Spring 1984

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DISQUALIFICATION OF CRIMINAL DEFENSE ATTORNEYS DUE TO PRIOR GOVERNMENT SERVICE

MARGO L. FRASIER

I. INTRODUCTION

"A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The twenty-two words of this disciplinary rule do not seem difficult to understand, but they have prompted much commentary about attorneys who leave the employment of regulators to become counsel for those who are regulated.

This comment is not about the attorney who works for one of the large federal agencies in Washington, D.C. and then becomes an associate with a large law firm. Rather, it is about the attorney who works for a prosecutor's office and then resigns to practice criminal defense law, particularly as a solo practitioner or in a small firm.

At the outset, it is crucial to recognize that the former prosecutor does not pursue his profession in a vacuum. His decision to practice criminal defense law affects the accused, who places his freedom in the attorney's hands; the prosecutor, who is determined to prevent the accused from gaining an unfair advantage; the public, which is anxious to have faith in the criminal justice system; and, ultimately, the trial judge, who must balance these competing interests while trying to observe the edicts of the American Bar

2. The American Bar Association's (ABA) Model Code of Professional Responsibility is divided into Canons, Ethical Considerations, and Disciplinary Rules. Canons are "statements of axiomatic norms expressing in general terms the standards of professional conduct expected of lawyers." Ethical Considerations are more specific objectives which are "aspirational in character." Disciplinary Rules are mandatory and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Model Code of Professional Responsibility Preamble and Preliminary Statement (1979).
4. Citations to cases involving civil suits and alternate fact patterns are included for their value in clarifying this situation. See, e.g., infra notes 35 & 58 and accompanying text.
Association's Model Code of Professional Responsibility. It is the judge's special duty to ensure that the "trial is conducted with solicitude for the essential rights of the accused."

II. THE CODE'S ROLE IN DISQUALIFICATION

Currently, courts rely heavily on Disciplinary Rule 9-101(B) and Canon 9 of the Code for guidance when the issue of disqualification arises. The ABA Code is not a statute, but "[a]s the legal profession's own source of ethical standards, the Code carries great weight in a court's examination of an attorney's conduct before it." Moreover, many states have given the Code the force of law by statutory adoption.

Illustrative of this point is the status of the Model Rules of Professional Conduct, which were adopted by the ABA House of Delegates in August 1983. These rules were adopted as a revision of the Code, but until the state supreme courts or state bar associations adopt the revision or courts build a body of case law upon it, these Model Rules have no authority.

A. Disciplinary Rule 9-101(B)

One court stated that "[t]he ethical requirement that an attorney who has been a public employee may not, upon retirement, act on behalf of a private client in any matter upon which he was engaged in the public interest is neither new, ambiguous nor difficult to understand." However, that opinion is not shared universally. In fact, even the ABA Commission on Ethics and Professional Responsibility acknowledged the difficulty of setting forth concrete meanings for the two main components of the rule. The Commission stated, "Although a precise definition of 'matter' as used in the disciplinary rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transac-

5. Hereinafter cited as the Code.
7. See supra text accompanying note 1.
10. In re Biederman, 307 A.2d 595, 597 (N.J. 1973) (attorney reprimanded for writing letters and participating in reinstatement proceedings as general counsel for corporation against whom he had instituted proceedings as deputy attorney general).
tions between identifiable parties.”12 Also, the “substantial responsibility” element was recognized as being the “most difficult to interpret in light of the underlying considerations, pro and con.”13

New Jersey is exemplary of those states that adopt a highly restrictive approach to disqualification. That jurisdiction recognizes tiers of authority, each having correlative limitations. The prosecutor, as opposed to one of his assistants, who goes into defense work is disqualified from representing anyone in any criminal matter that was pending in the office while he was a prosecutor. “[R]esponsibility, whether exercised or not, over the subject matter is automatically disenabling.”14 The first assistant prosecutor, because of his status, is presumed to have shared this fatal responsibility over pending matters.15 Furthermore, if there is actual sharing of responsibility with other assistant prosecutors, those assistants are likewise disqualified.16

Irrespective of his level of authority and responsibility, a former prosecutor is disqualified if he participated in the investigation, even if his participation was not of a substantial nature.17 “[A]ny actual knowledge of facts obtained by virtue of the office”18 or any consciousness of “information or material on a matter pending in the prosecutor’s office”19 warrants disqualification.

