THE ETHICAL DILEMMAS OF PUBLIC DEFENDERS IN IMPACT LITIGATION

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INTRODUCTION

"Institutional lawyers," such as legal services attorneys and public defenders, face a constant barrage of conflicting obligations and loyalties to different clients. Elsewhere in this Colloquium,[1] Martin Guggenheim describes several of the ethical problems that emerge in the institutional lawyer's daily representation of individual clients. This article will explore some of the equally perplexing ethical issues that arise when the institutional lawyer goes beyond individual representation and embarks on "impact litigation."[2]

The most familiar type of impact litigation is the class action,[3] and the literature on ethics in impact cases has tended to focus exclusively on this form of litigation.[4] Because class actions are invariably the result of meticulous advance planning, they are peculiarly susceptible to detailed rules and procedures for resolving ethical conflicts.[5]

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1. Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney,* 14 N.Y.U. REV. L. & SOC. CHANGE 13 (1986).

2. For purposes of this article, the term "impact litigation" will refer to cases in which the attorney's goals go beyond securing relief for the individual client and encompass some notion of effecting reform for all other individuals who are or will be suffering from the same legal problems as the individual client.

3. *See generally* H. NEWBERG, CLASS ACTIONS (2d ed. 1985) (comprehensive discussion of class actions). For a discussion of civil rights class actions, see generally 1 N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976); 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1979).

4. *See, e.g.,* Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective,* 77 NW. U.L. REV. 492 (1982); Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183 (1982); Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses,* 71 KY. L.J. 787 (1982-83); Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct,* 27 LOY. L. REV. 1047 (1981); *Developments in the Law — Conflicts of Interest in the Legal Profession,* 94 HARV. L. REV. 1244, 1447-57 (1981) [hereinafter cited as *Conflicts of Interest*]; Note, *The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation,* 97 HARV. L. REV. 947 (1984); Note, *Conflicts in Class Actions and Protection of Absent Class Members,* 91 YALE L.J. 590 (1982).

5. *See, e.g.,* Garth, *supra* note 4, at 521-32; Rhode, *supra* note 4, at 1247-62.

This article will focus on a type of unplanned (and occasionally chaotic) impact litigation that is, in some respects, the hallmark of the institutional lawyer. Because legal services attorneys and public defenders each represent a clientele with certain uniform problems, the same issues tend to reappear in case after case. Occasionally, one of these agencies or a public interest law center[6] will bring a class action to address such an issue. Far more frequently, however, the issue is raised in each of the individual cases until it is finally resolved by the highest appellate court of that jurisdiction. This approach creates an inherent potential for ethical conflicts. Because the clients' interests often diverge, lawyers from the same office frequently find themselves arguing totally inconsistent positions. For example, one lawyer argues an interpretation of a statute that benefits her client, while her colleague attempts in a different case to convince the same judge that the statute should be interpreted in the opposite way.

In analyzing the ethical dilemmas that pervade this mode of litigation, this article will focus on a series of cases recently handled by the District of Columbia Public Defender Service. Part I of this article will describe the evolution of this litigation, and the ways in which the ethical and tactical problems emerged. Part II will describe the various ethical and constitutional principles that form the backdrop for resolving these problems. Finally, Part III will propose some general guidelines for addressing ethical problems of this type in future cases.

I
THE *CHADHA* CASES: A STUDY IN ETHICAL CONFLICTS AND INSTITUTIONAL DECISION MAKING

A. The Litigation

The Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*[7] is about as unlikely a source for criminal defense impact litigation as one could imagine. The *Chadha* case concerned the constitutionality of one-house Congressional vetoes. The respondent, an alien, had been saved from deportation by an administrative decision of the Immigration and Naturalization Service (INS). Thereafter, the House of Representatives, acting pursuant to the legislative veto provision of the Immigration and Nationality

6. The term "public interest law center" is used in this article to refer to any organization that is specifically devoted to litigating impact cases on behalf of particular groups of clients. This term would include, for example, general law reform organizations like the Center for Law and Social Policy, as well as more narrowly focused organizations like the National Prison Project of the American Civil Liberties Union, the Youth Law Center, and the Mental Health Law Project. For a description of the ways in which such public interest law centers have interacted with other types of advocacy organizations in one representative area of the law, see Herr, *The New Clients: Legal Services for Mentally Retarded Persons,* 31 STAN. L. REV. 553 (1979).

7. 462 U.S. 919 (1983).

Act,[8] employed a one-house veto to overturn the INS decision. On review, the Supreme Court reinstated the INS decision, holding that the one-house veto provision of the Immigration and Nationality Act violated Article I of the Constitution.[9]

Because of the peculiarities of District of Columbia legislation, the *Chadha* decision has potentially profound implications for several groups of persons subject to prosecution under D.C. criminal statutes. Prior to 1973, Congress enacted all D.C. criminal laws. With the enactment of the "Home Rule Act"[10] in 1973, Congress ceded to the D.C. City Council the authority to enact criminal laws—subject to a one-house veto of any such legislation.[11] Under the *Chadha* decision, this one-house veto provision is obviously unconstitutional. The ramifications of that conclusion, however, are far less obvious and much more controversial. Attorneys with the Public Defender Service have argued each of the following diametrically opposed positions:

1. *Chadha* invalidates the entire Home Rule Act,[12] and thereby voids any laws passed by the D.C. City Council, including statutes raising the penal-

8. 8 U.S.C. §§ 1101-1503 (1982).

9. The Court held that the legislative veto provision of the Immigration and Nationality Act was unconstitutional because Congress' exercise of the veto failed to comply with the "single, finely wrought and exhaustively considered procedure," 462 U.S. at 951, set out in the "[e]xplicit and unambiguous" provisions of Article I. *Id.* at 945. These provisions, which the Court considered "integral parts of the constitutional design for the separation of powers," *id.* at 946, unequivocally require that all legislation, including resolutions, be approved by both Houses of Congress and presented to the President before they become effective. The Court held that the Article I requirements apply not only when Congress considers itself to be legislating, but whenever Congress in fact exercises "the legislative power of the Federal Government." *Id.* at 951.

10. Self-Government and Governmental Reorganization (Home Rule) Act, Pub. L. No. 93-198, 84 Stat. 774 (1973)(codified as amended at D.C. CODE ANN. §§ 1-201 to 1-244 (1981)) [hereinafter cited as Home Rule Act].

11. The purposes of the Home Rule Act were to "grant to the inhabitants of the District of Columbia powers of local self-government," and to "relieve Congress" "to the greatest extent possible, consistent with the constitutional mandate . . . of the burden of legislating upon essentially local District matters." Home Rule Act at § 102(a); *see* McIntosh v. Washington, 395 A.2d 744, 753 (D.C. 1978). Consistent with these purposes, Congress conferred upon the popularly elected D.C. City Council broad authority both to legislate and to administer the city's laws. *See* Home Rule Act at §§ 302, 404(a). *But see id.* at §§ 602(a) (1)-(8) (prohibiting the Council from taking certain enumerated actions). Simultaneously, Congress intended to exercise some oversight and maintain its constitutional role as "the ultimate legislative authority" for the District. *Id.* at § 102(a). Congress therefore imposed a significant limitation upon the City Council's power to enact criminal legislation. If the council passes an act amending or repealing any provision of the congressionally enacted legislation on criminal law or criminal procedure in the District of Columbia, then either House of Congress can prevent it from taking effect by passing a resolution of disapproval within thirty legislative days after the act's transmittal to Congress. *Id.* at § 602(c)(2).

