The Constitutional Problems with Late Motions to Disqualify Criminal Defense Counsel: A Proposed Solution

Introduction

Under the Model Code of Professional Responsibility, prosecutors may bring motions to disqualify defense counsel up until the date set for trial.[1] In recent years, the number of motions brought to disqualify opposing counsel for alleged conflicts of interest has vastly increased.[2] Despite attempts to curb the increase,[3] "[m]ost avid advance sheet readers would conclude that the flow of disqualification motions has not ebbed."[4] While there are times when it is proper for an attorney to seek to disqualify her opponent,[5] disqualification motions have become tactical weapons in the adversary process:[6] they are commonly brought simply to harass the opponent, to cause extra expense, to force an unwanted and unnecessary change of counsel, and to postpone the trial date.[7] Indeed, many courts have concluded that an increasing number of disqualification motions are interposed for purely strategic purposes.[8] Late motions may deny the defendant's constitutional rights to effective assistance of counsel and a speedy trial, however, and to the extent it is recognized, late

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981) [hereinafter MODEL CODE] requires only that a lawyer shall not: "assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

2. *See e.g.,* Armstrong v. McAlpin, 625 F.2d 433, 437 (2d Cir. 1980), *vacated and remanded,* 449 U.S. 1106 (1981), where the circuit court was left with a clear impression that disqualification motions have substantially grown in number; Woods v. Covington County Bank, 537 F.2d 804, 819 (5th Cir. 1976): "[A]ttempts to disqualify opposing counsel are becoming increasingly frequent. . . ."

3. *See infra* text accompanying notes 103-114.

4. Lerner, *Motions to Disqualify Opposing Counsel: Eliminating the Gamesmanship,* 191 N.Y.L.J. 5 (Feb. 7, 1984).

5. When the alleged conflict of interest would clearly prejudice the client or make a travesty of the judicial system, the attorney is correct in moving for disqualification. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 through EC 5-20 (1980).

6. Rice v. Baron, 456 F. Supp. 1361, 1368 (S.D.N.Y. 1978) (quoting Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977)); *see also* Melamed v. ITT Continental Baking Co., 592 F.2d 290, 296 (6th Cir. 1978); Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 501 F. Supp. 326, 331 (D.D.C. 1980); Altschul v. Paine Webber, Inc., 488 F. Supp. 858, 861 (S.D.N.Y. 1980).

7. *See* Lerner, *supra* note 4.

8. *Id.*

motions may deny the defendant her right to counsel of choice.[9] As courts face increasing numbers of motions to disqualify, the problems raised by late motions and the need for a solution become pressing.

This Note proposes an addition to the Model Code which limits the time within which motions to disqualify defense counsel may be brought. By encouraging early motions, the detrimental effects of the motions can be minimized. Under the proposed amendment, truly impermissible conflicts of interest would still be heard, but motions brought merely for tactical reasons would not.[10] Because the timing of motions to disqualify is generally within the control of the moving attorney, she should be subject to discipline under the Model Code for bringing the motion in a manner that impairs the constitutional rights of the defendant. The proposed rule should be included in the Model Code in order to clarify the line between zealous representation and unethical behavior.

I. The Problem

Motions to disqualify defense counsel brought near the trial date may violate the defendant's constitutional rights,[11] and cause the defendant to suffer both psychologically and monetarily. Postponing the trial date is especially hard on the defendant because it prolongs the social stigma of public accusation just when that period of stigma is expected to end. This occurs regardless of whether the motion is ultimately granted.

If the motion is granted, the defendant with a privately retained attorney incurs double expense. Since almost all the work done by the disqualified attorney is nondiscoverable work product, it may be denied to the newly retained attorney. The new attorney must begin virtually at square one, and the defendant must compensate the new attorney for the work for which she has already paid the disqualified attorney.

As a matter of strategy, the prosecution often brings a motion to disqualify defense counsel in order to damage the defense, or to buy time for the prosecution. If a disqualification motion is granted, the prosecution may profit from the opposition's reduced preparation time and resulting dimunition of effectiveness.

Bringing motions to disqualify earlier in the proceedings may temper these drastic effects, and it is for this reason that the timing of motions to disqualify should reflect on their validity. Because the Model Code of Professional Responsibility permits untimely motions to disqualify, the proposed rule should be adopted.

9. *See infra* text accompanying notes 44-102.

10. Because tactical motions are often brought near the date set for trial, they would be eliminated under the proposed rule. *See infra* text accompanying notes 116-123.

11. *See infra* notes 44-102 and accompanying text.

II. The Model Code as it Exists

The Model Code must be broad and flexible in defining impermissible conflicts of interest, since these conflicts vary widely from case to case. As a result, the Model Code is subject to abuse. Overzealous attorneys may bring bad faith motions to disqualify late in the proceedings because the disciplinary rules are necessarily vague. The Model Code identifies three types of conflicts that may subject an attorney to disqualification:[12] simultaneous representation of conflicting interests, present representation conflicting with the interests of a former client, and personal interests conflicting with the interests of a present client.

A. Simultaneous Representation of Conflicting Interests

Disciplinary Rule 5-105 governs conflicts resulting from simultaneous representation of clients whose interests potentially conflict.[13] Under this rule a lawyer shall not accept profferred employment if in her professional judgment it would likely require her to represent differing interests.[14] In other words, if a prudent attorney's performance would likely be affected by the multiple representation, the attorney should be disqualified.

In the criminal context, problems most often arise under this rule when one attorney seeks to represent more than one codefendant in a joint trial. Simultaneous representation of codefendants can be attacked even when the clients have intelligently consented[15] after full disclosure of the potential problems.[16] The rationale for defying the defendant's intelligent waiver of conflict-free representation is generally explained on the grounds that the defendant may not know enough to act in her best interest. In *United States v. Shepard,*[17] the court commented that a defendant's pretrial waiver may be no more than abstract speculation because the information available to the defendant at that time is insufficient, since the future strategy of the government is unpredictable

12. MODEL CODE, *supra* note 1, DR 5-105.

13. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9, 1.10, 1.12, 1.13, 2.2 (1983).

