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Turner v. State, 340 So. 2d 132 (Fla. 2d Dist. Ct. App. 1976)

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the permanent commitment of a dependent child to a licensed child-placing agency or HRS. The first step of every adoption of a dependent child under that chapter is a complete termination of parental rights. In order to so terminate those rights, the statute provides for personal notice when possible, notice by publication when personal notice is not possible, or waiver by written surrender of the child.

Incorporation of a similar provision into chapter 63, the Florida adoption statute, would forestall cases such as *Herzog* and grant everyone involved the rights and protections necessary for the security of an adoption proceeding. By making the adoption procedure a two-step process—termination of parental rights followed by creation of parental rights—the confidentiality need could also be met.

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Criminal Law—ETHICS—PUBLIC DEFENDER'S OFFICE IS A "LAW FIRM" FOR PURPOSE OF DETERMINING WHETHER CONFLICT EXISTS IN REPRESENTATION OF CODEFENDANTS—*Turner v. State*, 340 So. 2d 132 (Fla. 2d Dist. Ct. App. 1976).

On July 19, 1976, Ernest W. Turner, Arthur T. Longway, and Thomas C. Hyder were charged in a single information with the offense of burglary of a structure in violation of section 810.02, Florida Statutes.[1] The public defender was appointed to represent the three codefendants after each had executed an affidavit of insolvency.[2] During a routine intake interview with Thomas Hyder, it was discovered that a conflict of interest existed among the defenses of the three men. Moreover, the assistant state attorney assigned to the prosecution of the three defendants informed both the public defender's office and the court that each defendant had made statements that implicated another codefendant. Consequently, the public defender's office moved to be relieved as counsel for Turner and Longway. The trial court relieved one assistant public defender as individual counsel for Turner and Longway, but refused to appoint private counsel to represent them on the ground that separate attorneys within the public defender's office could properly represent the three codefendants.[3]

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1. FLA. STAT. § 810.02(1) (1975) provides: " 'Burglary' means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." The offense may be a felony of the first, second, or third degree depending on the circumstances involved.

2. *See* FLA. STAT. § 27.52 (1975).

3. The trial court stated: "[I]t appear[s] to the Court that the Public Defender

Two additional assistant public defenders were assigned to represent Turner and Longway, respectively. Immediately following their appointment, these attorneys filed renewed motions to be relieved as counsel for Turner and Longway due to the conflict of interest among the defenses of the three codefendants. The motions were denied.[4] Following this denial, defendant Longway sought and received permission to represent himself due to the very conflict alleged by the attorneys.[5] Despite this development, defendants Hyder and Turner were still represented by the public defender's office.[6] Believing that a conflict of interest remained, counsel for Turner filed a petition for a writ of certiorari[7] in the Second District Court of Appeal, asking review of the order denying the renewed motion to be relieved as counsel. The Second District Court of Appeal granted the writ, quashed the order, and remanded the cause for further proceedings.[8] In a per curiam opinion, the court held that the constitutional right to counsel means that counsel must not have divided loyalty between conflicting interests, and that a public defender's office is analogous to a private law firm for purposes of regulation under Canon 5 of the Florida Code of Professional Responsibility.

The court of appeal considered two issues. First, did the appoint-

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of this Judicial Circuit has ample other Assistant Public Defenders he can assign to defend said Defendant if necessary . . . ." Brief for Respondent at 5, Turner v. State, 340 So. 2d 132 (Fla. 2d Dist. Ct. App. 1976).

4. No. 76-329F (Fla. Cir. Ct. Manatee County, Aug. 12, 1976).

5. Longway moved for permission to represent himself as a result of an informal bargain with the state: if Longway wanted to resolve his problems swiftly, he could plead guilty, waive his right to counsel, and represent himself in exchange for a probable sentence of six months. Telephone conversation of the author with Mr. Nevin A. Weiner, Assistant Public Defender (Mar. 31, 1977).

