REDACTED

SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 19251

S.C. 19251 X01

MICHAEL SKAKEL,

v.

COMMISSIONER OF CORRECTION,

REPLY BRIEF OF CROSS-APPELLANT MICHAEL SKAKEL

WITH ATTACHED APPENDIX

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I. THE FLAT FEE AGREEMENT BETWEEN TRIAL COUNSEL AND MR. SKAKEL, AND THE CIRCUMSTANCES SURROUNDING ITS MAKING, CREATED A CONFLICT OF INTEREST WHICH DEPRIVED MR. SKAKEL OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL[1]

A. Attorney Reynolds Had No Role In the Negotiation Of The December 5, 2001 Agreement

By stating that Attorney Thomas Reynolds, an Illinois attorney, was involved in earlier fee agreement negotiations between Mr. Skakel and trial counsel, RRB: 129-130, Respondent is attempting to misdirect this Court's attention away from the facts adduced during the habeas trial that, by the time November, 2001 rolled around, trial counsel was communicating with Anne Hannon, a friend of the Skakel family, who assisted in negotiating the December 5, 2001 fee agreement (hereafter "December 5th Agreement"), and Mr. Skakel, directly. PE 317, 102; P/App. A-457-458; HT 4/26:85. Consequently, the written evidence demonstrates that Mr. Skakel was not represented by counsel during the December 5th Agreement negotiations, id., and trial counsel conceded that he did not communicate with Reynolds after the December 5th Agreement was put in place either, HT 4/26: 156, the logical inference being that Reynolds was no longer involved in this matter.

B. The Rules of Professional Conduct Require Consent After Consultation Regardless of the Participation of Independent Counsel

Regardless of whether or not Mr. Skakel was represented by counsel in the December 5th Agreement negotiations, Rule 1.7 of the 2001 edition to the Connecticut Rules of Professional Conduct, which was in place at the time Mr. Skakel was negotiating the new fee agreement with trial counsel, provides, in pertinent part, that -

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) **The client consents after consultation…**"

[1] The facts supporting this argument are recited at length in Mr. Skakel's main brief and therefore will not be repeated herein. See PB: 215-231.

Rule 1.7 of the Rules of Prof. Conduct (emphasis supplied); PRApp. A-2.[2] "'Consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Terminology, Rules of Prof. Conduct; PRApp. A-5. Thus, whether or not Mr. Skakel had independent counsel assisting him in negotiations, trial counsel had a duty to disclose all information pertinent to Mr. Skakel's consideration of the fairness of the December 5th Agreement, including his precarious financial position, the fact that he was burdened by significant IRS liens and that the IRS could levy his law firm operating account in order to effectuate payment of sums owed.[3] HT 4/22: 127-28, 134-36, 142, 151; HT 4/25: 121; Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000) ("We employ the term 'consult' to convey a specific meaning-advising the defendant about the advantages and disadvantages of taking [a certain approach], and making a reasonable effort to discover the defendant's wishes."); Cleveland v. Cleveland, 161 Conn. 452, 457-58 (1971) ("Webster's Third New International Dictionary defines 'consult' as 'to

[2] At the habeas trial, there was some confusion over whether or not the Rules of Professional Conduct required "informed consent" or "consent after consultation", and whether or not there was a difference in meaning of these terms. Through an exchange between Respondent's expert, Attorney Mark Dubois, and the habeas court, the parties learned that both terms imply that the client has to have an "understanding" of the issues. HT 4/26: 34-35. Thus, the analysis of the issue does not differ depending upon which terminology is used.

[3] Attorney Dubois's testimony on this point does not seem to square with the Rules of Professional Conduct in place at the time of the making of the agreement. RRB: 133-34. Dubois testified that trial counsel was not required to tell Mr. Skakel about his tax problems and that Attorney Reynolds was required to perform his own due diligence in order to uncover trial counsel's financial issues. Id. Contrary to Attorney Dubois' testimony, the commentary to the Rule, however, is silent on the issue of whether the presence of an independent lawyer relieves trial counsel of his obligation to inform his client of facts known only by him which would adversely affect his representation of his client, whether operating under the version of Rule 1.7 in place at the time of the agreement (PRApp. A-2), or the present version of Rule 1.7 which discusses the concept of "informed consent". PRApp. A-7. Even if Reynolds was still representing Mr. Skakel relative to the December 5th Agreement, his advice concerning legal/conflict issues would have been only as good as the information he was provided by trial counsel concerning the circumstances counsel was facing.

ask advice of,' 'seek the opinion of,' 'to take counsel,' to 'deliberate together.'")[4] Counsel's failure to provide this information to Mr. Skakel and/or independent counsel left Mr. Skakel without sufficient information in which to assess the reasonability of the December 5th Agreement.

