to represent Kretske. The next day, McDonnell announced that Kretske did not want him as counsel. Before ruling on that motion, the trial court asked Stewart whether he would represent Kretske also. Stewart noted that there might be a "little inconsistency" between the defense of Glasser and that of Kretske. 315 U.S. at 68. The court dropped the matter, and refused to permit McDonnell to withdraw. Then, following a conversation between the court, defendants and defense counsel, Kretske announced that Stewart had agreed to represent Kretske as long as the court appointed Stewart. Id. at 69. Apparently, Stewart wanted to be appointed to prevent the jury from inferring that the defendants acted jointly. See Petitioners' Bill of Exceptions, Transcript of Record, Vol. I at 181 (filed on appeal to Supreme Court, June 28, 1940). The court granted McDonnell's motion to withdraw, but did not specifically ask Glasser whether he accepted this arrangement. 315 U.S. at 69. Glasser first objected to this appointment some fifteen weeks after he had been convicted. Id. at 88 (Frankfurter, J., dissenting).
61. 315 U.S. at 67, 72-73 (discussing the strength of Government's case and possible impact on defense strategy). But see id. at 75-76 (difficult to determine degree of prejudice sustained). The decisions in Glasser and Holloway suggest that a court cannot appoint an attorney to represent an indigent codefendant when
The decisions in both Glasser and Holloway, however, begged the crucial issue of identifying what acts or omissions by a trial judge "force" counsel on an unwilling defendant. Although the remarkable insensitivity of the Arkansas trial judge made the Court's decision to reverse understandable, the Court left the role of counsel and of the trial court undefined. What must counsel do to trigger the trial court's obligation to inquire? Is it enough if counsel identifies the nature of the conflict in generic terms, as Hall had done, or must counsel identify the relevant disciplinary rules or facts that create the conflict? With respect to counsel's obligation to identify the conflict, for example, the Court said that Hall could have explained the conflict more clearly, but did not indicate what other information would have proven helpful or how far Hall could have gone without violating the attorney-client privilege. Further, must the trial court accept counsel's claim that a conflict exists or may it probe to satisfy itself that a conflict does exist? If the trial court may inquire, may it question the defendants as well as counsel? On these points, the Court vacillated. Although it approved accepting counsel's claim and appointing separate counsel without inquiry, it did not "preclude" inquiry into the sufficiency of counsel's representa-

62. At one point, for example, the trial judge said "every time I try more than one person in this court each one blames it [the crime] on the other one." 435 U.S. at 479.

63. The Court nonetheless recognized the need to "evolve some standards" in this area, as one Justice remarked during oral argument. Oral Argument, supra note 42, at 12. The Court's inability or unwillingness to set up standards was unfortunate because Holloway provided an opportunity to explore several troubling ethical issues for counsel. If counsel is ethically obliged to ask only for a narrative answer when he suspects that his client will perjure himself, see note 46 supra, is that type of questioning ineffective representation? Compare State v. Robinson, 290 N.C. 56, 67, 224 S.E.2d 174, 180 (1976) (ineffective representation for counsel to inform witness, "Tell what you would like to tell") with People v. Lowery, 52 Ill. App. 3d 44, 47, 366 N.E.2d 155, 157 (1977) (approving narrative answer). The Court implied that the prohibition against withdrawal without court permission in DR 2-110(B), even when mandated by other disciplinary rules, was constitutional when it noted that the trial court could either accept counsel's statement about conflict or probe counsel about the conflict as a condition to granting motion to withdraw. 435 U.S. at 486-87. See notes 68-70 infra and accompanying text. But what is counsel to say if the court refuses to permit withdrawal without further explanation of the conflict? How does counsel balance the threat presented by the conflict against the disclosure of some "secret" or "confidence" that was the source of the conflict? See ABA Code of Professional Responsibility, DR 4-101(B) & (C). Is either the trial court or counsel expected to ask the defendants whether they want counsel to proceed despite the conflict?

64. Examples include inconsistent defenses and the inability to cross-examine a testifying defendant on behalf of the other defendants. The latter reason would warrant separate counsel in every multiple representation case.

65. For example, counsel might announce that he fears that he might violate DR 7-102(A)(4) by presenting perjured testimony. Although such an announcement certainly should flag the problem for the court, it also may have a disproportionate impact on the outcome of the trial. Cf. Lowery v. Cardwell, 573 F.2d 727 (9th Cir. 1978) (counsel's in camera pronouncement to judge in bench trial that client committed perjury deprived defendant of due process; conviction reversed).


67. 435 U.S. at 485. Unfortunately, the Court's opinion did not discuss the interesting colloquy at oral argument concerning the effect of the attorney-client privilege. See Oral Argument, supra note 42, at 14 (suggestion that second judge be appointed to determine existence of conflict). The Court left the role of counsel and of the trial court undefined.

68. The Court reasoned that, as an officer of the court, counsel would not mislead the judge; if he did, he could be sanctioned. 435 U.S. at 486.
MULTIPLE REPRESENTATION

If the court can inquire, what does it do if met with counsel's refusal to amplify his claim on the ground of privilege? Similarly, the Court did not address whether the trial court could evaluate the conflict, as stated by counsel or as inferred by the court, to determine if it was de minimis on the facts of the given case and therefore did not require separate counsel.

Holloway's failure to answer these questions is particularly upsetting in light of the Court's casual treatment of similar issues in Dukes v. Warden, a decision mentioned by neither the Holloway majority nor minority. In Dukes the defendant sought to overturn his guilty plea on collateral attack because his retained counsel allegedly had a conflict of interest in representing Dukes' codefendants in a second case in which Duke had separate counsel. Zaccagnino, the attorney accused of conflict, negotiated a package plea bargain for Dukes in both cases. When Dukes refused to accept the plea bargain, Zaccagnino moved to withdraw because he thought Dukes should plead guilty. Dukes then asked the trial court to permit him to retain another attorney or to proceed pro se. The trial court denied counsel's request to withdraw, but did continue the opening of trial for one day to permit Dukes to retain another attorney. Dukes had another attorney from Zaccagnino's firm with him when he next appeared in court. At that time, Dukes pleaded guilty on the same terms as the original plea bargain. Before Dukes was sentenced, he learned that, before the same judge, Zaccagnino had tried to absolve his two codefendants in the second case by placing the principal responsibility on Dukes. When Dukes appeared for sentencing, he moved to withdraw his guilty plea, arguing that he had not intelligently waived his rights. In his petition for state habeas relief, he argued, for the first time, that as a result of the apparent conflict Zaccagnino had pressured him into pleading guilty and the guilty plea was therefore involuntary.

The Supreme Court denied relief, adopting the position of the Connecticut Supreme Court that Dukes had not established that an actual conflict had existed or that the alleged conflict had pressured Dukes into pleading guilty.

69. 435 U.S. at 487.
71. Given the Court's disappointing treatment of the many unresolved questions posed by multiple representation, it is difficult to discern why the Court granted certiorari. Because all courts of appeals require an inquiry if the defense objects, the Court broke little new ground. See Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 Hofstra L. Rev. 315, 329-30 (1977). Perhaps the Court wanted to alert the lower federal courts to their responsibility under Glasser. But these courts need more guidance than Holloway provides because the Court's remedy, automatic reversal, simply warns them to walk carefully when faced with multiple representation. The Court's effort in Holloway is also regrettable because it fails to give the states needed guidance. Rule 44(c), if enacted, would not apply to state litigation. Thus, the states would still be bound only by what the constitution requires, and what it requires, after Holloway, remains a mystery.
73. Id. at 251.
74. Id.
75. Id. at 252.
76. Id.
77. This attorney was with Dukes because Zaccagnino was engaged in another case. Id. at 252.
78. Id.
79. Id. at 254.
80. Id. at 255.
81. Id. at 256-57.
Of course, the procedural context of Dukes clouds its contribution to any clarification of the trial court's role when counsel objects on the grounds that a conflict exists. The Court has demanded far greater proof of the existence of a constitutional violation and of its effect before allowing a collateral attack on a guilty plea. Nonetheless, Dukes is important for approving the Connecticut Supreme Court's conclusion that no conflict had existed and for accepting the trial court's failure to intercede after both Dukes and his lawyer had claimed that a conflict did exist. Dukes as well as Holloway must give one pause in looking to the Court for leadership in resolving the difficult relationships between the trial court and the defense in multiple representation cases.

B. MULTIPLE REPRESENTATION AND THE TRIAL COURT

The Supreme Court's failure in Holloway to provide meaningful guidance to counsel or to trial courts when the defense objects to joint representation is compounded by its failure even to discuss the responsibility of the trial court when the defense does not announce the actual or potential existence of a conflict. Is the trial court obliged to ask counsel whether he is satisfied that no conflict looms? Must it ask the defendants whether they have discussed with counsel what a conflict means and whether they appreciate the risk of proceeding with one attorney? Should it satisfy itself that no conflict is likely to arise?

The willingness of the Court in Holloway to reverse a trial court that did not explore a defense objection suggests that the Court might require an inquiry about possible conflicts in joint representation cases on constitutional grounds. But other recent Supreme Court decisions contradict this conclusion. The Court was undoubtedly aware of proposed rule 44(c), and it might have chosen to proceed by legislation rather than by constitutional rule, a

82. See Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (showing of cause and actual prejudice required for habeas review when defendant failed to comply with state procedure for objecting to Miranda violation); McMann v. Richardson, 397 U.S. 759, 770 (1970) (guilty plea based on reasonably competent advice not subject to attack on ground that counsel misjudged admissibility of confession).

83. See Dukes v. Warden, 406 U.S. 250, 267 (1972) (Marshall, J., dissenting) ("The trial judge did not even minimally inquire into the facts behind petitioner's rather inarticulate claims.").

84. This failure prompted the Second Circuit to acknowledge reliance on its own precedents, rather than on Holloway, in deciding the trial court's obligation. Salomon v. LaVallee, 575 F.2d 1051, 1053 n.3 (2d Cir. 1978).

85. The need for answers to these questions is highlighted by the differing responses given by the courts of appeals. See notes 89-99, infra and accompanying text. The Court in Holloway acknowledged this division. 435 U.S. at 483. If the Court's answer is to adopt proposed rule 44(c), that answer will not establish the constitutional contours of the state courts' duty or guide the federal courts in implementing rule 44(c).

86. The considerations that contributed to the Court's adoption of a prophylactic remedy—the importance of the right to counsel and the difficulty of postconviction determinations of the existence and effect of a conflict, 435 U.S. at 489-91—apply equally when the defense has failed to object.

87. In Estelle v. Williams, 425 U.S. 501 (1976), for example, the Court found no due process right to appear in civilian clothes before a jury. A different result might have been reached if the trial court had "compelled" the defendant to wear jail clothes after overruling a defense objection thereto. Id. at 512-13. By analogy, the defendants would not be "compelled" to accept joint representation unless they objected. Holloway interpreted Glasser as a decision in which the trial court had forced counsel on an unwilling defendant, an analysis similar to that in Estelle. See Holloway v. Arkansas, 435 U.S. at 484-85.
choice that would be consistent with its reluctance to impose a constitutional prophylactic in other areas of criminal procedure. 88

The federal courts of appeals differ sharply in their positions on the appropriate role of the trial court. They also differ in their analysis of postconviction attacks based on an unannounced conflict. As an exercise of supervisory power, several courts of appeals require the trial judge to inform the defendants of their right to separate counsel and of the risk of conflict before appointing a single attorney or permitting the defendants to proceed with one retained attorney. 89 If the trial court fails to give that information, these courts of appeals usually require only a minimum showing by the defendants to establish that a conflict existed. 90

But these same courts disagree dramatically with respect to the burden required to prove that a conflict warrants reversal. Some equate proof of a conflict with proof of a constitutional violation. 91 Others shift the burden and, rather than require the defendant to prove prejudice, instead require the Government to show that the conflict was harmless error. 92 Still others continue to place the burden of proving prejudice on the defendant. 93 Recent

88. See Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (legislation, not fourth amendment, proper means to protect newspapers, as third-parties, from searches without subpoena); Manson v. Brathwaite, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) (procedures for identification of suspects more effectively developed by legislation than judicial fiat). 89. E.g., United States v. Lawriw, 568 F.2d 98, 105 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978); United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976); United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975); United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972); Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965). See also Zuck v. Alabama, 388 F.2d 436, 440 (5th Cir. 1979) (when no sua sponte inquiry, state must bear the burden of showing knowing and intelligent waiver). The Court's approval of joint representation in Holloway suggests that the trial court is not initially required to appoint separate counsel for each indigent, as the Court of Appeals of the District of Columbia Circuit requires. See notes 30-32 supra and accompanying text. Those courts of appeals that require this inquiry of indigents have not explicitly indicated whether each indigent has the right to separate counsel upon demand or only upon a showing that a conflict exists. Nor have these courts outlined the precise inquiry that the trial court must make.

90. Apparently no court presumes that a conflict exists as a result of joint representation, but some find one in unlikely places. See Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967) (conviction will stand only when no basis for "informed speculation" that rights were prejudiced); cf. Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (sua sponte suggestion of possible conflict).

91. See Lollar v. United States, 376 F.2d 243, 244 (D.C. Cir. 1967). For a general discussion of the burden of proof, see Geer, supra note 14; Hyman, supra note 71; Comment, supra note 14. When it has moved to disqualify an attorney, the Government occasionally has taken a position different from its usual argument that the defendant should carry the burden. See In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1012 (3d Cir. 1976) (sixth amendment violation whenever possible conflict).

92. See United States v. Carrigan, 543 F.2d 1053, 1056 (2d Cir. 1976); State v. Olsen, 258 N.W.2d 898, 907 n.17 (Minn. 1977); cf. United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972) (Government required to prove that prejudice was improbable). Although the Government occasionally can meet this burden, see Smith v. Regan, 583 F.2d 72, 76 (2d Cir. 1978), shifting the burden to the Government is an indirect and unsatisfactory method of prodding trial courts to inquire or to ban multiple representation. On direct appeal the Government is limited to showing no prejudice through the trial transcript. See United States v. Donahue, 560 F.2d 1039, 1044 (1st Cir. 1977) (Government's burden not met). The Government thus may have no way to meet its burden unless it can rely on the strength of its own case without an examination of the possibility that conflict-free representation might change the approach of the defense. Without the benefit of an explanation by counsel stating whether he thought a conflict existed, and if so, how it affected his representation, both the Government and postconviction court must engage in speculation that could be unfair to the Government or to the defense.

Supreme Court decisions that change the defendant's burden of proof when he raises a constitutional issue for the first time on habeas may further fracture the approach of these appellate courts. If the trial court does inquire and the defendants agree to proceed with a single attorney, the defendant may carry a heavy burden on postconviction attack to prove conflict and prejudice. When the agreement is treated as a waiver, the defendants must prove that their agreement was not voluntary and intelligent in order to obtain reversal.

Still other courts of appeals do not require the trial court to perform the prophylactic inquiry unless counsel announces a problem of conflict or the trial court detects the possibility sua sponte. Counsel has the primary obligation to search out conflicts, and on postconviction attack the defendant carries the ordinary appellate burden of establishing the error—the existence of a conflict—and the harm caused by that error. But, if despite counsel's silence the trial court should have detected the conflict and failed to obtain the defendant's agreement to proceed, some courts reverse unless the Government can establish harmless error. These courts effectively adopt the approach of those courts of appeals that require an inquiry by the trial court.

Unfortunately, Lawrie failed to explain how the defendant meets this burden. Must he show specifically how the conflict affected counsel's strategy? Must he show that the verdict would have changed if counsel had been free of conflict? Must he show that the conflict impeded him in establishing his innocence? See Wainwright v. Sykes, 433 U.S. 72 (1977). Holloway as well as Glasser came to the court on direct appeal. The Holloway opinion does not mention Sykes or Dukes. It is thus unclear whether the Holloway automatic reversal result will apply if the defendant raises the issue of conflict for the first time on collateral attack.

The problem of whether the standard is the same on collateral as on direct attack is illustrated by several decisions in the Second Circuit. In Kaplan v. Bombard, 573 F.2d 708, 714 n.7 (2d Cir. 1978), the court indicated that the same standard—the Government must prove the absence of prejudice when the court does not inquire—applies to both direct and collateral attack. In Salomon v. LaVallee, 575 F.2d 1051, 1055 (2d Cir. 1978), however, a different panel characterized the Kaplan footnote as "dictum" and concluded that the question was still unresolved. The panel remanded to the district court with instruction to apply the same standard. If the Government lost on remand and chose to appeal that reversal of the conviction, the panel indicated that it would then reconsider the burden issue.

Following Kaplan and Salomon, one habeas petitioner argued that Holloway eliminated the need to prove prejudice and that the Government therefore could not argue absence of prejudice, as permitted by Kaplan and Salomon. The district court, however, interpreted Holloway to require application of the automatic reversal rule only when the defense had objected to joint representation. Perez v. Harris, 459 F. Supp. 1141, 1144 (S.D.N.Y. 1978); cf. United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972) (when court does not inquire, improbability of prejudice is Government's burden on direct appeal; on collateral attack, burden is lack of prejudice by preponderance of evidence; no explanation of difference between burdens). See United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972). The defendants must prove how the quality or strategy of counsel's representation prejudiced them. United States v. Buigues, 568 F.2d 269, 273 (2d Cir. 1978). Even if a court treats the defendant's agreement as a waiver, however, it will not always treat that agreement as a waiver of future, as yet undetected conflicts. Cf. United States v. Eaglin, 571 F.2d 1069, 1086 (9th Cir. 1977) (waiver binding when no "unforeseeable conflicts" did develop).

6. Reading Holloway restrictively, several courts of appeals continue to refuse to require any form of judicial inquiry. See Canal Zone v. Hodges, 589 F.2d 207, 209 (5th Cir. 1979); United States v. Steele, 576 F.2d 111, 112 (6th Cir. 1978) (per curiam).

7. See United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir. 1976); cf. Abraham v. United States, 549 F.2d 236, 236 (2d Cir. 1977) (trial court may conduct inquiry even when counsel assures court that no conflict exists).

8. This obligation is consistent with counsel's ethical obligation. See DR 5-105. The Advisory Committee note to proposed rule 44(c) agrees. See 77 F.R.D. at 595-96.