6. While the appeal was pending, defendant Hyder entered a negotiated guilty plea, and his case was disposed of.

7. The petition was filed pursuant to FLA. CONST. art. V, § 4(b)(3); FLA. APP. R. 4.5(c).

8. Turner v. State, 340 So. 2d 132 (Fla. 2d Dist. Ct. App. 1976). The court relied on representations of counsel that conflict existed between the defenses of the co-defendants, since the alleged conflict revolved around confidential statements made by each defendant which implicated the others. On remand, the trial court assigned a special assistant public defender (private counsel) to represent Turner pursuant to FLA. STAT. § 27.53 (Supp. 1976). That attorney filed a motion for discharge pursuant to the Speedy Trial Rule, FLA. R. CRIM. P. 3.191, asserting that the state's failure to provide Turner with the proper counsel according to its obligation caused the defendant to be involuntarily unavailable for trial during the time required by the rule. The trial court did not discharge the case against Turner but imposed a sentence of time served awaiting trial and ordered him released. This disposition was reached in order to conclude the case and to prevent further petitions to higher courts on the theory that the speedy trial period had run. Letter to the author from Mr. Nevin A. Weiner, Assistant Public Defender (Feb. 17, 1977); telephone conversation of the author with Mr. Weiner (Mar. 31, 1977).

ment of one attorney to represent three codefendants, each of whom made statements which implicated the others, deny the defendants effective assistance of counsel as guaranteed by the sixth amendment to the United States Constitution?[9] Second, did the appointment of separate attorneys within the office of the public defender to represent the three codefendants circumvent Disciplinary Rule 5-105 of Canon 5, Florida Code of Professional Responsibility?[10] This rule incorporates the notion of effective representation by requiring that a lawyer withdraw from employment where a partner or associate of his firm would be required to withdraw due to a conflict of interest in the representation of another client.

Relative to the first issue, the court stated that "[t]he Sixth Amendment guarantee of the assistance of counsel includes the right to counsel whose loyalty is not divided between clients with conflicting interests. . . . [I]n the case of appointed counsel it is especially important for the court to determine that no prejudice will result from multiple representation."[11] The court cited the leading authority in this area of the law, *Glasser v. United States*.[12] In that case, Glasser and four codefendants were convicted of conspiracy to defraud the United States Government. At trial, one of Glasser's codefendants expressed dissatisfaction with his appointed counsel. The trial court appointed Glasser's attorney to represent this codefendant despite its knowledge of potentially inconsistent interests and over the objections of both Glasser and his attorney. Glasser appealed, contending that the appointment of his counsel to represent his codefendant created a situation violative of his fundamental rights since it denied him the effective assistance of counsel. The United States Supreme Court reversed his conviction and ordered a new trial.[13] The Court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."[14] In discussing the issue of whether the dual

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9. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

10. FLA. BAR CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(A) provides: "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment . . . ." DR 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

11. 340 So. 2d at 133 (citations omitted).

12. 315 U.S. 60 (1942).

13. *Id.* at 76.

14. *Id.* at 70.

representation had prejudiced Glasser, the Court stated that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[15] Earlier, the Court had noted that "[i]rrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness."[16] But in refusing to reverse the convictions of the codefendants, the Court held that "*they* must show that the denial of *Glasser's* constitutional rights prejudiced them in some manner . . . ."[17]

The *Turner* court also cited *Baker v. State*,[18] a Florida Supreme Court case which applied the *Glasser* rule by noting that "[t]he interests and defenses of most co-defendants are conflicting. . . . [This] makes it impossible for the same counsel to effectively represent two or more co-defendants simultaneously."[19] The *Baker* court held that it was unnecessary for the defendants to show that prejudice resulted from the denial of separate counsel.[20]

The third case cited by the *Turner* court regarding the right to effective counsel was *Marshall v. State*,[21] which required that separate counsel be appointed where requested, unless the state could demonstrate that prejudice would not result from a denial of the request. A denial without a showing by the state that no prejudice would result constituted reversible error.[22] Finally, the court cited *Craig v. United States*[23] and *United States v. Gougis*,[24] which held that the abrogation of effective assistance of counsel where there were conflicting interests applied not only to retained counsel, but to court-appointed counsel as well.