C. Mr. Skakel Presented Significant Evidence Of A Conflict of Interest

Respondent seeks to impugn the habeas court's finding of an actual conflict, or at least a "substantial risk" of a conflict, by improperly restricting the definition of a conflict of interest. RRB: 139-140. In so doing, the Respondent cited to opinions of the Fifth, Ninth and Eleventh Circuit Courts of Appeals as well as the California Supreme Court in arguing that other jurisdictions have not found conflicts of interests where an attorney's financial concerns were pitted against his client's interests.[5] Id. However, this Court has never been so restrictive in how it defines conflicts.

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[4] In cases involving the similar requirement of "informed consent", the Appellate Court has stated that the client must be fully apprised of "the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." DaSilva v. Comm'r of Correction, 132 Conn. App. 780, 792 (2012).

[5] In Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993) and Williams v. Calderon, 52 F.3d 1465 (9th Cir. 1995), cert. denied, 516 U.S. 1124 (1996), the Courts found no conflict where, had the lawyers needed any investigative or expert services for the defense, the sums to pay for those services would have had to come out of the lawyers' own pockets. RRB: 139. This was not the claim made in Mr. Skakel's case. Mr. Skakel did not expect that trial counsel would pay for the services he needed out of counsel's own pocket. That is why he paid over $1 million in legal fees to trial counsel and entered into a flat fee agreement for $450,000.00 several months before the commencement of trial. Mr. Skakel expected that his payment of these significant sums would result in trial counsel doing what was in Mr. Skakel's best interests, i.e., hiring the appropriate professionals necessary to conduct his defense. This was not done, as a result of trial counsel's own financial difficulties, and Mr. Skakel's defense suffered as a result. This takes the situation presented in Mr. Skakel's case beyond the realm of a "theoretical" or "potential" conflict to squarely within the province of an actual conflict. Caderno v. United States, 256 F.3d 1213 (11th Cir. 2001), cert. denied, 534 U.S. 1167 (2002), also cited by the Respondent, recognizes that a conflict of interest could arise in a situation where the client did not fully pay his retainer, thus financially impacting counsel. RRB: 139-140. What Caderno held, however, is that the petitioner only showed a mere possibility of a conflict and did not demonstrate that his counsel actively represented his own financial interest during the trial rather than his client's interests. As set forth in Mr. Skakel's main brief, he did sustain his burden of proving that

The paramount case on this subject, of course, is Phillips v. Warden, State Prison, 220 Conn. 112 (1991). In that case, this Court acknowledged that, historically, the issue of conflict-free representation arose in cases involving a single attorney representing criminal co-defendants. Id. at 134. However, citing to a host of cases in this state and around the country, this Court explicitly found that the conflict of interest jurisprudence was "equally applicable in other cases where a conflict of interest may impair an attorney's ability to represent his client effectively." Id. at 135. Although Phillips did not involve a multiple representation case, the Court noted that -

> the fundamental principle underlying the right to conflict-free representation is directly applicable to this case. That fundamental principle is that an attorney owes an overarching duty of undivided loyalty to his client. At the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, "perhaps the most basic of counsel's duties." "Loyalty of a lawyer to his client's cause is the sine qua non of the Sixth Amendment's guarantee that an accused is entitled to effective assistance of counsel." That guarantee affords a defendant "the right to counsel's undivided loyalty."

Id. at 135-37 (internal citations omitted). The Court, specifically referencing the Rules of Professional Conduct, continued:

> This requirement of loyalty carries with it the correlative duty of exercising independent professional judgment on the client's behalf, and both those

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an actual conflict of interest adversely affected trial counsel's performance. PB: 227-231. Finally, the Supreme Court of California did not reject "a claimed conflict arising from a fee arrangement materially indistinguishable from that alleged here", as Respondent claims, citing to People v. Doolin, 45 Cal. 4th 390, cert. denied, 555 U.S. 863 (2009). RRB: 140. In that case, counsel could have obtained additional sums for expenditures as the case progressed, upon written justification. Id. at 413. "[T]he agreement provided for the express authorization of increased expenditures." Id. Such was not the case here. The $450,000.00 lump sum represented the absolute bottom line for trial counsel. Under the December 5th Agreement, trial counsel was not entitled to request more money from Mr. Skakel for expenses, such as investigator and expert fees. In short, the December 5th Agreement pitted trial counsel's need to maximize his fee during a time of extreme personal financial hardship against Mr. Skakel's interest in and right to an adequate defense.

