Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **8 June 2011**

TRIAL CHAMBER IV

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*
v.
ABDALLAH BANDA ABAKAER NOURAIN
&
SALEH MOHAMMED JERBO JAMUS

Public Document
with Confidential *Ex Parte* Registry, Defence and Prosecution only Annexes A to C

Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team

Sources: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Counsel for the Defence
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Mr Ibrahim Yillah

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

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States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. By a memorandum dated 4 May 2011, the Counsel Support Section ("the CSS") notified the Office of the Prosecutor ("the OTP" or "the Office") of the proposed appointment Mr. Ibrahim Yillah ("Mr Yillah") as Associate Defence Counsel to the Defence team on the case of the Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("the *Banda and Jerbo* case")[1].

2. The OTP objects to this appointment. The OTP considers that the assignment of very recently departed lawyers of the OTP to defence teams creates a conflict of interest. The Office has around 40 lawyers working in the Prosecution Division ("PD"). They are integrated into different teams to manage 10 different cases. They all follow the same office procedures and strategies and engage regularly in legal and factual discussions about the Office activities. Offices are not assigned by team, so team members work with persons on other teams. Because lawyers share offices, conversations about cases often take place in hallways and other open areas and are accessible to anyone within PD. The organisational set-up of the OTP is such that lawyers within the Office are inevitably exposed, both formally and informally, to Office practices and confidential information. This confidential information includes information concerning the OTP's investigative and prosecutorial strategies in specific situations and cases, analyses of charging decisions and alternatives, and strategies relating to confirmation hearings and trial preparation.

3. Such exposure creates a real risk that, even inadvertently, such recently departed lawyers will use their unique knowledge of confidential information in decisions they make in representing their clients. Concerning Mr Yillah, therefore, regardless of whether he was assigned to the *Banda and Jerbo* case itself, as a trial lawyer in the OTP, he was exposed to and could have participated in or just overheard formal and informal office discussions concerning confidential information relating this case. This presents a real risk that he could inadvertently use such confidential information in his proposed new role.

4. Accordingly the Prosecution submits that in the particular circumstances of the OTP, lawyers who work within the Office have a conflict of interest and should be barred

[1] By a further email communication from the CSS on 26 May 2011 at 09.23 am, the CSS confirmed that it has proceeded to formalise the appointment of Mr Yillah. See also ICC-02/05-03/09-152.

for a period of time, which should be no shorter than one year, to work for the defence in any case before the International Criminal Court. As a consequence, the Prosecution requests that the Trial Chamber invalidates his appointment.

II. Background

5. On 4 May 2011, the CSS notified the OTP of the proposed appointment of Mr. Yillah as Associate Defence Counsel on the Defence team of the case of the *Banda and Jerbo* case.[2]

6. On 19 May 2011, the OTP submitted its formal response to the CSS ("the OTP Response") indicating its objection to Mr Yillah's appointment.[3]

7. On 21 May 2011, Defence Counsel for Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence Counsel") formally requested that Mr. Yillah be appointed as his co-counsel without delay.[4]

8. On 22 May 2011, Defence Counsel sent another letter to the CSS regarding Mr. Yillah's appointment as his co-counsel, together with a letter from Mr. Yillah himself in which he reaffirmed his intention to appoint Mr Yillah.

9. On 23 May 2011, the CSS informed the OTP and the Defence Counsel that it cannot *proprio motu* bar or act as an impediment to the appointment of counsel or a team member if counsel with carriage over the matter, and who has the sole authority to make such appointments, insists on the appointment and will therefore proceed to confirm Mr. Yillah's appointment[5].

III. Prosecution's Submissions

10. The Prosecution opposes the appointment of Mr. Yillah. Mr. Yillah started to work as an Associate Trial Lawyer (P2) in the OTP on 15 August 2005. He became a Trial

[2] Confidential *Ex Parte* Registry, Defence and Prosecution only Annex "A" appended to this filing. The Prosecution classifies the annexes to this filing as 'confidential *Ex Parte* Registry, Defence and Prosecution only', as they relate to confidential communications that transpired between the Prosecution, Registry and the Defence only.

[3] On 25 May 2011, the OTP submitted a corrigendum to its Response to the CSS. It is this corrigendum that is annexed to this filing as Confidential *Ex Parte* Registry, Defence and Prosecution only Annex "B", and referred to in this filing.

[4] The Prosecution does not attach to this filing the further correspondence and email communications which transpired between the Defence and the OTP. This is because these correspondence and email communications also address issues that are not relevant to this filing. In any event, the Defence is still able to recite any aspects of these exchanges that it deems relevant when it responds to the instant filing.

