By Len Niehoff

The Lawyer for the Situation

There is a story, perhaps apocryphal, about a leading Washington litigator who was confronted concerning his representation of apparently conflicting interests in a case. The story goes that the litigator responded by saying, "Well, you see, I am the lawyer for the situation." In *Mickens v Taylor,* 122 S Ct 1237 (2002) the United States Supreme Court addressed a particularly stark example of this thinking, a case in which a criminal defendant convicted of murder discovered that his court-appointed attorney had been representing the murder victim at the time of his death.

The defendant, Mr. Mickens, was no doubt distressed to learn his lawyer had been representing the victim. Presumably, he was particularly troubled because the attorney had failed to disclose this fact to Mickens himself, or to his co-counsel, or even to the judge who appointed him. Indeed, the representation was discovered only as a result of a clerk's mistake in producing a sealed file to the wrong person. And doubtless, Mickens was even more troubled by the fact that his lawyer's efforts had resulted not only in a guilty verdict, but in a death sentence.

Mickens accordingly sought habeas relief in the federal courts. The district court denied his request, the court of appeals panel reversed, and an en banc appellate court flipped again and affirmed the district court. The United States Supreme Court granted a stay of execution and took the case, but ultimately affirmed.

As an aside, it should be noted that Mickens' conviction has been the source of numerous challenges, appeals, and controversies. He was convicted and sentenced to death in 1993. Two years later, the United States Supreme Court vacated his death sentence because the trial judge had failed to instruct the jury that Mickens would not be eligible for parole if the jury sentenced him to life imprisonment. At his new sentencing hearing, testimony was presented about his troubled childhood, and favorable evidence was offered by a prison counselor and a corrections officer. The jury, unmoved, again sentenced Mickens to death. Mickens again challenged his sentence on numerous grounds, for example, questioning the capacity of a juror to render an impartial verdict in light of the fact that his brother had been murdered. But the only issue that made it to the Supreme Court was his argument that you simply cannot receive effective assistance of counsel from a lawyer who was also representing the person you are accused of killing.[1]

Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined. In short, the majority ruled that, under the facts of this case, Mickens could void the conviction only if he could show that the conflict of interest adversely affected his counsel's performance. The court of appeals found no such effect below, and so the Supreme Court affirmed the denial of habeas relief. The Court rejected Mickens' argument that he could void the conviction simply by showing that a conflict existed and the trial judge failed to inquire into it.

Justices Stevens, Souter, Breyer, and Ginsburg dissented. In his opinion, in which two other justices joined, Justice Stevens took Mickens' lawyer to task, asserting that the attorney's "concealment about his prior representation of the victim was a severe lapse of his professional duty" and was "indefensible." And Justice Stevens noted that this lapse may have resulted in actual prejudice: "An unconflicted attorney could have put forth a defense tending to show Mickens killed [the victim] only after the two engaged in consensual sex [as opposed to forcible sodomy], but [the lawyer] offered no such defense. This was a crucial omission—a finding of forcible sodomy was an absolute prerequisite to Mickens' eligibility for the death penalty." Justice Stevens summed it up this way: "Mickens had a constitutional right to the services of an attorney devoted solely to his interests. That right was violated." In her separate dissent, Justice Ginsburg described what happened here as more than just a trial error, but as a "structural defect" in the case and a "breakdown in the criminal justice system."

The *New York Times* headline regarding this case put it pointedly: "Justices Uphold Verdict Against Killer Represented by Victim's Ex-Lawyer." Surely many members of the public will think this result defies common sense. Equally troubling, many members of the public will think the conduct in question here defies common decency. Alas, we are left with another case that will do little except confirm what many people already believe about our profession: that we have so little loyalty that we would represent one client on Monday, and the person who murdered them on Tuesday. And, alas, a troubled public is unlikely to find much consolation

In an effort to conserve space and allow for more timely and extensive discussions of the United States Supreme Court decisions of interest to Michigan practitioners, the Supreme Court Review will be available on the website only, beginning with the January 2003 issue.

This column addresses proceedings before the United States Supreme Court that are of interest to *Michigan Bar Journal* readers.

in knowing that five justices of our highest court reviewed such conduct, in a case where a man's life was at stake, and shrugged. ✦

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FOOTNOTE

1. For those who are interested, as of the writing of this column Mickens remains on death row, where he has been for the past nine years. For a current update on his status and for additional background regarding his case, readers can consult the website of Virginians for Alternatives to the Death Penalty at www.vadp.org.