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Attorney Disqualification at the Grand Jury

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difficult statutory evaluation rule, the Court has created a standard leading to judicial waste and possible injustice, while a further recognition of the discretionary power of the federal judges would allow for "judicial economy, convenience, and fairness to the litigants."

Guy Holdridge

ATTORNEY DISQUALIFICATION AT THE GRAND JURY

The novel question of disqualifying an attorney for conflict of interest at the grand jury stage of a prosecution has been addressed in three recent cases, *Pirillo v. Takiff,*[1] *In re Investigation Before the April 1975 Grand Jury,*[2] and *In re Gopman.*[3] The courts expressed particular concern that conflict-laden representation would obstruct the free flow of information to the grand jury by encouraging a "stonewall" of silence. The reasoning is that a "stonewall" might develop as a result of an attorney's simultaneously representing a number of grand jury witnesses and potential defendants since the attorney's interest in defending one client prevents him from counseling another client to testify freely or to seek immunity in exchange for testimony. Thus a conspiracy of silence is created, particularly when one attorney represents all of the witnesses called before the grand jury. Non-disclosure is also encouraged when an attorney represents an outside institutional body which has an interest in halting the investigation while he simultaneously represents a witness before the grand jury.[4]

1. 462 Pa. 511, 341 A. 2d 896 (1975), *cert. denied*, 423 U.S. 1083 (1976).

2. 403 F. Supp. 1176 (D.D.C. 1975), *vacated,* 531 F.2d 600 (D.C. Cir. 1976).

3. 531 F.2d 262 (5th Cir. 1976).

4. Although Rule 6(d) of the Federal Rules of Criminal Procedure precludes an attorney from being present when his client testifies before the grand jury, a witness may confer with his attorney before and after giving testimony. A common practice is to allow the witness to leave the grand jury room and speak with his attorney when he is unsure as to how to answer a question. In *United States v. Mandujano,* 425 U.S. 564, 581 (1976), the court seemingly ratified this procedure stating, "Respondent was also informed that if he desired he could have the assistance of counsel but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law."

For circuit court approval of allowing witnesses to confer with their attorneys outside the grand jury room see United States v. George, 444 F.2d 310 (6th Cir. 1971); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971); Perrone v. United States, 416 F.2d 464 (2d Cir. 1969).

The latter concern provided impetus for the disqualification ordered in *Pirillo*. A dozen policemen called as witnesses and potential defendants before a special grand jury investigating corruption in the Philadelphia Police Department were represented by an attorney who had for some time been employed by the Fraternal Order of Police, an organization that had openly and vigorously opposed the investigation. The court disqualified the attorney, reasoning that his outside interest for non-disclosure unduly encouraged a refusal to testify among the witnesses he represented, thereby blunting the grand jury's investigative function.[5]

An attorney's multiple representation of members of a union prompted disqualification in *In re Investigation.*[6] Following a decision to strike, pressmen working at the *Washington Post* inflicted extensive damage on the newspaper pressroom. The twenty-one pressmen called before the grand jury all were represented by one attorney who was hired by the union's law firm. Nineteen claimed the fifth amendment privilege when questioned about the events at the *Post*; the other two testified they had seen nothing. Although the district court noted that there was a conflict of interest problem in the union's paying the attorney's fees,[7] its disqualification order was based squarely on the conflict created by multiple representation of witnesses and the resultant obstruction of the grand jury's investigative function.[8] On appeal, the decision was vacated as premature and remanded for the court to interview the witnesses more thoroughly in order to provide a factual basis for the prosecution to apply the more traditional remedy of selective grants of immunity.[9]

In *Gopman,* three labor union officials called as witnesses before a grand jury investigating breach of fiduciary duties by another union official were represented by a union attorney. Although nominally not

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Although the Supreme Court has held that a witness does not have a constitutional right to an attorney before the grand jury, *In re Groban,* 352 U.S. 330, 333 (1957), Leonard B. Boudin argues persuasively that in light of the extension of the right to counsel in *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Miranda v. Arizona,* 384 U.S. 436 (1966), a witness who is a de facto defendant should have the right to have counsel with him before the grand jury. Boudin, *The Federal Grand Jury,* 61 GEO. L.J. 1, 15-19 (1972). For the proposition that a witness should have the right to an attorney at the grand jury see Sheridan v. Garrison, 273 F. Supp. 673 (E.D. La. 1967), *rev'd,* 415 F.2d 699 (5th Cir. 1969), *cert. denied,* 396 U.S. 1040 (1970).