With regard to the second issue, *i.e.*, whether this mandatory representation circumvented Disciplinary Rule 5–105 of Canon 5, Florida Code of Professional Responsibility,[25] the *Turner* court held

15. *Id.* at 76.

16. *Id.* at 75.

17. *Id.* at 76 (emphasis added). See Comment, *Conflict of Interests: Multiple Defendants Represented by a Single Court-Appointed Counsel*, 74 DICK. L. REV. 241 (1970) [hereinafter *Conflict of Interests*], for an excellent discussion of the ways in which other jurisdictions have resolved the confusion created by the Court's interchangeable use of the terms "prejudice" and "conflict of interest."

18. 202 So. 2d 563 (Fla. 1967). Two defendants were represented jointly by two court-appointed counsel; both defendants were found guilty of felony murder and appealed on grounds of denial of the right to assistance of counsel.

19. *Id.* at 566.

20. *Id.*

21. 273 So. 2d 412 (Fla. 2d Dist. Ct. App. 1973).

22. *Id.* at 413.

23. 217 F.2d 355 (6th Cir. 1954).

24. 374 F.2d 758 (7th Cir. 1967).

25. Quoted at note 10 *supra*.

that "the public defender's office of a given circuit [was] a 'firm' within . . . this canon."[26] The court referred to *Allen v. District Court*[27] and *Commonwealth v. Bracey*.[28] Neither case held the public defender's office to be a firm within their respective codes of ethics, but held that "the trial judge's denial of the motion to withdraw placed the public defender in an untenable position"[29] and resulted in the denial of effective assistance of counsel.[30]

Two areas of current Florida law have been affected by the *Turner* decision: criminal law and ethics. First, the criminal law now requires that where a conflict of interest prohibits single representation of co-defendants, the court should appoint counsel other than those employed by the public defender. Second, ethical standards regarding the representation of conflicting interests will be applied to each public defender's office as if it were a law firm. A general discussion of each area follows.

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The United States Supreme Court has interpreted this amendment to require that criminal defendants in federal court be represented by counsel unless the right to counsel is competently and intelligently waived.[31] The Court has held the sixth amendment right to the assistance of counsel applicable to the states through the fourteenth amendment.[32] The Court considers the right to counsel so "necessary to insure fundamental human rights of life and liberty"[33] that its denial acts as a bar to a valid conviction. To meet this requirement, the Florida Legislature established the Public Defender System.[34] The system provides

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26. 340 So. 2d at 133 (Fla. 2d Dist. Ct. App. 1976).

27. 519 P.2d 351 (Colo. 1974).

28. 307 A.2d 320 (Pa. Super. Ct. 1973).

29. Allen v. District Court, 519 P.2d at 353.

30. Commonwealth v. Bracey, 307 A.2d at 320.

31. Johnson v. Zerbst, 304 U.S. 458 (1938).

32. Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanors for which imprisonment may be imposed); Gideon v. Wainwright, 372 U.S. 335 (1963) (felonies). This right has been expanded to include mandatory representation (unless waived) during custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966); at postindictment line-up, United States v. Wade, 388 U.S. 218 (1967); at preliminary hearing, White v. Maryland, 373 U.S. 59 (1963); and at probation revocation hearings, Mempa v. Rhay, 389 U.S. 128 (1967).

33. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

34. *See* FLA. STAT. § 27.50 (1975). Under this system, an accused has no right to have a particular attorney appointed to him, Diehl v. State, 200 So. 2d 240 (Fla. 3d Dist. Ct. App. 1967), nor to arbitrarily reject a particular attorney, Donald v. State, 166 So. 2d 453 (Fla. 2d Dist. Ct. App. 1964). For a comparison between the public defender system and the assigned counsel system, see 1 L. SILVERSTEIN, DEFENSE OF THE

for the appointment of counsel not affiliated with the public defender where a conflict of interest arises among codefendants.[35] It is the application of this provision which has been troublesome.

While certain minimum standards of "effective assistance of counsel" have been delineated by the courts,[36] the United States Supreme Court has addressed itself only once to the same issue in cases where an attorney was forced to represent more than one codefendant. This was done in the previously mentioned case of *Glasser v. United States*,[37] where the Court held that the right to assistance of counsel "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."[38] However, "conflicting interests" remained undefined after *Glasser*.

