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# Criminal Law—Guidelines Adopted Concerning Joint Representation of Multiple Defendants—State v. Olsen, 258 N.W.2d 898 (Minn. 1977)

define the requirement allows the court in the future to impose a high threshold of impairment before finding the defects constitute substantial impairment in a given situation.

If the court had this in mind, the elevation of the substantial impairment requirement is unfortunate. Under such a standard, fewer buyers may be able to revoke in the future because of their inability to establish the existence of both major and minor defects in the defective product. On the other hand, the likelihood that more than a handful of buyers will be denied a remedy due to the insolvency of the immediate dealer is minimal. Therefore, maintenance of the privity requirement might have been less inequitable than increasing the threshold of substantial impairment.

The impact of the *Durfee* decision on future attempts by buyers to revoke acceptance under section 2-608 of the U.C.C. is uncertain. The decision of the Minnesota court to disregard the privity requirement, at least when the immediate seller of the defective product is insolvent, is a reasoned one that does no more than rightfully assure consumers that they will not be unjustifiably burdened with defective products. By its decision, the court also recognizes the nature of the relationship between sellers and other parties higher in the sales chain of distribution and places the risk of loss from a defective product on those parties—be they distributors or manufacturers—who benefit, rather than upon innocent buyers. But the court should set forth a standard of what is necessary to establish substantial impairment. Doing so will benefit buyers and sellers alike, as well as the Minnesota trial courts, all of whom must struggle with the application of the substantial impairment requirement until the supreme court finally resolves the issue. When the court is afforded the opportunity, it should reach a decision that recognizes the practical reality that products requiring constant repair are essentially worthless to the consumer.

**Criminal Law**—GUIDELINES ADOPTED CONCERNING JOINT REPRESENTATION OF MULTIPLE DEFENDANTS—*State v. Olsen*, 258 N.W.2d 898 (Minn. 1977).

The Minnesota Supreme Court has long expressed disfavor with the practice of a single attorney representing multiple defendants in a criminal proceeding.[1] The basis for this view is the strong possibility of a

constitute substantial impairment; however, in combination with the frequent stalling of the Saab, plaintiff has shown substantial impairment." 262 N.W.2d at 354 (emphasis added). *See* notes 19-28 *supra* and accompanying text.

1. *See, e.g.*, State v. Olsen, 258 N.W.2d 898 (Minn. 1977); State v. Taylor, 305 Minn. 558, 561, 234 N.W.2d 586, 588 (1975) (per curiam) (reiterating strong disapproval of joint

conflict of interest arising,[2] coupled with the consequent diminished effectiveness of each defendant's legal representation.[3] Deprivation of "effective" assistance of counsel is recognized as a violation of both the United States[4] and Minnesota[5] constitutions. In *State v. Olsen*,[6] the Minnesota court commented again on the issue of joint representation of multiple criminal defendants and, in forceful language, adopted standards designed to protect the constitutional right of jointly represented codefendants to fair and effective counsel.

In *Olsen*, the defendants, Olsen and Kassube, were tried jointly by a jury and convicted of aggravated arson and conspiracy to commit arson.[7] Both defendants were represented by the same attorney.[8] Following de-

representation); State v. Wilson, 294 Minn. 501, 502, 200 N.W.2d 185, 187 (1972) (per curiam) (indicating "strong disapproval of dual representation"); State v. Robinson, 271 Minn. 477, 481, 136 N.W.2d 401, 405 (better practice to appoint separate counsel for each defendant in a joint trial), *cert. denied*, 382 U.S. 948 (1965).

2. When one attorney represents the interests of two or more codefendants, their interests may become "conflicting, inconsistent, diverse, or otherwise discordant," according to MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14. One commentator has remarked:

> [T]he attorney is placed in the untenable position of having to divide his loyalties between the competing interests of his clients. In such situations one or all of the clients may suffer because the judgment of the lawyer with regard to one client may not be in the best interests of the other.

Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 315 (1977).