12. The essence of this argument is that the one-house veto provision of the Home Rule Act is a nonseverable portion of the legislation as a whole. Accordingly, when the *Chadha* decision declared that one-house vetoes are unconstitutional, it had the effect of striking down not just the one-house veto provision of the Home Rule Act, but also the remainder of this nonseverable statute. This position was adopted by the trial court in United States v. Cole, 112 Daily Wash. L. Rep. 1117 (D.C. Super. Ct. May 9, 1984).

ties for drug offenses,[13] criminalizing certain theft and white collar offenses,[14] and expanding the system of preventive detention for persons awaiting trial;[15]

2. *Chadha* does not invalidate the Home Rule Act,[16] and therefore D.C. offenders are subject to all D.C. City Council legislation, including the substantially ameliorative Sexual Assault Reform Act of 1981,[17] which lowered the penalties for carnal knowledge and decriminalized certain consensual sexual acts;

3. *Chadha* does not invalidate the Home Rule Act or prior D.C. City Council legislation, except for the Sexual Assault Reform Act, the ameliorative and punitive provisions of which are uniformly invalidated by certain deficiencies in the statute's enactment.[18]

Public Defender attorneys in drug offenses, theft and white collar of-

13. In 1981, the D.C. City Council repealed the congressionally enacted Dangerous Drug Act, D.C. CODE ANN. §§ 33-601 to 33-612 (1981), and Uniform Narcotics Act, D.C. CODE ANN. §§ 33-501 to 33-526 (1981), and replaced them with the District of Columbia Uniform Controlled Substances Act of 1981, D.C. Law 4-29 (1981) (codified at D.C. CODE ANN. §§ 33-501 to 33-567 (Supp. 1985)). The new law proscribes a greater number of criminal acts, regulates a greater number of drugs, and increases the sentences that may be imposed. The effect of the legislation has been to substantially increase the number of prosecutions for drug-related offenses.

14. District of Columbia Theft and White Collar Crime Act of 1982, D.C. Law 4-164 (codified at D.C. CODE ANN. §§ 22-3801 to 22-3901 (Supp. 1985)) (changed the substantive law concerning several offenses involving larceny and fraud, created a number of new offenses, such as trafficking in stolen property and credit card fraud, and altered certain penalty provisions, including the addition of an enhanced penalty where the victim is 60 years or older).

15. District of Columbia Emergency Bail Amendment Act of 1982, D.C. Law 4-152 (codified at D.C. CODE ANN. §§ 23-1321, 23-1322, 23-1325 (Supp. 1985))(amending D.C. CODE ANN. §§ 23-1321, 23-1322, 23-1325 (1981)). The act authorized the preventive detention of defendants in first-degree murder cases, without even the minimal protections that had been established in Edwards v. United States, 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982). The statute also lengthened the permissible time limit for preventive detention in less serious felonies, and created a new provision for preventively detaining persons who are arrested for a new offense while on pre-trial release in another case.

16. This position also turns upon severability analysis. In this approach, the legislative history of the Home Rule Act is used to show that Congress did not intend the one-house veto provision of the Act to be an indispensable part of the legislation as a whole. Accordingly, the veto provision is severable, and the invalidation of that provision under *Chadha* does not void the entire Home Rule Act. *See, e.g.,* United States v. Davis, 112 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. Oct. 2, 1984).

17. The Act, which was vetoed by the House of Representatives before it ever went into effect, decriminalized carnal knowledge between minors and consensual sodomy and lowered the penalty for carnal knowledge by an adult. D.C. Act 4-69 (1981); *see also* H.R. Res. 208, 97th Cong., 1st Sess. (1981). In light of Congress' use of a one-house veto to invalidate the Sexual Assault Reform Act, it can be argued that the *Chadha* decision negates Congress' action and has the effect of reviving the fully enacted Sexual Assault Reform Act. *See* Brief for Appellant at 17-69, Cole v. United States, No. 84-703 (D.C. filed Aug. 1, 1984) (hereinafter cited as Brief for Appellant, Cole) (on file at the offices of the New York University Review of Law & Social Change).

18. This argument asserts that the Sexual Assault Reform Act never became legally effective in the period preceding its invalidation by the one-house veto because the publication and notice requirements of D.C. CODE ANN. § 1-1602 (1981) were never satisfied. *See* Brief for Appellee at 42-47, Gary v. United States, No. 83-796 (D.C. filed Aug. 17, 1984) (on file at offices of New York University Review of Law & Social Change). *Contra* Reply Brief for Appel-

fenses, and cases of preventive detention, argued that *Chadha* should be interpreted as invalidating the entire Home Rule Act.[19] Attorneys in carnal knowledge cases and certain other sexual offenses argued that the Home Rule Act was valid and that their clients should be permitted to benefit from the favorable provisions of the Sexual Assault Reform Act.[20] Finally, attorneys in cases of forcible sodomy and sexual assaults on incompetent women—the two offenses treated more harshly under the Sexual Assault Reform Act[21]—took the position that this particular enactment of the D.C. City Council was void.[22]

The situation was obviously chaotic and conflict-ridden. Since there were only a handful of trial judges presiding over these cases, Public Defender Service colleagues found themselves taking inconsistent positions before the same judge. Some attorneys found themselves advancing one position to a judge in one case, and then turning around and advancing the opposite position to a different judge in a different case.

Eventually, one of these cases[23] reached the D.C. Court of Appeals, the high court of the jurisdiction. The nature of the case dictated the Public Defender Service's appellate position on the proper interpretation and application of *Chadha*. Because the appellant was a sex offender convicted of carnal knowledge, the Public Defender Service took the position that *Chadha* invalidates only the veto provision of the Home Rule Act, and that all prior D.C. City Council legislation—including the Sexual Assault Reform Act—is valid.[24]

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lant Cole at 14-15, Gary v. United States and Cole v. United States, Nos. 84-796 & 84-703 (D.C. filed Sept. 11, 1984) (on file at offices of New York University Review of Law & Social Change).

19. *E.g.*, Motion to Dismiss the Information and Points and Authorities In Support Of Motion at 1-5, United States v. Parrish, M-4564-83 (D.C. Super. Ct. filed Mar. 1, 1984) (drug offense) (on file at the offices of the New York University Review of Law & Social Change); Motion to Vacate Order of Detention Pursuant to an Invalid Statute . . . And to Set Appropriate Conditions of Release at 1-2, United States v. Johnson, F-734-83 (D.C. Super. Ct. filed May 11, 1984) (preventive detention) (on file at offices of New York University Review of Law & Social Change).