14. United States v. Phillips, 699 F.2d 798, 803 (6th Cir. 1983) ("The waiver must be voluntary, and must be knowingly and intelligently made to be effective.").

15. *See* United States v. Curcio, 694 F.2d 14 (2d Cir. 1982) (the government moved to disqualify counsel for two codefendants despite their waiver of the right to have independent counsel); United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978) (the chosen attorney was disqualified from representing either of two codefendants where one pled guilty at trial, despite their requests to retain the attorney); United States v. Agosto, 538 F. Supp. 1149 (D. Minn. 1982) (the attorney was disqualified despite the waiver by his clients).

16. 675 F.2d 977 (8th Cir. 1982).

17. *Id.* at 979; *see also* United States v. Agosto, 538 F. Supp. 1149 (D. Minn. 1982). This argument also was used in United States v. Dolan, 570 F.2d 1177, 1181-82 (3d Cir. 1978), where the judge was unable to advise the defendant of all potential prejudices.

and potential prejudices are not yet known.[18]

This judicial stance on intelligent waiver enables the government to bring and probably win a motion to disqualify defense counsel merely by asserting that its trial strategy is undecided or unpredictable. The appeal of this argument is that it can be based on a mere showing of the complexity of multiparty prosecutions.[19] In this way, the defendant may quickly lose assistance from the only criminal defense firm in the area;[20] or, in the case of poor defendants, their only chance of obtaining counsel other than that appointed by the court. Sharing an attorney is often the only way impoverished codefendants can afford a privately retained attorney, and the government can eliminate this option all too easily.

B. Present Representation Conflicting with the Interests of a Former Client

Disciplinary Rule 4-101(B)(2) governs current representation that is potentially contrary to the interests of a former client. The Rule states that an attorney shall not knowingly "[u]se a confidence or secret of his client to the disadvantage of the client."[21] The test to determine whether this conflict exists was first enunciated in *T.C. Theater Corp. v. Warner Brothers Pictures,*[22] where the court interpreted the rule to prohibit representation when it is possible that the attorney obtained confidential information from the former client.[23]

Part of the appeal of bringing motions to disqualify opposing counsel under a claim of former adverse representation is that these disqualifications run to the entire law firm or agency of the disqualified attorney.[24] Because the rule of imputed disqualification is based on the assumption of inter-office sharing of confidential communications,[25] the moving attorney need not prove that any communications have been actually shared, or that the alleged communication is damaging to the prosecu-

18. *See, e.g.,* United States v. Agosto, 675 F.2d 965 (8th Cir. 1982), where the government based its motion in part on the possibility that defense counsel may be forced into taking inconsistent positions because of the complexity of the case.

19. Margolin & Coliver, *Pretrial Disqualification of Criminal Defense Counsel,* 20 AM. CRIM. L. REV. 227, 229 (1982) ("If the government's disqualification challenge succeeds, the best qualified lawyers (and their firms, which may be the only available firms practicing the relevant field of law), may be removed from the case.").

20. MODEL CODE, *supra* note 1, DR 4-101(B)(2).

21. 113 F. Supp. 265 (S.D.N.Y. 1953).

22. *Id.* at 268.

23. *See* MODEL CODE, *supra* note 1, DR 5-105(D).

24. The doctrine was developed to protect the attorney-client privilege of a former client of the attorney whose disqualification was sought on the premise that to require the former client to prove that he made confidential communications to this attorney would result in destruction of the privilege. This doctrine is linked to the rule originated in T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

25. *See, e.g.,* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).

tion.[26] Under Disciplinary Rule 5-105(D), an entire criminal defense firm may be disqualified without any demonstration of a substantive conflict.[27] These motions are particularly abusive when the disqualified attorney is a member of a large, departmentalized, and geographically diverse firm.[28]

C. Personal Interests Conflicting with those of the Client

Disciplinary Rule 5-102(A) and (B) govern the potential conflict between the attorney's personal interests and those of the client she seeks to represent.[29] Subdivision (A) of the Rule requires that an attorney or a member of her firm withdraw from representation when she ought to be called as a witness on behalf of her own client.[30] This Rule is based on (1) the difficulty involved in arguing one's own credibility, (2) the general appearance of impropriety in doing so, and (3) the arduousness of impeaching a fellow attorney.[31] Subdivision (B) provides that a lawyer or a member of her firm should withdraw whenever she learns or it is obvious that she or a member of her firm may be called as a witness other than on behalf of the client.[32] Particularly when an attorney may be called to testify for the opposition, she must withdraw from representation or face disqualification by the court.

The potential for abuse of subdivision (B) is particularly great. As at least one court has admonished, "[Disciplinary Rule 5-102(B)] was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him . . . ."[33] While this rule was not intended to be a tool of trial strategy, many motions to disqualify opposing counsel are based on the threat of being called to testify.[34] Under subdivision (B), the prosecutor need merely allege that to the best of her knowledge, the defense counsel will be called to testify.[35] Even if she ultimately does not call opposing counsel to the stand, the assertion that the opposing coun-

26. *See supra* note 24.

27. *See* Hodes & Gabinet, *The Ethics of Disqualifying Attorneys for Strategic Reasons*, 193 N.Y.L.J. at 1, col. 3 (April 18, 1985).

28. MODEL CODE, *supra* note 1, DR 5-102(A), (B). Aside from those discussed, the Model Code also governs financial or business interests of the attorney, *id.* DR 5-101, and the acceptance of outside compensation that may influence the attorney's performance, *id.* DR 5-107.

29. *Id.* DR 5-102(A).

30. *See generally*, Wydick, *Trial Counsel as Witness: The Code and the Model Rules*, 15 U.C.D. L. REV. 651 (1982). An additional problem is that the attorney may intentionally disregard the need for his own testimony in the case in order to retain the client representation.

31. MODEL CODE, *supra* note 1, DR 5-102(B).

32. Galarowicz v. Ward, 119 Utah 611, 620, 230 P.2d 576, 580 (1951).

33. *See, e.g.*, United States v. Hobson, 672 F.2d 825 (11th Cir. 1982).