> duties are also reflected in the relevant disciplinary guidelines. "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." Code of Professional Responsibility DR 5-101(A). Similarly, DR 5-105(A) of the Code of Professional Responsibility provides in pertinent part that" [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...." "A lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests...." Rules of Professional Conduct 1.7(b). The comments to Rule 1.7 reinforce these ethical precepts. They state, in relevant part: that "[l]oyalty is an essential element in the lawyer's relationship to a client"; that such loyalty is "impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests"; and that "***[t]he lawyer's own interests*** should not be permitted to have adverse effect on representation of a client."

Id. at 137-38 (emphasis supplied). The Court noted that the reference to a "lawyer's own interests" included financial and personal interests, whether or not they are related to the case at hand. Id. at 138. In short, this Court explained that an attorney may be laboring under a conflict of interest if his "interests or factors personal to him … are 'inconsistent, diverse or otherwise discordant with [the interests] of his client....'" Id. at 139 (internal citation omitted); see also State v. Crespo, 246 Conn. 665, 689-90 (1998), cert. denied, 525 U.S. 1125 (1999) (same); State v. Barnes, 99 Conn. App. 203, 217, cert. denied, 281 Conn. 921 (2007) ("Conflicts of interest ... may arise between the defendant and the defense counsel. The key here should be the presence of a specific concern that would divide counsel's loyalties.")

Other jurisdictions agree with this Court that an attorney's financial interests may create a conflict of interest with a client's Sixth Amendment rights to effective assistance of counsel. See State v. Cheatham, 296 Kan. 417, 454 (2013) (the financial disincentive under which trial counsel labored, a flat fee agreement in a death penalty case, was illustrated by his failure to adequately investigate and prepare the case and by his failure to

withdraw and serve as an alibi witness for the defendant.); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir.1993) (contingent fee in criminal case created actual conflict of interest), cert. denied, 511 U.S. 1022 (1994); United States v. Marrera, 768 F.2d 201, 207 (7th Cir.1985) (attorney's interest in movie rights to client's story created potential conflict of interest), cert. denied, 475 U.S. 1020 (1986); United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir.1980) (defendant entitled to hearing relative to claim that conflict based on attorney's private financial interests adversely affected representation), cert. denied, 451 U.S. 938 (1981).

Nevertheless, Respondent claims that Mr. Skakel did not demonstrate how "the alleged risk of seizure [by the IRS] nor the alleged risk of 'hording' created a conflict of interest implicating petitioner's right to effective assistance of counsel." RRB: 136. In so claiming, the Respondent once again improperly narrows the issues presented by Mr. Skakel. Mr. Skakel offered significant evidence during the habeas case, which was referenced in his main brief, outlining in great detail trial counsel's personal financial difficulties at the time he entered into the December 5th Agreement with Mr. Skakel, not the least of which were his tax liabilities, which conflicted with Mr. Skakel's rights to effective assistance of counsel. Indeed, the Respondent criticized Mr. Skakel for unnecessarily impugning trial counsel's character by going into the details of counsel's personal financial affairs. RRB: 145. It is precisely these details, however, which illustrate the conflict. PB: 219-221. Trial counsel spent beyond his means during the time in which he represented Mr. Skakel and, as one result, he was severely indebted to the IRS. Trial counsel admitted that he deposited the entire $450,000.00 flat fee into his operating account, after which there is no evidence of how he used the sums to Mr. Skakel's benefit. HT 4/16: 237, 240; HT 4/26: 148, 154-55; MOD: 118 (App. Pt. 1 A-1056). Indeed, when trial counsel was asked to produce, via subpoena, proof of how he spent the fee, counsel admitted that he did not even make a cursory check of his records in order to comply with the subpoena. HT 4/26: 149-150, 159-160. The logical inference, from trial counsel's failure to comply with the subpoena, is that there are no records concerning how counsel expended the fees

to Mr. Skakel's advantage because he immediately used the sums for personal and living expenses.[6] HT 4/26: 127, 148, 150, 151-52, 156; see also PE 114 at 4-6 (P/App. A-462).