20. *E.g.*, United States v. Cole, 112 Daily Wash. L. Rep. 1117 (D.C. Super. Ct. May 9, 1984) (carnal knowledge); United States v. Langley, 112 Daily Wash. L. Rep. 801 (D.C. Super. Ct. Mar. 30, 1984) (rape).

21. The Sexual Assault Reform Act increased the possible penalty for forcible sodomy from ten years to twenty years. *Compare* D.C. CODE ANN. § 22-3502 (1981) *with* D.C. Act 4-69 § 3 (1981). The Reform Act also criminalized nonforcible sexual intercourse with an incompetent person who is incapable of resisting because of intoxication, drugs, or mental or physical disability. D.C. Act 4-69 § 4 (1981).

22. *E.g.*, Brief for Appellant at 12 n.5, Goudy v. United States, 495 A.2d 744 (D.C. 1985) (defense counsel expressly eschewed argument that the one-House veto of the Sexual Assault Reform Act was invalid under *Chadha*, in prosecution for rape of a mentally incompetent woman); *see also* United States v. Reid, F-824-83 (D.C. Super. Ct. 1983) (defense attorney specifically refrained from arguing that *Chadha* revived the effect of the Sexual Assault Reform Act, in prosecution for forcible sodomy).

23. Cole v. United States, No. 84-703 (D.C. appeal filed May 14, 1984).

24. Brief for Appellant, Cole, *supra* note 17, at 36-50. Thus, the Public Defender Service argued, the appellant was only subject to the twenty year maximum sentence established by the

This is a story without an ending. The D.C. Court of Appeals has not yet issued its decision and the losing party will undoubtedly appeal the decision to the United States Supreme Court. In the meantime, in order to ensure that new clients will reap the benefits of an appellate victory, Public Defender Service attorneys continue to raise the various conflicting *Chadha* arguments.

B. The Ethical and Tactical Problems Highlighted by the Chadha *Litigation*

The situation created by *Chadha* inevitably results in numerous ethical dilemmas. First, a risk arises that some clients' interests will be sacrificed in favor of others. Attorneys, cognizant that only one interpretation of the statute can prevail, could choose to devote their greatest efforts to the interpretation that will benefit one particular group of clients. For example, the attorneys might favor the interpretation that benefits the largest proportion of the Public Defender Service clientele, or that benefits the clients who are facing the most severe sentences and therefore have the greatest need. In addition, in a politically charged case such as this—where the future of District Home Rule is at stake—attorneys or the agency's Board of Trustees could be motivated by an ideological goal of preserving Home Rule or a political desire to avoid antagonizing the District administration.[25] Finally, even if none of these conflicts actually materializes, there may be an "appearance of impropriety"[26] when a single agency takes radically inconsistent positions before the same tribunal.

These ethical problems may suggest that the Public Defender Service should withdraw from the cases of all but one group of clients. There are,

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Sexual Assault Reform Act, rather than the Congressionally imposed penalty of life imprisonment. *Id.* at 70-72, 79.

25. There has in fact been some suggestion that the Board of Trustees of the D.C. Public Defender Service attempted to improperly influence the agency's handling of the *Chadha* litigation. A trustee and agency staff attorneys filed suit against the Board of Trustees, alleging that the Board engaged in "unlawful interference in the handling of individual cases at [Public Defender Service]," First Amended Complaint at 2, Bazan v. Cohen, C.A. No. 2491-85 (D.C. filed Apr. 18, 1985) (on file at offices of New York University Review of Law & Social Change), and that the Board attempted to interfere specifically with the agency's raising of "politically sensitive arguments such as the constitutional validity of the District's 'home rule' legislation" in the *Chadha* litigation. Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 19-20, Bazan v. Cohen, C.A. No. 2491-85 (D.C. filed Apr. 18, 1985) (on file at offices of New York University Review of Law & Social Change). As a general matter, it is improper for the Board of Directors of a public defender agency to interfere with individual cases and clients. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974); *cf.* Estep v. Johnson, 383 F. Supp. 1323, 1325 (D. Conn. 1974) (where board member and staff attorney were considered "adversaries in the same litigation," board member was forced to either withdraw from the case or resign temporarily from the board); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 489, at 3 (1978) ("Certainly, in the minds of an organization's indigent clientele, the [legal aid] staff could not reasonably be deemed free of compromising influences if the lawyer-members of its board were to accept retainers from relatively affluent adverse parties.").

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1979) [hereinafter cited as MODEL CODE] ("A lawyer should avoid even the appearance of professional impropriety.").

however, equally compelling considerations that militate against such a course of action. First, the task of developing criteria for selecting the group of clients that will continue receiving representation is problematic, because any non-random selection process will expose the agency to accusations of improper favoritism. Moreover, several of the clients in each group may have a sixth amendment[27] right to continue receiving the services of their originally appointed attorney.[28] Finally, for the Public Defender Service to withdraw from hundreds of cases on the verge of trial would have a devastating impact on the court system.

For many of the same reasons, a situation of this type defies coordinated agency decision making. With hindsight, one could say that prior to accepting these cases, the agency supervisors should have formulated a coordinated position to accomodate all of the trial cases and, at the very least, should have employed more reasoned criteria in selecting the position that the agency would take on appeal. But choosing such criteria would once again create the risk of the agency picking its clients on an inappropriate ideological basis.

Before turning to the ethical and constitutional principles that form the essential foundation for any analysis of these issues, it is worthwhile to consider whether the *Chadha* litigation was an aberrant situation or was representative of the types of conflicts that institutional lawyers confront.

C. The Typicality of the Conflicts in the Chadha *Litigation*

To suggest that conflicts of this magnitude happen very often would be an overstatement. Yet, they do arise with disturbing regularity. In the past five years, there have been at least three other major conflicts of this type at the D.C. Public Defender Service.

In one conflict, agency attorneys argued in a juvenile parole revocation proceeding that Family Division judges lose all jurisdiction after commitment and therefore cannot revoke parole.[29] Meanwhile, other attorneys in cases where previously committed juveniles sought ameliorative relief, took the diametrically opposed position that the Family Division retains jurisdiction and therefore has the power to grant such relief.[30]

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

28. *See infra* notes 67-69 and accompanying text.

29. *In re* J.M.W., 411 A.2d 345 (D.C. 1980). The Public Defender Service took this position in *J.M.W.* in order to serve the interests of its client, even though a court holding that eliminated Family Division jurisdiction over the post-commitment treatment of a child would have a detrimental effect on other Public Defender clients who sought post-commitment relief from the Family Division. Indeed, after the appellate court in *J.M.W.* adopted the position advanced by the Public Defender Service, *see id.* at 348-49, the Government routinely relied on the *J.M.W.* decision to oppose defense motions to secure judicial relief for committed children. *E.g., In re* J.A.G., 443 A.2d 13 (D.C. 1982). Recently, the D.C. Court of Appeals limited the scope of the *J.M.W.* decision and approved the trial court's intervention on behalf of a previously committed child. *In re* A.A.I., 483 A.2d 1205 (D.C. 1984).