9. See United States v. Gaines, 529 F.2d 1038, 1044 (7th Cir. 1976). Some courts go further and reverse
Even after the determination of the appropriate burden of proof, two problems remain for the courts of appeals. The first problem, the development of a record to decide whether error occurred, presents great difficulties. The defendants' ability to obtain the facts necessary to prove the existence and effect of a conflict is restricted. The inquiry by the trial court will probably not develop that information, and the trial attorney will probably not help the defendants. Counsel himself has a conflict with his former clients. He is torn between protecting himself and describing openly why he thought no conflict existed or how he had minimized the conflict. This dilemma severely tests the attorney. Without a record of what counsel knew and why he acted as he did, postconviction courts are forced to speculate about the factual issues.

Second, if the trial court detects an actual or potential conflict, can it demand separate representation over the objections of the defendants? Allowing the trial court to order separate representation can be justified only on the assumption that the trial court can decide that the defendants' waivers are not intelligent or that the court in its supervisory power can override the defendants' desires. The unlikelihood that the defendants can give a knowing waiver of the right to conflict-free representation has led several courts to approve imposing separate counsel on each defendant. But this approach threatens the defendant's right to choose his own counsel, a constitutional issue that few courts have chosen to face.

1.00. The Holloway Court acknowledged this problem. 435 U.S. at 490-91.
1.02. Although once attacked, counsel may disclose privileged information, see DR 4-101(C)(4), this ethical dilemma pressures the attorney so much that one court refused to remand to force the attorney to testify. Instead, it chose to reverse without specific information on the attorney's conversation with his clients concerning the possibility of a conflict. United States v. Gaines, 529 F.2d 1038, 1045 (7th Cir. 1976). Counsel might, for example, testify that had he represented only X, he would still not have contrasted the evidence against each defendant because he feared that such a strategy would have jeopardized both defendants. Such a tactical decision might lead a reviewing court to conclude that the conflict was harmless error. But can a court trust counsel's statement as to tactics and trust that counsel in fact made that tactical assessment while representing X and Y? The same problem in estimating harm is present in deciding whether to impose a prophylactic rule banning multiple representation: is such a rule necessary if two attorneys would ordinarily orchestrate their representation in the same way as one would have in representing both defendants? Or, is separate representation necessary to free counsel to choose how to represent a client unhindered by any possibility of conflict?
1.03. Although the Court reversed without a finding of prejudice in Holloway, it nonetheless speculated about the effect of the conflict. Holloway v. Arkansas, 435 U.S. 475, 490 (1978). See note 56 supra. The Court in Glasser also speculated; the defendant, however, had offered at least one instance of how the attorney's representation had been changed by his simultaneous representation of the codefendant Kretske: the attorney had reserved cross-examination of one Government witness who had implicated Kretske but not Glasser and did not cross-examine when given the opportunity to do so later. Glasser v. United States, 315 U.S. 60, 72-73 (1942). Cross-examination of that witness might have helped Glasser by underscoring the witness' failure to mention him, but might also have emphasized the importance of the testimony against Kretske.
1.04. See United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978) ("actual serious conflict of interest" when one defendant who had plead guilty was about to be called as Government rebuttal witness; separate counsel imposed); United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978) (conflict "inescapable" when one defendant had agreed to testify for Government against codefendant). Except in the grand jury context, see notes 184-206 infra and accompanying text, however, no court has required separate counsel when the conflict was nascent.
1.05. The constitutionality of imposing separate counsel is discussed at text accompanying notes 216-49.
III. PROPOSED RULE 44(c)

The embarrassing divergence among the lower federal courts in defining the role of counsel and the trial court, as well as the burden shouldered by the defendant and Government on postconviction review, calls for some ordering hand to impose uniformity. The Supreme Court's reluctance to address any but the narrowest of issues in Holloway suggests that we cannot expect constitutional direction from the Court. Fortunately, Congress may soon have the opportunity to provide the necessary guidance. The Judicial Conference has proposed amending rule 44 of the Federal Rules of Criminal Procedure to require that the trial court oversee multiple representation by informing the defendants about the risk of conflict.

Proposed rule 44(c) is a step in the right direction, but because it is ambiguous in its mandate, it may reduce neither the incidence nor the inherent conflicts of joint representation. Nonetheless, analysis of rule 44(c) can be useful to the federal courts in interpreting the proposed amendment and to the state legislatures in deciding whether to adopt similar legislation.

Proposed rule 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

infra.

106. The Court is obviously aware of the alternative approaches to the problem. During oral argument in Holloway, one Justice asked Hall whether he thought a per se rule barring joint representation, or at least barring it whenever counsel announced a conflict, was constitutionally required. Oral Argument, supra note 42, at 7. The dictum in Holloway that joint representation is not per se unconstitutional, however, may inhibit any lower federal court from deciding to ban multiple representation as an exercise of its supervisory power.


108. Perhaps the Advisory Committee failed to specify the procedures for district courts to follow because of nettling constitutional issues. Other than the Advisory Committee Note, however, there are no working papers to explain the Committee's intent. Neither the minutes of the Advisory Committee's meetings at which the proposed rule was discussed, Conversation with the Committee's reporter (Jan. 4, 1979), nor any comments submitted to the Judicial Conference are available to the public. Conversation with staff attorney (Feb. 12, 1979).

109. There is no indication that the Advisory Committee intended that rule 44(c) should be enacted to cover state criminal litigation, although some states have adopted a procedure similar to rule 44(c). See, e.g., Moreau v. State, 24 Cr. L. Rptr. 2385 (Alaska Dec. 15, 1978), Commonwealth v. Davis, 24 Cr. L. Rptr. 2366 (Mass. Dec. 11, 1978), State v. Olsen, 258 N.W.2d 898 (Minn. 1977). There could be constitutional jurisdictional questions whether Congress could enact rule 44(c) to cover states under section 5 of the fourteenth amendment, which gives Congress power "to enforce, by appropriate legislation, the provisions of [the fourteenth amendment]." If Congress can increase but not reduce constitutional guarantees when legislating pursuant to section 5, see Katzenbach v. Morgan, 384 U.S. 641 (1966), it remains unclear whether Congress would be increasing or decreasing a defendant's sixth amendment rights in applying rule 44(c) to the states without clearer constitutional direction from the Supreme Court on how the sixth amendment applies to the conflict question. See text accompanying notes 216-49 infra.
The proposed rule would settle various points of disagreement among the courts of appeals. In effect, the Advisory Committee adopts the approach of those courts that have imposed the duty to inform and to inquire on the trial court. The Committee rejects the assumption that all attorneys can detect a conflict and will attempt to cure a conflict that they discover. The Committee expects the court to speak directly with each defendant in the hope that such an exchange will help the defendants understand the nature and the risks of a conflict. The Committee suggests that in some circumstances the court should conduct this discussion in chambers. The rule would empower the judge to demand separate counsel for each defendant. These achievements, however, must be juxtaposed against apparent limitations on the rule's application, against the Committee's imprecise explanation of the roles of counsel and the court, and against its inadequate discussion of the rule's constitutionality.
A. THE REACH OF THE PROPOSED RULE

If the rule values the assistance of conflict-free representation above the right to choose one's attorney, it has three distressing omissions. First, the rule orders the "court" to make an inquiry about possible conflicts whenever defendants "are charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13." Does the rule apply only after the defendants have been indicted or an information has been filed in district court? Is there then no obligation to inquire at any earlier stage, such as at the presentment or the preliminary hearing? The rule's reference to the "court" as the inquiring entity supports this apparent restriction. Rule 44(a) distinguishes between the "court" and the magistrate who usually appoints counsel at the presentment and presides at the preliminary hearing. A magistrate could appoint a single attorney whose representation would continue at least until arraignment on the indictment. Indeed, the Advisory Committee implies that separate counsel need not be initially appointed for each defendant. This limitation is unfortunate. The rule recognizes the importance of the inquiry even if the defendants decide to plead guilty before trial. Many defendants seek to plead guilty before they are indicted, because the defendants frequently obtain a more favorable plea bargain if they plead early in the process. A guilty plea might bury a glaring conflict that infected the plea bargaining for the codefendants.

Second, the rule does not appear to cover cases like Dukes v. Warden, in which a defendant, charged alone in one proceeding, is a codefendant in a second proceeding and one attorney represents defendants in both proceed-

116. This choice is implicit in the power that the rule would give the judge to demand separate representation even over spirited objection by the defendants. See 77 F.R.D. at 601; notes 177-82 infra and accompanying text.
118. Rule 5 of the Federal Rules of Criminal Procedure outlines the obligations of the magistrate to advise the defendants and to set a date for the preliminary examination. The preliminary examination will occur unless the Government has filed an information with the district court or the grand jury has indicted the defendants. See Fed. R. Crim. P. 5, 5.1.
119. Fed. R. Crim. P. 44(a) (right to appointed counsel from time of initial appearance before magistrate or court); see Fed. R. Crim. P. 5, 5.1. See generally C. Wright supra note 107, § 80 (discussing practice under Rule 5(c), which became Rule 5.1 in 1972).
120. See 77 F.R.D. at 597-98 ("Rule 44(c) is not intended to prohibit the automatic appointment of separate counsel in the first instance . . . .").
121. 77 F.R.D. at 598.
122. Former Central Intelligence Agency Director Richard Helms, for example, was permitted to plead no contest to two misdemeanors if he did so before a grand jury decided whether to indict him on felony charges.
124. If the road to overturning a guilty plea is to attack counsel's advice—advice supposedly affected by the conflict—the defendant will have difficulty in proving that a conflict would have emerged. See United States v. Marti, 526 F.2d 17 (9th Cir. 1975) (no conflict found in counsel's recommendation of guilty plea). Thus, by pleading guilty, the defendant will probably forfeit the sole basis for a successful attack on counsel's representation. The guilty plea may hide any problem of joint representation: counsel may urge his clients to plead guilty because he fears that a conflict will develop if the case goes to trial, a development that may require him to withdraw from representing either defendant.
ings. The rule’s reference to rules 8(b) and 13 suggests that the court is not under any obligation even if it knows of the separate indictments. The rule also would not appear to apply if the codefendants are severed under rule 14.126

Third, the rule fails to provide adequate guidelines for review of a postconviction attack based on conflict.127 The Committee indicates that although a trial court’s failure to make a rule 44(c) inquiry will not necessarily result in reversal, an appellate court is more likely to find that a conflict existed in this instance.128 Further, because conflicts that were not apparent initially may surface later in the proceeding, even an adequate initial inquiry does not preclude reversal on conflict grounds.129 If the trial court makes an inadequate inquiry or none at all, the appellate court would still face the problem of defining and allocating the burden of proving the existence of a conflict. The proposed rule thus fails to solve one of the major problems of multiple representation.

B. THE ROLE OF COURT AND COUNSEL

The Advisory Committee does not adequately define the trial court’s obligation under the rule. It appears to assume, with unjustified optimism, that a court can meaningfully implement the rule’s directive with the assistance of counsel.

Advice given to the defendants. The rule would require that the court “personally advise each defendant of his right to the effective assistance of

126. Compare United States ex rel. Sullivan v. Cuyler, 593 F.2d 512, 519-24 (3d Cir. 1979) (on collateral attack, reversing conviction when defendant’s counsel represented two others charged with same murder because of possibility of prejudice) with id. at 525 (Garth, J., with Adams & Rosenn, JJ., dissenting from denial of petition for en banc hearing) (higher burden of actual prejudice applies when same attorney represents two or more defendants at separate trials).

127. The Advisory Committee may assume that no postconviction attack on conflict grounds is possible if the court makes proper inquiries and the defendants either demand single representation or opt for separate representation. But the constitutionality of those alternatives and the binding effect of the defendants’ action may still remain appellate issues. Cf. Salomon v. LaVallee, 575 F.2d 1055, 1055 (2d Cir. 1978) (dictum) (if defendant has proceeded with joint representation after adequate inquiry, conviction reversed if actual prejudice demonstrated).

128. 77 F.R.D. at 603. In contrast, the failure to follow scrupulously the inquiry demanded under rule 11 of the Federal Rules of Criminal Procedure when a defendant pleads guilty requires reversal. See McCarthy v. United States, 394 U.S. 459, 472 (1969) (defendant whose plea accepted in violation of rule 11 entitled to replead). If rule 44(c) is important enough to enact, its observance should be mandatory, especially because the rule 11 inquiry is the model for the rule 44(c) inquiry. 77 F.R.D. at 600-01 (citing United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975) (district court should address defendant regarding conflict as it does in rule 11 procedure)). The Advisory Committee’s decision not to require the inquiry is inexplicable given its assumption that reversal will follow almost automatically whenever the defendant can establish that a conflict did exist. Id. at 600 (citing Glasser v. United States, 315 U.S. 60 (1942)).

129. 77 F.R.D. at 604. Proposed rule 44(c) also fails to state whether representation of two defendants on appeal is proper. Although the Supreme Court has ruled that indigent defendants are entitled to appointed counsel on an appeal of right, Douglas v. California, 372 U.S. 353, 357-58 (1963), it did not consider whether the two defendants in that case were entitled to separate counsel on appeal. As long as the trial attorney was not appointed for appeal, one attorney probably could represent codefendants on appeal even if the appeal were based on conflict at trial. In attacking trial counsel’s representation as ineffective, appellate counsel can identify the source of the conflict if defendants waive the attorney-client privilege.
counsel, including separate representation."130 This order is ambiguous. Does the Advisory Committee intend that the court provide indigents with separate representation upon their request? Or, as a condition to separate appointments, must the defendants claim, if not prove, that a conflict exists?131 If the former, the rule appears to clash with the practice in many courts,132 and with the Committee's approval of the initial appointment of one attorney for multiple defendants. If an indigent can demand his personal attorney without demonstrating that the assigned counsel has even the potential for a conflict, the Committee does not explain whether his demand has constitutional significance.133 The Advisory Committee also fails to explain whether the single attorney appointed for multiple defendants is expected to begin his interview with each client by informing him of the option to request a personal attorney.134

The rule also is unclear regarding what the court must tell the defendants when they first appear before the court. Is it incumbent upon the court to explain what a conflict is, where conflicts might emerge, and what their effect might be?135 If the judge attempts to explain all these factors, his advice inevitably will be arid.136 The judge knows little, if anything, about the facts of

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130. 77 F.R.D. at 599.
131. United States v. Foster, 469 F.2d 1 (1st Cir. 1972), cited by the Advisory Committee as a guide for giving advice on the right to separate representation, 77 F.R.D. at 599, does not answer these questions. In Foster the First Circuit held that the court must inquire only to determine that the defendants understood "that they must retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government." 469 F.2d at 5.
132. Only the federal courts in the District of Columbia, see Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967), and in Vermont, see United States v. Mari, 526 F.2d 117, 121 (2d Cir. 1975) (Oakes, J., concurring), automatically appoint separate counsel for each indigent. See notes 29-32 supra and accompanying text.
133. One could argue that the sixth amendment's right to the assistance of counsel means the right to a personal attorney unless that right is waived. Although Holloway did not hold that each defendant is constitutionally entitled to separate representation on demand, rule 44(c) may legislatively mandate that result. See notes 216-49 infra and accompanying text.
134. The failure of the rule to explain counsel's role yokes the attorney with an unnecessarily difficult task in interviewing his clients. A lawyer can maximize his control over the defense and maximize his compensation by representing both clients. See GUIDELINES, supra note 28, at § 2.10 (attorney who represents joint defendants may be compensated up to statutory maximum for each defendant). Retained counsel probably can demand a higher fee. See Cole, supra note 32. Thus, counsel has an incentive not to advise each client of the opportunity for personal counsel. Furthermore, unless he is careful, he may blunder into a conflict that requires him to withdraw from representing both defendants. See note 26 supra. As a result, requiring counsel to discuss with each client whether either wants a separate personal attorney is an ineffective way of implementing the rule's objectives, and it is better to appoint separate counsel initially. See text at notes 250-58 infra.

Yet, it may be easier for appointed counsel than retained counsel to discuss the conflict issue with his clients. Appointed counsel frequently finds his clients in jail, and thus has no problem in speaking with them separately. Because appointed counsel need not gain the defendants' trust in order to collect his fee, he need not fear alienating one defendant by refusing to represent the latter. In contrast, retained counsel may lose the confidence, and thus the fee, of both defendants if he informs one that he cannot represent him because of a conflict—both defendants may infer from that announcement that counsel thinks that the matter is serious or that one is guilty.

135. But see United States v. Donahue, 560 F.2d 1041, 1043 (1st Cir. 1977) (ordering that this advice be given "prior to trial").
136. Like the gunner who fires at the position where the unseen enemy is likely to be, the judge can highlight only the usual points of tension. See United States v. Garafola, 428 F. Supp. 620, 624 (D.N.J. 1977) (trial judge does not have sufficient information to make meaningful inquiry into potential conflict), aff'd sub nom. United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).
the case, the potential defenses, or the postures of the defendants. At best, by ordering counsel to discuss the prospect and effect of a conflict with his clients, counsel will only be informed of his preexisting ethical obligations.

The court’s ability to evaluate the potential for conflict.

The rule directs the court to satisfy itself that no conflict is likely to develop. This assessment serves as a prelude to deciding whether to extract a waiver of separate counsel from the defendants or to require separate counsel for each defendant. In carrying out this responsibility, however, the judge is hamstrung by an inability to obtain information about the case.

The Advisory Committee says nothing about the Government’s obligation to help the judge assess whether a conflict exists. The prosecutor might prefer not to reveal that information. The potential for a conflict might enable the Government to prove its case more easily if a single attorney’s representation is compromised by differences between his clients. The judge’s assessment may also be made before the prosecutor is familiar with the Government’s evidence. An investigator may prepare the Government’s case and give the file to the prosecutor only shortly before trial. Even a prosecutor who organizes the prosecution from its inception may not recognize the significance of the Government’s evidence for conflict purposes because he does not know what the defense will be. In fact, he may not yet have collected the one piece of information that creates a potential for conflict between the defendants.