The New Jersey Supreme Court also has indicated that the likelihood of disqualification is much greater when a prosecutor’s office has a small number of attorneys than when it has a large staff. That assumption is based on the belief that the “possibility of sharing in resolution of problems—legal, factual, and investigative—are undoubtedly greater when there are but a few assistant prosecutors.”20 Under the New Jersey policy, it would be difficult for a former prosecutor to practice criminal defense law in the same jurisdiction for a substantial period of time. But New Jersey’s approach is, self-admittedly, more restrictive than that contemplated by the ABA.21

12. Id. in 62 A.B.A.J. at 519 (footnote omitted).
13. Id.
15. Id. at 120-21.
16. Id. at 120.
17. Id.
18. Id.
19. Id. at 121.
20. Id. at 121 n.3.
21. Id. at 121.
The ABA's test as set out in Opinion 342 is whether "the lawyer had 'substantial responsibility' in regard to the matter in question, rather than whether he possessed certain knowledge."\textsuperscript{22} The ABA views substantial responsibility as envisaging a "much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question."\textsuperscript{23} In order for an attorney to fall under this rule he must have been "personally involved to an important, material degree in the investigative or deliberative processes regarding the transactions or facts in question."\textsuperscript{24} Even being the chief prosecutor in a large office does not ipso facto give the government employee the substantial responsibility contemplated by the rule "in regard to all the minutiae of facts lodged within that office."\textsuperscript{25}

Recognizing that increasing the scope of DR 9-101(B) could possibly be detrimental to governmental recruiting, the ABA did not intend to encompass "official responsibility" within the definition of "substantial responsibility."\textsuperscript{26} Still, it is possible for an attorney to be subject to the restraints of DR 9-101(B), without a showing of actual personal or substantial involvement, if he had "such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter."\textsuperscript{27}

By requiring the party who is moving for disqualification to demonstrate only that it is unlikely that the attorney was not involved to the degree contemplated by DR 9-101(B), the ABA acknowledged that proving actual involvement or receipt of confidential information is often difficult.\textsuperscript{28} Moreover, if proof of actual receipt of confidential information were required, the challenging party might be forced to choose between disclosing privileged information in order to support a motion and foregoing the possibility of having the former prosecutor disqualified.\textsuperscript{29} This could very well destroy the confidences Canon 4 seeks to protect.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{22} Formal Op. 342, n.25, \textit{supra} note 11, in 62 A.B.A.J. at 520.
\item \textsuperscript{23} Formal Op. 342, \textit{supra} note 11, in 62 A.B.A.J. at 520.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} \textit{Id}.
\item \textsuperscript{26} Formal Op. 342, n.29, \textit{supra} note 11, in 62 A.B.A.J. at 520.
\item \textsuperscript{27} Formal Op. 342, \textit{supra} note 11, in 62 A.B.A.J. at 520.
\item \textsuperscript{28} \textit{See, e.g.,} Note, Attorney Disqualification and Access to Work Product: Toward a Principled Rule, 63 Cornell L. Rev. 1054, 1059 (1978).
\item \textsuperscript{29} \textit{See, e.g.,} Government of India v. Cook Indus., Inc., 569 F.2d 737, 740 (2d Cir. 1978).
\item \textsuperscript{30} "A Lawyer Should Preserve the Confidences and Secrets of a Client," \textit{Code} Canon 4 (1979).
\end{itemize}
An example of a flagrant violation of DR 9-101(B) would be for the very attorney who secured a conviction against a defendant to represent him in an attempt to overturn his conviction.\textsuperscript{31} It would likewise be inappropriate for a prosecutor to switch sides if he had been in the grand jury room interviewing witnesses under oath.\textsuperscript{32} There is little question that a former prosecutor would violate DR 9-101(B) if he appeared for both the defense and prosecution in the same case and attacked an indictment he had drawn up.\textsuperscript{33}

However, when a conflict is less obvious there is no consensus among jurisdictions as to whether DR 9-101(B) is violated. Some jurisdictions disqualify freely. The Federal District Court of Hawaii suggested that signing a complaint is a fatal exercise of substantial responsibility.\textsuperscript{34} The Northern District of Illinois found that “even the decision that a ‘boilerplate’ complaint of a particular kind will do an adequate job implicates a legal judgment.”\textsuperscript{35}

In \textit{United States v. Kitchin},\textsuperscript{36} the Fifth Circuit upheld the disqualification of a defense attorney whose associate had been actively involved in prosecuting the defendant at an earlier stage in the same matter while serving as assistant United States attorney. “For a former prosecutor to be associated with the lawyer who represents a person he earlier helped prosecute, even if only at an embryonic stage, would likely provoke suspicion and distrust of the judicial process.”\textsuperscript{37}