5. 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied,* 423 U.S. 1083 (1976).
6. 403 F. Supp. 1176 (D.D.C. 1975), *vacated,* 531 F.2d 600 (D.C. Cir. 1976).
7. *Id.* at 1179.
8. *Id.* at 1182.
9. 531 F.2d 600 (D.C. Cir. 1976).

targets of the investigation, the three witnesses were subject to criminal penalties if they had improperly kept records sought by the grand jury. All claimed the fifth amendment privilege and refused to produce the records. Although it is unclear from the opinion precisely on what basis the decision was reached, the court disqualified the attorney stating that "the public interest in a properly functioning judicial system must be allowed to prevail . . . ."[10]

Courts are vested with the authority to disqualify attorneys,[11] but the exercise of that authority has constitutional implications[12] most notably in depriving a party of the counsel of his choice. The sixth amendment right of counsel does not extend an unlimited right to attorney of choice. For example, indigents who have an attorney appointed for them by the court have a right to "competent counsel," not to the attorney of their particular choosing.[13] Additionally, in the interests of proceeding with trial, courts have refused a defendant's belated request for change of counsel where the defendant was deemed to have had sufficient opportunity to select a lawyer to his liking.[14] In the recent case of *Faretta v. California,*[15] the Supreme Court reversed a conviction because the defendant had not been allowed to represent himself. This recognition by the court that an accused is master of his own defense with the power to control decisions relevant thereto might be argued as a basis for allowing a defendant more privilege in selecting a particular attorney. However, the classic statement of the limited right to counsel of preference is found in *Powell v. Alabama,*[16] in

10. 531 F.2d 262, 268 (5th Cir. 1976).

11. Theard v. United States, 354 U.S. 278 (1957); Flaska v. Little River Marine Constr. Co., 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968). *See* 28 U.S.C. §§ 1654, 2071 (1970).

12. In addition to the sixth amendment right discussed in the text at notes 13-15, *infra*, parties engaged in a cooperative defense, as in the instant cases, may have a first amendment right to associate for the purpose of retaining counsel. *See* United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971); UMW v. Illinois State Bar Ass'n., 389 U.S. 217 (1967); Brotherhood of Ry. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). For a positive statement of the right to an attorney of choice see United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972).

13. United States *ex rel.* Reid v. Richmond, 197 F. Supp. 125, 126 (D.D.C. 1960), *rev'd on other grounds*, 295 F.2d 83 (2d Cir.), *cert. denied*, 368 U.S. 948 (1961).

14. *E.g.*, United States *ex rel.* Carey v. Rundle, 409 F.2d 1210, 1214 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

15. 422 U.S. 806 (1975).

16. 287 U.S. 45 (1932).

which defendants were said to have only "a fair opportunity to use counsel of choice."[17]

In practice, despite these constitutional repercussions, disqualification at all stages of criminal proceedings has been left largely to judicial discretion.[18] In *United States v. Dinitz*,[19] the Fifth Circuit, sitting en banc, recently reaffirmed that the scope of review for a disqualification order is limited to "abuse of discretion."[20] In that case, one of the defendant's attorneys was disqualified for including remarks in his opening statement that the trial judge repeatedly warned him not to make. The Fifth Circuit, in upholding the disqualification, stated its policy clearly: "[T]he Sixth Amendment's right to *choice* of counsel merely informs judicial discretion—it does not displace it."[21]

When exercising that discretion, trial courts' disqualification orders have largely reflected a concern for clients' rights and have been invoked mainly[22] to protect the person being represented[23] or a prior client's

17. *Id.* at 53.

18. *E.g., Ex parte* Burr, 22 U.S. (9 Wheat.) 529 (1824); W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976); Richardson v. Hamilton Int'l. Corp., 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). For a case where discretion was held to be abused see Gas-A-Tron v. Union Oil Co., 534 F.2d 1322 (9th Cir. 1976).

19. 538 F.2d 1214 (5th Cir. 1976).

20. *Id.* at 1224.

21. *Id.* at 1219. *But cf. In re* Evans, 524 F.2d 1004 (5th Cir. 1975) (court held that for pro hac vice appearances, failure to admit an attorney must be based on a complaint justifying disbarment).

22. Disqualifications have also been ordered to protect the integrity of the judicial system. In a confusing line of cases, disqualifications have been based on "nipping a conflict in the bud." Tucker v. Shaw, 378 F.2d 304, 307 (2d Cir. 1967). *See, e.g.*, International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 257 (D.D.C. 1965). *But cf.* Yablonski v. UMWA 24945, 448 F.2d 1175, 1177 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (court said it was proper for an attorney to represent potentially conflicting interests for six months in order to "ascertain the exact nature of the lawsuit and protect the interests of all defendants. . . .").