30. *E.g., In re* R.C.A., J-0500-81 & J-1697-81 (D.C. Super. Ct. 1981), *appeal dismissed as moot,* Nos. 82-247 and 82-248 (D.C. 1983).

In another conflict of this type, the majority of the staff attorneys adopted a position that a certain judge had a conflict of interest that necessitated his recusal in all felony cases.[31] A handful of attorneys, however, perceived that this judge would be beneficial for their clients, and therefore took the position that the judge's conflict did not require recusal.

The final conflict involves a class action suit, in which the agency is currently arguing that placement of any juvenile offenders in a certain detention facility is unlawful.[32] Yet, whenever individual clients prefer that facility to others, their Public Defender Service attorneys must essentially concede the lawfulness of placement in that facility.[33]

If the D.C. Public Defender Service's experience is representative of the hundreds of public defender agencies throughout the country, then this is a problem of substantial dimension. Moreover, even if the problem affects relatively few clients, the fundamental constitutional and ethical principles in this area demand that a solution be formulated. In the next section, we will move towards such a solution by examining the applicable ethical directives.

II
THE ETHICAL AND CONSTITUTIONAL PARAMETERS OF INSTITUTIONAL LAWYERING IN CRIMINAL DEFENSE IMPACT CASES

A. The General Ethical Standards Governing Conflicts of Interest

The American Bar Association ethical directives have always prohibited attorneys from representing clients with directly conflicting interests.[34] Traditionally, the Code of Professional Responsibility has embraced a fairly narrow view of the types of conflicts that constitute an ethical dilemma. The wording of the Code suggests that the interests of the two clients have to be overtly adverse,[35] and that only factual disputes—not disputes about legal issues[36]—

31. *See, e.g.,* Defendant's Motion That Trial Judge Recuse Himself, United States v. Murchison, F-4617-81 (D.C. Super. Ct. filed Mar. 12, 1982) (arguing that trial judge was precluded from presiding over a case that was indicted and prosecuted by the Felony Trial Division of the United States Attorney's Office because his wife was chief of that office) (on file at the offices of the New York University Review of Law and Social Change).

32. Jerry M. v. District of Columbia, C.A. No. 1519-85 (D.C. Super. Ct. filed Mar. 1, 1985) (challenging conditions in the Receiving Home and other D.C. juvenile detention facilities).

33. For example, in the case of juvenile A.B., the Government filed a motion seeking to transfer the juvenile from Oak Hill Youth Center to the Receiving Home. The juvenile client informed his Public Defender Service counsel that he preferred the Receiving Home to his current placement in Oak Hill. Accordingly, the attorney did not oppose the child's transfer to the Receiving Home. *In re* A.B., J-1471-84 and J-1478-84 (D.C. Super. Ct. 1984).

34. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9 (1983) [hereinafter cited as MODEL RULES]; MODEL CODE, *supra* note 26, at Canon 5, DR 5-105, EC 5-14.

35. *Compare* MODEL CODE, *supra* note 26, at DR 5-105(a) (defining conflicts in terms of "adverse effect" upon the lawyer's exercise of his independent professional judgment and representation of "differing interests") *with* MODEL RULES, *supra* note 34, at Rule 1.7 (expressly encompassing both direct and indirect adverse effects). Under the Code, the type of conflict

implicate the ethical directives for conflicts.[37] Under this interpretation, the only issue that has sparked significant controversy in criminal cases has been the relatively overt conflict inherent in representing multiple co-defendants in the same prosecution.[38]

The situation has changed dramatically as a result of the ABA's recent revision of the Code. In August of 1983, the ABA adopted the new Model Rules of Professional Conduct.[39] These rules have been adopted in a number of states,[40] and are on the verge of adoption in several more.[41]

The new Model Rules substantially broaden the concept of conflicts. The Rules expressly apply both to situations in which "representation of [one] client will be directly adverse to another client,"[42] and to situations where a lawyer's representation of a new client "may be materially limited by the lawyer's responsibilities to another client."[43] The ethical directives of the Model Rules also apply to situations in which the advancement of a particular legal

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that would typically produce disqualification was one in which the attorney found herself representing a particular company in one case while simultaneously representing the company's adversary in a different case. *See, e.g.*, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); Sapienza v. New York News, 481 F. Supp. 676 (S.D.N.Y. 1979).

36. A purely "legal" issue might be, for example, the interpretation of a statute or prior court decision.

37. *See, e.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1350 (9th Cir. 1981) (distinguishing between disputes over "statutory construction versus disputes over facts").

38. *E.g.*, Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); *see also* Cole, *Time for a Change: Multiple Representation Should Be Stopped*, 2 NAT'L J. CRIM. DEF. 149 (1976); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939 (1978); Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075 (1979); Comment, *Conflicts of Interest in Public Defender Offices*, 8 J. LEGAL PROF. 203 (1983).

39. MODEL RULES, *supra* note 34.

40. Thus far, seven states have adopted the Model Rules: New Jersey (adopted on July 12, 1984); Arizona (adopted on Sept. 7, 1984); Montana (adopted on June 6, 1985); Minnesota (adopted on June 13, 1985); Washington (adopted on June 25, 1985); Missouri (adopted on Aug. 7, 1985) and Delaware (adopted on Sept. 12, 1985). The state of Virginia, which revised its Code of Professional Responsibility in October of 1983, incorporated a number of the provisions of the Model Rules into its revised Code. This information was provided on October 1, 1985 by the Center for Professional Responsibility, ABA Special Committee on Implementation of the Model Rules of Professional Conduct.

41. In thirteen states, the Model Rules have been submitted to the state's highest court with a state bar association recommendation that the Rules be adopted: Arkansas; Florida; Illinois; Maryland; Michigan; Nebraska; Nevada; New Hampshire; New Mexico; North Carolina; South Carolina; Utah; and Wisconsin. In Vermont, the Rules are pending consideration before the state's highest court, with a state bar association recommendation against adoption, urging retention of the current state Code of Professional Responsiblity. In several other states, the Rules are still being studied by the respective state bar associations, and have not yet reached the stage of being considered by the state's highest court. This information was provided on October 1, 1985 by the Center for Professional Responsibility, ABA Special Committee on Implementation of the Model Rules of Professional Conduct.

42. MODEL RULES, *supra* note 34, at Rule 1.7(a).

43. *Id.* at Rule 1.7(b).

argument may injure the interests of another client. The Comment to the rule on conflicts of interest explains that:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.[44]

The key to these principles is the concept of "adverse affect" on the clients' interests. Where cases are pending in the exact same tribunal, the adoption of a particular legal position will affect both of the clients' cases. Consistent with the Code's underlying rationale of preventing attorneys from favoring one client over another (or appearing to do so),[45] the Model Rules now govern situations in which an attorney could more forcefully advance the particular legal interpretation that benefits the client she favors.