While it is true that trial counsel was entitled to be compensated for his services rendered, he was not authorized to horde the entirety of the December 5th fee for himself at the expense of Mr. Skakel's rights, simply because he was financially in dire straits. By the very terms of the December 5th Agreement, itself, trial counsel explicitly promised to pay expenses already incurred, which he did not do until after the trial, and then only at the insistence of Mr. Skakel's brother, who was concerned that trial counsel's negligence in this regard was impeding Mr. Skakel's appeal. PE 102 (P/App. A-458); PE 103 (P/App. A-480). Thus, trial counsel very clearly horded the $450,000.00 fee for himself rather than abide by the terms of the agreement. Indeed, had counsel segregated any sums for the expenses he promised to pay, he would not have been in the position of having to make payments to a fund set up by the Skakel family to pay the court reporter's fees, which sums were advanced by the Skakel family as a result of trial counsel's delinquency. PE 104 (P/App. A-481); HT 4/26: 127-28. In short, the totality of the circumstances demonstrates that, during the relevant time period, counsel was personally spending beyond his means and was subject to significant IRS liens; the IRS could have levied counsel's law firm operating account to satisfy his tax obligations (HT 4/22: 126, 152-53), a risk which was substantial given the IRS's vigorous pursuit of payment from trial counsel through wage levies and property attachments; counsel never advised Mr. Skakel of his financial difficulties (HT 4/25: 120-21); counsel's operating account for the Skakel case was broke at the time he

[6] Respondent criticizes Mr. Skakel relative to this point, stating that he bore the burden of proof on the issue of trial counsel's competence and diligence, and that trial counsel bore no such burden. RRB: 148. However, trial counsel, as an Officer of the Court, was duty bound to comply with a subpoena issued by a fellow Officer of the Court. His deliberate failure to do so, particularly in the midst of a proceeding which attacked his competence and diligence, is highly suspect and a situation in which an unfavorable inference can be drawn. See generally Maciejewska v. Lombard Bros., 171 Conn. 35, 43 (1976); Grabowski v. Fruehauf Trailer Corp., 2 Conn. App. 167, 173 (1984).

entered into the December 5th Agreement with Mr. Skakel (HT 4/26: 152, 155); the same account was broke after the trial (PE 104 [P/App. A-481]); counsel admitted to taking sums from this fee for personal use (HT 4/26: 127, 148-52, 169); and there is no evidence that counsel incurred any additional expenses after the December 5th Agreement on Mr. Skakel's behalf, which were essential in order to present an adequate defense, including the hiring of an expert to address the coercive environment at Elan and conducting the necessary investigation to adequately impeach Gregory Coleman's testimony. The conflict here is plain – trial counsel consumed the $450,000.00 fee for his personal use to the detriment of Mr. Skakel's defense.[7]

D. The Habeas Court Employed The Correct Standard In Addressing The Conflict Of Interest Issue

The habeas court correctly determined that, in order to establish that an actual conflict of interest violated a petitioner's Sixth Amendment rights to effective assistance of counsel, the petitioner must demonstrate that (1) trial counsel actively represented conflicting interests; and (2) the actual conflict of interest adversely affected the lawyer's performance (hereafter "the Sullivan standard"). MOD: 14 (App. Pt. 1 A-952). Respondent argues, however, that the habeas court improperly employed a lesser burden of proof relative to conflict of interest claims and that Mr. Skakel must prove prejudice under Strickland in order to prevail. RRB: 141-144. Respondent argues, incorrectly, that Mickens v. Taylor, 535 U.S. 162 (2002) advocates for this approach. In so arguing, Respondent takes the Supreme Court's remarks, in *dicta*, too far.

In Mickens, the petitioner argued that his trial counsel had a conflict of interest because counsel briefly represented the victim who petitioner was accused of murdering in a juvenile proceeding just prior to his murder. Id. at 164. Upon the victim's death, the judge dismissed the charges against him, thereby relieving counsel of his appointed duties

[7] It is immaterial that trial counsel did not use the fee to pay off his IRS debts. RRB: 140. The fact of the matter is that he consumed the entirety of the fee without segregating any sums for necessary expenses, expenses that he promised to pay, past and future.

in the juvenile proceedings. Id. at 165. The following day, the same judge appointed trial counsel to represent the petitioner. Id. Trial counsel never informed the petitioner of his representation of the victim, but the petitioner learned of this representation when a court clerk mistakenly produced the victim's file in the federal habeas proceeding. Id.

