

# WHY YOU SHOULD NOT REPRESENT CRIMINAL CODEFENDANTS

NANCY RIPPERGER<sup>1</sup>

**AT FIRST GLANCE, REPRESENTING CRIMINAL CODEFENDANTS MAY SOUND APPEALING TO SOME LAWYERS. FINANCIALLY, IT CAN BE A VERY “GOOD DEAL.” THE LAWYER CAN CHARGE MORE THAN HE OR SHE WOULD IN REPRESENTING JUST ONE OF THE CODEFENDANTS. YET REPRESENTING AN ADDITIONAL CODEFENDANT ONLY INCREASES THE LAWYER’S WORKLOAD MARGINALLY.**

In short, representing codefendants means more money and only a little more work for the lawyer. So, what is not to like about joint representation of criminal codefendants? From an ethical standpoint, it most likely violates a lawyer’s duty of loyalty and Rule 4-1.7.

A lawyer has a duty of undivided loyalty to his or her client. Loyalty and independent judgment are essential elements in a lawyer’s relationship to a client.<sup>2</sup> A lawyer who attempts to serve clients with conflicting interests cannot give each client the loyalty he or she deserves.<sup>3</sup>

Rule 4-1.7 addresses a lawyer’s duty of loyalty when representing codefendants. It provides, in pertinent part:

(a) Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

....

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client. . .

(b) Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 4-1.7 does not, *per se*, prohibit joint representation. However, it is almost impossible for a lawyer to provide joint representation in criminal matters without violating the rule. As the Missouri Court of Appeals has stated, the “ethical pitfalls inherent to joint representation of codefendants in criminal cases demand the utmost prudence by attorneys accepting such employment.”<sup>4</sup> Comment 23 in Rule 4-1.7 also warns that representing criminal codefendants is very risky both for the lawyer *and* the clients. It provides the “potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.” Similarly, Standard 4-1.7 of the ABA Standards For The Defense Function cautions the defense counsel should not undertake to represent more than one client in the same criminal case except where necessary to secure counsel for preliminary matters such as bond hearings.

The reasons why a lawyer should not represent criminal codefendants is two-fold. First, conflicts almost always exist between criminal codefendants. Some conflicts arise because one defendant decides to “turn against” another. Examples include situations where one defendant wants to testify against another or where one defendant confesses and his or her confession implicates the other defendant. With these situations, the lawyer clearly cannot maintain his or her duty of loyalty to both clients.

Other conflicts do not involve one defendant turning on another but still impact the lawyer’s duty of loyalty. These conflicts develop because there are differences in the co-defendant’s circumstances. A defendant’s demeanor, criminal history, culpability, and attitude will influence the prosecutor,

the judge, and the jury.<sup>5</sup> A lawyer's duty of loyalty prohibits the lawyer from pointing out differences in the codefendants' culpability or criminal history during plea negotiations, trial, and sentencing. If the lawyer makes these comparisons, he or she puts the more-culpable codefendant or the defendant with a more extensive criminal history at a disadvantage.<sup>6</sup> As the U.S. Supreme Court stated, "in a case of joint representation . . . the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process."<sup>7</sup>

A prosecutor also can create a conflict between codefendants by making a group plea offer. These offers are generally dependent upon all codefendants accepting and are almost always more advantageous for one codefendant than the other. This creates a conflict when one codefendant wishes to accept and another wants to proceed to trial. In addition, the less-culpable defendant may feel pressured to accept the deal so that the more-culpable defendant can receive the benefit of the deal.<sup>8</sup>

A second reason a lawyer should avoid codefendant representation is because it is almost impossible to obtain a valid "waiver" of the conflict. This is true because the Sixth Amendment comes into play. In *Glasser v. United States*, the Supreme Court held that the "assistance of counsel" guaranteed by the Sixth Amendment "contemplates that such assistance be untrammeled and unimpaired" by "conflicted counsel."<sup>9</sup> "Stated another way, the Sixth Amendment right to counsel includes the right to effective assistance free of conflicts of interest, and in the case of a single attorney representing multiple defendants, free from conflicting interests among each of the defendants."<sup>10</sup>