34. However, if the allegation is unfounded the attorney who signed and verified the motion may be subject to sanction under MODEL CODE, *supra* note 1, DR 7-102(A)(2).

35. *Id.* DR 7-102(A)(1).

sel may be called is adequate grounds for disqualification of both the defense attorney and her entire firm.

D. The Protection Provided by the Model Code

The Code is relatively silent regarding the timing of disqualification motions. The direction it provides is couched in terms of ethical axioms, which is fitting for a document guiding the ethical conduct of attorneys. However, when the attorneys who move for disqualification—supposedly to uphold the ethical guidelines—are actually doing so for unethical reasons, something less philosophical and more practical is needed.

The Code's existing regulation, Disciplinary Rule 7-102(A)(1), provides that "a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[36] Given the broad flexibility of the conflict rules, Disciplinary Rule 7-102(A)(1), does little to protect the defendant. "It is an unimaginative lawyer indeed who cannot think of some reason to seek disqualification other than for obvious delay or harassment."[37]

Aside from Disciplinary Rule 7-102(A)(1), the Code provides only a weak statement[38] requesting that attorneys "be temperate and dignified" in their conduct, and that they "refrain from all illegal and morally reprehensible conduct."[39] This Ethical Consideration is not mandatory, but is merely aspirational. Similarly, the admonition directed specifically to the government, that the "prosecutor should be punctual . . . in the submission of all motions, briefs, and other papers,"[40] is merely advisory. There is no professional sanction for failure to follow these standards.[41]

So long as the rules identifying impermissible conflicts of interest are indefinite, their potential for abuse in the adversary process remains strong.[42] Because the adversary process is of less than utopian design,

36. Morgan, *The Evolving Concept of Professional Responsibility,* 90 HARV. L. REV. 702, 736 (1977).

37. The Preamble explains, "[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." MODEL CODE, *supra* note 1, Preamble.

38. *Id.* EC 1-5.

39. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, 3-2.9(b) The Prosecution Function (ABA 1979).

40. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, 4-1.1(f) (ABA 1979). The Defense Function explains that "the standard is intended as a guide to honorable professional conduct and performance."

41. Because attorneys work within a process based on adversarial ethics, attorneys see it as their duty to exhaust any and all of the procedural options open to them. This can be easily justified as zealous representation for which attorneys are praised.

42. Morgan, *The Evolving Concept of Professional Responsibility,* 90 HARV. L. REV. 702, 735 (1977).

and because the conflict rules lend themselves to abuses of the sort described, Disciplinary Rule 7-102(A)(1) does not adequately protect the rights of criminal defendants. Yet, it is the only mandatory guidance the Code provides.[43]

III. The Effects of Late Motions to Disqualify on the Constitutional Rights of Defendants

A. The Right to the Effective Assistance of Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."[44] Beginning with the landmark case of *Powell v. Alabama,*[45] the Sixth Amendment has been interpreted to guarantee the effective assistance of counsel.[46] The guarantee of effective representation inures to defendants

43. First Wis. Mortgage & Trust v. First Wis. Corp., 571 F.2d 390 (7th Cir. 1978). MODEL CODE, *supra* note 1, DR 2-110(A)(2) provides that an attorney withdrawing from employment shall deliver "to the client all papers and property to which the client is entitled." Similarly, EC 2-32 provides that "even when he justifiably withdraws, a lawyer should protect the welfare of his client by . . . delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed . . . ." *Id.* EC 2-32. Nevertheless, access to the work product of the disqualifed attorney seems dependent upon the reason why the attorney was disqualified in the first place. As the court explained in First Wis. Mortgage & Trust v. First Wis. Corp., 571 F.2d at 397:

> To say that a lawyer's physical presence gives the appearance of impropriety while the use of his work product does not is to immerse oneself in the same 'hair-splitting niceties' which properly have been condemned in the enforcement of ethical standards. . . . While there might be a point where an attorney's acts are so ministerial or otherwise unobjectionable to the former client that such work could be used by substitute counsel after disqualification, we are not compelled to draw that line in the present case.

See also Realco Services, Inc. v. Holt, 479 F. Supp. 867, 880 (E.D. Pa. 1979) ("[I]t is unclear whether substitute counsel should be permitted [access to the work product of a disqualified firm] where the original counsel is disqualified under the 'substantial relationship' test."). *Contra* Academy of Cal. Optometrists, Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975) (where the defendant discharged his own attorney then sought to recover the work product, the court demanded that the attorney turn over the files because to hold otherwise would result in extreme delay and expense).

44. U.S. CONST. amend. VI.

45. 287 U.S. 45 (1932).

46. *Id.* at 71. This explication was extended to the states through incorporation of the Due Process Clause of the Fourteenth Amendment in the case of Gideon v. Wainwright, 372 U.S. 335 (1963). The Court reasoned:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad . . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 344-45 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

with privately retained attorneys and court-appointed attorneys alike.[47] Although the Court recognizes the constitutional right to effective assistance of counsel, not until *Strickland v. Washington*,[48] in 1984, did it define the criteria for ascertaining when the right has been violated. Under *Strickland* the right to effective assistance is violated if counsel has not functioned as a reasonably competent attorney,[49] and counsel's deficiencies were prejudicial to the defendant.[50]

Deficiencies in attorney performance may be shown by specific acts or omissions, including failure to fully investigate the facts and law. When a motion to disqualify is granted near the trial date, the judge may refuse to grant a continuance. When this occurs, the replacement attor-

47. *See* Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970); *see also* Garton v. Swenson, 497 F.2d 1137 (8th Cir. 1974).

48. 466 U.S. 668 (1984). *See infra* notes 51-53 and accompanying text.

Prior to *Strickland*, courts "traditionally have resisted any realistic inquiry into the competency of trial counsel." Wainwright v. Sykes, 433 U.S. 72, 117 (1977) (Brennan, J. dissenting). Prior to 1973, the "farce and mockery test" was applied by eleven of the federal circuits. Eight others (the First, Third, Fourth, Fifth, Seventh, Eight, Ninth and the District of Columbia) adopted a reasonableness standard, while others utilized the ABA's test from the 1971 draft of the Standards Relating to the Prosecution Function and the Defense Function. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971). Other circuits (for example, the Sixth) took the existing tests and varied them to fit their own sense of justice.