Starting with the basic admonition from the Sermon on the Mount that "[n]o man can serve two masters,"[39] the treatises have found a conflict of interest "where the defenses of co-defendants are antagonistic or where one co-defendant attempts to exculpate himself at the expense of his co-defendant."[40] Similarly, conflicts exist "where it is a lawyer's duty to contend on behalf of one client for that which his duty to another client requires him to oppose . . . ."[41]

The courts, however, have encountered substantial difficulties in their attempts to define conflicting interests. Although superficially the *Glasser* opinion appears to give a straightforward definition of conflicts, four phrases have been problematic for the courts.[42] They are

1) [i]rrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness;[43]
2) [t]he right to have the assistance of counsel is too fundamental and

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POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965); JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASSOCIATION—THE PROBLEM OF ASSISTANCE TO THE INDIGENT ACCUSED (1961).

35. FLA. STAT. § 27.53(3) (Supp. 1976).

36. Mitchell v. United States, 259 F.2d 787 (D.C. Cir. 1958).

37. 315 U.S. 60. The United States Supreme Court recently granted certiorari in Holloway v. Arkansas, which raises the constitutionality of requiring a single public defender to represent three codefendants, all of whom denied any involvement in the alleged offense but did not attempt to incriminate others. 97 S. Ct. 1643 (1977).

38. 315 U.S. at 70.

39. *Matthew* 6:24. In his well-known treatise, H. S. Drinker notes that the word "can" connotes "not so much the fact that this is wrong, as that it will not work." H. DRINKER, LEGAL ETHICS 22 n.5 (1953).

40. *Conflict of Interests*, *supra* note 17, at 256.

41. R. WISE, LEGAL ETHICS 139 (1966).

42. *See generally Conflict of Interests*, *supra* note 17.

43. Glasser v. United States, 315 U.S. at 75.

absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial;[44]

3) [the codefendants] must show that the denial of Glasser's constitutional rights prejudiced them in some manner . . .;[45] and

4) [it is the duty of the court] to refrain from embarrassing counsel . . . by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client . . . .[46]

Consequently, in attempting to determine whether the right to effective assistance of counsel requires that codefendants be represented separately, courts have alternately adopted "conflict of interest, prejudice, and embarrassment of counsel as the indicia of ineffectiveness."[47]

The history of the various interpretations of *Glasser* adopted by the Florida courts is a curious one. In *Baker v. State*,[48] the Florida Supreme Court discussed whether two defendants who were found guilty of felony murder were denied effective representation where each was represented jointly by two court-appointed counsel. The court held that *Glasser* dictated that "it was unnecessary that the defendants show prejudice flowing from the denial to them of separate counsel."[49] The court reasoned that "[t]he interests and defenses of most co-defendants are conflicting. . . . It is this conflict and inconsistency of position which makes it impossible for the same counsel to effectively represent two or more co-defendants simultaneously."[50] The court reversed the convictions.[51]

Following this supreme court decision, the Fourth District Court of Appeal in *Youngblood v. State*[52] interpreted *Baker* as supporting automatic appointment of separate counsel for codefendants. While seemingly a valid interpretation of the *Baker* language, *Youngblood* was overruled by the supreme court.[53] In its decision, the supreme

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44. *Id.* at 76 (citations omitted).

45. *Id.*

46. *Id.*

47. Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369, 375–76 (1969) [hereinafter *The Case for Separate Counsel*].

48. 202 So. 2d 563 (Fla. 1967).

49. *Id.* at 566. The court focused on the language in *Glasser* that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 76.

50. 202 So. 2d 563, 566.

51. *Id.* at 567.

52. 206 So. 2d 665 (Fla. 4th Dist. Ct. App. 1968), *rev'd*, 217 So. 2d 98 (Fla. 1968).