[5] Confidential *Ex Parte* Registry, Defence and Prosecution only Annex "C" appended to this filing.

Lawyer (P3) on 1 August 2008, a position which he held until he resigned his appointment with the Office on 19 April 2011. Over the period of his employment with the OTP, he worked on the Situation in Uganda, the *Prosecutor v Katanga and Ngudjolo* case, and as a trial lawyer on the prosecution team on the *Prosecutor v Bemba* case.

11. In his capacity as a trial lawyer in the OTP, Mr. Yillah directly participated in formal and informal office discussions that inherently included confidential discussions of the strengths and weaknesses of the various cases which are at pre-trial or trial stages. Within the ranks of junior and senior staff in the OTP, the lawyers and investigators frequently confer amongst themselves and seek advice on investigative and prosecutorial tactics and policies. Over the course of Mr Yillah's employment with the Office, such formal and informal discussions have occurred and have included confidential investigative strategies, charging strategies for potential suspects and strategies for the preparation of cases for confirmation hearings or trials.

12. Trial attorneys on levels P1-P4 across the different cases and situations all have offices on a single floor in the Arc building of the International Criminal Court ("ICC"). Lawyers share offices, and the office assignments are not based on the trial teams to which the lawyers are assigned. To the contrary, there is value in grouping lawyers from different teams precisely because they can share perspectives and keep each other abreast of the office's activities. Therefore, the collegial exchanges between lawyers and office colleagues is desirable, inevitable and impossible to avoid. It is also commonplace and necessary that lawyers go outside of their respective teams to discuss matters. Even where the matters discussed may not *per se* be "confidential" the discussions remain privileged and include issues like trial strategy to overcome weaknesses in the case. The focus thus far on whether the allegedly conflicted lawyer was part of a particular trial team or whether there is documented proof that the lawyer was involved in confidential discussions is unduly limited. In fact, it is neither reasonable nor possible for OTP staff to maintain records of attendance at general meetings or of every conversation with persons outside their particular teams – including identity of persons and particular subjects discussed -- to document in the future the communication of confidential information as proof of the existence of demonstrable conflict.

13. If, immediately upon their resignation, lawyers formerly employed in the OTP are free to sign on as defence counsel on cases that were being litigated while the lawyers were

still in the OTP, there will always be the risk that they will consciously or unconsciously bring to their new clients knowledge or understanding of the case (and of the prosecutorial strategies that might have informed it) that they could only have acquired as attorneys in the OTP. Mr Yillah resigned from his position within the OTP on 19 April 2011, and a letter was communicated to the OTP notifying his proposed appointment to a defence team on 4 May 2011 - a mere two weeks following his resignation. Mr Yillah provided no information that he was going to join a defence team in the near future.

14. The OTP is aware that in some national jurisdictions, primarily the United Kingdom, no time restrictions are placed on the ability of a lawyer departing a prosecution office or judicial chamber to appear as defence counsel or before the same judicial chamber.[6] This practice contradicts other relevant national traditions (and is also not the most appropriate one to adopt in this Court). Article 21(1)(c) of the Statute makes clear that the Court shall be guided by "general principles of law derived […] from national laws of legal systems of the world". In many other national jurisdictions there is the presumption of a conflict of interest. These legal systems have put in place corresponding safeguards to avoid the situation in which a conflict might arise because of the close proximity of legal practitioners, all of whom are deemed part of a shared legal community. These systems properly recognize that when lawyers previously worked in a closed environment there is a real risk that, even inadvertently, they may use or divulge confidential information acquired in their prior positions.

15. Some jurisdictions thus impose a fixed period of time before which an attorney may appear against the Prosecution office for which he previously worked. Those time limits reflect a presumption regarding how long it takes for pending cases to become resolved.

16. For instance, under the French legal system, serving and former magistrates (i.e. prosecutors and judges) are barred for five years from practising as lawyer, solicitor, notary and bailiff, and shall not work for a member of these professions within the jurisdiction of the court where they had practiced.[7]

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[6] The OTP is also mindful of Trial Chamber III's decision ((ICC-01/05-01/08-769)) to allow Mr Nick Kaufman to be included on the Defence Team of on the *Bemba* case – first as a legal consultant, and subsequently as co-counsel.

[7] Article 9-1 de l'Ordonnance n°58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069212&dateTexte=20110523.

17. Under the Italian system, former members of the judiciary (i.e. judges and prosecutors) are barred for two years from practicing as lawyers in the same judicial district in which they had worked for three years or more prior to leaving before they had left the judiciary.[8]

18. Similarly, Article 36 of the Chinese Law on the Profession of Lawyer[9] prohibits a former prosecutor from serving as defence counsel within two years of his/her resignation from the post of prosecutor or judge.