Mickens argued that the Supreme Court's precedent established an "unambiguous rule" that "where a trial judge neglects a duty to inquire into a potential conflict, the defendant, to obtain [automatic] reversal of the judgment, need only show that his lawyer was subject to a conflict of interest, and need not show that the conflict adversely affected counsel's performance." Id. at 170. This, however, was not an accurate statement of the Supreme Court's holdings on the subject of conflicts of interest. On the contrary, the Court explained that in Holloway v. Arkansas, 435 U.S. 475 (1978), it held that automatic reversal is only appropriate where trial counsel is forced to represent co-defendants, over objection, unless the trial judge has determined that no conflict exists. Id. at 168. The Court also summarized Cuyler v. Sullivan, 446 U.S. 335 (1980), noting that it held that "absent objection [by trial counsel or the defendant], a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of his representation.'" Id. Sullivan also held that a trial judge only has a duty to inquire into a possible conflict when it "knows or reasonably should know that a particular conflict exists." Id. The Court then explained how Wood v. Georgia, 450 U.S. 261 (1981) was consistent with its holding in Sullivan, rather than the automatic reversal rule advocated by the petitioner. Id. at 169-170.

Ultimately, in Mickens, the Supreme Court concluded that because this was not a case in which trial counsel objected to representing multiple defendants (as in Holloway), the petitioner was obligated to demonstrate that a conflict adversely affected his counsel's performance under Sullivan. Id. at 173-74. The Court then explicitly stated that "the only question presented [in Mickens] was the effect of a trial court's failure to inquire into a potential conflict upon the Sullivan rule that deficient performance of counsel must be shown." Id. at 174. The Court concluded its opinion by noting that whether or not the

Sullivan standard applied in conflict cases other than multiple representation cases was an open question in that Court. Id. at 176. Nowhere in the Court's opinion did it state that the Sullivan standard was limited to joint representation cases.

In the void left by the United States Supreme Court, this Court has unequivocally answered that question, starting with Phillips v. Warden, State Prison, 220 Conn. 112 (1991), an opinion rendered before Mickens. Phillips was not a joint representation conflict of interest case. Rather, the conflict of interest demonstrated by the petitioner in that case resulted from the fact that his counsel, who was a convicted murderer, but whose conviction was on appeal at the time of the petitioner's trial, had decided to forego individual voir dire on the subject of his own murder conviction during the petitioner's trial. Petitioner's counsel, Avcollie, was a prominent political figure in the jurisdiction where the petitioner's case was pending, and Avcollie's highly publicized murder conviction occurred in the same jurisdiction. This Court held:

> that conflict of interest adversely affected Avcollie's performance as the petitioner's lawyer because, as a direct result of his violation of those duties, Avcollie was required to make the tactical choice of choosing between two options-inquiring of the venirepersons during individual voir dire whether they knew about his murder conviction, or forgoing such inquiry-either of which was fraught with peril for the petitioner's right to a fair trial before an impartial jury, and because the course he chose of forgoing the inquiry created a significant risk of a jury biased against his client.

Id. at 139-40. Phillips expressly found that the Sullivan standard was appropriate in cases other than joint representation cases:

> While the right to conflict-free representation typically is implicated in cases involving representation of criminal codefendants by a single attorney…it is equally applicable in other cases where a conflict of interest may impair an attorney's ability to represent his client effectively.

Id. at 134-35 (internal citations omitted). Indeed, this Court clearly addressed the fact that the typical conflict case involves joint representation issues. Nevertheless, this Court explained that the conflict analysis should be the same, no matter what type of conflict is

raised, since the fundamental issue in every conflict case is the same – the attorney's duty of loyalty to his client.

> In the context of representation of multiple codefendants by one attorney, we have defined a conflict of interest as existing where the attorney adduces evidence or advances arguments on behalf of one defendant that are damaging to the interests of the other defendant. Although that definition does not directly address a case such as this case, where there are no differing interests of codefendants, the fundamental principle underlying the right to conflict-free representation is directly applicable to this case. That fundamental principle is that an attorney owes an overarching duty of undivided loyalty to his client. At the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, "perhaps the most basic of counsel's duties."

Id. at 135-36 (internal citations omitted). As a result, and noting that "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests", this Court employed the rule set forth in Sullivan that, in order to establish a conflict which violates the Sixth Amendment, a petitioner must prove that (1) counsel actively represented conflicting interests; and (2) an actual conflict of interest adversely affected his lawyer's performance. Id. at 133 (internal citations and quotations omitted).

