Multiple Representation of Targets and Witnesses During a Grand Jury Investigation

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The propriety of one attorney representing several clients whose conduct is under investigation by a grand jury has been explored only superficially by the courts and the American Bar Association's Code of Professional Responsibility. Prosecutors nonetheless have often moved to disqualify counsel representing multiple clients in recent years, basing their motions both on the client's interest in loyal and competent representation and on the government's interest in the unimpeded progress of the grand jury investigation. Professor Tague discusses the factors that counsel should consider in deciding whether to undertake multiple representation at the grand jury stage, including strategy, ethics, and the doctrinal grounds for disqualification. He concludes that, while the motion to disqualify should rarely be granted, multiple representation is a risky venture that should rarely be undertaken.

I. INTRODUCTION

Over the past several years, prosecutors have frequently moved to disqualify counsel from simultaneously representing more than one client.
when those clients may be targets or witnesses (or a combination of the two) of a grand jury investigation of alleged criminal conduct.\(^2\) The prosecutor believes that the grand jury cannot crack the purported criminal enterprise without cooperation from one or more of counsel's clients.\(^3\) He cannot approach each client to explain the alternatives available and the danger of noncooperation. He is reluctant to immunize or to offer a plea bargain or a promise of nonprosecution unless he receives a proffer as to the help that that client might provide in exchange. When no client comes forward to cooperate, the prosecutor suspects that counsel is the mortar in the "stonewall."\(^4\) Not surprisingly, the prosecutor, frustrated, brings the disqualification motion on the hope that, once counsel is removed, the "wall" will crumble.

Many defense attorneys,\(^5\) in contrast, characterize differently the government's purpose in moving to disqualify.\(^6\) They view the motion to disqualify

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2. Several prosecutors told me that they felt obliged to make the formal motion when discreet attempts to inform counsel of the conflict problem failed to induce him to withdraw on his own.

3. Perhaps the model case illustrating the textual discussion is In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976). A grand jury was investigating the destruction of press machinery of the Washington Post during a labor strike by the Pressmen's Union. The Union retained Sol Rosen to represent its members, but the nature of his representation is unclear from the record. He met with over 100 of the union members and lectured them about the nature of the investigation, the right to invoke the fifth amendment, and the opportunity to cooperate with the government. In part to avoid a conflict, though, he did not speak individually with any union member. Of the first 21 members subpoenaed to testify, 19 invoked the privilege and the other two testified that they knew nothing of the destruction of the equipment. The government then moved to disqualify Rosen on the grounds that the witnesses were improperly invoking the privilege, that Rosen was providing ineffective assistance of counsel and that, as a result, the grand jury's investigation was impeded. Id. at 604. The district court granted the motion, ordering Rosen to withdraw and requiring each union member to retain separate counsel (to the extent that only one attorney from any firm could represent a union member). In re Investigation Before April 1975 Grand Jury 403 F. Supp. 1176 (D.D.C. 1975). During oral argument before the Court of Appeals for the District of Columbia Circuit, one judge asked the government why it had not immunized one or more of the witnesses who had invoked the fifth amendment. The government responded that it did not intend to immunize anyone unless it knew the substance of the witness's testimony, to avoid immunizing someone with obvious culpability or someone who would provide marginal assistance. That judge then asked why the government could not, through investigation, determine which of the witnesses were more likely to provide helpful testimony or were more culpable. The government responded that it had not been able to make either determination. The court of appeals reversed the disqualification order on the ground that the government had failed to establish its burden that a conflict existed, that Rosen actually represented the subpoenaed members, that the members would not have waived the conflict if it existed and that they might have testified if they had separate representation.


4. See In re Gopman, 531 F.2d 262, 269 (5th Cir. 1976) (Clark, J., dissenting); Favretto Address to Chicago Bar, supra note 1, at 13. The obviously pejorative term "stonewalling," taken from the Watergate investigation, is probably used by prosecutors to criticize implicitly any attempt to impede an investigation.

5. I use the term "defense counsel" as a shorthand description of any attorney who represents an entity or individual who may be a target of, a subject of, or a witness before the grand jury.

6. The motion to disqualify is a more forthright attack on counsel than that mounted by prosecutors during the Nixon era. So far as I can determine, the government never moved to disqualify counsel from representing witnesses or targets during any of the many investigations of political conduct during the late
as an aggressive attempt by the government to destroy the cohesiveness of a labor union or political group,7 or as a tool to enable the government to influence the client to select a more compliant attorney. They believe that the "stonewall" is a proper defense approach (assuming the clients do not want to cooperate unless forced to do so by a grant of immunity) and that the prosecutor's argument that counsel should be disqualified for having violated his ethical obligations is sophistry, enabling the prosecutor to disguise his true purpose of obtaining cooperation without giving anything in exchange. To support this belief, they point out that the government has taken the inconsistent positions of urging adoption of a per se rule against multiple representation when it has moved to disqualify,8 but of not moving to disqualify an attorney whose clients will cooperate without demanding immunity, a favorable plea bargain, or a promise of nonprosecution in return.

Despite the need to resolve whether or when counsel may represent more than one client at the grand jury stage, courts have provided inconsistent help to the government and scant instruction to defense counsel.9 Although the decisions are about equally divided on whether the government's motion should be granted,10 those in which counsel have been disqualified have

1960's and early 1970's. However, defense counsel in many of those investigations report that the government attempted to intimidate them by accusing them of obstructing justice when they spoke to uncounseled witnesses, when they counselled their clients to invoke the fifth amendment, or when they refused to reveal information about their clients (for example, identity, location, and fee arrangements). See generally Zwerling, Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege, 27 Hastings L.J. 1263 (1976). Nonetheless, one attorney who recently was disqualified from multiple representation reported that the government instituted an Internal Revenue Service investigation of his personal tax returns once he appealed the order. 7. Reported comments by prosecutors, such as "investigation by terrorism," Newsweek, Dec. 1, 1975, at 113—that is, subpoenaing targets in the hope that they will perjure themselves or improperly refuse to testify, thereby inviting a contempt citation—fuel this fear of defense counsel. Defense counsel have occasionally struck back. One attorney, for example, disqualified from representing four witnesses subpoenaed to testify before a grand jury, In re Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976), filed a defamation action against Newsweek magazine based on an article allegedly critical of counsel's representation (copy of complaint on file with American Criminal Law Review). Counsel withdrew that complaint when Newsweek published no further articles about his representation. 8. E.g., In re Special February 1977 Grand Jury, 581 F.2d 1262, 1264-65 (7th Cir. 1978) (rejecting per se requirement of disqualification whenever conflict potential).

9. As one attorney wrote, "A review of these cases [involving multiple representation] can only lead the practicing attorney to a hopeless impasse in arriving at a decision as to whether to undertake the multiple representation of witnesses appearing before a federal grand jury when such multiple representation may well be to the best interest of all those witnesses." Petition for Writ of Certiorari at 10 (Nov. 6, 1978), In re Grand Jury Investigation, 436 F.Supp. 818 (W.D. Pa. 1977), aff'd per curiam by equally divided court, 576 F.2d 1071 (3d Cir.) (en banc), cert. denied, 439 U.S. 953 (1978).

10. For cases granting the motion see United States v. Clarkson, 567 F. 2d 270 (4th Cir. 1977) (defense attorney disqualified because he prepared tax returns for his client being audited by IRS); In re Investigative Grand Jury Proceeding, 563 F.2d 652 (4th Cir. 1977); In re Gopman, 531 F.2d 262 (5th Cir. 1976) (possibility of conflict of interest due to dual representation enough to allow trial court discretion to disqualify); United States v. RMI Co., 467 F. Supp. 915 (W.D. Pa. 1979) (disqualification motions granted with respect to representation of corporate employees whose attorney represented defendant corporation); In re Grand Jury Investigation, 436 F. Supp 818 (W.D. Pa. 1977) (grand jury witnesses given immunity and testimony detrimental to other clients of their attorney; disqualification granted), aff'd per curiam by equally divided court, 576 F.2d 1017 (3d Cir.) (en banc), cert denied, 439 U.S. 953 (1978); In re Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976) (witnesses similarly represented may have learned grand jury testimony of other witnesses); People ex rel. Losavio v. J.L., 580 F.2d 23 (Colo. 1978) (counsel's offer to forego statutory right to be present as client testified before grand jury not basis to permit multiple
involved egregious conduct by counsel,11 have involved unusual restrictions on counsel's representations,12 or have represented raw judicial power;13 those in which counsel has not been disqualified have frequently been based on an inadequate record of whether a conflict existed, whether the clients' conduct would have differed if each had been separately represented, or whether the clients' waivers were acceptable.14 Still unresolved by the decisions are two questions: first, identification of the factual predicate necessary to establish an existential or potential conflict and the allocation of the burden of proof on that issue; and second, identification of the factual predicate necessary to establish a waiver of the conflict and the effect of such a purported waiver.15

Legislative pronouncements provide no more help. Disciplinary Rule 5-105(C) of the American Bar Association (ABA) Code of Professional Responsibility inconsistently instructs counsel to forego multiple representation if it is not obvious that he can adequately represent the interest of each, but then apparently permits informed clients to waive the effect of any conflict.16 A recommendation by the Committee on the Grand Jury of the


For cases denying the motion see In re Special February 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (no abuse of discretion in denial of motion); In re Taylor, 567 F.2d 1183 (2d Cir. 1977) (motion premature where witness had not yet appeared before grand jury or indicated intention to exercise fifth amendment rights); In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976) (mere fact that witnesses with same attorney invoked fifth amendment insufficient to warrant disqualification); In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976) (motion premature as government should have brought individual witnesses before court for ruling with respect to whether fifth amendment was properly invoked); SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976) (before excluding counsel from questioning of his clients by SEC, SEC must adduce concrete evidence that his presence would obstruct or impede investigation); In re Grand Jury, 446 F. Supp. 1132 (N.D. Tex. 1978) (no conflict of interest where attorney represented employees whose corporate employer was target of grand jury investigation); In re Special February, 1975 Grand Jury, 406 F. Supp. 194 (N.D. Ill. 1975) (attorney with alleged conflict nevertheless granted pro hac vice status).

11. In two cases, for example, counsel himself was the target and his clients were possible witnesses against him. United States v. Clarkson, 567 F.2d 1262 (4th Cir. 1977); In re Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977).

12. Counsel was disqualified in one state court decision because, inter alia, a state rule which barred disclosure of a witness's testimony would have created tension for counsel who was obliged to inform Client B of the testimony of Client A. Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896, 906 (1975), aff'd per curiam, 466 Pa. 187, 352 A.2d 11, appeal dismissed and cert. denied, 423 U.S. 1083 (1976). Such a restriction does not exist in the federal system. See Fed. R. Crim. P. 6(e); People ex rel. Losavio v. J.L., 580 P.2d 23 (Colo. 1978) (client's offer to forego statutory right to counsel to be present as client testified before grand jury not basis to permit multiple representation).


14. E.g., In re Taylor, 567 F.2d 1183, 1187 (2d Cir. 1977); In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 607 (D.C. Cir. 1976).

15. Resolution of these issues is especially important because appellate courts have asked only whether the lower court abused its power in deciding to disqualify or not to disqualify. See In re Special February 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (no abuse in denying government's motion to disqualify); In re Gopman, 531 F.2d 262, 266 (5th Cir. 1976) (no abuse in granting government's motion to disqualify).

16. ABA Code of Professional Responsibility, Disciplinary Rule 5-105(A) and (B) provide that a
ABA directs counsel not to represent more than one client "if the exercise of (his or her) . . . independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by . . . representations of another client." But that recommendation fails to explain when a conflict may emerge and does not grapple with the difficult question of whether counsel should elect to withdraw in the face of a demand by informed clients for him to continue. The Judicial Conference has not included in Rule 44(c), a proposed amendment to the Federal Rules of Criminal Procedure, any provision with respect to multiple representation at the pre-charge stage.

It does not follow, however, from the judicial refusal to drive counsel from the case, or from the unhelpful legislative pronouncements, that attorneys should eagerly agree to represent more than one client. Multiple representation presents grave risks to counsel and his clients. Multiple representation may force counsel to structure his representation of all in a way that he would not if he represented but one client. To maximize the position of all, he may compromise the position of individual clients. In cases where he must withdraw, counsel may have acted on behalf of all in a way that destroyed the attorney-client privilege of each, thereby exposing all to great risk at the hands of any one who decides later to cooperate. And counsel himself risks exposure by way of an obstruction of justice charge, a contempt citation, an ethical inquiry by a disciplinary board or by the judge supervising the grand jury investigation, or a malpractice suit instituted by a disgruntled client who ultimately suffers from that multiple representation.

Unfortunately, it is impossible to extrapolate clear guidelines from the reported cases and the impressions of attorneys to assist counsel (and his lawyer should forego representation of multiple clients "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected," or if the representation would be likely to involve him in representing different interests. However, DR 5-105(C) allows him to represent the clients "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

The substitute for DR 5-105(C), proposed by the ABA's Commission on Evaluation of Professional Standards, is no more helpful. Proposed Rule 1.8 provides:

CONFLICT OF INTEREST

In circumstances in which a lawyer has interests, commitments, or responsibilities that may adversely affect the representation of a client, a lawyer shall not represent the client unless: (a) The services contemplated in the representation can otherwise be performed in accordance with the rules of Professional Conduct; and (b) The client consents after adequate disclosure of the circumstances.

ABA Commission on Evaluation of Professional Standards, Discussion Draft of Model Rules of Professional Conduct, Rule 1.8 (Jan. 30, 1980). Interestingly, Proposed Rule 1.8 may relax the proscription of DR 5-105(A), (B), and (C). Counsel might conclude, for example, that he could competently represent his clients, given the "services contemplated" (see text accompanying note 99 infra), when his representation would involve "differing interests" and would not "obvious[ly]" protect the interests of each client.

19. See discussion in text following note 45 infra.
20. An important question is why counsel elects to represent more than one client. A review of the cases
clients) in deciding when the potential benefits of multiple representation outweigh the possible risks, and at what point that balance may shift. Nonetheless, I hope to identify several of the factors that counsel should consider in deciding whether to agree to, and when to withdraw from, multiple representation. Before that attempt, however, it is helpful to discuss the nature of conflicts at the grand jury stage, the reasons why clients might prefer and why the government is opposed to multiple representation, and the doctrinal pegs available to support disqualification.