19. An alternative approach is reflected, for example, in the Canadian system. Former public servants, including prosecutors, must undertake to minimize the possibility of real, apparent or potential conflicts of interest between their new employment and their most recent responsibilities within the federal public service.[10] In addition, no former public office holder, including a prosecutor, shall act in such a manner as to take improper advantage of his or her previous public office;[11] no former public office holder shall act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown;[12] no former public office holder shall give advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public.[13]

20. Rule 1.11 of the American Bar Association's Model Rules of Professional Conduct, followed by all but one State in the United States, requires informed consent in writing from a government agency where the lawyer previously worked.[14] In substance it is identical to a general rule applicable to lawyers in both public and private positions.

[8] Regio Decreto convertito in Legge 22 gennaio 1934, n. 36 (in Gazzetta Ufficiale, 30 gennaio 1934, n. 24) - Ordinamento delle professioni di avvocato e di procuratore." The relevant provision therein is: *Titolo II, Articolo 26*.
[9] Law on Lawyers and Legal Representation of China (1998), Article 36 reads as "Lawyers who have acted as a judge or a public procurator are prohibited from acting as a representative or a defender for a lawsuit within two years of leaving their posts at the people's courts or people's procuratorates.", full text of the law available at: http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/law-on-lawyers-and-legal-representation.html (last accessed 30 May 2011)
[10] Chapter 3: Post-Employment Measures of The Values and Ethics Code for the Public Service of Canada of 1 September 2003 at http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.asp.
[11] Section 33 of the Conflict of Interest Act (S.C. 2006, c. 9, s. 2), Part 3: Post-employment Rules for All Former Public Office Holders at http://laws-lois.justice.gc.ca/eng/acts/C-36.65/page-11.html#h-13.
[12] Section 34(1) of the Conflict of Interest Act (S.C. 2006, c. 9, s. 2), Part 3: Post-employment Rules for All Former Public Office Holders at http://laws-lois.justice.gc.ca/eng/acts/C-36.65/page-11.html#h-13.
[13] Section 34(2) of the Conflict of Interest Act (S.C. 2006, c. 9, s. 2), Part 3: Post-employment Rules for All Former Public Office Holders at http://laws-lois.justice.gc.ca/eng/acts/C-36.65/page-11.html#h-13.

[14] Model Rules of Professional Conduct, available at http://www.abanet.org/cpr/mrpc/rule_1_11.html, see Annex B for Rule 1.11 "Special Conflicts Of Interest For Former And Current Government Officers And Employees."

Rule 1.9(a) of the Rules provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."[15]

21. In Germany, the German Federal Law on Lawyers[16] states that a lawyer may not practice "if he/she has already been concerned with the same legal issue as a judge, an arbitrator, a public prosecutor […]."[17]

22. In short, in almost all national jurisdictions former prosecutors are barred or limited in their representation of suspects as defence counsel in opposition to the prosecutors' offices with which they were recently affiliated.

23. The Prosecution submits that the safeguards put in place in these jurisdictions are particularly relevant and necessary in the context of a small office like the Prosecution Division in the Office of the Prosecutor, currently staffed by 37 trial, and appellate lawyers assigned to particular teams (plus the Deputy Prosecutor, the Prosecutor Coordinator, and a third lawyer, all of whose responsibilities extend to all teams) to prosecute 24 persons currently charged in 10 cases in seven different situations. Those lawyers originally assigned to the cases where there are pending arrest warrants are redeployed to support other teams. This is a normal practice because of the breadth of the work and the limited number of persons to handle it, therefore resources are regularly shared and redistributed across teams. Moreover, P-4 and P-5 lawyers in PD meet to discuss openly their cases and issues. Though the other lawyers may not be present during the unfiltered discussions, it is common that the senior lawyers who attend then report to their teams and thus share the information discussed at those meetings with the entire group.

24. Thus, it is essential that the Chambers recognize that there is a constant pattern of consultation and discussions about strategy, concerns, issues in the cases, and other

[15] Ibid.