Additionally, courts have ordered disqualification "to avoid even the appearance of impropriety," *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973). Canon 9 of the ABA Code of Professional Responsibility cautions, "A lawyer should avoid even the appearance of professional impropriety." Regarding the increased use of Canon 9 to disqualify attorneys in the Federal Second Circuit see Note, 25 CATH. U. L. REV. 343, 343-63 (1976).

On this matter a leading ethics scholar has noted, "Also, even where all parties agree, the appearance of a lawyer on both sides of the same controversy, particularly in cases of some notoriety, will often give an impression to the public which is most unfortunate for the reputation of the bar, and which of itself should be decisive. . . ." H. DRINKER, LEGAL ETHICS 105 (1953).

confidences.[24] Trial courts have been alert to ensure that a defendant receives representation that is not constitutionally deficient because of conflicts of interest.[25] The right to a conflict-free attorney may be waived,[26] but only after the court has assured itself that the waiver was made knowingly and intelligently.[27] A thorough questioning of the defendant may be in order in this regard, since the defendant might not be fully aware of the effect his attorney's conflict has on the possibilities for a plea bargain or a grant of immunity for his testimony.[28]

Since the ability to foresee future events and the sense of decorum of judges vary from court to court, disqualification on the two above discussed bases is not subject to any easily discernible rules.

23. *E.g.*, Glasser v. United States, 315 U.S. 60 (1942).

24. *E.g.*, Richardson v. Hamilton Int'l. Corp., 469 F.2d 1382 (3d Cir. 1972). Canon 4 of the ABA Code of Professional Responsibility says, "A lawyer should preserve the confidences and secrets of a client." An attorney representing a party opposing a former client, may find himself afoul of this provision. The degree of involvement with the prior client, the time that has lapsed since the representation, the nature of the present action and other factors make the determination of a violation of Canon 4 a controvertible issue.

25. *See* Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of [undivided] counsel is too fundamental and absolute to indulge in nice calculations as to the amount of prejudice arising from its denial.").

26. *E.g.*, United States v. Swanson, 509 F.2d 1205 (8th Cir. 1975).

27. *See* Johnson v. Zerbst, 394 U.S. 458, 464 (1938).

28. *See e.g.*, United States v. Garcia, 517 F.2d 272, 273-74 (5th Cir. 1975). In *Pirillo*, 462 Pa. 511, 341 A.2d 896, 901-02 (1975), the Pennsylvania Supreme Court discussed the difficulties of waiving the right to conflict-free representation but avoided ruling on whether a proper waiver was made. The D.C. Circuit Court of Appeals, in remanding for further interviewing of the witnesses, in *In re Investigation*, 531 F.2d 600, 607 (D.D.C. 1976), questioned whether the witnesses had actually waived their right to a conflict-free attorney.

Ethical Consideration 5-16 of the ABA Code of Professional Responsibility says in part, "Thus before a lawyer may represent multiple clients he should fully explain to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of his clients of those circumstances."

Even if a client knows of the outside interest of his attorney, a full explanation should not be lightly inferred as the subtleties of grants of immunity, contempt for improperly invoking the fifth amendment, and other possible developments in the criminal justice system are not easily understood by the layman. In *United States v. Liddy*, 348 F. Supp. 198, 200 (D.D.C. 1972), the court noted that "In situations where more than one defendant is represented by the same attorney, however, the court cannot simply assume that such arrangement is in accord with the desire of each defendant. Because one may accept dual or multiple representation without comprehending that his interests conflict with those of his co-defendants or without being aware of his right to demand individual representation, it is the court's duty to satisfy itself that the choice is intelligently made and that conflicts are not likely."

There does not appear to be much concern that conflict-laden representation may obstruct either the truth-seeking function of the trial or the prosecutor's role in developing his case against defendant. For example, in *United States v. Garcia,*[29] where a number of policemen were charged with corruption, the district court allowed a defendant to hire as counsel the attorney who represented six other defendants at the trial and fifteen unindicted policemen who had testified at the grand jury which had indicted the defendant. The Fifth Circuit concluded that despite the conflicts of interest the defendant *could* waive his right to a conflict-free attorney and remanded for a determination of whether an intelligent waiver had been made.[30] Significantly, no mention was made of the effect that the multiple representation had on the government's ability to marshal the most truthful and convincing case against the defendant.[31]

In contrast, in the three grand jury conflict of interest cases discussed previously,[32] disqualification was not based on the protection of witness-clients' rights. Rather, the public interest in the effective functioning of the grand jury as an investigative body was the reason most emphasized to justify the disqualification orders.[33] This emphasis is not surprising since

29. 517 F.2d 272 (5th Cir. 1975).