Where charges against the accused were unrelated to the attorney’s former duties, the Fourth Circuit found that the “singular circumstances of having prosecuted a defendant does not disqualify a former government attorney from defending the same individual. . . .”\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{31} See \textit{In re Biederman}, 307 A.2d 595, 597 (N.J. 1973).
\item \textsuperscript{32} Morgan, supra note 3, at 37.
\item \textsuperscript{33} People v. Spencer, 61 Cal. 128, 130 (1882) (attorney suspended for moving to set aside indictment for omission of required forms on behalf of defendant when he had prepared the indictment as district attorney).
\item \textsuperscript{34} Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314, 1316 n.11 (D. Hawaii 1975) (attorney and members of his firm disqualified from participating as plaintiff’s counsel where attorney had filed and participated in similar suit against the defendants while a deputy attorney general).
\item \textsuperscript{35} Kadish v. Commodity Futures Trading Comm’n, 548 F. Supp. 1030, 1033 (N.D. Ill. 1982) (attorney who had prepared injunctive complaint to use against commodity brokers while working for commission disqualified from later representing brokers).
\item \textsuperscript{36} 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843 (1979).
\item \textsuperscript{37} Id. at 905.
\item \textsuperscript{38} United States v. Smith, 653 F.2d 126, 128 (4th Cir. 1981) (attorney’s disqualification as defense counsel reversed where he had supervised investigation and trial of defendant on an unrelated charge as assistant United States attorney).
\end{itemize}
Some courts have imputed to the head of a government office or subdivision the "knowledge of the proceedings taken by his juniors."\(^{39}\) The prudence of disqualifying every prosecutor who reaches a supervisory level is questionable. Assistants tend to perform their duties with autonomy. The only knowledge the superior might have of a given case is the name of the accused.

In contrast to this restrictive approach, which seemingly calls for disqualification based on job titles, is the approach taken by the Florida Fifth District Court of Appeal in *Endress v. Coe.*\(^{40}\) The district court quashed a trial court’s disqualification of a former chief assistant prosecutor whose involvement in the case in question while with the state had been minimal. The court stated:

Absent a showing of participation to any extent in the investigation leading to a criminal charge, or some involvement in the case itself, or some advantage gained that would work to the disadvantage of the state, a former assistant state attorney [prosecutor] should not be automatically disqualified from acting as defense counsel for a defendant investigated or charged during the time counsel served as an assistant state attorney.\(^{41}\)

Although the Fifth Circuit disqualifies where there is a "specifically identifiable" violation of the Ethical Rules,\(^{42}\) that jurisdiction is also flexible in finding that even actual substantial responsibility while associated with the government does not always mandate disqualification.\(^{43}\) These decisions based on the underlying circumstances of each case allow for much-needed flexibility. An unbending rule could "frequently defeat important social interests including the client’s right to counsel of his choice, the lawyer’s right freely to practice his profession, and the government’s need to attract skilled lawyers."\(^{44}\)

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40. 433 So. 2d 1280 (Fla. 5th DCA 1983).
41. *Id.* at 1281.
42. *See supra* text accompanying notes 36-37.
43. Woods v. Covington County Bank, 537 F.2d 804, 812 (5th Cir. 1976).
44. *Id.* (citations omitted).
B. Canon 9

Decisions indicate that many courts treat Canon 9 as the equivalent of a Disciplinary Rule. Therefore, even if a former prosecutor gets over the substantial responsibility hurdle of DR 9-101(B), he may confront a motion to disqualify based on the perceived need to consider "not only the objective propriety of his conduct, but also the appearance it will present to an independent observer." The dividing line between ethical and unethical behavior under Canon 9 is even less clear than it is under DR 9-101(B). What creates the "appearance of impropriety" and whether a trial court can and should disqualify an attorney under this illusive standard are even more controversial questions than the issue of what constitutes substantial responsibility.

It is recognized that an attorney may be disqualified even when there is no actual conflict of interest, if he fails to avoid the appearance of impropriety. A showing of "actual evidence of any impropriety" or "proof of actual evil" is not required. The rationale supporting this view is that the attorney, although not actually in violation of the Code, must stand aside because "courts should be concerned with the public's confidence in the integrity of our legal system [and] [t]his concern should not be lightly ignored."

The alternate approach is a reluctance to disqualify. The courts that adopt this position still recognize that it is essential that the public have confidence in the integrity and impartiality of our system of criminal justice, and that the appearance of impropriety may be as damaging as actual impropriety. This group would re-

45. See supra note 8.
49. Andrews v. Allstate Ins. Co., 366 So. 2d 462, 463 (Fla. 4th DCA 1978) (firm disqualified from representing plaintiff because defendants previously had given statements to the firm thinking the firm would represent the defendants).
quire at least a "reasonable" appearance of impropriety. A mere "possibility" of the appearance of impropriety may be insufficient. It is not reasonable to find "an appearance of evil" where an attorney who once worked for a vast governmental agency undertakes a case against the government. The claim of impropriety cannot be a "fanciful, unrealistic or purely subjective suspicion." Nor will the attorney's conduct be "governed by standards which can be imputed only to the most cynical members of the public." Disqualification under Canon 9 must be based on articulable principles so as to prevent it from being "manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers."