Despite the numerous variations by these courts, the effective assistance of counsel was generally taken to mean such assistance that the rights of the accused are properly safeguarded and his defense is competently and zealously presented. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932). The courts customarily focus not only on the attorney's in-court performance, but on the attorney's familiarity with the facts and the law of the particular case. *See, e.g.*, Hollingshead v. Wainwright, 423 F.2d 1059, 1060 (5th Cir. 1970). And they do so in light of the circumstances of the individual case. *See, e.g.*, Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

The one striking commonality of the tests is the courts' continuing concern for the time the attorney has had to prepare the case for trial. *See, e.g.*, United States v. King, 664 F.2d 1171, 1172-73 (10th Cir. 1981). Because attorneys have a duty to investigate, they must be afforded sufficient time to do so:

> Counsel has a duty to conduct an independent investigation of the facts and circumstances of a given case. . . . Pretrial preparation is 'susceptible to reasonably objective determinations'. . . , and the failure to investigate is one such objective violation of the attorney's duty to his client. . . . 'Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed . . . .'

Johnson v. United States, 413 A.2d 499, 503 (D.C. 1980) (quoting respectively Oesby v. United States, 398 A.2d 1, 8 n.14 (D.C. 1979); Monroe v. United States, 389 A.2d 811, 819 (D.C. 1978); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)). For a full explanation see Comment, *The Sixth Amendment Right to Effective Counsel: What Does It Mean Today?*, 59 NEB. L. REV. 1040 (1980); *see also* Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981); Via v. Powhatan Correctional Center, 643 F.2d 167 (4th Cir. 1981); United States v. King, 664 F.2d 1171 (10th Cir. 1981); United States v. Baynes, 622 F.2d 66 (3d Cir. 1980).

49. *Strickland*, 466 U.S. at 686-87.

50. *Id.* at 694.

ney may not have adequate time to fulfill the duty of investigation. In some cases, the shortness of time to prepare may itself give rise to a presumption of ineffectiveness and prejudice.

The prejudice element of the *Strickland* standard requires the defendant to show that there was a reasonable probability that but for counsel's errors, the outcome of the case would have been different.[51] The defendant whose attorney was disqualified late in the proceedings without the grant of a continuance, may show prejudice by demonstrating that the new attorney suffered from a lack of knowledge of the facts of the case, because she was not allowed sufficient time to conduct independent investigation. Thus, successful motions to disqualify defense counsel brought near the trial date may cause both deficiency and prejudice which can threaten, if not violate, defendant's constitutional right to effective assistance of counsel.

Because criminal cases often involve several parties or complicated facts, criminal cases require months or even years of preparation.[52] An attorney retained or appointed near the trial date probably will not have sufficient time to assess thoroughly the facts and defenses available to the defendant. As a result, the defendant's right to effective assistance of counsel will be impaired. If the newly retained attorney is granted the time necessary to adequately prepare, the late motion to disqualify may have created a "Catch 22" situation: upholding either the right to a speedy trial or the right to effective assistance of counsel, but not both. Therefore, neither granting nor denying a continuance can preserve the defendant's rights.

B. The Right to a Speedy Trial

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[53] In addition to the constitutional provision, each federal district court must conduct continuing studies of the administration of criminal cases and plan for prompt case disposition under the Speedy Trial Act of 1974.[54] The purpose of the right to a speedy trial is to prevent undue and oppressive incarceration prior to trial, minimize the anxiety and concern accompanying public accusation, and limit the possibility that long delay will impair the ability of an accused to defend herself.[55]

Even though the purpose of the speedy trial right is broad, its application is limited. The right is necessarily relative and sometimes consis-

51. *Id.*

52. *See, e.g.*, United States v. Agosto, 538 F. Supp. 1149 (D. Minn. 1982) (where the attorney had been working on the case for over three years before the trial date).

53. U.S. CONST. amend. VI.

54. Speedy Trial Act of 1974, 18 U.S.C. §§ 3152-56, 3161-74 (1985).

55. *See* Smith v. Hooey, 393 U.S. 374 (1969).

tent with delays.[56] Violations depend on the circumstances of each case. The right is not violated by delays caused by the accused:[57] for example, if the defendant seeks to have her appointed counsel disqualified, the time necessary for her new attorney to become familiar with the case cannot support a claim of a violation of her speedy trial right.[58] Moreover, the right is not violated when the delay is excusable or unavoidable. For example, courts have held that the right to a speedy trial is not violated when a judge's illness and the resulting court congestion cause a five month delay;[59] when extra time is needed to deal with foreign governments;[60] or when the trial is postponed because of the defendant's hospitalization.[61]

When the delay is not caused by the defendant, courts apply an ad hoc balancing test to determine the constitutionality of the delay.[62] The court balances the conduct of the defense and the prosecution, paying particular attention to the length of the delay, the reasons for it, the defendant's assertion or nonassertion of her constitutional rights, and any prejudice resulting from the delay.[63] The prejudice factor is not limited to impairment of the defendant's case; the defendant's mental suffering is also considered.[64] Institutional delays, such as court recesses, are considered in the balancing, but delays caused by tactical moves weigh most heavily in determining violations of the right.[65] In addition, delays re-

56. United States v. Ewell, 383 U.S. 116, 120-21 (1966).

57. Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947).

58. *See* United States v. Jones, 524 F.2d 834 (D.C. Cir. 1975), where the court used this reasoning to deny the defendant's claim when a significant portion of the thirteen month delay between arrest and trial was due to several motions and counsel changes by the defendant himself, and where the defendant failed to show substantial prejudice from the delay.

59. United States v. Latimer, 548 F.2d 311 (10th Cir. 1977).

60. United States v. Hay, 527 F.2d 190 (10th Cir. 1975).

61. United States v. Johnson, 579 F.2d 122 (1st Cir. 1978).

62. Barker v. Wingo, 407 U.S. 514, 530 (1972).

63. *Id.* at 530-33.