30. *Id.* at 273-74.

31. The problem of multiple representation has also arisen in the context of administrative proceedings. In *SEC v. Csapo,* 533 F.2d 7 (D.C. Cir. 1976), the D.C. Circuit rejected an S.E.C. disqualification of an attorney who represented a number of witnesses called before the Commission in a probe of illegal insider trading. A single firm represented four of the principal targets; in addition, other officers of the corporation being investigated testified that they had been approached to hire the same firm in order to present a "common front." *Id.* at 9-10. The court held there was no "concrete evidence" that the investigative function of the hearing had been obstructed, *id.* at 11, and that in any case "such [multiple] representation may facilitate and expedite the proceedings." *Id.* at 11-12.

For an instance where an attorney disqualification was upheld based on conflict of interest disrupting the investigative function of an administrative hearing, see Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952) (attorney for taxpayer not allowed to represent secretary-bookkeeper in the IRS probe of the taxpayer). *Contra,* Backer v. CIR, 275 F.2d 141 (5th Cir. 1960). A distinguishing factor in *Torras* is that the secretary was just a witness and not in as great need for a particular attorney. The converse of this argument was used in *SEC v. Higashi,* 359 F.2d 550 (9th Cir. 1966), to overturn an attorney disqualification where the client-witness was a potential defendant.

32. Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied,* 423 U.S. 1083 (1976); *In re* Investigation, 403 F. Supp. 1176 (D.D.C. 1975), *vacated,* 531 F.2d 600 (D.C. Cir. 1976); *In re* Gopman, 531 F.2d 262 (5th Cir. 1976).

33. In *Pirillo v. Takiff,* 462 Pa. 511, 341 A.2d 896, 905 (1975), the Supreme Court of Pennsylvania noted that the court supervising a grand jury "must be alert to prevent as far as possible any abridgement of the body's function which is to

courts have increasingly stressed the investigative function of the grand jury over its historical role as a protection for the accused against unjust prosecution.[34] For example, in *United States v. Calandra,*[35] the Supreme Court noted that the grand jury served for centuries as a "protector of citizens against arbitrary and oppressive governmental action,"[36] but went on to conclude that "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."[37]

Determining whether the investigative function of a grand jury has been subverted is not always an easy task. Courts should carefully analyze the actual effect the representation of an outside institutional interest or multiple representation of witnesses has on the grand jury. In *Pirillo* and *In Re Investigation* the attorneys' outside interests clearly militated against testimony by the grand jury witnesses. In *Pirillo* the Fraternal Order of Police organization that paid the witnesses' attorney had openly stated its opposition to the investigation. The attorney had personally been involved in efforts to block the probe. In *In re Investigation* the union that hired the witnesses' attorney faced a $15 million civil suit for the incident at the *Post*. In these two situations, the lawyers were not free to advise a witness to testify or to seek immunity, and since they represented all of the witnesses before the grand jury, a "stonewall" was encouraged.

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investigate public wrongs and bring indictments for the protection of society." At trial in *In re Investigation,* 403 F. Supp. 1176, 1180 (D.D.C. 1975), the district court concluded that "the public interest in the effective functioning of the grand jury compels the conclusion that . . . [no] single attorney can continue to represent all pressmen called as witnesses before the grand jury."

Although the basis of the opinion in *In re Gopman,* 531 F.2d 262, 268 (5th Cir. 1976), is far from clear, the court did note that "the public interest in a properly functioning judicial system must be allowed to prevail. . . ."

34. *E.g.,* United States v. Calandra, 414 U.S. 338 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972); Kastigar v. United States, 406 U.S. 441 (1972); Costello v. United States, 350 U.S. 359 (1956).

Leonard B. Boudin complains that the grand jury's "traditional role . . . as the arbiter of government prosecution has been eroded by recent government practice and Supreme Court decisions to a status as merely another weapon in the government's fact-finding arsenal." Boudin, *supra* note 4.

Matthew Zwerling points out that it was the view of the grand jury as a protector of individual liberties — brought home by the popular refusals of grand juries to indict the Earl of Shaftesbury in England in 1681 and initially not to indict Peter Zenger in America in 1735 — that led the founding fathers to enshrine the grand jury in the fifth amendment. Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege,* 27 HASTINGS L.J. 1263 (1976).

35. 414 U.S. 338 (1974).

36. *Id.* at 343.

37. *Id.* at 344.

In *Gopman*,[38] however, the outside interest of the union members (and at least theoretically, of the union) was in favor of disclosure of its record-keepers' activities. A chief purpose of the Landrum-Griffin Act[39] under which the investigation was brought is to give union members access to the financial records of their union. In this case, then, the outside interest of the witnesses' attorney did not subvert the investigative purpose of the grand jury; rather, it encouraged disclosure.[40] If in fact the union attorney's allegiance rests with union officers rather than members, then there is no outside conflicting interest when he represents the officers before the grand jury. Although not articulated by the majority, disqualification in *Gopman* may be justified on the conflicts engendered by one attorney's representing three key witnesses. Attorney Gopman could not advise one of his clients to testify, even if innocent, if the testimony would incriminate one of the other witnesses/potential defendants because the other witness was also his client.

The district court in *In re Investigation* based its holding on the problem of representation of multiple witnesses. The appellate court, although vacating the order, noted its approval of the reasoning that representation of several witnesses before a grand jury involves inherent conflicts of interest.[41] *Pirillo* also noted this problem but studiously avoided holding that representation of several witnesses before a grand jury was per se a conflict of interest. The disqualification order nonetheless required each witness to be represented by a separate attorney.[42]

Prohibiting multiple representation at the grand jury is a harsh remedy and disruptive of common practice. However, the logic of the subversion of function argument leads to such a conclusion, particularly where the witnesses sharing a common attorney are potential targets and there are few other witnesses available to supply the needed information to the grand jury.

Attorney disqualification to preserve the investigative function of the grand jury should be invoked only in extreme circumstances. The failure to analyze the actual effect of the conflict on the grand jury function as in *Gopman* is to be avoided. The constitutionally related right to attorney of

38. 531 F.2d 262 (5th Cir. 1976).

39. Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) 29 U.S.C. §§ 401 *et seq.* (1970).

40. *See In re* Gopman, 531 F.2d 262, 268-69 (5th Cir. 1976) (Clark, J., dissenting).

41. 531 F.2d 600, 603 n.4 (D.C. Cir. 1976).

42. 462 Pa. 511, 341 A.2d 896, 906 (1975), *cert. denied*, 423 U.S. 1083 (1976).

choice and the historical purpose of the grand jury as a shield and not an unlimited prosecutorial tool should be weighed before disqualification is ordered. A witness's apparent waiver of his right to a conflict-free attorney, however, should be carefully scrutinized as the potential conflicts in multiple representation in the context of criminal prosecutions are numerous and sometimes subtle, making a knowing and intelligent waiver difficult.

Robert Bruce Macmurdo

MATERIALITY UNDER THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES ACTS: HOW MUCH DISCLOSURE?

A minority shareholder in an acquired corporation sought damages, restitution, and other equitable relief under the Securities Exchange Act of 1934, and rules promulgated thereunder, alleging that the joint proxy statement issued by the boards of directors of both corporations soliciting approval of the acquisition was incomplete and misleading in that it omitted certain material facts.[1] The trial court denied plaintiff's motion for partial summary judgment on the liability question.[2] The Court of Appeals reversed in part, granting plaintiff's motion for summary judgment under Section 14(a) of the Securities Exchange Act of 1934,[3] and rule 14a-9,[4] finding that certain facts omitted from the proxy statement were material as a matter of law.[5] The Supreme Court granted writs[6] to review the

1. The plaintiff claimed violations of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78N(a) (1934) and rules 14a-3 and 14a-9, promulgated thereunder, 17 C.F.R. §§ 240.14a-3, 240.14a-9 (1975). The basis of the rule 14a-3 claim was the averment that the statement did not disclose that the transfer of certain stock to National (the acquiring corporation) had given National control of *TSC* (the acquired corporation). The rule 14a-9 complaint alleged omission by TSC and National of certain material facts relating to the degree of National's control over TSC and the favorability of the terms of the proposal to the TSC shareholders. 96 S. Ct. 2126, 2129-30 (1976). The petition also claimed violation of rule 10b-5, 17 C.F.R. § 240.10b-5 (1976). This claim was not before the Court.

2. 361 F. Supp. 108 (N.D. Ill. 1973).

3. 15 U.S.C. § 78n(a) (1934).

4. 17 C.F.R. § 240.14a-9 (1976).

5. Northway, Inc. v. TSC Indus., Inc., 512 F.2d 324 (7th Cir. 1975). The court also affirmed the denial by the lower court of the plaintiff's motion for summary judgment on the rule 14a-3 question and the defendant Schmidt's cross-motion for summary judgment on the 10b-5 question. No appeal was taken on these questions.

6. 423 U.S. 820 (1975).