The court cannot rely on the defense attorney any more than on the prosecution. Defense attorneys will not always learn or freely advise the court of the facts and potential defenses necessary to evaluate whether a conflict looms. An attorney who searches for a conflict early in the proceedings may not find it. Clients may not reveal vital information because they forget, fail to appreciate its significance, or are embarrassed by it. Without discovery, which he will not obtain until far into the case, the attorney probably does not know the contours of the Government’s case and cannot decide whether

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137. See id. (trial judge unaware of facts and trial strategies at beginning of trial).
138. See DR 5-105(C) (lawyer may represent multiple clients if obvious he can adequately represent interests of each and they each consent after full disclosure of possible effect). Furthermore, this order may not be effective. See note 134 supra.
139. 77 F.R.D. at 593, 599.
140. The failure to disclose might violate the prosecutor’s ethical obligation to be fair—a violation that might itself warrant reversal—or even constitute a constitutional violation of the obligation to disclose information helpful to the defense. See United States v. Agurs, 427 U.S. 97, 110 (1976) (even if no specific request, prosecutor must disclose information obviously of substantial value to defense). In grand jury investigations, however, the Government may refuse to reveal information relevant to the conflict. See Fed. R. Crim. P. 60(e). But see In re Taylor, 567 F.2d 1183, 1189 (2d Cir. 1977) (dictum) (criticizing Government’s willingness to disclose conflict in camera but not to defense).
141. This observation does not describe the practice in United States Attorneys’ offices as much as in city prosecutors’ offices.
142. But cf. Kaplan v. Bombard, 573 F.2d 708, 715 (2d Cir. 1978) (trial court can rely on assurances of trial counsel that potential conflicts discussed with clients). To trust counsel as the trial court did in Kaplan, however, is to invite the sort of extended postconviction attack that occurred in that case. Id. at 712-14. Indeed, the attorney-client privilege may bar attorneys from so advising the court. See notes 260-72 infra and accompanying text; cf. note 53.
143. For example, the Government need not disclose grand jury testimony until the witness testifies at trial. See 18 U.S.C. § 3500 (1976).
his clients should testify. Without investigation, the attorney cannot identify any discrepancies between the stories of the potential defense witnesses and the defendants. He may be barred by the attorney-client privilege from confronting one defendant with the inconsistent position of the other. Moreover, a statement by counsel about the facts and defenses threatens to undercut whatever trust either client has in him.

Furthermore, most attorneys believe that they should control the presentation of the defense and fear that disclosing information to the judge might interfere with that control. To control the defense, attorneys may keep salient information from the client or avoid asking the client questions that might elicit information inconsistent with the approach chosen by counsel. Counsel may conduct the interview in a way that indirectly provides the defendant with an answer that avoids the immediate emergence of a conflict. Fearing that he will eliminate the room his client needs to change an answer or to adopt a different position, the attorney may hesitate to ask pointed questions at any early stage of his representation. The attorney may not want to know certain information until he has decided how to explore sensitive, potentially damning areas without eliminating his clients’ trust. Hence, if the court questions defendants about their conversations with counsel, as the Advisory Committee apparently expects, it may discover that counsel has had only a general discussion about the nature of a conflict. The judge may be unable to uncover facts indicating the potential conflict if counsel has kept information from his clients.

Can the court discover an existing conflict that counsel has not brought to its attention? That is, may the court accept counsel’s statement that no conflict exists or must it conduct an independent inquiry? Although the Advisory Committee does not explain the court’s obligation in such a situation, it probably intends that the court should so inquire. Particularly

144. Until he knows the criminal records of his clients and thus can evaluate the risk of impeachment, the attorney cannot decide whether either should testify. See Fed. R. Evid. 609(a) (credibility of witness may be impeached by evidence of previous convictions). Without a decision on pretrial motions to suppress, the attorney does not know what evidence the Government can offer in its case-in-chief and what it must reserve for impeachment.

145. In Holloway, for example, Hall refused to follow the trial court’s order to interview all three defendants together. Conversation with Harold Hall (Jan. 5, 1979). Hall apparently wanted to avoid the problem of the defendants waiving each other’s privilege. His decision appears sound because communications between defendants, even with counsel present, probably are not privileged with respect to each other. See Proposed Fed. R. Evid. 503(d)(5) (no privilege for communication between jointly represented clients and their attorney when offered in action between the clients). Hence, by not interviewing the defendants together, counsel can eliminate one source of evidence for the Government if it chooses to grant one defendant immunity in exchange for testimony against the other about those conversations.

146. See State v. Brazile, 226 La. 254, 259, 75 So. 2d 856, 859 (1954) (in answer to court’s request to identify conflict, appointed counsel noted that “mental outlook” of defendants might be prejudiced in future discussions if counsel divulged conversations). Understandably, indigents are often suspicious of appointed attorneys. The indigent did not select the attorney, and the opponent, the Government, is compensating the attorney. Fearing that the attorney might reveal their conversations, indigents may withhold information important in determining whether a conflict exists.

147. See 77 F.R.D. at 599, 600.

148. This intention is implicit in the rule’s order that the court “personally advise” each defendant, id. at 593, and in the Advisory Committee’s discussion of waiver. Id. at 600. Inquiry would prevent a postconviction attack on the ground that counsel lacked authority to consent to joint representation on behalf of each defendant. See note 214 infra and accompanying text. Inquiry would also eliminate the dubious proposition that counsel could waive objection to joint representation on behalf of a silent client. See Kaplan v. Bombard, 573 F.2d 708, 714-15 & n.8 (2d Cir. 1978) (defendant’s silence held to be consent).
because the defendants, and not simply counsel, must agree to joint representation, the court should not rely on counsel’s representation. The Advisory Committee anticipates that the court would ask counsel to explain the “nature of the contemplated defense” on the record and to do that in chambers whenever necessary “to avoid the possibility of prejudicial disclosures to the prosecution.” But because counsel may be wrong in his assessment, the Advisory Committee is unrealistic in assuming that the attorney will cooperate in the court’s inquiry by providing this type of information to the court.

United States v. Liddy is instructive. In Liddy, one attorney was retained to represent four of the defendants charged with the Watergate burglary. Arguing that the defendants might want to plea bargain because the evidence against each was strong and that representation by one attorney might inhibit him or the defendants from negotiating, the Government before trial asked the judge to order each defendant to obtain separate counsel. In response, the attorney submitted identical affidavits from each defendant opposing the Government’s motion. Each defendant stated that he had discussed the facts of the case with counsel, that he had been advised by counsel and by other attorneys of his right to separate counsel, that he had a constitutional right to select his own attorney, and that he refused to “submit” himself “to any inquiry by any prosecutor or court” regarding his choice of counsel.

There are many reasons why an attorney would act as defense counsel did in Liddy. He does not want to provide the judge with information that might be used against any client later in the proceedings. He will certainly refuse to have his clients speak, even in chambers, for fear that they thereby waive their fifth amendment and attorney-client privileges or expose themselves to a perjury charge if their testimony at trial is different from what they...
said in chambers. Counsel is himself restricted by the attorney-client privilege.\(^\text{159}\)

The Advisory Committee implicitly recognizes the attorney's problem by limiting the court's inquiry to the "contemplated defense."\(^\text{160}\) But explaining defenses without disclosing the facts that support them or how the attorney intends to develop them may not educate the judge unless the defenses are themselves inconsistent. A statement of the facts without identifying the speaker, although more helpful to the judge, comes close to violating the attorney-client privilege.\(^\text{162}\) The judge may doubt that he has the supervisory authority to order the attorney to disclose.\(^\text{163}\) Without specific direction from the proposed rule, the judge is not likely to press the attorney closely.

The court's options if it suspects a conflict. The rule is silent regarding the court's obligation to respect counsel's disclosure that a conflict exists or may arise. Although the Court in Holloway did not order trial courts to accept counsel's representations, the thrust of the proposed rule suggests that

\(^{159}\) By failing to discuss what will happen in chambers, the Advisory Committee does not defuse such concerns, especially because that proceeding will be on the record. See 77 F.R.D. at 599. The Advisory Committee does not say whether that discussion is under oath, or whether the court can reveal the statements by the defendants if their later testimony is inconsistent with their in-chambers comments. The Government probably could not use those statements in its case-in-chief. See Simmons v. United States, 390 U.S. 377, 394 (1968) (Government may not use in case-in-chief defendant's suppression hearing testimony necessary to establish standing). The Government, however, probably could use the statements for the purposes of impeachment. See Harris v. New York, 401 U.S. 222, 225 (1971) (Government may impeach defendant's testimony with statements inadmissible under Miranda). The changes to rule 44(c) suggested below would approach these concerns head on by requiring counsel and the defendants to elect between revealing the information necessary to evaluate the defendant's waiver of separate representation and suffering separate representation. See notes 250-72 infra and accompanying text.

\(^{160}\) See DR 4-101(B) (a lawyer shall not knowingly reveal confidence of client). The Advisory Committee does not even mention this problem. The Holloway Court's discussion of the privilege is unenlightening. The majority suggested that Hall could not have explained the conflict more fully without risking breach of the privilege. 435 U.S. at 485. The Court did not comment on whether the attorney is obliged to ask his clients to permit him to discuss the conflict as frankly as he thinks necessary without exposing the precise conversations covered by the privilege. The Court failed to recognize that DR 4-101(A) & (B)(1) bar counsel from revealing "secrets" as well as privileged communications. By noting that a court may not demand information that trenches upon the attorney-client privilege, did the Holloway Court implicitly approve of judicial questions designed to elicit "secrets" of the defendant? Justice Powell, in dissent, was critical of the majority's position concerning counsel's obligation to disclose, but refused to "resolve the tension between the assertion of a constitutional right and a claim of lawyer-client privilege." 435 U.S. at 493 n.1. In contrast, in Glasser, appellate counsel and not trial counsel explained where the conflict arose and appellate counsel's comment about the conflict did not include any discussion of conversations protected by the privilege. 315 U.S. 60, 72 (1942).

\(^{161}\) 77 F.R.D. at 599.


\(^{163}\) Disciplinary Rule 4-101(C)(2) permits an attorney to "reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order." The force of that rule, however, is unclear. It permits but does not require an attorney to reveal. It does not explain when the court may "order" the attorney to reveal. The examples footnoted in the Disciplinary Rules suggest that the court can require disclosure if the client is about to commit a crime, an example obviously irrelevant for conflict purposes unless the attorney is certain that his clients will perjure themselves. ABA Code of Professional Responsibility Canon No. 4, n.15. The Court in Holloway mentioned DR 4-101(C)(2), but did not discuss its meaning. 435 U.S. at 487 n.11. The Court implied, however, that the trial court could not invoke DR 4-101(C)(2) to require disclosure. Id. at 487 (trial court could not "improperly require[e] disclosure of confidential communications"). See notes 247 & 265 infra.
in such instances the court appoint separate counsel or permit the retained attorney to withdraw.\textsuperscript{164}

The problem remains whether the court can make an inquiry to determine if the attorney should withdraw from representing both clients or, if the attorney has chosen to continue to represent one client, whether that choice was proper. The attorney may have blundered into a conflict that should bar him from representing either client. The attorney's choice of continuing to represent a particular defendant may also be self-serving. For example, if \textit{X} maintains that he is innocent and \textit{Y} is guilty, while \textit{Y} admits that he is guilty and \textit{X} is innocent, the attorney should represent \textit{Y} because he has no information that impairs his representation of \textit{Y}. He cannot, however, represent \textit{X}, because to do so would require him to use \textit{Y}'s admission in favor of \textit{X}. Yet in practice the attorney may prefer to represent \textit{X} rather than \textit{Y}. Compensation for appointed counsel is a function of the time that he spends. Because \textit{Y} is more likely to plead guilty and \textit{X} is more likely to go to trial, the attorney, to maximize his fee, would prefer to represent \textit{X}.\textsuperscript{165} Counsel might also choose the defendant who has other cases pending in order to receive appointments in them.

Less crass considerations might also influence counsel to prefer \textit{X} over \textit{Y}. \textit{X} might be easier to work with or might allow the attorney more leeway in conducting the defense. Once the attorney chooses to represent \textit{Y}, he instead may decide to reinterview \textit{Y} in order to induce him to withdraw his admission. Counsel might then “forget” \textit{Y}'s admission and announce to the court that a conflict obliges him to withdraw from representing \textit{X}. Despite these concerns, courts probably must trust attorneys to choose the conflict-free defendants. Unless courts are willing, if ever permitted, to intrude upon the attorney-client privilege, counsel alone have the information necessary to assess where conflicts lie.

The rule does address the judge's role if defendants oppose separate representation despite the existence of a conflict or if the judge is not satisfied that there is no potential for conflict. The court has at least two alternatives:\textsuperscript{166} It may secure a waiver from the defendants of their right to separate (and presumably effective) representation or it may require that each defendant be separately represented.\textsuperscript{167}

\textsuperscript{164} See Uhl v. Municipal Court, 37 Cal. App. 3d 526, 535, 112 Cal. Rptr. 478, 484 (1974) (instructing trial courts to accept counsel's assurance that conflict exists without requiring disclosure of fact giving rise to conflict). There are practical reasons for the courts to accept the attorney's representation. The attorney-client privilege impedes the attorney's full disclosure. The disclosing attorney may lose the confidence of the client whom he will continue to represent because the client may fear that the attorney will also disclose their future conversations. Conversely, the attorney may alienate the defendant by announcing the nature or factual basis of the conflict. That announcement could disrupt whatever harmony exists between the defendants and between defendants and defense counsel. Moreover, the judge, concerned that the information might improperly influence him later, might not want to know the specific reason for the conflict.

\textsuperscript{166} This comment assumes that the Government does not condition its plea offer, as it frequently does, on acceptance by both defendants. See Smith v. Regan, 583 F.2d 72, 76 (2d Cir. 1978) ("plea bargain offered by prosecution was 'package' or 'both or nothing' deal").

\textsuperscript{167} Id. at 600-01. Although the Advisory Committee does not prefer one course over the other, its extensive discussion of waiver perhaps implies that it prefers that approach. This approach is more
In obtaining a waiver, the court is expected to address each defendant personally, and

should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney’s possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wished with outside counsel, and that he voluntarily waives his Sixth Amendment protections.\textsuperscript{168}

The inquiry expected by the Advisory Committee undoubtedly will prove unenlightening both to the court and to the defendants. The model will probably be the inquiry required by rule 11 of the Federal Rules of Criminal Procedure before acceptance of a guilty plea.\textsuperscript{169} The rule 11 inquiry is often simply a procedural facade that enables a postconviction court to impose a high burden on the defendant who seeks to overturn his plea. The rule 11 inquiry is a litany. The attorney has primed his client to waive each right, and the defendant is not likely to understand the meaning of rule 11’s terms of art—the rights to confront and cross-examine the witnesses and not to be compelled to incriminate himself.\textsuperscript{170} A defendant who agrees to proceed with the same attorney as his codefendant is even less likely to understand what is involved than the defendant who pleads guilty. Some defendants do not understand what a conflict is\textsuperscript{171} and few are schooled in the tactical decisions

prudent, given the constitutional problems presented by imposing counsel on a protesting defendant. See notes \textsuperscript{216-49 infra} and accompanying text.

\textsuperscript{168} Id. at 601 (quoting United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975)). The Advisory Committee adopts the approach of the courts of appeals that have ordered trial courts to inquire into potential conflicts of interest without specifying the form of the inquiry. See United States v. Donahue, 560 F.2d 1039, 1045 (1st Cir. 1977) (inquiry need take no particular form).

\textsuperscript{169} Rule 11 requires that the judge, before accepting a plea of guilty or nolo contendere, must personally address the defendant and determine, \textit{inter alia}, whether he understands (1) the nature of the charge and the penalty; (2) that he has a right not to plead guilty with a concomitant right to a jury trial at which he has the rights of confrontation, assistance of counsel, and the fifth amendment; (3) that if he pleads guilty, there will be no trial; and (4) that the court can ask him questions about the offense to which he pleads guilty. \textsc{Fed. R. Crim. P.} 11(c)(1)-(5).

Although the Advisory Committee does not recommend explicitly a rule 11-type inquiry, it suggests this approach with its citation to United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975) (directing trial courts to follow procedures similar to rule 11 when eliciting joint representation waivers). 77 F.R.D. at 600-01. Cf. In re Grand Jury, 446 F. Supp. 1132, 1140 (N.D. Tex. 1978) (following rule 11-type inquiry in informing grand jury witness of possibility of conflict).

\textsuperscript{170} Trial courts are urged not to use “routine boilerplate” questions. United States v. Coronado, 554 F.2d 166, 173 (5th Cir.), cert. denied, 434 U.S. 870 (1977); see Cleary, \textit{Preparing a Client to Plead Guilty}, 24 \textsc{Practical Lawyer} 45, 46 (1978) (discussing how attorney should prepare client to answer judge’s “standard . . . format of questions”). The defendant’s plight, however, is graphically depicted in a cartoon appearing in L. Weinreb, \textit{Criminal Process} 681 (3d ed. 1978), which shows a defendant comprehendingly staring while judge, prosecutor, and defense counsel simultaneously expound legalisms; the caption reads, “\textit{no person shall be . . . deprived without due process of law}”. Cf. Faculty Note, \textit{A Postscript to the Miranda Project: Interrogation of Draft Protesters}, 77 \textsc{Yale L.J.} 300, 310-11 (1967) (describing problems individuals have in understanding \textit{Miranda} warnings).

\textsuperscript{171} In United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977), for example, defendants were told by the magistrate that a conflict might exist; when asked whether he wanted to be represented by the attorney representing the codefendant, Donahue answered: “I’m really vague about how that mechanism of conflict of interest works. [My attorney] seems to think that it’s fine [for counsel to continue
that counsel must make, and probably even fewer are sensitive to the potential impact of a conflict.172

There is a second reason why the rule 44(c) inquiry will be less adequate in protecting the defendant's right than the rule 11 inquiry. When a defendant pleads guilty, he is confronted with the Government's evidence and may be asked factual questions by the court to determine if he actually is guilty.173 In contrast, the Advisory Committee does not suggest that the court can ask the defendant to discuss the facts of the defense to determine whether a conflict may exist. At the time that he is expected to waive the right to separate counsel, the defendant may not know what the evidence will be or understand the implications of the evidence of which he is aware. He may not have had searching conversations with counsel. He may not know what his codefendant has said to counsel. He may hesitate to express concern to the court for fear of alienating counsel in case the court refuses to act. Moreover, even if the defendant is prepared to speak, the attorney would probably interrupt to encourage the defendant to invoke the fifth amendment or attorney-client privileges.

An affidavit such as the one submitted by the defendants in United States v. Liddy174 would appear to satisfy the court's obligation to obtain a waiver. In stymieing the court's attempt to determine whether a conflict existed, the response of the defendants in Liddy prevented the court from determining whether they understood the risks of a conflict. Such concerns have prompted one court to admit frankly that the virtue of any "waiver" of the right to conflict-free representation is its usefulness for denial of a postconviction attack on the effectiveness of counsel's representation.175

The Advisory Committee implicitly acknowledges the possible abuse of the right to waive176 by empowering the court to demand separate representation, even if the the defendants object. The court's power is broad,177 but virtually

representation], and I would go along with that, but I'm a little bit vague about just what the conflict of interest might involve." See Shuttle v. Smith, 296 F. Supp. 1315, 1318 (D. Vt. 1969) (defendant had never heard of term "conflict of interest").