[16] Bundesrechtsanwaltsordnung of 1 August 1959 available at: http://bundesrecht.juris.de/brao/index.html, English translation available at http://www.brak.de/seiten/pdf/Berufsregeln/BORA_1.7.2008_engl.pdf

[17] In citing rules from other national jurisdictions, the Prosecution notes that many jurisdictions require a fixed period of time before which an attorney may appear against the Prosecution office for which he previously worked. Those time limits reflect a presumption regarding how long it takes for pending cases to become resolved. The cases in this Court, as the Chamber is well aware, are more complex than many domestic prosecutions and take months and even years to be completed. That said, the Prosecution would not oppose a waiting period of one year as the presumptive bar. After a year, a former attorney in the OTP could join a defence team in a case against the OTP so long as there is no documented proof of a continuing conflict of interest.

confidential prosecution matters. It is accepted without question that members within a particular team are privy to inside information about their own case. There should also be the same presumption that lawyers in PD are privy to inside information about all cases, because the reality is that for these purposes there is only one team in PD. Nor do the one or two year disqualification time limits of some national jurisdictions apply to the work of PD. The cases in this Court, as the Chamber is well aware, are more complex than many domestic prosecutions and take years to be completed.

25. That said, the Prosecution would not oppose a waiting period of only one year as the presumptive bar. Most issues and strategy concerns are resolved in some fashion in a year, even though the case itself may take several years for resolution, or memories of conversations and deliberations may fade. After a year, a former attorney in the OTP could join a defence team in a case against the OTP so long as there is no indicia of an actual and continuing conflict of interest.

26. But if the Chamber imposes a ban on working on any case that arose while the attorney was in the Prosecution Division or limits a ban to a fixed term of years, in the Prosecution's view, it would be impossible for Mr. Yillah to work for the *Banda and Jerbo* Defence team while respecting and remaining bound by "the duties of confidentiality stemming from his […] former position" (Article12(1)(b), Code of Conduct) in the OTP. Article 12 of the Code of Conduct provides that:

> "Counsel shall not represent a client in a case:
> (a) …
> (b) In which counsel was involved or was privy to confidential information as a staff member of the court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. …" (emphasis added)

27. This article sets out two causes for attorney disqualification for former staff members: (i) prior involvement or (ii) knowledge of confidential information, in the case in which counsel seeks to appear. Either ground is sufficient to constitute impediment to representation.

28. The Code of Conduct deliberately does not require that the prior involvement be substantial.[18] The drafters of Article 12 of the Code of Conduct elsewhere impose a standard of substantiality in two occasions when stipulating the impediments to

[18] In this respect, it is significantly different than Article 14 (c) of the ICTY Code of Professional Conduct. The, Code of Professional Conduct for Counsel appearing before the ICTY expressly states: "Counsel shall not represent a client in connection with a matter in which counsel participated personally and substantially as an official or staff member of the Tribunal […]" (emphasis added). This provision is the basis for a "substantial involvement test" set out in some ICTY jurisprudence. In contrast, Article 12(1)(b) of the ICC Code of Conduct does not require prior "substantial" and "personal" involvement, but only involvement or knowledge of confidential information.

representation. The first addresses a conflict of interest between the case of the Accused for whom counsel seeks to appear and cases of other clients represented by the same counsel (see Article 12(1)(a)). The second addresses the probability of a counsel appearing as a witness in the proceedings in which he seeks to appear (see Article 12(3)). Accordingly, the exclusion of the substantiality standard in subparagraph Article 12(1)(b) of the Code of Conduct is not a result of oversight but an expression of determined intent by the drafters to *not* require that the prior involvement be "substantial" when considering potential disqualification of a former staff member of the Court.[19]

29. Nor does the Code of Conduct define "confidential information" to mean only documents, evidence, confidential filings, or the like. This definition would therefore include investigative and prosecutorial strategies, which are also confidential. Furthermore, confidential information is more than tangible material; it includes, for example, information regarding internal assessments of the OTP of the strengths and weaknesses of its case and the reasons underlying its prosecutorial strategy – precisely the kind of confidential information to which Mr Yillah was regularly and necessarily exposed in the course of his employment with the OTP.

30. The Code of Conduct, however, bars Mr. Yillah from undertaking a role with the Defence team because he has until very recently been exposed to confidential Prosecution information. It is inconceivable that as Defence counsel he will be able to exclude in his exercise of judgment any information or knowledge regarding strengths and witnesses and strategic decisions received whilst part of the OTP, and exercise that professional judgment based solely on public information or information provided by his client or the defence team. Indeed Mr Yillah's knowledge of such confidential information confronts him with a dilemma – even were it possible for him to identify the information underlying his judgment as confidential, nonetheless he will be ethically obligated to use that information and judgment to the benefit of his clients,

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[19] This is in line with the drafting history of this code of conduct. See Chapter III (13) of the proposal for a draft Code of Professional Conduct for counsel before the International Criminal Court, prepared by the International Criminal Bar, Ethics Committee, available at http://217.148.84.127/bpi-icb/files/Code_of_Conduct_en2.pdf, it states:

> "13. Former members of the Office of the Prosecutor and former Judges and staff of the Chambers and of the Registry. 1). Former Prosecutors or members of the office of the Prosecutor and former Judges and former staff of the Chambers and of the Registry may accept mandates to act as counsel on behalf of accused persons, victims and witnesses in matters that are prosecuted before the International Criminal Court under the following conditions. a) The former Prosecutor, member of the office of the Prosecutor, former staff of the Chambers or of the Registry, or former Judge <u>was not involved in any matter</u> related to the mandate they are called to accomplish. b) The former Prosecutor, member of the office of the Prosecutor, former staff of the Chambers or of the Registry, or former Judge <u>is not in a conflict of interests and has not been privy to any information that is likely to result in a conflict of interests.</u>" (emphasis added)

while at the same time he would be ethically prohibited from using it. If he ignores the information, he disserves his client's interests. If he acts in favour of the interests of his client he will place the Prosecution at an undue disadvantage. Either way, he will affect the fairness of the trial and the public perception of justice.

31. This dilemma is unavoidable. Mr. Yillah's knowledge of OTP confidential policies, practice, and strategies acquired in the course of his relatively long period of employment with the OTP and his inevitable exchanges with colleagues and peers in the OTP must, even inadvertently, inform or influence some of his actions as Defence counsel. Mr. Yillah's views and contributions will unavoidably affect and influence the other members of the Defence team. He must share his assessment of the Prosecution strengths and weaknesses, which will be influenced by his insider knowledge of the case, if he is to represent the interests of their shared clients. The Prosecution reminds the Court that it is the *knowledge* of the counsel, rather than the *passing of this knowledge* to the opposing party that is envisaged as impediment to representation pursuant to Article 12(1)(b) of the Code of Conduct. This knowledge alone will affect the functions of Mr. Yillah in the Defence team and necessarily will extend to the members of the Defence team, since his knowledge cannot be isolated from the legal opinions or views he will present and share with them.

32. Even if there is no actual conflict, there will be a clear and unavoidable perception that the defence counsel may be using information acquired when he was in the Prosecution Division. Unlike national jurisdictions, *all* of the cases in this Court are high-profile and important. The process must, accordingly, be above suspicion. If prosecutors are free to routinely transfer from prosecution to defence shortly upon leaving the OTP it could undermine the confidence of the victims and the public in the system of justice.

33. Nor is this representation necessary to guarantee the rights of the Accused. While Mr. Yillah is a competent and experienced attorney, there are many other equally experienced or skilled lawyers on the list of counsel qualified to practice in this Court. Therefore it is not necessary that the Defence team take on the services of a person with even a potential conflict of interest in order to guarantee competent legal assistance to the Accused. The Registry maintains a list of qualified counsel qualified to appear before the Court which exceeds 300 names.[20] In addition, the Accused may

[20] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Counsel/List+of+Counsel/List+of+Counsel+before+the+ICC.htm

choose counsel not on the list.[21] Given the wide availability of qualified attorneys with a similar skill and experience as Mr. Yillah, it is neither necessary nor appropriate to invoke an "interests of justice" exception under Article 12(b) of the Code of Conduct to require his appointment instead of another equally qualified lawyer unburdened by conflict.[22] Mr Yillah's appointment should not be the beginning of a general practice of using the Office of the Prosecutor as a stepping stone to becoming a member of a defence team. Such a practice in this context would be against the interest of justice. The Prosecution observes that the previous Senior Trial Lawyer in the *Banda and Jerbo* case is also being appointed on another Defence team before the Court by the same co-counsel who has appointed Mr. Yillah. In light of Mr. Yillah's very recent employment in the OTP, allowing him to use, however inadvertently, OTP-acquired knowledge about the case on behalf of his clients would, contrary to the interests of justice, infringe on the Prosecutor's right to protect privileged information.

IV. Relief sought

34. For the reasons set out above, the Prosecution respectfully requests that the Chamber**:**

i) invalidate the contested appointment, or alternatively refer the request to a judge of the Pre-Trial Division pursuant to Article 64(4) of the Statute; and

ii) suspend the contested appointment pending a final decision on the matter.

Luis Moreno-Ocampo

Prosecutor

Dated this 8th day of June 2011

At the Hague, The Netherlands

[21] Regulation 75(2) of the Regulations of the Court.

[22] The Prosecution notes, for example, that the Defence counsel team also recently retained Nicholas Koumjian, a highly qualified attorney and former prosecutor in several international criminal tribunals, who can be expected to provide competent assistance and who is not burdened by any conflict of interest.