II. THE NATURE OF CONFLICTS AT THE GRAND JURY STAGE

The root nature of a conflict at the grand jury stage is the same as that at trial: to zealously represent Client A, counsel must act on his behalf in a way that he cannot if that action might disadvantage Client B; yet, in failing to aid Client A, counsel misserves that client. Implicit in this double bind, of course, is the assumption that counsel must represent both clients in the same way as he would if he represented either one alone.21

But a conflict may be less likely to erupt at the grand jury stage than at trial—or, at least may be less likely to injure both clients irremediably.22 At trial, defense counsel is expected to participate actively by cross-examination, by presentation of defense evidence, by argument, and, when necessary, by allocution. That active role for counsel at trial is not always the role that he will or should play at the grand jury stage. The conflict at the grand jury stage suggests various reasons. The most common is to continue an already-existing attorney-client relationship with a target entity or a third-party payor. This preexisting relationship takes several forms. The attorney may have a prepaid contract to represent the members of the entity, see Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), aff'd per curiam, 466 Pa. 187, 352 A.2d 11, appeal dismissed and cert. denied, 423 U.S. 1083 (1976); or the attorney may have an undisclosed agreement to represent the underlings of a criminal, cf. In re Abrams, 56 N.J. 271, 266 A.2d 275 (1970) (improper to accept payment from A to represent B when B apparently is part of A's criminal enterprise); or the attorney has previously represented the clients in the very matter that has come under investigation, and thus has an intimate knowledge of a complex factual situation, see In re Taylor, 567 F.2d 1183, 1185 (2d Cir. 1977); SEC v. Caspo, 533 F.2d 7, 11 (D.C. Cir. 1976). In this third context, the government often suspects that the work by counsel predating the grand jury investigation was itself an integral part of the criminal enterprise. Counsel himself may thus be a target. See In re Grand Jury Empauned 2/14/78, 603 F.2d 469, 472 (3d Cir. 1979); In re Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652, 654 (4th Cir. 1977). Counsel may also be sympathetic to the political position of his clients. Or, he may be retained solely to provide instruction about the nature of a grand jury investigation, but not to assist each witness or target individually. See In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976) (discussed in note 3 supra). Last, many attorneys believe it appropriate to represent family members or shareholder-officers of a close corporation, each of whom may have equal exposure.

21. Also implicit is the assumption that counsel understands what a conflict is and recognizes the possible loci and crippling effects of conflicts. If that assumption is proven inaccurate in a given case, the court should disqualify to protect counsel and his clients from counsel's insensitivity.

22. This point is necessarily impressionistic. It is not possible to evaluate accurately the relative disadvantages of a conflict before as against after indictment. Before indictment, the guilty client may have a better opportunity to negotiate a favorable disposition, and the innocent client, by cooperating, may be able to avoid indictment and the concomitant burden of proving his innocence at trial. See generally ABA, HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS 89-90 (1978) (listing alternatives for individual which he may be prevented from pursuing by multiple representation). On the other hand, the advantages of multiple representation are probably greater before indictment than after indictment. Compare Part III infra (pre-indictment) with Tague, Multiple Representation and Conflicts of Interest in Criminal Cases, 67 GEO. L.J. 1075, 1122-25 (1979) (post-indictment).
MULTIPLE REPRESENTATION

develops from counsel's failure to seek a favor from the prosecution on behalf of Client A—immunity, a promise of nonprosecution, or a plea bargain—in exchange for that client's cooperation whenever that cooperation might disadvantage Client B. But it is not always clear that cooperation with the government benefits his clients. Clients may fear being immunized as much as they fear being indicted.23 A client who agrees to accept what appears to be a favorable plea bargain before indictment may be saddened when his former co-clients are acquitted at trial, or never indicted at all.24 None of counsel's clients may be targets, even though they may be exposed to criminal liability. None may be indicted, even if they are targets: the investigation may falter and end, or the grand jury may refocus its attention elsewhere. All may be indicted for crimes no more serious in number or kind than those to which they would have pled guilty in exchange for cooperation. All may be able to obtain a disposition after indictment that is not too different from that which they might have obtained beforehand. Conversely, an offer to cooperate may backfire: in rejecting counsel's proffer on behalf of one client, the prosecutor may obtain information that furthers the investigation of that client or that convinces him to indict that client.25

Nonetheless, a potentially damaging conflict is all but inherent in certain attorney-client relationships, whether at the grand jury stage or later. First, payment of counsel's fees by someone other than the client presents several problems. An entity with exposure to criminal liability may ask its previously retained counsel to represent its members or employees, some of whom may be targets and others witnesses.26 An entity that is free of criminal exposure

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23. One defense attorney notes that certain clients prefer not to be immunized out of concern that their testimony might result in civil tax liability, possible loss of licenses, class-action suits, or extradition for extraterritorial violation of securities laws. See Address by Seymour Glanzer, NEW YORK LAW JOURNAL Seminar, [1979] 26 CRIM. L. REP. (BNA) 2105, 2107. Other reasons include damage to one's reputation and fear of retribution from those whom the immunized witness might implicate.

These reasons to reject immunity may underlie the legislative proposal to give the witness the right to reject an offer of immunity. See Appendix to Hearings on S. 3405 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 16-17 (1978).

24. For example, a prospective government witness who had plea bargained in exchange for his testimony in the bribery trial of former Congressman Otto Passman rued that he had not gone to trial when the government did not indict as many people as he had anticipated. Washington Post, March 29, 1979, § A, at 6, col. 5.

25. The client has no recourse if the prosecutor rejects the proffer and refuses to extend immunity or to plea bargain. United States v. Rothman, 567 F.2d 744 (7th Cir. 1977). Although admissions made during plea negotiations may be protected, FED. R. EVID. 410 (statements made during plea negotiations with prosecutor not admissible in subsequent proceedings), the grand jury's power to subpoena may permit the government to circumvent the client's fifth amendment protection to obtain documents or evidence revealed during the proffer. See Fisher v. United States, 425 U.S. 391 (1976) (subpoena of taxpayer's records from accountant). And Rule 410 may not apply if the client bargains for immunity or promise of non-prosecution, rather than bargaining to plead guilty to a particular charge. Multiple representation also presents a risk if one of the clients agrees to cooperate without disclosing that fact to counsel and conveys information about his co-clients to the government. Cf. Glanzer, supra note 23 (describing practice in several securities cases where immunized witness, armed by the government with an interception device, spoke to defendants). Because the sixth amendment right to counsel does not apply before a formal charge, the clients have no constitutional protection against governmental seizure of information in this way. See, e.g., Massiah v. United States, 377 U.S. 201 (1964).

26. In this context a number of attorneys have elected to represent either the corporation or its employees, in part out of concern that indemnification of the employees for the legal expenses may be an improper corporate expenditure. But see In re Grand Jury Proceedings, [August 9, 1979] 926 ANTITRUST
may nonetheless incur civil liability or receive adverse publicity through the criminal culpability of its members, creating the same potential conflict between the payor's interests and those of its members or employees. Second, counsel himself may be a target of the investigation, and his clients may be the sources of information that will damn him.\textsuperscript{27} Third, a witness who is a target and one who is a nontarget, but who has some exposure, may ask counsel to represent them both.\textsuperscript{28} These obvious conflict situations do not exhaust the possible loci of conflicts, however. Counsel's problem at the grand jury stage is in obtaining information to determine what exposure his clients have to criminal liability and what risks they run by not cooperating. The grand jury operates in secrecy and secrecy is frequently a vital component of a successful investigation. A client who is a subpoenaed witness or a target is not entitled to discover from the government the direction of the investigation or the information already gathered. The government does not always reveal the subject matter of the investigation or the identity of witnesses (much less their testimony), and may refuse to reveal the identity of the targets. Counsel has no way to learn this information unless the prosecutor voluntarily discloses it,\textsuperscript{29} or unless counsel can learn the identity of a witness and convince him to

\textsuperscript{29} The Department of Justice follows the practice of informing a witness of the general subject matter of the investigation (as long as that disclosure would not adversely affect the investigation), of the right not to incriminate himself, of the risk that anything the witness says could be used against him, of the opportunity to consult with counsel outside the grand jury room, and of his status as a target (substantial evidence links that person to the commission of a crime) or as a subject (that person's conduct is within the scope of the investigation). See United States Department of Justice, United States Attorneys' Manual, tit. 9, § 9-11.250 (1977). The Constitution, however, does not require such disclosure. See United States v.
discuss his testimony.\textsuperscript{30} As a result, counsel may not know what questions to ask his clients or at what point he has received as much information as his clients possess. Hence, in representing multiple clients, interviewing each separately without disclosing to any the information provided by the others\textsuperscript{31} may not provide counsel with the information he needs to assess whether conflicts exist that should prompt him to withdraw from representing one or more clients. Counsel may not even have time to discuss the individual position of each client if the government has subpoenaed his clients on short notice.\textsuperscript{32} Or, counsel may not have enough time to discuss in depth with a target client his criminal exposure if, as frequently happens, the prosecutor chooses to subpoena the targets as the first witnesses. A client, in turn, may be reluctant to disclose information that incriminates him or his co-clients for fear that counsel will disclose that information to the co-clients, in spite of counsel's assertion that he will not.

Just as the grand jury process works to deny counsel information, counsel may structure his representation to deny himself information and avoid uncovering a conflict. He might, for example, choose to lecture his clients about the nature and effect of a conflict and about the grand jury process,\textsuperscript{33} but refrain from questioning each client closely as to his knowledge, involvement and desire to cooperate.\textsuperscript{34} Although this sort of representation avoids the emergence of a factual or tactical conflict, it is questionable. It may damage the client who needs individualized attention, especially one who is forced to testify through immunization. When the government was required to give transactional immunity, a witness was protected no matter how sketchy his testimony as long as he testified about the criminal act. With the

\textsuperscript{30} A witness before a federal grand jury is not sworn to secrecy. \textsc{Fed. R. Crim. P.} 6(e). State practice is sometimes different. See cases cited in note 12 \textit{supra}.

\textsuperscript{31} Attorneys usually begin their representation of multiple clients by informing them of the nature of a grand jury investigation, of the opportunity to cooperate or to invoke the fifth amendment and of the risks and advantages of multiple as against separate representation. If the clients want joint rather than separate representation, the attorney then attempts to determine the facts each client possesses. Within this general framework, however, an important difference exists between those attorneys who perform each step with each client separately and those who speak to all of the clients at the same time. Speaking with all clients simultaneously is a dangerous practice: the clients have the opportunity to pressure each other not to decide what is in the best interests of each and not to disclose information that might harm the others; the attorney-client privilege may also be eliminated between the clients. But interviewing the clients separately also presents several interesting questions: if a conflict between Client A and Client B develops, from which client does counsel withdraw, or how does counsel determine whether both nonetheless want counsel to continue? If counsel decides to withdraw from Client A, can he notify Client B of the information he has received from Client A? If a conflict develops between Client A and Client B, should counsel interview the remaining clients or should he automatically refuse to represent them?

\textsuperscript{32} Although federal prosecutors are urged to use the "forthwith subpoena" sparingly, see \textsc{United States Attorneys' Manual, supra} note 29, \textsection 9-11.230, subpoenas to appear on two-day notice prompted one attorney not to interview his clients. See \textit{In re Investigation Before the April 1975 Grand Jury}, 531 F.2d 600 (D.C. Cir. 1976).

\textsuperscript{33} See note 3 \textit{supra}.

\textsuperscript{34} One attorney, in fact, told me that he rarely discusses the facts possessed by each client and learns of them only when the client informs him of the prosecutor's question and his intended answer as the client testifies. This is a questionable practice unless counsel believes that his client should invoke the fifth amendment, but the failure to determine whether invocation of that privilege is justified may result in problems for counsel. See text accompanying notes 150-56 \textit{infra}.

Washington, 431 U.S. 181 (1977) (no constitutional violation in failing to warn grand jury witness of his status as a potential defendant). Of course, the extent to which the prosecutor discloses information about a witness may be a function of the prosecutor's desire to terrorize that witness into cooperating fully.
switch to use immunity, however, the witness' incentive is to testify as fully as possible. The government may not use against him his testimony or the fruits thereof if the grand jury indicts him. As a consequence, counsel must learn what information his client possesses and what information the client should disclose while testifying.

If counsel who chooses not to question his clients closely nonetheless unwittingly discovers a conflict, his choice of options is not easy. If, for example, Client A reveals something that would damage him but would help Client B, counsel is in the untenable position of considering whether to pressure Client A to waive the attorney-client privilege to permit counsel to inform Client B. There, as in the instance when Client B wishes to reveal information that would damage A, counsel might withdraw from representing B and remain with A. He cannot assist B to the detriment of A; he must release his control over B to permit B to disclose. But counsel may not be able to continue with A either if, as almost surely will have occurred, B has provided counsel with privileged information which counsel could use to impeach B. If B testifies at A’s trial, counsel, to assist A, must attempt to impeach B with that information. But B may be able to invoke the attorney-client privilege to bar such questioning. The conflict would then damage A. Counsel should have withdrawn from representing both clients.

Conflicts do not emerge at the grand jury stage simply through counsel's relationship with his clients. Unlike the post-charge stage, the government has some control over whether a conflict will emerge at the grand jury stage. After the indictment, the government rarely needs the cooperation of the defendants; it has gathered its evidence. At the grand jury stage, however, the government seeks information. It can force a witness to testify through a grant of immunity, it can institute a contempt charge against an immunized witness who refuses to testify, it can entice a witness to cooperate by offering a favorable disposition, it can disclose information that divides the clients. The government thus has the power to create a conflict that severs the agreement not to cooperate, an agreement which was carefully crafted by counsel and his clients.

III. THE ADVANTAGES OF MULTIPLE REPRESENTATION

A conflict denies counsel the opportunity to act—even to consider acting—on behalf of a client in the way that he might have acted had he represented that client alone. But multiple representation does have three principal advantages: it may contribute to the termination of the investigation, it may cause the government to aid one or more of counsel's clients in a way it would not have if each had been separately represented, or it may result in governmental disclosure of valuable information about the direction of the investigation and the status of the clients.