53. State v. Youngblood, 217 So. 2d 98 (Fla. 1968).

court referred to *Belton v. State*,[54] a decision rendered after *Baker*. In *Belton*, the court held that failure to appoint separate counsel for co-defendants was not error "in the absence of a request for separate counsel or a showing of prejudice . . . ."[55] The supreme court applied the *Belton* holding to *State v. Youngblood* and ruled that

> [w]hen a joint defendant requests separate counsel, his request should be granted unless the state can clearly demonstrate for the record that prejudice will not result from a denial. If request is made and the record shows prejudice . . . or is silent on the subject, such denial will constitute reversible error.[56]

In these holdings, the supreme court has made it plain that every co-defendant will not automatically be entitled to the undivided assistance of a single attorney. The court failed, however, to specify the circumstances in which the state could demonstrate the absence of prejudice.[57]

A case-by-case evaluation reveals that prejudice does not occur, nor is reversal required, where all codefendants enter guilty pleas,[58] or where counsel employs similar trial tactics for all codefendants or fails to employ varying ones.[59] Reversal has resulted where a confession of one defendant which implicates another defendant has been introduced into evidence.[60] While one court has held that a defendant voluntarily waives his right to appointment of separate counsel by failing to object to appointment of a single counsel at the time of the appointment, that conviction was overturned.[61] The law does not favor the waiver of rights,[62] with the result that a waiver is "not to be lightly inferred—it must be shown to have been knowingly, voluntarily

54. 217 So. 2d 97 (Fla. 1968).

55. *Id.* at 98.

56. *Id.* at 101.

57. For a summary of the various situations in which state and federal courts have found ineffective assistance of counsel, see J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: TRIAL RIGHTS § 4, at 155 (1974).

58. Williams v. State, 268 So. 2d 543 (Fla. 3d Dist. Ct. App. 1972); Gardner v. State, 214 So. 2d 786 (Fla. 2d Dist. Ct. App. 1968); Williams v. State, 214 So. 2d 29 (Fla. 2d Dist. Ct. App. 1968); Wellington v. Wainwright, 214 So. 2d 28 (Fla. 1st Dist. Ct. App. 1968); Mitchell v. State, 213 So. 2d 289 (Fla. 2d Dist. Ct. App. 1968).

59. Sotomayor v. State, 224 So. 2d 357 (Fla. 2d Dist. Ct. App. 1969); Stone v. State, 196 So. 2d 445 (Fla. 4th Dist. Ct. App. 1966).

60. Baker v. Wainwright, 422 F.2d 145 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970); Marshall v. State, 273 So. 2d 412 (Fla. 2d Dist. Ct. App. 1973).

61. Baker v. State, 217 So. 2d 880 (Fla. 1st Dist. Ct. App. 1969), *writ of habeas corpus granted sub nom.* Baker v. Wainwright, 422 F.2d 145 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970). The United States District Court for the Northern District of Florida had refused to grant a writ of habeas corpus, and its decision was appealed.

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

and intentionally made."[63] In summary, "[w]here one attorney is appointed to represent two defendants at a joint trial he must be alert to facts indicating a possible conflict and, if they arise, promptly call them to the court's attention."[64] Any doubt as to whether possible conflicts of interest will impair effective assistance of counsel should be resolved in favor of granting a motion for separate counsel.[65]

The *Turner* decision also affects the area of ethics. The Florida Code of Professional Responsibility[66] mandates that "[a] lawyer should exercise independent professional judgment on behalf of a client."[67] This mandate compels an attorney to exercise his professional judgment "solely for the benefit of his client and free of compromising influences and loyalties,"[68] and "precludes [an attorney's] acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."[69] When a lawyer is confronted with two or more clients whose interests conflict, "he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided . . . . He should resolve all doubts against the propriety of the representation."[70] An attorney is rarely justified in accepting the representation because "[i]f a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with [the] likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially."[71] In fact, prior to deciding to represent multiple clients, an attorney "should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."[72]

The Disciplinary Rules further provide that "[a] lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client . . . ."[73] More-

63. Baker v. Wainwright, 422 F.2d at 149.

64. Gravitt v. United States, 523 F.2d 1211, 1219 (5th Cir. 1975).

65. Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967).