The Model Rules do not absolutely prohibit multiple representation even in situations of potential conflict. Rather, the Rules require that the attorney make an assessment of her ability to adequately represent both clients. The attorney does not need to withdraw if:

> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.[46]

Although the Model Rules are phrased in terms of representation by a single attorney, they make clear that a law firm functions as a single attorney for purposes of conflicts. Thus, the Model Rules mandate that a firm representing two different clients with irreconcilably opposed interests withdraw from one of the clients' cases.[47]

Finally, the definition of "conflicts" raises the question of whether a public defender's preference for one law reform position over another constitutes the type of dilution of loyalty that is contemplated by the ABA directives. Traditionally, ethical conflicts have been framed in terms of paying clients and attorneys who are financially motivated to favor one client over another.[48]

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44. *Id.* at Rule 1.7 comment (Conflicts in Litigation).

45. *See, e.g.*, International Business Mach. v. Levin, 579 F.2d 271, 279-80 (3d Cir. 1978); *Cinema 5, Ltd.*, 528 F.2d at 1386-87.

46. MODEL RULES, *supra* note 34, at Rule 1.7(b); *see also id.* at Rule 1.7(a) (establishing an identical standard for actual conflicts). The Code imposed equivalent procedures for client consent to representation notwithstanding the existence of conflicts. *See* MODEL CODE, *supra* note 26, at DR 5-105(c).

47. *See* MODEL RULES, *supra* note 34, at Rule 1.10 (Imputed Disqualification).

48. *E.g., Cinema 5, Ltd.*, 528 F.2d at 1387 ("It can hardly be disputed that there is at least

There has been growing recognition, however, of the equally grave problem of divided loyalties in the public interest context. In the area of class action litigation, commentators have long pointed out the glaring risks of conflicting loyalties to different groups with differing goals.[49] In recent years, the courts have been more willing to acknowledge the existence of such conflicts, and have applied the ABA ethical precepts to ideological conflicts as well as financial conflicts.[50]

B. Ethical Issues in the Context of Poverty Law

The threshold question in applying the rules of ethics to the poverty law context is whether a Legal Services office or a Public Defender agency constitutes a "law firm" for purposes of conflicts of interest. Under the Code of Professional Responsibility, this is a controversial issue, with courts taking widely varying positions.[51] If the agency is viewed as simply a collection of unaffiliated individual attorneys sharing office space, then there is no conflict whatsoever in different staff attorneys representing clients with different interests. If, however, the agency is seen as one cohesive unit, conflicts may arise. The new Model Rules resolve this issue. A single legal aid office is to be deemed a "law firm," but multiple field offices in varying locations are not necessarily part of the same "firm."[52] These classifications reflect a logical application of the reasoning underlying the rules on conflicts. Whereas members of the same legal aid office might be expected to share information, discuss strategy, and have access to each other's case files,[53] this would not be

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the appearance of impropriety where half [the attorney's] time is spent with partners who are defending Cinerama in multi-million dollar litigation, while the other half is spent with partners who are suing Cinerama in a lawsuit of equal substance.").

49. *See, e.g.*, Garth, *supra* note 4, at 492-99; Rhode, *supra* note 4, at 1186-91, 1210-1212; *Conflicts of Interest, supra* note 4, at 1447-48.

50. *See, e.g.*, Moore v. Margiotta, 581 F. Supp. 649, 653 (E.D.N.Y. 1984) (disqualifying law firm from representing two plaintiff classes with apparently adverse interests and explaining: "The interests need not conflict directly, but the mere fact of adjusting or compromising legal tactics or arguments to accomodate both classes of plaintiffs obviously impairs counsel's use of independent professional judgment as to each class.").

51. A public defender agency was deemed a "firm" for purposes of the conflict rules in Babb v. Edwards, 412 So. 2d 859, 860 (Fla. 1982); Commonwealth v. Westbrook, 484 Pa. 534, 400 A.2d 160 (1979); Allen v. District Court In and For Tenth Judicial District, 184 Colo. 202, 205, 519 P.2d 351, 353 (1974). Other courts have declined to hold public defender agencies to traditional ethical limitations when representing multiple defendants. *See, e.g.*, State v. Bell, 90 N.J. 163, 447 A.2d 525 (1982); People v. Robinson, 79 Ill. 2d 147, 158-59, 402 N.E.2d 157, 161-63 (1979); People v. Wilkins, 28 N.Y.2d 53, 56, 268 N.E.2d 756, 757, 32 N.Y.S.2d 8, 10 (1971).

52. MODEL RULES, *supra* note 34, at Rule 1.10 comment (Definition of 'Firm') ("Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.").

53. *See, e.g.*, Flores v. Flores, 598 P.2d 893, 896-97 (Alaska 1979). These are the factors which generally underlie the extension of the conflict's taint from the individual attorney to the rest of the attorney's law firm. *See Conflicts of Interest, supra* note 4, at 1361-63.

true of attorneys in different field units.

Although a legal aid office may operate in much the same way as a law firm, one critical difference exists for purposes of conflict principles. When a private law firm withdraws from a client's case because of a conflict of interest, the client can simply retain another firm. The legal aid office, however, is the "lawyer of last resort" for its client;[54] as both commentators[55] and courts[56] have pointed out, the withdrawal of a legal aid office may as a practical matter leave the indigent client without representation.

Commentators have suggested various solutions to this "last resort" lawyer problem in the civil law context of the Legal Services program. Stressing the indigent clients' rights to zealous, unimpaired representation, some commentators have proposed creating sufficient legal aid field units and back-up systems to furnish alternative counsel in conflict situations.[57] Other commentators, however, have suggested that the traditional conflict rules should be loosened in the context of indigent clients.[58]

Although a network of back-up systems is certainly the ideal solution to the conflicts problem, in reality such arrangements are not yet available in many areas of the country. In such areas, it may indeed become necessary to qualify the normal ethical rules and call upon a legal aid office to represent two clients, notwithstanding their conflicting interests.[59] Obviously, the appropriateness of this course of action depends upon the degree of conflict and the extent to which office procedures could be modified to guard against sharing of information about the clients.[60]

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54. Berger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney,* 62 B.U.L. REV. 1115, 1123 (1982).

55. *Id.* at 1122-25; *Conflicts of Interest, supra* note 4, at 1398. *See* LEGAL SERVICES CORP., ANNUAL REPORT 10 (1979); Idaho State Bar Ethics Comm., Ethics Opinion, *reprinted in* ADVOCATE, May 1975, at 9.

56. *See Robinson,* 79 Ill. 2d at 159, 402 N.E.2d at 162; In re Amendment to Articles of Incorporation of the Defender Ass'n of Philadelphia, 453 Pa. 353, 375, 307 A.2d 906, 917 (Roberts, J., dissenting), *cert. denied,* 414 U.S. 1079 (1973).

57. *Conflicts of Interest, supra* note 4, at 1399-1400, 1408-11.