If each client agrees not to attempt to advance his personal litigation posture, and instead to play for the largest possible stake—that the government will drop the investigation or redirect it to focus on others—multiple representation provides the most effective way to achieve that hoped-for result. The clients may have an allegiance to a political cause or to an organization (a labor union or a corporation, for example) that supersedes the desire of each (at least initially) to cooperate or to protect himself from
prosecution or conviction. But any group of clients might benefit from united opposition to the government. If none cooperates—that is, if no one makes a proffer of testimony in exchange for favorable treatment, if all invoke the fifth amendment when subpoenaed, perhaps even if all refuse to testify once immunized—the government may be unable to indict any client because no other credible sources possess enough admissible information to indict (much less convict at trial), or because the prosecutor refuses to immunize or plea bargain with any of counsel's clients without knowing what help he will receive in return or what has been each client's involvement. This approach may appear desperate and foolhardy, but the goal of aborting the investigation is not unrealistic. In In re Taylor, for example, the investigation ended once the court of appeals announced its decision that counsel should not have been disqualified. The same result occurred in Pirillo v. Takiff. And, in In re Investigation Before the 1975 Grand Jury, the grand jury did indict several members of the Pressmen's Union, but not as many as might have been expected.

On the other hand, multiple representation may also result in at least one of counsel's clients receiving more from the government than he might have received with separate representation. In this sense, the relationship of multiple representation to the grand jury's investigation is like a game of draw poker: the defense does not know what the government knows, wants, and is willing to give; and the government is not certain what each client has to offer. The benefit for the defense is in forcing the government to make the first move, and to make that move blindly.

35. See In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 604 (D.C. Cir. 1976) (government moved to disqualify counsel, renouncing as an alternative the "blind selection . . . of random witnesses for possible grants of immunity"). The Attorney General's guidelines for the grant of immunity suggest why federal prosecutors usually demand a proffer as a condition of receiving immunity. In determining whether to seek immunity, the prosecutor with authority to make such a request is expected to consider, inter alia, "the value of the person's testimony or information to the investigation or prosecution; . . . the person's relative culpability in connection with the offense . . . being investigated or prosecuted, and his history with respect to criminal activity; . . . the possibility of successfully prosecuting the person prior to compelling him to testify or produce information." Office of the Attorney General, Guidelines Relating to Use of Statutory Provisions to Compel Testimony or Production of Information (Jan. 14, 1977), reprinted as Response to Request of Subcommittee Staff for Comments on Other Aspects of H.R. 94, in Hearings on H.R. 94, supra note 3, at 755, 774-75. To evaluate these points, the prosecutor needs to know what the witness will testify to. See also Favretto Address (Oct. 27, 1978) supra note 1 at 6 ("As a matter of practice during our investigations, we are insisting upon a proffer of testimony before a potentially culpable individual is offered immunity in return for his testimony before the grand jury."). Nonetheless, some defense attorneys steadfastly refuse to make that proffer under any circumstances. See Glanzer, supra note 23 (urging counsel who makes a proffer to condition its making upon government's promise not to use information conveyed).

36. 567 F.2d 1183 (2d Cir. 1977).

37. 462 Pa. 511, 341 A. 2d 896 (1975), appeal dismissed and cert. denied, 423 U.S. 1083 (1976). The investigation, discussed in note 1 supra, ended because its federal funding was terminated before final resolution of the disqualification issue on appeal.

38. 531 F.2d 600 (D.C. Cir. 1976).

39. This is the opinion of the attorneys on both sides. See Cole, supra note 3, at 149, 151 nn.4-6, 153 (1976) (criticizing outcome and multiple representation in general as a "dismal scene").

40 It is, of course, a common negotiating ploy to attempt to get the opponent to make the first offer. E.g., M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL EDUCATION 235 (1974).
would have received by waiting. If the government needs the information from an insider to crack the enterprise, it must act. If no client will make a proffer, the prosecution may be forced to bestow some favor blindly. Its selection of the person to favor may be disastrous from its point of view. It may immunize a client who has little to contribute but who thereby receives protection from prosecution. It may immunize or offer a favorable plea bargain to the client who is most culpable. The latter error may give counsel's other clients a tactical advantage at trial: they can contrast their lesser complicity against that of the immunized client in the hope of jury nullification, or they can attack the credibility of the immunized client through his complicity and receipt of governmental favor.41

Of course, in approaching counsel's clients to offer a bargain, the government has precipitated a conflict. Counsel should withdraw from representing all clients at that point.42 If he must select the client who will be favored, he has a conflict with his other clients. If the government selects the client without counsel's assistance, counsel probably must still withdraw, since he almost surely has information from that client which he must use to the benefit of his other clients. But, if counsel must withdraw, he has nonetheless forced the government to make the first move—a move that has maximized the position of one of the clients and probably advanced the position of the others as well.

Likewise, even if the government does not blindly offer something to any client, it may still be forced to act in a way that helps counsel's clients. If, for example, the government argues, in support of a motion to disqualify, that a conflict exists because one of counsel's clients is a target, or because counsel himself is the target, or because one of the counsel's clients will implicate his co-clients if he testifies truthfully once immunized, the government should be forced to disclose the information that substantiates that claim. In a number of cases, however, the government has simply asserted that a conflict existed during an ex parte proceeding with the judge supervising the grand jury.43

41. The government's argument that extension of blind offers of immunity might diminish the credibility of an otherwise credible witness has been rejected as a ground for disqualification of counsel. See In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 609 n.14 (D.C. Cir. 1976) (noting that if witness were an accomplice, defendant would be entitled to cautionary instruction even if witnesses were not immunized).

42. Most attorneys have withdrawn or offered to withdraw if the government did identify the target status of counsel's clients or did offer favors to one but not to another. See In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977) (client told court he would seek separate representation if government revealed how his testimony would incriminate co-clients); In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976) (counsel said he would withdraw if conflict developed; none of his clients immunized; he had refused to represent union); In re Gopman, 531 F.2d 262 (5th Cir. 1976) (counsel withdrew from representation of target; disqualified nonetheless); Petitioner's Brief For Certiorari at 13, Pirillo v. Takiff, 423 U.S. 1083 (1976) (dismissing appeal and denying certiorari); cf. In re Special February 1977 Grand Jury, 563 F.2d 652 (4th Cir. 1977), presents an
The government refused to share that information with the defense to permit counsel and his clients to assess whether a conflict did exist and whether any client wanted separate representation based on that information. If the government is required to disclose the bases of its assertion,\(^4\) that disclosure may help counsel's clients enormously. They then may learn the identity of the targets, the direction of the grand jury investigation, the part the government expects each client to play in the investigation, and the evidence as to each.

The clients can maintain a united front more easily if all are represented by one attorney than if each is represented separately. A single attorney representing all clients can act as the funnel through which flows all communication among the clients and with the prosecutor. Maintaining a united front with separate representation is possible only if each attorney and his client knows who the other attorneys are and trusts that they will cooperate. But with separate representation, no attorney can be certain that he has received from other counsel all information that he thinks necessary to evaluate his single client's position.\(^4\) And unless an attorney believes that he is receiving complete information from the other attorneys, he must weigh the risks of noncooperation with the prosecution differently than he might if he controlled all communication among the targets and witnesses and with the prosecutor. Game theory is instructive. Studies suggest that imperfect communication among those faced with possible jeopardy pressures each to seek and to settle for less than he might have obtained if all had cooperated.\(^4\)

The "Prisoner's Dilemma" is an example.\(^4\) \(X\) and \(Y\) each has two choices: to

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\(^4\) Compare In re Taylor, 567 F.2d 1183 (2d Cir. 1977) (government must disclose basis of assertion that conflict exists to enable informed waiver of conflict by witness) with Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), aff'd per curiam, 466 Pa. 187, 352 A.2d 11, appeal dismissed and cert. denied, 423 U.S. 1083 (1976) (disclosure not required because of government interest in secrecy). Whether the government must disclose is a different issue from the question of which side bears the burden of establishing whether a conflict existed, whether the witnesses properly invoked the fifth amendment, and whether the witnesses would have invoked the fifth amendment even if separately represented. Because I believe that the government bears the burden on these issues and that the clients have the right to waive the conflict, I think that the government should be required to disclose so that the clients have an opportunity to make an informed and voluntary waiver. See SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976) (before excluding counsel from questioning by SEC staff of his clients, SEC must adduce "concrete evidence' that his presence would obstruct or impede its investigation").

\(^4\) Although defense counsel frequently try to cooperate by pooling information and dividing motion practice, see GRAND JURY DEFENSE OFFICE, NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES § 3.6(a)-(b) at 12 (2d ed. 1976), this is not always possible, when, for example, documents are subpoenaed from different places. See Smaltz, Tactical Considerations for Effective Representation During a Government Investigation, 16 AM. CRIM. L. REV. 383, 415-19 (1979).

Also, separately represented witnesses may have greater trouble resisting prosecutorial entreaty or threat. Cf. Glanzer Address, supra note 23 (describing the prosecutor's "tree-shaking" letter—informing the client of conduct that must be explained—and the "life-boat" letter—warning the client that someone else will cooperate if he does not).


\(^4\) Id. at 417-19. The "Prisoner's Dilemma," an example of a zero-sum game in which \(X\) will win and \(Y\) will lose, or the reverse, is similar to a grand jury investigation when counsel's clients possess the incriminating information. In exchange for favor from the prosecutor, either Client \(A\) or Client \(B\) will testify and damn the other. The same is true if Client \(A\) is a "subject" and Client \(B\) is a "target," see note 29.
confess or not to confess. The result of either decision in terms of punishment is different depending upon the other person's choice. If neither knows what the other will do, each may rationally choose a course of conduct—to confess—that results in personal punishment less than the worst possibility but greater than the optimal. The result would differ if both had greater information about what the other intended to do and if both trusted that the other would act as agreed. They would then both refuse to confess, thereby minimizing the punishment for both. The "Prisoner's Dilemma" suggests that, as long as each client does not want to cooperate unless he must, single counsel may maximize the possibility that all of his clients will benefit.

In two other ways, multiple representation may impede if not block an investigation of an organization and its members. First, even if the government does succeed in disqualifying counsel, counsel can delay the investigation by appealing the disqualification order. Second, the prosecutor, before commencing a formal grand jury investigation, frequently informally seeks information from the employees or members. When the organization's counsel learns of that informal investigation, he may notify the prosecutor that the latter may not speak to any employee unless counsel is present. Counsel asserts that, as attorney for the organization, he represents all of its members. Thus, by approaching any employee, the prosecutor, counsel argues, will violate Disciplinary Rule 7-104(A)(1) or 7-104(A)(2) of the ABA supra, although the pressure on Client A to cooperate may be less here, while the pressure on Client B will be greater (nonetheless, a proffer by Client B may disclose his involvement to the prosecution which then will refuse to offer in return for his cooperation).

48. McGinnies assumes the following punishments for X and Y, depending upon what each does: if neither confesses, each will receive a sentence of one year; if both confess, each will receive a sentence of eight years; if one confesses and one refuses, the confessor will receive a sentence of 6 months and the nonconfessor a sentence of 20 years. Id. at 417. Thus, X and Y will maximize their joint position by refusing to confess. But, the decision not to confess carries the risk of subjecting the nonconfessor to the worst sentence, if the other does confess. On the other hand, X can maximize his individual position by confessing, if Y does not. But if Y has also tried to maximize his personal position, his decision to confess will result in a higher sentence—eight years—for each.

49. That is, he will not testify unless immunized.

50. The "Dilemma" also suggests why counsel should not continue to represent X and Y if the prosecutor is willing to offer favor to either in exchange for his testimony against the other.

51. The Antitrust Division of the U.S. Department of Justice has expressed concern over investigative delays resulting from multiple representation of grand jury witnesses. Deputy Director of Operations Favretto warned that the Division will increase its vigilance of multiple representation during grand jury investigations. Favretto Address to Chicago Bar, supra note 1, at 12. The Department of Justice advocates an absolute prohibition of multiple representation before grand juries, rather than the removal of attorneys who unduly delay or impede the grand jury proceedings, as proposed by one bill. Hearings on H.R. 94, supra note 3, at 723-25 (testimony of Benjamin R. Civiletti, then Asst Att'y Gen., U.S. Dep't. of Justice).

52. The clients, defense counsel, and the prosecutor each has standing to appeal immediately. E.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 605 n.8 (D.C. Cir. 1976) (counsel may appeal); In re Special February 1977 Grand Jury, 581 F.2d 1262, 1263-64 (7th Cir. 1978) (government may appeal). See United States v. Clarkson, 567 F.2d 270, 272 n.2 (4th Cir. 1977) (noting that counsel should have appealed, not violated, order if dissatisfied with disqualification; contempt of counsel affirmed).

53. Several prosecutors told me that they were more worried about this defense ploy than about multiple representation once a formal grand jury investigation had begun.
Code of Professional Responsibility. If applicable, those disciplinary rules will block the prosecutor from informally approaching any employee and perhaps from speaking to any employee who approaches him voluntarily. If the prosecutor cannot take these initial investigative steps to determine whether a crime was committed and by whom, he may decide that a formal grand jury investigation is not warranted. This variant of multiple representation then will have succeeded.

Another important advantage of multiple representation is in minimizing the cost of legal assistance. The claim that multiple representation is a defense attorney's "dream" because it will result in higher fees is too cynical in many instances. True, in a protracted investigation, counsel's fees may be very large. Attorneys usually do not represent clients in grand jury investigations inexpensively. Many charge a fee in the neighborhood of $100 per hour; few charge a flat fee, as is the customary practice in representing a client after indictment, at least when he is charged with a street crime. But that hourly fee

54. Disciplinary Rule 7-104(A) provides:

During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so; (2) Give advice to a person who is not represented by a lawyer, other than advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) (footnotes omitted).

55. The applicability of these two disciplinary rules in the grand jury context is as yet undetermined. Compare Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1011 (3d Cir. 1976) (prosecutor may not ethically approach any client to discuss immunity without counsel's knowledge) with United States v. Turkish, 470 F. Supp. 903, 910 (S.D.N.Y. 1978) (prosecutor can inform clients of conflict problem, although he should do so in counsel's presence). Their applicability is problematic. Disciplinary Rule 7-104(A)(1) may not require the prosecutor to notify counsel for two reasons. First, the Rule appears to assume communication during on-going litigations; because the grand jury has issued no indictments, no one may be opposed formally by the prosecutor. Second, application of the Rule to all employees of the entity would probably overly restrict prosecutorial investigation. See In re FMC Corp., 430 F. Supp. 1108 (S.D. W. Va. 1977) (government not barred from interviewing corporation's employees as long as employees informed of right to counsel); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1410 (Feb. 14, 1978) (proper to interview any employee other than those who could bind corporation without notifying corporation's counsel). INFORMAL OPINION No. 1410 appears to bar the prosecutor from approaching top-level employees who are the most likely to possess important information.