In a civil suit, the Second Circuit went so far as to say that absent a "claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." The court followed the Connecticut Bar Association's recommendation, refusing to allow Canon 9 to be used "promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."

Although the Fifth Circuit has at times set a rather rigid standard for disqualification on the basis of substantial responsibility, it stated that "while Canon 9 does imply that there need be no proof of actual wrongdoing, . . . there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur" and "the likelihood of public suspicion or obloquy [must outweigh] the social interests which will be served by a lawyer's continued participation in a particular case." By using this

53. Osborn v. District Court, 619 P.2d 41, 47 (Colo. 1980) (supreme court found trial judge had properly disqualified firm as defense counsel due to associate's involvement in prosecuting defendant while deputy district attorney; in companion case, court found district judge had acted with "excess of caution" in disqualifying district attorney and staff because attorney had represented defendant on unrelated charge while in private practice).
54. Endress v. Coe, 433 So. 2d 1280, 1281 (Fla. 2d DCA 1983).
57. Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976).
59. Woods, 537 F.2d at 819.
62. See supra notes 36-37 and accompanying text.
63. Woods, 537 F.2d at 813.
64. Id. at 813 n.12.
two-step approach, the Fifth Circuit ensures that there will be a consideration of the underlying competing interests before a decision is made.

III. THE COMPETING INTERESTS

A. The Defendant's Interest

In civil cases it is usually appropriate to disqualify an attorney on a conflict of interest claim if it is determined that there was "an attorney-client relationship between the moving party and opposing counsel which involved matters related to the pending suit." In criminal cases the defendant's sixth amendment rights are implicated and the civil standard is neither appropriate nor controlling.

The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Courts agree that a criminal defendant's choice of particular counsel is given protection by the amendment, yet, it is a logical imperative that "[t]here is some point short of allowing a defendant complete freedom in choosing his own counsel at which the sixth amendment's prescription is satisfied." Courts have interpreted the amendment to ensure that a defendant is afforded a "fair opportunity to secure counsel of his own choice," and that he "may be represented by any counsel who will agree to take his case." It is the "actual choice of the defendant which deserves consideration." However, the defendant's choice must be balanced against and may be overridden by the need to preserve the highest standards of professional conduct.

In attempting to strike such a balance, New Jersey has taken the stance that while the defendant has a right to retain qualified

65. See, e.g., DeArce v. State, 405 So. 2d 283, 284 (Fla. 1st DCA 1981).
67. U.S. Const. amend. VI.
69. Id.
71. United States v. Cunningham, 672 F.2d 1064, 1070 (2d Cir. 1982).
72. United States v. Seale, 461 F.2d 345, 358 (7th Cir. 1972).
counsel of his choice, he has no corresponding right to be represented by counsel disqualified because of an ethical requirement. The Third Circuit's view is that the defendant is only protected from an "arbitrary dismissal" of his chosen counsel in cases where there is a possibility of conflict due to the joint representation of defendants. Nevertheless, the Third Circuit, in a case involving disqualification of counsel due to a conflict between the defense attorney and the trial judge, recognized that because all attorneys are not alike, the defendant's selection of a particular attorney "becomes critical to the type of defense he will make." The court also noted that by allowing a defendant to select his own counsel the "intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured.

Correspondingly, most courts agree that the defendant's choice should be honored absent a "showing that some important interest will be adversely affected by permitting chosen counsel to proceed," or that there is a "serious risk of undermining public confidence in the integrity of our legal system." A highly speculative conflict of interest is not enough; it must be very likely to materialize.

The ABA cautions against allowing DR 9-101(B) to become a "mere tool" by which one party could improve its chances of success by depriving the other of competent counsel. Courts need to be cognizant of the "reality that the motion to disqualify counsel is an effective litigation tactic that can . . . , if successful, deprive [a defendant] of his chosen and well-prepared attorney."

B. The Prosecutor's Interest

When a prosecutor moves across the aisle to the defense table,

76. United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979).
77. Id. at 57.
79. See United States v. Hobson, 672 F.2d 825, 828 (11th Cir.) (criminal defense attorney disqualified due to suspicion of involvement in the crime), cert. denied, 103 S. Ct. 208 (1982).
80. Flanagan, 679 F.2d at 1076.
there is a question raised as to what information he has taken with him. The danger of confidential information acquired from a former client being used to that client’s disadvantage has required disqualification in civil cases without a prerequisite showing of actual receipt of the information.83 A showing of access to the substantially related material is enough.84 This standard has been applied in both criminal85 and civil86 cases where the former client was the government.