64. United States v. Dreyer, 533 F.2d 112, 115 (3d Cir. 1976); *see also* United States v. Greene, 578 F.2d 648, 655 (5th Cir. 1978) ("Prejudice may take the form of specific harm to the presentment of a defense or simply personal prejudice, such as the loss of employment and family and the experiencing of public scorn and obloquy occasioned by having to stand accused for a significant period of time."); United States v. Vispi, 545 F.2d 328, 335 (2d Cir. 1976) ("That a defendant should be accorded a fair and prompt chance to exculpate himself, as well as to be relieved of the anxiety and societal pressures of a public accusation of criminal conduct, lies at the root of the Sixth Amendment's guarantee of a speedy trial."); United States v. Macino, 486 F.2d 750, 753 (7th Cir. 1973) ("As to the anxiety and stigma which inevitably attach to arrest and indictment, we must recognize that they exist despite the fact that a trial transcript or court record will seldom reveal them. Nor can this form of prejudice be treated lightly . . . they are the 'major evils protected against by the speedy trial guarantee.' "). *But see* United States v. Hill, 622 F.2d 900, 910 (5th Cir. 1980) (finding that reliance on the anxiety inherent in the delay, standing alone, is an insufficient form of prejudice to warrant reversal).

65. Petition of Provoo, 17 F.R.D. 183 (D. Md.), *aff'd,* 350 U.S. 857 (1955) (government's decision to prosecute in a district where venue was doubtful and ultimately denied, while venue

sulting from deliberate choices made by the prosecution for its own advantage may violate the defendant's right *regardless* of whether the government's choice was made in good faith.[66]

Even when made in good faith, disqualification motions inevitably cause delay. Delays resulting from untimely motions can range from a few months to nearly a year.[67] A motion to disqualify made near the trial date may harm the defendant in a variety of ways. If a court grants a continuance to hear the motion, and thereby postpones the trial date, the defendant's right to a speedy trial may be denied. Even if the motion is ultimately denied, preparation for the hearing will have cost the defendant valuable time. In addition, a late motion may cause the defendant extreme anxiety under the pressure of prolonged social opprobrium. The defendant's anguish is exacerbated if she must be incarcerated longer because of the time necessary to investigate and hear the motion.[68] If the motion to disqualify is granted, the defendant must suffer additional delay while the new attorney investigates the facts and prepares the case for trial. Moreover, the defendant's case may be prejudiced or impaired. The new attorney may never attain the same level of understanding of the case as the disqualified attorney because during the time taken to hear the disqualification motion, witnesses may have died or moved away, memories may have faded, and evidence may have staled or disappeared.[69]

When these results spring from a motion to disqualify brought by the government for merely tactical reasons, the delays are neither excusable nor unavoidable. Because the defendant has not caused the delay, the court will apply the balancing test and will likely determine that the defendant has been denied a constitutional right.[70] Thus, when a tactical motion to disqualify is brought near the trial date, the inherent delays

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in another district was clearly appropriate); United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959) (government chose to prosecute by court-martial even though jurisdiction was doubtful).

66. *See* United States v. Dreyer, 533 F.2d 112, 115 (3d Cir. 1976).

67. *See* Bottaro v. Hatton Assoc., 680 F.2d 895, 897 (2d Cir. 1982) (court noted the nine month delay before dismissing the motion as unfounded); United States v. Agosto, 538 F. Supp. 1149 (D. Minn. 1982) (trial was postponed for a full five months before the defendant's attorney of three years was disqualified).

68. *See, e.g.*, Cain v. Smith, 686 F.2d 374, 385 (6th Cir. 1982) ("The present case is a paradigm example of the personal prejudice the right to a speedy trial is designed to prevent. Cain, a resident of Chicago, Illinois, was incarcerated in Louisville, Kentucky. His incarceration, quite obviously, disrupted his family life, isolated him from his friends, and destroyed his ability to continue to work as a dental technician . . . . The harsh and often times violent atmosphere of jail undoubtedly inflicted a grave hardship on him.").

69. United States v. Phillips, 699 F.2d 798, 802 (6th Cir. 1983) ("From the time of disqualification the defendant's case is affected by the loss of an attorney in whom he has confidence. Even a most competent counsel who enters the picture following disqualification of the attorney first selected by the defendant labors under severe handicaps.").

70. When the delay is through no fault of the defendant and is brought for tactical reasons causing long delay, all of the considerations point toward denial of the right.

will almost inevitably result in the denial of the defendant's right to a speedy trial.

C. The Right to Counsel of Choice

Although the right of the criminally accused to be represented by the counsel of her choice is not explicitly stated in the Constitution, the right has been held to be "an essential component of the Sixth Amendment."[71] As the Court explained in *Powell v. Alabama,*[72] "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."[73] In addition to being implicitly found in the Sixth Amendment, the right to counsel of choice is also grounded in the Due Process Clause.[74] Nevertheless, the right to counsel of choice has clear limits.

The right of the indigent defendant to have the court appoint a particular attorney is restricted to very specific situations. In California, the right to choice of appointed counsel is confined to situations where the preferred attorney has previously represented the defendant in a related prosecution, or where other counsel would have to spend substantial time and effort to attain the necessary factual and legal background.[75] In addition, the defendant's prior relationship with the preferred attorney must have given rise to a sense of mutual trust and confidence between them.[76] The court will appoint the attorney of the defendant's choice if it is convinced that appointment of that attorney will afford the defendant a continuity of representation, lessen public expense, and will not offend countervailing considerations of comparable weight.[77]

Under the federal standards, the right to have counsel appointed does not guarantee the defendant a "meaningful relationship" with the appointed attorney,[78] nor does it imply a right to have a particular attor-

71. *See* Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981); *see also* United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), *cert. denied,* 396 U.S. 825 (1969).

72. 287 U.S. 45 (1932).

73. *Id.* at 53.

74. *See* United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978); United States v. Johnston, 318 F.2d 288 (6th Cir. 1963); Harris v. Superior Court, 19 Cal. 3d 786, 567 P.2d 750, 140 Cal. Rptr. 318 (1978).