Disciplinary Rule 7-104(A)(2) also appears to restrict prosecutorial communication with any employee who might be a target or subject of the investigation because such a "person" has an interest in conflict with that of the government, although the proper interpretation of "advice" is still unsettled. See AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 340-41 (1979).

Disciplinary Rule 7-104(A)(1) does prevent the prosecutor from communicating an offer of any type to the client, even if he believes that counsel has not informed his client of that offer. See ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1373 (Dec. 2, 1976) (improper to send copies of plea offer to counsel's clients).

56. Prosecutors appear reluctant to test their authorization for fear that counsel will ask a disciplinary board to investigate the ethics of questioning an employee in counsel's absence.

57. See Cole, supra note 3, at 153. In fact, in several instances, counsel reported that they charged nothing. In an investigation of political conduct, for example, attorneys frequently told me that the question was whether they were sympathetic to the politics of the potential clients rather than whether the clients could pay a fee.

58. Several attorneys reported, however, that they charged a fee of $250-$500 per day while assisting a witness as he testified.
is sometimes charged against all clients rather than against each separately; hence, the cost to each client may be considerably less than it would be if he were to retain separate counsel.\textsuperscript{59} Also, it may be easier for clients to organize a defense fund to raise money if all are represented by a single attorney.\textsuperscript{60} And many attorneys fear that a labor union or small corporation that has agreed to provide counsel for its members who are witnesses or targets\textsuperscript{61} will face bankruptcy if it must pay for separate counsel for each. In \textit{In re Investigation Before April 1975 Grand Jury},\textsuperscript{62} for example, the estimated cost to the Pressmen's Union of paying for separate counsel for the 100-plus members who were subpoenaed would have approached $200,000.\textsuperscript{63} Moreover, the government, although it has frequently voiced a demand for separate counsel, has apparently never suggested that the judge supervising the grand jury investigation should appoint counsel to assist any indigent witness or target.\textsuperscript{64}

Finally, even if there exists an adequate pool of capable attorneys to provide separate representation for defendants charged with street crime, there may not be as many attorneys with experience in sophisticated grand jury investigation work.\textsuperscript{65} An attorney inexperienced in federal prosecution may not assist a single client as well as might an experienced attorney saddled with a conflict.\textsuperscript{66} Interestingly, many defense counsel in white-collar crime cases are former members of a United States Attorney's office. That experience may give them a tactical edge that other defense attorneys may lack. They may have more insight into how the government develops its case, how important certain information is for the investigation, and how likely it is that the prosecutor will offer a favorable disposition in exchange for cooperation or in spite of the failure to offer to cooperate.

\section{IV. The Doctrinal Grounds for Disqualification}

The government's motives in moving to disqualify must necessarily appear mixed. On the one hand, the motion appears self-serving.\textsuperscript{67} By eliminating

\textsuperscript{59} If counsel prepares the same motion on behalf of all clients (a wiretap disclosure motion, for example), the per-client charge will be less if apportioned among all.

\textsuperscript{60} This was reported by several attorneys. On the other hand, a group of attorneys might be better able than a single attorney to help raise money for the fund because they would be able to appear at more fundraising events.

\textsuperscript{61} Of course, there may be a problem of proper expenditure of union or corporate funds if the officer were a target.

\textsuperscript{62} 531 F.2d 600 (D.C. Cir. 1976).

\textsuperscript{63} Estimate by counsel. The district court's order forbade representation by any attorney of more than one subpoenaed union member, \textit{In re Investigation Before April 1975 Grand Jury}, 403 F. Supp. 1176, 1183 (D.D.C. 1975), an order that several attorneys understood to prohibit two attorneys of the same firm from each representing a separate union member.

\textsuperscript{64} This criticism was expressed by several attorneys. There is some question, however, as to whether the court is authorized to appoint counsel before indictment. See 18 U.S.C. § 3006A(a) (1976) (ordering each district court to adopt plan for appointment of counsel for indigents who, \textit{inter alia}, are charged with felony or misdemeanor, who are under arrest when representation is required by law or who are constitutionally entitled to representation).

\textsuperscript{65} This is the claim of many attorneys. \textit{But see In re Investigation Before April 1975 Grand Jury}, 403 F. Supp. 1176, 1182 (D.D.C. 1975) (union members could choose from "limitless pool of qualified attorneys in the District of Columbia"), vacated on other grounds, 531 F.2d 600 (D.C. Cir. 1976).

\textsuperscript{66} A conflict might not impede counsel from making the many motions available to challenge the grand jury's jurisdiction or its subpoenas.

\textsuperscript{67} A self-serving factor impelling the government to disqualify counsel is probably its use of the grand
counsel, the government hopes to obtain more information, and to obtain it without conceding favor in return. On the other hand, the government is obliged to "seek justice" and to police the conduct of counsel. The former broad ethical directive probably includes an obligation to protect the interests of the witnesses and targets by informing them of the risk they run by not cooperating and by retaining a single attorney to represent them all. The latter probably includes the obligation to notify the court whenever the prosecutor believes that counsel is violating a disciplinary rule of the Code of Professional Responsibility.

The government has advanced two doctrinal justifications for disqualification. First, multiple representation impedes the grand jury's investigation; second, multiple representation constitutes an unethical act that mandates judicial sanction against counsel by way of disqualification. It might also advance a third justification: disqualification is necessary to protect against

jury to investigate political dissidence and white-collar crime. In this context, the prosecutor may be under extreme pressure to complete the investigation successfully. In Pirillo v. Takiff, 462 Pa. 311, 312, 341 A.2d 896, 898 (1975), aff'd per curiam, 466 Pa. 187, 352 A.2d 11, appeal dismissed and cert. denied, 423 U.S. 1083 (1976), for example, the Governor, following publication of a report by a state commission, had appointed a special prosecutor to investigate and prosecute alleged police corruption in Philadelphia. In other instances the prosecutor wants to carry through with an investigation that he himself has originated. See WATERGATE SPECIAL PROSECUTOR FORCE, REPORT 34 (1975) (prosecutor usually initiates white-collar crime probe). Critics of the grand jury argue that the grand jury in the last 10 years has been used to obtain information for intelligence purposes as well as when federal investigators are blocked by constitutional restrictions. See Hearings on S. 3405 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 17 (1978) (testimony of Morton Stavis, Esq., Center for Constitutional Rights) [hereinafter cited as Hearings on S. 3405]; id. at 37 (testimony of Judy Mead, National Lawyers Guild). The value of a grand jury to investigate is obvious: whereas the police have no subpoena power and cannot search unless fourth amendment requirements are satisfied, the grand jury may issue subpoenas to testify or produce documents almost without restriction. Hence, when, as in white-collar crime investigations, the government suspects "X" but does not know what "X" has done, the grand jury provides an invaluable way of circumventing constitutional restrictions on the police. If the prosecutor suspects that counsel's multiple representation has thwarted the investigation, he is tempted to move to disqualify. See Hearings on H.R. 94, supra note 3, at 672 (statement by Patrick Tobin, Washington Representative Int'l Longshoremens & Warehousemens Union). However, no court has as yet scored the prosecutor's motives in moving to disqualify, as has happened in the civil context. See Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977) (critical of motions to disqualify opposing counsel in civil litigation as prompted by strategic considerations).

68. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-13 (1978).

69. Cf. SEC v. Csap, 533 F.2d 7 (D.C. Cir. 1976) (dictum) (SEC has duty to inform parties of attorney's possible conflicts); United States v. Turkish, 470 F. Supp. 903, 910 (S.D.N.Y. 1978) (dictum) (prosecution should have notified client of possible conflict in counsel's simultaneous representation of another). Notifying counsel's clients is difficult because of the uncertain restrictions of Disciplinary Rule 7-104. See notes 54-55 supra. As a result, several prosecutors said that they first attempted to alert counsel that he might have a conflict; this effort frequently proved unsuccessful because counsel distrusted the prosecutor's motives. In Turkish the prosecutor eventually notified the client, in counsel's presence, that a potential conflict existed. 470 F. Supp. at 910.

70. See In re Gopman, 351 F.2d 262, 265-66 (5th Cir. 1976); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 1-103(A) ("A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [concerning "misconduct" by another attorney] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.") (footnote omitted).

71. So that neither counsel nor court could miss this second basis, one prosecutor described his motion to disqualify as a "Motion to Disqualify or in the Alternative to Disbar or Suspend From Practice." Conversation with former Assistant United States Attorney Robert B. Amidon (Jan. 16, 1980). The motion was so styled for two reasons: first, as a basis to argue that the government need not prove prejudice to its position as a predicate to disqualification; and, second, to influence the court to disqualify as a lesser sanction. Id.
later constitutional attack by any of counsel's clients on the investigation or on the conviction.

The first values the investigation as paramount to the right of the clients to select counsel and to impede the investigation in whatever way is legally available. The second values the ethical obligations of counsel as paramount to the desires of his clients who themselves do not object to counsel's continued representation. Each of the three arguments presents conceptual and proof problems for the government, and none is persuasive.

A. MULTIPLE REPRESENTATION AS AN IMPEDIMENT TO THE INVESTIGATION

One could easily reject as a proper ground for multiple representation the obstruction of an effective grand jury investigation that constitutes a principal tactical advantage of multiple representation. After all, the grand jury is frequently the best, if not the only, available way for the government to investigate criminal conduct. The social value in not deterring the grand jury's work may explain why the Supreme Court has not permitted individuals to invoke other rights which would block or delay the collection of information by the grand jury. Not surprisingly, then, the government has urged repeatedly that counsel should be disqualified because multiple representation impedes the grand jury's work.

The government's argument takes various forms. Defense counsel, assumed to recognize the nature and effect of a conflict, is also assumed to have structured his representation in a way to avoid the conflict. Hence, counsel has not approached the prosecution with an offer to have Client A cooperate because that offer would compromise Client B's position. Or, counsel has advised his clients to invoke the fifth amendment when in fact one or more of them would incur no risk by testifying. That advice is supposedly spurred by counsel's desire to avoid a conflict if Client A were to testify in a way that would undercut Client B's position. If the clients were separately represent-

72. Of course, this point overlooks the oft-expressed objection to an investigatory grand jury: the government should not be permitted to use the greater power of the grand jury, which can issue subpoenas and bypass fourth amendment challenges, to assist a police investigation blocked by constitutional considerations.

73. See, e.g., United States v. Calandra, 414 U.S. 338 (1974) (witness subpoenaed before grand jury cannot raise fourth amendment objections); Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment does not protect against disclosure of confidential news sources); Blair v. United States, 250 U.S. 273 (1919) (witness cannot challenge constitutionality of statute whose alleged violation grand jury was investigating).

74. The argument is not that counsel has advised his clients to invoke the privilege but rather that the conflict may affect counsel's decision as to whether and how to advise his clients to invoke the privilege. See In re Grand Jury Proceedings, 428 F. Supp. 273, 276-78 (E.D. Mich. 1976). This argument would result in the automatic disqualification of any attorney who simultaneously represented a target and a nontarget witness. In disqualifying counsel in In re Grand Jury Proceedings, the court went too far. It found an actual conflict of interest based on the government's assertion that four of counsel's clients would be asked questions about the subject of the investigation, also represented by counsel. It criticized counsel, who represented the Teamsters Union, for representing four members of the Union during a grand jury investigation of James Hoffa's disappearance. And it rejected the waiver by the four witnesses of the right to effective representation as superseded by the public's interest in an effective investigation. The court improperly assumed that the four witnesses possessed information which might damage the subject, and it
ed, so the argument goes, each would be fully informed of the cost-benefit ratio in cooperating or not cooperating. If the clients were fully informed, the prosecutor could more intelligently decide to whom to grant immunity or a favorable plea bargain—separate counsel would make proffers to explain the assistance that his single client might provide.

Because the client has but a due process or first amendment right to retain counsel, the government has argued that the importance of the investigation is a factor to be juxtaposed against the client’s flexible right to select counsel. Several courts have accepted this argument and have concluded that counsel should be disqualified. The argument does not persuade, at least without factual proof of the type that has been successfully adduced in only one case.

This argument misperceives the purpose of counsel’s representation and of his clients’ invocation of the fifth amendment. While the grand jury may be entitled to every person’s testimony, counsel’s objective is not to aid the grand jury but to protect his clients. In several instances, the government has baldly argued that the failure of defense counsel to approach the government justifies disqualification. In effect, the government expects the defense to make the first move in the draw poker analogy. But counsel is not obliged to make a proffer; nor must his clients cooperate even if that would appear to be in the best interest of each. The government, as a result, may be forced to offer a favorable plea bargain or immunity, even if blindly, in order to force the issue. Several defense counsel have asserted that they would withdraw once the government has extended such an offer—again suggesting that overlooked the fact that counsel offered his services without pay to the four New Jersey witnesses who were subpoenaed before a Michigan grand jury. The decision suggests that counsel may be disqualified if disqualification might expedite an otherwise frustrated investigation (especially when the investigation concerns a highly publicized, politically sensitive issue). The disqualification order was not appealed when counsel was unable to obtain a stay of the order pending appeal.

75. E.g., Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), aff’d per curiam, 466 Pa. 187, 352 A.2d 11, appeal dismissed and cert. denied, 423 U.S. 1083 (1976). The argument based on the first amendment is advanced by members of a labor union who have joined together in part to obtain legal assistance. See id.