Although a former prosecutor may have had access to information that would be deemed “confidential” in a subsequent civil action, the same problem may not be present in a criminal case. In Brady v. Maryland,87 the United States Supreme Court recognized a due process requirement that the prosecution disclose requested evidence favorable to the defendant on the issue of guilt or punishment.88 Although Brady may minimize the possibility of unfair advantage to a defendant, its impact is limited by the Supreme Court’s holding that the information be requested by the defendant and, moreover, that it be favorable to him. Also, a former prosecutor may have had access to information that did not become part of the prosecution’s files but could be used to discredit opposing witnesses.89

In addition to the Brady disclosure rule, discovery rules also may alleviate a possible unfair advantage to the defendant. Although federal courts and most state courts do not have formal discovery in criminal cases, Florida allows extensive discovery.90 But even in Florida and other discovery states, there are advantages that can be gained by the former prosecutor’s access to the files within the prosecutor’s office. For example, in Florida, the work product of the prosecutor,91 the identity of a confidential informant,92 and, generally, police reports93 are not available to de-

86. United States v. Trafficante, 328 F.2d 117, 120 (5th Cir. 1964) (defendant’s attorney in tax lien proceeding disqualified because he had worked on the case while with the Internal Revenue Service; court referred to Canon 36).
88. Id. at 87.
90. FLA. R. CRIM. P. 3.220.
91. FLA. R. CRIM. P. 3.220(c)(1).
92. FLA. R. CRIM. P. 3.220(c)(2).
fense counsel through the formal discovery process. However, a former prosecutor may have gained access to this information during his prior government service.

There is also a possibility that the former prosecutor might have interviewed witnesses and victims and, thereby, established a rapport that would give his client an advantage during cross-examination that other criminal defendants do not enjoy. The prosecutor’s office also has access to information in which private parties have a reasonable expectation of privacy. Misuse of these resources must be prevented.  

An even graver danger is the possibility that the prosecutor would improperly fail to remedy a weakness he discovered in an information, probable cause affidavit, or indictment in hopes of exploiting the defect at a subsequent trial. While this possibility is remote, its occurrence would be extremely damaging to the legitimacy of the prosecutor’s office in the eyes of the public.

C. The Former Prosecutor’s Interests

As one commentator noted, “If most government lawyers stayed forever on their side of the courtroom, as many do in England, conflicts of interest surrounding their cases would hardly be the headline it is today.” But in the United States, switching sides is the rule rather than the exception. Although prosecutors’ offices encourage some to make a career of government service, they benefit from the infusion of new ideas that comes with turnover at lower levels.

[T]he revolving door is an important aid to government recruitment of attorneys with talent and imagination. The main advantages that government agencies have to offer young attorneys are training and experience, both of which can be turned into financial gain when and if the attorney chooses to leave the government.

The danger implicit in disturbing this quid pro quo has been widely recognized. If the former prosecutor’s employment opportu-
nities are severely restricted, he may be understandably reluctant to serve or be deterred from accepting government employment. Severe limitations may force many to avoid government service totally. If the experience gained is less valuable, government service will become a less attractive opportunity.

In spite of these dangers, some states adhere to a restrictive approach to the "revolving door." New Jersey, for example, prohibits an assistant county prosecutor from appearing "in any criminal matter in any capacity against the State in the county in which he served for a period of six months from the date of termination of his public employment." This restriction applies even if the attorney is not otherwise disqualified.

A more sensitive approach would require independent grounds for disqualification of the attorney. Criminal law is a specialty. If the former prosecutor is prevented "from engaging in [the] practice of the very specialty for which the government sought his service . . . the sacrifices of entering government service will be too great for most men to make."

D. The Public's Interest

Public trust in the administration of justice is a concern of all of those involved in the legal system. Public trust in the legal profession is even more crucial "in a case involving the public's interest in the prosecution of alleged criminal acts as opposed to civil litigation." This is because the public is most concerned "when the public itself, rather than a private party, is suffering the consequences" of any potential misuse of information or power by a former or present government attorney.

