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Disqualifying Defense Counsel: The Curse of the Sixth Amendment

Keith Swisher

ARTICLE

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Abstract. Lawyer disqualification—the process of ejecting a conflicted lawyer, firm, or agency from a case—is fairly routine and well-mapped in civil litigation. In criminal cases, however, there is an added ingredient: the Sixth Amendment. *Gideon*, which is celebrating its fiftieth anniversary, effectively added this ingredient to disqualification analysis involving indigent state defendants, although it already existed in essence for both federal defendants and defendants with the wherewithal to retain counsel. Once a defendant is entitled to counsel, the many questions that follow include whether and to what extent conflicts of interest—or other misconduct—render that counsel constitutionally ineffective. Most cases and commentary are arguably directed too late in the process—i.e., at the post-conviction stage in which the deferential *Sullivan* or the even more deferential *Strickland* standard applies. A much faster and more effective remedy might be to disqualify problematic counsel on the front end. But the government might use motions to disqualify as tools to weaken criminal defendants' defenses by depriving defendants of their chosen and effective advocates—just as civil litigants seemingly use motions to disqualify. This Article takes a close look at the application of the Sixth Amendment in disqualification cases and finds: (1) that when compared to civil litigants and even the prosecution, criminal defendants generally have weaker, not stronger, rights to counsel and to ethical representation; and (2) that the way forward is judicial respect for rich—and poor—defendants' rights to continuity and discontinuity of counsel.

Author. Associate Professor of Law, Phoenix School of Law; LL.M., Harvard Law School; J.D., B.S., Arizona State University. I owe many thanks

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INTRODUCTION

Lawyer disqualification is fairly routine and well-mapped in civil litigation.[1] In criminal cases, however, there is an added ingredient: the Sixth Amendment.[2] Once a defendant is entitled to counsel, the many questions that follow include whether and to what extent conflicts of interest—or other misconduct—render that counsel constitutionally ineffective.[3] Most cases and commentary are arguably directed too late in the process—at the post-conviction stage in which the deferential *Cuyler v. Sullivan*[4] or the even more deferential *Strickland v. Washington*[5] standard applies.[6] A much faster and more effective remedy might be to disqualify problematic counsel on the front end. But the government might use motions to disqualify as tools to weaken criminal defendants' defense by depriving defendants of their chosen and effective advocates—just as civil litigants occasionally use motions to disqualify. This Article takes a close look at the application of the Sixth Amendment in disqualification cases and finds: (1) that when compared to civil litigants and even the prosecution, criminal defendants generally have weaker, not stronger,

1. *See generally* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71 (2014) (discussing the factors courts consider when determining whether to disqualify counsel).

2. U.S. CONST. amend. VI.

3. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 686 (1984) (noting an "actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective" (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980))). The *Strickland* Court also noted that in *Cuyler* "the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest." *Id.* at 692 (citing FED. R. CRIM. P. 44(c)).

4. Cuyler v. Sullivan, 446 U.S. 335 (1980).

5. Strickland v. Washington, 466 U.S. 668 (1984).

6. *See generally* 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(d) (3d ed. 2007 & Supp. 2014) ("The *Cuyler* [*v. Sullivan*] opinion requires that the defendant presenting a postconviction challenge 'demonstrate [that] an actual conflict of interest adversely affected the lawyer's performance.' This requires a showing both that counsel was placed in a situation where conflicting loyalties pointed in opposite directions (an 'actual conflict') and that counsel proceeded to act against the defendant's interests ('adversely affect[ing] his performance')."); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1170 (2003) ("As this Article describes, as a practical matter the constitutional right to competent counsel rarely affords a remedy when a criminal defense lawyer does little more than encourage the client to plead guilty. Moreover, as a normative matter, because constitutional decisions demand so little from criminal defense lawyers, the case law tends to undermine the dictates of the ethics codes rather than reinforce them.").

rights to counsel and to ethical representation; and (2) that the way forward is judicial respect for rich—and poor—defendants' rights to continuity and discontinuity of counsel.[7]

The patchwork constitutionalization[8] of lawyer, firm, and defender office disqualification is one of *Gideon v. Wainwright*'s[9] often overlooked and undertheorized legacies. Two years ago, I embarked on a large, continuing project to diagram and clarify the law and practice of lawyer disqualification. I have since been mapping out—among other things—

7. For example, requiring separate counsel for codefendants can itself be seen as an attack on due process and Sixth Amendment rights—because it can weaken a united defense to the charges and enable the government to pit each defendant against every other defendant. *Cf.* Flanagan v. United States, 465 U.S. 259, 262–63 (1984) (noting that petitioners "contended that disqualification of counsel of their choice after they had knowingly waived conflict-free representation deprived them of their Sixth Amendment right to assistance of counsel and of their Fifth Amendment due process right to present a common defense through joint counsel" but rejecting petitioners' attempt to take an interlocutory appeal of the district court's order disqualifying their counsel); *infra* Part II.B (arguing that defendants' waivers of conflict-free representation need to be taken seriously). Furthermore, courts are often concerned with themselves—or at least someone or something other than the defendant—when they announce disqualification decisions. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 160 (1988) (noting that courts have "an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" and recognizing "[n]ot only the interest of a criminal defendant[,] but the institutional interest in the rendition of just verdicts in criminal cases").

8. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 140 (2006) (concluding that the trial court violated the defendant's Sixth Amendment right to counsel of choice when it erroneously denied his chosen counsel's pro hac vice applications); *Wheat*, 486 U.S. at 153 (affirming the denial of a motion to substitute counsel because counsel had represented two other defendants charged in the same conspiracy, notwithstanding the defendant's right to counsel of choice and the willingness of all defendants to waive their rights to conflict-free representation); *cf.* Mickens v. Taylor, 535 U.S. 162, 164, 174 (2002) (concluding that the trial court's knowing appointment of defense counsel who had previously represented the victim on assault charges at the time of his murder did not violate the defendant's Sixth Amendment rights because the defendant failed "to establish that the conflict of interest adversely affected his counsel's performance[,]" even though "the trial court fail[ed] to inquire into a potential conflict of interest about which it knew or reasonably should have known"); *Cuyler*, 446 U.S. at 348 ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."); United States v. Alfonzo-Reyes, 592 F.3d 280, 293–94 (1st Cir. 2010) (affirming disqualification for an actual conflict of interest over defendant's claim that the disqualification violated her Sixth Amendment right; noting that "although a defendant may generally waive his Sixth Amendment right to a non-conflicted attorney, 'the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers'" (quoting *Wheat*, 486 U.S. at 159))).

9. Gideon v. Wainwright, 372 U.S. 335 (1963). For federal defendants, of course, *Gideon* and its progeny were old news. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 70 (1942) (concluding "that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests").

the once seemingly innumerable factors that courts weigh when discerning whether to employ the equitable remedy of disqualifying an attorney or law firm. One prominent, recurring factor weighing in the balance is the defendant's "Sixth Amendment right."[10]

Although my larger project is not limited to the criminal context, the Sixth Amendment has inserted itself numerous times. Two examples are worth noting. First, as part of an empirical study in which I am collecting and coding every federal lawyer disqualification case over the past decade, criminal cases have constituted a large and arguably disproportionate share of those cases. Second, when criminal courts undertake a disqualification analysis, they often speak of the "Sixth Amendment" as a formidable barrier to disqualification.[11] Through comparisons to civil cases, however, I now question whether the Sixth Amendment is actually acting as some talismanic, or even significant, barrier to disqualification. I also conversely suspect that, when the Sixth Amendment is understood as a talismanic barrier,[12] it is misunderstood—and perhaps in ways that are ultimately detrimental to criminal defendants.[13] For example, many courts state in passing that the defendant's "Sixth Amendment right" must be honored when considering disqualification, but they then go on to analyze the disqualification question with little-to-no additional attention paid to the Sixth Amendment and its possible implications.[14] Other courts have, somewhat ironically, used the "Sixth Amendment right" to dilute ethical

10. *See Glasser*, 315 U.S. at 70 (noting that the Sixth Amendment guarantees "assistance of counsel"); *Alfonzo-Reyes*, 592 F.3d at 293–94 (stating that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant" (quoting *Wheat*, 486 U.S. at 159))).

11. *See Alfonzo-Reyes*, 592 F.3d at 293–94 (pointing out that the Sixth Amendment does not allow defendants to select lawyers of their own choosing).

12. *See, e.g.*, United States v. Pizzonia, 415 F. Supp. 2d 168, 186 (E.D.N.Y. 2006) ("In this case, the fundamental deciding factor is defendant's Sixth Amendment right to have counsel of his own choosing. Given that right, the motion to disqualify is denied.").

13. *See infra* Part III. The right to counsel is a factor, although presently a murky one. *See generally* United States v. Escobar-Orejuela, 910 F. Supp. 92, 94 (E.D.N.Y. 1995) ("Resolving disqualification motions where a criminal attorney is sought to be disqualified because of his or her former Government employment requires a careful balancing of a defendant's Sixth Amendment right to counsel of his or her choice with the duty of the Court to preserve the integrity of the judicial process and the Government's right to a fair trial. There is sparse case law addressing the clashing of these competing interests.").

14. *See, e.g.*, United States v. Gotti, 782 F. Supp. 737, 742 (E.D.N.Y. 1992) ("This court is keenly aware of its obligation to balance Locascio's right to counsel against the integrity of the trial process, to consider alternatives less drastic than disqualification, and to make specific findings where disqualification is compelled by potential conflict."), *aff'd,* United States v. Locascio, 6 F.3d 924 (2d Cir. 1993). The court then proceeded to disqualify defense counsel and refused to disqualify the prosecutor. *Id.* at 747.

protections in defense counsel.[15] These treatments, and others discussed below, form the curse of the Sixth Amendment.

This Article explores this unique hub of legal ethics, constitutional law, equitable remedies, and appointed and retained counsel. It is designed, in short, to inform the reader as to the extent that the Sixth Amendment actually does, and should, affect lawyer disqualification questions. Part I of this Article briefly describes lawyer disqualification and the most common grounds on which criminal defense counsel face disqualification. Part II examines the curse of the Sixth Amendment: that criminal defendants generally receive weaker protections in disqualification proceedings than their civil counterparts. In response, this Part offers some suggestions for courts to cure or alleviate this curse. Part III, however, considers whether on balance the weakened Sixth Amendment might actually be, at important times, a blessing, not a curse.