75. *Harris,* 19 Cal. 3d at 795-98, 567 P.2d at 756-58, 140 Cal. Rptr. at 324-26.

76. *Id.* at 797, 567 P.2d at 757, 140 Cal. Rptr. at 325.

77. *Id.* at 799, 567 P.2d at 759, 140 Cal. Rptr. at 327.

78. Morris v. Slappy, 461 U.S. 1, 14-16 (1983). *But see, id.* at 22-24 (Brennan, J., concurring):

> Nothing about indigent defendants makes their relationships with their attorneys less important, or less deserving of protection, than those of wealthy defendants. . . . It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

ney appointed.[79] Nevertheless, when an indigent defendant objects to the appointed attorney the court will inquire into the defendant's complaint in a manner that is sufficient to ease her dissatisfaction, distrust, and concern.[80]

Only upon a showing of good cause may the indigent defendant request the replacement of an appointed attorney.[81] Good cause is not determined solely according to the subjective standards of the defendant.[82] A defendant's general loss of confidence or trust in her appointed counsel, standing alone, is insufficient,[83] as is a bare conclusion that the appointed attorney cannot adequately represent the defendant.[84]

Although the Supreme Court has never specifically set forth what constitutes good cause, it is important that to avoid delay, the defendant raise specific complaints at the time of arraignment[85] and suggest a particular attorney with whom she feels comfortable.[86] The court must also consider the appointed attorney's opinion regarding her ability to adequately represent the defendant.[87]

The defendant's right to retain private counsel of her choice is more readily upheld, but it too is limited. The right must yield to overriding interests of justice, which include preserving the integrity of the court's procedures,[88] avoiding the likelihood of public suspicion,[89] and upholding regulations promoting the interests of the state.[90] In exercising the right to choose her attorney, the defendant may not select an attorney in a fashion that will obstruct judicial administration or frustrate the function of the judiciary.[91] For example, the defendant cannot manipulate the selection process to disrupt the trial or intentionally cause delay.[92]

While the restrictions on the defendant's right to counsel of choice

79. Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985).

80. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

81. United States v. Burkeen, 355 F.2d 241, 245 (6th Cir. 1966).

82. McKee v. Harris, 649 F.2d 927, 932 (2d Cir. 1981).

83. Hutchins v. Garrison, 724 F.2d 1425, 1430-31 (4th Cir. 1983).

84. Conroy v. United States, 296 F. Supp. 693, 695 (N.D. Okla. 1969).

85. Birt v. Montgomery, 725 F.2d 587, 595 (11th Cir. 1984); Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982).

86. United States v. Parhms, 424 F.2d 152, 155 (9th Cir. 1970).

87. Hutchins v. Garrison, 724 F.2d 1425, 1433 (4th Cir. 1983) (explaining that the *Morris* Court as influenced by counsel's statement to the trial court that he was ready for trial). *Contra* Sykes v. Virginia, 364 F.2d 314 (4th Cir. 1966) (irrelevant that appointed counsel stated that he was unprepared).

88. United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985).

89. United States v. Hobson, 672 F.2d 825, 828-29 (11th Cir. 1982).

90. Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976); United States *ex rel* Carey v. Rundle, 409 F.2d 1210, 1214 (2d Cir. 1969).

91. *See, e.g.*, United States v. Poulack, 556 F.2d 83 (1st Cir. 1977); People v. Felder, 22 Ill. App. 3d 737, 317 N.E.2d 595 (1979); People v. Douglas, 61 Cal. 2d 430, 392 P.2d 964, 58 Cal. Rptr. 884 (1964); People v. Shaw, 46 Cal. App. 2d 768, 117 P.2d 34 (1941).

92. Linton v. Perini, 656 F.2d 207 (6th Cir. 1981).

are strictly applied, the right may not be limited unnecessarily.[93] The prosecution must show that some important interest will be adversely affected before it can deny the defendant's counsel of choice.[94] Neither unreasonable docket control[95] nor the government's interests in having uninterrupted criminal proceedings[96] is sufficient to deny the defendant's choice of counsel.

Decisions upholding the defendant's right to counsel of choice against disqualification motions are based on the realization that counsel disqualification has a serious and immediate effect.[97] "[W]ere a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is the cornerstone of the adversary system, would be undercut."[98] When chosen counsel is disqualifed near the date set for trial, the defendant loses an attorney whom she has grown to trust. Since disqualifications sometimes run to the disqualified attorney's entire law firm, the defendant may be precluded from retaining a member of the only firm in the area that is qualified to try the case.

The indigent defendant will likely be unable to convince the court to appoint another attorney with whom she has had a relationship in the past. A defendant's choice of replacement counsel may also be vicariously disqualified if the attorney had jointly represented the defendant, in a prior matter, with the disqualified attorney. Moreover, the defendant's choice of replacement counsel may be overruled if some past aspect of their attorney-client relationship poses a potential conflict of interest. If the defendant has never been represented by an attorney, or has been represented only by an attorney who has also been disqualified, the defendant has no grounds to request that the court appoint a specific attorney, and she must take whomever the court appoints. When the court appoints a new attorney without granting a continuance, the defendant will be represented by an attorney with whom she has not had the time to establish a relationship of trust and confidence.

When the privately retained attorney of choice is disqualifed late in the proceedings, the defendant may be rushed into hiring another attorney without much time for evaluation of her credentials or experience. The court may deny the defendant's request for a continuance to find new counsel if the continuance will interrupt the orderly administration of justice.[99] Because the court may find that the motion to disqualify for

93. United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978).

94. United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983).

95. *See supra* note 88.

96. *See supra* note 90.

97. Society for Good Will to Retarded Children v. Carey, 466 F. Supp. 722, 724 (E.D. N.Y. 1979).

98. Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981).

99. United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978).

conflict of interest should have been foreseen, only a slight inconvenience or delay may be a sufficient ground for rejecting a request for continuance to obtain new counsel.[100]

When the disqualification is granted without a continuance, the defendant may not be given adequate time to secure her second choice; this result may constitute a denial of due process.[101] In the end, the defendant may be represented by an attorney whom she does not completely know and trust and whom she has retained without adequate deliberation. For example, in *United States v. Agosto,*[102] when the defendant's attorney of three years was disqualified, the defendant was represented at trial by an attorney he had known for only two months. Whether or not the new attorney was highly competent, one could hardly say the two month relationship was of the quality of the first. Thus the untimely motion to disqualify may defeat the right to counsel of choice and undermine the basic trust and confidence between attorney and client.