In some situations the threat to public confidence is apparent. Public trust undoubtedly would be undermined if the same attorney played the role of prosecutor at the first trial and defense

98. Mundheim, supra note 3, at 708.
100. Snider, supra note 3, at 24.
101. Morgan, supra note 3, at 53.
103. Id.
106. Note, supra note 46, at 1416.
counsel on retrial.\textsuperscript{107} If a prosecutor moonlighted as a defense attorney in the same judicial circuit where he worked as a prosecutor, the public might fear he would use “his influence and position to extract favorable treatment for such defendants in order to further the success of his private professional career.”\textsuperscript{108} Even if he moved his part-time defense activities to another county, he might “justifiably raise serious doubts as to the propriety of such action by the public.”\textsuperscript{109} Even if the former government attorney is not doing anything improper, “[t]he appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Justice must not only be done; justice must also be seen to be done.”\textsuperscript{110}

While there is a need to maintain public confidence, there is also a danger of overreacting. It is doubtful that public confidence in the integrity of judicial procedures can be founded on disqualification for “an unethical conflict of interest where none exists or can exist, with the result of depriving a criminal accused of the services of an attorney in whom he reposes confidence.”\textsuperscript{111}

Moreover, public suspicion of the criminal justice system conversely might be aroused if prosecutors routinely seek disqualification of the defense attorney. The public might begin to wonder if there is some evidence of innocence the prosecution is trying to conceal. If the former prosecutor is now employed by a legal aid or defender organization, and ethical rules result in denial of effective representation to an indigent defendant, danger of public disillusionment is even greater.\textsuperscript{112}

IV. THE DYNAMICS OF THE DISQUALIFICATION PROCESS

A. The Trial Judge’s Role

The judiciary has been criticized as taking a “piecemeal and somewhat contradictory” approach to attorney disqualification.\textsuperscript{113} Perhaps this deficiency is due to the lack of clear guidelines for

\textsuperscript{107} Osborn v. District Court, 619 P.2d 41, 45 (Colo. 1980).
\textsuperscript{108} People v. Rhodes, 115 Cal. Rptr. 235, 239 (1974).
\textsuperscript{109} Myers v. State, 296 So. 2d 695, 699 (Miss. 1974).
trial courts to follow. Unless the trial judge knows or should know that a particular conflict exists, he is under no duty to initiate an inquiry. Generally, a trial judge will not have knowledge of the defense attorney's prior involvement on the state's side absent a motion by the prosecutor.

Furthermore, in a criminal prosecution, disqualification may be inappropriate absent a motion by the former client even if the judge does have independent suspicions of conflict, because of the added implication of the defendant's constitutional rights. On the other hand, as noted previously, the defendant's right to select his own counsel is not unbridled. It "is specifically limited by the trial court's power and responsibility to regulate the conduct of attorneys who practice before it." The trial judge is the ultimate guardian of a defendant's right to effective assistance of counsel. Because of this positive duty, he may not be in a practical position to wait until the accused or an attorney raises the issue of conflict. The "Constitution also protects defendants whose attorneys fail to consider, or choose to ignore, potential conflict problems." Once the possibility of conflict is known, the court has a duty to inquire further. Defendants who retain their own counsel are entitled to no less protection than those for whom the state appoints counsel.

While there is consensus as to a trial judge's power to disqualify, there is disagreement among jurisdictions as to what must be shown before disqualification is proper. Due to the trial court's broad discretion, even a violation of the Code will not automatically result in disqualification of an attorney. Representative of the strict approach, New Jersey disqualifies without requiring formal proof and findings, positing that the business of the trial courts is to "provide the facilities for the determination of questions of guilt or innocence, not to determine the ethical propriety

115. United States v. Cunningham, 672 F.2d 1064, 1072 (2d Cir. 1982).
116. See supra text accompanying notes 67-75.
121. Cuyler, 446 U.S. at 344-45.
of a particular retainer." The Fifth District Court of Appeal of Florida suggests Florida would allow disqualification if sufficient facts are alleged that, if true, would warrant removal. The Second Circuit, however, disqualifies only if the misconduct would affect the outcome of the trial. Otherwise, "conventional disciplinary machinery" is used to sanction the attorney, with the organized bar assuming the burden of making it an effective deterrent.

Although a defendant has a right to be represented by "counsel free of any conflicts of interest, this is a right which can be waived. . . . Thus, [another] sensitive inquiry must be made after a [trial] court concludes that a conflict exists or is likely to develop." Some jurisdictions take the view that, while the court has a responsibility to ensure that the defendant makes a knowing and intelligent waiver of his right to conflict-free counsel, once the defendant accepts the potential threat to his interests his ultimate choice should be honored. Under this view, the court does not have the power to unilaterally obstruct the defendant's decision since he can choose to take a "calculated risk" and waive his right to conflict-free counsel. Others feel that the court's goal should be to foreclose as many opportunities as possible for defendants to claim that due to conflicts of interest, their assistance of counsel was ineffective.

Trial courts must be sensitive to the possibility that if the defendant is allowed to proceed with the former prosecutor as his counsel, he may use this as a strategy to gain reversal. A defendant content with his counsel before trial may, upon conviction, allege that the representation constituted a conflict that resulted in denial of his rights. The best approach is to complement each view with the other. Once the defendant makes a knowing and intelligent waiver, he should be forced to accept the consequences of his actions on appeal.