I. THE CONTEXT: DEFENSE COUNSEL DISQUALIFICATION

Disqualification, both criminal and civil, essentially unfolds as follows. First, the court becomes aware—often through a motion to disqualify—that the lawyer's representation might be improper, which typically means that the representation has violated, or will likely violate, the ethical rules.[16] In criminal cases, the lawyer is typically in jeopardy of

15. Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 285 (1982) ("The unique status of the criminal defendant under the Constitution provides him with a wide range of protections unavailable to his civil counterpart. It is ironic, however, that with respect to the issue of multiple representation, the existence of rights guaranteed under the [S]ixth [A]mendment has heretofore served not to enhance the position of the criminal defendant, but rather to deprive him of the benefit of the rigorous ethical standards derived in other contexts."). For example, consider *United States v. Judge*, 625 F. Supp. 901, 903 (D. Haw. 1986), in which the court refused to apply the otherwise prevailing rule of imputed disqualification to a public defender's office in part because in a "criminal case . . . the defendant's choice of counsel should be accorded great deference" and the "defendant made a knowing, intelligent and voluntary waiver on the record of his right to conflict-free representation." *See infra* Part II.D. More broadly, this result is arguably yet another area—and an overlooked one—in which defendants who can afford private counsel are treated better than those who must use appointed counsel. *See, e.g.*, United States v. Salvagno, No. 5:02–CR–51, 2003 WL 21939629, at *2 (N.D.N.Y. Mar. 4, 2003) (applying imputed disqualification to a private law firm). This is particularly true because defendants with appointed counsel generally have no right to a particular attorney, unlike wealthier defendants.

16. *See, e.g.*, Guillen v. City of Chicago, 956 F. Supp. 1416, 1421 (N.D. Ill. 1997) ("Disqualification motions require a two-step analysis. The court must consider (1) whether an ethical violation has actually occurred, and (2) if disqualification is the appropriate remedy."). *See generally* RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES (2003) (addressing virtually all areas of lawyer disqualification law, including a discussion of disqualification in the criminal context); Keith Swisher, *The Practice and Theory of Lawyer*

disqualification in the following four ethical dilemmas:

(1) when the lawyer represents two or more codefendants—a concurrent client conflict of interest;[17]

(2) when the lawyer represents a prosecution witness or has previously represented a prosecution witness in the same or a related matter—a concurrent or former client conflict of interest;[18]

Disqualification, 27 GEO. J. LEGAL ETHICS 71 (2014) (discussing lawyer and law firm disqualification primarily in the civil context).

17. *See* Wheat v. United States, 486 U.S. 153, 164 (1988) (affirming the denial of a motion to substitute counsel because counsel had represented two other defendants charged in the same conspiracy). *See generally* Holloway v. Arkansas, 435 U.S. 475, 476–77 (1978) (observing that "[p]etitioners, codefendants at trial, made timely motions for appointment of separate counsel, based on the representations of their appointed counsel that, because of confidential information received from the codefendants, he was confronted with the risk of representing conflicting interests and could not, therefore, provide effective assistance for each client" and concluding that "petitioners were deprived of the effective assistance of counsel by the denial of those motions"); RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 31.7 (2003) (discussing disqualification in the joint representation context).

18. *See, e.g.*, United States v. Alfonzo-Reyes, 592 F.3d 280, 293, 294, 296 (1st Cir. 2010) (affirming disqualification of defendant's attorney even though the attorney's former client-turned-witness was willing to waive the conflict); United States v. Gearhart, 576 F.3d 459, 464 (7th Cir. 2009) (discussing other remedies and noting that "a district court may 'on rare occasions' exclude evidence to resolve a conflict of interest when 'the probative value of the evidence is weighed against the negative consequences of admitting the evidence'" (quoting United States v. Messino, 181 F.3d 826, 830 (7th Cir.1999))); United States v. Moscony, 927 F.2d 742, 748 (3d Cir. 1991) (concluding that, because the lawyer had formerly represented clients during the government's investigation, and those former clients were now expected to be government witnesses during the trial, the district court correctly "determined that fairness, both to Moscony and to the witnesses, dictated the disqualification of" the lawyer's firm in part because cross-examination of the former clients "if foregone (which Moscony did not offer to do) would have deprived Moscony of his Sixth Amendment right to effective assistance of counsel (which Moscony did not offer to waive), and if pursued would have violated ethical standards regarding privileged communications (which the witnesses would not 'waive' even if they could)"); United States v. Iorizzo, 786 F.2d 52, 57 (2d Cir. 1986) (disqualifying the lawyer because his partner had represented targets of the same investigation that culminated in the defendant's indictment). *See generally* RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 31.8 (2003) (discussing disqualification considerations when the lawyer has formerly represented a witness); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4–3.5(d) (3d ed. 1993) ("Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply."); Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 56 (1983) ("When the former client of defense counsel testifying for the government desires disqualification to preserve confidential information, the government's interest in seeking disqualification seems strongest."). To avoid disqualification, courts can consider whether the witness will waive confidentiality and privilege, whether the testimony could be admitted through stipulation, and on "rare occasions," whether to exclude the testimony to protect the defendant's right to choice of counsel. *See, e.g.*, *Gearhart*, 576 F.3d at 464–65 (discussing other remedies and

(3) when the lawyer has previously represented the government in the matter or has otherwise obtained helpful confidential information while working for the government—a former client conflict of interest;[19] and

(4) when the lawyer will be a necessary witness in the trial—a lawyer-as-witness role conflict.[20]

noting that "a district court may 'on rare occasions' exclude evidence to resolve a conflict of interest when 'the probative value of the evidence is weighed against the negative consequences of admitting the evidence'" (quoting United States v. Messino, 181 F.3d 826, 829–30 (7th Cir.1999))).

19. *See* LaSalle Nat'l Bank v. Cnty. of Lake, 703 F.2d 252, 255–56 (7th Cir.1983) (noting that if "a substantial relationship did exist, we are entitled to presume that the attorney received confidential information during his prior representation"); Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 56 (1983) (noting the government's strong interest in disqualification when the lawyer had formerly represented the government in related proceedings); *see also* United States v. Smith, 995 F.2d 662, 676 (7th Cir. 1993) ("We believe these facts were sufficient to allow [the district court] to conclude that Mr. Norris had substantial involvement with the investigation and thus presume that Mr. Norris received confidential information. . . . It follows that the presumption in favor of permitting Marren to choose Mr. Norris was overcome by concerns for the integrity of the judicial process and that Marren's Sixth Amendment right to counsel was not violated." (citing *Wheat,* 486 U.S. at 158–59; *LaSalle*, 703 F.2d at 255–56)). *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4–3.5(h) (3d ed. 1993) ("Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter."). This category of disqualification is less prevalent than the other three, but it occurs regularly enough to deserve distinct classification.

20. *See, e.g.*, United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993) (concluding that the district court properly disqualified the defense counsel because counsel "would function in his representational capacity as an unsworn witness for [the defendant]. An attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, ethical codes may require him to withdraw his representation"); *cf.* Michael F. Orman, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145, 170 (stating that "an unethical prosecutor's attempt to effect an attorney's disqualification via a grand jury subpoena will fail unless the court determines that a showing of need for the attorney's testimony at trial has been made which is sufficiently compelling to override the defendant's qualified [S]ixth [A]mendment right"); Stacy Caplow, *The Reluctant Witness for the Prosecution: Grand Jury Subpoenas to Defense Counsel*, 51 BROOK. L. REV. 769, 788 (1985) (noting that the government can be "required to make a preliminary showing of reasonable need in addition to relevance when it subpoenas an attorney whose testimony before a grand jury investigating his or her client would result in the attorney's disqualification"). *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.7 (2013) (declaring that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" absent several exceptions). To avoid unnecessary disqualification, the trial court should first determine that defense counsel will be a necessary witness at trial. *See* State v. Van Dyck, 827 A.2d 192, 195 (N.H. 2003) ("We admonish trial courts to review motions to disqualify defense counsel in criminal cases cautiously to minimize the potential for abuse of the advocate-witness rule and the risk that a criminal defendant will be deprived unnecessarily of his chosen counsel.").

These are the most common situations,[21] although disqualification issues arise in many other situations.[22] For example, the lawyer might also face disqualification: when the lawyer is implicated in criminal or professional misconduct in the matter;[23] when the lawyer's financial interests strongly conflict with the defendant's interests;[24] or when the

21. These four common categories above are not mutually exclusive. For example, the lawyer may have previously represented a government witness, and for that reason, cannot effectively cross-examine that witness because the lawyer owes the witness a continuing duty of confidentiality. If the witness waives confidentiality, however, the lawyer might need to consider testifying for the defendant. *See, e.g.*, Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 332–33 (1989) (discussing United States v. Mitchell, 572 F. Supp. 709 (N.D. Cal. 1983), *aff'd,* 736 F.2d 1299 (9th Cir. 1984)).

22. *See* United States v. Schwarz, 283 F.3d 76, 81–82 (2d Cir. 2002) (finding an actual conflict of interest where defendant's attorney formed a law firm with another defendant's attorney and entered into a retainer agreement with an organization whose elected delegate was also a defendant); United States v. Henke, 222 F.3d 633, 636 (9th Cir. 2000) (concluding that a conflict of interest was present between defense attorneys under a joint defense agreement and a former defendant who participated in joint defense meetings); United States v. Ziegenhagen, 890 F.2d 937, 940–41 (7th Cir. 1989) (declaring a conflict of interest because the defense attorney had previously worked for the prosecution on a case involving his current client).

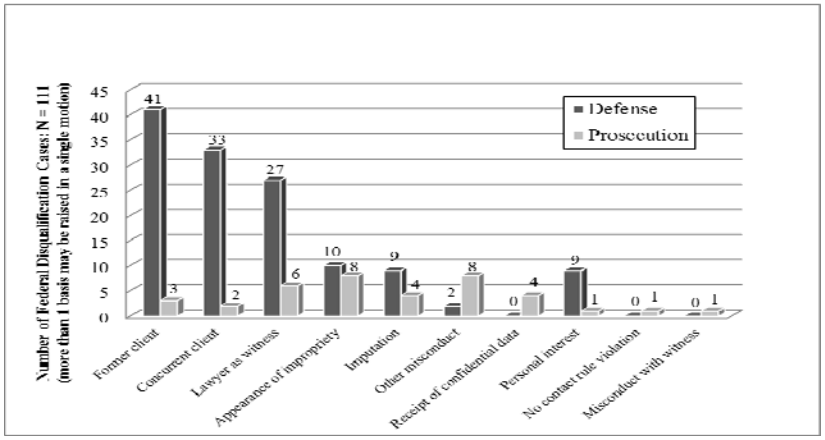
23. *See* 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(a) (3d ed. 2007 & Supp. 2014) ("[T]he paradigm case is that in which the lawyer representing the defendant fears opening himself up to criminal prosecution because he is under investigation for an offense relating to the same events." (citing Mannhalt v. Reed, 847 F.2d 576, 583–84 (9th Cir. 1988))); *see also* RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 31.9 (2003) (discussing disqualification concerns when the lawyer may have been involved in the criminal conduct); *cf.* Mathis v. Hood, 937 F.2d 790, 796 (2d Cir. 1991) (affirming "the judgment of the district court based on its conclusion that Mathis's attorney had an actual conflict of interest sufficient to undermine its confidence in the outcome of the appeal, a conflict that established a per se violation of Mathis's right to effective assistance of counsel" because the attorney's misconduct was at issue); *Ziegenhagen*, 890 F.2d at 940–41 (declaring an "actual conflict of interest" because a defense attorney had been put in a position in which his duty to his current client, a criminal defendant, might require the attorney to challenge a conviction the prosecutor's office had previously obtained against the client while the defense attorney was serving as a prosecutor and was present at the client's sentencing hearing).