172. Whatever harmony exists between codefendants before trial is too frequently bottomed on ignorance and hope. Once trial begins, however, and the Government introduces evidence implicating one in different ways and to different degrees than the other, the harmony that existed disintegrates as each wants to protect himself. The conflict then emerges.

173. To execute its obligation to determine that "there is a factual basis for the plea," Fed. R. Crim. P. 11(f), the court "may ask [the defendant] questions about the offense to which he has pleaded." Id. at 11(c)(5). An express admission of guilt by the defendant, however, is not constitutionally required. North Carolina v. Alford, 400 U.S. 25, 37 (1970); cf. People v. Coates, 32 Mich. App. 52, 60, 188 N.W.2d 265, 268 (1971) (absence in record of recital of events in defendant's own words not fatal to acceptance of guilty plea). By pleading guilty, the defendant waives whatever fifth amendment protection he had against answering the court's questions concerning the offense to which he pleads. See also Cleary, supra note 170, at 45 (discussing how to prepare client to give factual information about offense).


176. This is not to say that the defendants do not have a constitutional right to waive. See notes 216-49 infra and accompanying text.

177. See note 166 supra and accompanying text. The Advisory Committee appears to give more power to trial courts than is currently given by any appellate court. For support, the Committee cites a concurring opinion in United States v. Carrigan, 543 F.2d 1053, 1057-58 (2d Cir. 1976) (Lumbard, J., concurring) (urging prophylactic ban on multiple representation) and dictum in United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978). See 77 F.R.D. at 601-03.
undefined. One instance given—if the court doubts that the defendants are able “to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation”178—is so open-ended that it could apply in any case. Equally broad is the suggestion that the court may impose separate counsel whenever it is unable to satisfy itself that no conflict will emerge.179 Because the Advisory Committee warns that appellate courts may reverse even if the defendants waive,180 trial courts may interpret the Advisory Committee’s comment as a direction to impose separate counsel in every case. After all, even if the defense does not invoke any privilege, when can a court be certain that a conflict will not arise? The court also could impose separate counsel if the defendant refuses to waive an objection to any future, presently unforeseen conflict181 or if an actual conflict exists.182

C. A REPRESENTATIVE EXAMPLE: CONFLICT IN THE GRAND JURY CONTEXT

Because the Advisory Committee notes that an appellate court may reverse even if the defendants waive,183 one might expect judges to invoke freely the power given by rule 44(c) to order separate representation. But the courts’ treatment of analogous situations in the context of grand jury proceedings184 indicates that this may not in fact occur. In the grand jury context the courts may balance more freely the interests of the Government with those of the witness when considering the conflict problem185 because the grand jury witness, unlike the defendant, has no sixth amendment right to counsel.186 At

178. 77 F.R.D. at 602 (quoting United States v. Dolan, 570 F.2d 1177, 1181 (3d Cir. 1978) (dictum)). If the conflict problem is as “subtle” as the Dolan court suggests, every cautious trial court will require separate representation.
179. Id.
180. Id. (quoting United States v. Carrigan, 543 F.2d 1053, 1057-58 (2d Cir. 1976) (Lumbard, J., concurring));
181. See United States v. Bernstein, 533 F.2d 775, 788 (2d Cir. ) (waiver “was not without strings” because defendant expected court to intervene if actual prejudicial conduct by attorney occurred), cert. denied, 429 U.S. 998 (1976). Although it did not mention Bernstein, the Advisory Committee would probably concur in the result because on the facts of Bernstein the waiver would not be binding. For a discussion of the problem if a conflict does emerge late in the proceedings, see Buffalo Chief v. South Dakota, 425 F.2d 271, 278-80 (8th Cir. 1970); note 267 infra.
182. 77 F.R.D. at 603 (quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978)).
183. See id. at 600-01.
185. Rule 44(c) does not apply to precharge appointment or retention of counsel because the thrust of rule 44 is to provide appointed counsel when constitutionally required. The grand jury witness is not entitled to Miranda warnings, see United States v. Mandujano, 425 U.S. 564, 580-81 (1976), and thus is not entitled to appointment of counsel. See note 186 infra and accompanying text.
186. The sixth amendment is triggered once formal criminal proceedings begin. See Kirby v. Illinois,
best, the due process clause protects the witness' choice of counsel from
arbitrary judicial interference.\footnote{187} Because the risk of conflict and the risks of
multiple representation both for the witness and for the Government are
substantial, it would not be surprising if courts favored disqualifying counsel
from representing several witnesses. That they have not suggests that courts
will sparingly exercise the rule 44(c) disqualification authorization.

The risk of multiple representation for the grand jury witness is great,
particularly when, as frequently happens, a target of the investigation retains
counsel for the witnesses.\footnote{188} Counsel has a delicate, if not impossible, task of
identifying potential conflict,\footnote{189} of reconciling the interests of his clients,\footnote{190}
and of advising each of the nature and effect of a conflict.\footnote{191} Given these
problems, an intelligent waiver of a conflict by a grand jury witness may not
be possible.\footnote{192}

At the same time, the Government has a great interest in preventing
multiple representation because the grand jury's ability to function effectively
may depend upon the willingness of witnesses to cooperate rather than to
invoke the fifth amendment. Witnesses may not cooperate if they are
represented by the same attorney\footnote{193} and for that reason, prosecutors frequent-

\footnote{187. \textit{In re Taylor}, 567 F.2d 1183, 1186 n.1 (2d Cir. 1977) (disqualification of counsel reversed because arbitrary); see \textit{In re Gopman}, 531 F.2d 262, 266 (5th Cir. 1976) (proper exercise of discretion to disqualify counsel when possibility of conflict great).

188. An employer, corporation, or union may retain counsel for its employees or its members. A conflict is almost certain to arise when counsel represents both target and nontarget witnesses.

189. It may be more difficult to determine whether a conflict exists because the witness has no right to learn the purpose or scope of the inquiry. Because counsel is not permitted to accompany the witness into the grand jury room, he must depend upon the witness' memory to infer the direction of the inquiry and thus the exposure to possible criminal liability of that witness and his other clients. See \textit{Fed. R. Crim. P. 6(d)} (defense counsel prohibited from grand jury room during hearing).

190. If the target has done nothing wrong, his interest is in having the witnesses testify to clear him and to expose any wrongdoing by others; the implicated witnesses obviously may prefer to protect themselves by invoking the fifth amendment. If the target has criminal liability, the witnesses may help themselves by cooperating so as to shift responsibility to the target. In exchange for testimony, a witness may receive immunity, a promise of nonprosecution, or a favorable plea offer. See \textit{generally Note, Supervising Multiple Representation of Grand Jury Witnesses, 57 B.U. L. REV. 544, 563-67 (1977)} (discussing counsel's many sources of conflict).

191. Counsel may himself have a conflict with the witnesses: he may jeopardize the prospect of receiving other business from an employer if he advises employees in a way that might injure the employer; or, he himself may be a target of the grand jury probe, and thus be compromised in advising his clients regarding the options of testifying or invoking the fifth amendment. See \textit{In re Investigation Before February 1977 Lynchburg Grand Jury}, 563 F.2d 652, 657 (4th Cir. 1977) (attorney who was target of investigation disqualified from representing other witnesses).

192. Counsel may not be able to explain fully the nature, effect, or probable existence of a conflict to a witness in order for that witness to make an intelligent waiver. For example, fearful of uncovering an actual conflict, or uncertain whether he has been retained only to advise but not to represent a witness, counsel may decide to forego a factual interview of the witness. He thus deprives himself and the witness of the information needed to assess whether a conflict does exist. The Government may have subpoenaed the witness to appear on such short notice that counsel has not had time to explain the alternatives available to the witness. Attorneys uncertain about the appropriate strategy usually tell witnesses to invoke whatever privilege is available. In following this advice, the witness may lose his best chance to cooperate with the Government. See \textit{Kramon, The Grand Jury: An Overview, LITIGATION} 8, 11 (Summer 1978).

193. See \textit{In re Investigation Before April 1975 Grand Jury}, 403 F. Supp. 1176, 1178 (D.D.C. 1975) ("stonewall" built by assertion of fifth amendment by many witnesses attributed in part to representation by one attorney), vacated, 531 F.2d 600 (D.C. Cir. 1976) (per curiam); Silbert, \textit{Multiple Representation by...
ly move to disqualify counsel from multiple representation to remove what they perceive as an impediment to a successful inquiry.194

One would expect that after balancing the interests of the witnesses with those of the Government, courts routinely would disqualify counsel who represents several witnesses in the grand jury setting. In Pirillo v. Takiff,195 the Pennsylvania Supreme Court did hold that a judge supervising a grand jury investigation of alleged police corruption did not abuse his discretion by disqualifying an attorney and his associate from representing twelve witnesses.196 In reaching its decision, the court balanced the prosecution’s interests in a successful grand jury probe,197 in protecting the witnesses from the potentially harmful effects of a conflict, and in preventing possible unethical conduct by counsel in representing conflicting interests198 with the first and sixth amendment rights asserted by the witnesses.199 Because of the potential conflict resulting from the multiple representation,200 the court found that the prosecution’s interests outweighed those of the witnesses. Doubting that the witnesses could evaluate whether to cooperate with the prosecution, the court rejected the claim that they would or could waive any conflict.201

With a few exceptions,202 however, the federal courts have refused to follow the lead of the Pirillo court. Most courts have declined to intervene to

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194. The motion to disqualify was once termed “novel.” See In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 608 (D.C. Cir. 1976) (per curiam). It has gained favor with prosecutors. See Silbert, supra note 193; D.C. Circuit Proceedings, supra note 184, at 522. Several prosecutors, however, have told the author that they will no longer make the motion because courts have usually denied it.


196. 462 Pa. at 529-32, 341 A.2d at 905-06. The witnesses, police officers subpoenaed to testify in connection with the probe, were members of a police organization that had retained the attorneys to represent its members.

197. Id. at 523-24, 341 A.2d at 902.

198. Id. at 524-30, 341 A.2d at 902-05.

199. Id. at 520-23, 341 A.2d at 900-02. The witnesses argued that the first amendment right of association permitted them to accept counsel retained by the police organization. Id. at 521-23, 341 A.2d at 901-02. Also rejected was the attorneys' argument that the disqualification order arbitrarily interfered with their right to pursue a profession. Id. at 521, 341 A.2d at 900-01.

200. Id. at 529-30, 341 A.2d at 905. The supreme court noted that counsel's representation of more than one witness "purportedly" involved an "impermissible conflict" but did not resolve this point, perhaps because it did not outlaw multiple representation per se. Id. at 524, 341 A.2d at 902, 906.

201. Id. at 525-28, 341 A.2d at 903-04. The organization had opposed the probe and counsel, loyal to the organization, apparently would not initiate a discussion with the witnesses about cooperating with the prosecution. Id. at 525-28, 341 A.2d at 903-04.

202. See, e.g., In re Investigation Before February 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); In re Gopman, 531 F.2d 262 (5th Cir. 1976); In re Grand Jury Investigation, 426 F. Supp. 818, 822
preclude potential conflicts and have required proof by the Government that an actual conflict does exist, a burden that the Government will not easily satisfy. An actual conflict is not established per se by the payment of counsel's fees for witnesses, even by a target of the investigation, and even if the witnesses invoke the fifth amendment. Most important for analysis of rule 44(c), though, is the belief by courts that grand jury witnesses may waive not only a potential conflict but perhaps an actual conflict as well.

The courts' reluctance to interfere with the witness' selection of counsel at the grand jury stage indicates that it is unlikely that they will exercise the authority given them by rule 44(c) to disqualify counsel at trial, even in the face of an actual conflict, at least as long as they are satisfied that the defendants understand the nature of the conflict and the peril it presents. Moreover, the sixth amendment rights of the defendant further complicate the issues presented by rule 44(c). The Advisory Committee passes, perhaps too quickly, the constitutional issues of whether the judge may impose separate counsel. The Committee does not discuss the obvious problems that many

& n.14 (W.D. Pa. 1977) (citing but distinguishing Pirillo and limiting disqualification to special facts of case), aff'd by equally divided court, 576 F.2d 1071 (3d Cir.) (en banc) (per curiam), cert. denied, 439 U.S. 953 (1978). Commentators have generally approved of the Pirillo result. See Note, Supervising Multiple Representation, supra note 190, at 567-69; Note, Ethics, Judicial Power and the Sixth Amendment, supra note 195, at 595.

203. Compare Matter of Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1013 (3d Cir. 1976) ("confronted with hypotheticals and not evidence [of conflict], with rhetoric and not fact," order to disqualify reversed) and Silbert, supra note 193, at 9-10 (agreeing that Government should have burden to prove factual basis to infer that there may be conflict) with Pirillo v. Tskiff, 462 Pa. 511, 529-30, 431 A.2d 896, 905 (1975) (probability, not certainty, of conflict sufficient to warrant disqualification).

204. In re Grand Jury, 446 F. Supp. 1132, 1136 & n.2 (N.D. Tex. 1978). That court thought, however, that the fee arrangement would involve an actual conflict if, as in Pirillo, the payor had taken a staunch stand against cooperation by the witnesses. Id. at 1136.

205. In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1012 (3d Cir. 1976); In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 607 (D.C. Cir. 1976) (per curiam). The Government must indicate to counsel its willingness to offer immunity, if not actually communicate an offer to specific witnesses. See In re Grand Jury Empaneled January 21, 1975, 536 F.2d at 1012 (although witness invoked fifth amendment privilege, Government did not offer immunity; disqualification of attorney therefore improper).


207. See 77 F.R.D. at 602-03. The Committee does not discuss whether the nonindigent with retained counsel should be treated differently from the indigent with appointed counsel. Several factors, however, suggest such a need. First, the nonindigent must pay for separate counsel; the disqualified attorney is probably not required to return the full amount of his fee. See Note, Attorney Disqualification and Access to Work Product: Toward a Principled Rule, 63 CORNELL L. REV. 1054, 1072 n.79 (1978) (unlike that clients of disqualified attorneys will recover fees for lost work product). Second, the nonindigent may have developed a closer, more trusting relationship with the to-be-disqualified attorney, especially when counsel was retained before criminal charges were brought. Third, disqualified counsel may not be able to share his work product or investigation with new counsel because disclosure might alert new counsel to the basis of the conflict, thus damaging the client whom the disqualified counsel probably continues to represent in other matters. Cf. First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201, 202-06 (7th Cir. 1978) (en
judges will dread: the indigent defendant who refuses to cooperate with the newly appointed attorney or the nonindigent defendant who refuses to retain a different lawyer. Nor does it discuss whether codefendants might sometimes receive better representation, even in the face of a conflict, from one attorney, or whether the indigent defendant is constitutionally entitled to select the replacement attorney. These problems may lead many judges to seek a waiver rather than to demand separate attorneys.

IV. CONSTITUTIONAL QUESTIONS

Rule 44(c) poses two constitutional questions. First, is the trial court constitutionally compelled to perform the inquiry envisioned by the rule? Second, when can the court impose separate counsel on a protesting defendant? The second question can be phrased from the defendant’s point of view. As part of his right to choose his own defense, can the defendant choose an attorney who has or who may have a conflict? That is, if the sixth amendment guarantees the defendant the right to conflict-free representation, can the defendant waive that right?

The Advisory Committee does not explicitly discuss this first issue. It apparently assumes that the inquiry is not constitutionally required, because it states that the court’s failure to inquire would not mandate automatic reversal. A strong argument nonetheless exists that the inquiry is constitutionally required or that the court must at least inform the defendants of the right to separate representation. Glasser v. United States and its interpretation in Holloway v. Arkansas imply that separate representation is a bane (firm represented plaintiff trust and defendant until conflict over loan dispute; after disqualification, defendant’s new counsel sought relevant firm’s work product; court granted access unless disclosure would give improper advantage to defendant because of firm’s representation of plaintiff in other matters).

The Advisory Committee’s position is weakened by its heavy reliance on concurring opinions or dictum. See 77 F.R.D. at 601-03; note 177 supra. Further, the only case cited by the Committee that required separate counsel involved a blatant conflict that demanded judicial intervention. See United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978), affg United States v. Garafola, 428 F. Supp. 620 (D.N.J. 1977); note supra. In that setting courts should readily impose separate counsel because the attorney’s actions demonstrate that he can not be trusted to represent the defendants effectively even if he were not hampered by a conflict. See note 218 infra.

208. Although the Court presumably would not submit facially unconstitutional legislation to Congress, its promulgation of rule 44(c) does not foreclose constitutional or interpretive inquiry. See Mississippi Pub. Corp. v. Murphree, 326 U.S. 44 (1946) (questions of “validity, meaning or consistency” of approved rules still remain); cf. Douglas, J., 34 L. Ed. 2d lxvi (1972) (dissenting to the Court’s approval of the Federal Rules of Evidence) (“[T]his Court does not write the Rules, nor supervise their writing, nor appraise them on their merits . . . our approval being merely perfunctory . . . we are merely the conduit to Congress.”). Questions of the constitutionality of rule 44(c) might arise in its implementation by the federal courts or in passage of similar legislation by the states.

209. 77 F.R.D. at 603. If the Advisory Committee’s intent was not to foreclose an inquiry into harmless error, its position may be inconsistent with the Holloway Court’s rule of automatic reversal. Although the rule 11 inquiry into a defendant’s guilty plea is not constitutionally required, a state court must nonetheless determine that the defendant’s plea is voluntary and intelligent. See Boykin v. Alabama, 395 U.S. 238 (1969). Also the Committee’s position is inconsistent with its analogy to the rule 11 inquiry because—at least on direct appeal—the failure to conduct that inquiry results in automatic reversal. McCarthy v. United States, 394 U.S. 459, 472 (1969).