IV. Judicial Altering of the Model Code

Recognizing the potential for improving defendants' rights against tactical motions to disqualify, courts have viewed the motions as adversarial strategic ploys,[103] and have approached them with a jaundiced eye.[104] To assure the genuineness of motions to disqualify, some courts have gone beyond cynicism and have imposed stringent standards on the motions. In *City of Cleveland v. Cleveland Electric Illuminating Co.,*[105] the court refused to accept the Model Code's irrebuttable presumption of disclosure of confidential communications between members of the same law firm.[106] In a concurring opinion in *J.P. Foley & Co. v. Vanderbilt,*[107] Judge Gurfein demanded that "strict judicial scrutiny" be applied whenever disqualification of an attorney is sought because the opposition has called her as a witness.[108] Judge Gurfein justified this change as preventing the "literalism [of the Rule][109] from possibly overcoming substantial justice to the parties."[110] In *MacArthur v. Bank of New York,*[111] the court required a showing that the attorney's testimony on behalf of his

100. *Id.* at 492.

101. United States v. Johnston, 318 F.2d 288 (6th Cir. 1963).

102. 538 F. Supp. 1149 (D. Minn. 1982).

103. J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring).

104. Rice v. Baron, 456 F. Supp. 1361, 1368-69 (S.D.N.Y. 1978).

105. 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd,* 573 F.2d 1310 (6th Cir. 1977).

106. *See also,* First Wis. Mortgage and Trust v. First Wis. Corp., 571 F.2d 390 (7th Cir. 1978).

107. 523 F.2d 1357 (2d Cir. 1975).

108. *Id.* at 1360 (Gurfein, J., concurring).

109. MODEL CODE, *supra* note 1, DR 5-102(B).

110. 523 F.2d at 1360.

111. 524 F. Supp. 1205 (S.D.N.Y. 1981).

own client is "genuinely necessary"[112] when the adversary seeks disqualification on this ground.[113]

The courts' ad hoc changes do not preserve the rights of the defendant whose counsel is being challenged. While the stricter standards may result in fewer unnecessary disqualifications, the motions still harm the defendant. The trial may be postponed to hear the motion, perhaps causing the defendant to spend additional time in jail. As a result, her mental anguish may continue. If the trial is not postponed, the defendant with a privately retained attorney must pay her attorney for the time spent opposing the motion. Further, if the court refuses to impose stricter standards on the motion, the defendant's view of the criminal justice system will be tainted.[114] Indeed, ad hoc standards result in an unequal application of the law, which harms the integrity of the justice system. Ad hoc judicial changes at the trial level are inefficient and unfair.

V. Proposed Rule

To curtail the abuses of the conflict rules and to preserve the rights of the criminal defendant, a rule bearing directly on *when* motions to disqualify may be brought should be added to the Model Code of Professional Responsibility.[115] The rule should contain the following provisions:

Any attorney seeking to disqualify her opponent under the Disciplinary Rules preventing conflicts of interest must bring the motion as soon as she knows or should have known the alleged conflict exists, but under no circumstances later than a prescribed number of days before the date set for trial.[116] Should an attorney seek to disqualify her opponent after the proscribed number of days before the trial date, she must make a

112. *Id.* at 1210.

113. *Id.*

114. For thorough explanation, see generally J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972).

115. While an action for damages under 42 U.S.C. § 1983 (1982) may seem a plausible remedy, prosecutors are absolutely immune from such an action. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409 (1976), holding that a prosecuting attorney acting within the scope of his prosecution in presenting the State's case, is absolutely immune from a civil suit for damages under section 1983 for alleged deprivations of the accused's constitutional rights; *see also* Kennedy, *Prosecutorial Immunity Under Section 1983*, 5 AM. J. TRIAL ADVOC. 361 (1983); Nahmod, *Constitutional Accountability in Section 1983 Litigation,* 68 IOWA L. REV. 1, 2 (1983).

116. This Note does not determine exactly what the time limit should be. That is more properly determined by the legislature and the American Bar Association. However, in deciding what the time limit should be, particular attention should be paid to the purpose of the conflict rules. As the states incorporate the new rule into their existing standards, the time limit should be based on the time allowed for discovery in that state. In this way, internal consistency can be achieved.

prima facie showing of the alleged conflict before the motion will be heard. In addition, the attorney must show by clear evidence that:

(a) sufficient steps were taken at the outset of discovery to ascertain the alleged conflict and the appropriate steps taken were not fruitful; and

(b) there is no less disruptive means by which the alleged conflict can be resolved.

Moreover, the attorney seeking disqualification shall bear the burden of showing that there is no less disruptive means by which the alleged conflict of interest may be resolved.[117]

An exception to the rule would allow attorneys to argue for disqualification after expiration of the time limit, but it is restricted to the most extreme circumstances. To come within the exception the moving attorney must demonstrate that she could not reasonably have discovered the conflict earlier, and if the failure to discover the conflict was by any fault of the moving attorney, the motion will be denied. However, if an actual conflict exists, the prima facie showing will be easily made. This narrow exception therefore limits late disqualification motions to those situations where the harm resulting to the defendant is justified. Violations of the rule would be grounds for disciplining attorneys who seek to manipulate the judicial rules to their own advantage, at the expense of the defendant's rights.

VI. Effects of the Proposed Rule

The major distinction between the proposed rule, and the Model Code as it exists, is the specific time limit imposed for motions brought to disqualify counsel. Although having a specific time limitation in the Model Code of Professional Responsibility may seem somewhat unusual, a vague "reasonable time" standard will not adequately protect the interests of criminal defendants.[118] As the cases reveal, too many attorneys consider any time—even the eve of trial—to be a reasonable time to move for disqualification. A reasonable time limit encourages late motions because the motions will be heard no matter when they are brought.[119] In contrast, a specific time limit in the Model Code would put attorneys on notice that motions brought late in the proceedings for tactical reasons are unacceptable. Such a rule would provide an incen-

117. *See* United States v. Agosto, 538 F. Supp. 1149, 1154 (D. Minn. 1982).