24. *See generally Schwarz*, 283 F.3d at 81 (holding that "Schwarz's convictions for the civil rights violations must be vacated and remanded for a new trial because his attorney's unwaivable conflict of interest denied him effective assistance of counsel" in part because the attorney's firm had a multi-million dollar retainer agreement with a police union that had adverse interests to the defendant); Winkler v. Keane, 7 F.3d 304, 307–08 (2d Cir. 1993) ("Winkler argues that the contingency fee created an actual conflict of interest for trial counsel because Winkler's interests in effective representation were pitted against trial counsel's monetary interest. We agree. The contingency fee agreement in this case provided trial counsel with an extra $25,000 only if Winkler was acquitted or otherwise not found guilty. Thus, trial counsel had a disincentive to seek a plea agreement, or to put forth mitigating defenses that would result in conviction of a lesser included offense. Plainly the contingency fee agreement created an actual conflict of interest."); 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(d) (3d ed. 2007 & Supp. 2014) (noting that the attorney's interest in the case's media rights or marketability might violate the defendant's rights and citing

lawyer has entered into a joint defense agreement (JDA) with another defendant, who then turns state's evidence and against whom the lawyer may not use the information learned through the JDA to cross-examine her.[25]

The following charts show the bases for all federal disqualification decisions in criminal cases over the last five years:[26]

BASES FOR DISQUALIFICATION MOTIONS AGAINST DEFENSE AND PROSECUTION: 2008–2012

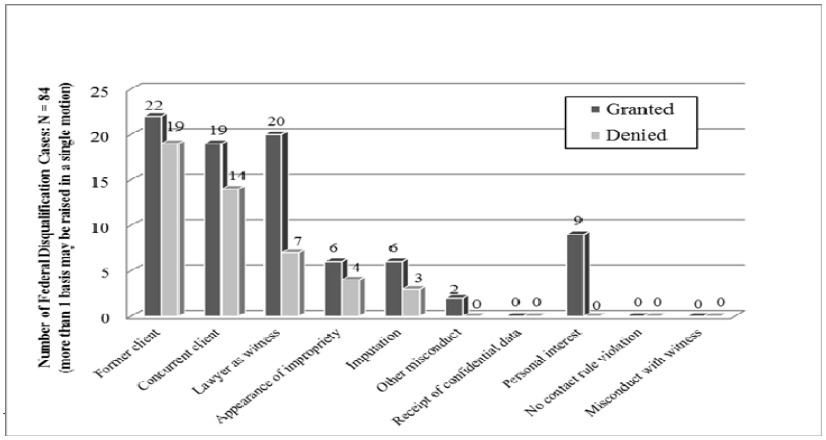


United States v. Hearst, 638 F.2d 1190 (9th Cir. 1980), *Buenoano v. Singletary*, 963 F.2d 1433 (11th Cir. 1992), and *Dumond v. State*, 743 S.W.2d 779 (Ark. 1988)); *cf.* Wood v. Georgia, 450 U.S. 261, 272 (1981) (reversing in part because the defendant-employee's lawyer may have been "influenced in his basic strategic decisions by the interests of the employer who hired him").

25. *See, e.g.*, *Henke*, 222 F.3d at 636 (agreeing with "defendants' principal claim . . . that they are entitled to a new trial because their attorneys worked under an actual conflict of interest that prohibited them from cross-examining one of the government's key witnesses"). *See generally* Matthew D. Forsgren, Note, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219, 1244 (1994) ("Even when prevailing ethical rules support disqualification, however, the Sixth Amendment further requires courts to balance the defendant's right to counsel of choice against the interests of the government witness. Although the Supreme Court has seemingly reduced the right to counsel of choice to a weak presumption, lower courts still recognize that adversarial fairness in complex criminal cases largely depends on access to counsel of choice."). Disqualification might be avoided if the JDA explicitly waived that remedy. *See, e.g.*, *In re* Shared Memory Graphics LLC, 659 F.3d 1336, 1342 (Fed. Cir. 2011) (upholding advance waiver).

26. To be counted, the cases had to concern and adjudicate motions to disqualify. Thus, nondispositive or merely analogous cases were not counted. *See* Lambright v. Ryan, 698 F.3d 808, 826 (9th Cir. 2012) (refraining to review the district court's disqualification analysis because of mootness); United States v. Scruggs, 691 F.3d 660, 669 (5th Cir. 2012) (addressing the defendant's later ineffective assistance of counsel claim based on an alleged conflict of interest). Habeas cases were also not counted because they, at least technically, were civil cases. Because only federal decisions were counted, moreover, we must be careful about relying too heavily on the results; state courts rendered many decisions during this timeframe, and those decisions are not reflected in the results.

GRANT/DENIAL OF DISQUALIFICATION MOTIONS AGAINST DEFENSE COUNSEL: 2008–2012



the reasons listed above—the court's second step is to weigh various interests to determine whether the remedy of disqualification is equitably—and for criminal cases, constitutionally—justified in the circumstances.[27] In the typical case, the court will look, at least in passing, at the interests of the defendant,[28] the lawyer,[29] the prosecutor,[30] the

27. *See, e.g.*, Guillen v. City of Chicago, 956 F. Supp. 1416, 1421 (N.D. Ill. 1997) (noting the two-step analysis that the court must use when deciding whether to grant a disqualification motion (citing SWS Financial Fund A v. Salomon Bros. Inc., 790 F. Supp. 1392, 1399 (N.D. Ill. 1992))).

28. The Sixth Amendment provides defendants with rights to counsel of choice and conflict-free counsel, although the former right generally applies only to defendants who can afford counsel. Other rights, such as the right to self-representation, are beyond the scope of this Article. *See generally* Faretta v. California, 422 U.S. 806, 832 (1975) ("The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation."). In addition to Sixth Amendment rights, defendants have other interests at stake—the loss of a prepared or trusted counsel and the resulting delay in the proceedings—and courts properly weigh those interests in determining whether the disqualification remedy is appropriate in the circumstances. *See, e.g.*, Owen v. Wangerin, 985 F.2d 312, 317 (7th Cir. 1993) ("[D]isqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary." (quoting Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983))).

29. *See* Holloway v. Arkansas, 435 U.S. 475, 485–86 (1978) ("[S]ince the decision in *Glasser*, most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. In so holding, the courts have acknowledged and given effect to several interrelated considerations. An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. Finally, attorneys are officers of the court, and when they address

court,[31] and if applicable, the lawyer's other current or former clients.[32] Courts then weigh these interests in the context of all of the circumstances and determine whether disqualification should, or even must, follow.

The next Part considers to what extent does, and should, the Sixth Amendment impact the above disqualification analysis.

II. THE CURSE—AND RECOMMENDED CURES

The Sixth Amendment itself provides for the "Assistance of Counsel" in criminal cases,[33] but many courts have effectively construed this constitutional right to provide equal or less protection to criminal defendants than to civil litigants. The added ingredient in criminal lawyer disqualification cases, then, can actually be poisonous—or at least not nutritious—to criminal defendants, as suggested in the Sections below.

To be sure, the problem is not just the Sixth Amendment, or courts' interpretations thereof; the problem is being a criminal defendant. Systematically, clients with conflicted lawyers generally fare better in the civil context, whereas criminal defendants fare worse on both ends of the case. On the front end, defendants generally have greater difficultly substituting defense counsel and ensuring that counsel maintain the ethical standards required of all other attorneys.[34] On the back end, courts rarely

the judge solemnly upon a matter before the court, their declarations are virtually made under oath." (citations and internal quotation marks omitted)); Leversen v. Super. Ct., 668 P.2d 755, 761 (Cal. 1983) (concluding that the trial court's denial of defense counsel's motion to withdraw violated the defendant's "constitutional right to assistance of counsel free from any conflict of interest adversely affecting counsel's performance" because defense counsel possessed a former client's confidential information relevant to the defendant's case).

30. *See, e.g.*, United States v. Gearhart, 576 F.3d 459, 463–64 (7th Cir. 2009) ("We review the disqualification of counsel for abuse of discretion. We likewise review the manner in which the court balances the defendant's right to counsel against the government's interest in proving its case beyond a reasonable doubt for abuse of discretion." (citations omitted)).

31. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 160 (1988) (noting that courts look to their "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" and "institutional interest in the rendition of just verdicts in criminal cases"). Courts are also interested in judicial economy—whether the disqualification will cause delays or repetition. *See generally* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71 (2014) (describing courts' interests and how they weigh those interests in disqualification cases).

32. For example, if the lawyer's current or former client will likely be a government witness, that client would have an interest in preserving the client's confidential or privileged information on cross-examination (absent a waiver). *See supra* note 18 (citing cases).

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

34. To be sure, post-*Holloway*, defendants—or at least their attorneys—who object to joint representation have a much easier path to substitution, and if denied, to reversal. *See Holloway*, 435

reverse the trial court's disqualification order or the defendants' convictions on the basis of conflicted or otherwise ineffective representation.[35] Moreover, certain courts appear prosecution-minded by acting on their "legitimate wish" to protect their convictions from later challenges—but this wish is not completely consistent with their neutral adjudicator role.[36] Nevertheless, certain courts seem to be taking this skewed approach,[37] and their disqualification orders are rarely reversed.[38]

A stronger Sixth Amendment would alleviate some of these broader problems for criminal defendants. Even courts quick to protect their convictions should recognize that pretrial disqualification need not follow the same deferential standards as post-conviction practice. In the hope that conscientious courts might take stronger interpretations in the future, I identify below several emblematic ways in which the weakened Sixth

U.S. at 476–77 ("A rule requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application.").

35. *See, e.g.*, Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 54 (2009) ("This [risk-based] standard of conduct [in the ethical rules] stands in stark contrast to the standard governing post-conviction claims of ineffective assistance of counsel under the Sixth Amendment, which in most cases requires proof that the lawyer's conduct was, in fact, adversely affected by the circumstances that produced the conflicting interests.").