58. Berger, *supra* note 54, at 1127-31, 1151-60.

59. *Cf.* Fla. Bar Comm. on Professional Ethics, Op. 72-48 (1973) (in county with small number of attorneys available for court appointment, hardship conditions justify relaxation of conflict rules to permit assistant state attorney and his partner to serve as court-appointed defense counsel for indigents in federal court); Ohio State Bar Ass'n Comm. on Professional Conduct, Informal Op. 76-5 (1976) (village solicitor permitted to concurrently perform prosecutorial and defense roles in different courts because of shortage of attorneys for indigents); Ohio State Bar Ass'n Comm. on Professional Conduct, Informal Op. 75-12 (1975) (shortage of attorneys justifies criminal defense work by partners of county prosecutor).

60. *See, e.g., Flores,* 598 P.2d at 896-97 (suggesting that legal aid society's multiple representation of clients with directly conflicting interests would be ethically permissible if agency developed appropriate regulations for "record keeping, access to files, supervision, and physical separation of offices"). *Cf.* People v. Wilkins, 28 N.Y.2d 53, 268 N.E.2d 756, 320 N.Y.S.2d 8 (1971) (where size of office was so large as to preclude possibility of free flow of information concerning clients, multiple representation by legal aid society would be permitted).

C. *Special Aspects of the Public Defender Context That Require Further Qualification of the General Ethical Standards*

The ethical conflicts that confront the legal services attorney in the civil law realm are very complex. They become even more perplexing, however, in the public defender's realm of criminal cases because of the applicability of the sixth amendment's requirement of effective assistance of counsel.[61]

The sixth amendment in effect elevates the concept of conflict-free counsel to a constitutional level. As numerous courts have recognized,[62] a conflict of interest and dilution of the attorney's loyalty to the client can impair the attorney's performance and render her representation ineffective. It is unclear to what extent the sixth amendment standard is synonymous with the ABA ethical precepts.[63] The courts will generally give substantial weight to ABA standards in gauging whether an attorney fell below "professional norms" and thereby rendered ineffective assistance.[64] But the sixth amendment may im-

61. The sixth amendment guarantee of court-appointed counsel for indigent defendants applies directly to federal prosecutions, Johnson v. Zerbst, 304 U.S. 458 (1938), and, through incorporation in the fourteenth amendment due process clause, also applies to state prosecutions, Gideon v. Wainwright, 372 U.S. 335 (1963). Although the sixth amendment does not expressly provide for "effective" assistance of counsel, the Supreme Court has long recognized that the guarantee of counsel "cannot be satisfied by mere formal appointment," Avery v. Alabama, 308 U.S. 444, 446 (1940), and that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). *See also* Evitts v. Lucey, 105 S. Ct. 830, 836 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); Strickland v. Washington, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.").

62. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335 (1980) (undivided loyalty is element of effective assistance); Holloway v. Arkansas, 435 U.S. 475, 481-84, 490 (1978); United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir. 1976); Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 278-79 (8th Cir. 1970); Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).

63. Tague, *supra* note 38, at 1077 n.12.

64. In *Strickland*, 466 U.S. 668, the Supreme Court established a two-pronged test of ineffectiveness under the sixth amendment. The first prong examines whether "counsel's performance was deficient," and the second prong examines whether "the deficient performance prejudiced the defense." *Id.* at 687. In assessing the attorney's performance under the first prong, the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. The Supreme Court has specifically cited American Bar Association standards as one of the primary guides for assessing attorney competency in sixth amendment cases:

> The Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. . . . In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of cir-

pose an even more rigorous requirement of conflict-free counsel than do the ABA directives. For example, some courts have interpreted the sixth amendment as prohibiting multiple representation of clients in situations where the clients' consent to the multiple representation arguably would have satisfied the ABA criteria.[65] Other courts have held that the sixth amendment establishes a particularly rigorous standard for assessing the adequacy and validity of the client's consent to multiple representation.[66] Thus, the sixth amendment accentuates the ethical considerations weighing in favor of an attorney's withdrawal in a conflict situation.

Paradoxically, however, the sixth amendment also may furnish an impediment to the public defender's withdrawal in such situations. Several courts have recognized that a defendant has a sixth amendment right to retain the services of her originally appointed attorney.[67] The combination of familiarity with the case and the existence of a trusting relationship between attorney and client will render the attorney uniquely competent to handle the case.[68] Even if that attorney then develops a conflict of interest, the values underlying the sixth amendment may weigh against removing her from the case.[69]

The situation is complicated still further when the public defender agency is the only source of experienced criminal defense representation in a particular jurisdiction. While most jurisdictions have supplementary sources of crim-

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cumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S. at 688-89.

65. *See, e.g.*, United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); In re Holmes, 290 Or. 173, 619 P.2d 1284 (1980); *see also* United States v. Vargas-Martinez, 569 F.2d 1102 (9th Cir. 1978).

66. *E.g.*, United States v. Foster, 469 F.2d 1 (1st Cir. 1972); *see* Geer, *supra* note 38, at 140-41 & n.74.

67. *See, e.g.*, Harling v. United States, 387 A.2d 1101 (D.C. 1978); Smith v. Superior Court of Los Angeles County, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968). *But see* Morris v. Slappy, 461 U.S. 1, 13 (1983) (fact-specific holding that indigent defendant did not have right to continued representation by his original court-appointed attorney because "[o]n this record, [the trial court] could reasonably have concluded that [the defendant's] belated requests to be represented by [the original attorney] were not made in good faith but were a transparent ploy for delay.").

68. *See* Harris v. Superior Court, 19 Cal. 3d 786, 797-99, 567 P.2d 750, 757-58, 140 Cal. Rptr. 318, 325-26 (1977) (although indigent defendant has no general right to select the attorney appointed to represent him, the unique nature of the relationship that the defendant developed with an attorney in a prior case can require the honoring of the defendant's request for the appointment of that attorney in the new case as well); *see also* Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981), *cert. denied,* 454 U.S. 1162 (1982) ("Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel."); STANDARDS FOR CRIMINAL JUSTICE 4-29 commentary (2d ed. 1980) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence.").

69. For example, in United States v. Jeter, F-7151-80 (D.C. Super. Ct. 1980), the attorney developed a conflict of interest, and the trial court disqualified him from further representing the defendant. When the defendant, citing the length and quality of the attorney-client relationship, thereafter asserted his sixth amendment right to continued representation, the trial court reinstated the original appointment of counsel. *See* Motion For Reconsideration of Court Order Removing Counsel, United States v. Jeter, F-7151-80 (D.C. Super. Ct. 1980) (on file at the offices of the New York University Review of Law & Social Change).

inal defense attorneys,[70] there are rural areas where the only lawyers in town are civil lawyers and a single public defender (who may actually be based in a nearby town).[71] In such an area, even when the public defender has a conflict of interest, the sixth amendment may preclude reassignment of the case to a local civil lawyer who does not have the expertise to provide effective representation in, for example, a complicated homicide or rape case.[72]

The existence of these competing sixth amendment interests suggests that a court may have to engage in a balancing process whenever a public defender has a conflict of loyalties to different clients. Part III of this article proposes some criteria for such a balancing process, and then applies these criteria in re-examining the proper courses of action in the *Chadha* litigation.