66. INTEGRATION RULE OF THE FLORIDA BAR, art. X (effective Oct. 1, 1970) provides that "the Code of Professional Responsibility promulgated by order of the Supreme Court of Florida entered June 30, 1970, and the Canon of Ethics for Judges promulgated by the Supreme Court of Florida on June 27, 1941, as thereafter amended shall constitute a code of ethics applicable to the members of The Florida Bar . . . ."

67. FLA. BAR CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5.

68. *Id.*, EC 5-1.

69. *Id.*, EC 5-14.

70. *Id.*, EC 5-15.

71. *Id.*

72. *Id.*, EC 5-16.

73. *Id.*, DR 5-105(B). However, the representation is allowed where "it is ob-

over, "[i]f a lawyer is required to decline employment or to withdraw from employment under [the aforementioned] Disciplinary Rule, no partner or associate of his or his firm may accept or continue such employment."[74] Law firms are reasonably included in this rule.[75] Generally, there is ready access to confidential information between the members of a law firm,[76] and such information is susceptible to disclosure due to the close association of the members of the firm. The economic situation which results from the sharing of profits within a private law firm is another reason given for the regulation.[77] The possible destruction of the confidential relationship between the attorney and the client and the loss of public confidence in the bar and legal system further explain the inclusion of firms under this rule.[78]

Using a similar analysis, the District of Columbia Court of Appeals in *Borden v. Borden*[79] analogized a legal aid program financed by the Office of Economic Opportunity to a firm for purposes of regulation by the American Bar Association Code of Professional Responsibility.[80] In *Borden*, the plaintiff-wife who sought a divorce from her husband was represented by an attorney from a legal aid program. Upon plaintiff's motion for appointment of counsel to represent her defendant-husband, the trial court appointed another attorney from the program for that purpose. Both attorneys moved to set the court's appointment aside, arguing that it created conflicts of interest. Reasoning that since the attorneys were not paid by their clients there was no conflict of interest, the court denied the motion.[81] The appellate court reversed, noting that the legal aid attorneys "practice[d] their profession side-by-side, literally and figuratively . . . ."[82] Because of this, they were "subject to subtle influences that may well [have affected] their professional judgment and loyalty to their clients, even though they [were] not faced with the more easily recognized economic conflict of interest."[83] Thus, the conflict of interest inherent in this

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vious that he can represent the interests of each and if each consents to the representation. . . ." *Id.*, DR 5-105(C).

74. *Id.*, DR 5-105(D).

75. For an analysis, see 37 Mo. L. Rev. 346 (1972).

76. *Id.* at 348, *citing* United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955).

77. *Id.*, *citing* NAACP v. Button, 371 U.S. 415 (1963); ABA Code of Professional Responsibility, EC 5-22.

78. 37 Mo. L. Rev. at 348.

79. 277 A.2d 89 (D.C. Ct. App. 1971).

80. *Id.* at 91.

81. *Id.* at 90.

82. *Id.* at 91.

83. *Id.*

representation necessitated the appointment of counsel other than that employed by the legal aid program.

Another case utilizing the "free flow of information" analysis is *Allen v. District Court*,[84] which was cited by the *Turner* court. In *Allen*, the public defender was appointed to represent a welfare recipient charged with fraudulently obtaining welfare assistance. The public defender was subsequently appointed to represent a welfare department employee who was to be the prosecution's chief witness against the recipient, but who was himself charged with theft and embezzlement of welfare payments.[85] Prior to trial, the public defender's motion to withdraw from representation of the welfare department employee was denied in part.[86] On appeal of this denial, the Supreme Court of Colorado, although not declaring the public defender's office to be a firm for purposes of regulation under its code of ethics, considered the factors operating within the public defender's office which made it impossible to represent conflicting interests. The court declared that "even though different members of the public defender's staff were representing [the two defendants], the knowledge . . . gained by any member of the staff would be attributed to the other."[87] Accordingly, the resulting conflict was to be avoided by allowing the public defender to withdraw from representation of the employee.[88]

While Florida courts have never held that a legal aid service is analogous to a firm for purposes of regulation by the Code of Ethics, the Professional Ethics Committee of The Florida Bar has opined that "absent consent . . . it would not be proper for this OEO [legal services] program to provide representation of conflicting interests, whether different lawyers provided the representation, or whether different 'law offices' [operating within the program are] involved."[89] Consent "must be procured with extreme caution, and . . . any doubt whatever must be resolved against the representation."[90] The opinion was based on the "co-mingling of records" and the "ordinary interchange of information between attorneys typical of any large law firm" which took place in the legal services office.[91] While the Pro-

84. 519 P.2d 351 (Colo. 1974).