210. 315 U.S. 60 (1942).

constitutional right. The Court in *Glasser* reversed petitioner's conviction not because of ineffective assistance, but instead because the trial court had interfered with Glasser's general sixth amendment right to the assistance of counsel, “untrammeled and unimpaired by a court order requiring that the lawyer shall simultaneously represent conflicting interests.”\(^2\) That basis of reversal made sense on *Glasser*'s facts because Glasser had retained counsel. *Holloway* extended *Glasser* by providing similar protection to indigent defendants.\(^3\) *Holloway* thus suggests that each defendant—whether indigent or able to retain counsel—has the right to a separate, personal attorney. Because only an informed defendant can waive the right to counsel, whatever the contours of that right, a waiver of this sixth amendment right is binding only if it satisfies the most demanding tests of notice and knowledge.\(^4\) If this analysis is correct, rule 44(c) is unconstitutional because it requires neither a conflict inquiry by the trial court nor notice to the defendants of his rights.\(^5\)

The second constitutional question raised by rule 44(c) is whether the court may impose separate counsel over a defendant's objection. The Advisory Committee would permit the court to pursue this option in its discretion.\(^6\) It cites *United States v. Dolan*\(^7\) as support for the constitutionality of this course of action.\(^8\) But *Dolan* does not support the reach of the rule.\(^9\) In *Dolan* defense counsel had an actual conflict in representing two defendants, a

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212. 315 U.S. at 70. Over Glasser's objection, his retained attorney was appointed by the court to represent a codefendant with conflicting interests. *Id.* at 68-69.

213. 435 U.S. at 482. Although the Court mentioned the right to effective representation, it stated that joint representation did not per se constitute ineffectiveness. It did not conclude that Hall had been ineffective, although it did suggest how a conflict might have affected his representation. *Id.* at 482, 490.

214. See Glasser v. United States, 315 U.S. 60, 70 (1942) (before finding waiver of right to counsel, court will “indulge every reasonable presumption against the waiver of fundamental rights”). In *Brewer v. Williams*, 430 U.S. 387 (1977), the Court reversed a conviction because of the introduction of a statement given to the police by a defendant who had earlier asserted his right to counsel and who had not at the time of the statement specifically waived the presence of counsel. Cj. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter*, 67 Geo. L.J. 1, 29 (1978) (*Brewer* may be interpreted as holding only that Williams did not waive his right to counsel “even assuming” defendant could waive without consulting counsel; state has burden to establish waiver by proving intentional relinquishment of known right). Compare *Youngblood v. State*, 206 So. 2d 665, 667-68 (Fla. Dist. Ct. App.) (joint representation per se violation of sixth amendment right; failure to object not equal to waiver), rev'd, 217 So. 2d 98, 100 (Fla. 1968) (absent objection defendant must show prejudice resulting from joint representation) with *Kaplan v. Bombard*, 573 F.2d 708, 714-15 (2d Cir. 1978) (failure to object held to be consent to joint representation).

215. The practice of those courts of appeals that do not require the inquiry would, of course, be similarly unconstitututional.

216. See note 167 supra and accompanying text.

217. 570 F.2d 1177 (3d Cir. 1978).

218. 77 F.R.D. at 603. *Dolan* appears to be the only decision holding that a court may disqualify counsel even when the defendant objects and executes an informed waiver.

219. Nor does *United States v. Vargas-Martinez*, 569 F.2d 1102 (9th Cir. 1978), a case not cited by the Advisory Committee in which counsel was disqualified. In *Vargas-Martinez*, *X* had retained counsel who had represented codefendant *Y* in an unrelated state prosecution. *Y*, represented by different counsel in the federal case involving *X*, agreed to testify for the Government against *X*. *Id.* at 1104. Apparently no record was developed on the existence of an actual conflict, but the court thought that the possibility that counsel might have received confidential information from *Y* while representing her in the state case created a conflict. The disqualification was upheld because even though *X* had agreed to waive any conflict, *Y* had not. *Id.* Although approving of the order to disqualify counsel, the court of appeals implied that if *Y* had waived, counsel could have represented *X* even if counsel had a conflict. See *id.* at 1104 (absent waiver by *Y*, ordering substitution only possible resolution).
conflict that the court of appeals thought potentially crippled a fair and effective defense.\textsuperscript{220} As the Advisory Committee notes,\textsuperscript{221} rule 44(c) goes beyond situations in which actual conflicts exist by empowering the court to require separate representation if, for example, the court is unable to determine to its satisfaction that a conflict would not arise.

The \textit{Holloway} Court casually brushed aside this constitutional question by noting that “a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interest.”\textsuperscript{222} That statement does not answer the crucial question of when the defendant “waives” his right. In contrast to \textit{Holloway}, the courts of appeals have disagreed on whether, as an exercise of supervisory power, a court may demand separate representation. In those cases approving the disqualification of an attorney, the courts have scrutinized the defendant’s right to select counsel\textsuperscript{223} and hedged it with restrictions. The indigent cannot select the attorney to be appointed\textsuperscript{224} and cannot interfere with the judicial process by retaining or replacing an attorney.\textsuperscript{225} A judge’s insistence on separate representation therefore can be rationalized as simply another justifiable restriction on a right that is not absolute.\textsuperscript{226}

\begin{itemize}
  \item \textsuperscript{220} 570 F.2d at 1184. Moreover, although the court discussed the clash between the defendant’s right to select counsel and his right to effective representation, \textit{id.} at 1182-83, that court did not approve of disqualifying counsel solely on the ground that the defendant had no right to select conflict-laden counsel under Faretta v. California, 422 U.S. 806 (1976). See notes 227-33 infra and accompanying text. Instead, the court appeared to rest its decision on the trial court’s supervisory power to bar an attorney who violated his ethical obligations. 570 F.2d at 1184. Because an actual conflict existed, the court thought that the attorney would violate DR 5-105(C) by continuing to represent a defendant willing to waive the effect of any conflict. \textit{id.} The court thus implied that its supervisory power gave the trial court authority to disqualify an attorney when the trial judge was not satisfied that waiver was proper. \textit{id.} at 1181.
  \item \textsuperscript{221} See notes 179-82 supra and accompanying text.
  \item \textsuperscript{222} 435 U.S. at 483 n.5. The Court left this dictum unexplained.
  \item \textsuperscript{223} See, e.g., United States v. Dolan, 570 F.2d 1177, 1182 (3d Cir. 1978); United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978); United States v. Bernstein, 533 F.2d 775, 787-88 (2d Cir.), \textit{cert. denied}, 429 U.S. 998 (1976).
  \item \textsuperscript{224} The argument is that, by analogy, an indigent who cannot demand appointment of a specific attorney cannot demand continued representation by an appointed attorney with a conflict. \textit{But see} Harris v. Superior Court, 19 Cal. 3d 786, 797-99, 567 P.2d 750, 757-58, 140 Cal. Rptr. 318, 325-26 (1977) (abuse of discretion not to appoint requested attorney who had represented defendant in related prosecution). \textit{Harris} is apparently the first case in the country that limits the discretion of a trial judge in appointing counsel for an indigent when the indigent can show objective considerations supporting the choice of appointed counsel.
  \item \textsuperscript{225} See United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978); People v. Kroeger, 61 Cal. 2d 236, 244-45, 300 P.2d 369, 374, 37 Cal. Rptr. 593, 598 (1964); \textit{cf.} Magee v. Superior Court, 8 Cal. 3d 949, 959, 506 P.2d 1023, 1025, 106 Cal. Rptr. 647, 649 (1973) (defendant has right to select \textit{pro hac vice} attorney who appears \textit{pro bono} as long as appearance will not disrupt proceedings).
  \item \textsuperscript{226} The argument appears to assume that, on balance, the disqualification of one attorney does not overly interfere with the defendant’s right to select counsel because the defendant can choose any other attorney. \textit{Cf.} \textit{In re Investigation Before April 1975 Grand Jury}, 403 F. Supp. 1176, 1182 (D.D.C. 1975) (multiple representation would cause stifling of grand jury investigation, witnesses could choose from a limitless pool of qualified attorneys), \textit{vacated on other grounds}, 531 F.2d 600 (D.C. Cir. 1976) (per curiam). That assumption is questionable with respect to retained counsel. The argument assumes that attorneys are fungible. But a defendant able to retain an attorney whom he trusts or thinks has superior ability obviously loses his bargained-for advantage. \textit{Cf.} State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225 (disqualification of noted criminal defense attorney for authoring letter that might have improperly influenced prospective jurors), \textit{cert. denied}, 393 U.S. 924 (1968). Similarly, an indigent who has come to trust appointed counsel has "selected" that attorney in a sense. Those courts that hold that an appointed attorney can be removed over the indigent defendant's objection must face the issue of whether the indigent should be given the opportunity to select replacement counsel. \textit{See note 224 supra.}
Other courts of appeals have concluded that the defendant has the right to conflict-laden counsel as long as he waives any objection. These appellate courts believe that *Faretta v. California* mandates this conclusion. In *Faretta* the Supreme Court held that the sixth amendment gives the defendant the right to structure his own defense. Among his options is self-representation, even if his choice of that option appears suicidal. If the defendant may foolishly choose to represent himself, these courts reason, the defendant may also foolishly choose to have a conflict-burdened attorney.

The logic of that a fortiorari argument, however, is questionable and the reliance on *Faretta* may be misplaced. *Faretta* is doctrinally unclear. The Court in *Faretta* said that the right to self-representation is "independent" of the right to counsel and does not arise "mechanically from the defendant's right to the assistance of counsel." What the Court had in mind is uncertain. Perhaps it wanted to foreclose in other contexts the argument that the defendant's right to protection necessarily included the right to forego that protection. If this interpretation of *Faretta* is correct, it may follow that the right to counsel, when the defendant wants a particular attorney, does not include the right to forego the effective assistance of counsel that a conflict-laden attorney might be unable to provide. This analysis suggests that when a defendant has asserted his right to counsel a court has the power, and perhaps the constitutional obligation, to demand separate representation if it perceives a conflict.

If the discussion in *Faretta* of the scope of the right to counsel provides no certain answer to the constitutionality of demanding separate representation, neither does its discussion of waiver. A *pro se* defendant apparently makes

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227. E.g., United States v. Alvarez, 580 F.2d 1251, 1259 (5th Cir. 1978); United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978); United States v. Waldman, 579 F.2d 649, 651 (1st Cir. 1978); United States v. Armedo-Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975) (per curiam); United States v. Garcia, 517 F.2d 272, 276-77 (5th Cir. 1975). In contrast to the criminal defendant, a witness before a grand jury may be able to waive a potential conflict. Compare United States v. Mahar, 550 F.2d 1005, 1009 (5th Cir. 1977) (waiver of actual conflict at trial permissible) with *In re Gopman*, 531 F.2d 262, 268 (5th Cir. 1976) (waiver of actual conflict disallowed in grand jury proceedings, although may be possible to waive potential conflict).

228. 422 U.S. 806 (1976).

229. *Id.* at 837.

230. *Id.* at 834.

231. *Id.* at 819 n.15 (emphasis in original).

232. The Court's citation in the same footnote to *Singer v. United States*, 380 U.S. 24 (1965), see 422 U.S. at 819 n.15, supports this analysis. *Singer* held that a defendant's right to a jury trial does not create a derivative right to a bench trial when he has waived a jury trial. 380 U.S. at 34-35. *Singer* is understandable because the Government also has the right to demand a jury trial. Without the Government's agreement to waive jury trial, the defendant can not insist on a bench trial. The *Dolan* court supported its holding that the defendant could not demand a conflict-burdened attorney by citing *Faretta*'s discussion of *Singer*. 570 F.2d at 1183. But the *Dolan* court's interpretation of *Faretta* may be wrong. The Government can demand a jury trial even if the defense wants to waive one, but no case holds that the Government can refuse to permit an attorney to represent multiple defendants.

233. In this context it is interesting to consider whether a defendant would be damaged more by representing himself than by representation by a conflict-burdened attorney. The damage obviously would be a function of the defendant's own ability and of the seriousness of the conflict. A *pro se* defendant probably suffers most from his lack of knowledge and experience when raising and presenting constitutional issues such as motions to suppress and other objections to exclude evidence. But he can present to the jury his version of the facts unhindered by a conflict. In contrast, the conflict hindering the attorney usually would not prevent him from raising constitutional issues, but might compromise his presentation of each defendant's factual position.
two waivers: a waiver of the right to counsel and a waiver of the right to effective representation. The second waiver is binding, and the pro se defendant cannot whipsaw the judicial process by claiming on appeal that his self-representation had been ineffective.234 By analogy, the defendant who decides to proceed with a conflict-burdened attorney—one whose effectiveness would be certainly subject to question—would likewise make a binding waiver of the right to effective representation.235

This analogy, however, does not answer the first waiver question of when and how the defendant who wants joint representation waives the right to individual, conflict-free representation.236 Although not altogether clear, Faretta suggests that the trial court is not required to oversee closely the defendant’s decision to proceed pro se.237 The court probably must explain the charges, the possible punishments, the right to counsel, and the risk of self-representation to the defendant, as well as determine that he recognizes his options.238 The court is not required to assess whether the defendant would represent himself adequately in terms of appreciating the complex constitutional, evidentiary, and tactical problems presented by a trial.239 Faretta thus

234. See Faretta v. California, 422 U.S. 806, 834 n.46. (1976).
235. The defendant would waive only the ineffectiveness caused by the conflict and not other errors of counsel.
236. This first waiver question can be asked in the alternative: On the one hand, what must the court do at a minimum to obtain a binding waiver of conflict-free representation? On the other, can the court insist on a certain type of waiver as a condition of joint representation? The position that a defendant can never waive effective representation is probably wrong. Apparently, no constitutional right is so important or absolute that the defendant cannot waive or lose it. In Illinois v. Allen, 397 U.S. 337 (1970), for example, the court of appeals had reversed a conviction because the trial court had excluded an unruly defendant from the courtroom during trial. Id. at 339. The court of appeals held that the sixth amendment right of confrontation was absolute as long as the defendant insisted on being present. Id. at 341-42. The Supreme Court disagreed, however, and concluded that the defendant had “lost” his right by his conduct. Id. at 346. See United States v. Armedo-Sarmiento, 524 F.2d 591, 593 (2d Cir. 1975) (per curiam) (trial court’s grant of Government’s motion to disqualify counsel reversed and remanded to permit waiver by defendants). The Second Circuit, however, failed to explain the nature of the waiver, a question not decided on remand because one of defendants retained separate counsel. Conversation with Trial Counsel (Jan. 3, 1979).
237. 422 U.S. at 835. One problem with interpreting Faretta is that the cases it cited as support used different terms of art, terms that imply different tests. Compare Von Moltke v. Gillies, 32 U.S. 708, 724 (1948) (plurality opinion) (“to be valid such waiver [of counsel] must be made with an apprehension of the nature of the charges . . . , and all other facts essential to a broad understanding of the whole matter.”) (quoted in Faretta v. California, 422 U.S. at 835) with Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1942) (defendant must “know . . . what he is doing and his choice [must be] made with eyes open”) (quoted in Faretta v. California, 422 U.S. at 835). An “understanding of the whole matter” may suggest that the defendant must be aware of all of the facts and appreciate the options, while “know . . . what he is doing” suggests only that he need to be informed by the court of the alternatives without an inquiry by the court into his appreciation of them. If there is a difference, the Faretta Court appeared to choose the Adams approach by concluding that a “knowing exercise of the right to defend himself” was sufficient. 422 U.S. at 836.
238. Perhaps because of the extensive discussion between Faretta and the trial court, the Supreme Court did not explain what a trial court should say to the defendant other than to advise him of the “dangers and disadvantages of self-representation.” 422 U.S. at 835. One court has suggested that rule 11(c) of the Federal Rules of Criminal Procedure sets the standard. United States v. McCaskill, 585 F.2d 189, 190 (6th Cir. 1978) (per curiam). But cf: United States v. King, 582 F.2d 888, 890 (4th Cir. 1978) (no particular form of inquiry required).

Although the Advisory Committee leaves the inquiry to the discretion of the trial judge, it speaks of notifying the defendants of the “probable hazards” of joint representation. 77 F.R.D. at 600 (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE TRIAL JUDGE § 3.4 (1972)).
suggests that it is enough for a court to inform a defendant demanding joint representation of the opportunity for separate counsel and of the risks that he runs if he refuses to accept separate representation.

It does not necessarily follow from the preceding interpretation of *Faretta* that the court can force a conflict-free attorney on an informed defendant. Because the holding of *Faretta* was not based on the defendant's legal knowledge, it suggests that a trial court should not demand separate counsel for an informed defendant because of that defendant's supposed inability to understand the legal consequences of his decision. If the foregoing analysis of *Faretta* is correct, rule 44(c) is unconstitutional in authorizing the court to override the defendant's waiver of separate, conflict-free representation.

But this analysis is not necessarily correct. The Advisory Committee sidesteps the problems posed by this extension of *Faretta*. It argues that the defendant cannot always knowingly and intelligently waive the right to separate representation. The Advisory Committee justifies its position by noting that the court may be unable to assess whether an actual conflict exists. *Faretta* assumes that the court can explain to the defendant the risks of *pro se* representation and the benefit of having an attorney. The reasoning of the Advisory Committee implicitly challenges such an assumption in the context of multiple representation. Because the judge cannot always determine whether a conflict exists or may arise, he cannot adequately inform the defendants of the peril they face in proceeding with the same attorney; if the defendants are not informed of that peril, their waiver is not intelligently given. This chain of reasoning results in an invalid waiver; therefore, according to the Advisory Committee, the court can impose separate representation.

Assuming that the Advisory Committee is correct in its interpretation of *Faretta*, its position leads to a remarkable result. Although the court can impose separate representation whenever the judge cannot gather enough information to assess fully the source and effect of a conflict, the court cannot impose separate representation if the conflict is so blatant that the judge perceives it! In the latter situation, the court could provide enough information to allow an intelligent waiver. Thus, in the only situation in which the courts of appeals have exercised their supervisory power to impose separate representation, they arguably have acted unconstitutionally.

We need make no assessment of how well or poorly *Faretta* had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

*Id.* at 836 (footnote omitted). The inquiry is thus designed to provide information to the defendant and not to probe his understanding and ability to assess the ramifications of that information.

240. *See id.*

241. 77 F.R.D. at 602 (quoting United States v. Dolan, 570 F.2d 1177, 1181 (3d Cir. 1978)).

242. *Id.* This point was made forcefully by the district court in United States v. Garafola, 428 F. Supp. 620, 624-25 (D.N.J. 1977) (it is easier to explain risks of *pro se* than of multiple representation; ABA Code of Professional Responsibility requires attorneys to avoid representing conflicting interests), *aff'd sub nom.* United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).

243. 77 F.R.D. at 602.
Obviously, courts may recoil at this result, even if it correctly follows from Faretta and the dictum in Holloway. Of course, when faced with a conflict so glaring that a court could clearly perceive it, counsel on his own may elect to withdraw. If counsel does not move to withdraw, the court might nonetheless conclude that as part of its supervisory power to ensure ethical conduct by attorneys, whether retained or appointed, it could disqualify any attorney whose continued representation would violate the Code of Professional Responsibility. Less grandly, the court might decide it could remove a particular attorney.