77. In re Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977) (government disclosed to court that counsel was target).


defense attorneys are acting in accord with the draw poker analogy. Only when the government first makes the offer, then demonstrates that counsel’s conflict led him not to discuss the offer his clients or to advise his clients to refuse to testify, even if immunized, has the government established the factual predicate that justifies disqualification.81

The government has also asserted that the client has invoked the privilege solely because of multiple representation.82 To prove that assertion—that with separate representation the client would not invoke the privilege—may prove to be an impossible burden. The client cannot be expected to retain separate counsel, and it is unlikely that the court would appoint separate counsel to determine whether, with individual advice, the client would elect to testify.83 And without that separate advice, it is unrealistic to expect the client to admit that but for multiple representation he would not invoke the privilege. Moreover, it does not follow that disqualification is proper even where separate representation would cause a client to testify in a case where he would not testify if jointly represented. Instead, the government’s option is to test whether the client has properly invoked the privilege—to protect himself when he risks exposure rather than to protect others.84

B. MULTIPLE REPRESENTATION AS A VIOLATION BY COUNSEL OF HIS ETHICAL RESPONSIBILITIES

This governmental argument to disqualify represents a shift in emphasis from whatever right the grand jury has to obtain information to counsel's

81. Arguably, counsel should also be disqualified if the prosecutor tells counsel that he will favor one of counsel’s clients but not both, and leaves to counsel the determination of which client will receive that benefit. Counsel obviously cannot choose which client will receive that favor and probably cannot even discuss with both which is more likely to benefit. Moreover, although both clients could decide to refuse to make a proffer or to bargain for favor, each may overly influence the other to make that decision if counsel discusses the question with each simultaneously.

82. See In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 607 (D.C. Cir. 1976). Attorneys report that district court judges have frequently appeared upset that counsel's clients have invoked the fifth amendment, without regard for whether that invocation appeared proper or whether the clients would have invoked the privilege if separately represented. See id.; Pirillo v. Takiff, 462 Pa. 511, 516, 341 A.2d 896, 899 (1975) (implicitly accepting government’s characterization of invocation of privilege by all 12 clients as “conspiratorial ‘stonewall’”), aff’d per curiam, 466 Pa. 187, 352 A.2d 11, appeal dismissed and cert. denied, 423 U.S. 1086 (1976); cf. Maness v. Meyers, 419 U.S. 449, 455 (1974) (trial court, which found attorney in contempt for advising client to invoke fifth amendment, “appear[ed] to have been offended” by that advice; contempt citation reversed). To disqualify because the clients have invoked the privilege is wrong. See In re Gopman, 531 F.2d 262, 267 (5th Cir. 1976); cf. Slochower v. Bd. of Education, 350 U.S. 551 (1956) (cannot fire teacher for invocation of fifth amendment). As a result, the government has shifted its argument from an implied criticism of the invocation of the privilege to a claim that counsel cannot properly inform his clients about when they may or should invoke the privilege. See note 74 supra.

83. But see In re Grand Jury Proceedings, 436 F. Supp. 818, 821 n.11 (W.D. Pa. 1977) (when government offers “any type of immunity,” different counsel should advise client about option), aff’d per curiam by equally divided court, 576 F.2d 1071 (3d Cir.) (en banc), cert. denied, 439 U.S. 953 (1978); but cf. United States v. Villareal, 554 F.2d 235 (5th Cir.), cert. dismissed, 434 U.S. 802 (1977) (court took notice of the propriety of appointing separate counsel after the charge to advise defendants concerning conflict issues). Nonetheless, it is unlikely that the clients would discuss the issue with separate counsel. See Tague, supra note 22, at 1099 (noting affidavits filed by clients in Watergate case in opposition to government’s request that each retain separate counsel).

violation of his ethical responsibilities to represent his clients in accord with Canons 5 and 6 of the Code of Professional Responsibility. No doubt the prosecutor is himself ethically obliged to notify the court of counsel's apparent ethical violation, even if to date prosecutors have ironically done so only, when counsel's multiple representation denied them information they needed for a successful investigation.

A threshold question with this argument is whether a federal court has authority to disqualify counsel for his apparent or actual violation of the Code. Not all federal district courts have adopted the Code, their own ethical code, or the ethical rules of the state in which they sit. Nonetheless, the courts believe that they can oversee counsel's conduct because counsel owes them a fictional responsibility as an "officer of the court." They thus may deny counsel the opportunity to appear pro hac vice or may disqualify counsel who is licensed to practice in the jurisdiction.

A second question, however, is whether the court may disqualify when either counsel has not clearly violated a disciplinary rule or his clients are prepared to waive the effect of any apparent or actual violation; or whether the court may disqualify only when counsel has clearly violated a disciplinary rule and his clients will not or cannot waive the effect of that violation. The courts have not specifically addressed this question, but their answer is implicit in the decisions. Those courts that have disqualified have assumed that they may disqualify "to nip any conflict in the bud" and that the clients may not waive. The government obviously benefits from this judicial interventionism and paternalism. Those courts that have refused to disqualify counsel have charged that they may disqualify "to nip any conflict in the bud" and that the clients may not waive.
fy have demanded proof that a conflict does exist (with the government
shouldering that burden; counsel has not been required to demonstrate the
nonexistence of a potential or actual conflict), and that the clients have not
waived the effect of any conflict (with counsel and his clients shouldering this
burden). If the government may demand a hearing at which both counsel
and his clients must aver, if not testify, as to the communications between
counsel and his clients about the conflict issue, and as to the understanding
and desires of the clients, then the government may also profit even from the
more reserved of these judicial approaches, as I hope to show in the next
section.

Counsel may violate his ethical obligations under either Canon 5 or Canon
6 while representing more than one client.

1. Canon 5

The disciplinary rules of Canon 5 outlaw conflicts of interest. Counsel may
have three conflict problems. First, he may have a direct conflict with his
clients because he is a target of the investigation, either along with or apart
from his clients. When this conflict exists, counsel should be disqualified
whenever his clients may be witnesses to his alleged criminal conduct.
Counsel's advice reeks of self-service: no attorney would commit legal suicide
overriding client's attempt to waive conflict as uninformed), aff'd per curiam by an equally divided court,

(1976) (to establish grounds to disqualify, government may present affidavits summarizing testimony of
witnesses who need not themselves testify). Courts have also demanded that the government prove other
facts as a condition of disqualification: proof that the clients would not invoke the fifth amendment if
separately represented, In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 607 (D.C. Cir.
1976); proof that the immunized clients would incriminate the nonimmunized clients, In re Special
February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); proof that counsel's advice was contrary to the
client's best interest, would not have been given
by
a different attorney, or was given to obstruct justice, In
to demonstrate a conflict between a target organization and its members—by showing that the members
wanted to resist but the organization wanted them to cooperate in order to thrust responsibility on
them—the government probably could never prevail. Cf. In re Gopman, 531 F.2d 262, 268 (5th Cir. 1976)
(Clark, J., dissenting). In contrast to these decisions the government has argued that there should be a
presumption against multiple representation which, if accepted, would probably place the burden to show
no conflict on the defense. See Favretto Address to Chicago Bar, supra note 1, at 15.

This allocation of the burden of proof at the grand jury stage contrasts sharply with that allocation after
conviction, where the defendant usually must prove conflict and prejudice. See Tague, supra note 22, at
1088-91.

91. See In re Taylor, 567 F.2d 1181, 1191 (2d Cir. 1977) (no disqualification unless Disciplinary Rule 5-
105(D) violated).

92. The conflict problem also creates tension with counsel's obligations under Canon 4 to protect the
confidences of each client. Client A might, for example, reveal something that magnifies his exposure in
contrast to Client B's or that exonerates Client B, or Client A may discuss his testimony before the grand
jury (information which might assist Client B when he testifies, in minimizing his exposure or in placing
responsibility on Client A). Because any witness before a federal grand jury may disclose his testimony,
counsel may be obliged to pressure Client A, after he testifies, to waive his personal attorney-client privilege
to permit counsel to inform Client B, to whom counsel owes a duty to inform. But, at the same time,
counsel owes a duty to Client A not to represent him in a way that might injure his position to the
advantage of Client B. One attorney was disqualified on the basis of Canon 4, although without proof that
Client A would testify in a way that might injure Client B. In re Grand Jury Proceedings, 428 F. Supp. 273
by advising his clients to cooperate fully with an investigation that could damn him. 93

Second, counsel may appear to have a conflict in that he wants to collect a large fee from each of his clients. 94 To reap the fee, he thus structures his representation to avoid the conflict. This is the objection advanced by one oft-cited commentator. 95 It is probably baseless in almost every situation. 96 True, to avoid the appearance of a conflict bottomed on payment of fees by a third party, attorneys sometimes require each client to pay personally. 97 But those attorneys usually charge each client a fee less than that which they would charge a single client. Also, some attorneys charge a high rate for representing all of the clients, but expect the clients to apportion that charge among themselves. And counsel has himself occasionally retained an attorney to press the appeal of his disqualification order rather than demand that his clients pay for the appeal. 98

The third type of conflict is the more usual. It is the conflict among his clients that compromises or threatens to compromise counsel's representation of each. Disciplinary Rule 5-105(C) of the ABA Code of Professional Responsibility provides: "In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." 99

93. See ABA Code of Professional Responsibility, Disciplinary Rule 5-101 ("Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment").

94. See id., Ethical Consideration 5-7 (counsel should not "become financially interested in the outcome of the litigation").

95. Cole, supra note 3.

96. Counsel in the three cases cited by Cole, id., were apparently not motivated by the prospect of a large fee. In Pirillo and Gopman counsel had a preexisting employment contract with a labor union to represent its members. In the latter, counsel also withdrew from representation of target members of the union. In the third, In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976), counsel was hired by a union to represent its members, in part because hiring separate attorneys would have cost an exorbitant amount.

97. See In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1012 (3d Cir. 1976). There, counsel deliberately demanded that each client pay the fee separately to eliminate the appearance of possible control by a third party over his or his clients' conduct, an important reason supporting the disqualification in Pirillo. Many defense attorneys believe payment by a third party to be a false problem and intend to accept payment from such a source in the future, as long as they notify the clients of that source and notify the source that they will advance the interests of the clients. See ABA Code of Professional Responsibility, Disciplinary Rule 5-107(A) & (B) (with consent of client, counsel can accept payment from third party, as long as he does not permit the payor to "direct or regulate his professional judgment in rendering such legal services").

98. See In re Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); In re Gopman, 531 F.2d 262 (5th Cir. 1976). Counsel himself has standing to appeal because a disqualification order is directed at him and is at least an implicit finding that he acted unethically. See In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 606 n.10 (D.C. Cir. 1976).

99. Disciplinary Rule 5-105(A) provides:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C). [footnotes omitted].

ABA Code of Professional Responsibility, Disciplinary Rule 5-105(B) states the same mandate for counsel who has already accepted employment.
problem must be hurdled to disqualify on the basis of DR 5-105(C). What is the “interest” of each client? Courts have assumed, as DR 5-105(A) and (B) also apparently do, that “interest” must be defined as if counsel represented each client alone. But, as discussed in Part III, the “interest” of each client during a grand jury investigation may not be to further his personal interest in the way usually understood. Each client’s “interest” may be to deny himself—and his co-clients—the opportunity to act alone. To oppose the investigation, each client may choose to forfeit the path that might appear to advance his personal interest—the opportunity to cooperate. As long as each client understands that is his “interest,” and all agree to work together through single counsel to achieve that “interest,” counsel should not be disqualified if his “independent professional judgment” is that this united approach will benefit each individually and all collectively.

Also, DR 5-105(C) provides that the clients may waive the effect of a conflict. Courts are divided over whether the clients may waive either a potential or an actual conflict.10 An important, and as yet unsettled question, is whether a court could sanction counsel through disqualification independent of the desires of his clients. Assuming, however, that the clients can waive,101 and that their waiver supersedes the judicial authority to disqualify counsel,102 the determination of whether they fully understand the conflict issue is difficult. This determination involves both potential benefit and risk to the clients. The government should be required to disclose the information it has that leads the prosecutor to believe that a conflict exists. Several courts have permitted the prosecutor to make this disclosure in camera.103 In camera disclosure is wrong: the information should be given to counsel and his clients for their appraisal.104 Once informed, the clients may nonetheless deny that the information is true, that it can be proven or that it creates a conflict.105 And if that information does induce counsel to withdraw or does convince


101. I believe they can. If two defendants can waive even an actual conflict at trial, see, e.g., Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978) (dictum) (“defendant may waive his right to the assistance of an attorney unhindered by a conflict of interest”); United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978), I see no reason to countermand the clients’ willingness to waive at the pre-charge stage. Of course, because it may be more difficult for counsel to determine whether a conflict exists before a charge, the clients may not be able to make an informed waiver. Thus, the question is not whether the clients can waive, but whether they have made an informed and voluntary waiver.

102. Rather than disqualifying counsel, the court may be left with the option of recommending a disciplinary inquiry of counsel’s conduct. See SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976).


105. See In re Special February 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (counsel could continue to represent both immunized and nonimmunized clients as long as no showing that former would incriminate latter).
one or more of his clients to seek separate representation, multiple representation has again aided the clients. They have a better understanding of the nature of the investigation and of each other’s position.

But the waiver determination has its risks as well. The court should conduct a hearing, and the prosecutor should be permitted to participate. The prosecutor may want to disclose information that precipitates the conflict. He may want to question counsel and his clients to ensure that the waiver by each is both informed and voluntary so that he can eliminate the conflict question as a subsequent ground for appeal.

Counsel and his clients should be forced to testify as to counsel’s explanation of the conflict problem, as to the clients’ understanding of that problem and of his and their desire to continue with him alone and as to counsel’s belief that his clients can give an informed and adequate waiver. The questioning should probe deeply into the attorney-client relationship.106 If the

106. The court should not settle for an affidavit from each client. See GRAND JURY DEFENSE OFFICE, supra note 45, Appendix A at 538.25 (Supp. 1979) (sample affidavit). The inquiry should be probing and should not go beyond asking in summary terms whether each client understands that he can retain separate counsel, whether each understands the nature of a conflict and its possible effect upon counsel’s representation, and whether each nonetheless wants the same attorney to represent all. A FED. R. CRIM. P. 11 type of inquiry (conducted by the court when a defendant pleads guilty), recommended by several courts, e.g., In re Grand Jury, 446 F. Supp. 1132, 1140 (N.D. Tex. 1978), is inadequate. I suggest that the inquiry cover the following areas:

1. Choice of counsel: Who chose the attorney? What discussions concerning that selection occurred among the co-clients? Has each considered whether to retain separate counsel? If so, and has decided not to do so, why? What is the fee arrangement? Has counsel explained his obligations if the fee is paid by a third party?

2. Advantages and disadvantages of multiple representation: What advantages and disadvantages does each foresee for himself and for his co-clients in multiple representation? What conversations have the clients had among themselves on this issue? What has counsel suggested about this issue? Did he discuss this issue with each client separately or with all together?