85. *Id.* at 352.

86. The public defender was allowed to withdraw from representation on the theft and conspiracy charges but not on the embezzlement charge. *Id.* at 352.

87. *Id.* at 353.

88. *Id.*

89. FLA. BAR PROFESSIONAL ETHICS COMM., Op. 67-37 at 467.

90. *Id.*

91. *Id.*

fessional Ethics Committee opinion is only advisory,[92] it illustrates a line of thinking similar to that of the *Borden* and *Allen* courts.

Although the *Turner* decision is merely an extension of the current Florida criminal law in this area, it was the first appellate decision in Florida to make a determination of prejudice *prior* to a plenary trial on the merits.[93] The court seems to have taken a step in the direction of a per se rule requiring separate counsel for each codefendant. However, the decision is more likely a warning to the trial courts that they should take upon themselves the duty of protection of defendants' rights, by appointing separate counsel at the first suggestion of a conflict of interest.[94] This position has been impliedly advocated by many, including the *Glasser* and *Allen* courts.[95] It is, as one student has noted, a necessary solution to an otherwise "potentially unresolvable situation"[96] because "[r]egardless of how harmonious the situation appears before trial, the possibility of conflict is always present where two defendants are represented by the same counsel."[97]

The *Turner* decision is consistent with the Florida Supreme Court's holding in *State v. Youngblood*.[98] By requiring the appointment of separate counsel when conflict exists between the defenses of the codefendants, the *Turner* court follows the *Youngblood* test: a court must grant a request for separate counsel unless the state demonstrates that prejudice will not result from single representation.[99]

At first glance, the *Youngblood* holding seems inconsistent with the rules enunciated in *Glasser*[100] and *Baker*.[101] Both *Glasser* and *Baker*

92. FLA. BAR PROFESSIONAL ETHICS COMM., Op. 66-56 at 396, 397 (1967).

93. For support of the position that the *Turner* court takes, see *The Case for Separate Counsel*, *supra* note 47, at 389-90.

94. *See id.* at 389.

FLA. STAT. § 27.53(3) (Supp. 1976) provides:

> If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, . . . it shall be his duty to move the court to appoint one or more members of The Florida Bar who are in no way affiliated with the public defender . . . , to represent those accused. However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict . . . .

95. "Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness." Glasser v. United States, 315 U.S. 60, 75 (1942). *See also* Allen v. District Court, 519 P.2d 351 (Colo. 1974); *The Case for Separate Counsel*, *supra* note 47, at 389.

96. *Conflict of Interests*, *supra* note 17, at 259.

97. *Id.* at 258, *citing* Morgan v. United States, 396 F.2d 110 (2d Cir. 1968).

98. 217 So. 2d 98.

99. *Id.*

100. 315 U.S. 60.

101. 202 So. 2d 563 (Fla. 1967).

indicate a preference for separate counsel even in the absence of a showing of prejudice.[102] *Youngblood* holds likewise, as long as a request has been made for separate counsel. On the other hand, "[i]f no request for separate counsel is made . . . reversible error does not occur unless the record reveals that some prejudice results from the failure to appoint separate lawyers for each defendant."[103] Viewed from this perspective, the *Glasser* and *Baker* courts ruled as they did because objections to joint counsel and requests for separate representation had been raised at the trial level.[104]

In the area of ethics, the decision to analogize a public defender's office to a private law firm for purposes of regulation by the Code of Professional Responsibility is unprecedented in Florida case law. Following the *Borden* lead seems well-advised. Indeed, the *Borden* court included public defenders in its admonition: "We should avoid always any action that would give the appearance that government attorneys are 'legal Hessians' hired 'to do a job' rather than attorneys at law."[105]