36. *See Wheat*, 486 U.S. at 161 (noting that the "need to investigate potential conflicts arises in part from the legitimate wish of district courts that their judgments remain intact on appeal"). Courts should not, and under the Codes of Judicial Conduct cannot, favor one side over the other. *See generally* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 351 (2010) (explaining that it violates the ethical rules when judges pander to the prosecution). To covet affirmance in criminal cases almost always favors the prosecution (save government appeals of a suppression order and interlocutory matters, among a few other examples); acquittals, of course, are generally not appealable. More generally, judges have no personal "right" to, or legitimate interest in, their orders or their assigned cases, and judges would do better not to cling to cases as if they do have such rights or interests. *See, e.g.*, Keith Swisher, *Recusal, Government Ethics, and Superannuated Constitutional Theory*, 72 MD. L. REV. 219, 244–49 (2012) ("[A] judge's personal interest in keeping a case ranges from illegitimate to insignificant."); *see also* Ligon v. City of New York, 736 F.3d 166, 171 (2d Cir. 2013) ("A district judge has no legal interest in a case or its outcome, and, consequently, suffers no legal injury by reassignment.").

37. *See* United States v. Jones, 623 F. Supp. 110, 114 (E.D. Pa. 1983) (discerning an interest that the proceeding be "free from future attacks" and disqualifying counsel); State v. Love, 594 N.W.2d 806, 817 (Wis. 1999) (claiming "a court's institutional interest that the court's judgments remain intact on appeal and be free from future attacks over the adequacy of the waiver or fairness of the proceedings" (quoting in part *Wheat*, 486 U.S. at 161) (internal quotation marks omitted)).

38. *See* United States v. Cain, 671 F.3d 271, 294–95 (2d Cir. 2012) ("Consistent with the deferential approach dictated by *Wheat*, . . . we have never concluded that the trial court abused its discretion in disqualifying a conflicted attorney."); 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(c) n.126 (3d ed. 2007 & Supp. 2014) ("Given the discretion *Wheat* provides to the trial judge for disqualifying notwithstanding a waiver, that course of action is seen as presenting the least room for a successful appellate attack, given a case with a realistic potential for presenting an actual conflict.").

Amendment currently falls short in defense counsel disqualification proceedings.

A. *The Paper Tiger Right to Counsel of Choice*

Particularly when compared to civil litigants—who enjoy no Sixth Amendment rights—the Sixth Amendment right turns out to be mostly toothless. At best, the Sixth Amendment adds to moneyed criminal defendants a "presumption" of choice of counsel and adds little-to-nothing to indigent criminal defendants.[39] Thus, the Sixth Amendment ordinarily offers criminal defendants no appreciable advantage over civil counterparts, as explained below.

Civil litigants enjoy a "right" to their counsel of choice, and courts generally place great weight on that "right."[40] Wealthy criminal defendants receive only the same, if not lesser, weight to their right to counsel of choice—a mere "presumption."[41] For both sets of litigants,

39. *See, e.g.*, United States v. Alfonzo-Reyes, 592 F.3d 280, 293–94 (1st Cir. 2010) (affirming disqualification for an actual conflict of interest over defendant's claim that the disqualification violated her Sixth Amendment right; noting that "although a defendant may generally waive his Sixth Amendment right to a non-conflicted attorney, 'the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers'" (quoting *Wheat*, 486 U.S. at 159)). Some judges do treat the Sixth Amendment with considerable or even exclusive force, but those judges do not appear to be in the majority.

40. *See* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 283 (1982) ("While the civil litigant has no [S]ixth {A]mendment right to counsel of choice, courts have nonetheless been willing to honor his selection of a particular attorney absent sufficient countervailing considerations. At least one court has held that to forbid arbitrarily even a civil litigant to retain a particular attorney would unnecessarily obstruct 'his ability to enter private contractual arrangements for representation and would deprive him of his constitutional right to due process of law.'" (citation omitted) (quoting *In re* Taylor, 567 F.2d 1183, 1186 n.1 (2d Cir. 1977))); *see also* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 96–97 (2014) (showing that courts weigh heavily a civil litigant's right to chosen counsel when deciding whether disqualification is warranted).

41. Some courts refer to it as a "strong presumption." *See* Ryan v. Eighth Jud. Dist. Ct. *ex rel.* Cnty. of Clark, 168 P.3d 703, 709 (Nev. 2007) ("[A]lthough the district court has broad discretion to balance a non-indigent criminal defendant's right to choose her own counsel against the administration of justice, we conclude that there is a strong presumption in favor of a non-indigent criminal defendant's right to counsel of her own choosing."). "[F]ear of a mistrial is no longer an adequate ground to reject a knowing, intelligent, and voluntary waiver of the right to conflict-free representation." *Id.* at 710 n.24 (noting, however, that the "holding today does not disturb the district court's discretion to reject a valid waiver when dual representation would interfere with the administration of justice"). Generally, however, it is a "weak presumption." *See, e.g.*, Matthew D. Forsgren, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219, 1244 (1994) (noting that "the Supreme Court has seemingly reduced the right to counsel of choice to a weak presumption"). Importantly,

moreover, trial courts imprecisely weigh the litigants' right to counsel against disqualification, and appellate courts review the resulting decision under the deferential abuse of discretion standard.[42] The Sixth Amendment's added weight often exists only in a vacuum, as it did in *United States v. Gonzalez-Lopez*.[43] In other words, in the absence of countervailing interests, defendants' right to counsel will prevent the disqualification.[44] But in light of countervailing interests—which are indeed present in the majority of cases—the rights to counsel of choice or to waive conflict-free counsel may well fail to prevent disqualification.[45]

For example, the right may give way to courts' "calendar demands," including "scheduling and other decisions that effectively exclude a defendant's first choice of counsel;"[46] thus, "the right to be represented by counsel of choice can be limited by mundane case-management considerations."[47] Even over the client's waiver of any conflicts, moreover, courts can jettison the lawyer for a conflict of interest, among other reasons.[48] Indeed, courts can do so even when the client's waiver

these strong or weak presumptions generally apply only to defendants with money; indigent defendants receive little-to-no right to counsel of choice, as discussed below.

42. *See, e.g.*, United States v. Gearhart, 576 F.3d 459, 463–64 (7th Cir. 2009) ("We review the disqualification of counsel for abuse of discretion. We likewise review the manner in which the court balances the defendant's right to counsel against the government's interest in proving its case beyond a reasonable doubt for abuse of discretion.") (citation omitted).

43. United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) ("However broad a court's discretion [to disqualify] may be, the Government has conceded that the District Court here erred when it denied respondent his choice of counsel. Accepting that premise, we hold that the error violated respondent's Sixth Amendment right to counsel of choice and that this violation is not subject to harmless-error analysis.").

44. *See* Wheat v. United States, 486 U.S. 153, 162 (1988) ("[If] a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant." (quoting United States v. Dolan, 570 F.2d 1177, 1184 (1978))).

45. Countervailing interests could include the likely impact of counsel's conflict of interest or other misconduct, the court's scheduling conflicts, prejudice to the government, and so on. No such countervailing interests were present in *Gonzalez-Lopez*, a point the government essentially conceded. *Gonzalez-Lopez*, 548 U.S. at 152.

46. *Id.* at 152.

47. *Id.* at 155 (Alito, J., dissenting).

48. The *Gonzalez-Lopez* Court summarized several examples of limitations on a defendant's choice of counsel:

> Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. None of these limitations on the

would likely render the representation permissible under the ethical rules.[49]

Thus, the right at present is merely a "presumption" that cannot normally withstand the circumstances, including the fact that most defendants cannot afford counsel. Importantly and unfairly, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them."[50] A "right" that fails to apply to most criminal defendants is hardly advantageous, much less equal.[51]

The cure is simple in theory but difficult to achieve in practice: courts must stop discriminating against indigent defendants, and they must show greater respect for all defendants' rights to continuity and discontinuity of counsel. This cure is discussed immediately below.

B. *The Nascent Rights to Continuity and Discontinuity of Counsel*

Although courts generally honor a weak presumption of counsel of choice for defendants with money, most courts do not explicitly honor indigent defendants' right to continuity of counsel. Because the Supreme Court has repeatedly stated that indigent defendants are not entitled to counsel of choice, many judges assume that they have virtually unlimited

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right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.

Id. at 151–52 (majority opinion) (citations and internal quotation marks omitted); *see also Wheat*, 486 U.S. at 159 ("The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government.") (footnote omitted).

49. *See, e.g.*, Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1222 (1989) ("[T]he *Wheat* decision is bottomed on the Court's misunderstanding of the ethical rules. If Iredale obtained the informed consent of Wheat and his codefendants, there was virtually no possibility that his representation of Wheat would have violated the prevailing ethical norms. As a consequence of the Court's misunderstanding, the Court upheld the denial of Wheat's choice of counsel in a case where the ethical rules plainly would have permitted that choice.").

50. *Gonzalez-Lopez*, 548 U.S. at 151.

51. *See, e.g.*, *Indigent Defense Systems*, BUREAU OF JUST. STAT., http://www.bjs.gov/index.cfm?ty=tp&tid=28 (last visited Mar. 24, 2014) ("Publicly financed counsel represented about 66% of federal felony defendants in 1998 as well as 82% of felony defendants in the [seventy-five] most populous counties in 1996.").

discretion to disqualify or otherwise remove court-appointed counsel.[52] That assumption stretches the case law, and it is unwise.

Although it is true that indigent defendants do not typically have the right to a particular attorney, once a court makes the appointment, the resulting attorney-client relationship should not be extinguished lightly. To do otherwise ignores significant costs:

> One cost is the effect of any of these choices on an existing attorney client relationship. Even prior to trial, a bond of trust is created between the accused and counsel. The trial judge should be reluctant to sever that bond and compel the accused to go through the process again with new counsel. A second cost factor is administrative and involves both the delay in beginning a new trial and the judicial resources that were expended throughout the course of the aborted trial. The third factor is the strain placed on democratic ideals when the independence of the legal profession is challenged by the judiciary.[53]

52. *See generally* Morris v. Slappy, 461 U.S. 1, 14 (1983) ("reject[ing] the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel"); Daniels v. Lafler, 501 F.3d 735, 740 (6th Cir. 2007) ("[W]e hold that a defendant relying on court-appointed counsel has no constitutional right to the counsel of his choice. This does not mean that an indigent defendant never could establish that the arbitrary replacement of court-appointed counsel violated his constitutional rights. The replacement of court-appointed counsel might violate a defendant's Sixth Amendment right to adequate representation or his Fourteenth Amendment right to due process if the replacement prejudices the defendant—e.g., if a court replaced a defendant's lawyer hours before trial or arbitrarily removed a skilled lawyer and replaced him with an unskilled one. But because Daniels does not even allege prejudice here, we must affirm the denial of his Sixth Amendment claim."); United States v. Parker, 469 F.3d 57, 61 (2d Cir. 2006) ("There is no constitutional right to continuity of appointed counsel. While the criminal defendant does of course retain some interest in continuous representation, courts are afforded considerable latitude in their decisions to replace appointed counsel, and may do so where a potential conflict of interest exists and 'in the interests of justice,' 18 U.S.C. § 3006A(c), among other circumstances." (citations omitted)).