Whenever a lawyer represents codefendants, the trial court has a duty to hold a hearing to determine whether a conflict exists and whether the conflict has been waived.<sup>11</sup> Because there is a constitutional right at play, the courts are particularly stringent in determining whether the client gave "informed consent" or "waived" the conflict. At a minimum, the waiver must be made in a knowing, intelligent, and voluntary manner.<sup>12</sup> To provide a valid waiver, the client must be aware of the conflict, realize the consequences to his or her defense if he or she continues with conflicted counsel, and be aware of his or her right to obtain other counsel.<sup>13</sup> It is not enough for a lawyer to warn clients that there are potential conflicts and ask them to waive the conflicts. The lawyer must explain in detail the pitfalls that may arise in the case which would make it desirable for the clients to have separate counsel.<sup>14</sup> All these safeguards are necessary because one cannot waive what one does not know.<sup>15</sup>

So, what does this mean for a lawyer attempting to obtain a conflict waiver from codefendants? First, a general waiver is not sufficient. The waiver must advise the codefendants of much more than the mere possibility of a conflict arising.

Second, the waiver should:

a) identify every actual<sup>16</sup> or potential conflict the lawyer anticipates arising;

b) explain in detail how the conflict affects the lawyer's duty of loyalty, confidentiality, and the attorney-client privilege;

c) explain in detail the advantages and risks involved with joint representation; and

d) be written in easy-to-understand language.

Third, the lawyer should advise the codefendants that they should consult with outside counsel before signing any waiver.<sup>17</sup>

Fourth, if a specific conflict arises during the representation that was not discussed in the waiver, the lawyer should obtain an additional waiver that details all the required information set forth above.

Finally, even if the lawyer has done all the things listed above, some courts may find that certain conflicts cannot be waived because "no rational defendant would knowingly and intelligently desire the attorney's representation."<sup>18</sup>

In summary, the ethical risks are great for a lawyer who chooses to represent criminal codefendants because conflicts of interest are likely to arise and it is almost impossible to obtain a valid waiver of these conflicts. Thus, the most prudent action for a lawyer to take is to turn down such representation. 

## Endnotes

1 Nancy Ripperger is staff counsel to the Office of the Chief Disciplinary Counsel.

2 Comment 1 to Rule 4-1.7.

3 *State v. Risinger*, 546 S.W.2d 563, 565 (Mo. App. S.D. 1977).

4 *Henderson v. State*, 734 S.W.2d 254, 257 (Mo. App. S.D. 1987).

5 Gary Tobias Lowenthal, *Why Representing Multiple Defendants Is A Bad Idea Almost Always*, CRIM. JUST. (Spring 1988).

6 *Id.*

7 *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978).

8 Lowenthal, *Why Representing Multiple Defendants Is A Bad Idea Almost Always*, CRIM. JUST., (Spring 1988).

9 *Glasser v. United States*, 315 U.S. 60, 70 (1942).

10 *Hoffman v. Leake*, 903 F.2d 280, 285 (4th Cir. 1990).

11 *State v. McShane*, 87 S.W.3d 256, 263 (Mo. banc 2002).

12 *Brady v. United States*, 397 U.S. 742, 748, (1970).

13 *United States v. Levine*, 794 F.2d 1203, 1206 (7th Cir. 1986).

14 *In re Clauss*, 711 N.W.2d 1, 3 (Iowa 2006). See also Comment 18 to Rule 4-1.7 (When representing multiple clients in a single matter the attorney must disclose the possible effects on loyalty, confidentiality, and the attorney-client privilege in addition to the advantages and risks involved with joint representation).

15 *Hoffman v. Leake*, 903 F.2d 280, 289 (4th Cir. 1990).

16 An "actual conflict of interest" for Sixth Amendment purposes means a conflict that will affect counsel's performances as opposed to a mere theoretical division of loyalties presented by a "potential conflict of interest." See *DePriest v. State*, 510 S.W.3d 331, 338 (Mo. banc 2017). The distinction becomes important when the courts are considering whether a defendant's claim of ineffective assistance of counsel is valid after a guilty plea. Prejudice to the defendant is presumed following a guilty plea if the defendant's attorney operated under an "actual conflict of interest." *Id.*

17 *State v. McShane*, 87 S.W.3d 256, 263 (Mo. banc 2002).

18 *United States v. Schwartz*, 283 F.3d 76, 95-96 (2nd Cir. 2002).