124. Pantori, Inc. v. Stephenson, 384 So. 2d 1357, 1359 (Fla. 5th DCA 1980).
B. Appeal of Disqualification Orders

1. Interlocutory Appeal

In *Cohen v. Beneficial Industrial Loan Corp.*, the United States Supreme Court established a test to determine when an interlocutory appeal of a trial court’s decision would be allowed. The lower court’s decision must “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” The Supreme Court applied the *Cohen* test in *Firestone Tire & Rubber Co. v. Risjord*, and held that orders denying motions to disqualify counsel in a civil case are not appealable as final decisions. However, the Court made clear that it was not expressing an opinion on whether an order granting a motion to disqualify in a civil or criminal case, or an order denying a motion to disqualify in a criminal case, would be immediately appealable.

The vast majority of courts have held that an order disqualifying a defense counsel in a criminal case is immediately appealable. Some courts have reviewed disqualification orders without directly ruling on the appealability issue. Allowing appeal acknowledges that deferring review may jeopardize the defendant’s case by prohibiting representation by counsel of his choice. Furthermore, from the time of disqualification the defendant’s case is affected by the loss of an attorney in whom he had confidence. The trial is not disrupted by the appeal since it must be stayed anyway to give the defendant an opportunity to obtain new counsel. Also, “disqualification often impairs the reputation of the disqualified firm

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133. Id. at 546.
135. Id. at 379.
136. Id. at 372 n.8.
139. Phillips, 699 F.2d at 802.
or attorney, and this injury may never be corrected on appeal if the party is satisfied with the performance of his new counsel.\(^1\)

The Ninth Circuit appears to be alone in its view that disqualification is not addressable in an interlocutory appeal.\(^2\) The rationale is that civil disqualification orders are not appealable before final resolution of the case, and the addition of the sixth amendment element does not warrant treating a criminal case differently.\(^3\) However, the circuit does allow a "really" exceptional case to be heard before conviction by way of a petition for writ of mandamus.\(^4\)

If a motion for disqualification is denied in a criminal case, the government should be able to appeal immediately; once a judgment has been rendered, the disqualification either cannot or will not be reviewed. Even the Ninth Circuit has recognized that the double jeopardy rule precludes retrial on the basis that the disqualification order was erroneous.\(^5\) Therefore, after an acquittal, the erroneous denial would be irreparable. Conversely, if the prosecutor were to secure a conviction, there would be no reason to appeal the denial.

2. **Standard of Review**

Appellate courts have held that since the disqualification of an attorney is within the trial court's discretion, its ruling should only be overturned in a civil case if an abuse of discretion is shown.\(^6\) Some courts apply this standard in criminal cases when the motion to disqualify has been granted.\(^7\) Others have held that "the 'abuse of discretion' standard is simply too deferential where such a fundamental constitutional right is affected,"\(^8\) and that the "clearly erroneous" test should be applied to issues of fact.\(^9\)

141. *Id.* at 441.


143. *Id.* at 1112.

144. *Id.* at 1114.

145. *Id.* at 1113 n.1.

146. *E.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1351 (9th Cir. 1981); Central Milk Producers Co-op. v. Sentry Food Stores, Inc., 573 F.2d 988, 991 (8th Cir. 1978); W.T. Grant Co. v. Haines, 531 F.2d 671, 676 (2d Cir. 1976).

147. *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976).


149. *E.g.*, *id.* at 827-28; *see also* Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976).
If the defendant is not allowed to appeal until after conviction, the question of whether prejudice must be shown arises. The Ninth Circuit recognizes that if the defendant had to show "he was convicted because of new counsel, the burden would be insurmountable, and the disqualification 'effectively unreviewable on appeal.'" Therefore, prejudice is presumed if the disqualification is found to be erroneous. Furthermore, the right to counsel is considered by some to be so basic to a fair trial that its denial is never harmless error.

The opposite problem is posed when the defendant's appeal is based on his being allowed to proceed with a former prosecutor as counsel. Under these circumstances, the Illinois Supreme Court makes distinctions based on the amount of involvement that the attorney had with the case while a prosecutor. In People v. Newberry, the court found no inherent prejudice although the defendant's appointed attorney had been employed as a prosecutor when the defendant was indicted. Four years later, the same court reversed a defendant's conviction in People v. Kester when the appointed attorney had been personally involved in prosecuting the defendant in the same case. The court found that, absent a waiver of the right to conflict-free counsel, the possibility that subtle influences would make the former prosecutor reluctant to attack the actions of the prosecutor's office or willing to persuade his client to plead guilty to avoid confrontation with his former colleagues is sufficient to imply prejudice.