3. Conflicts: Does each understand the nature of a conflict, the places where one might exist, the effect of one on counsel’s representation and the possibility that counsel might withdraw in the future because of a conflict? Does each understand what counsel cannot do because of a conflict? What conversations has each had with his co-clients and with counsel about the conflict problem? Does each waive the effect of such a conflict? Does each understand the significance of such a waiver?

4. Independent counselling: Has each discussed what he knows with counsel? With his co-clients, either separately or together? Has counsel discussed with each his personal exposure and that of his co-clients? Has counsel discussed what is in the best interest of each? Does any desire to speak with separate counsel?

5. Invocation of the fifth amendment: What conversations has each had with counsel and his co-clients about invoking the fifth amendment if subpoenaed to testify? Why is each invoking the fifth amendment? Would each invoke the fifth amendment if separately represented?

6. The attorney-client privilege: Has counsel discussed the nature of the conflict problem and the grand jury process with the co-clients together? Discussed what each client knows in the presence of the other(s)? Has counsel asked each to waive the privilege so that he can discuss with the co-clients what each has told counsel? Has any client withheld information
clients refuse to answer by invoking the fifth amendment or refuse to permit counsel to answer by invoking the attorney-client privilege, the court has the power to disqualify.\textsuperscript{107} Without that testimony, the court cannot determine whether the clients have made an informed and voluntary waiver and whether counsel has fully and accurately explained the nature and ramifications of a conflict to them.

But courts have overidden an ostensibly informed and voluntary waiver. In two cases, courts concluded that the client’s allegiance to the entity, whether or not it paid counsel’s fees, rendered the waiver involuntary.\textsuperscript{108} Those decisions, on first inspection, appear wrong. If, as the government has conceded, the court should not countermand an apparently informed and voluntary waiver by defendants after they have been charged,\textsuperscript{109} courts should not treat the clients’ purported waiver at the grand jury stage with greater skepticism. But this conclusion may be drawn too quickly. There is a ticklish problem in determining whether the waiver is informed and voluntary. Clients have difficulty understanding what a conflict is and what its effect might be—a difficulty augmented by uncertainty about the direction of the investigation and their personal exposure to criminal liability. They may be all too apt to accept counsel’s evaluation that no conflict exists, despite the insistence by the court that one does or soon will.\textsuperscript{110} Equally important, an informed client may not be able to give a voluntary waiver. Each client may feel tremendous peer pressure not to seek separate representation. To retain separate counsel may be understood as a betrayal by his co-clients, even if in fact the client simply wants separate assurance that his opposition to the investigation is the appropriate course for him. Consequently, the client may fear that by seeking separate counsel he will be ostracized by his co-clients or may expose himself to physical harm or dismissal from employment. And

\begin{enumerate}
\item Status: Does each understand whether he is a target or a witness? Does each understand why he is a target or what exposure he has? Does each client who is vulnerable to indictment understand what risks he runs by not attempting to cooperate?
\item Counsel: Counsel should be asked why he wants to represent his clients; whether he believes a conflict does or may exist; what he has or will do to prevent the emergence of a conflict or to limit the damage of a conflict; what conversations he has had with his clients about the conflict issue; whether he believes that each has knowingly and voluntarily waived the effect of any conflict; and when, if ever, he might withdraw on the ground of a conflict; and whether he would represent any client differently if he represented each client separately.
\end{enumerate}

\textsuperscript{107} See Tague, \textit{supra} note 22, at 1115 & n.249.


\textsuperscript{109} See \textit{In re Taylor}, 567 F.2d 1183, 1187 n.2 (2d Cir. 1977). The government’s “concession” in \textit{Taylor} suggests the self-serving nature of the government’s motion to disqualify at the grand jury stage: the government makes the motion when its interests are endangered (the success of the investigation) but does not when its interest in a conviction will ordinarily be advanced by multiple representation (post-charge).

that client may in fact have information that would damn his co-clients, but
which he is afraid to reveal to the attorney representing all for fear that the
attorney will then share that information with the co-clients. As a result, the
judicial decision as to whether the clients' waiver is informed and voluntary is
difficult. Courts may err on the side of disqualifying counsel. To prevent
disqualification, counsel and his clients may be forced to submit to searching
inquiry. 111 Whether counsel and his clients should agree to that is discussed in
Part V.

2. Canon 6

A second basis to disqualify because of a conflict might be counsel's
violation of the directive of Canon 6 of the ABA Code of Professional
Responsibility that "A lawyer should represent a client competently," or of
his duty to interview and investigate as outlined in the ABA Standards
concerning the defense attorney. 112 If, for example, the prosecutor suspects
that counsel has not advanced the interests of Client A in order to protect
Client B, he might move to disqualify on the basis that counsel has not
provided competent representation. 113 Disciplinary Rule 6-101 of the ABA
Code of Professional Responsibility, however, does not appear to make that
sort of representation a basis for sanction. The disciplinary rule appears
intended to proscribe an attorney from representing a client when that
attorney lacks the training or experience to provide informed representa-
tion. 114 In contrast, an attorney who steers his representation at the grand jury
stage in a way designed to protect the interests of all of his clients would
appear to know precisely what he must do. Of course, if at a hearing counsel's
explanation of why he thought multiple representation was appropriate
revealed that he did not understand the nature of the conflict problem in
general or as it applied to the particular case, the court might disqualify.

Also, although there is no express waiver provision included in Canon 6,
the clients should be able to waive Canon 6 protection to the same degree that
they can waive Canon 5 protection. As long as they understand the type of
"representation" that counsel can provide, 115 counsel should not be disquali-

111. I have suggested an intrusive inquiry to ensure that the purported waiver is informed and
voluntary. See note 106 supra.

112. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION, §§ 4-3.2 & 4-
4.4 (1979 Approved Draft) (duty to interview clients and duty to investigate, respectively).

113. This objection involves counsel's alleged violation of Canon 6 or of the Defense Standards rather
than of his sixth amendment constitutional duty to provide effective representation. Because an individual
has no pre-charge sixth amendment right to counsel, the prosecutor could not base a motion to disqualify
on the ground of a constitutional violation by counsel of his obligation under the sixth amendment.
Moreover, the prosecutor would not want to claim that a conflict rendered counsel's representation
constitutionally ineffective: such an argument would undercut the prosecutor's claim that the grand jury's
freedom to investigate is an important factor that merits comparison with the client's due process right to
select counsel. See Part IV(1) supra.

114. Disciplinary Rule 6-101(A) of the ABA Code of Professional Responsibility provides, for
example, that an attorney shall not "(1) Handle a legal matter which he knows or should know that he is
not competent to handle, without associating with him a lawyer who is competent to handle it." Nor would
counsel violate Disciplinary Rule 6-101(A)(2) if, with the consent of his clients, he elected not to interview
them or to investigate to avoid uncovering a conflict. That disciplinary rule provides that an attorney shall
not "handle a legal matter without preparation adequate in the circumstances."

115. The best example of less-than-customary representation is that of counsel in In re Investigation
C. THE MOTION TO DISQUALIFY AS A WAY TO PROTECT AGAINST LATER OBJECTION BY COUNSEL'S CLIENTS

A third reason for the government to disqualify counsel or at least to obtain his clients' waiver of any conflict is to protect against later constitutional attack on the investigation or on a conviction. Apparently, no defendant has attacked his conviction on the ground that a conflict at the grand jury stage rendered counsel's representation constitutionally ineffective. The client probably could not establish prejudice stemming from his counsel's failure because of a conflict to negotiate a favorable plea bargain or immunity. But, a convicted defendant might be successful if his trial attorney was barred from cross-examining a former co-client who testifies for the government at trial when that former client, now witness, invokes the attorney-client privilege.116

More likely than an attack on the conviction is an attack on the investigation itself. United States v. Turkish117 is illustrative. The New York County District Attorney began an investigation of commodities dealings by Bear Stearns & Co., a broker-dealer, and Norman Turkish, a limited partner in Bear Stearns & Co. and a commodities futures specialist. The law firm that represented Turkish during that state investigation informed him that it perceived no conflict in its simultaneous representation of Bear Stearns and its other employees. The law firm asked the district attorney's office to notify it if that office believed that the firm had a conflict. Apparently having received no notification of a conflict from the district attorney's office, the law firm permitted Turkish to speak informally on several occasions with different state prosecutors. Approximately ten months after Turkish was first interviewed by the district attorney's office, that office told Turkish that the law firm had a potential conflict of interest because Turkish was a target. Turkish was subsequently indicted by a state grand jury118 and by a federal grand jury for conspiracy to defraud the United States, evasion of income tax, and the filing of false tax returns.119 The federal indictments were based in part on the information developed by the New York City District Attorney's office.

116. The government has the converse problem. X and Y are represented by attorney A. That attorney, after speaking with both clients, decides he must withdraw from representing X, but continues to represent Y. Y then cooperates with the government against X. At X's trial, X argues that Y should not be permitted to testify against him because attorney A helped structure Y's cooperation by means of the privileged information he had received from X. One attorney reported that he had successfully suppressed such testimony on these facts.

118. The federal district court's opinion does not name those charges.
119. The district court's opinion does not identify the factual bases for these charges.
Once Turkish was indicted, the law firm suggested that he obtain separate counsel. He did, and replacement counsel then moved alternatively to dismiss the federal indictment or to bar the federal prosecutor from using the evidence gathered by the district attorney's office on the ground that the law firm had had a conflict of interest which he had never waived.

The federal district court denied the motion, finding that no actual conflict existed, that Turkish was surely aware of the potential for conflict, and that there was no proof that the state and federal prosecutors could not have obtained from other sources the information the state had received from Turkish, or that the law firm would have represented Turkish any differently had he been the firm's sole client. Nonetheless, the court held that the prosecutor has a duty to inform an attorney and his clients of a potential or actual conflict because at the preindictment stage no judge continuously oversees the grand jury proceedings.\(^\text{120}\) Hence, the court implied that it might exercise its supervisory power to dismiss an indictment or to suppress the evidence if the government failed to notify counsel and his clients of a conflict problem. Turkish thus suggests not only that the government may not profit from a conflict, but also that the wise prosecutor should institute a motion to disqualify if counsel refuses to withdraw or his clients do not seek separate representation once informed.

### V. The Risks of Multiple Representation

The unwillingness of many courts to disqualify either because the government could not or would not meet its high burden of showing conflict or because the clients were permitted to waive is, in my view, proper. That is not to say, however, that attorneys should be quick to agree to represent more than one client. Multiple representation may involve grave, and not always foreseeable, risks for counsel's clients as well as for counsel personally. In this section, I outline the potential problems, many of which to date remain, thankfully, speculative. Nonetheless, foresighted counsel should carefully weigh the possible disadvantages against the advantages discussed in Part III before undertaking multiple representation.\(^\text{121}\)

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120. 470 F. Supp. at 909 (citing SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976) (SEC has duty to notify witnesses that their attorney may have conflict)).

121. Multiple representation may impede grand jury reform favored by defense counsel or provoke legislative authorization to investigate defense counsel. As to the former, the government has opposed permitting counsel to be present as his client testifies before the grand jury for fear that counsel would disclose that testimony to his other clients, or for fear that counsel's presence will pressure a client not to cooperate who otherwise would do so without disclosing that fact to counsel. See Favretto Address to ALI-ABA, supra note 1, at 10-11. Of interest is the Colorado grand jury reform which permits counsel to accompany his client while testifying but bars counsel from simultaneously representing others. See People ex rel. Losavio v. J.L., 580 P.2d 23 (Colo. 1978). Congressperson Eilberg, a leading proponent of grand jury reform, opposed a proposed Senate reform to permit a witness to reject immunity because he feared that witnesses would be reluctant to accept immunity if they worried that the others might retaliate. See Hearings, supra note 67, at 8 (testimony by Hon. Joshua Eilberg).

As to the latter, there have been various proposals to authorize federal district courts to order disciplinary proceedings against counsel who is guilty, inter alia, of conduct unbecoming a member of the bar of that court, including, for example, malpractice, conduct prejudicial to the administration of justice, or a violation of the Code of Professional Responsibility. If a court learned that an attorney might have
A. THE CLIENTS

The most obvious disadvantage of multiple representation for each client is loss of the opportunity either to seek favor in return for cooperation or to contrast his position against that of the others. Because few investigations will terminate without indictments, at least as a result of multiple representation, the pre-indictment stage provides the best opportunity for a target to negotiate a favorable arrangement. By seeking immunity, an individual with some exposure to criminal liability may be able to insulate himself from prosecution. By seeking to plead no contest, a client may preserve his right to indemnification for defense expenses. By cooperating against an employee, a corporation may avoid suit by a shareholder. By making a proffer, a target may be able to influence the government's recommendation concerning the charges for which he will be indicted.

Counsel may also be unable to obtain vital information because of the conflict problem. He may refrain from interrogating each client closely or his clients may fear disclosing information to him. The prosecutor may not notify counsel of the target status of one of his clients or explain to counsel the evidence that it possesses with respect to one or more of his clients for fear that counsel will share that information with his other clients. This loss of information may damage a client who is subpoenaed to testify. The client may perjure himself or obstruct justice if he fails to testify accurately and fully. He risks contempt if he improperly invokes the fifth amendment. If immunized, he may not recognize that he can maximize his protection by testifying as fully as possible. And the client may be forced to waive the effect of a conflict at a point when he does not have sufficient information to evaluate the likely effect of the conflict.

committed such conduct, it could ask the United States Attorney to investigate. If after that investigation, the United States Attorney thought that counsel had committed such conduct, the court could issue a show cause order why counsel should not be disciplined. See S. 2723, 94th Cong., 1st Sess. (1975); H.R. 6044, 94th Cong., 1st Sess. (1975). The Department of Justice has also urged that, as part of any grand jury reform, Congress bar multiple representation. See Hearings on H.R. 94, supra note 3, at 724 (Appendix I to testimony by Benjamin R. Civiletti, then-Assistant Attorney General); cf. id. at 955 (testimony of Gary P. Naftalis) (private attorney who recommends enactment of "something approaching a per se rule" prohibiting multiple representation at the grand jury stage).

122. See notes 35-37 supra and accompanying text (citing cases where multiple representation did cause termination of investigation). One prosecutor reports that about one-half of the antitrust investigations end with no indictment, but does not explain why. Favretto Address to ALI-ABA, supra note 1, at 17.

123. In the antitrust context, about 90% of those indicted plead guilty. Favretto Address to ALI-ABA, supra note 1, at 17.