III

PROPOSED STANDARDS FOR RESOLVING ETHICAL CONFLICTS OF PUBLIC DEFENDERS IN IMPACT LITIGATION

A. Proposed Standards and Procedures

Ideally, a public defender agency could avoid any ethical conflicts in impact litigation by planning out all of its legal positions, and then simply declining appointment to any clients whose interests would be inconsistent with the planned positions. Advance planning of this type is possible, and in fact invariably occurs, when a public interest law center embarks upon class action litigation. But institutional litigation in the public defender context often defies this type of careful advance planning. A new landmark decision or statute may create a wholly new perspective on well-settled criminal law issues, and may abruptly spawn a host of new legal challenges. At the time the new decision is announced or the new statute is enacted, the public defender agency will already be representing hundreds or possibly thousands of clients. Several of these clients will now, for the first time, have conflicting interests.

When a conflict of this sort first arises, the public defender agency should follow the course of action suggested by the ABA Model Rules of Conduct, and conduct an agency-wide assessment of whether the representation would adversely affect any group of clients. In gauging such potential effects, the agency should consider not only possible dilution of the attorneys' zeal in ad-

70. In Seattle, for example, a number of organizations of defense lawyers share responsibility for representing the defendant population along with the Seattle-King County Public Defender. In the District of Columbia, there is an established system for appointing private attorneys to cases that are not assigned to the D.C. Public Defender Service; private attorneys become eligible for appointment by placing their names on a list maintained by the Criminal Justice Act office. Similarly, in New York City, private attorneys on the "18(b) panel" will take criminal cases which cannot be assigned to the New York Legal Aid Society.

71. *See supra* note 59.

72. *See* People v. Robinson, 79 Ill. 2d 147, 159, 402 N.E.2d 157, 162 (1979) (rigid application of conflict rules to public defenders in rural counties would "[i]n many instances . . . require the appointment of counsel with virtually no experience in the trial of criminal matters, thus raising, with justification, the question of competency of counsel").

vocating each client's position, but should also consider less tangible adverse effects such as a possible erosion of either the agency's or the individual attorney's credibility if staff attorneys are advancing inconsistent arguments to the same judge in different cases. Such an erosion of credibility would, after all, seriously damage all the clients' chances of prevailing.

If an adverse effect is even conceivably possible, the agency attorneys should immediately follow the ABA directives by informing each client of the potential conflict and inquiring whether the client wishes to retain the attorney's services notwithstanding the potential conflict.[73] A strict application of this disclosure-and-waiver procedure is the key to balancing the competing sixth amendment interests. While a defendant has a right to effective, conflict-free counsel,[74] it is a right which the defendant controls: as long as the defendant has been fully informed of the potential conflict, the defendant must be accorded the prerogative of waiving the right to a wholly conflict-free attorney.[75] Moreover, such a procedure is the only way of effectuating the defendant's sixth amendment right to retain originally appointed counsel.[76] If the attorney-client relationship is of a certain duration or quality, then the defendant should be permitted to continue that relationship even in the face of possible conflicts.

Naturally, the attorney's disclosure to the client must be exhaustive. The ABA directives specify that the disclosure must include an "explanation of the implications of the common representation and the advantages and risks involved."[77] The discussion of risks must necessarily include the aforementioned risks of dilution of loyalty and erosion of credibility.

Various courts[78] and commentators[79] have suggested that criminal defendants, generally, are neither educated enough nor sophisticated enough to comprehend a complex explanation of potential conflicts and risks. In response, we offer our own very different experience as practitioners in the field. We have found that defendants invariably do understand even subtle nuances of their legal situation, as long as the explanation is presented in a clear and straightforward manner. When defendants fail to understand, it is usually the fault of the attorney who has rushed through the explanation or has couched concepts in legalese.[80] It is important to remember that many criminal defendants—although perhaps lacking in formal education—have prior experience with the criminal justice system and are painfully aware of possible

73. MODEL RULES, *supra* note 34, at Rule 1.7. *See supra* note 46 and accompanying text.

74. *See supra* note 62 and accompanying text.

75. *See* Tague, *supra* note 38, at 1110-16.

76. *See supra* notes 67-69 and accompanying text.

77. MODEL RULES, *supra* note 34, at Rule 1.7(b)(2).

78. *See, e.g.,* Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965); United States v. Garafola, 428 F. Supp. 620, 623-24 (D.N.J. 1977).

79. *See, e.g.,* Geer, *supra* note 38, at 140; *Conflicts of Interest, supra* note 4, at 1395.

80. For a further discussion of the nature and consequences of attorneys' use of legalese, see Benson, *The End of Legalese: The Game Is Over,* 13 N.Y.U. REV. L. & SOC. CHANGE 519 (1984-85).

deficiencies in an attorney's performance. Moreover, the gravity of the consequences of conviction gives these defendants a particular incentive for carefully weighing all of the risks. Indeed, we have found that it is almost routine for clients to get a "second opinion" (by consulting former attorneys or "jailhouse lawyers") before relying on the advice of a newly appointed attorney.

If, after disclosure, the client objects to continued representation, then the attorney should withdraw even if she feels that unimpaired representation is possible. The ABA directives on disclosure and consent were obviously fashioned to permit a client to retain alternative counsel whenever the client is fearful of the attorney's disloyalty.[81] If this is to be the standard for paying clients, then the sixth amendment and the equal protection clause of the fourteenth amendment necessitate the application of an equivalent standard for indigent clients.[82]

In emphasizing client consent as the key factor, we have eschewed the option of expanding the role of the trial court as an arbiter and examiner of conflicts. It could be suggested, for example, that whenever a potential conflict arises, the trial judge should convene a hearing to balance the competing sixth amendment interests and independently gauge the appropriateness of the attorney's continuing representation. However, such an approach would irremediably prejudice the defendant. First of all, an effectiveness hearing would inevitably require that the attorney disclose information about the projected defense, the defendant's version of the events, and the nature of the attorney-client relationship; in this manner, this ostensibly beneficial hearing could serve to undercut the defense and possibly bias the judge against the defendant.[83] Moreover, a system in which the judge decides the issue of continuing representation simply does not accord sufficient weight to the defendant's sixth amendment right to retain her originally appointed attorney.

While this resolves the issue of conflicts in impact litigation in the trial courts, there is still the thorny matter of handling such conflicts at the appellate level. Essentially, the question is whether a public defender agency should

81. This conclusion flows from the Rules' mandate that the client, and not the attorney, is the final arbiter of whether the conflict is so extreme as to necessitate the attorney's relinquishment of the case. *See* MODEL RULES, *supra* note 34, at Rule 1.7(b) (even though attorney believes representation will not be adversely affected, the representation cannot continue unless the "client consents after consultation" and full disclosure). In this manner, the Model Rules enable the client to make her own assessment of the risks of attorney disloyalty where the attorney has already admitted to the potential for divided loyalties.

82. *See, e.g.*, Smith v. Superior Court, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74, 68 Cal. Rptr. 1, 10 (1968) ("once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.").