3. *See* notes 27-30 *infra* and accompanying text. Conflict and resulting diminished effectiveness of counsel can occur at any time in the criminal proceeding. *See* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 125-40 (1978).

4. The sixth amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. CONST. amend. VI. The United States Supreme Court decided that this provision contemplates "effective" assistance of counsel in Powell v. Alabama, 287 U.S. 45 (1932).

5. Although the Minnesota Constitution includes a representation clause analogous to that of the United States Constitution, *compare* MINN. CONST. art. 1, § 6 *with* U.S. CONST. amend. VI, the Minnesota Supreme Court has relied instead on the fourteenth amendment of the United States Constitution and article one, section seven of the Minnesota Constitution as authority for the proposition that the Minnesota criminal defendant's right to counsel contemplates "effective" counsel. *See* State v. Fields, 279 Minn. 374, 377, 157 N.W.2d 61, 63 (1968) ("effective" assistance of counsel mandated by fourteenth amendment); State v. Waldron, 273 Minn. 57, 65, 139 N.W.2d 785, 792 (1966) (due process contemplates effective assistance of counsel).

6. 258 N.W.2d 898 (Minn. 1977).

7. *Id.* at 900. Kassube conspired with Olsen to set fire to Kassube's home in order to collect on an insurance policy. Olsen's accomplice, Gerald Johnson, died while attempting to set the house on fire. *Id.*

8. *See id.* at 904. The court in *Olsen* does not mention whether counsel was appointed or retained, although because of the paramount nature of the rights involved, probably no distinction should be made. *See, e.g.*, United States v. Lawriw, 568 F.2d 98, 101 (8th Cir. 1977) (applying rule equally to both appointed and retained counsel), *cert. denied*,

nial by the trial court of Olsen's petition for post-conviction relief,[9] Olsen appealed[10] and the supreme court reversed and remanded the case for a new trial. Olsen's conviction was reversed because the trial court had failed to comply with the then pertinent statute,[11] which required separate trials for two or more codefendants unless a joint trial was ordered by the trial court upon written motion by the prosecution.[12] The prosecution had failed to make a written motion for joint trial, a failure viewed by the supreme court as reversible error.[13] This error was compounded by the failure of the trial court to instruct Olsen of his right to a separate trial until the second day of the trial, which deprived him of the ability to meaningfully waive this right.[14] Although the basis for the

435 U.S. 969 (1978); United States v. Valenzuela, 521 F.2d 414, 416 (8th Cir. 1975) (same standard of prejudice applies to retained counsel), *cert. denied*, 424 U.S. 916 (1976); Lollar v. United States, 376 F.2d 243, 246 (D.C. Cir. 1967) (risk and disabilities inherent in joint representation present whether counsel appointed or retained). However, a distinction between retained and appointed counsel might have significance. *See* United States v. Huntley, 535 F.2d 1400, 1406 (5th Cir. 1976) (court's disposition of the case made it unnecessary to consider what represented a waiver of the right to effective assistance of counsel in the context of joint representation by retained counsel), *cert. denied*, 430 U.S. 929 (1977); Foxworth v. Wainright, 516 F.2d 1072, 1076 n.4 (5th Cir. 1975) ("Joint representation by retained counsel is a different question entirely.").

9. 258 N.W.2d at 900. At the end of trial, Olsen moved for judgment notwithstanding the verdict and a new trial. Upon denial of this motion by the trial court, Olsen appealed. The supreme court remanded the case for post-conviction proceedings. These proceedings concerned alleged recantation of testimony by a witness for the state. *See id.* at 903.

10. Four separate grounds for reversal were presented by Olsen. The supreme court rejected his first three arguments on the following grounds: first, the evidence was sufficient to sustain the verdict; second, Olsen was not denied due process of law on account of a reference to codefendant made by the trial court to the jury because Olsen made no timely objection; and third, a new trial was not warranted on the basis of recanted testimony because the recantation was not sufficient to constitute error. *See id.* at 901-03.