53. Jay William Burnett & Catherine Greene Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove or Not to Remove Deficient Counsel*, 41 S. TEX. L. REV. 1315, 1335–36 (2000) (footnotes omitted); *see* Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 60–61 (1983) ("Another factor affecting the cost of disqualification is the timing. Pretrial preparation may entail considerable effort and expense. Substitute counsel will find it necessary to duplicate many of the tasks undertaken by the disqualified lawyer, creating even greater expense for the defendant. Of course, if the defendant is indigent, the public must bear the additional financial burden created by a disqualification of defense counsel. This also is a pertinent consideration for the court. There are other costs of disqualification for the defendant, often intangible but nevertheless considerable. For example, there is a substantial value in continuity of representation in preparation for trial."). *See generally* Note, *Rethinking the Boundaries of the Sixth Amendment Right to Choice of Counsel*, 124 HARV. L. REV. 1550, 1561 (2011) (noting that "the fact that counsel has authority to *overrule* the defendant on so many individual strategic questions is all the more reason for giving substantive protection to choice of counsel in the first place").

The cost to the defendant becomes pricier the longer that counsel has been appointed. In addition to the valuable time preparing for trial, "[a] longer association with counsel also allows for the development of confidence and rapport, two essential ingredients in a criminal defendant's relationship with his lawyer."[54] Thus, as the ABA recommends, courts should generally respect a defendant's continuity of counsel.[55]

Many state courts have inspired the way, recognizing that "[t]o allow trial courts to remove an indigent defendant's court-appointed counsel with greater ease than a non-indigent defendant's retained counsel would stratify attorney-client relationships based on defendants' economic backgrounds."[56] Although it might be argued that federal law implies continuous representation, federal courts to date have generally failed to keep pace with the states.[57]

54. Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 60 (1983) ("One factor affecting the cost of disqualification for both the defendant and counsel is the maturity of their attorney-client relationship. If the lawyer has represented the defendant on other occasions, and is familiar with the defendant's family and background as well as the circumstances of the defendant's prior contacts with the courts, disqualification of counsel is particularly costly to the defendant. A longer association with counsel also allows for the development of confidence and rapport, two essential ingredients in a criminal defendant's relationship with his lawyer.").

55. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5–6.2 (3d ed. 1993) ("Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary."); Katy Bosse, *A Price Tag on Constitutional Rights:* Georgia v. Weis *and Indigent Right to Continued Counsel*, 6 MOD. AM. 43, 46–47 (2010) ("The current ABA *Ten Principles of a Public Defender System* guide maintains that 'the same attorney continuously represents the client until completion of the case.' Additionally, the guide further asserts that the same attorney should represent the client from the initial assignment through the trial and sentencing. In *Gideon's Broken Promise*, the ABA's 2004 study of the nation's indigent criminal defense standards, the ABA reported that national standards have long recognized a right to continued counsel as an essential component of an effective defense practice. The same study also found that many states still practiced 'horizontal representation,' where multiple public defenders handled different aspects of a single case. In contrast, the study reported that, in some states, the same prosecutor handled the prosecution of a defendant from beginning to end, largely due to the ample funding available to the state's prosecuting agency." (footnotes omitted)).

56. Weaver v. State, 894 So. 2d 178, 189 (Fla. 2004) (citing several states recognizing a defendant's right to keep appointed counsel); *see also* State v. Huskey, 82 S.W.3d 297, 311 (Tenn. Crim. App. 2002) (recognizing and enforcing defendant's "right" to keep appointed counsel).

57. *See* 18 U.S.C. § 3006A(c) (2012) (suggesting that counsel should be substituted only "in the interests of justice"); FED. R. CRIM. P. 44(a) ("A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right."). *But see supra* note 52 (rejecting a similar constitutional right to counsel). In the context of the quoted sentence in Rule 44, "counsel" could be read to mean the same counsel. This essentially is the concept of "vertical" representation, which has much to commend it and is supported by the ABA. *See supra* note 55 (discussing vertical representation); *cf.* United States v. Gearhart, 576 F.3d 459, 464 (7th Cir. 2009) ("The Sixth Amendment protects a criminal defendant's right to a fair opportunity to secure the

When defendants' counsel come with conflicts of interest, however, the rights to continuity of counsel and conflict-free counsel conflict. To address this tension, defendants could waive the right to conflict-free counsel to preserve the right to continuity of counsel. Generally, defendants are permitted—for better or worse—to waive most fundamental rights.[58] Furthermore, any difference in waiver-strength makes little sense: If a wealthy defendant can waive the conflict of interest, the indigent defendant's waiver generally should hold the same force; each has a right to conflict-free representation.[59] The indigent defendant's waiver should not "be dictated by the government" simply because the defendant lacks the money to retain private counsel.[60] As the ABA Standards provide, "[r]epresentation of an accused establishes an inviolable attorney-client relationship," and "[r]emoval of counsel from representation of an accused, therefore, should not occur over the objection of the attorney and the client."[61] Notwithstanding the

counsel of his choice. This right to choose one's counsel, in turn, implies the right to continuous representation by the counsel of one's choice. Thus, disqualification of defense counsel should be a measure of last resort . . . .") (citations omitted); Daniels v. Woodford, 428 F.3d 1181, 1214 (9th Cir. 2005) (noting that the trial court erroneously disqualified criminal defendant's private counsel who had been working pro bono and whose conflict would be remedied by the defendant's waiver and stipulation).

58. *Cf., e.g.*, Faretta v. California, 422 U.S 806, 835 (1975) (permitting defendants to waive counsel entirely by recognizing the right to self-representation).

59. *See generally* Wood v. Georgia, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.").

60. *See* United States v. Perez, 325 F.3d 115, 125–26 (2d Cir. 2003) ("Where the right to counsel of choice conflicts with the right to an attorney of undivided loyalty, the choice as to which right is to take precedence must generally be left to the defendant and not be dictated by the government. . . . The courts do, of course, retain discretion to reject a defendant's knowing and intelligent waiver when his attorney's conflict jeopardizes the integrity of judicial proceedings. . . . But absent such institutional concerns, courts will not 'assume too paternalistic an attitude in protecting the defendant from himself,' and although the defendant's choice of counsel 'may sometimes seem woefully foolish' to the court, the choice remains his." (citations omitted)).

61. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5–6.3 (3d ed. 1993). *See generally* Ephraim Margolin & Sandra Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 AM. CRIM. L. REV. 227, 247–48 (1982) ("Waiver analysis provides adequate protection for a defendant's right to competent counsel. There are many fundamental rights which a defendant may waive, in particular the right to be represented by counsel at all, and there is no reason to 'discriminate' against the right to waive conflict-free representation."); Note, *Rethinking the Boundaries of the Sixth Amendment Right to Choice of Counsel*, 124 HARV. L. REV. 1550, 1563 (2011) ("[T]he Sixth Amendment presumes that defendants are capable of weighing relevant costs and benefits when choosing an advocate. Absent a direct threat to the structure of the adversarial process, defendants should be left to their choice."). For a more extreme extension of waivers, see *id.* at 1568–69 ("First, disbarment alone generally should not be sufficient to disqualify an advocate for Sixth Amendment purposes. . . . Second, courts should generally allow

compelling case for continuity of counsel, current practice varies from civil disqualification law—and the ethical rules. In civil cases, courts rarely disqualify attorneys for conflicts of interest to which the interested clients have consented; thus, civil litigants' waivers are more frequently honored.[62] Turnabout in criminal disqualification practice would be fair play because defendants' waivers are often honored when defendants later seek to reverse their convictions on the basis of invalid waivers.[63]

Finally, a corollary right should also be recognized—the right to discontinuity of counsel. "Because the indigent defendant has no initial choice, the court has a greater obligation to ensure that appointed counsel provides appropriate representation, not merely representation that will survive a post-conviction challenge."[64] Thus, contrary to much of the current law and practice, courts should more readily respect defendants' request for substitution of counsel.[65] Courts should recognize that many,

representation by advocates who have had formalized, pertinent training, even when that training falls outside of a state bar's prescribed model.").

62. When the conflict arises from the lawyer's duties to a former client, however, the former client generally must consent as well. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.9 (2013) (prohibiting lawyers from acting adversely to their former clients in matters substantially related to the former clients' matters unless the former clients give informed consent).

63. *See, e.g.*, United States v. Friedman, 854 F.2d 535, 573 (2d Cir. 1988) (rejecting the defendant's argument that his waiver of conflict-free counsel was not voluntary, knowing, and intelligent); *see also* Gomez v. Ahitow, 29 F.3d 1128, 1135–36 (7th Cir. 1994) ("'The law on this point is clear. A defendant who knowingly and intelligently waives his attorney's potential or actual conflict of interest may not, under any circumstances, later claim that such a conflict deprived him of his right to effective assistance of counsel.'" (quoting Harvey v. McCaughtry, 11 F.3d 691, 695 (7th Cir. 1993))); RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 31.10 (2003) (noting that a knowing and voluntary waiver or guilty plea often precludes later ineffective assistance of counsel claims related to the waiver or plea); 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(c) (3d ed. 2007 & Supp. 2014) ("Although *Wheat* spoke of federal circuits that appeared to allow a defendant to challenge counsel's competency on conflict grounds notwithstanding defendant's waiver of his right to conflict-free counsel, post-*Wheat* circuit court rulings have established that a knowing and intelligent waiver precludes a subsequent competency challenge based on that conflict." (footnotes omitted)).

64. Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1258 (2006).

65. *See id.* at 1260–61 ("Even though the attorney–client relationship is critical to effective representation, the law is clear that the defendant is not entitled to a meaningful relationship with counsel, and that the defendant is not entitled to substitution of counsel merely because the defendant has lost confidence in, or no longer trusts counsel. Different jurisdictions' standards governing substitution of counsel are phrased in a variety of ways. The trial court may be directed to ask whether the breakdown in the relationship between the defendant and defense counsel would prevent an adequate defense, whether exceptional circumstances exist, whether the defendant can demonstrate counsel's ineffectiveness or whether there is a 'conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.' While some courts recognize that disagreement over trial strategy may warrant substitution of counsel, others hold that a dispute over tactical decisions is not sufficient. The mere allegation that

though of course not all, defendants are experiencing ineffective counsel,[66] and courts must resist the urge to review every request with laziness or suspicion.[67] Courts have generally been receptive and even deferential to defense attorneys' motions to withdraw in light of conflicts;[68] a similar reception should be given to defendants, who of course have even more at stake than attorneys.[69] Moreover, recognizing and honoring this right would make the proceedings, in actuality and in appearance, fairer to defendants and would reduce defendants' grounds and motivation to challenge the proceedings post-conviction. And of course, to avoid

counsel has not met frequently enough with defendant to discuss the case may not even call for further inquiry by the court. Applying these extremely demanding standards, courts deny motions for substitution despite serious complaints by the defendant." (footnotes omitted)).

