

WAIVER OF CONFLICT-OF-INTEREST WHEN DEFENDANT'S ATTORNEY CHARGED WITH A CRIME

Introduction

The Sixth Amendment and the State Constitution guarantee a criminal defendant conflict-free representation. Wood v Georgia, 450 US 261, 271 [1981]; People v Harris, 99 NY2d 202, 209 [2009]. A potential conflict of interest arises when a criminal investigation or charge is pending against an attorney representing a defendant. See People v Cortez, 22 NY3d 1061 [2014] [Lippman, CJ, concurring]; People v Payton, 22 NY3d 1011 [2013]; People v Konstantinides, 14 NY3d 1 [2009]. Once the trial court becomes aware that a potential conflict exists, the court must inquire of the defendant on the record to determine if the defendant is aware of the risks involved and willing to waive them. See Payton, 22 NY3d at 1014; Cortez, 22 NY3d at 1065-1066.

If the attorney is implicated in the "same or closely related criminal conduct" as the defendant, as a co-defendant or otherwise, the United States Court of Appeals for the Second Circuit has held that the conflict is a per se violation of the Sixth Amendment and cannot be waived. United States v Williams, 372 F3d 96, 103 [2d Cir 2004].

To the extent a conflict of interest may be waived, the following model colloquy is provided to assist the court in effecting a knowing and voluntary waiver. Portions of this colloquy are drawn from the Rules of Professional Conduct and the Comments thereto.

The Clerk of the Court should record on the file that this admonition was given and the date it was provided.

Court to Defendant:

Select as applicable:

As you are aware,
Are you aware that

your lawyer is:

Select as applicable:

under criminal investigation by (specify)?
charged with committing (a crime [or specify] by (specify)?)

As a result, your interests in resolving your case may conflict with those of your lawyer, [especially because he/she is being prosecuted by the same district attorney's office that is prosecuting you].

Our law does not prohibit your continued representation by your current lawyer. The law is, however, concerned that a conflict of interest may harm your case.

The primary interest of lawyers facing [a criminal investigation / criminal charges] must be to resolve their own case in their favor. As a result, the client's interest in resolving their case in their favor may suffer.

In other words, a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client may be adversely affected by the lawyer's primary interest in resolving the lawyer's own case favorably.

The conflict of interest could, for example, affect a lawyer's ability to devote sufficient time to inquire into and analyze the factual and legal elements of the client's case, as well as to act with reasonable diligence and promptness in representing the client.

The conflict may impair a lawyer's ability or willingness, even unintentionally, to give the client detached advice or to advocate on the client's behalf with the district attorney's office in order to fairly resolve the client's case, including, if the client wishes, by a fair plea bargain.

The conflict may affect a lawyer's ability or willingness at a trial, even unintentionally, to assert the best defense strategy and to provide effective representation in defense of the client, if the lawyer fears doing so would adversely affect the lawyer's own case.

In sum, do you understand that a potential conflict of interest between you and your lawyer could affect your lawyer's ability to defend you fully and fairly?

Under our law, therefore, you are entitled to a lawyer whose interests do not conflict with your interest in favorably resolving the criminal charges against you. You may continue with your present lawyer, but if the lawyer's conflict of interest harms your case, it may then be too late to complain. You should therefore consider obtaining another lawyer, and if you cannot afford another lawyer, the state will provide one free of charge. I will adjourn the case for you to consider your options, unless you have considered what I have said and have decided how you wish to proceed. What do you wish to do?

Add if the defendant decides to continue with the lawyer:

Do you understand that by continuing with your present lawyer, you may be waiving any future complaint that the lawyer's representation of you was ineffective?

Has anyone threatened you, or forced you, or pressured you to continue with the same lawyer against your will?

Have I, or your lawyer, or anyone else, said anything to you to have you continue with the same lawyer against your will?

Have you, therefore, chosen to continue with the same lawyer voluntarily, of your own free will and choice?

Add as appropriate:

The Court finds that the defendant has knowingly and voluntarily waived any potential conflict.

Note: Defense Counsel's Professional Responsibility

If the defendant chooses to continue to be represented by the current lawyer, the Court may, in its discretion, choose to refer the defendant's counsel to Rule 1.7 of the Rules of Professional Conduct that, with some exceptions, provides in essence that a "lawyer shall not represent a client if a reasonable lawyer would conclude that. . . the representation involves a concurrent conflict of interest." ¹

¹ Rules of Professional Conduct, Rule 1.7 (Conflict Of Interest: Current Clients):

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that 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 (i) the lawyer's independent professional judgment on behalf of a client will be adversely affected by, or (ii) the representation of one or more clients otherwise will be materially limited by, the lawyer's responsibilities to another client, a former client or a third person or by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (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 other proceeding before a tribunal; and

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