11. The statute provided:

> When two or more defendants shall be jointly indicted or informed against for a felony, they shall be tried separately, provided, however, upon written motion, the court, in the interest of justice and not related to time or economy may order joint trial for any two or more said defendants. In cases other than felonies, defendants jointly indicted or informed against may be tried jointly or separately, in the discretion of the court. In all cases any one or more of said defendants may be convicted or acquitted.

Act of May 27, 1969, ch. 801, § 1, 1969 Minn. Laws 1477 (superseded by MINN. R. CRIM. P. 17.03, subd. 2(1)).

12. *See* 258 N.W.2d at 904. Prior to 1969, the statute read in part as follows: "When two or more defendants shall be jointly indicted for a felony, any defendant who shall require it shall be tried separately." Revised Laws of Minn. § 5360 (1904). This language was interpreted as giving the defendant an absolute right to a separate trial. *See, e.g.*, State v. Robinson, 271 Minn. 477, 136 N.W.2d 401, *cert. denied*, 382 U.S. 948 (1965); State v. Martineau, 257 Minn. 334, 101 N.W.2d 410 (1960).

13. *See* 258 N.W.2d at 903.

14. *See id.* The right to separate trial in Minnesota may be waived under certain circumstances. *See, e.g.*, State v. Duncan, ___ Minn. ___, ___, 250 N.W.2d 189, 198 (1977) (consent of defendant to joint trial); State v. Bergland, 294 Minn. 558, 559, 202

reversal in *Olsen* was the error committed by the trial court in applying the separate trial statute, the related issue of joint representation of criminal defendants by the same counsel also was considered by the supreme court.[15]

Joint representation of criminal codefendants by the same attorney has long been viewed as constituting a possible violation of the criminal defendant's sixth amendment right to fair and effective counsel. This view was first espoused by the United States Supreme Court in *Glasser v. United States*,[16] in which the Court, focusing on the threat of conflicts of interest arising from joint representation,[17] interpreted the sixth amendment right to mean assistance "untrammeled and unimpaired" by conflicting duties and loyalties.[18] Although courts generally have endorsed the *Glasser* view that the sixth amendment might be violated by joint representation of criminal defendants, they have differed in their approach to appeals based on such claims.[19] In Minnesota prior to *Olsen*, a defendant was required to establish actual prejudice in order to sustain a claim of a constitutional violation.[20] Other courts have held that conflict alone or the substantial possibility of conflict sufficiently establishes a sixth amendment violation,[21] while yet other courts have re-

N.W.2d 223, 224 (1972) (per curiam) (same). In this case, Olsen, who was not even informed of his right to separate trial until after his trial had begun, did not have a meaningful opportunity to consent or object to the joint trial procedure until it was too late and his rights already had been affected.

One commentator has taken the view that an adequate waiver of the right to separate trial is impossible because conflicts of interest rarely can be predicted. *See* Geer, *supra* note 3, at 140-41.

15. *See* 258 N.W.2d at 904-08. That the court's discussion of joint representation was not essential to its holding in the case is evident from the following language: "On the basis of the joint-trial procedures, reversal is necessary; however, we feel compelled to comment, once again, on the final issue raised—the joint representation of co-defendants by a single attorney . . . ." *Id.* at 904.

16. 315 U.S. 60 (1942).

17. *See id.* at 76. The *Glasser* principle has been embodied in a federal statute that requires federal courts to "appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when good cause is shown." 18 U.S.C. § 3006A(b) (1970). This provision, however, has not been utilized widely. *Compare* Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968) (joint representation of defendants did not violate prior version of 18 U.S.C. § 3006A(b) (1970)), *cert. denied*, 395 U.S. 964 (1969) *with* United States v. Christopher, 488 F.2d 849 (9th Cir. 1973) (court did not consider possible violation of 18 U.S.C. § 3006A(b) (1970)) *and* United States v. Foster, 469 F.2d. 1 (1st Cir. 1972).

18. *See* 315 U.S. at 70.