Since Phillips, and even after the decision in Mickens was issued, this Court has continued to apply the Sullivan standard to all types of conflict claims. In State v. Parrott, the defendant raised a conflict claim on direct appeal. State v. Parrott, 262 Conn. 276 (2003). In that case, the defendant claimed that his lawyer's decision to sit eight to ten feet away from him during *voir dire* constituted a conflict of interest. Id. at 282. The State argued that the defendant had only presented a potential conflict and that, in any event, the defendant had not shown that the "conflict" resulted in any deficiency in counsel's performance under Mickens. Id. In short, although Parrott was not a joint representation

case, even the State advocated for a resolution pursuant to Mickens.[8] In setting forth the standard, this Court stated:

> In its recent decision in Mickens v. Taylor, supra, at ----, 122 S.Ct. at 1245, the United States Supreme Court reaffirmed the general rule that, in order to demonstrate a sixth amendment violation based on the trial court's failure to inquire into a potential conflict of interest about which it knew or should have known, ***a defendant must establish that the conflict of interest adversely affected his counsel's performance***.

Id. at 287 (emphasis supplied). This Court went on to define the conflict of interest concept:

> We have described an attorney's conflict of interest as that which impedes his paramount duty of loyalty to his client.... Thus, an attorney may be considered to be laboring under an impaired duty of loyalty, and thereby be subject to conflicting interests, because of interests or factors personal to him that are inconsistent, diverse or otherwise discordant with [the interests] of his client...." ***Although the weight of federal and Connecticut authority with regard to conflicts of interest focuses on cases where an attorney represents codefendants charged in connection with the same incident, this court concluded in Phillips that the term conflict of interest should be interpreted more broadly***.

Id. at 287-88 (internal citations omitted) (emphasis supplied). This statement in Parrott puts the Respondent's arguments in this case to bed; all cases which raise actual conflicts of interest in Connecticut are to be analyzed under the Sullivan standard.

In State v. Figueroa, also a post-Mickens direct appeal in which a conflict of interest was raised before the Appellate Court, the defendant claimed that his attorney's "alleged

[8] The Respondent may argue that the State could not have advocated for a resolution under the Strickland standard because Parrott was not a habeas case. This begs the question – why should there be a different standard for raising a conflict of interest claim depending upon what type of proceeding in which the claim is raised? It does not make sense that Mickens provides an appropriate standard for conflict of interest claims raised on direct appeal, but Strickland ought to be used for an identical claim in a habeas case. The evil presented is the same, and an attorney laboring under a conflict of interest, particularly a concealed one, is not entitled to the deferential approach provided by Strickland, that counsel's conduct is presumed reasonable and that the attorney has the client's best interests at heart.

improper role in improperly securing favorable testimony placed her in an untenable position where her personal interests were in conflict with plausible alternative defense strategies and her participation in the [a] meeting [with a witness] diminished her credibility as an advocate." State v. Figueroa, 143 Conn. App. 216, 223 (2013). The Appellate Court agreed with the defendant and cited to the Sullivan standard reiterated in Mickens that he must show that a conflict "adversely affected his counsel's performance." Id. at 227 (internal citations omitted). In order to show an adverse effect on counsel's performance, the Appellate Court elaborated that:

> the defendant must show that [the attorney] might plausibly have pursued an alternative defense strategy, and that the alternative strategy was in conflict with, or may not have been pursued because of, [the attorney's] other loyalties or interests...." The United States Court of Appeals for the Second Circuit has explained that "a defendant need suggest only a 'plausible' alternative strategy that was not pursued at trial [because of a conflict of interest], not necessarily a 'reasonable' one." This is because "a true conflict of interest forecloses the use of certain strategies and thus the effect is difficult if not impossible to measure."

Id. at 227 (internal citations omitted); see also United States v. Feyrer, 333 F.3d 110, 116 (2d Cir. 2003) (same); Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993) (same). The Appellate Court expressly found that the defendant made a showing of an actual conflict affecting performance, even though other witnesses would have been available, aside from defense counsel, to testify about the meeting with the witness, because defense counsel was the only person who could have testified as to what she meant by her statements to the witness and why she believed her client's presence was warranted in the meeting. Id. at 229. The Court concluded that it need not determine that defense counsel's testimony would have been a successful trial strategy, but rather that her testimony possessed "sufficient substance to be a viable alternative." Id. (internal citation omitted).