244. The judicial power to impose counsel in other contexts does not undercut the interpretation of Faretta and Holloway offered in the text. See Faretta v. California, 422 U.S. 806, 835 n.46 (1975). See 18 U.S.C. § 3000(A) for authority to impose counsel on a nonindigent who does not waive counsel but does not or cannot retain counsel, as well as on the pro se defendant who unnecessarily disrupts the proceedings, see Allen v. Illinois, 397 U.S. 337, 339-41 (1970), or who appears unable to represent himself effectively. Accord, Uniform R. Crim. P. 321(b). These authorities, however, are irrelevant when the defendant wants any attorney.

245. Attorneys have often represented to the court that they would withdraw if a conflict developed. See In re Grand Jury Investigation, 436 F. Supp. 818, 823 (W.D. Pa. 1977) (representation accepted for one witness because actual conflict had not yet developed), aff'd per curiam by an equally divided court, 576 F.2d 1071 (3d Cir.) (en banc), cert. denied, 439 U.S. 953 (1978); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), appeal dismissed and cert. denied, 423 U.S. 1083 (1976) (representation contained in Petitioner's Jurisdictional Statement on Appeal to the United States Supreme Court, App. B at 46, Dec. 3, 1975). The ABA Code of Professional Responsibility DR 5-105(C) allows counsel to represent multiple clients only if it is "obvious" he can represent each "adequately" and where the clients have agreed after "full disclosure." But because self-interested attorneys may not fully disclose, or because inept attorneys may honestly, albeit wrongfully, believe they are able to represent both clients adequately, some have argued that the ABA should adopt a disciplinary rule barring counsel from representing multiple defendants under any circumstances. See Geer, supra note 14, at 157. Adoption of such a disciplinary rule would create two problems: First, its infringement on counsel's freedom to pursue a profession might raise a constitutional question because Holloway provided that joint representation was not per se unconstitutional and second, if all states did not adopt such a rule, the conflict problem would remain for the courts to resolve.

Another in terrorem method to prevent multiple representation is to require counsel to sign an affidavit representing that no conflict exists or will arise; if counsel is wrong, he may be disciplined. See United States v. Garafo, 428 F. Supp. 620, 628 (D.N.J. 1977), aff'd sub nom. United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978) (no comment on district court's suggestion of affidavit). By not mentioning either the Garafo affidavit or an amendment to the disciplinary rules, the Advisory Committee in rule 44(c) explicitly rejected these approaches; the rejection may be based on a desire to retain the court's power to appoint one attorney initially or on the Committee's belief that these approaches were beyond its jurisdiction. Either alternative would avoid the conflict problem because it is probable that attorneys would then decline to represent more than one client. Moreover, the Garafo approach should comport with the sixth amendment, because counsel can always refuse to represent a prospective client. The client's constitutional right arises only after counsel has agreed to represent him. My suggestion below that separate attorneys should be appointed at the initiation of criminal proceedings is premised on a failure to adopt either alternative and is intended to increase the protection afforded by rule 44(c). See text accompanying notes 253-58 infra. Those who disagree with the proposals in the next section and worry that rule 44(c) will fail for not giving sufficient direction to the judge might conclude that multiple representation should be barred directly by a disciplinary rule or indirectly by the Garafo affidavit.

246. The conflict might prevent the attorney from providing loyal, competent, and zealous representation required by Canons 5 and 6. See United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978) (attorney disqualified by court against defendant's wishes because of Canon 5); cf. In re Gopman, 531 F.2d 262, 266 (5th Cir. 1976) (in grand jury proceeding, attorney disqualified because of Canon 5). When an actual conflict exists, the court could conclude that counsel could not obviously provide adequate representation. See DR 5-105(C), supra note 245; cf. In re Gopman, 531 F.2d at 268 (leaving undecided whether disqualification is proper where ethical violation "relatively minor"). Part of a court's problem is interpreting what "obvious" means in DR 5-105(C). If "adequately represent" means representation when...
appointed counsel even if its power did not reach retained counsel. The court also might appoint standby counsel to assist the court in minimizing the effect of the conflict. Or, as the next section suggests, if the defendants refused to provide whatever information the court demanded to determine the extent of their understanding, the court could conclude that it was unable to inform the defendants adequately of the risks they faced.

the attorney’s independent judgment on behalf of one client is in no way impaired by representation of another, it could never be “obvious” that counsel can satisfy DR 5-105(C). Hence, the second part of DR 5-105(C), authorizing representation even where a conflict exists if both clients consent after full disclosure, must qualify DR 5-105(C)’s first requirement. See Code of Professional Responsibility and the D.C. Bar Legal Ethic Committee, Opinions, No. 49 (June 27, 1976) (interpreting “consent” clause to override “adequately represent” clause of DR 5-105(C)). Having so interpreted DR 5-105(C), a court nonetheless might conclude that an attorney who had failed to recognize the conflict could not have explained the conflict to his clients, and the clients had therefore not consented after “full disclosure.” No court, however, has faced the constitutional question of whether the defendant’s waiver overrides the court’s power over an attorney. Also, it is not clear that a court could disqualify an attorney who apparently violated an Ethical Consideration but not necessarily a Disciplinary Rule, as might be the case if the court could not perceive an actual conflict. See EC 5-1 (“The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties.”); EC 5-14 (“Maintaining the independence of professional judgment required of a lawyer precludes his acceptance of continuing employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client.”); EC 5-15 (The attorney “should resolve all doubts [about the possibility of a conflict] against the propriety of [joint] representation.”); cf. Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1385-86 (2d Cir. 1976) (plaintiff’s attorney disqualified on motion of defendant because of his firm’s representation of another defendant in separate but similar litigation on basis of apparent violation of EC 5-1 and 5-14).

247. This power would flow from 18 U.S.C. § 3006(A)(c) (1976), which authorizes a court to “terminate the appointment of counsel . . . as the interests of justice may dictate.” The cases in which trial counsel has not been disqualified, despite a conflict, have involved retained rather than appointed counsel. See United States v. Armesto-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). A distinction could be drawn between retained and appointed counsel based on the court’s power to select appointed counsel. If the defendant cannot demand appointment of a particular attorney, see note 224 supra and accompanying text, he cannot demand that a particular appointed attorney remain as counsel. This argument would fail, however, if an informed defendant can waive conflict-free representation. And it is also premised on a questionable, although almost uniformly followed principle that the indigent has no right to select the attorney appointed. See note 224 supra; Tague, An Indigent’s Right to the Attorney of His Choice, 27 Stan. L. Rev. 73, 79 (1974) (noting courts have almost unanimously held selection of counsel for indigents solely within discretion of trial court).

248. See United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972), cited with approval in Faretta v. California, 422 U.S. 806, 834 & n.46 (1975) (an example of the court’s power to assist the pro se defendant).

As noted in Dougherty, standby counsel appointed to assist the court may call witnesses and ask questions without reference to the defendant under the same authority that permits a judge to take such action in the interests of justice. To see how this use of standby counsel would apply in Holloway, assume that all three Holloway defendants want Hall to represent them. In order to protect the nontestifying defendants, the trial court might then appoint separate counsel to cross-examine each defendant who testified. But, in so doing, standby counsel might interfere with Hall’s trial strategy, if the conflict feared by the judge in fact did not exist or if Hall successfully structured an effective defense to avoid the emergence of the conflict. As a result, it may be unwise to seize blindly upon the option of standby counsel. Cf. United States v. Johnson, 585 F.2d 374, 376 (8th Cir. 1978) (per curiam) (dictum) (standby counsel cannot infringe on defendant’s pro se right).

249. This analysis is based on an analogy to forfeiture rather than waiver. The defendant can forfeit a right by not asserting it and the court is not required independently to inform him of that right. Cf. Wainright v. Sykes, 433 U.S. 72, 90-91 (1977) (failure to object at state trial to admission of statements imposes burden of showing prejudice to obtain federal habeas relief); Estelle v. Williams, 425 U.S. 501, 512-13 (1976) (although defendant cannot be compelled to stand trial in jail clothes, relief conditioned on
If Faretta means that defendants have the right to waive conflict-free representation, we must search for ways to minimize the possibility that a conflict will emerge and to ensure informed and intelligent waiver. Two possible improvements to rule 44(c) follow. First, the magistrate or judge should appoint separate counsel at the first appearance of the indigent defendants and the court should require that nonindigent defendants retain separate counsel or at least discuss the matter of conflict with a separate attorney. Second, if the defendants nonetheless insist upon a single attorney, the court could require them to satisfy the burden of proving an intelligent waiver. This second change might include demanding that the defendants themselves discuss with the court—or at least permit counsel to discuss—the facts of the case and the reasons why each wants a single attorney as a way of determining whether each understands the significance of his choice.

The first suggested change to the proposed rule would apparently go further than the practice in any court. It is patterned, however, after the practice of the District of Columbia Circuit as announced in United States v. Ford. This change should all but eliminate multiple representation for several reasons. First, it would prevent the defendants from coming to trust the single attorney who represented them before the court informed each of the right to separate representation. The defendants might fear the entry of a new attorney after indictment more than the prospect of a conflict that could divide the loyalty of a trusted attorney. Second, defendants unaware of the timely objection. In contrast, a defendant can waive a specific right only after an intelligent and voluntary relinquishment. To use an analysis based on forfeiture rather than waiver makes sense when the defendant wants to choose an option that will probably hurt him more than it will help. Cf. United States v. Mahar, 550 F.2d 1005, 1009 (5th Cir. 1977) (right to procedural detriment waived more easily than right assuring procedural fairness; court can disqualify conflict-laden attorney if defendant has not “affirmatively asserted” desire for that attorney; waiver, not forfeiture, analysis used).

250. The changes suggested could be adopted by redrafting rule 44(c), or by local court rule pursuant to rule 57 of the Federal Rules of Criminal Procedure.

251. The Advisory Committee quotes from United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975) (“the court should seek to elicit a narrative response from each defendant . . . that he has discussed the matter with his attorney or if he wishes with outside counsel . . .”). 77 F.R.D. at 601. I would suggest that this meeting with outside counsel be obligatory. If one of the defendants were indigent, the court could appoint counsel for him.

252. Cf. Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) (attorney in civil case associated with two firms, one representing plaintiff and other representing defendant in another matter, has burden of establishing no actual or apparent conflict).


254. In United States v. Donahue, 560 F.2d 1039 (1st Cir. 1977), for example, a psychiatrist and his
opportunity for joint representation would not be tempted to ask for it.\textsuperscript{255} It would be rare that an indigent defendant would request that he and his codefendant be represented by a single attorney. Furthermore, the indigent may not have the right to demand representation by codefendant's counsel. If the court need not appoint a specific attorney requested by the indigent, perhaps it could deny a request for joint representation as a variation of this judicial power to select the indigent's attorney.

The experience in the District of Columbia federal courts after the announcement of Ford illustrates how effectively the change would eliminate joint representation. Although there are no statistics detailing how often two appointed attorneys have asked that but one of them be permitted to proceed, the author could find no one—judge, court personnel, or attorneys—who knew of any instance in which this request had been made.\textsuperscript{256} The apparent absence in the Court of Appeals for the District of Columbia Circuit of any appeal involving an alleged conflict further supports the inference that Ford has eliminated the conflict problem.\textsuperscript{257} Whatever its explanation, this experience with Ford underscores the benefit of the first suggested change in rule 44(c).\textsuperscript{258}

receptionist were charged with illegally prescribing drugs. The psychiatrist hired a law firm to represent both defendants. The defense was structured to help the psychiatrist because, as one attorney told the receptionist, if the psychiatrist were acquitted, the receptionist would be also. \textit{Id.} at 1041. When asked at the arraignment whether he understood that a possible conflict existed, the receptionist said that he didn't understand the term, but that he trusted the attorney who assured him that joint representation was "fine" and that he should "go along." \textit{Id.} at 1042.

\textsuperscript{255} The constitutional question here is whether the court must inform the defendants that they can choose joint rather than separate representation. Courts could refuse to advise defendants of the opportunity to have a single attorney if they interpret \textit{Faretta} as not requiring the court to advise the defendant of his pro se right and to obtain his waiver of that right on the record. See \textit{Felts v. State}, 24 Cr. L. Rptr. 2366 (Okla. Ct. Crim. App. Dec. 12, 1978) (no judicial duty to inform); cf. \textit{Chused, Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics}, 65 Calif. L. Rev. 636, 664 & n.123 (1977) (listing pre-\textit{Faretta} cases refusing to so advise). \textit{But cf. id.} at 663-68 (arguing, nonetheless, that such notice should be given). To strengthen the prophylactic impact of rule 44(c), courts should not be required—and, arguably, should not elect—to so inform defendants.

\textsuperscript{256} The author sent a letter to each federal district court judge in the District of Columbia asking whether he or she had ever had such a request. Although not all responded, those that did knew of none. Neither did court personnel in the clerk's office or a sampling of attorneys who practice criminal law in the federal courts in the District of Columbia.

\textsuperscript{257} That court of appeals apparently has not heard any appeal in which single counsel retained by multiple defendants was attacked as ineffective on conflict grounds. This may be due to \textit{United States v. Lollar}, 376 F.2d 243 (D.C. Cir. 1967), which requires an inquiry into the defendant's understanding of the right to separate representation. The only reported case on this issue in the District of Columbia federal courts appears to be \textit{United States v. Liddy}, 348 F. Supp. 198 (D.D.C. 1972), in which the Government moved for separate representation for defendants who had retained counsel. \textit{See notes 152-57 supra} and accompanying text.

\textsuperscript{258} It may be that every attorney believes that by providing individual representation he can contribute something more to the defense than could a colleague who would represent both defendants, or that it is better to avoid any possibility of conflict, or that each is economically motivated not to lose his fee by moving to withdraw. Whatever the reason, the \textit{Ford} decision apparently has ended the problem of conflicts by appointed counsel.

We do not know, however, how a district court would determine why the defendants wanted but one attorney and whether dual representation would benefit the defendants. These determinations would necessarily involve the difficult question of whether the court could demand that the defense waive the attorney-client and fifth amendment privileges.
Assuming the constitutionality of a waiver of separate representation, the second suggested change in rule 44(c) attempts to ensure that the defendants understand the significance of that choice. In an in camera conference the judge would ask the defendants or counsel to explain, first, why the defendants and counsel wanted joint representation; second, whether a conflict existed or was anticipated; third, how counsel intended to prevent any conflict; fourth, what the defense would be and the evidence to establish it; fifth, the substance of every conversation between counsel and the defendants regarding these matters; and, sixth, any other matters the court might help the defendants make an informed decision. Defendants would be expected to waive the attorney-client privilege and personally disclose or permit counsel to disclose that information. Defendants would

259. The majority of attorneys with whom I have discussed the waiver issue have expressed alarm that the court may be powerless to impose separate counsel on an informed defendant. But they can not identify the reason. They sidestep the constitutional clash by questioning whether counsel himself appreciates the conflict and has discussed it with his clients, whether the defendants truly understand the conflict, and whether the court is able to determine what counsel has said and what his clients understand. I believe that informed clients are constitutionally entitled to waive a potential or actual conflict, and my proposal in the text is designed to test their understanding.

260. This discussion should be oral, on the record, and perhaps under oath. Affidavits could be too carefully tailored to omit the information the judge needed to assess the waiver.

261. This discussion might alert one defendant that the strength of his position was being sacrificed to protect the codefendant. See United States v. Donahue, 560 F.2d 1039, 1041-42 (1st Cir. 1977); note 254 supra. Such a discussion might also indicate that counsel had not been insightful or honest in discussing the case or that concern for the fee prompted counsel's decision. With this procedure the court may discover that one defendant was indigent and unaware of the right to appointed counsel or had agreed to joint representation reluctantly, especially when counsel had been retained by the codefendant or a third party. Cf. In re Investigation before the April 1975 Grand Jury, 531 F.2d 600, 608 (D.C. Cir. 1976) (per curiam) (grand jury witness might prefer advice by separate attorney about invoking fifth amendment).

262. For example, the court might ask counsel and the defendants to explain what a conflict means. See In re Grand Jury, 446 F. Supp. 1132, 1141-42 & nn.9-10 (N.D. Tex. 1978) (understanding of nature of conflict demonstrated by answer to court's hypothetical question).

263. Disclosure by counsel of "secrets" or information developed through counsel's investigation might not involve the attorney-client privilege, but might nonetheless involve counsel's duty under DR 4-101(A). See DR 4-101(A) ("secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OPINIONS, NO. 341 (1975) (duty of attorney to disclose fraud of client subject to provisions of DR 4-101, which prohibit disclosure of "secrets" or "confidences"). This suggestion is similar to a judicial demand to inspect in camera documents claimed to be privileged in order to determine whether the privilege does apply. See Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir. 1970) (in stockholder derivative action court may inspect documents in camera to determine whether privilege applied), cert. denied, 401 U.S. 975 (1971).
be expected to affirm or to comment upon counsel's statements. 264 If defendants refuse to provide this information personally or through counsel, they would be denied joint representation. 265 If they give this information,

264. Although this suggestion obviously trenches upon the fifth amendment's protection, apparent inroads into that privilege already exist. See Williams v. Florida, 399 U.S. 78, 80-86 (1970) (approving state rule requiring defendant to disclose his alibi witnesses); cf. Fisher v. United States, 425 U.S. 391, 409-10 (1976) (approving subpoena of defendant's documents from counsel; mere assertion that document contains incriminatory writing insufficient to invoke fifth amendment). I would test the waiver by requiring a disclosure analogous to the conditions imposed on the defendant's use of alibi witnesses or defendants receipt of certain documents or reports in the possession of the Government. See Fed. R. Crim. P. 12.1 (if defendant fails to disclose identity of alibi witness court can exclude such testimony); id. at rule 16(b)(1)(A) & (B) (defense request for certain items triggers prosecution's right of discovery); Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (prisoner disciplinary board may draw adverse inferences from inmate's refusal to testify). But see United States v. Paz-Sierra, 367 F.2d 930, 932 (2d Cir. 1966) (expressing concern that judicial inquiry might infringe on defendant's fifth amendment protection). The Second Circuit, however, has indicated that it considers some form of inquiry required, thereby suggesting that that court now believes the problem of guaranteeing effective representation outweighs the impact of an inquiry on the fifth amendment. See Salomon v. LaVallee, 575 F.2d 1051, 1055 (2d Cir. 1978).