The reason for viewing the office of the public defender as a firm for purposes of ethical regulation is a sound one. Although the public defender's office lacks the economic conflict of interest typically involved in a firm, the close association of the attorneys in the public defender's office makes it possible that confidential information will be inadvertently circulated. The necessity of utilizing the services of the same investigator, the inevitable discussions occurring in the office among the attorneys, and the overlapping sources of information from identical witnesses all contribute to this possibility.[106] Furthermore, public confidence in the public defender and the Bar as a whole must be maintained. In order to do this, lawyers must "not only avoid evil,

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102. *See* discussion accompanying notes 48–51 *supra*.

103. State v. Youngblood, 217 So. 2d at 101.

104. If, as in *Youngblood*, no request for separate counsel is made at the trial level, a plenary trial ensues. It is possible that during the course of this trial, the defendants may unknowingly waive all nonjurisdictional defects by entering voluntary guilty pleas. *See* Gardner v. Wainwright, 433 F.2d 137, 139 (5th Cir. 1970). Moreover, ethical considerations may demand that the appointed attorney withdraw from the representation of *all* defendants due to information and knowledge gained during the representation. *See* H. DRINKER, LEGAL ETHICS 112 (1953); R. WISE, LEGAL ETHICS 156 (1966). In addition, if prejudice arises during the course of the trial, the State is burdened with the cost of the appeal, the cost of a retrial if so ordered, and the subsequent cost of outside counsel as required. In the long run, the practice of appointing special assistant public defenders where a conflict of interest requires the public defender to withdraw from representation of codefendants is more efficacious when performed prior to trial.

105. 277 A.2d. at 93.

106. Memorandum in Support of Petition for Writ of Certiorari at 4, Turner v. State, 340 So. 2d 132 (Fla. 2d Dist. Ct. App. 1976).

but also the appearance of evil."[107] Thus, where an attorney requests permission to withdraw from an appointment in an effort toward self-regulation of his conduct according to ethical standards, a court should never force him into an untenable position by requiring that he represent adverse interests. By appointing separate attorneys for individual defendants where there is alleged conflict, the courts uphold not only the individual's constitutional rights and protections, but also the integrity of the entire criminal justice system.

MELANIE HINES ALFORD

Eminent Domain—PRIOR PUBLIC USE DOCTRINE: NEW JUDICIAL CRITERIA—*Florida East Coast Railway v. City of Miami*, 321 So. 2d 545 (Fla. 1975).

The City of Miami brought condemnation proceedings to acquire, for use as a public park, land owned by the Florida East Coast Railway Company (hereinafter FEC).[1] The railroad asserted, as an affirmative defense, that the prior public use doctrine precluded the city's condemnation of the land. This doctrine provides that property presently being used for a public purpose by an entity having the power of condemnation cannot be condemned by another entity that has the same general power of condemnation.[2] The prior public use doctrine

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107. R. WISE, LEGAL ETHICS 2 (1966).

1. FLA. STAT. § 166.401 (1975) grants the power of eminent domain to municipalities:

> All municipalities in the state may exercise the right and power of eminent domain; that is, the right to appropriate property within the state, except state or federal property, for the uses or purposes authorized pursuant to this part. The absolute fee simple title to all property so taken and acquired shall vest in such municipal corporation unless the municipality seeks to condemn a particular right or estate in such property.

FLA. STAT. § 166.411 (1975) gives the condemnation power to cities for the purpose of establishing public parks:

> Municipalities are authorized to exercise the power of eminent domain for the following uses or purposes:
>
> . . . .
>
> (4) For public parks, squares, and grounds . . . .

For a background discussion of the theory of eminent domain, see Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

2. Property that has been acquired by the power of eminent domain and is presently being put to an important public use cannot be reappropriated for another use unless the second appropriation is expressly granted by the legislature or arises as a necessary implication. This rule was stated in Adirondack Ry. v. New York, 176 U.S. 335, 349 (1900): "It is true that the State may delegate the power [of eminent domain], and where it has done so to a railroad corporation and by its exercise lands have been