In Rodriguez v. Comm'r of Correction, 312 Conn. 345, 349 (2014), the petitioner claimed that his trial counsel operated under a conflict of interest, pursuant to Phillips,

during his underlying criminal trial because counsel had recently been prosecuted for bribery in the same jurisdiction, but was acquitted; the petitioner also claimed that counsel was unable to prepare for the petitioner's trial as a result of counsel's own prosecution. Despite the fact that the petitioner clearly had not raised a joint representation conflict claim, this Court utilized the Sullivan standard, reiterated by Mickens, to resolve the issue. Id. at 352 (internal citations omitted) ("In a case of a claimed conflict of interest ... in order to establish a violation of the [right to counsel] the [petitioner] has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance.") See also Wargo v. Comm'r of Correction, 316 Conn. 180 (2015) (per curiam) (non-multiple representation case employing more lenient Sullivan standard for conflict claims).

In support of its argument that the Sullivan standard does not apply in this case, the Respondent cites to cases in other jurisdictions which have employed the Strickland prejudice prong instead.[9] Respondent's efforts ignore this Court's explicit finding in Parrott that conflict of interest claims should be interpreted more broadly, rather than be limited to joint representation cases, State v. Parrott, supra, at 288 [10], a determination that makes

[9] In one such case cited by the Respondent, Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (RRB: 143), the Fifth Circuit stated that a "'conflict' between the lawyer's self-interest and that of his client is not a real conflict in the eyes of the law." This is certainly not an accurate statement of the law in Connecticut and therefore should not be relied upon as persuasive authority. Rule 1.7 of the Connecticut Rules of Professional Conduct, which defines conflicts of interest, specifically includes situations in which a lawyer's own interests conflict with that of his client's, PRApp. A-2, and this Court's precedent has agreed with that definition. Phillips, supra; Rodriguez v. Comm'r of Correction, supra, see also Winker v. Keane, 7 F.3d 307 (2d Cir. 1993) (actual conflict of interest existed when client's interests in effective representation were pitted against trial counsel's monetary interest).

[10] See also Taylor v. State, 428 Md. 386, 409-10 (2012) (internal citations omitted) ("We have emphasized repeatedly that '[a] defense attorney's representation must be untrammeled and unimpaired, unrestrained by commitments to others; counsel's loyalty must be undivided, leaving counsel free from any conflict of interest.' The same concern that led to the presumption of prejudice in multiple representation conflict cases…is equally

good policy sense. Applying a different standard depending upon the type of conflict is raised, or a different standard depending upon the context in which the claim was raised (direct appeal vs. habeas cases) creates a situation in which certain types of conflicts are valued over others, which are equally as detrimental to a petitioner's Sixth Amendment right, and which will lead to inconsistent application of the law throughout the state. When a lawyer's own interests diverge from his client's interests, his duty of loyalty is compromised just as severely as in joint representation situations, if not more severely. Although he may be "obliged to advance the client's best interest despite his own interests or desires", RRB: 143, citing Beets, supra, at 1271, the risk that he will not act accordingly, in the face of his own significant troubles, is simply too great. Nevertheless, Mr. Skakel is not advocating for an automatic reversal if merely a conflict has been established, without a showing of adverse effect. On the contrary, Mr. Skakel demonstrated at length in his main brief how trial counsel's actual conflict of interest adversely affected his performance, PB: 227-29, and how the potential conflict of interest created by the December 5th Agreement in fact materialized and prejudiced his rights to effective assistance. PB: 229-231.

II. CONCLUSION

Based upon the foregoing reasons and authorities, Mr. Skakel, the Cross-Appellant, hereby asks this Court to reverse the habeas court's finding that he failed to demonstrate that a conflict adversely affected trial counsel's representation and grant his petition for writ of habeas corpus on this additional ground.

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present in personal interest attorney conflict cases … This is because the precise degree of prejudice to the outcome of the trial that could result from an actual attorney-created conflict is too difficult to determine, and the right to effective assistance of counsel, pursuant to both the Sixth Amendment and Article 21, remains too fundamental to risk…")

THE APPELLEE/CROSS-APPELLANT
MICHAEL SKAKEL

By _____

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that:

(1) the electronically submitted brief and appendix have been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with **all** provisions of this rule.

HUBERT J. SANTOS

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SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 19251

S.C. 19251 X01

MICHAEL SKAKEL,

v.

COMMISSIONER OF CORRECTION,

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tion (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client. The duty of confidentiality continues after the client-lawyer relationship has terminated.

Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(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 shall include explanation of the implications of the common representation and the advantages and risks involved.