Although others might blanch at the effect of my suggestion on the confidentiality of attorney-client communications, I have a greater fear that courts will disqualify counsel by presuming that the clients are uninformed. Unlike disclosure of privileged information over a client's objection, requiring disclosure here would not harm the defendants, if restrictions on the use of information were adopted. See notes 268-72 infra and accompanying text. Compare Briceno v. Thorp, 37 Eng. Rep. 864, 866 (Ch. 1821) (to resolve issue of whether to disqualify counsel from representation in suit against former client, court should conduct in camera hearing to determine whether former client revealed privileged relevant information to counsel) with Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973) (court cannot inquire whether counsel in fact received relevant confidential information against former client; to do so would breach confidences privilege designed to protect). I distinguish Patentex and Holloway, in which the court approved of judicial probing of the announced conflict as long as the privilege was respected, 435 U.S. at 487, from my approach because in these two cases the former client objected to counsel's continued work. Counsel of course may disclose confidential communications once he is attacked. See DR 4-101(C)(4) (1977).

This suggestion simply changes the timing of that disclosure, however, assuming that one defendant usually will attack his conviction on conflict grounds. Cf. Lowery v. Cardwell, 575 F.2d 727, 729 (9th Cir. 1978) (on remand counsel testified that motion to withdraw based on belief that client had committed perjury). Finally, the SEC's insistence that counsel notify the SEC or the shareholders if counsel's client refuses to disclose or correct a securities law violation is instructive. See SEC v. National Student Marketing Corp., 457 F. Supp. 682, 712 (D.D.C. 1978). Although the SEC's rationale—that the securities laws protect the public and counsel has a responsibility to the public—initially appears irrelevant for criminal law because the "public" does not rely on counsel's statement that no conflict exists, its policy is not: the disclosed conflict might aid the interested parties in assessing whether to proceed with but one attorney. Thus, counsel may be obliged to violate his ethical duty of confidentiality in order to represent his client effectively. Cf. Lowery v. Cardwell, 575 F.2d at 732 (Hufstedler, J., concurring) (withdrawal because of client's perjury denied client effective assistance of counsel). Some attorneys might condition representation of multiple defendants on the right to disclose. At the least, attorneys should advise clients that the court will demand disclosure and thereby ease the shock of counsel's discussion. Cf. Lefstein, The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma, 6 Hofstra L. Rev. 665, 668 (1978) (suggesting that given uncertainty about counsel's obligation to disclose perjury by client, counsel warn client in initial interview that such disclosure required). 265. Disqualifying appointed counsel is easier to justify than disqualifying retained counsel. The power to remove should be subsumed within the court's power to appoint. See note 247 supra. But to disqualify retained counsel requires interfering in a contractual relationship the court did not create. To peg judicial power to disqualify on counsel's duty as an "officer of the court" begs the question of counsel's responsibility. Because counsel is vital to the adversary process, perhaps judicial interference intended to eliminate conflicts and other obstacles that might restrict counsel's fulfillment of his role is justified. Cf. Board of Ed. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) (unless attorney's conduct taints trial, courts
their waiver of the right to conflict-free representation will be as informed, intelligent, and binding as possible.\textsuperscript{266}

should hesitate to disqualify). Analogously, sua sponte judicial action designed, on balance, to help the defendant has withstood constitutional attack even when the defense has objected. See Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978) (over defense objection, trial court instructed jury concerning defendant's failure to testify). Due process concern would be reduced were courts to place attorneys on notice that multiple representation would be permitted only upon disclosure.

Other analogies justifying disqualification focus on the defendant's refusal to disclose rather than on the court's power to supervise counsel. First, a defendant can forfeit rights even without waiver. See Illinois v. Allen, 397 U.S. 337, 343 (1970) (approving removal of obstreperous defendant from court). Second, by not providing the information demanded, the defendants might be held to have elected between the competing rights to structure the defense and to effective representation. Cf. Kaplan v. Bombard, 573 F.2d 708, 714 (2d Cir. 1978) (defendant's failure to demand separate representation held to be election of joint representation). Third, although one can not be punished for invoking the fifth amendment, see Spevack v. Klein, 385 U.S. 511, 514 (1967) (plurality opinion) (attorney may not be disbarred for invoking fifth amendment), one nonetheless could be dismissed from public employment for failing to answer questions relevant to that employment through invocation of the privilege. Cf. Uniformed Sanitation Men Ass'n, Inc. v. Commissioner, 392 U.S. 280, 285 (1968) (public employee subject to dismissal for refusal to disclose information when given immunity); id. at 285 (Harlan, J., concurring in the judgement) (attorney could be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance" of office). By analogy, the defendants would be denied joint representation not because they invoked the privilege but because they refused to furnish information necessary to assess the validity of the waiver. Cf. Belli v. State Bar, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527 (1974) (that attorney's communications with press are constitutionally protected does not preclude disciplining attorney for those communications).

\textsuperscript{266} The discussion between court and defense is necessary if an intelligent waiver requires a recognition of the actual existence of the conflict. See Zuck v. Alabama, 588 F.2d 436, 440 (5th Cir. 1979). The Fifth Circuit in Zuck appears to go further than any other court unless that court intended that the defendants must be apprised only of an existing conflict of which the defense counsel is aware. In that case counsel simultaneously represented the prosecutor in an unrelated civil case; Zuck's mere knowledge of this representation was held not to constitute a valid waiver. \textit{Id.} at 440. Defendant's waiver would be analogous to a tactical decision by counsel that, even if wrong or foolish, nonetheless bars an attack on his representation as ineffective.
This second suggested change is, admittedly, extreme. But some protection for the attorney-client and fifth amendment privileges can be added. The record of that hearing could be sealed. The Government should not be permitted to use it as a source to impeach a defendant who later testified at trial or as a basis for a perjury charge unless the defendants chose to wage a postconviction attack on their waiver or on counsel's representation because of the conflict. That attack would free the appellate court to open

267. This suggestion would fuel the concern of those who already fear that rule 44(c) as drafted would unnecessarily interfere with the defense. See NATIONAL LAW JOURNAL 6, col. 3 (Nov. 20, 1978) (comment by Prof. Lewis). Professor Lewis suggests that rule 44(c) would interfere with the defense and would help the Government by leading to the appointment or retention of attorneys who are the "most compliant to the wishes of the prosecutor." Id. The validity of Professor Lewis' thesis depends on the ability of counsel to identify a conflict and to appreciate its significance. Counsel must be willing to act in the best interests of his clients—by withdrawing, if the conflict is serious, and by continuing, if to withdraw would damage the clients more than would continued representation. The court must carefully structure its role in helping the clients make the decision concerning their representation.

My proposal may not eliminate two other problems. First, neither the defense nor court may anticipate a conflict that developed unexpectedly at trial. See Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970). In Buffalo Chief, counsel did not notice that a conflict existed until a Government eyewitness testified at trial. Id. at 277. Counsel did not appreciate the significance of the conflict until the trial had ended. Id. at 278 n.4. The defendants surely had not anticipated the conflict because their request to consolidate their trials had made the emergence of the conflict inevitable. In such a situation the problem is whether the defendants can waive the effect of a conflict that they do not anticipate. Probably they can. Cf. Henderson v. Morgan, 426 U.S. 637, 644 (1976) (dictum) (guilty plea not intelligent if defendant advised solely of technical as opposed to substantive elements of charge). But cf. United States v. Bernstein, 533 F.2d 775, 787-88 (2d Cir.) (defendant's hesitation in waiving future, unforeseen conflicts ground to demand separate representation over her objection), cert. denied, 429 U.S. 998 (1976).

Second, a defendant who refused to disclose might also refuse to retain replacement counsel as ordered by the court. The court then faces the awkward dilemma of forcing the defendants to take action that it thinks beneficial but that the defendants oppose. To appoint counsel for such a defendant might jeopardize the defendant's position before the jury if he refused to cooperate. Perhaps in this situation the court should permit the joint representation on the expectation that no appellate court would reverse on the ground of conflict. See United States v. Bubar, 567 F.2d 192, 203 & n.18 (2d Cir.) (defendant's postconviction attack on counsel's effectiveness denied because of election to exercise right to select counsel, even if no waiver of right to effective representation), cert. denied, 434 U.S. 872 (1977).

268. The defendants would, in effect, receive immunity for purposes of trial—protection similar to that which an immunized witness receives. See New Jersey v. Porta, 99 S. Ct. 1292, 1297 (1979) (defendant's immunized testimony before grand jury may not be used to impeach trial testimony); United States v. Frumento, 552 F.2d 534, 543 (3d Cir. 1977) (en banc) (witness' immunized testimony may not be used against witness for any purpose except perjury prosecution).

Counsel would also receive protection because the court could report counsel's continued representation as an apparent ethical violation of DR 6-101(A), which prohibits representation when counsel is not qualified.

269. Such protection clearly is not constitutionally required and would be a legislative decision. See United States v. Kahn, 415 U.S. 239 (1974) (per curiam) (defendant's false statements to establish indigency admissible in Government's case-in-chief); Harris v. New York, 401 U.S. 222 (1971) (Government may impeach defendant with statement taken in violation of Miranda). Congress has similarly decided to bar use of a defendant's statements during plea negotiations or while pleading guilty, except as a basis for a perjury or false statement charge. See FED. R. CRIM. P. 11(e)(5) (amending FED. R. EVID. 410, as enacted, which permitted use of defendant's inconsistent statements during settlement negotiations for impeachment).

270. This suggestion assumes that the defendants spoke under oath at the hearing. It would delay, but not necessarily preclude, a perjury or false statement charge. See FED. R. CRIM. P. 11(e)(5) & (e)(6); FED. R. EVID. 410. If counsel spoke and the defendants were instructed to speak only if they disagree with counsel's statements, the risk of perjury would be reduced, thereby making my suggestion less alarming to the defendants. Nonetheless, the court could test the defendant's understanding of the conflict issue. 271. Thus, this protection would not overly clash with recent Supreme Court pronouncements...
the record of the hearing. The risk of a perjury charge might dampen the defendant's ardor for appeal on the ground of conflict and thereby strengthen the force of the waiver. 272

VI. THE ADVANTAGES AND DISADVANTAGES OF SEPARATE REPRESENTATION

Analysis of the advantages and disadvantages of separate representation supports the position that joint representation ordinarily should be barred unless the defendants give a waiver as required by rule 44(c) and the suggested changes to that rule. Joint representation benefits the defendants only infrequently. To ensure that they recognize what their choice entails, defendants should be required to discuss their desire. Separate representation benefits not only criminal defendants but also the defense counsel, the Government, and the courts.

A. THE DEFENDANTS

Defendants generally would benefit from separate representation. 273 When a conflict develops, the reason is obvious. 274 Separate representation would expressing abhorrence with perjured testimony, even when extracted in possible violation of Miranda safeguards. See United States v. Mandujano, 425 U.S. 564, 582 (1976) (plurality opinion) (defendant's testimony before grand jury could be basis for perjury charge even though defendant received no Miranda warnings).

272. An interesting fruit-of-the-poisonous tree question would arise in a perjury proceeding if the Holloway defendants argued that their testimony was the fruit of the trial judge's failure to inquire and of counsel's failure, because of the conflict, to prepare each to testify. Cf. Harrison v. United States, 392 U.S. 219, 222 (1968) (defendant's testimony at first trial excluded at second trial as fruit of illegally obtained confessions improperly used at first trial).

The suggested inquiry would also help in deciding whether the defendants' waiver was knowing and voluntary. Unfortunately, the Advisory Committee does not explain whether the defendants may attack their waiver of separate counsel as constitutionally defective, and if so, which side carries the burden of proof. The defendants should have that burden. See United States v. DeFillipo, 590 F.2d 1228, 1237, 1238 (2d Cir. 1978) (after inquiry, defendant bears burden of proving prejudice). But see United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978) (Government has burden of proving knowing, intelligent waiver even when defendants' waiver on-the-record). The disclosure suggested should eliminate any chance of reversal unless, perhaps, a crippling conflict developed that no one reasonably could have anticipated at the time of the inquiry.

273. Separate attorneys, whether appointed or retained, may provide better representation than single counsel. By working together, two attorneys may achieve tactical advantages and gather more information than either could by himself. At trial, for example, one can make an opening statement after the Government opens, and the other can reserve opening until the close of the Government's case. This strategy would allow one attorney to blunt the force or to challenge the persuasiveness of the Government's opening argument. The other attorney can then outline the facts of the defense after the Government rests, a point at which counsel should know what evidence to produce.

Other advantages would also accrue at trial. One attorney may use a different style in cross-examining a witness whose testimony the other was unable to shake. One may direct questions to issues that the other forgot to cover or probe further in an area in which the other was unsuccessful. Each can keep notes of the questions and answers while the other is examining a witness. Both can monitor the record and limit the effect of evidence as to his client. Single counsel has difficulty in conceding the admissibility of evidence against one client while attacking its application to another, the locus of the conflict in Glasser. See United States v. Glasser, 315 U.S. 60, 72 (1942).

274. In addition to compromising counsel's effectiveness, a conflict may result in the disclosure of
alleviate any fear of damaging one client in the process of helping the other. Even when a conflict does not exist or might not arise, the defendants usually would benefit from separate representation. Because the defendant relinquishes so much control over the litigation to the attorney, he needs the undivided loyalty of counsel. Counsel can make important decisions without consulting the defendant or by overruling him. Even if counsel informs the defendant about the decisions to be made, the defendant usually will accede to counsel’s suggestion.

Defendants with retained as well as those with appointed counsel may need separate representation, although for different reasons. If a defendant retains counsel for himself and his codefendant, counsel may slant the defense to favor the paying client. The Government may also be able to discover the identity of the person who pays for counsel, thereby circumstantially suggesting a conspiracy or a stronger case than actually exists against the nonpaying defendant. An indigent who does not have friends or family willing to provide information or support vital to the defense may need counsel’s undivided attention. Defendants with retained as well as those with appointed counsel may need separate representation, although for different reasons. If a defendant retains counsel for himself and his codefendant, counsel may slant the defense to favor the paying client. The Government may also be able to discover the identity of the person who pays for counsel, thereby circumstantially suggesting a conspiracy or a stronger case than actually exists against the nonpaying defendant. An indigent who does not have friends or family willing to provide information or support vital to the defense may need counsel’s undivided attention.

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public defender must represent simultaneously more than one defendant in the case.

The nonindigent defendant who initially retains separate counsel gains certain advantages over the defendant who must retain separate counsel after the court refuses to permit joint representation. A defendant will have to spend additional money to retain a second attorney who will have to repeat investigation or research if disqualified counsel cannot share his work product with replacement counsel.282

This is not to say that separate representation will always benefit each defendant.283 For example, defendant X’s attorney may undercut defendant Y’s case by contrasting the differences between X and Y. An attorney representing both X and Y might also try to distinguish between the defendants, but would do so in a way that was not so obviously damaging to Y. Some defendants, especially those who must retain counsel, might benefit from joint representation.284 These defendants can share the cost, which will be greater because of counsel’s appearance for two defendants, but which after apportionment will probably be less for each defendant. If one defendant lives outside of the jurisdiction, he may have trouble finding counsel familiar with the idiosyncracies of the local court; by sharing a local attorney chosen by a local defendant, an out-of-state defendant may receive better representation. One defendant might prefer to be represented by a prominent attorney whom only his codefendant or the defendants together have the money to hire. Even in the face of an emerging conflict, two defendants may prefer to keep a single retained counsel to shepherd them through a grand jury investigation before criminal charges are filed, either because they have come to trust him or because they believe he has mastered a complicated fact pattern.285 Some defendants may prefer to present a common defense even when one defendant would benefit from separate representation and separate defense.286 These considerations support the position that the defendant

282. See note 207 supra. If counsel continues to represent defendant X, defendant Y’s replacement counsel may be affected by the conflict. For example, if counsel for Y were recommended by counsel for X, the former may be subtly influenced by the recommendation. If X, who retained counsel for himself and Y, also pays for substitute counsel, the latter may be affected in the tactical choices. Cf. Yablonski v. United Mine Workers, 448 F.2d 1175, 1180 (D.C. Cir. 1971) (per curiam) (counsel, after withdrawing from representing certain clients, continued to shoulder major part of their defense).

283. The examples given in the text illustrate the difficulty in judging whether joint representation helps or hurts the defendants. The author knows of no data other than his own impressions and experiences and those of others to document these examples. Others disagree. Several judges told the author that they believed that two defendants would both be hurt by separate counsel if the jury dislikes one of the attorneys. In contrast, the author’s experience has been that the less favored attorney would benefit from the presence of the other attorney.

284. Those who have argued this point have rarely given illustrations. For example, Justice Frankfurter’s assertion in Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting in part), that a “common defense often gives strength against a common attack,” certainly was inapplicable to Glasser. Glasser’s defense almost certainly was prejudiced when defense counsel, aware of the conflict, chose not to cross-examine a Government witness who had implicated Glasser and the codefendant because he feared that the witness would damage further the codefendant’s case. Proper cross-examination would have revealed that the witness had no personal knowledge of Glasser’s personal involvement. Id. at 72-73.


286. For example, although counsel usually controls tactics, political defendants might prefer an
should be able to waive separate representation, but that such waiver should be as informed as possible so that the defendants can understand why each has decided to share counsel.

B. DEFENSE COUNSEL

In the absence of a binding waiver, defense attorneys would also benefit if separate representation were required. Those attorneys who are unable to detect even blatant conflicts would be protected against a rash decision to represent multiple defendants. Those sensitive to the risk of a conflict and its possible effect would be spared the anxiety and limitations inherent in

attorney whom they thought they could control or one who has agreed to permit them to make the tactical decisions concerning the defense. See note 275 supra. See generally Tague, supra note 247, at 84 nn.66 & 67.

Nonpolitical defendants may believe that the risks of separate defenses or separate presentations outweigh the risks of a common defense that does not favor either defendant. Because coordination and control become more difficult as more attorneys appear, defendants might prefer single representation to minimize the risk of codefendants becoming antagonists. See United States v. Donahue, 560 F.2d 1039, 1044 (1st Cir. 1977) (had they been aware of conflicts of interest, defendants "might have agreed on a single strategy, on the theory that hanging together would minimize the danger of hanging at all"). Implicit in the pithy comment of the Donahue court is the belief that the Government benefits if the defendants accuse each other or if it can plea bargain with one defendant in exchange for testimony against the other.

Both defendants might benefit from sharing counsel if the Government were forced to offer one defendant immunity or a promise to dismiss the charge in exchange for testimony needed to convict the other. The Government might be forced to make its choice between the defendants without adequate information because the attorney-client privilege and the potential conflict will preclude counsel from disclosing their expected testimony. As a result, the Government might offer immunity to the defendant who could help it less. Such a result would not be likely to damage seriously the other defendant who could then attack the immunized codefendant to gain jury sympathy. Cf. In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976) (no conflict in joint representation of nine witnesses before grand jury until Government offers immunity to one).