66. *See, e.g.*, Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 515 (2009) (noting "that ineffective assistance of counsel is a rampant criminal justice problem and among the leading causes of wrongful convictions").

67. *See* Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1261–62 (2006) ("In addition to facing these difficult legal standards, a defendant seeking substitution of counsel must overcome the court's natural reluctance to bring new counsel into the case and generate delay in the proceedings. The court is entitled to assess the timeliness of the motion and to consider the government interest in taking the case to trial and avoiding the delay that would result from a change in defense counsel. Administrative convenience always weighs against granting the motion, and courts are often impatient with defendants who request new counsel on the eve of trial, expressing frustration with the lack of timeliness and threatened disruption of the case. Although some defendants are probably crafty manipulators, others appear to be victims of lawyer incompetence or neglect, raising the issue in the only way they understand.").

68. *See* Holloway v. Arkansas, 435 U.S. 475, 485–86 (1978) ("[S]ince the decision in *Glasser*, most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. . . . In so holding, the courts have acknowledged and given effect to several interrelated considerations. An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.' . . . Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. . . . Finally, attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'" (citations omitted) (internal quotation marks omitted)); Leversen v. Super. Ct., 668 P.2d 755, 761 (Cal. 1983) (concluding that the trial court's denial of defense counsel's motion to withdraw violated the defendant's "constitutional right to assistance of counsel free from any conflict of interest adversely affecting counsel's performance" because defense counsel possessed a former client's confidential information relevant to the defendant's case).

69. Such considerations fit easily within the "interest of justice" standard. *See, e.g.*, Martel v. Clair, 132 S. Ct. 1276, 1287 (2012) ("As its name betrays, the 'interests of justice' standard contemplates a peculiarly context specific inquiry," and relevant factors "generally include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict).").

dilatory tactics, courts could consider—among other factors—whether the defendants have already requested and received substitute counsel earlier in the case.

In sum, showing a greater respect for defendants' interests in continuity and discontinuity of counsel would strengthen the Sixth Amendment rights to counsel of choice and to conflict-free counsel, and it would enable indigent criminal defendants to enjoy equal treatment to wealthier defendants and civil litigants.

C. *The Weakened Rights of Former Criminal Defendants*

The Sixth Amendment can hurt former criminal defendants, who also occasionally receive less protection than their civil counterparts. That is, in civil cases, the former client can generally succeed in disqualifying the lawyer when the lawyer has since started acting adversely in the same or a substantially related matter.[70] In criminal cases, in contrast, certain courts will not disqualify the lawyer unless the client had, in fact, given the lawyer relevant confidential information.[71] Thus, when the Sixth Amendment

70. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.9 (2013) ("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.").

71. *See* Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 31 (1983) ("In essence, the civil disqualification cases analyze the nature of the prior client representation and the usefulness of information that a lawyer might have learned from that type of representation, rather than trying to reconstruct what the lawyer actually learned or used against the former client. The opposite is true in criminal cases. Even though there may be a 'substantial relationship' between the subject matter of the defense lawyer's prior representation of a prosecution witness and issues that are relevant to an effective cross-examination of the witness on behalf of the defendant, the defendant's conviction will not be reversed unless he can show that his lawyer did not in fact probe those issues, in order to protect the confidences of the prosecution witness."); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2013) ("A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services."). To be sure, this approach has occasionally worked against the government as well. *See, e.g.*, United States v. Washington, 797 F.2d 1461, 1466 (9th Cir. 1986) ("We cannot accept . . . such a restrictive reading of the ABA disciplinary rule as a basis for denying a criminal defendant his Sixth Amendment right to counsel of his choice. We have grave doubts whether an appearance of impropriety would ever create a sufficiently serious threat to public confidence in the integrity of the judicial process to justify overriding Sixth Amendment rights. It is easy to express vague concerns about public confidence in the integrity of the judicial process. It is quite a different matter to demonstrate that public confidence will in fact be undermined if criminal defendants are permitted to retain lawyers who worked for the government in the field of law implicated by an indictment. We are unwilling to sacrifice a defendant's Sixth Amendment right to counsel of his choice on such

actually has teeth and defeats the lawyer's disqualification, it might be to the detriment of other or former criminal defendants.[72] To be sure, this is a rare example of a stronger Sixth Amendment right, although it is not universally followed in the courts and it is not without potential costs to the former clients.

D. *The "Right" to Screening*

In the name of the Sixth Amendment, criminal courts can be more lax in applying the imputed disqualification rules.[73] Some courts do not impute the disqualification to associated lawyers to the same extent as in civil cases, and some courts permit the more liberal use of screening—or ethical walls—in criminal cases. Some courts, moreover, "view [public defender] offices as different [than private firms]," in part because "the salaried government employee does not have the financial interest in the success of the departmental representation that is inherent in private practice."[74] Fortunately, many public defender offices and indigent–defense appointing authorities have resisted this suggestion to dilute defendants' rights to conflict-free representation.[75]

an unsubstantiated premise. Indeed, for all we as judges know in a vacuum, the public very well may have greater confidence in the integrity of the judicial process assured that a criminal defendant's right to counsel of his choice will not be lightly denied. . . . This is not to say that a criminal defendant has a right to choose counsel who has an actual conflict of interest because of prior government employment. As we have said, a defendant's Sixth Amendment right to retain counsel of his choice is a qualified one. If, for example, [the prosecutor-turned-defender] did in fact receive in confidence information that is material to the government's case that would give him an advantage in representing Washington, concerns about the integrity of the judicial process and our adversarial system of justice could possibly outweigh Washington's Sixth Amendment interests.").

72. This is not to say that the criminal defendants' rights should never trump non-parties' rights; it is only to say that non-parties' rights, to the extent jeopardized, should be considered.

73. *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 783 (1987) ("There is certainly much substance to petitioner's argument that the appointment of two partners to represent coindictees in their respective trials creates a possible conflict of interest that could prejudice either or both clients. Moreover, the risk of prejudice is increased when the two lawyers cooperate with one another in the planning and conduct of trial strategy, as Leaphart and his partner did. Assuming without deciding that two law partners are considered as one attorney, it is settled that '[r]equiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel.'" (quoting *Holloway,* 435 U.S. at 482)). *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2013) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, [absent certain exceptions].").

74. 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(a) (3d ed. 2007 & Supp. 2014) (citing cases); *see also* RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 32.11 (2003) (noting that courts generally permit screening more frequently in public defender offices than in private firms).

75. As one treatise observed:

In sum, although a few courts earnestly permit screening to honor defendants' choice of counsel, the result is that criminal defendants are often entitled to less protection from defense attorneys' conflicts of interest.

E. *The "Right" to Be Inferior to Prosecutors*

When compared to criminal defendants—and even civil litigants—prosecutors have it much better in disqualification practice, both in their odds of fending off a disqualification challenge in the trial court or on appeal and in their standing to file attenuated disqualification motions. First, when prosecutors face disqualification, they boast much better odds of beating it.[76] Defendants typically have a harder time disqualifying prosecutors than prosecutors have disqualifying defendants' lawyers.[77] Indeed, over the last five years, no federal decision has ultimately disqualified a prosecutor in a criminal case, while plenty of defense lawyers have been disqualified over that same period.[78] The following chart demonstrates the difference starkly:

> The vast majority [of surveyed public defender offices] required that the conflict be eliminated through representation outside the office (either private counsel or some form of "conflict public defender office"). See Bureau of Justice Statistics, County-Based and Local Public Defender Offices, 2007 (NCJ-231175 9/2010) (7% used ethical screen); Bureau of Justice Statistics, State-Based Public Defender Program (NCJ-228229 9/2010) (all [nineteen] reporting state-based programs required outside representation, with most relying on "state administered assigned counsel program"; none reported reliance on "ethical screen").

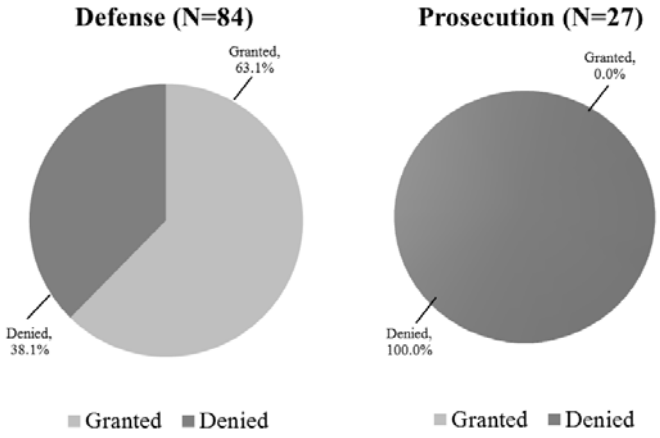
3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(a) (3d ed. 2007 & Supp. 2014). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. d(iv) (2007) ("The rules on imputed conflicts and screening . . . apply to a public-defender organization as they do to a law firm in private practice in a similar situation.").

76. *Compare* United States v. Kahre, 737 F.3d 554, 559 (9th Cir. 2013) ("We therefore hold that proof of a conflict must be clear and convincing to justify removal of a prosecutor from a case. Otherwise . . . prosecutors could be removed simply by the filing of an action against them."), *with* Wheat v. United States, 486 U.S. 153, 164 (1988) (indicating a defendant's chosen counsel can be disqualified by a showing of a potential serious conflict).

77. *See, e.g.*, *Kahre*, 737 F.3d at 576 (requiring "clear and convincing evidence of an impermissible conflict of interest or of prejudice" before a prosecutor may be disqualified). Such a high standard of proof is rarely used in civil disqualification cases.

78. The same disparity holds true for the last decade of reported disqualification decisions (2003–2012). Although district courts have sparingly disqualified prosecutors in reported criminal decisions, those few decisions were later overturned on appeal. The statement above also needs to be qualified in several other respects. *See supra* note 26 (discussing the limitations). Moreover, habeas cases are technically civil, but prosecutors have occasionally been disqualified from them. *See, e.g.*, Archuleta v. Turley, 904 F. Supp. 2d 1185, 1195 (D. Utah 2012), (disqualifying an assistant attorney general because, as a court staff attorney, he had worked for the court on the defendant's state habeas case), *reconsideration denied* (Jan. 15, 2013).

GRANT/DENIAL OF DISQUALIFICATION MOTIONS IN FEDERAL CASES: 2008-2012



Moreover, in the relatively rare events of prosecutors' disqualification, prosecutors generally may immediately appeal the disqualification,[79] unlike defendants.[80]

79. JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS § 6:8 n.10 (2d ed. 2013) ("In contrast to the general rule with respect to criminal defense counsel, federal courts have ruled that the U.S. may appeal immediately from an order disqualifying a U.S. Attorney from prosecuting a criminal case." (citing United States v. Whittaker, 268 F.3d 185 (3d Cir. 2001); United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981); United States v. Vlahos, 33 F.3d 758 (7th Cir. 1994); *In re* Grand Jury Subpoena of Rochon, 873 F.2d 170 (7th Cir. 1989))).

80. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 440 (1985) (holding "that orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to disqualify in civil cases, are not collateral orders subject to appeal as 'final judgments' within the meaning of 28 U.S.C. § 1291"); Flanagan v. United States, 465 U.S. 259, 260 (1984) (holding that "a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable"); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 370 (1981) (holding that "orders denying motions to disqualify counsel are not appealable final decisions under § 1291"). Furthermore, "[m]any state courts have followed the federal lead by rejecting the notion of a right to appeal on this issue," and "[t]he parties are left with the cumbersome and procedurally difficult remedy of filing an extraordinary writ of mandamus." Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655, 665–66 (1997). *See generally* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 111 (2009) (rejecting interlocutory appeal over discovery order potentially violating the attorney-client privilege but noting that "in extraordinary circumstances—*i.e.,* when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus"). This effective lack of appealability has meant that trial courts often have almost unfettered discretion in their disqualification decisions. *See* Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655, 666 (1997) ("In the pre-*Risjord* era, there were many disqualification motions, and lower courts found themselves reversed with some regularity. A body of law was developing,

Second, when moving for disqualification, prosecutors do not face the standing hurdles of civil parties. Contrary to civil cases, the government-movant typically is not a former client of the defense lawyer, and therefore the government's confidential information is not at risk.[81] Where it is a risk—when for example the lawyer had represented the government in obtaining the indictment or other earlier proceedings—courts properly consider and even grant the government's motion to disqualify its former lawyer.[82] In other cases, however, the government's interest is strained, but courts generally fail to hold that the government lacks standing to complain—again unlike civil cases.[83] Courts should at least consider the lack of harm to the former client and possibility of harm to the defendant as weighing against disqualification. Furthermore, this consideration would be only fair: When a *defendant* later moves for reversal of his conviction, courts usually do not enforce the conflicts rules absent a showing of prejudice.[84]

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and—because the Courts of Appeal were developing it—there were various bright lines and clear tests emerging to guide the lower courts in disqualification motions. A lower court that made up its own rules would be promptly reversed. In the post-*Risjord* era, trial court judges have almost carte blanche to disqualify or not to disqualify as they see fit. . . . *Risjord* and the cases in its wake have not reduced the number of disqualification motions, but they have reduced the uniformity in the way they are resolved.").

81. *See generally* Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 358 (1989) ("In most instances, however, the government will not suffer because of defense counsel's conflict of interest. For example, in cases such as *Iorizzo* and *Wheat*, in which defense counsel would be called on to cross-examine a past or present client, the government's case would not be harmed and, indeed, might benefit from defense counsel's possible inability to conduct a vigorous cross-examination. Similarly, in the common situation in which a single defense attorney represents jointly charged defendants, the government has no legitimate interest that is threatened by defense counsel's potential conflict; to the contrary, the government will be the likely beneficiary of any conflict of interest that emerges.").

82. *See, e.g.*, Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 56 (1983) ("The government also has a strong interest in seeking disqualification when defense counsel is a former prosecutor who participated in related government investigations of the defendant."); *see also supra* note 19 (citing cases).

83. *See* Dougles R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 58–62 (2001) (noting, with few exceptions, that courts generally grant the government standing to move to disqualify defense counsel). One notable exception is *Daniels v. State*, 17 P.3d 75, 84 (Alaska Ct. App. 2001) ("The refusal to disqualify in the absence of a motion by the former client is all the more appropriate in the context of a criminal prosecution with its implication of constitutional rights. . . . Thus, when the former client—the one whose interests are ostensibly at stake—fails to join the government's motion to disqualify the defense attorney, this fact strongly militates against a finding that disqualification . . . is mandated." (citations and internal quotation marks omitted)).

84. JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS § 7:9 (2d ed. 2013) ("Similarly, the Wisconsin Supreme Court has held that a defendant's representation at a second sentencing hearing

Of course, I do not mean to suggest that the Sixth Amendment is responsible for prosecutors' relative advantage in disqualification law and practice. Rather, this comparison shows the relative weakness of criminal defendants' rights in this context. This result is surprising, not the least of which because the prosecution does not have any Sixth Amendment rights. A call for equality, at a minimum, does not seem out of line.

III. THE CURSED BLESSING

Although the Sixth Amendment in this context has been rendered a curse or at least a paper tiger, perhaps that is a surprisingly good thing. Many of the lawyers in these cases suffered from material-to-egregious conflicts of interest; such lawyers are not necessarily the best for criminal defendants. More generally, the "right to counsel" has shielded ethically troubled lawyers from disqualification in both the criminal and civil contexts. When that right is weighted too heavily, it effectively insulates attorney misconduct. With the disqualification remedy defeated, the lawyers may be brought to justice only in a later disciplinary proceeding or malpractice action. Both of those remedies, however, are less effective than disqualification and unlikely to follow in any event.[85] The attractiveness

by counsel who had previously appeared at the first sentencing hearing on behalf of the state was *not* in and of itself an impermissible conflict of interest. The court held that 'in order to establish a Sixth Amendment violation on the basis of a conflict of interest in a serial representation case, a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel converted a potential conflict of interest into an actual conflict of interest by (1) knowingly failing to disclose to the defendant or the circuit court before trial the attorney's former prosecution of the defendant, or (2) representing the defendant in a manner that adversely affected the defendant's interests.'" (quoting State v. Love, 594 N.W.2d 806, 817 (Wis. 1999))). As another example, "[m]ost jurisdictions . . . do not follow a *per se* rule of disqualification, but rather, disqualify a prosecutors' office only if actual confidences of the defendant are involved in some manner prejudicial to the defendant's interests." *Id.* (citing cases). The ethical rules, in contrast, require the former prosecutor to refrain from defending the later case whenever the prosecutor had personally and substantially participated in the case. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(a) (2013). This ethical prohibition does not hinge on whether prejudicial (or helpful) confidential information was actually received (although if it was, the information would impose additional ethical limitations on the prosecutor). The prosecutor must also be screened. *Id.* R. 1.11(b)–(c). Finally, in the pretrial disqualification context—versus post-conviction reversal context—civil and criminal courts determine whether disqualification is the appropriate remedy by weighing a variety of factors, including the harm to the defendant and lack of harm to the government, as noted above.

85. *See, e.g.*, Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 114–16 (2014) (showing that disciplinary proceedings and malpractice actions generally do not provide an adequate remedy and often provide no remedy at all). For criminal defendants, it is virtually impossible to succeed in a malpractice case in many jurisdictions. *See generally* 3 RONALD E. MALLEN ET AL., LEGAL MALPRACTICE § 27:1 (2013 ed.) ("Civil legal malpractice suits brought against criminal attorneys have increased, but rarely has an appellate court affirmed a judgment against an attorney. Militating against legal malpractice actions is the unique

of a paper-tiger Sixth Amendment can be witnessed in joint representations, but the weakened Sixth Amendment enables opportunities for prosecutors to file disqualification motions to gain "strategic" advantages, as discussed below.

A. *Joint Representation and Other Ethically Questionable Behavior*

A stronger Sixth Amendment right to counsel, including unquestioning deference to defendants' waivers of conflict-free counsel, would enable and promote joint representation. Although the practice of joint representation of criminal defendants has persisted, it almost always violates the ethical rules, even assuming the co-clients give informed consent.[86] Joint representation, at a minimum, materially limits the lawyer's abilities to advocate on behalf of each defendant,[87] and the law effectively

ability of a criminal convicted defendant to assert the lawyer's misconduct as a basis for relief from the judgment of conviction. As discussed in a subsequent section, the failure to get that relief may preclude a legal malpractice action; whereas success may obviate or minimize the damage claim." (footnotes omitted)); *Id.* at § 27:2 ("The statistics collected by the American Bar Association's National Legal Malpractice Data Center . . . show that criminal law practitioners account for only a small percentage of all claims.").

86. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt.23 (2013) ("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."); *Id.* R. 1.7(b)(1) (barring a concurrent conflict of interest unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4–3.5(c) (3d ed. 1993) ("Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that: (i) the several defendants give an informed consent to such multiple representation; and (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.").

87. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 489–90 (1978) ("Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied.").

acknowledges the dangers.[88] Public defender offices therefore tend to avoid it to the extent possible.[89]

To understand joint representation's perseverance in practice, one narrative suggests that the courts' increased tolerance, if not celebration, of joint representation is to honor defendants' control over their defenses and to bolster their ability to benefit from a united front against the prosecution.[90] Another, equally plausible narrative suggests that courts are disinterested in the likely damage to the jointly represented defendants and, later, are eager to affirm their convictions.[91] But "if the conflict is so serious that the defendant cannot reasonably waive it, the court must disqualify the defense attorney."[92]

To be sure, as the Supreme Court has recognized, not all conflicts are unwaivable. Joint representation can benefit defendants,[93] and as

88. *See* 18 U.S.C. § 3006A (2012) ("The United States magistrate judge or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown."); FED. R. CRIM. P. 44(c) ("The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.").

89. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 346 n.11 (1980) ("Seventy percent of the public defender offices responding to a recent survey reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation." (citing Gary Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 950 n.40 (1978))).

90. *See, e.g.*, Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 226 (1982) ("Potential benefits that may outweigh the risk of multiple representation include reduced legal fees, the avoidance of unnecessary future conflicts, and, in litigation, the opportunity to present a united front." (citations omitted)).

91. *See generally* Jay W. Burnett & Catherine G. Burnett, *Ethical Dilemmas Confronting A Felony Trial Judge: To Remove or Not to Remove Deficient Counsel*, 41 S. TEX. L. REV. 1315, 1363 (1999) (stating that there is fear of abuse of power by judges when disqualifying counsel for conflicts of interest).

92. Dougles R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 58 (2001); *see also* United States v. Schwarz, 283 F.3d 76, 95–96 (2d Cir. 2002) ("An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation. Under such circumstances, the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel." (citations omitted)).

93. *See* Holloway v. Arkansas, 435 U.S. 475, 482–83 (1978) ("[I]n some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.'" (quoting in part Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting))); Nancy J. Moore, *Disqualification of an Attorney Representing*

suggested above, their voluntary, knowing, and intelligent waiver of conflict-free counsel should be given significant weight.[94] The waiver, however, should generally follow only after advice from independent counsel.[95] Even then, joint representation's strengths can be at least partly replicated by separate representation with joint defense agreements—without some of joint representation's weaknesses. Thus, defendants need independent advice about the dangers of joint representation and a fuller understanding of the possible alternatives.[96]

Arguably for the better, the weakened Sixth Amendment provides trial courts with a greater—and somewhat unreviewable—ability to stop serious conflicts of interest by ordering disqualification of the conflicted lawyer.[97] The next Section considers whether this state of affairs has enabled the government to take strategic advantage of defendants by moving to disqualify their counsel.

Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense, 27 UCLA L. REV. 1, 41 (1979) ("[C]ommon representation affords the clients certain unique advantages that outweigh the particular risks involved.").

94. See *supra* Part II A–B for a discussion of the advantages of equalizing the ability of indigent criminal defendants to waive conflict-free counsel with that of wealthier criminal defendants and civil litigants.

95. *See, e.g.*, United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994) (noting that the district court must "give the defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel" (internal quotation marks omitted)).

96. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2013) (noting that to obtain informed consent from a client, the lawyer must explain "the material risks of and reasonable alternatives to the proposed course of conduct"); *Id.* R. 1.7 cmt. 18 ("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.").

97. *See* Wheat v. United States, 486 U.S. 153, 163–64 (1988) ("[T]he district court must be allowed substantial [and 'broad'] latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses."); United States v. Cain, 671 F.3d 271, 294–95 (2d Cir. 2012) ("Consistent with the deferential approach dictated by *Wheat*, . . . we have never concluded that the trial court abused its discretion in disqualifying a conflicted attorney."); 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.9(c) n.126 (3d ed. 2007 & Supp. 2014) ("Given the discretion *Wheat* provides to the trial judge for disqualifying notwithstanding a waiver, that course of action is seen as presenting the least room for a successful appellate attack, given a case with a realistic potential for presenting an actual conflict."); *see also supra* note 80 (discussing the inability of defendants to take interlocutory appeals of orders disqualifying their counsel).

B. *Strategic Motions to Disqualify*

Before we curse the Sixth Amendment and celebrate its interpreted inefficacy, we should question whether the government will run wild under the weakened Sixth Amendment. The government might well have a strategic motive behind its disqualification motion—the motive to deprive the defendant of an effective advocate.[98] Although courts state that they will consider such a motive in determining whether disqualification is warranted,[99] prosecutors are often presumed to act without such questionable motives.[100] It is also unlikely that, unlike civil

98. *See* Dougles R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 65–66 (2001) ("Disqualification motions can be abused as a litigation tactic in criminal cases just as in civil cases. This is especially true on the government side, where an over-zealous prosecutor may attempt to disqualify a defense attorney not because he has a conflict of interest that threatens his client's Sixth Amendment right to the effective assistance of counsel, but because the prosecutor is worried by the defense attorney's skill, or because the prosecutor hopes to force the defendant's cooperation or coerce a plea. Where several defendants are represented by a single lawyer, the government may use a disqualification motion as a tool to force the defendants to obtain separate lawyers, and thereafter pit the different defendants against each other. Courts must therefore be sure to hold the government to its heavy burden when attempting to disqualify defense counsel." (footnotes omitted)); *see also* Ephraim Margolin & Sandra Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 AM. CRIM. L. REV. 227, 228 (1982) (witnessing such motives).

99. *Wheat*, 486 U.S. at 163 ("Petitioner of course rightly points out that the Government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side; but trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of a decision."); Daniels v. State, 17 P.3d 75, 82 (Alaska Ct. App. 2001) ("We acknowledge that the State has an interest in making sure that trials are conducted fairly and that potential reversible errors are addressed and remedied. Nevertheless, motions to disqualify an opposing litigant's attorney can also be used as a tactic to weaken or disrupt the presentation of an opponent's case. Moreover, when (as here) the ostensible reason for disqualification is the attorney's conflicting loyalty to a former client, the normal rule is that 'courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.'" (footnotes omitted)); Gomez v. Super. Ct., 717 P.2d 902, 905 (Ariz. 1986) ("[A]lthough we do not believe the state's motion was made for purposes of harassing the petitioners, that certainly appears to be the result in the instant case. The petitioners have retained counsel and are now ready for trial. If they must obtain a new attorney unfamiliar with the case, it will cause inconvenience, delay and additional costs. Second, the state has not shown that it will be damaged if the motion is not granted. By establishing a record that petitioners know of Cole's possible conflict, the state has laid a foundation to argue that petitioners have waived any claim of ineffective assistance of counsel on this basis. . . . [W]e think [any public suspicion] is too remote to outweigh depriving petitioners of an attorney in whom they have expressed confidence and whose disqualification could possibly cause them harm. Also, we note that there can be public suspicion regarding an attempt by the state to disqualify a defendant's attorney. [F]or the [State] to participate in the selection or rejection of its opposing counsel is unseemly if for no other reason than the distasteful impression which could be conveyed." (internal quotation marks omitted)).

100. *See, e.g.*, Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 351–52 (1989) (noting that, although the Court stated that it would be "improper for the prosecutor 'to "manufacture" a conflict

movants, prosecutors would candidly disclose their strategic motives. Thus, prosecutors' strategic motives seem likely to go un- or under-checked.

Although the concern over strategic behavior is real, the concern is often inapplicable or mitigated for several reasons. First, disqualification decisions should be primarily based on the merits of the motion, not the motives of the movant.[101] Second, and justifying the first, the ethical rules are—primarily—designed to protect clients;[102] enforcing them should not normally be a bad move, even assuming a strategic movant.[103] Finally, prosecutors arguably have a duty to bring the conflict or other misconduct to the court's attention; duty-bound actions ordinarily are not strategic ones in some sinister sense.[104]

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in order to prevent [the] defendant from having a particularly able defense counsel at his side,' . . . it was willing to give the prosecutor the benefit of the doubt, in accordance with a presumption that prosecutors generally act ethically" (quoting in part *Wheat*, 486 U.S. at 163)).

101. *See, e.g.*, Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 135–37 (2014) (arguing that disqualification motions should be decided on merits, not motives).

102. Of course, a court must examine the purpose and effect of the ethical rules in context. *See* Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1243 (1989) ("[T]he professional standards are not a moral code. They may protect interests that are not especially compelling, or, while serving important interests, may not be closely tailored to those interests. In considering constitutional challenges to the judicial enforcement of professional standards, the Court has therefore been required to scrutinize those standards to determine whether they serve sufficiently compelling interests to outweigh interests of constitutional magnitude asserted by an individual.").

103. In addition to ethical protections to which criminal defendants are entitled, courts have an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160. Of course, many ethical rules require client consent, and with it, those rules are not violated. *See* Ephraim Margolin & Sandra Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 AM. CRIM. L. REV. 227, 247–48 (1982) ("Waiver analysis provides adequate protection for a defendant's right to competent counsel. There are many fundamental rights which a defendant may waive, in particular the right to be represented by counsel at all, and there is no reason to 'discriminate' against the right to waive conflict-free representation."). For a more extreme extension of waivers, see Note, *Rethinking the Boundaries of the Sixth Amendment Right to Choice of Counsel*, 124 HARV. L. REV. 1550, 1569 (2011) ("First, disbarment alone generally should not be sufficient to disqualify an advocate for Sixth Amendment purposes. Second, courts should generally allow representation by advocates who have had formalized, pertinent training, even when that training falls outside of a state bar's prescribed model."). *See supra* Part II.B (arguing that defendants' waivers should be entitled to significant weight).

104. *See, e.g.*, Bruce Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 324 (1989) (showing why prosecutors have a duty to bring certain conflicts of interest to the attention of the defense and the court and discussing appropriate and inappropriate reasons for prosecutors to file motions to disqualify defense counsel).

To be sure, many "strategic" motions should be denied, but not necessarily because of that strategic motive, which is present to some degree in almost every disqualification motion—and almost all other motions for that matter.[105] Many of these motions should instead be denied because they are weak on the merits. No court explicitly considers the prosecution's strategic gain as weighing in favor of disqualification, and courts do and should consider other factors, such as the lack of harm to the defendants, as weighing against disqualification. Conversely, when other factors weigh in favor of disqualification, such as demonstrated harm to the defendants were the representation permitted to proceed, courts should generally grant the motions—notwithstanding certain prosecutors' less-than-pure motives.

In sum, by not inflexibly insulating certain attorney misconduct, the weakened Sixth Amendment might be a partial blessing, and on balance, the resulting strategic opportunities might be justifiable or at least tolerable.

CONCLUSION

The Sixth Amendment in disqualification cases is largely weak. It generally does not enhance the defendants' right to counsel, as compared to prosecutors or civil litigants. At times, it even seems to weaken criminal defendants' ability to receive ethical representation. Of course, the Sixth Amendment is not actually the curse. Rather, the curse has been certain courts' indifference to indigent defendants,[106] to equal approaches to disqualification law, and to defendants' rights to continuous, effective, and conflict-free counsel.[107] But some of this indifference has, perhaps

105. *See* Reed v. Hoosier Health Sys., Inc., 825 N.E.2d 408, 413 n.4 (Ind. Ct. App. 2005) ("If moving to disqualify an attorney for a tactical advantage were not allowed, there would not be the hundreds of cases disqualifying attorneys—as litigants would not waste expenses if disqualification were not to their tactical advantage."); Ronald D. Rotunda, *Resolving Client Conflicts by Hiring "Conflicts Counsel"*, 62 HASTINGS L.J. 677, 678 n.2 (2011) ("No party makes any motion that it regards as strategically disadvantageous."); Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 135 (2014) (acknowledging that almost all motions are filed with at least some strategic or tactical reasons in mind).

106. *See generally* Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1210 n.40 (1989) ("The presumption in favor of counsel of choice applies only to those defendants who can afford to retain their counsel. It does not extend to those indigent defendants whose counsel is appointed by the court." (citing Caplin & Drysdale v. United States, 57 U.S.L.W. 4836, 4838 (1989))).

107. *See, e.g.*, *id.* at 1223, 1248–49 (1989) ("The Wheat Court established the trial judge's broad discretion to issue rulings in an area of enormous importance to criminal defendant's and to

inadvertently, resulted in a blessing: a strong right to counsel, including an unlimited right to waive conflict-free counsel, would effectively strap many defendants to ethically challenged representations.[108] The Sixth Amendment thus survives as both a curse and a blessing.

criminal trials in general, yet gave virtually no guidance to trial judges concerning the exercise of that discretion.").

108. Although it might arguably be "paternalistic" to disqualify counsel in cases in which the defendant has chosen to waive the right to conflict-free counsel, "[c]riminal defendants are less able than most clients to make a knowledgeable decision about their representation, both because they tend to be among the least sophisticated of clients and because pending criminal charges place them under unusual pressure." *Id.* at 1236 n.155. In other cases, moreover, the typical "defendant generally cannot and is not expected to bring the problem to the court's attention." *Id.* at 1208 n.34.