C. Vicarious Disqualification

Once a trial judge has decided to disqualify a former prosecutor, he still must face one final issue. He must decide whether to disqualify the firm with which the former prosecutor is associated, as the government is entitled to vicarious disqualifications when its secrets and confidences are threatened.

Interestingly, New Jersey does not require vicarious disqualifica-

151. Id.
152. United States v. Laura, 607 F.2d 52, 58 (3d Cir. 1979).
154. Id. at 36.
156. Id. at 571-72.
tion during the six month period of personal disqualification it would impose on every former assistant prosecutor. However, the state requires disqualification of the firm if the affiliated attorney had any involvement in the matter sufficient to disqualify him under the state’s guidelines. This standard comports with the restrictive view.

Another line of thought is that a strict prophylactic application of vicarious disqualification would "virtually halt the revolving door by making law firms extremely reluctant to hire former government attorneys." If the former prosecutor infected "all the members of any firm he joined with all his own personal disqualifications, he would take on the status of a Typhoid Mary, and be reduced to sole practice under the most unfavorable conditions." Instead of vicarious disqualification, this more flexible approach would allow the firm to show the former prosecutor had been and would be insulated from the case.

V. RECOMMENDATIONS

Ideally, a lawyer's word that he has not violated the confidences of a former client would be an adequate safeguard against impropriety. Unfortunately for the trial judge who must decide the disqualification question, the attorney's bond is not enough. In a criminal case the added element of the defendant's sixth amendment rights necessitates a stricter standard for the disqualification of a former government attorney. A defendant's choice of counsel should be honored whenever possible.

It is recommended that whenever the trial judge is aware or is informed that the defense counsel is a former prosecutor, he perform a three-step process. First, he should ascertain whether the attorney was so intimately involved in the investigation or prosecution of the case that he was privy to what would be classified as the prosecutor's work product or other evidence not available to the defense through formal discovery. Access to files in the prosecu-

158. See supra notes 102-03 and accompanying text.
160. Note, supra note 46, at 1440.
162. Id. (Safeguards in Kesselhaut included: attorney had no connection with case in private practice; all other attorneys were prohibited from discussing the case with him and were to prevent any case documents from reaching him; files were kept in a locked file cabinet and keys were kept by the partners.)
163. See supra notes 87-93 and accompanying text.
Attorney Disqualification

A lawyer's office should not warrant automatic disqualification in every case. Canon 9's "appearance of impropriety" standard should not be used to justify disqualification absent a showing that it would also be proper to disqualify under DR 9-101(B).

Only if the trial judge finds that the former prosecutor's client has gained an advantage through the use of information, either contained in the prosecutor's files or through the prosecutor's investigation, should he move to the second step of weighing the competing interests. These include the defendant's right to chosen counsel; the individual attorney's interest in safeguarding his professional mobility; society's interest in securing public confidence in the legal system; and, relatedly, the legal system's interest in securing those rights, privileges and values found necessary to our adversarial system. The judge should allow the attorney to proceed unless there is at least some possibility that the trial will be tainted by his representation.

If disqualification is found to be the only means adequate to safeguard the trial process, the court still should be reluctant to impose vicarious disqualification. Only when screening procedures are inadequate should the attorney's entire firm be disqualified.

If the former prosecutor is not disqualified, the court should move on to the third step. Before a defendant is allowed to proceed with the former prosecutor by his side, the court should ensure that the defendant makes a knowing and intelligent waiver of any conflict that is present. If the defendant elects to do so, his decision should be honored.

Both sides should be permitted to use the interlocutory appeal process. A defendant deprived of his choice of counsel on a motion by those prosecuting him should not have to wait and utilize post-conviction remedies. The prosecutor cannot wait and still have a remedy.

Appellate courts should use the "clearly erroneous" test due to the importance of the constitutional right at issue. The facts in these types of motions to disqualify will seldom be disputed. The conclusion that the trial judge reaches is entitled to some deference but "abuse of discretion" is not a stringent enough standard when the defendant has been stripped of his attorney.

Trial courts are placed in an unenviable position when a former

165. See supra note 162 and accompanying text.
166. See supra note 145 and accompanying text.
prosecutor accepts a retainer in a criminal case in which he was substantially and personally involved while with the prosecutor's office. The bar should not be allowed to shift its responsibility to the courts. The bar should be the vehicle for controlling and sanctioning an attorney's behavior whenever possible. Traditional disciplinary machinery is the proper way to deal with an attorney's failure to avoid the appearance of impropriety through representation of a defendant in a matter in which he had substantial responsibility while with the government. By utilization of this resource, in most cases, the defendant's chosen counsel can be retained and professional ethics can be vigorously maintained.