Commentary

Loyalty to a Client. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Commentary to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Subsection (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subsection (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subsection (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent. A client may consent to representation notwithstanding a conflict. However, as indicated in subsection (a)(1) with respect to representation directly adverse to a client, and subsection (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests. The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation. Subsection (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subsection (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subsection (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are cir-

cumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

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.

Interest of Person Paying for a Lawyer's Service. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the client's consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party. Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Rule 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction, including investment services, with a client or former client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client or former client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client or former client and are fully disclosed and transmitted in writing to the client or former client in a manner which can be reasonably understood by the client or former client;

(2) The client or former client is advised in writing that the client or former client should consider seeking the advice of independent counsel in the transaction and is given a reasonable opportunity to do so;

(3) The client or former client consents in writing thereto;

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction; and

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and either (B) that the lawyer will provide legal services to the client or former client concerning the transaction, or (C) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved

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violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Commentary accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Commentaries are intended as guides to interpretation, but the text of each Rule is authoritative.

TERMINOLOGY

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Commentary, Rule 1.10.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

CLIENT–LAWYER RELATIONSHIPS

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Commentary

Legal Knowledge and Skill. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established

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persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of subsection (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, commentary.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9 (c) (2). See Rule 1.9 (c) (1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.7. Conflict of Interest: Current Clients

(Amended June 26, 2006, to take effect Jan. 1, 2007.)

(a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(P.B. 1978-1997, Rule 1.7.) (Amended June 26, 2006, to take effect Jan. 1, 2007.)

COMMENTARY: **General Principles.** Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of ''informed consent'' and ''confirmed in writing,'' see Rule 1.0 (f) and (c).

Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under subsection (a) and obtain their informed consent, confirmed in writing. The clients affected under subsection (a) include both of the clients referred to in subsection (a) (1) and the one or more clients whose representation might be materially limited under subsection (a) (2).

A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of subsection (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Commentary to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Commentary to Rule 1.3 and Scope.

If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of subsection (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9; see also the next paragraph in this Commentary and the first paragraph under the ''Special Considerations in Common Representation'' heading, below.

Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or

realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9 (c).

Identifying Conflicts of Interest: Directly Adverse. Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation. Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons. In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts. The lawyer's own interests must not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients; see also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

A lawyer is prohibited from engaging in a sexual relationship with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8 (j).

Interest of Person Paying for a Lawyer's Service. A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8 (f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of subsection (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations. Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in subsection (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under subsection (b) (1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

Subsection (b) (2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law.

Subsection (b) (3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or the same proceeding before any tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a ''tribunal'' under Rule 1.0 [n]), such representation may be precluded by subsection (b) (1).

Informed Consent. Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0 (f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See second and third paragraphs under the ''Special Considerations in Common Representation'' heading in this Commentary, below (effect of common representation on confidentiality).

Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing. Subsection (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0 (c); see also Rule 1.0 (o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0 (c). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent. A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict. Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of subsection (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future conflicts that might arise and the actual and reasonably foreseeable adverse consequences of those conflicts, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under subsection (b).

Conflicts in Litigation. Subsection (b) (3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by subsection (a) (2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of subsection (b) are met.

Ordinarily, a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying subsection (a) (1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts. Conflicts of interest under subsections (a) (1) and (a) (2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see second paragraph under ''Identifying Conflicts of Interest: Directly Adverse'' heading in this Commentary, above. Relevant factors in determining whether there is significant risk of material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See first paragraph under ''Identifying Conflicts of Interest: Material Limitation'' heading in this Commentary, above.

For example, conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege.

As to the duty of confidentiality, continued common representation will almost certainly be inappropriate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and the lawyer should inform each client that each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. To that end, the lawyer must, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides prior to disclosure that some matter material to the representation should be disclosed to the lawyer but be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2 (c).

Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients. A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13 (a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the

frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Conflict Charged by an Opposing Party. Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Rule 1.8. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction, including investment services, with a client or former client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client or former client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client or former client and are fully disclosed and transmitted in writing to the client or former client in a manner that can be reasonably understood by the client or former client;

(2) The client or former client is advised in writing that the client or former client should consider the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction;

(3) The client or former client gives informed consent in writing signed by the client or former client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction;

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction; and

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and either (B) that the lawyer will provide legal services to the client or former client concerning the transaction, or (C) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn to for legal services concerning the transaction. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a) (1) through (a) (5), the phrase "former client" shall mean a client for whom the two-year period starting from the conclusion of representation has not expired.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may pay court costs and expenses of litigation on behalf of a client, the repayment of which may be contingent on the outcome of the matter;

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless: