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Peter F. Vaira

Daniel B. Huyett

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Peter F. Vaira**
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Representation of multiple grand jury witnesses, unless for good cause,[1] must be avoided. Multiple representation not only harms grand jury witnesses,[2] but it impedes grand jury investigations from arriving at the truth[3] and it dishonors the legal profession.[4] Despite the many old saws offered to defend this practice,[5] it is time to call it what it is: an inherent conflict of interest that allows attorneys to keep all parties to a grand jury investigation harmonious and unified in their goal of preventing the return of indictments. What constitutes a conflict and how to resolve it are unfortunately questions that have not been definitively answered by the courts.[6] It is now time

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** United States Attorney, Eastern District of Pennsylvania. B.A. 1959, J.D. 1962, Duquesne University.

*** Assistant United States Attorney, Eastern District of Pennsylvania. B.A. 1972, Denison University; J.D. 1975, Dickinson School of Law.

1. "Good cause" means that no conflict will likely arise from the representation before a grand jury of one or more witnesses who may have differing and adverse interests. *Cf.* FED. R. CRIM. P. 44(c) (effective December 1, 1980). Although Rule 44(c) applies to multiple representation at trial, the rule should also be applied to prevent harms posed by multiple representation in the grand jury setting. *See* note 62 and accompanying text *infra.*

2. *See* notes 12-21 and accompanying text *infra.*

3. *See* note 17 and accompanying text *infra.*

4. *See* notes 12-18, 29-31 and accompanying text *infra.*

5. For example, it has been argued that preventing multiple representation deprives clients of their right to counsel of their choice; it deprives clients of their right to associate for the purpose of retaining legal representation; *e.g., In re* Gopman, 531 F.2d 262, 268 (5th Cir. 1976) (dissent); it deprives attorneys of their right to practice their chosen profession; *In re* Taylor, 567 F.2d 1183, 1189 (2d Cir. 1977); it is financially prohibitive for multiple clients who can obtain less expensive legal counsel for multiple representation; and it deprives clients of experienced legal representation since there are few lawyers experienced in grand jury practice. Tague, Multiple Representation of Targets and Witnesses During a Grand Jury Investigation, 17 AM. CRIM. L. REV. 301, 315-16 (1980).

6. *See* Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense,* 27 U.C.L.A. L. REV. 1, 5 (1979); Tague, *supra* note 5, at 303.

for a rule certain. We propose that unless there is good reason to believe that no conflict of interest is likely to arise, courts should prohibit representation of more than one grand jury witness.[7]

A typical example of how an ethical conflict of interest often arises is as follows. A grand jury investigation is focusing on the conduct of a company and some of its officers and employees. Several of the individuals suspected of being criminally involved are company officers or high level employees. Some of the individuals are targets—putative defendants—of inquiry and others are not. Several of the culpable individuals know of each other's criminal activity, and other nonculpable employees also know of the criminal activities. Beyond this, all owe a loyalty to the organization that employs them.

In any grand jury inquiry involving a complicated financial crime, as in this example, the testimony and cooperation of an insider to the scheme is essential to the investigation.[8] A lawyer has many opportunities to approach the prosecutors at various stages of the investigation with offers of his or her client's cooperation in return for immunity or leniency.[9] Moreover, if the interests of the individual client are to be served by such cooperation, it is the lawyer's ethical duty to strongly urge it, despite the client's initial dislike of giving information against the interests of associates or employers.[10]

When advising one of his clients about cooperating against the interests of the other clients, the lawyer clearly represents clients with differing and adverse interests.[11] The lawyer should advise those who may escape indictment or enter into favorable preindictment plea agreements to cooperate with the government against his culpa-

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7. *See* note 62 and accompanying text *infra.*

8. *See* Moore, *supra* note 6, at 2 & nn.4-9.

9. *See* Tague, *supra* note 5, at 330.

10. In a recent district court decision in which the court disqualified an attorney from representing more than one grand jury client, the court said the following about the advice an attorney gives to a client:

> The apparent willingness or even desire of the non-target client to remain silent, at least at the outset, should not be a factor in assessing the attorney's ability to counsel him or her independently or effectively. A lawyer is often called upon to give a client advice which is unwelcome to the client, and which the client, as a purely personal matter, does not want to hear or follow. But part of a lawyer's duty to a client is to give that advice which, in light of the facts and applicable legal principles, best suits the client's individual interests, even though the client would prefer to be in different circumstances or to be able to follow a more attractive course. The lawyer's duty in this regard can be fulfilled only where the lawyer can advise the client without attention to or concern about the interests of others.

Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162, 167 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980). *See also In re* Investigation Before February 1977, Lynchburg Grand Jury, 563 F.2d 652, 657 (4th Cir. 1977).

11. The lawyer clearly represents clients with adverse interests when his fee is being paid by the company that the lawyer advises one of his clients to cooperate against. *See In re* Grand Jury, 446 F. Supp. 1132, 1136 (N.D. Tex. 1978); *In re* Abrams, 56 N.J. 271, 266 A.2d 275 (1970); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), *aff'd per curiam,* 466 Pa. 187, 352 A.2d 11, *cert. denied,* 423 U.S. 1083 (1976); Moore, *supra* note 6, at 3 n.10.

ble, or more culpable, clients.[12] But to do so would mean advising one client to cooperate against the other clients, thereby harming the others by aiding the government's attempt to indict and convict them.[13] Attempting to escape this ethical bind, the lawyer most likely will advise none of his clients to cooperate.[14] This results in stonewalling, with all the clients asserting their fifth amendment rights not to incriminate themselves[15] and flatly refusing to negotiate cooperation agreements with the prosecutors.[16]

In such situations, the grand jury investigation is delayed and often thwarted,[17] not because of good, ethical counseling where the lawyer protects the best interests of each individual client, but because one client's interests were sacrificed for another's.[18] This frequently occurs when one client can readily negotiate a favorable agreement with the government while another can not. Moreover, when the grand jury investigation is eventually completed and indictments are returned,[19] some clients who once had the opportunity for immunity or leniency end up being indicted. When convictions result from these indictments, some of the lawyer's clients are found guilty when they might have escaped indictment,[20] and others receive stiffer sentences than they could have bargained for at the pre-indictment stage.[21]

Although stonewalling sometimes impedes grand jury investigations, it should not be abolished. If the best defense in an investigation is for everyone to remain uncooperative and silent, and if they

12. *See In re* Investigation Before February, 1977 Lynchburg Grand Jury, 563 F.2d 652, 656 (4th Cir. 1977).

13. *Id.* at 657; *In re* Investigation Before April, 1975 Grand Jury (Washington Post), 531 F.2d 600, 603 n.4 (D.C. Cir. 1976); Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162, 166 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980); *In re* Grand Jury Investigation (Sandler and Janovitz), 436 F. Supp. 818, 821 (W. D. Pa. 1977), *aff'd per curiam,* 576 F.2d 1071 (3d Cir.), (*en banc*), *cert. denied,* 439 U.S. 953 (1978); A.B.A. Code of Professional Responsibility, DR 5-105(A) and (B).

14. Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162, 166 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980).

15. He who asserts the fifth amendment to protect others rather than to protect himself from incrimination does not properly invoke this privilege. *See* Rogers v. United States, 340 U.S. 367 (1951); *In re* Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652, 656 (4th Cir. 1977). To advise the inappropriate assertion of this privilege is obviously unethical. ABA Code of Professional Responsibility, DR 1-102(A)(5), 7-102(A)(7).

16. *See* note 25 *infra.*

17. *See* Tague, *supra* note 5, at 310, 314.

18. A noted criminal defense lawyer characterized the stonewalling situation very well: "To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charybdis of ineffective assistance of counsel." Cole, *Time for a Change: Multiple Representation Should Be Stopped,* 2 NAT'L J. CRIM. DEF. 149, 155 (1976).

19. "[F]ew investigations will terminate without indictments, at least as a result of multiple representation. . . ." Tague, *supra* note 5, at 330.

20. *See* Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162, 166 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980).

21. *See* Tague, *supra* note 5, at 330. "[T]he pre-indictment stage provides the best opportunity for a target to negotiate a favorable settlement." *Id.*

can legally do so,[22] then stonewalling per se should not be a ground for prohibiting multiple representation.[23] Each person involved in a grand jury investigation, however, should get such advice only from an attorney who has that person's best interests at heart, and not from an attorney who represents another client's adverse interests. An attorney representing only one grand jury witness can competently and ethically advise his client of the advantages and disadvantages of either stonewalling or cooperating. But an attorney who represents multiple witnesses who have the capability to cooperate against each other cannot ethically discuss such options, much less recommend one.[24]

Stonewalling, therefore, can be accomplished just as well with each witness represented by a separate lawyer.[25] And if it later becomes advantageous for one witness to break the stonewall, then that party's lawyer can ethically advise him or her to do so without concern for any other clients.

Apart from such glaring ethical predicaments, numerous less obvious problems flow from multiple representation of grand jury witnesses. For example, to competently represent a client, a lawyer must become completely familiar with the facts of the matter under investigation from all the clients he represents.[26] Part of this process requires the lawyer to contact government counsel to attempt to gain as much information as possible about the nature and extent of the grand jury investigation.[27] If, however, this lawyer represents more than one client, the prosecutor will be reluctant to discuss any details of the investigation about any one client for fear that this lawyer will either tell the other clients or use the information for their benefit.[28]

Another common problem is the lawyer's inability to preserve lawyer-client confidentiality.[29] In a situation where there is no stonewalling, the lawyer must measure the relative capability of each

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22. *See* note 15 *supra.*

23. A client who knows of the criminal activity of others has no legal responsibility to cooperate. *See* Moore, *supra* note 6, at 55 n.266.

24. *See* note 13 *supra.*

25. Two commentators opined that multiple representation is the best way to successfully carry out a stonewall defense. *See* Moore, *supra* note 6, at 31-2; Tague, *supra* note 5, at 310-14.

26. ABA Code of Professional Responsibility, E.C. 4-1; ABA Project on Standards Relating to the Administration of Criminal Justice, The Defense Function, §§ 3.1(a), 3.2(a); Smaltz, *Tactical Considerations for Effective Representation During a Government Investigation,* 16 AM. CRIM. L. REV. 383, 387 (1979).

27. *See* Smaltz, *supra* note 26, at 387.

28. *See* Tague, *supra* note 5, at 330.

29. *Compare* ABA Code of Professional Responsibility, Canon 4 *with* Canon 7. *See In re* Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652, 657 (4th Cir. 1977); *In re* Investigation Before April, 1975 Grand Jury (Washington Post), 531 F:2d 600, 603 n.4 (D.C. Cir. 1976); *In re* Grand Jury Proceedings (Buffalino), 428 F. Supp. 273, 277; Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162, 167 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980); Tague, *supra* note 5, at 322 n.92.

client to effectively negotiate with the government. Although the lawyer may technically obtain a waiver of the attorney-client privilege, he undoubtedly will be forced to use the confidential information obtained from one client to benefit another when advising that client of his best course of action and when negotiating on behalf of that client with the government. Not only is this unethical, but it vitiates a knowing and voluntary waiver by the client who would not have waived the attorney-client confidentiality had he known that it would be used to his disadvantage.[30] The lawyer faces the ethical bind of either sharing client confidences and competently representing some of his clients, or maintaining the confidences and incompetently representing all of his clients.[31]

Multiple representation problems do not disappear once indictments are returned. If one of the lawyer's clients is indicted after the grand jury investigation, the lawyer is faced with the continuing problem of not being able to cross-examine any of his non-indicted (and undoubtedly former) clients when they testify on behalf of the government. Otherwise, he would be obligated to use information obtained from the confidential communications of the witness-client.[32] Effective representation of the indicted client is then in jeopardy. Even the former client's consent will not justify using his confidential communications against him on cross-examination.[33]

Despite substantial disagreement among the courts as to how to solve the problems of multiple representation,[34] there are basic and fundamental points of agreement. For example, using the ABA Code of Professional Responsibility as the standard for determining the existence of a conflict,[35] courts have not been hesitant to disqualify attorneys found to be in a conflict situation during representation of grand jury witnesses.[36] Likewise, the government has been found to have standing to move to disqualify a lawyer in such a conflict situation.[37]

Even with agreement on these basic principles, no consensus has emerged to provide guidance for determining a conflict and remedy-

30. *In re* Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652, 657 (4th Cir. 1977).

31. Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162, 167 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980).

32. *See* United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978); United States v. R.M.I. Co., 467 F. Supp. 915, 919-21 (W.D. Pa. 1979).

33. *See* Westinghouse Elec. Corp. v. Gulf Oil Co., 588 F.2d 221, 228 (7th Cir. 1978).

34. *See* note 6 *supra.*

35. *See, e.g.,* United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978); Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162, 167 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980).

36. *See, e.g., In re* Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977).

37. *See, e.g., In re* Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976).

ing the situation once a conflict is identified.[38] Some courts have held that a potential conflict of interest is not enough to disqualify an attorney,[39] while others require an actual conflict.[40] Those courts that agree on the standard for disqualification disagree about the definition of this standard.[41] For example, one court found an actual conflict when a lawyer simply represented a target and a non-target of an investigation in which immunity had not been offered.[42] On the other hand, another court held that there was not even a potential conflict until an offer of immunity had been made.[43]

Furthermore, courts have differed on a client's waiver and its effect, if any, on a conflict of interest. Some have held that an informed waiver by a client will cure a conflict of interest between multiple grand jury witnesses,[44] and others have held that a finding of an actual conflict disqualifies an attorney, notwithstanding the client's waiver.[45] Still other courts have disqualified attorneys despite a waiver by the clients, reasoning that an informed waiver is impossible to obtain.[46]

Three decisions of the Third Circuit Court of Appeals have contributed to this confusion.[47] In *In Re Grand Jury Empaneled January 21, 1975 (Curran),*[48] the court of appeals accepted the soundness of the Pennsylvania Supreme Court's rationale articulated in *Pirillo v. Takiff*:[49] that lawyers should be disqualified when the effectiveness

38. *See* note 6 *supra. See also* Smaltz, *supra* note 26, at 406-08.

39. *See, e.g., In re* Special February, 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); *In re* Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); *In re* Grand Jury, 446 F. Supp. 1132 (N.D. Tex. 1978); *In re* Grand Jury Proceedings (Buffalino), 428 F. Supp. 273 (E.D. Mich. 1976); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied,* 423 U.S. 1083 (1976).

40. *See, e.g.,* Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162 (N.D. Ohio 1979), *appeal dismissed*, 621 F.2d 813 (6th Cir. 1980). *Compare In re* Grand Jury Empaneled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976) *with* United States v. Dolan, 570 F.2d 1177, 1183 n.9 (3d Civ. 1978) *and In re* Grand Jury Investigation (Sandler and Janavitz), 436 F. Supp. 818, 827 (W.D. Pa. 1977), *aff'd per curiam*, 576 F.2d 1071 (3d Cir.), (*en banc*), *cert. denied*, 439 U.S. 953 (1978). *See also In re* Special February, 1977 Grand Jury, 581 F.2d 1262, 1264-65 (7th Cir. 1978) (a disqualification motion may be granted when a potential conflict exists, but is required to be granted when an actual conflict exists).

41. *See In re* Grand Jury, 446 F. Supp. 1132 (N.D. Tex. 1978) (discussion interpreting courts' diverse definitions of actual and potential conflicts).

42. *See* Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162 (N.D. Ohio 1979), *appeal dismissed,* 480 F.2d 813 (6th Cir. 1980).

43. *See In re* Grand Jury Investigation (Sandler and Janavitz), 436 F. Supp. 818 (W.D. Pa. 1977), *aff'd per curiam*, 576 F.2d 1071 (3d Cir.), (*en banc*), *cert. denied*, 439 U.S. 953 (1978).

44. *See, e.g., In re* Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977).

45. *See, e.g., In re* Grand Jury, 446 F. Supp. 1132, 1140 N.D. Tex. 19780.

46. *See, e.g.,* Matter of Investigative Grand Jury Proceedings (Wittenberg), 480 F. Supp. 162 (N.D. Ohio 1979), *appeal dismissed,* 621 F.2d 813 (6th Cir. 1980).

47. *See* United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); *In re* Grand Jury Empaneled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976); *In re* Grand Jury Investigation (Sandler and Janavitz), 436 F. Supp. 618 (W.D. Pa. 1977), *aff'd per curiam*, 576 F.2d 1071 (3d Cir.), (*en banc*), *cert. denied*, 439 U.S. 953 (1978).

48. 536 F.2d 1009 (3d Cir. 1976).

49. 462 Pa. 511, 341 A.2d 896 (1975), *aff'd per curiam,* 466 Pa. 187, 352 A.2d 11, *cert. denied,* 423 U.S. 1083 (1976).

of a grand jury investigation is impeded by multiple representation.[50] The court of appeals, however, reversed the district court's order, which had disqualified the attorney from his multiple representation, because there were insufficient facts of record to demonstrate that the multiple representation actually impeded the grand jury's investigation.[51] Alternatively, the *Curran* court approved the waiver of the conflict by the lawyer's clients.[52]

In *In re Grand Jury (Sandler and Janavitz),*[53] the District Court for the Western District of Pennsylvania disqualified an attorney from representing a witness who had received immunity and an offer of non-prosecution. The court rejected the argument that an attorney should be disqualified because his multiple representation was impeding the grand jury, thus refusing to follow the *Curran* reasoning.[54] Rather, the court interpreted *Curran* as providing a precedent for disqualifying the lawyer involved in multiple representation when an actual conflict was found,[55] despite that the phrase "actual conflict" was not used in the *Curran* decision. The *Sandler and Janavitz* court defined actual conflict to mean that situation in which immunity or non-prosecution had actually been granted to one client.[56] This is contrary to *Curran,* which stated that a conflict may arise upon the mere approach of the lawyer by the prosecutor to discuss immunity and cooperation.[57] The district court further refused to accept and approve the client's waiver of the conflict, reasoning contrary to *Curran*, that it was impossible to knowingly and voluntarily waive the conflict.[58] On appeal, the Court of Appeals for the Third Circuit, sitting en banc, added to the confusion by affirming the lower court decision by an equally divided vote and by issuing a per curiam decision.[59]

The subsequent case of *United States v. Dolan*[60] involved multiple representation of a defendant at trial, but it discussed multiple representation at the grand jury stage. Contrary to *Curran*, but in accord with *Sandler and Janavitz, Dolan* takes a dim view of a waiver of a conflict of interest by the client, because both the public interest in an effective grand jury investigation and the need to en-

50. The *Pirillo* decision was also predicated upon a concern for the breach of ethics by the lawyer who represents multiple grand jury witnesses. 462 Pa. at 525, 341 A.2d at 904-05.
51. 536 F.2d at 1013.
52. 536 F.2d at 1012.
53. 436 F. Supp. 818 (W.D. Pa. 1977), *aff'd per curiam*, 576 F.2d 1071 (3d Cir.), (*en banc*), *cert. denied*, 439 U.S. 953 (1978).
54. *Id.* at 822 n.14.
55. *Id.* at 823 n.17.
56. *Id.*
57. 536 F.2d at 1012-13.
58. 436 F. Supp. at 822.
59. 576 F.2d 1071, 1072 (3d Cir. 1978).
60. 570 F.2d 1177 (3d Cir. 1978).

force lawyers' ethical conduct preclude waivers by witnesses of conflict-free counsel.[61]

All the confusion over what gives rise to a conflict and what to do once the conflict is identified leaves judges, lawyers, and grand jury witnesses with little guidance when faced with multiple representation. There is only one way to sweep away the confusion, and that is to make a rule certain.

A simple and direct solution is to apply Rule 44(c)[62] of the Federal Rules of Criminal Procedure to the grand jury setting. This rule requires the court to inquire into a multiple representation situation and to take appropriate measures unless there is good reason to believe no conflict of interest is likely to arise. Thus, when a lawyer represents more than one client in a grand jury investigation and such representation is challenged, the lawyer must demonstrate during a hearing that no conflict of interest is present or will likely arise. Questions of actual versus potential conflict would not come into play. At such a hearing, the government lawyer would present evidence of the conflict, which can be presented in a variety of ways. For example, the government could present to the judge *in camera* the sworn testimony of grand jury witnesses that outlines the scope of the investigation. The government could also present sworn affidavits by the prosecuting attorney that demonstrate the problems of seeking cooperation because of the conflict of interest. The government could demonstrate by affidavit proof that one of the lawyer's clients has information which might be used against the others.

Although Rule 44(c) allows the defendant to make a knowing and voluntary waiver of separate representation, an attempted waiver by a grand jury witness should be rejected by the court in most cases because persuasive arguments can be made at a Rule 44(c) hearing that any waiver is not knowing or voluntary. For example, since it is the attorney's obligation to avoid a conflict of interest in the first instance,[63] that attorney is presumably advising his client-witnesses that no conflict exists that would preclude his ade-

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61. *Id.* at 1181-1184.

62. Rule 44. Right to and assignment of counsel.

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

Amendments to the Federal Rules of Criminal Procedure, 441 U.S. 989, 999.

63. ABA Code of Professional Responsibility, DR 5-105; ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct (Discussion Draft), Comment, Rule 1.8 (1980).

quately representing them. As Judge Lacey said in *United States v. Garafola,*[64]

> He has already told his clients that there is no conflict in their interests. Thus, when the defendants answer the court's inquiry, they actually are relying on advice received from their lawyer. If he tells them there is no conflict and that he can effectively represent them, how can their responses to the court be deemed to amount to a *Johnson v. Zerbst* [304 U.S. 458 (1938)] [knowing and voluntary] waiver of their sixth amendment right to effective aid of counsel?

Furthermore, the relationships between multiple clients often prevent a voluntary waiver. For example, clients frequently have strong employment, business, or financial relationships. During an investigation of an employer, where one lawyer represents both the employer and employee, a waiver of separate representation by an employee is purely illusory. The reason for the employee-witness's attempted waiver is not because he truly believes that the lawyer can give sound advice, but because he does not want to antagonize his employer. At least one district court has held that a waiver by an employee under such circumstances is void because the witness is incapable of waiver by virtue of his employment.[65]

The unpredictable course of a grand jury investigation further makes it impossible for a client to make an intelligent and knowing waiver. Neither the court nor defense attorneys can foresee how a client's status will change during a grand jury investigation.[66] As the investigation progresses to indictment, a client may miss opportunities to mitigate his difficulties. Any waiver under such circumstances is by definition unknowing and invalid.

Equally important is the public's right to an effectively functioning grand jury. Courts have recognized that this important right should not be circumvented by a waiver of the witness's right to conflict-free counsel.[67] This principle was clearly articulated by the Third Circuit Court of Appeals in *United States v. Dolan:*[68]

> Although it may be true that these four witnesses may waive their sixth amendment right to effective assistance of counsel, they cannot at the same time waive the right of the public to an effec-

64. 428 F. Supp. 621, 624 (D.N.J. 1977), *aff'd sub nom.*, United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).

65. *In re* Grand Jury Investigation (Sandler and Janavitz), 436 F. Supp. 818 (W.D. Pa. 1977), *aff'd per curiam*, 576 F.2d 1071 (3d Cir.), (*en banc*), *cert. denied*, 439 U.S. 953 (1978). *See* Moore, *supra* note 6, at 91-92.

66. "In doubtful situations or where the course of the proceeding cannot be clearly foreseen, the question of conflict should be resolved in favor of separate representation." ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct (Discussion Draft), Comment, Rule 1.8 at 29 (1980).

67. *See, e.g., In re* Grand Jury, 446 F. Supp. 1132, 1140 (N.D. Tex. 1978); *In re* Grand Jury Proceedings (Buffalino), 428 F. Supp. 273, 278 (E.D. Mich. 1976).

68. 570 F.2d 1177, 1182 (3d Cir. 1978) (quoting *In re* Grand Jury Proceedings, 428 F. Supp. 273, 278 (E.D. Mich. 1976)).

> tive functioning grand jury investigation . . . . It would seem to this court that the public has an overriding interest to see that the grand jury investigation in this matter be allowed to uncover the truth free of any potential obstructions arising from a conflict of interest in multiple representation.

The only way out of this confusing morass is to apply Rule 44(c) to challenges to representation by lawyers of more than one grand jury witness. Such a procedure would go a long way toward alleviating the ethical and practical problems of multiple representation. The courts would be relieved of the troublesome task of balancing the witnesses' right of counsel with the public's right to a functioning grand jury; the role of the attorney will be well defined; and the efficient functioning of the grand jury will be protected.