19. *See, e.g.*, United States v. Lawriw, 568 F.2d 98, 101 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978); United States v. Williams, 429 F.2d 158, 160-61 (8th Cir.) (joint representation not per se violative of sixth amendment absent conflict of interest between codefendants), *cert. denied*, 400 U.S. 947 (1970).

20. *See, e.g.*, State v. Wilson, 294 Minn. 501, 200 N.W.2d 185 (1972) (per curiam); State *ex rel.* Knott v. Tahash, 281 Minn. 305, 161 N.W.2d 617 (1968); State v. Robinson, 271 Minn. 477, 136 N.W.2d 401, *cert. denied*, 382 U.S. 948 (1965).

21. *See* United States v. Valenzuela, 521 F.2d 414, 416 (8th Cir. 1975); United States

quired a showing of demonstrable conflict with potential prejudice before finding a constitutional violation.[22]

The Minnesota court in *Olsen* identified various conflict situations to which the *Glasser* standard might apply.[23] These include the situations in which an attorney attempts to represent codefendants with inconsistent pleas, factually inconsistent alibis, conflicting testimony, or differences in degrees of involvement in the crime allegedly commited.[24] Additionally, the conflict also may be present when the attorney is faced with differing tactical considerations regarding the admission of evidence and the calling, cross-examining, and impeaching of witnesses, or when different strategical considerations respecting the final summation apply to each codefendant.[25] Recognizing these considerations, the *Olsen* court went beyond *Glasser,* holding that the sixth amendment may be violated even in the absence of an actual conflict of interest.[26] The court stated:

> The inherent difficulty which faces any attorney who undertakes the joint representation of codefendants is that he or she must simultaneously balance the interests of each defendant against the other. Not only must the attorney defend against the prosecution, but he or she must also defend against conflicts between the defendants themselves.[27]

When an attorney is faced with such a task, the defendant is denied the complete attention of the attorney to the advocacy of the defendant's cause.[28] Such a denial is not only constitutionally infirm but is proscribed by American Bar Association standards[29] and by the Minnesota Code of Professional Responsibility.[30]

For these reasons, the Minnesota court adopted a procedure, labelled

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v. Gougis, 374 F.2d 758, 761 (7th Cir. 1967); Hall v. State, 63 Wis. 2d 304, 307, 217 N.W.2d 352, 355 (1974).

22. *See* Craig v. United States, 217 F.2d 355 (6th Cir. 1954).

23. *See* 258 N.W.2d at 904-05.

24. *See id.* at 905.

25. *Id.* For a discussion of conflicts of interest at the various stages of a criminal proceeding, see Geer, *supra* note 3, at 125-35; Annot., 34 A.L.R.3d 470 (1970).

26. *See* 258 N.W.2d at 904. *See generally* Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). In *Holloway,* the Court stated that "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing . . . ." *Id.* at 490 (emphasis in original).

27. 258 N.W.2d at 904.

28. *See* Note, *Conflict of Interests in Criminal Proceedings,* 23 ARK. L. REV. 250, 254 (1969).

29. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 to -16; *id.* DR 5-105; ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 14 (The Defense Function § 3.5(b)) (Approved Draft 1971).

30. *See* MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 to -20; *id.* DR 5-101 to -105.

the affirmative-inquiry approach,[31] designed to safeguard the criminal defendant's sixth amendment right to fair and effective counsel by ensuring that, prior to trial,[32] the defendant is cognizant of the risks inher-

31. *See* 258 N.W.2d at 906-08.

The affirmative-inquiry approach adopted by *Olsen* also has been adopted by other courts. *See, e.g.*, United States v. Foster, 469 F.2d 1 (1st Cir. 1972); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); People v. Chacon, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968); People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975). *But see, e.g.*, United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1049 (1976); United States v. Boudreaux, 502 F.2d 557 (5th Cir. 1974) (per curiam); United States v. Christopher, 488 F.2d 849 (9th Cir. 1973). The Third Circuit has recommended a rule "which assumes prejudice and non-waiver if there has been no on-the-record inquiry by the court" but has not adopted the requirement. *See* United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973).