83. *See* Butler v. United States, 414 A.2d 844 (D.C. 1980) (en banc) (reversing conviction in a bench trial because defense counsel, in a pre-trial hearing on ineffectiveness, extensively revealed client confidences and informed the judge that the defendant intended to commit perjury).

rationally choose the position it wishes to take on appeal, or simply allow the first-case-in-time to control the agency's appellate position. As we have already suggested,[84] counsel is constrained to adopt the latter approach. Counsel's duties of loyalty and zealous representation to that first appellate client demand the vigorous advocacy of the position that will benefit that particular client. Moreover, as a systemic matter, the first-in-time approach provides an effective random selection procedure that avoids favoritism based on inappropriate ideological considerations.[85]

These proposed guidelines for handling conflict situations assume that there are other criminal defense attorneys in the region who are available for appointment in the event of the original attorney's withdrawal. In those rural areas which lack alternative experienced criminal defense counsel,[86] the trial judge would have to go beyond the local jurisdiction and draw upon the Bar of other counties or even nearby cities. Such a procedure could of course be quite costly, since the attorney would have to be reimbursed for extensive travel and lodging expenses. But such financial considerations could not justify any lesser implementation of the defendant's constitutional rights to effective, conflict-free counsel.[87]

B. The Chadha *Cases Re-Examined*

Under the standards we have proposed in this article, the *Chadha* litigation would have been handled differently.[88] As each case arose, the agency

84. *See supra* notes 25-28 and accompanying text.

85. *See* Berger, *supra* note 54, at 1138-39 & n.105.

86. *See supra* notes 59, 70-72 and accompanying text.

87. In a wide variety of contexts, the courts have repeatedly reaffirmed the fundamental principle that financial considerations cannot justify the impairment of individuals' constitutional rights. *See, e.g.,* Welsch v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977) ("If Minnesota chooses to operate hospitals for the mentally retarded, the operation must meet minimal constitutional standards, and that obligation must not be permitted to yield to financial considerations."); Rhem v. Malcolm, 507 F.2d 333, 340-41 & n.20 (2d Cir. 1974) (affirming district judge's power to fashion equitable relief to ameliorate unconstitutional living conditions in the Manhattan House of Detention ("the Tombs"); city's claim of "fiscal inability" did not abrogate its obligation to operate the facility in conformance with constitutional requirements); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.) (unconstitutional practices of corporal punishment in penal institutions could not be justified by State's claim that it was "too poor to provide other accepted means of prisoner regulation;" court declares that "[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations"); Mills v. Board of Education, 348 F. Supp. 866, 875-76 (D.D.C. 1972) (insufficient funds will not provide an excuse for continuing system of education which may result in discrimination in violation of the equal protection clause.).

88. It should be noted that the course of conduct that we advocate would not in any sense have been mandatory under the ethical requirements that prevailed in the District of Columbia at the time of the *Chadha* litigation. At that time, and indeed still at the present time, the applicable ethical criteria are those that were adopted by the ABA in 1969; the District of Columbia has not yet adopted the 1983 Model Rules. *See* Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Comm., Preface (1983) (explaining that "the majority of the provisions [of the D.C. Code] mirror those of the Model Code adopted by the American Bar Assocation" in 1969). These rules apparently do not categorize positional

would have immediately assessed the potential for conflict and adverse effects on representation. As staff attorneys appeared with differing positions in the same trial courts, the agency would have concluded that there was a likely impairment of credibility and, therefore, a potential conflict. The attorneys then would have consulted with each of their affected clients, and fully explained the *Chadha* litigation and the potential adverse effects on the client's interests. Then, each client would have been given the opportunity to either consent to continued representation (preferably in a written waiver) or ask for new counsel.

At the appellate level, under our proposed standards, the first-case-in-time approach would have controlled the agency's position on appeal. Thus, once the first appellate client had been represented, and the Public Defender Service had gone on record with a position in the appellate court, there would have been a presumption against the agency representing appellants who required a different legal position. Although the comments to the ABA Model Rules specifically disparage the advocacy of inconsistent positions "in cases pending at the same time in an appellate court,"[89] the Rules do not absolutely forbid such multiple representation. The decisive factor here would once again have been the decision of the client. Each appellate attorney would have carefully explained the conflict to her client, and would have particularly emphasized the probability that the taking of inconsistent positions would so severely damage the agency's credibility in both cases as to impair the chances of success. With a careful enough explanation of this risk, the likelihood is that most clients would have adopted the prudent course of requesting assignment of new counsel.[90]

CONCLUSION

The foregoing discussion has served, at the very least, to illustrate that

inconsistencies, such as the ones that arose in the *Chadha* litigation, as ethical conflicts. *See supra* notes 35-37 and accompanying text.

89. MODEL RULES, *supra* note 34, at Rule 1.7 comment (Conflicts in Litigation).

90. In a recent case, one of the authors followed precisely such an approach and withdrew from an appellate case that would have required the Public Defender Service to advance a position on the *Chadha* issue that was directly inconsistent with the agency's position in an appeal already pending before the D.C. Court of Appeals. In the pending appeal, the agency argued that the *Chadha* decision did not invalidate the Home Rule Act. Cole v. United States, No. 84-703 (D.C. appeal filed May 14, 1984); *see supra* notes 23-24 and accompanying text. In the new case, Parrish v. United States, No. 85-203 (D.C. 1985), a prosecution for a drug offense, the agency would have had to argue that *Chadha* did invalidate the Home Rule Act and thereby precluded the prosecution of appellant under the local drug laws. *See supra* notes 12-13 and accompanying text. The client in *Parrish* was informed of the conflict and decided to opt for new, conflict-free counsel. Accordingly, the Public Defender Service filed a motion to withdraw from the appeal on the basis of the conflict of interest. *See* Motion for Leave to Withdraw As Counsel and for Appointment of Substitute Counsel, Parrish v. United States, No. 85-203 (D.C. filed June 6, 1985) (on file at offices of New York University Review of Law & Social Change). The Court of Appeals granted the motion and appointed a different attorney to handle the appeal. Order of July 2, 1985, Parrish v. United States, No. 85-203 (D.C. 1985) (on file at the offices of the New York University Review of Law & Social Change).

the institutional lawyer who embarks upon impact litigation will invariably face complex ethical issues. The discussion also has suggested that courts, commentators, and even institutional lawyers have devoted insufficient scrutiny to these dilemmas. With the advent of the more rigorous ABA Model Rules of Professional Conduct, attorneys' awareness and resolution of these conflicts is not simply advisable, but actually mandatory.

In this article, we have proposed certain standards to effectuate the ABA ethical directives and the constitutional requirements of the sixth amendment. These standards will require changes in the daily practice of institutional lawyers. For example, agency administrative procedures for gathering and disseminating information about potential conflicts will have to be vastly improved. Also, the institutional lawyer's already hectic life of high caseloads and constant emergencies will be complicated further by lengthy discussions with clients about conflicts and potential consequences of such conflicts.

All of this additional paperwork and encroachment on time will certainly be inconvenient. However, such inconveniences are trivial prices to pay for the assurance that the clients are receiving proper and effective representation.