288. Lowenthal has examined the current practices of attorneys with respect to multiple representation in an instructive empirical study of public defender practices. See Lowenthal, supra note 17. Of those public defender offices who responded to his questionnaire, 70% preferred not to represent multiple defendants even if no conflict were apparent and 49% refused ever to do so. Id. at 950. The reasons given are understandable: to avoid losing the client's trust and the possibly detrimental impact on representation given the likelihood of a conflict. Id. at 951-52. Many of the offices that will represent codefendants with a conflict, at least through the plea bargaining stage, do not prefer that practice but undertake it because of budget constraints. Id. at 953. Some offices may practice multiple representation to increase the number of clients whom they represent and convince the jurisdiction to increase the staff.

Prosecutors do not appear to oppose separate representation. See Oral Argument, supra note 42, at 32 (state's attorney did not oppose separate representation). Indeed, prosecutors have moved to disqualify one attorney from representing multiple clients. See In re Special February 1977 Grand Jury, 581 F.2d 1262, 1263 (7th Cir. 1978) (citing cases involving grand jury representation); United States v. Liddy, 348 F. Supp. 98, 199 (D.D.C. 1972) (at trial).

Current practices of attorneys should be considered in judging whether to enact and how to implement rule 44(c), as the practices of state courts have influenced the Supreme Court in deciding whether to enact constitutional or prophylactic rules. See Gideon v. Wainwright, 372 U.S. 335, 336 (1963) (right to counsel; 22 states filed amicus briefs urging result reached); Mapp v. Ohio, 367 U.S. 643, 651 (1961) (over one-half of states had adopted exclusionary rule). But see, e.g., United States v. Wade, 388 U.S. 218 (1967) (apparently no state had right to counsel at postindictment lineup); Miranda v. Arizona, 384 U.S. 436, 521 (1966) (Harlan, J., dissenting) (77 states filed amicus briefs in opposition to rule adopted); Grano, Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent? 72 MICH. L. REV. 717, 791 (1974).

289. See United States v. Gaines, 529 F.2d 1038, 1042-43 (7th Cir. 1976) (attorney's representation of multiple defendants when one accused the other reflected "remarkable insensitivity").
structuring the defense to avoid conflict. Attorneys would be freed from the threat of a lawsuit based on ineffectiveness, of a contempt citation if they violate a judicial order to continue the joint representation, of a disciplinary action if the assessment that no conflict will arise proves incorrect, or of their representation becoming the focus of a postconviction attack on the verdict.

290. See generally Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966). Multiple representation may embroil counsel in the uncertainty of hard ethical questions. First, counsel learns from X information that leads him to question strongly the truthfulness of some aspect of Y’s testimony; does he suborn perjury by permitting Y to testify? Second, counsel receives information from Y that leads him to believe that an opposing witness’ identification of X and Y is accurate; if counsel decides that he ethically can not attempt to discredit the witness’ testimony, he chooses a course that he would not have adopted if he had represented only X. Third, having interviewed X, counsel may be tempted to conduct a leading interview of Y in order to eliminate any inconsistencies in the story. Fourth, assuming counsel withdraws or is disqualified, is he obliged to disclose the conflict to replacement counsel? Is he obliged to disclose to the court his former client’s intent to commit perjury, if that is the basis of the conflict? When it is likely that the judge will suspect that perjury is involved, counsel perhaps should tell the court that the conflict does not concern possible perjured testimony. Although the answers are not altogether clear, counsel can probably refuse to disclose in each instance. Compare ABA Comm. on Ethics and Professional Responsibility, Formal Opinions, No. 268 (1945) (no disclosure to replacement counsel) end Lefstein, supra note 264 with ABA Defense Standards, supra note 20, § 7.7 (implying that disclosure to court is proper). Fifth, if the trial court conditions withdrawal on an explanation of the conflict, counsel must decide whether the attorney-client privilege bars any disclosure and, if he discloses, whether he thereby gives his client a basis to sue him. Cf. Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.) (law firm and firm’s client sued after disclosing that security registration statement did not contain certain required information), cert. denied, 419 U.S. 998 (1974).

Even if courts accept the suggested limitations on the Government’s use of the disclosed information, they may be more reluctant to limit their power to discipline counsel who, at the trial, appears to act inconsistently with his in camera disclosure. The controversy continues about counsel’s proper approach to the questions noted above, but counsel may hesitate to make himself the source of further examination of each practice. Counsel’s concern, then, may impel him to withdraw—a result that I hope for, because the purpose of the disclosure to the court is to inform counsel as well as his clients.

291. Cf. Woodruff v. Tomlin, 593 F.2d 33 (6th Cir. 1979) (following mistrial, district court’s dismissal of complaint, which alleged malpractice based in part on a conflict in civil suit, reversed for new trial); Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973) (defendant’s federal malpractice suit against appointed attorney after conviction in state court dismissed); Legal Times of Washington, Jan. 15, 1978, at 28 (discussing law suit filed by SEC special counsel against law firm for alleged conflict in representing corporation and corporate officers who supposedly rifled corporate assets). One problem for the defendant who sues counsel is his burden of proving injury, a burden that may require him to prove his innocence of the criminal charge during the course of the civil suit. See generally Kaus & Mallen, The Misguiding Hand of Counsel—Reflections on “Criminal Malpractices,” 21 U.C.L.A. L. Rev. 1191, 1200-1206 (1974).


294. The Supreme Court fears that an attorney may inject error into the record in the hope of providing his clients with a basis for postconviction appeal. See Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (unexcused failure to make timely suppression motion under state rule bars federal habeas review). Few attorneys, however, would want their conduct to become the source of such error. Cf. Smith v. Regan, 583 F.2d 72, 74 (2d Cir. 1978) (retained counsel worried that defendants, who disagreed with his trial strategy, would later claim that he had “framed them—railroaded them”; they did).
Many attorneys would also benefit economically if separate representation were required. Conflicts can force an attorney to withdraw from representing both defendants, thereby stripping him of any compensation. A defendant who retained counsel for himself and his codefendant might fire an attorney who decided to withdraw from representing the codefendant. Finally, more attorneys would be appointed and retained if separate representation were required, even if the compensation for separate representation is less than for joint representation.

C. THE GOVERNMENT

The Government would also benefit from separate representation, even though the defendants often thereby achieve tactical advantages. For example, separate representation would eliminate reversals of convictions when the joint attorney did not announce a conflict. Delays of trial because of the appearance of replacement counsel either when the single attorney announces a conflict and moves to withdraw or when the court intercedes to disqualify the attorney and orders separate representation would be avoided. Mistrials based on conflicts that bar retrial on the ground of double jeopardy would disappear. Also, with separate attorneys representing the defendants, the Government's chances of splitting the defense by convincing one defendant to testify against the other through an offer of immunity or a plea

See Cole, supra note 32 (arguing that fee considerations ban joint representations). But the practical result of a prophylactic approach, adopted either by statute, court rule, or disciplinary rule, is troubling. Consider, for example, the problem for each member of the pressman's union in deciding whether to retain separate counsel, as the district court would have required in In re Investigation Before April 1975 Grand Jury, 403 F. Supp. 1176, 1183 (D.D.C. 1975), rev'd per curiam, 531 F.2d 600 (D.C. Cir. 1976), or to appear before the grand jury without counsel. The Government has never offered to pay counsel's fee, and no court has suggested that it would share in the cost by paying retained counsel the amount that would have been paid to appointed counsel under the Criminal Justice Act.

Several defense attorneys to whom the author spoke thought it wrong to consider the Government's interest in separate representation. These attorneys believe most conflicts are artificial or insignificant. Thus, recognizing the benefits to the Government of separate representation would encourage the Government to move to disqualify counsel and unfairly aid the Government in an adversarial system.

Cf. United States v. Bernstein, 553 F.2d 775, 788 n.10 (2d Cir.) (after 16 months of pretrial work court intervened to disqualify counsel; defendant opposed disqualification on ground that replacement counsel would not have time to prepare), cert. denied, 429 U.S. 998 (1976). Delay might also occur if the defendants choose to appeal the court's demand for separate representation, a demand that is immediately appealable. See Hull v. Celanese Corp., 513 F.2d 568, 570-74 (2d Cir. 1975) (disqualification order appealable as final order under 28 U.S.C. § 1291 (1976)); cf. In re Special February 1977 Grand Jury, 581 F.2d 1265, 1263-64 (7th Cir. 1978) (denial of disqualification motion in grand jury setting appealable as final judgment); In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 605 n.8 (D.C.Cir. 1976) (same).

During oral argument in Holloway, the State expressed concern that double jeopardy might bar retrial if a conflict that emerged during trial caused the court to declare a mistrial. Oral Argument, supra note 42, at 20. When the defendant opposes the mistrial motion, retrial is not forbidden when manifest necessity required declaring mistrial. See Arizona v. Washington, 434 U.S. 497, 505 (1978) (jeopardy attaches unless manifest necessity requires declaration of mistrial).
bargain would improve. Additionally, the Government would be freed from fears that offering immunity or a plea bargain to one defendant would in itself create a conflict. With separate counsel, the chances that each defendant will testify improve. The Government thus can use otherwise inadmissible evidence. The Government would be freed from deciding whether to move to disqualify a single attorney in order to protect the defendants from conflict-laden counsel or to protect any conviction from attack based on ineffective assistance.

D. THE TRIAL AND APPELLATE COURTS

The advantages for trial and appellate courts of requiring separate representation or of implementing the suggested changes to rule 44(c) are clear. The uncertainty that many trial judges face in defining their responsibility would be gone. What sort of inquiry may or must they conduct? Must they test the defendant's attorney-client or fifth amendment privileges to determine for themselves whether a conflict exists? The suggested changes would eliminate the hypocrisy of asking defendants to waive any conflict, when the court is uncertain how to ensure that any waiver is intelligently given. The irritating need to continue the proceedings while replacement counsel becomes acquainted with the case would vanish. The problem of whether an indigent defendant could select replacement counsel also would disappear. The appellate court would be freed from spending the time necessary to review the record, to order the lower court to conduct a hearing, or to hear appeals by each defendant on conflict grounds. Finally, eliminating multiple representation would probably further the goal

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299. Cf. United States v. Alvarez, 580 F.2d 1251, 1254 (5th Cir. 1978) (conviction reversed because of ineffective assistance when retained counsel, also representing codefendant who plea bargained, significantly limited cross-examination of codefendant).

300. For example, if the Government had obtained a confession from defendant X that also implicated defendant Y, but was admissible only to impeach X, counsel representing X and Y might decide not to have X testify so as to bar the Government's use of a confession that could seriously damage Y's case. See Bruton v. United States, 391 U.S. 123, 137 (1968) (defendant's conviction reversed when prejudicial effect of erroneously admitting codefendant's confession could not be cured by limiting instruction). If counsel represented only X, he would not worry so much about the impact of X's confession on Y, because Y's attorney could effectively cross-examine X.

With separate representation from the start, the prosecutor would also be freed from the fear that his comments made to the single attorney, designed to separate X from Y, will provide Y with information about X or the Government's case that improve Y's defense.

301. Although the Government has both standing and an ethical obligation to notify the court of a possible conflict, see Matter of Special February 1977 Grand Jury, 581 F.2d 1262, 1264 (7th Cir. 1978), one suspects that the Government's desire to protect the defendant is secondary to its desire to obtain testimony. See United States v. Gaines, 529 F.2d 1038, 1040 (7th Cir. 1976) (conviction vacated because of uninformed waiver of separate counsel); cf. PARALLEL GRAND JURY AND AGENCY INVESTIGATIONS supra note 184 (Government's Sample Motion to Disqualify) ("Government does not relish filing this motion [to disqualify]").

302. See United States v. Lovano, 420 F.2d 769, 773 (2d Cir. 1970) (posttrial hearing on conflict issue took 102 transcript pages and involved appointment of separate counsel for each defendant). Following the Supreme Court's reversal of Holloway, separate counsel have been appointed and separate trials ordered for each defendant. Conversation with Harold Hall (Jan. 5, 1979).

303. See United States v. Eaglin, 571 F.2d 1069, 1085 n.23 (9th Cir. 1977) (rejection of appeal on conflict ground by one defendant does not bar appeal on same ground by codefendant).
of accurate factfinding, an end many courts consider the paramount aim of adjudication.

The one issue that will trouble the courts is the cost of appointing separate counsel. No statistics exist to determine the cost of appointing separate counsel initially as opposed to the cost of postconviction review of conflict issues. The number of criminal cases involving multiple defendants is not known. The percentage of those cases in which more than one defendant is indigent or the single attorney moves to withdraw because of a conflict is similarly unavailable. Nor do we know how frequently defendants appeal on conflict grounds or the overall judicial cost of postconviction challenges. Although the cost of appointing separate counsel might appear significant, that cost, relative to the overall cost of trial and appeal, may not be so great.

304. A careful attorney may not offer evidence on behalf of X that he would have offered had he not also represented Y. Also, the Government may learn of more information because counsel representing only X may be more willing to encourage X to cooperate than he might be if that cooperation would endanger his second client, Y.

305. Another approach would be severing the defendants, but severance would not solve the conflict problem—as it would if the problem were an unruly or inept defendant whose pro se representation jeopardized the position of his counseled codefendants. See United States v. Dougherty, 473 F.2d 1113, 1126 (D.C. Cir. 1972) (proper to sever pro se defendant who makes multiple defendant trial unmanageable or unfair to codefendants). The single attorney who continues to represent both defendants in the separate proceedings might still have a conflict based on information he had obtained from one of them. Cf. United States v. Vargas-Martinez, 569 F.2d 1102, 1103 (9th Cir. 1978) (conflict where defendant's attorney represented codefendant, who agreed to become prosecution witness in unrelated state proceedings).

306. The cost would increase if the court had to appoint counsel for an indigent for whom a codefendant would otherwise retain counsel. See United States v. Bernstein, 533 F.2d 775, 787 (2d Cir.) (court appointed counsel for Y when attorney retained by X to represent both X and Y withdrew, and Y lacked money to retain other attorney), cert. denied, 429 U.S. 998 (1976).

307. Obviously, eliminating conflict as a possible ground for appeal might not significantly reduce the number of appeals, given the various other grounds for challenging verdicts. Eliminating the possibility of a conflict, however, would eliminate a ground that frequently leads to reversal. See notes 1-2 supra.


309. The average compensation to private appointed attorneys in district and appellate courts in fiscal 1977 for all purposes—representation of adults and juveniles before conviction, of appellants, of probation and parole violators, of collateral petitioners, and of material witnesses—was estimated to be $411 per case; the average cost of federal public defender representation was estimated to be $453 per case. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES COURT S, March 10-11, 1977 and September 15-16, 1977, at 539 (1977) (estimated costs). Interestingly, the average cost of appointing private counsel for adult defendants before conviction was $513 per case; for appeals, $1001; for habeas petitioners, $408; and for federal petitioners under 28 U.S.C. § 2255 (1976) (federal custody; remedies on motion attacking sentence), $326. Id. at 541. Assuming that each indigent defendant both appealed and collaterally attacked his conviction on conflict grounds and that each would not challenge the conviction but for the conflict, these figures suggest that it would cost less to appoint separate attorneys at trial than to suffer the cost of appointing counsel for postconviction attack. The cost of appointing one attorney when each defendant makes both a direct and collateral attack would be approximately $1770: $453 for the public defender at trial, $1001 for appointment of private counsel on appeal, and $326 for collateral attack. If separate attorneys were appointed initially for each defendant, and no appeal followed, the cost would be about $864: $411 for the public defender and $543 for private counsel. Because these estimates rely on so many assumptions, they are obviously gross. They are nonetheless suggestive. Other commentators also opt for uncertain but expected overall savings in exchange for the cost of requiring separate counsel. See United States v. Mari, 526 F.2d 117, 121 (2d Cir. 1975) (Oakes, J., concurring) (suggesting savings in "cost of justice" if separate counsel required except in "extraordinary circumstances").
Moreover, some courts, by compensating a private appointed counsel for representing each defendant, eliminate any savings in appointing but one attorney. Further economies might be achieved by creating a second public defender's office or by contracting with a particular law firm to represent a codefendant. Instead of cost being an obstacle to the appointment of separate counsel, such a policy might in fact reduce the cost to the judicial system.

VII. Conclusion

The defendant's right to select counsel can conflict with his right to effective representation of counsel. There is no approach to the conflict problem presented by multiple representation that permits full implementation of both rights. A binding choice must be made between the conflicting rights; otherwise, the defendants have the opportunity to thwart the trial and appellate courts by claiming either that they were denied the right to effective representation or that their right to select counsel was violated. An ordering of priorities is necessary. Because conflicts are likely to arise and because conflicts have crippling effects, the right to choose one's attorney, when that choice is an attorney who simultaneously represents another defendant, should be given the lower priority. Yet, the choice of which right to favor should ordinarily be made by the defendant. If enacted, rule 44(c) would help to clarify the roles of court, counsel, and defendants. If the changes suggested in this article are added, the rule as implemented might prevent the conflict issue from arising, at least with indigents. If the defendant nonetheless wants joint representation, the amended rule should help the defendant make a meaningful choice between his rights. It would help the court make a meaningful assessment of whether the defendant understands his choice and of whether to demand separate representation over defense objection.

310. See Guidelines, supra note 28, § 2.10. In contrast, Harold Hall reported that, at the time of the trial in Holloway, he was not separately compensated for representing each defendant and that the maximum that he could receive was $300. Oral Argument, supra note 42, at 9.

311. The monetary savings in contracting with a private law firm when compared with the cost of appointing separate private counsel might be considerable. In Alameda County, California, in 1975, for example, a group of attorneys proposed to form a law firm that would contract with the county to provide representation for any indigent whom the public defender's office could not represent for conflict reasons. Although never proposing a hard per-case charge, the attorneys estimated that they would charge the county between $250-300 per case, thus estimating that their representation would result in a savings of some $400,000 that fiscal year. Conversation with the attorneys, April 18, 1979. When the private bar objected to that proposal, the county chose not to accept it. Instead of the discretionary award set by each judge that then existed, the county substituted a low fee-per-representation award to each private attorney appointed when the public defender declared a conflict. Id. ("Problem Statement" submitted by attorneys to county) (copy on file at Georgetown Law Journal). A similar contract could be let to other firms to represent defendants when more than two are charged together.