124. One defense counsel believes that use immunity may provide greater protection than transactional immunity because the former bars the government from using the fruits of immunized testimony. See Simon, Federal Witness Immunity in Business Crime Investigations, 4 LITIGATION 17, 18 (1978). The jointly-represented client who refuses to make a proffer may forego immunity if the government is deciding whether to immunize him or another witness not represented by counsel.

125. See ABA, HANDBOOK, supra note 22, at 90.

126. One prosecutor reports that in the antitrust context the government will usually not make a recommendation to the grand jury about indictments until defense counsel has had the opportunity to argue why his client should not be indicted or should not be indicted for the charges contemplated. Favretto Address to ALI-ABA, supra note 1, at 16.

127. See In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 608 (D.C. Cir. 1976) (order for separate counsel vacated; court noted availability of contempt citation against witnesses improperly invoking fifth amendment).
The clients also run the risk of being charged with obstruction of justice.\textsuperscript{128} Client \(A\)'s payment of counsel's fees for Client \(B\) may be interpreted as a device to keep Client \(B\) from cooperating.\textsuperscript{129} Client \(A\) may discuss with Client \(B\) their common plight in a way that influences Client \(B\) to invoke the fifth amendment or not to testify fully to protect Client \(A\).\textsuperscript{130} A non-target client may decide to destroy documents which he fears might damage a target co-client.\textsuperscript{131} A client may be found in civil or criminal contempt if he improperly invokes the fifth amendment.\textsuperscript{132} Conduct like these examples may harm the client even if it does not become the basis for a separate obstruction of justice charge: at the client's later trial, such conduct may have evidentiary value as demonstrative of his consciousness of guilt.

Multiple representation may also result in the disclosure of more information than would separate representation. If forced to testify at a hearing to determine whether his waiver of the conflict is informed and voluntary, a client might reveal information that could aid the prosecutor. This is especially true if the court conducts that hearing without defense counsel being present;\textsuperscript{133} counsel thereby loses the opportunity to control the testimony of his clients by careful examination, to object to questions asked by the court that he considers irrelevant, and to oversee the testimony by his clients to insure that they answer no more than they should in response to the questions. Also, if counsel believes that Client \(A\) is obstructing justice, he may be required under Disciplinary Rule 4-101(C)(3) of the ABA Code of Professional Responsibility to disclose the information that supports that

\begin{itemize}
\item \textsuperscript{128} See 18 U.S.C. § 1503 (influencing or injuring officer, juror or witness generally) and § 1510 (obstruction of criminal investigations) (1976).
\item \textsuperscript{129} See In re Grand Jury Proceedings, 600 F.2d 215 (9th Cir. 1979) (fact that two defendants who had not paid counsel's fees had pleaded guilty found insufficient to establish conspiracy to obstruct justice in that counsel retained to promote criminal conduct). Also the government may be able to discover the identity of the payor and the payment arrangement because that information is not thought protected by the attorney-client privilege, see In re Michaelson, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975), although that information may be entitled to fifth amendment protection if its disclosure might implicate the payor. In re Grand Jury Proceedings, 600 F.2d 215 (9th Cir. 1979).
\item \textsuperscript{130} Conviction for obstruction based on an attempt to pressure a witness to invoke the fifth amendment is proper even when that witness can properly invoke the privilege. See United States v. Cioffi, 493 F.2d 1111 (2d Cir.), cert. denied, 419 U.S. 917 (1974); United States v. Cole, 329 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964). Client \(A\)'s presence at the time that Client \(B\) testified might also be considered obstruction. Cf. In re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977) (target of investigation was seen standing near counsel as he spoke with immunized co-client while latter was testifying before grand jury), aff'd per curiam by equally divided court, 576 F.2d 1071 (3d Cir.) (en banc), cert. denied, 439 U.S. 953 (1978).
\item \textsuperscript{131} See United States v. Fineman, 431 F. Supp. 197 (E.D. Pa. 1977), (obstruction of justice to destroy document if person has reason to believe grand jury will want document and if he destroys it to prevent its production), aff'd mem., 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978).
\item \textsuperscript{132} Cf. In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 604, 608 n.13 (D.C. Cir. 1976) (witnesses had invoked privilege to questions concerning "age, marital status, number of children, name of parents, and relationship with their attorney").
\item \textsuperscript{133} See In re Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977) (defense counsel and prosecutor agreed that court could question clients about conflict question in their absence). An unanswered question is whether the clients could be charged with perjury or whether their testimony could be used to impeach them later at trial. Compare Simmons v. United States, 390 U.S. 377 (1968) (government may not use in its case-in-chief defendant's testimony to obtain standing) with United States v. Kahan, 415 U.S. 239 (1974) (government could use in its case-in-chief defendant's false statement of indigency given to obtain appointed counsel).
\end{itemize}
believe. If counsel fears that he himself will be charged with obstructing justice based upon his representation of his clients, he may be free to disclose whatever will protect him from prosecution. If counsel's work product covers all of his clients, he may be forced to disclose that work if one of his clients demands disclosure once he decides to cooperate. The attorney-client privilege may not protect Client A from the disclosure of otherwise privileged communications between Client A and Client B if Client B decides to cooperate. If counsel is house-counsel to the entity, communications to him by employees or members of the entity may not be protected by the attorney-client privilege. If counsel is forced to disclose his work product, his extensive investigation of each client's position may harm one or all.

Finally, if counsel is forced to withdraw because of a conflict with Client A, he may also be forced to withdraw from representing his remaining clients to protect them. He may be barred by Client A's attorney-client privilege from sharing confidential information obtained from Client A with his other clients. He may be similarly barred from cross-examining Client A at the trial of his other clients. An entity may be denied representation by its regularly retained counsel in a later civil suit if he represented any of the entity's employees or members in the criminal investigation of their conduct. And,

134. Still unclear is the meaning of Disciplinary Rule 4-101 (C)(2) (an attorney may reveal "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order") and 4-101(C)(3) (an attorney may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime") (footnotes omitted).

135. See Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.) (counsel, joined as civil defendant with his law firm and its client, revealed his relevant conduct to SEC and to plaintiff's counsel in attempt to obtain dismissal from suit), cert. denied, 419 U.S. 998 (1974); Application of Friend, 411 F. Supp. 776 (S.D.N.Y. 1975) (over client's objection, attorney permitted to give to grand jury documents otherwise protected by attorney-client privilege to defend himself against accusation of complicity with his client).


137. The scope of the "common defense" protection for communications between defense counsel and their clients is not as yet clear, and may provide protection for counsel's clients as they speak with each other and to counsel. See United States v. McPartlin, 595 F.2d 1321, 1335-36 (7th Cir. 1979)(alternative holding) (attorney-client privilege barred disclosure by Defendant A of statements made by Defendant B to Defendant A's attorney which Defendant A claimed would support his defense). But cf. Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977) (no disqualification of counsel on conflict grounds because counsel's clients did not expect that communications to counsel would be kept confidential between clients).


139. Cf. In re Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973) (reversing civil contempt citation of attorney who refused to testify about work product pertaining to interviews with non-employees of client); In re Terkelbou, 256 F. Supp. 683, 685-86 (S.D. N.Y. 1966) (government could not compel defense counsel to report existence, time, place, or content of defense counsel's meeting with witness). For a discussion of the efforts of the government to obtain information relevant to an investigation from opposing counsel, see Tarlow, Witness for the Prosecution—A New Role for the Defense Lawyer, 1 NAT. J. CRIM. DEF. 331 (1975).

if counsel must withdraw from representing all of his clients, each must incur additional attorney's fees in retaining another attorney.  

B. COUNSEL

Multiple representation presents risks for counsel from so many sources that a prudent attorney would usually be wise not to represent more than one client. He may come under attack from the prosecutor, from an ethics committee or from his clients.  

1. Criminal Exposure

An attorney who represents multiple clients may himself be a target of the investigation. In many complex criminal enterprises the attorney is suspected of being an integral part of the crime. Intrusive questioning by the court of counsel and his clients on the waiver issue may uncover the damaging information about counsel's participation in the scheme.  

But, apart from involvement in the crime under investigation, counsel may become the focus of investigation as a result of his representation. To date, apparently no attorney has been charged with obstruction of justice under 18 U.S.C. § 1503 or § 1510 for his representation of his clients. But the government has signalled its interest in counsel's representation as a source of 'obstruction.' Counsel could interfere with the investigation in a way that

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141. This will surely result if counsel attempts to precipitate the conflict by obtaining information from the government to aid his clients in determining the target status of each and the evidence against each.  

142. Counsel also risks contempt if he continues to speak to clients after having been disqualified. See United States v. Clarkson, 567 F.2d 270, 272-73 (4th Cir. 1977) (attorney prohibited from contacting clients to render advice concerning matter for which attorney was disqualified because of conflict of interest). One attorney reported that his tax returns were audited as he represented co-clients—an audit he suspected was precipitated by multiple representation. And none of the attorneys to whom I spoke relished the prospect of disqualification, although one reported that his practice had increased after he had been disqualified.  

143. See note 11 supra.  

144. See In re Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652, 654 (4th Cir. 1977) (after in camera, ex parte examination of witnesses, court concluded actual conflict existed). The attorney was ultimately convicted in that case.  

145. One innovative prosecutor told me that counsel also risked committing “misprision.” 18 U.S.C. § 4 (1976) (making it a felony to knowingly and actively conceal commission of felony by another). Whether counsel's likely defense to such a charge—the attorney-client privilege bars his disclosure of such information—would prevail has not yet been tested.  

146. See Favretto Address to Chicago Bar, supra note 1, at 17 (“[W]e would be naive if we did not recognize that [multiple] representation can create an atmosphere conducive to the lawyer becoming a participant in an effort to obstruct the investigation or to channel it into unproductive areas.”); cf. In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 607 (D.C. Cir. 1976) (unclear whether government's reference to “obstruction” was intended to describe potentially criminal conduct by counsel or the effect of multiple representation on grand jury's effectiveness). Several prosecutors with whom I spoke were prepared to investigate whether counsel's conduct constituted obstruction; others were not. Many defense attorneys feared that the government would broaden its investigation to include their representation. Two attorneys who were disqualified from representing four clients, In re Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976), because of their representation of another client, A, a target, alleged that the prosecutors attempted to intimidate Client A, as he testified under a grant of immunity, by threatening him and them with obstruction. Affidavit of William E. Bufalino, Sr., at 4 ¶ 20, 8 ¶ 29, In re Grand Jury Subpoena to Stephen Andretta, Grand Jury No. 75-313 (E.D. Mich. 1975) (in support of Motion for Order to Show Cause Why Grand Jury Should Not Proceed Forthwith; dated Feb. 2, 1976) (copy on file with American Criminal Law Review).
might constitute an obstruction of justice. For example, to prevent a conflict from emerging, he might refuse to approach the government on behalf of a client who wished to explore cooperation. He might encourage an immunized client-witness to minimize his incrimination of a target client. He might, overtly or subtly,\textsuperscript{147} influence a non-client witness to testify less than candidly or openly about his clients, he might fail to correct obviously inaccurate or incomplete testimony by a client or by a non-client about his clients,\textsuperscript{148} or he might prepare the testimony to be given by the witness.\textsuperscript{149} He might not police his clients to prevent them from pressuring a witness to testify in a particular way, or he might not report his clients if he discovers that they have pressured a witness. If, by accepting payment of his fee from a third party or from Client A on behalf of Client B, he does not make clear that he will represent the interests of the nonpaying client independently of the fee arrangement, the nonpaying client may feel pressured not to cooperate.

Also, counsel's way of advising his clients about the fifth amendment may be viewed skeptically by the government.\textsuperscript{150} An attorney can, without risk, explain the nature of the fifth amendment and can advise his client to invoke that privilege. \textit{Maness v. Meyers}\textsuperscript{151} suggests both the protection and the problems for counsel in discussing the fifth amendment with his clients. Maness, an attorney, had advised his client to invoke the fifth amendment and not to produce certain allegedly obscene magazines, subpoenaed by the government in a civil confiscation proceeding, which were similar to those for which the client had already been criminally convicted for distributing. The client refused to produce the subpoenaed material solely because of counsel's advice. The state court found Maness in contempt because, in its view, the

\textsuperscript{147} For example, if counsel's clients were friends of a non-client witness, counsel might have his clients accompany that witness everywhere. Or, counsel might interview all of his clients together, thereby impeding any one from seeking separate representation or incriminating the others. Counsel might also agree to represent a person whom the government expected would provide incriminating information about counsel's other clients. See Transcript of Hearing on Initial Appearance of Angie Long Visitor 11-12 (D.S.D., Jan. 18, 1979) (counsel for defendant in one part of "Wounded Knee" litigation appeared specially on behalf of person arrested pursuant to "material witness warrant;" government moved to disqualify counsel's other clients.

\textsuperscript{148} This is a ticklish problem for counsel, combining possible criminal exposure, cf. United States v. Sarantsos, 455 F.2d 877 (2d Cir. 1972) (attorney convicted of aiding and abetting others in making false statements when he should have known their statements were false), 18 U.S.C. § 4 (misprision of felony); with difficult ethical judgments, see \textit{ABA CODE OF PROFESSIONAL RESPONSIBILITY}, Disciplinary Rule 7-102(A)(6) (failing to disclose that which counsel is obliged to reveal), DR 7-102(A)(6) (participating in creation or preservation of evidence counsel knows or should have known was false), DR 7-102(B)(2) (failure to disclose fraud by non-client); and with the uncertain restrictions on disclosure stemming from the attorney-client privilege), DR 4-101(C) (attorney may reveal client's intention to commit a crime).


\textsuperscript{150} If, for example, counsel explains the potential charges to his clients, who then invoke the fifth amendment without having been interviewed by counsel as to the involvement of each, counsel may have simultaneously gone too far and not far enough. Cf. \textit{In re Investigation Before April 1975 Grand Jury}, 531 F.2d 600 (D.C. Cir. 1976) (discussed in note 3 supra).

\textsuperscript{151} 419 U.S. 449 (1975).
fifth amendment did not apply to a civil proceeding. In a unanimous reversal of the state court, the Supreme Court held that the nature of the information rather than the nature of the proceeding controlled whether the invocation was proper, and that an attorney could not be disciplined if, in good faith, he advised his client to ignore a court order that the subpoenaed information would not incriminate him. But Maness also set forth important although unclear restrictions on such advice. First, counsel must advise his client in good faith that the information sought would incriminate him. Second, counsel must advise; he may not instruct or order: the decision to invoke the privilege must be the client’s choice. Third, counsel is subject to sanction if the government could not use his client’s testimony or response to a subpoena duces tecum against him in a criminal proceeding.