32. *See* 258 N.W.2d at 906-07. The *Olsen* court did not specifically address the question of when, in the course of the litigation, this procedure should be instituted. In a subsequent decision, however, the court indicated that if *Olsen* had been decided at the time of the trial from which the instant appeal was taken, the trial court judge would have been obligated to intervene in the omnibus hearing when a conflict first manifested itself. *See* State v. Ray, 273 N.W.2d 652 (Minn. 1978) (conviction by jury of burglary and aggravated assault; counsel represented defendant and alleged codefendant who was never charged; at omnibus hearing fact of plea reduction offer in exchange for turning state's evidence revealed; counsel related to trial court that he relayed offer to defendant but stated that he could not offer counsel in light of conflict of interest arising from his representation of party against whom state desired defendant to testify; held that *Olsen* would have required court to intervene during the omnibus hearing). The exact time or stage chosen is a matter of importance because a prejudicial conflict of interest can occur as early as the inception of the attorney-client relationship. *See* United States v. Lawriw, 568 F.2d 98, 103 n.11 (8th Cir. 1977) (advocating inquiry as soon as possible), *cert. denied*, 435 U.S. 969 (1978).

Notwithstanding the *Olsen* court's reference to the "trial" court, *see* 258 N.W.2d at 907, or the inference in the *Ray* decision that the *Olsen* procedure should not be instituted until the first manifestation of conflict, *see* State v. Ray, 273 N.W.2d at 655, the *Olsen* procedure should be instituted during the codefendants' first appearance before the judicial system. This appearance is currently governed by rule 5 of the Minnesota Rules of Criminal Procedure, and the *Olsen* colloquy could be easily incorporated within the warnings and pronouncements of rule 5 because this rule already requires the trial court to initiate considerable discussion with the defendant concerning such weighty matters as the right to counsel. *See* MINN. R. CRIM. P. 5. Also, such a course of action would not offend those writers not in favor of *Olsen*-type protection prior to preliminary matters such as initial hearings and bail hearings. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 14 (The Defense Function § 3.5(b)) (Approved Draft 1971) (such a procedure not needed for preliminary matters such as initial hearings and application for bail).

Minnesota criminal defendants are first subjected to the full prosecutorial apparatus of the state during the rule 5 hearing. Because the sixth amendment guarantees the defendant "that he need not stand alone against the State at any stage of the prosecution . . . ," United States v. Wade, 388 U.S. 218, 226 (1967), and because the *Olsen* court has determined that "effective" assistance of counsel contemplates assistance "untrammelled and unimpaired" by the requirement that one lawyer simultaneously represent conflicting interests, *see* 258 N.W.2d at 904 (citing Glasser v. United States, 315 U.S. 60, 70 (1942)), the *Olsen* procedure should be understood to be triggered at the rule 5 initial hearing.

ent in joint representation. The standard promulgated is based on the standards of the American Bar Association,[33] the Fifth Circuit Court of Appeals decision in *United States v. Garcia*,[34] and the District of Columbia Court of Appeals decision in *Lollar v. United States*.[35] Under the *Olsen* standard, the record must clearly indicate that any waiver by the defendant of his rights respecting separate counsel was made voluntarily and with full understanding of the consequences.[36] The trial court must question each defendant separately and on the record.[37] Furthermore, each defendant is to be advised of the dangers of joint representation and is to have an opportunity to question the trial court on the nature and consequences of joint representation.[38] When satisfactory inquiry does not appear on the record, the burden will be on the state to establish beyond a reasonable doubt that no prejudicial conflict of interest existed.[39]

The affirmative-inquiry approach is an alternative to an earlier approach that was first enunciated in *United States v. Mandell*.[40] The *Mandell* approach places the duty of informing the defendant of the potential dangers of joint representation on the defense counsel, while cautioning the trial judge to watch for indications of conflict during the trial.[41] The court in *Mandell* did not feel that an adequate showing of

33. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 to -16; *id.* DR 5-105; ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 14 (The Defense Function § 3.5(b)) (Approved Draft 1971).

34. 517 F.2d 272 (5th Cir. 1975).

35. 376 F.2d 243 (D.C. Cir. 1967).

36. *See* 258 N.W.2d at 907.

37. *See id.* & n.16; *cf.* State v. Nelson, ___ Minn. ___, ___, 250 N.W.2d 816, 817 (1976) (record indicated that guilty plea was voluntary and informed); State v. Nace, 308 Minn. 170, 171, 241 N.W.2d 101, 102 (1976) (per curiam) (trial court has primary responsibility to elicit testimony attendant to guilty plea); MINN. R. CRIM. P. 15.01 (procedure outlining colloquy required for court to accept a guilty plea).

38. 258 N.W.2d at 907.

39. *Id.* at 907-08. The *Olsen* court borrowed this concept of shifting the burden from Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967). *See id.* Shifting the burden is not a new concept. *See, e.g.*, United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972) ("government will be required to demonstrate from the record that prejudice to the defendant was improbable"); United States v. Carrigan, 543 F.2d 1053, 1056 (2d Cir. 1976) (citing *Foster* with approval). Essentially, this is the "harmless error" rule articulated in Chapman v. California, 386 U.S. 18 (1967), which holds that a constitutional error is harmless only if the court is able to declare that it is "harmless beyond a reasonable doubt." 368 U.S. at 24. In addition, the *Chapman* Court held that the beneficiary of the error has the burden of proving harmlessness. *See id.* For a discussion of the "harmless error" doctrine, see Nordby, *The Craft of the Criminal Appeal*, 4 WM. MITCHELL L. REV. 1, 26-28 (1978).

40. 525 F.2d 671 (7th Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1049 (1976).

41. *See* 525 F.2d at 677.

Prior to *Olsen* the Minnesota court apparently treated the issue of joint representation in a manner similar to *Mandell*. Under the earlier Minnesota standard, the trial court was

noncompliance by the Bar with the governing provisions of the canons of ethics had been made to warrant the adoption of an approach that placed the burden on the state to ensure that the defendant's constitutional rights were protected.[42]

The affirmative-inquiry approach adopted by the Minnesota Supreme Court in *Olsen*[43] is superior to the *Mandell* standard for several reasons. First, although both *Olsen* and *Mandell* require some evidence of conflict before granting a new trial to a defendant,[44] they differ as to which party has the burden of proof with respect to the existence or absence of prejudice. The *Mandell* standard, which assures that adequate disclosure of the perils of joint representation is made to the defendant by the defense attorney, places the burden of showing prejudicial conflict of interest on the defendant.[45] Conversely, the *Olsen* standard creates a rebuttable presumption of error when the trial record is devoid of a valid court-initiated waiver, which the state has the burden of rebutting.[46] Second, *Mandell* requires review of the trial record to determine whether conflict existed.[47] Such a review may not, however, disclose all sixth amendment violations.[48] For example, review of the trial record will not disclose the defense counsel's strategy in his or her dual representation of the defendants.[49] The *Olsen* standard attempts

not required to engage in a waiver inquiry, implying that the disclosure and waiver was left to the defense attorney, and the defendant had the burden of establishing a prejudicial conflict of interest resulting from the joint representation. *See, e.g.*, State v. Robinson, 271 Minn. 477, 136 N.W.2d 401, *cert. denied*, 382 U.S. 948 (1965).

42. *See* 525 F.2d at 676-77 (citing United States v. Paz-Sierra, 367 F.2d 930, 932-33 (2d Cir. 1966)). The court further reasoned that a factual finding by the trial court that no prejudice was likely to occur as the result of joint representation would be especially burdensome to a defendant appealing a conviction on the ground that he was denied effective assistance of counsel due to joint representation. *See id.* at 677. Although the *Mandell* court refused to adopt an affirmative-inquiry approach, it did not forbid district courts within its circuit from doing so. *See id.*

43. Various jurisdictions have adopted forms of an "affirmative inquiry" standard, although they may differ from the procedure adopted in *Olsen* with respect to the timing of the inquiry. *See, e.g.*, Abraham v. United States, 549 F.2d 236, 239 (2d Cir. 1977) (per curiam) (conduct hearing only when conflict arises); United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972) (exact timing left to trial judge's discretion).