118. Binding moving attorneys to a reasonable time would not add anything to the existing disciplinary rule in the Model Code. MODEL CODE, *supra* note 1, DR 7-102(A)(1) (1981). A devious attorney could still justify an eve-of-trial motion based on factors within her control. Flimsy explanations of what was reasonable under the circumstances would still unfairly impinge on the constitutional rights of the defendant by warranting undue delay and possible postponement of the trial date.

119. *See supra* notes 1, 4 and text accompanying notes 36-43.

tive to investigate and bring motions to disqualify as soon as conflicts are recognized.

Time limitations are not completely unknown to the rules governing professional responsibility. Disciplinary Rule 2-101(F) sets a strict thirty day time period during which the attorney is bound by any fee advertisement she has placed.[120] Rule 2-101(E) of the California Rules of Professional Conduct requires an attorney to keep within her possession any written or electronic communication from her clients for one year.[121] In addition, the new Model Rules of Professional Conduct provide that an attorney must retain any advertisement for a full two years after publication.[122] Thus, setting specific time periods in the Model Code may be appropriate when necessary to serve the ends of justice.

Because late motions to disqualify often impair the constitutional rights of defendants, and because the Model Code purports to guide the ethical conduct of attorneys, the suggested time limit would be an appropriate addition to the Model Code. Attorneys bringing late motions in bad faith should be subject to sanctions by the state or local bar association. The rule proposed would provide a clear, bright line standard in determining when an attorney has acted in an unethical fashion. Setting a specific time period for disqualification motions would protect the rights of the particular defendant and uphold the integrity of the Bar.

A. The Right to Effective Assistance of Counsel

For a motion to disqualify to comply with the time requirements of the proposed rule, it must be brought as soon as the alleged conflict of interest is discovered. When the motion is brought early in the proceedings, the defendant's right to effective assistance of counsel can be preserved even if the motion is granted without a continuance; the new attorney will have the benefit of time to become fully conversant in the facts and law of the case. She will have nearly the same amount of time to prepare for trial as the moving attorney. Rather than rushing into the case under the pressure of a rapidly approaching trial date, she may pursue all the investigative avenues open to her. The defendant will thus be represented at trial by a well prepared attorney, whose performance will likely be reasonably competent, and will probably not result in any prejudice.

B. The Right to a Speedy Trial

Although some delay will inevitably result from any motion to disqualify, not all delays violate the defendant's right to a speedy trial. Even when a motion is brought within the time limits of the proposed rule,

120. MODEL CODE, *supra* note 1, DR 2-101(F) (1984).
121. CALIFORNIA RULES OF PROFESSIONAL CONDUCT 2-101(E) (1984).
122. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7-2(b) (1984).

delay would result.[123] However, the delay, and the resultant harm, would be minimized. Motions brought within the limits of the proposed rule, even if granted, will cause far less delay because the new attorney will not have to spend time duplicating the preparation of the disqualified attorney in its totality. When the motion is brought early in the proceedings, the disqualified attorney will probably not have spent a great deal of time on preparation. The new attorney's work may be more effective because the witness' memories and the evidence will be fresh. Moreover, the defendant's anxiety will be lessened because the trial would not be prolonged by the collateral issue of disqualification. Because the new attorney can prepare the case more efficiently, the trial date may remain the same. Thus, the time the defendant is incarcerated and subject to the stigma of public accusation may not be extended at all beyond the original trial date.

C. The Right to Counsel of Choice

If motions to disqualify are brought as soon as the alleged conflict is discovered, the non-indigent defendant will have more time to search for alternative counsel in whom she has, or can develop, trust and confidence. Because the motion will have been heard early in the proceedings, a continuance for the purpose of finding another attorney is less likely to interrupt judicial administration, and thus it is more likely to be granted. Because the choice will not be made under the time pressure of an impending trial date, the defendant may choose calmly and intelligently. Once chosen, the defendant will have sufficient time to become acquainted with the new attorney to learn to trust and confide in her. Thus, early motions to disqualify may permit the defendant to retain an attorney of choice rather than an attorney of necessity. The benefits of the proposed rule are less significant for indigent defendants. However, if the defendant has a second choice counsel who is familiar with the facts of the case and with whom the defendant has previously had a relationship of trust and confidence, a disqualification earlier in the proceedings may prompt the court to appoint the defendant's second choice counsel because the countervailing factor of delay would probably be insignificant.

Conclusion

This Note has addressed the problem of motions to disqualify defense counsel brought near the date set for trial. Motions brought late in the proceedings often are brought for tactical reasons rather than for

123. Delay will still result from the time necessary to investigate the alleged conflict of interest, and to hear and decide the merits of the motion.

concern for the parties' rights.[124] These motions cause delay, expense, and anguish for the defendant. Conversely, they buy time for the prosecution and can eliminate the most qualified opposition. When the government successfully disqualifies defense counsel near the trial date, the defendant's constitutional rights to the effective assistance of counsel, to a speedy trial, and to counsel of choice may be impaired. When these results stem from motions brought for purely tactical reasons, the moving attorney should be subject to sanctions for disregarding the rights of the defendant and behaving in an unethical fashion.

The Model Code of Professional Responsibility does not adequately provide for such sanctions, nor does it sufficiently protect the rights of defendants from untimely motions to disqualify.

The rule proposed in this Note is a practical way to alleviate the infringement of constitutional rights caused by late motions to disqualify. The rule encourages prompt investigation of potential conflicts of interest and requires that motions be brought as soon as a conflict is realized. Motions brought earlier in the proceedings preserve the rights of the defendant while still allowing substantial conflicts of interest to be challenged. Adding the proposed rule to the Model Code of Professional Responsibility can protect the rights of the criminal defendant and uphold the integrity of the legal profession.

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124. *See* Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1352 (D. Colo. 1976).

* Member, second year class.

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