Maness suggests that counsel must be careful in informing his clients of the fifth amendment privilege. Because of the uncertainty of criminal exposure of his clients, many attorneys uniformly advise them to invoke the privilege. Whereas that form of advice appears proper if counsel is in fact unsure whether the client has criminal exposure, it is more questionable if he is unsure in part because he has chosen not to interview his clients at length to avoid the emergence of a conflict. Counsel may also have gone too far if he advises Client A to invoke the privilege to protect Client B, if he influences Client A not to testify after having been immunized, or if he advises his client not to testify after the court has determined that the client would not risk incrimination by testifying.

The above examples will infrequently involve a violation of 18 U.S.C. § 1503 or § 1510. In my discussions with prosecutors, however, they divided about equally in answering the question of whether they might investigate the way that counsel represented his clients. And one attorney was subpoenaed to explain why he had counselled his clients to invoke the fifth amendment; he himself invoked the fifth amendment in refusing to answer. Furthermore, the intrusive questioning of counsel and his clients at a waiver hearing on the issue of conflict will increase the chances that counsel’s representation will come under investigation. The clients may testify that they

152. Justices Stewart (joined by Justice Blackmun) and White concurred in the result, each authoring a separate concurring opinion.
153. Id. at 457 (emphasizing that state court that had reviewed contempt citation found that counsel had “advised” rather than “instructed” his client not to produce subpoenaed material).
154. Id. at 467. The difficulty of separating the force of counsel’s “advice” from his client’s “free choice” obviously poses difficult problems of intent and understanding.
155. Id. at 468 (no basis to infer that fifth amendment privilege invoked in bad faith or without reasonable grounds); id. at 473 (White, J., concurring). If his client is ordered to testify and if he nonetheless believes that his client will incriminate himself, counsel should indicate that his client expects to receive implicit immunity for his testimony. Cf. Lefkowitz v. Turley, 414 U.S. 70 (1973) (compelled testimony, in absence of formal immunization, inadmissible at later criminal trial); In re Grand Jury Empaneled Feb. 14, 1978, 603 F.2d 469, 474 (3d Cir. 1979) (trial court provided judicially created immunity for documents produced in camera).
157. Maness probably provides protection for counsel in the last example, however, at least as long as counsel had a good faith belief that the court was wrong and that his client would incriminate himself by testifying. 419 U.S. at 460, 468. Of course, the client thereby exposes himself to a contempt citation.
158. Counsel’s conduct went unreported. I believe that except for matters specifically covered by counsel’s fifth amendment privilege, counsel must disclose the advice he gave to his clients or be disqualified at his client’s waiver hearing.
felt pressured by counsel or that they interpreted his "advice" as pressure
either to refuse to cooperate or to invoke the privilege when they were
uncertain whether to do so. Although counsel's actions may have been
proper, he does not control his clients at a waiver hearing, a factor posing a
serious problem if he did not understand fully each client's desire, willingness
to blame anyone to avoid prosecution, or ability to comprehend his advice
and to make a personal assessment of what to do.

2. Ethical Inquiry

If a court refuses to disqualify counsel, it may nonetheless recommend or
request an ethical inquiry into counsel's compliance with the ABA Code of
Professional Responsibility. At a minimum, such an inquiry will prove
embarrassing to counsel. The inquiry will probably occur after the grand jury
investigation, and perhaps after the formal criminal proceedings have con-
cluded. At that point, counsel's clients will have had the opportunity to
observe the effect of multiple representation. One or more may believe that
they were injured by multiple representation. If one was charged or convicted,
he may be bitter. He may not remember counsel's remonstrations about the
risks of multiple representation. Counsel himself may not have documented
the many instances in which he attempted to explain the conflict problem and
perhaps to dissuade his clients from joint representation. Even with that
documentation, counsel may be in peril if his clients steadfastly contend that
they did not understand what he said. Unless the court has conducted a
searching waiver hearing, counsel's credibility is pitted against that of his
clients with respect to the advice that he gave and to the understanding of his
clients. Counsel may be forced to reveal confidences which would otherwise
be protected by the attorney-client privilege and which might reveal other
criminal conduct by his clients. The inquiry may also uncover other aspects of
counsel's representation which present difficult ethical issues. Even if
absolved, no attorney can look forward to such an inquiry.

159. See SEC v. Csapo, 533 F.2d 7, 12 (D.C. Cir. 1976) (reversing disqualification of counsel but
suggesting that SEC could institute ethics inquiry); In re Grand Jury Proceedings, 428 F. Supp. 273, 278
(E.D. Mich. 1976) (court has power to discipline counsel for ethical breach); In re Abrams, 56 N.J. 271,
Supp. 620, 626 (D.N.J. 1977) (cautioning attorneys that continued representation in face of conflict after
institution of formal charge might result in discipline), aff'd sub nom. United States v. Dolan, 570 F.2d
1177 (3d Cir. 1978). Pursuant to Disciplinary Rule 1-102, the prosecutor may request an inquiry as may
the clients themselves. Several clients did so after the disqualification order was reversed in In re
Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976). The ethics committee absolved
counsel after reviewing affidavits and papers (including waivers by charging clients).

160. One defense attorney suggests that counsel should explain to his clients, on each occasion when he
speaks with them together or separately, "all of their rights, liabilities, duties, obligations and opportunities
as witnesses . . . , and to memorialize this [statement] in some fashion on each occasion." Koelzer,
Multiple Representation of Grand Jury Witnesses (copy on file with American Criminal Law Review).
Counsel's caution succeeded: he was not disqualified in In re Grand Jury Empaneled January 21, 1975, 536
F.2d 1009 (3d Cir. 1976).

161. See discussion of the ethical inquiry of counsel involved in In re Investigation Before April 1975
Grand Jury, 531 F.2d 600 (D.C. Cir. 1976), note 3 supra. Thus, counsel himself has a conflict at any waiver
hearing: to protect his clients he may want to avoid that hearing; to protect himself, he will want the
hearing.

162. Counsel faces difficult and not always certain ethical choices in advising his clients. Client A asks
Moreover, during an ethical inquiry, counsel may encounter a court that believes it can proscribe conduct which would not be outlawed by the disciplinary rules of the Code of Professional Responsibility. *In re Abrams* is an extreme, albeit instructive, example. Attorney Abrams, at the sentencing of his client, Young, urged leniency by characterizing Young's involvement in the lottery business as minimal in contrast to that of a third person, Pickett. Abrams acknowledged during allocution that his fee to represent Young had been paid by Pickett who had promised to pay Abrams' fee to represent anyone involved in Pickett's lottery business. A finding by an ethics committee that Abrams had committed no ethical violation in the course of representing Young did not satisfy the New Jersey Supreme Court. The court found a conflict inherent in a payment arrangement whereby a superior in a criminal enterprise paid counsel's fees to represent an inferior. Young's waiver of the conflict, in the court's view, did not eliminate counsel's obligation not to represent an individual in such a setting. In reprimanding Abrams, the court announced that this rather trivial sanction should not be taken as an indication of the possible sanction to be imposed in the future for such representation.

3. Loss of Money

Counsel may lose money or be forced to spend money because of multiple representation. If he must withdraw, and has charged a fixed rather than an hourly fee, he may have no way to value the benefit of what he has done for his clients. Or, he may be forced to disgorge his fee. If he must withdraw, he may be required to withdraw from representing all of his clients. If he or the government appeals a disqualification order, if he is investigated by an ethics committee, or if he is sued for malpractice, he will probably retain counsel for himself. If found to have acted unethically, he may be forced to pay a fine. If he represents the entity and its employees or members, he may hypothetically what would happen if certain documents were never found or never "existed," or whether he should retain or give to counsel certain evidence. Client A asks counsel to reveal what Client B has said about his own and Client A's involvement. Client A, but not Client B, wants to cooperate; how does counsel advance the interests of each? Which client does he continue to represent, or must he withdraw from representing both? See also *Tague*, supra note 22, at 1126 n.290.


164. Counsel may also not be paid by a third-party payor if it determines that payment of fees on behalf of target employees is not a proper expenditure. Cf. *In re Grand Jury Proceedings*, 428 F. Supp. 273, 278 (E.D. Mich. 1976) (court questioned why counsel for union represented union members when investigation concerned matter unrelated to lawful union activity; counsel, however, represented members gratis).

165. See *Tague*, supra note 22, at 1080 n.26. However, I could find no instance in which counsel withdrew, voluntarily or by court order, from representing all of his clients. See, e.g., *In re Grand Jury Emaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976) (counsel voluntarily withdrew from representing entity, but continued to represent individuals; not disqualified); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976) (counsel voluntarily withdrew from representing target, but continued to represent nontargets; disqualified); *In re Grand Jury Investigation*, 436 F. Supp. 818 (W.D. Pa. 1977) (counsel voluntarily withdrew from representing all but one of his clients who were offered promise of nonprosecution and continued to represent others; disqualified from representing the remaining client who was offered nonprosecution), *aff'd per curiam by equally divided court*, 576 F.2d 1071 (3d Cir.) (en banc), *cert. denied*, 439 U.S. 953 (1978).

166. Attorneys have themselves retained counsel on appeal in several instances. See note 98 supra.

167. The Board of Governors of the California Bar has asked the legislature to authorize it to fine attorneys up to $2,500 for misconduct. 54 CAL. ST. BAR J. 391 (1979).
be dismissed by that entity from representing it in a parallel civil proceeding or from representing it in general.

Perhaps counsel's most serious monetary problem is the threat of a malpractice suit brought by a disgruntled client. An imprisoned defendant convicted of a street crime may be unaware that he can sue counsel for malpractice, may be unable to retain counsel to press such a suit, and probably could not prove harm. But a convicted white-collar defendant—whether an individual or an entity—is perhaps better able to assess the impact of counsel's choice to represent more than one client, and is probably more likely to sue. Such a defendant, now plaintiff, might be able to show harm if counsel had refused to seek immunity or a favorable plea bargain on behalf of that former client because of the conflict problem.

Even victory for counsel in a malpractice suit may prove costly. The malpractice suit brought by E. Howard Hunt against William Bittman and the law firm of Hogan & Hartson, although yet another extreme example, is illustrative. As a partner in Hogan & Hartson, Bittman represented Hunt during the Watergate affair. According to Hunt, Bittman acted as the conduit of "hush" money paid by the White House to Watergate burglars, of whom Hunt was one. Bittman and Hunt were both apparently informed by government attorneys that Bittman may have had a conflict in representing Hunt. Bittman himself was a possible target and had tailored his defense of Hunt to the interests of the payor of his fee—the White House. Hunt alleged, inter alia, that because of the conflict, Bittman and Hogan & Hartson had failed to reveal their personal interests which were at odds with Hunt's, had revealed confidential information to others, had failed to represent Hunt adequately during negotiations with the prosecutors, and, during Hunt's appearances before grand juries, had "encouraged and condoned" Hunt's concealment of information and his perjury and had themselves concealed evidence, and had deterred Hunt from testifying in judicial proceedings. Hunt's suit was dismissed, but not before Bittman and Hogan & Hartson

168. See Mathews, supra note 140, at 573-74.
169. I could find no instance, however, in which counsel's clients sued him. Cf. Woodruff v. Tomlin, 593 F.2d 33 (6th Cir. 1979) (malpractice suit based on attorney's representation of clients with conflict in civil litigation) (opinion vacated; en banc decision pending).
171. Id., Memorandum of Points and Authorities in Support of Defendant Bittman's Motion to Dismiss, at 21 n.8.
172. Id., Amended Complaint, Count I, ¶ 5, at 3. The alleged conflict involved the possibilities that Bittman might be called as a witness by the Watergate Special Prosecutor's Office to testify about Hunt's demands for "hush" money and that Bittman himself might become a focus of that Office's investigation due to his representation of Hunt. [Plaintiff's] Opposition to Defendant's Motion to Dismiss at 19 (May 29, 1979), Memorandum of Points and Authorities in Support of Defendant Bittman's Motion to Dismiss at 20.
173. Id., Amended Complaint, Count I, ¶ 5, at 3.
174. Id., ¶ 6, at 3-4.
175. Id., ¶ 9a, at 4.
176. Id., Count IV, ¶ 17, at 6. This allegation was part of a more general cause of action alleging that the defendants had obstructed justice while representing Hunt.
177. Id., Order [Granting Defendants' Motion for Dismissal, Treated as Motion for Summary Judgment]. In granting the defendants' motion on the ground of the statute of limitations, the court
had reportedly spent over a million dollars in defense. Bittman also withdrew as a partner from Hogan & Hartson and is under investigation by an ethics committee as a result of his representation of Hunt.\textsuperscript{178}

VI. CONCLUSION

The courts have spoken inconsistently and unclearly about the propriety of multiple representation at the grand jury stage. As does the American Bar Association in its Code of Professional Responsibility, the courts place responsibility largely on counsel to decide whether to represent more than one client. I have attempted to identify some of the factors which counsel should consider: the tactical advantages and disadvantages of multiple representation, the risk to counsel and to his clients. Although I do not believe that a motion to disqualify should be granted, except in exceptional circumstances, neither do I believe that prudent counsel should undertake multiple representation, except in extraordinary circumstances. The risks are too great for his clients. The waiver hearing may damage the clients; obviously, so also may multiple representation if counsel understands the conflict problem and hobbles his representation accordingly. Nor are many clients worth the personal risk to counsel of multiple representation.\textsuperscript{179} But, if counsel does undertake multiple representation, he should withdraw at the first sign of a serious conflict;\textsuperscript{180} the conflict problem is not one that counsel can solve or bury by continued representation. Like a cancer, a conflict will grow, dividing counsel from his clients and his clients from each other, harming all to the potential advantage of the government.

\textsuperscript{178} See Legal Times, Oct. 29, 1979, at 32.

\textsuperscript{179} This is the view of several attorneys. The one exception may be when counsel is sympathetic to the political position of his clients.

\textsuperscript{180} Because counsel has made no formal appearance, he should be able to withdraw without obtaining judicial approval. See ABA Code of Professional Responsibility, Disciplinary Rule 2-110. Thus, he need not disclose the reason for his decision—an explanation that might jeopardize his clients' position.