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

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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.


The Minnesota Supreme Court has long expressed disfavor with the practice of a single attorney representing multiple defendants in a criminal proceeding. 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\(^1\) and Minnesota\(^5\) constitutions. In *State v. Olsen,*\(^4\) 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.\(^6\) Following de-

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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:

> [The 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.]


4. The sixth amendment to the United States Constitution provides in part that "in 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,
Olsen appealed 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, 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. The
prosecution had failed to make a written motion for joint trial, a failure
viewed by the supreme court as reversible error. This error was com-
pounded 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. 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 repre-
sentation 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 suffi-
cient 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 testi-
mony 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 sepa-
rately, in the discretion of the court. In all cases any one or more of said defen-
dants 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

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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 codefiffs 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-
quired a showing of demonstrable conflict with potential prejudice before finding a constitutional violation.\textsuperscript{22}

The Minnesota court in \textit{Olsen} identified various conflict situations to which the \textit{Glasser} standard might apply.\textsuperscript{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 committed.\textsuperscript{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 strategic considerations respecting the final summation apply to each codefendant.\textsuperscript{25} Recognizing these considerations, the \textit{Olsen} court went beyond \textit{Glasser}, holding that the sixth amendment may be violated even in the absence of an actual conflict of interest.\textsuperscript{26} The court stated:

\begin{quote}
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.\textsuperscript{27}
\end{quote}

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.\textsuperscript{28} Such a denial is not only constitutionally infirm but is proscribed by American Bar Association standards\textsuperscript{29} and by the Minnesota Code of Professional Responsibility.\textsuperscript{30}

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

\begin{quote}
\textsuperscript{22} See \textit{Craig} v. United States, 217 F.2d 355 (6th Cir. 1954).
\textsuperscript{23} See \textit{258 N.W.2d} at 904-05.
\textsuperscript{24} See \textit{id.} at 905.
\textsuperscript{25} \textit{Id.} For a discussion of conflicts of interest at the various stages of a criminal proceeding, see \textit{Geer}, supra note 3, at 125-35; Annot., 34 A.L.R.3d 470 (1970).
\textsuperscript{26} See \textit{258 N.W.2d} at 904. \textit{See generally} \textit{Holloway} v. Arkansas, 435 U.S. 475, 489-90 (1978). In \textit{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 . . . ." \textit{Id.} at 490 (emphasis in original).
\textsuperscript{27} 258 N.W.2d at 904.
\textsuperscript{28} \textit{See Note, Conflict of Interests in Criminal Proceedings, 23 Ark. L. Rev. 250, 254 (1969).}
\textsuperscript{29} \textit{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).}
\textsuperscript{30} \textit{See Minn. Code of Professional Responsibility EC 5-14 to -20; id. DR 5-101 to -105.}
\end{quote}
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 275, 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 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 “untrammeled 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, the Fifth Circuit Court of Appeals decision in United States v. Garcia, and the District of Columbia Court of Appeals decision in Lollar v. United States. 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. The trial court must question each defendant separately and on the record. 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. 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.

The affirmative-inquiry approach is an alternative to an earlier approach that was first enunciated in United States v. Mandell. 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. 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. (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.
42. 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.\(^1\)\(^2\)

The affirmative-inquiry approach adopted by the Minnesota Supreme Court in *Olsen\(^3\)* 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,\(^4\) 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.\(^5\) 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.\(^6\) Second, *Mandell* requires review of the trial record to determine whether conflict existed.\(^7\) Such a review may not, however, disclose all sixth amendment violations.\(^8\) For example, review of the trial record will not disclose the defense counsel's strategy in his or her dual representation of the defendants.\(^9\) The *Olsen* standard attempts

\(^1\) See, e.g., State v. Robinson, 271 Minn. 477, 136 N.W.2d 401, cert. denied, 382 U.S. 948 (1965).

\(^2\) 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.

\(^3\) 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).

\(^4\) 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).

\(^5\) See 525 F.2d at 677.

\(^6\) 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).

\(^7\) See 525 F.2d at 677-78.

\(^8\) 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.

\(^9\) 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.


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

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