44. The *Olsen* court did not abandon the requirement of "conflict" when it adopted the burden-shifting mechanism. This is evident in the following language: "the burden shifts to the state to demonstrate beyond a reasonable doubt that a prejudicial *conflict of interests* did not exist." 258 N.W.2d at 907-08 (emphasis added).

45. *See* 525 F.2d at 677.

46. *See* 258 N.W.2d at 907-08. Other courts have reached a similar result. *See, e.g.*, Lollar v. United States, 376 F.2d 243, 245 (D.C. Cir. 1967) (rebuttable presumption of prejudicial error where trial record devoid of valid, court-initiated waiver).

47. *See* 525 F.2d at 677-78.

48. The court in Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) stated: "Like the famous tip of the iceberg, the record may not reveal the whole story . . . ." *Id.* at 246.

49. A defense counsel's use of contrasting trial tactics or stratagems on behalf of codefendants at a joint trial may result in conflicts of interest. For example, unfavorable

to avoid this problem by obtaining a knowledgeable waiver at the outset so that review of the record for conflict does not become necessary. Lastly, the *Olsen* approach avoids the problem of knowledgeable waiver of rights respecting separate counsel that can arise if a defendant waives these rights without fully appreciating the significance of potential conflicts.[50] By providing the supreme court with a trial record replete with all waiver discussion, review of the waiver is possible.

The adoption of the affirmative-inquiry standard by the Minnesota court in *Olsen* properly transfers from the defense counsel to the trial court the responsibility of protecting the untrained and oftentimes uninformed defendant's right to effective counsel. By adopting this standard, the Minnesota court has stepped into the forefront of this important area. The Minnesota criminal defendant's sixth amendment right to effective counsel is now better protected from the perils of joint representation.

**Election Law**—MINNESOTA BALLOT POSITION STATUTE DOES NOT VIOLATE EQUAL PROTECTION—*Ulland v. Growe*, 262 N.W.2d 412 (Minn.), *cert. denied*, 436 U.S. 927 (1978).

The arrangement of candidates' names on election ballots has traditionally been the prerogative of state legislatures.[1] In recent years, how-

references to one defendant may be made in order to promote the image of the other defendant before the jury, or counsel may decide to allow only one defendant to testify, leaving a question in the mind of the jury as to why the nontestifying codefendant did not take the stand. Moreover, counsel may fail to object to certain damaging evidence because it is favorable to one defendant, or he may unknowingly emphasize one defendant's case to the detriment of the other's defense. Furthermore, different mitigating or aggravating circumstances and varying degrees of involvement in the crime may lead counsel to play one defendant against the other.

50. *See* Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965) ("An individual defendant is rarely sophisticated enough to evaluate the potential conflicts . . . ."); United States v. Garafola, 428 F. Supp. 620, 623 (D.N.J. 1977) (average defendant unable to understand fully the effect joint representation may have on trial strategy). *See generally* Geer, *supra* note 3, at 140-42. The jointly represented defendant is not in a position to evaluate whether his rights will be protected adequately by a single counsel. For example, a "strong" defendant may thrust his own attorney upon a "weak" codefendant who will accept the joint representation without realizing that he is entitled to the undivided loyalty of counsel to his own cause. Furthermore, it is virtually impossible for a defendant to envision, before trial, the myriad circumstances under which a conflict may arise, because conflicts are at times unforeseeable and often develop during the course of trial. In addition, defendants usually consent to a waiver in reliance on advice received from counsel who has represented that no conflicts exist.

1. *E.g.*, Mann v. Powell, 333 F. Supp. 1261, 1266 (N.D. Ill. 1971); *see, e.g.*, Voltaggio v. Caputo, 210 F. Supp. 337, 338-39 (D.N.J. 1962), *appeal dismissed*, 371 U.S. 232 (1963). The methods of determining ballot position include: