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"THROUGH A GLASS, DARKLY": HOW THE COURT SEES MOTIONS TO DISQUALIFY CRIMINAL DEFENSE LAWYERS

*Bruce A. Green**

When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things.

For now we see through a glass, darkly; but then face to face¹

Unfortunately for all concerned, a district court must pass on the issue of whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly.²

Suppose that before the outset of a criminal trial it appears that the attorney hired by the accused will have a conflict of interest which may affect his ability to wage a vigorous defense. The prosecutor moves to disqualify defense counsel, contending that the representation would be unethical and unfair to the accused, thus jeopardizing any subsequent conviction. The defendant opposes the motion and agrees to waive any future claims based on counsel's potential conflict. Is it nevertheless appropriate to grant the prosecution's disqualification motion?

Although raised frequently in the lower courts, the question of what the trial judge's role is in conflict-of-interest cases has, for nearly half a century, lurked in the background of the Supreme Court's decisions concerning the scope of a criminal defendant's right to the undivided loyalty of his attorney. Last term, as its conflict-of-interest jurisprudence reached middle age, the Court had the opportunity to articulate its views on that question. In *Wheat v. United States*,³ the Court

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1. 1 Corinthians 13:11-12 (King James).

2. *Wheat v. United States*, 108 S. Ct. 1692, 1699 (1988).

3. 108 S. Ct. 1692. For commentaries on the *Wheat* decision, see Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 797-801 (1989); The Supreme Court,

held that a trial judge has discretion to disqualify defense counsel, even over the defendant's objection, if a serious possibility for a conflict of interest exists.

The Court's reflections on the trial judge's role in conflict-of-interest cases are important, not only because they guide the conduct of trial judges in a significant number of criminal trials, but also because they illuminate other aspects of the Court's conception of the adversary process. The Court's efforts to define the trial judge's role are colored by its views of at least five subsidiary issues: (1) the ethical rules concerning conflicts of interest; (2) the extent to which defense attorneys can be trusted to avoid ethical violations; (3) the nature of the relationship between defense attorneys and their clients and the importance of limiting judicial intrusion into that relationship; (4) the importance of the autonomy of the criminal accused; and (5) the institutional interests of the judiciary in criminal cases.

The Court's thinking about these issues has unquestionably evolved over time, but that does not mean that its understanding of these issues has grown any more profound. To the contrary, an examination of *Wheat* in light of the Court's earlier efforts strongly suggests that now, even more than before, the Court views the trial judge's role in the adversary process "through a glass, darkly." This presents trial judges with a problem. Their own views of their role in the adversary process are informed by their experience presiding over numerous criminal trials; thus, some trial judges are likely to reject the relatively simplistic view of their role expressed in *Wheat* in favor of their own, more complex views. Yet these same judges are bound by the decision in *Wheat*, and will be able to derive little guidance from it.

This Article examines *Wheat v. United States* in light of the Supreme Court's earlier conflict-of-interest cases in an effort to provide greater guidance to trial judges. As background, Part I briefly discusses the relevant Supreme Court decisions, beginning in 1942 and culminating last year with *Wheat*. Part II demonstrates the inadequacy of the Court's reasoning in *Wheat*. It argues that *Wheat* ignores the more sophisticated aspects of the Court's earlier jurisprudence, including the Court's understanding of the relative importance of client autonomy and the sanctity of the attorney-client relationship, while building on both a misunderstanding of the prevailing standards of professional responsibility and an unfair assumption that defense lawyers will not comply with those standards. Thus, Part II views *Wheat* not as a sign of maturation, but as a step backward in the Court's conception of the adversary process. Finally, Part III addresses the trial judge's need for further guidance in cases in which defense counsel has a potential conflict of

1987 Term—Leading Cases, 102 Harv. L. Rev. 143, 180–91 (1988); Note, Sixth Amendment—Paternalistic Override of Waiver of Right to Conflict-Free Counsel at Expense of Right to Counsel of One's Choice, 79 J. Crim. L. & Criminology 735 (1988).

interest, and proposes a framework for the trial judge's exercise of discretion in such cases.

I. BACKGROUND: THE DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL'S UNDIVIDED LOYALTY

When a defense attorney simultaneously represents two defendants who have been jointly charged, the interests of the two clients may conflict, with the result that the attorney may be unable adequately to defend one client without undermining the other's defense. For example, it may benefit the first client to try to show that he unwittingly participated in criminal acts at the behest of his codefendant, but an attorney who represents both defendants cannot pursue this strategy without harming his second client.⁴ In other instances, the conflict arising out of the simultaneous representation of codefendants may be less obvious. For example, when the government's proof against each defendant is qualitatively or quantitatively different, a lawyer representing both defendants at the same trial cannot use his examination of witnesses and his arguments to the jury to underscore the weakness of the evidence against one client without implicitly calling attention to the strength of the evidence against the other.⁵ Conflicts like these, which arise from the joint representation of codefendants, have received the most attention from courts⁶ and commentators.⁷ Nevertheless, an attorney's representation may give rise to a conflict of interest in other

4. See, e.g., *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 949-50 (7th Cir. 1982); see also *United States v. Roth*, 860 F.2d 1382, 1385-89 (7th Cir. 1988) (information provided by defendant in connection with plea bargain creates conflict where it might inculpate another of counsel's clients), cert. denied, 109 S. Ct. 2099 (1989).

5. See Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 127-28, 131-33 (1978).

6. See generally Annotation, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel—State Cases*, 18 A.L.R.4th 360 (1982 & Supp. 1988); Annotation, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel—Federal Cases*, 53 A.L.R. Fed. 140 (1981 & Supp. 1988); Annotation, *Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel*, 34 A.L.R.3d 470 (1970 & Supp. 1988).

7. See, e.g., Aronson, *Conflict of Interest*, 52 Wash. L. Rev. 807, 829-33 (1977); Cole, *Time for a Change: Multiple Representation Should Be Stopped*, 2 Nat'l J. Crim. Defense 149 (1976); Geer, *supra* note 5; Girgenti, *Problems of Joint Representation of Defendants in a Criminal Case*, 54 St. John's L. Rev. 55 (1979); Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 Hofstra L. Rev. 315 (1977); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939 (1978); Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Tex. L. Rev. 211, 271-86 (1982); Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L.J. 1075 (1979); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1373-97 (1981).

situations as well, such as when the defense attorney formerly represented a government witness⁸ or when the attorney himself is a potential trial witness.⁹

A. *Decisions Prior to Wheat*

Beginning in 1942 with its decision in *Glasser v. United States*,¹⁰ the Supreme Court has recognized repeatedly that a criminal defense lawyer's conflict of interest is a problem of constitutional, and not simply ethical, dimension.¹¹ In *Glasser*, the Court held that a trial judge may not interfere with a defendant's right to receive his attorney's undivided loyalty by ordering defense counsel to represent a codefendant. Glasser, a former federal prosecutor in charge of liquor cases in Chicago, was accused of accepting bribes in exchange for dismissing criminal cases. When a codefendant, another former federal prosecutor, informed the court that he was not satisfied with his appointed attorney, the trial judge proposed that Glasser's attorney simultaneously represent both defendants. Glasser initially objected, but then was silent when the judge ordered the joint representation. Both defendants were subsequently convicted. On reviewing the trial record, the Court found that, in order to promote the interests of Glasser's codefendant, the defense attorney had failed to object to the admission of certain evidence and had failed fully to cross-examine some of the prosecution witnesses.¹² Based on this finding, the Court overturned Glasser's conviction, holding that "'the assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."¹³

At the same time, however, the Court recognized that the defendant may generally waive his right to conflict-free representation, just as he may waive many other constitutional rights at trial.¹⁴ A valid waiver

8. See, e.g., *Roth*, 860 F.2d at 1385-86; *United States v. James*, 708 F.2d 40 (2d Cir. 1983); *United States v. Moscony*, 697 F. Supp. 888, 889-93 (E.D. Pa. 1988); see also *infra* notes 73-76 and accompanying text. See generally Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L.J. 1 (1983) (assessing frequency with which criminal defense lawyers confront former clients as government witnesses and ethical implications of such situations).

9. See, e.g., *Roth*, 860 F.2d at 1386; *United States v. Micke*, 859 F.2d 473, 480-81 (7th Cir. 1988); *United States v. Cunningham*, 672 F.2d 1064, 1074-75 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984).

10. 315 U.S. 60 (1942).

11. See, e.g., *Burger v. Kemp*, 107 S. Ct. 3114 (1987); *Cuyler v. Sullivan*, 446 U.S. 335, 342-45 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481-87 (1978).

12. 315 U.S. at 72-74.

13. 315 U.S. at 70.

14. See, e.g., *Faretta v. California*, 422 U.S. 806, 835-36 (1975) (waiver of right to counsel); *Ross v. Wainwright*, 738 F.2d 1217, 1221 (11th Cir. 1984) (waiver of right to competent counsel), cert. denied, 470 U.S. 1055 (1985); *United States v. Frye*, 738 F.2d 196, 200 (7th Cir. 1984) (waiver of right to trial by pleading guilty); *United States ex rel.*

will later foreclose the defendant from overturning his conviction on the basis of his attorney's conflict of interest.¹⁵ The standard adopted in *Glasser* to govern the waiver of this right,¹⁶ like the standard governing the waiver of other rights afforded criminal defendants, was derived from the Supreme Court's opinion in *Johnson v. Zerbst*,¹⁷ which stated that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."¹⁸ In the Court's view, Glasser's professional experience was one relevant consideration, but it was not sufficient in itself to overcome the presumption against the waiver of constitutional rights.¹⁹ While concluding that Glasser had not effectively relinquished his right,²⁰ the Court left little room for

Williams v. DeRobertis, 715 F.2d 1174, 1178 (7th Cir. 1983) (waiver of right to trial by jury), cert. denied, 464 U.S. 1072 (1984); *United States v. Hammond*, 605 F.2d 862, 863 (5th Cir. 1979) (waiver of right to present witnesses); see also *Pfeifer v. United States Bureau of Prisons*, 615 F.2d 873, 876-77 (9th Cir.) (waiver of right to habeas review), cert. denied, 447 U.S. 908 (1980).

15. See, e.g., *United States v. Roth*, 860 F.2d 1382, 1389 (7th Cir. 1988), cert. denied, 109 S. Ct. 2099 (1989); *United States v. Krebs*, 788 F.2d 1166, 1173 (6th Cir.), cert. denied, 479 U.S. 930 (1986); *United States v. Williams*, 809 F.2d 1072, 1085 (5th Cir.), cert. denied, 108 S. Ct. 228, 259, 506 (1987).

16. 315 U.S. at 70-71.

17. 304 U.S. 458 (1938).

18. *Id.* at 464. The Court added: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* See generally Stuntz, *supra* note 3, at 795-801 (discussing waiver of counsel).

19. 315 U.S. at 70. Following *Glasser*, some judges argued that a defendant's decision to give up the right to an attorney whose loyalties are undivided, and to proceed to trial with an attorney who has a conflict, could never be a truly "knowing" decision, at least in cases involving multiple representation. This argument was put most forcefully by Circuit Judge Oakes in *United States v. Mari*, 526 F.2d 117, 119-21 (2d Cir. 1975) (Oakes, J., concurring), cert. denied, 429 U.S. 941 (1976), and by District Judge Lacey in *United States v. Garafola*, 428 F. Supp. 620, 623-26 (D.N.J. 1977), *aff'd sub nom. United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); see also *United States v. Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring); Lowenthal, *supra* note 7, at 971-72. The contention was that an attorney who represents codefendants cannot anticipate all of the conflicts that may arise and therefore cannot explain the dangers of multiple representation with sufficient particularity to enable the defendant to make an informed decision. Most courts have not accepted this argument, however, and have generally considered a defendant's voluntary waiver to be a "knowing" decision. This makes the waiver valid as long as the defendant understood, in a general sense, the dangers created by his attorney's conflict. See *infra* note 131 and accompanying text.

20. 315 U.S. at 70-72. In his dissenting opinion in *Glasser*, Justice Frankfurter argued that the defendant should have been foreclosed from asserting a constitutional challenge because he had acquiesced in the trial judge's decision to appoint Glasser's lawyer to represent the codefendant. Justice Frankfurter stressed that the defense attorney had agreed to accept the joint representation and that Glasser, an experienced prosecutor who was well aware of his rights, did not renew his objection. *Id.* at 88-92 (Frankfurter, J., dissenting). A majority of the Court rejected this analysis, finding that Glasser's right to independent counsel could not be relinquished simply by his failure to object, but only by an affirmative waiver. *Id.* at 70-72.

doubt that a knowing and voluntary waiver of the right to independent counsel would generally foreclose a defendant from later raising a successful sixth amendment challenge.

Almost four decades later, in *Holloway v. Arkansas*,²¹ the Court reaffirmed that the sixth amendment guarantee of "assistance of counsel" includes a right to be represented by an attorney whose loyalty is undivided. In that case, a single defense attorney was appointed to represent three men charged with robbery and rape, notwithstanding the attorney's assertion that the defendants' interests conflicted and that, as a consequence, he would be unable to cross-examine witnesses effectively. The Court held that the trial judge should have either appointed separate lawyers for the three defendants or, at minimum, inquired into defense counsel's representations to determine whether the defendants' interests did in fact conflict. The Court overturned the defendants' convictions, holding that, under *Glasser*, "whenever a trial court improperly requires joint representation over timely objection reversal is automatic."²²

Two years later, in *Cuyler v. Sullivan*,²³ the Court held that a defendant who can demonstrate that his attorney had a conflict of interest may be entitled to a new trial, even if the attorney was hired by the defendant, and the trial judge had no affirmative role in creating the conflict.²⁴ As in *Holloway*, the Court considered a defendant's claim that his attorney had a conflict arising out of the simultaneous representation of two codefendants. The Court acknowledged that "a possible conflict inheres in almost every instance of multiple representation,"²⁵ but recognized at the same time that not every instance of multiple representation involves an actual conflict between the codefendants' interests. To the contrary, in many cases, codefendants whose interests are closely aligned may benefit from a common defense.²⁶ The Court held that a mere "possibility of conflict is insufficient to impugn a criminal conviction."²⁷ In a case unlike *Holloway*, that

21. 435 U.S. 475 (1978).

22. *Id.* at 488.

23. 446 U.S. 335 (1980).

24. See *id.* at 344-45 ("Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.").

25. *Id.* at 348 (emphasis added).

26. *Id.*; see *infra* notes 59-60 and accompanying text. There may be other substantial advantages in multiple representation. See Margolin & Coliver, Pretrial Disqualification of Criminal Defense Counsel, 20 Am. Crim. L. Rev. 227, 251-57 (1982) (practical reasons for multiple representation include personal bond between defendants, trust in particular lawyer, pooling resources, and skepticism of prosecutor's motives in seeking to disqualify defense counsel); Tague, *supra* note 7, at 1124-25 (advantages include sharing cost of prominent attorney and having expertise of attorney who can guide defendants through grand jury investigation).

27. 446 U.S. at 350.

is, in which the existence of defense counsel's conflict is not apparent at trial, a convicted defendant must demonstrate that "counsel actively represented conflicting interests."²⁸ Furthermore, the defendant must show that the conflict "adversely affected his lawyer's performance."²⁹

The Court recently applied the *Sullivan* standard in a capital murder case, *Burger v. Kemp*.³⁰ Petitioner Burger and codefendant Stevens were tried separately for the brutal drowning of a taxi driver. Two law partners, appointed to represent the defendants, participated jointly in the representation of each defendant. Reviewing the record, a five-Justice majority found that the shared representation did not constitute an actual conflict of interest and that, even if it did, the lawyers' advocacy was unaffected.³¹ In contrast, three dissenting Justices found both that the joint representation constituted an active conflict of interest,³² and that the conflict undermined the representation of Burger.³³ This

28. *Id.*

29. *Id.* at 348. *Sullivan's* requirement that a defendant show an actual—as opposed to a potential—conflict of interest makes it difficult for him to establish that he was deprived of a constitutional right. In many cases, the conflict may be a subtle one, and the facts needed to establish its existence may not be easily accessible. Even in hindsight, it may be hard to show that other interests served by defense counsel were in fact adverse to the defendant's interests. See, e.g., *United States v. Bradshaw*, 719 F.2d 907, 915–18 (7th Cir. 1983) (finding no actual conflict in defense tactics chosen by attorney where defendant's assertion that he was less culpable than codefendants held without merit). At the same time, the responsibility to show that counsel's representation was impaired by the conflict may pose an even more difficult problem for a convicted defendant. Much of a defense lawyer's conduct is not recorded, and the evil of a conflict is often "in what the advocate finds himself compelled to *refrain* from doing." *Cuyler v. Sullivan*, 446 U.S. at 357 (Marshall, J., concurring in part and dissenting in part) (quoting *Holloway*, 435 U.S. at 490). A defendant who learns only after trial that his attorney's loyalties were divided may have a hard time showing precisely how the lawyer's conflict adversely affected his investigative decisions, his advice regarding whether to plead guilty, his conduct of plea negotiations, or his performance at trial.

The defendant's burden is less substantial in a case where "a trial court improperly requires joint representation over [the defendant's] timely objection." *Holloway*, 435 U.S. at 488. In such a case, a criminal defendant may obtain a new trial without proving that defense counsel's conflict impaired his representation. *Id.* at 490; accord *Wood v. Georgia*, 450 U.S. 261, 272–74 (1981).

The burden in conflict-of-interest cases is, in either situation, less onerous than in cases where the defendant alleges that he received ineffective assistance of counsel but that counsel's inadequacies were not attributable to a conflict of interest. In such cases, the defendant must show that counsel's errors "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). See generally *Berger, The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 *Colum. L. Rev.* 9, 88–96 (1986) (criticizing *Strickland's* outcome-based prejudice test).

30. 483 U.S. 776 (1987).

31. *Id.* at 783–85.

32. The dissent found that "[the defendants'] interests were diametrically opposed on the issue that counsel considered to be crucial to the outcome of petitioner's case—the comparative culpability [of the defendants]." *Id.* at 802 (Blackmun, J., dissenting).

33. The dissent found that Burger's representation was impaired in two principal ways. First, it caused the attorneys to refrain from pursuing a plea bargain for Burger on

case illustrates not only the problems of proof imposed by the *Sullivan* standard, but also the importance of addressing potential conflicts of interest in advance of trial, when the court can still substitute an independent attorney for one whose loyalties are divided.³⁴

B. *The Decision in Wheat*

In *Wheat v. United States*,³⁵ the Court confronted the question whether a defendant must be permitted to waive conflict of interest claims and proceed to trial with his choice of counsel—a question which had split the lower federal courts.³⁶ Rejecting the defendant's arguments premised on the sixth amendment right to counsel, the Court

the basis of his lesser culpability. *Id.* at 803–04. Second, in appealing from the death sentence imposed on Burger, the lawyers were compelled to refrain from arguing that the sentence was disproportionate because Burger was less culpable than his codefendant. *Id.* at 804–05.

34. Of course, unless a potential conflict is identified by a trial judge, by a defense attorney or by the prosecutor, it is unlikely to be addressed in advance of trial, since an unsophisticated defendant generally cannot and is not expected to bring the problem to the court's attention. See, e.g., *Sullivan*, 446 U.S. at 347 (trial judge must initiate inquiry when he "knows or reasonably should know that a particular conflict exists"); *Holloway*, 435 U.S. at 485–86 ("defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem"); *Mannhalt v. Reed*, 847 F.2d 576, 583–84 (9th Cir.) (prosecutor must bring "potential conflict to the trial judge's attention and move for disqualification if appropriate"), cert. denied, 109 S. Ct. 260 (1988); Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am. J. Crim. L. 323, 328 (1989) (arguing that "a criminal prosecutor has a duty to disclose defense counsel's potential conflict to both the defense attorney and to the trial judge"). But see *Dukes v. Warden*, 406 U.S. 250, 257 (1972) (petitioner knew his attorney represented two codefendants in an unrelated case but "never complained to the court that he was not satisfied with [the attorney] because of this dual representation" (quoting opinion below, 161 Conn. 337, 344–45, 288 A.2d 58, 62 (1971))).

35. 108 S. Ct. 1692 (1988).

36. In *United States v. Curcio*, the Second Circuit concluded that a defendant's knowing, voluntary waiver must be respected. 694 F.2d 14 (2d Cir. 1982). See also cases cited *infra* note 155.

In contrast, the Third Circuit held in *United States v. Flanagan* that defense counsel may be disqualified when he has a serious potential conflict, regardless of whether the defendant is willing to waive his right to conflict-free representation. 679 F.2d 1072 (3d Cir. 1982), rev'd on other grounds, 465 U.S. 259 (1984); see also *In re Paradyne Corp.*, 803 F.2d 604, 611 n.16 (11th Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986); *United States v. Phillips*, 699 F.2d 798, 801–02 (6th Cir. 1983), overruled on other grounds, *United States v. Tosh*, 733 F.2d 422 (6th Cir. 1984); Geer, *supra* note 5, at 158–60; Lowenthal, *supra* note 7, at 967–68.

The court in *Flanagan* stressed that a defendant does not have an absolute right to the counsel of his choice. 679 F.2d at 1075; see also *Dolan*, 570 F.2d at 1182–83; cf. *Morris v. Slappy*, 461 U.S. 1, 12–15 (1982) (trial court may refuse to grant continuance where defendant's chosen, privately retained lawyer is unavailable for trial). Moreover, the Third Circuit reasoned that a defendant's decision to be represented by an attorney who has a potential conflict "implicates more considerations and affects more people than does a decision to proceed *pro se*." 679 F.2d at 1076 n.5. For example, in the Third Circuit's view, defense counsel's potential conflict threatens to undermine the court's

determined that a trial judge has discretion to disqualify a defense attorney who has either an actual conflict of interest or a "serious potential for conflict."³⁷

Wheat and a large number of codefendants were jointly charged with conspiring to distribute thousands of pounds of marijuana over a period of several years. Two of Wheat's codefendants, Bravo and Gomez-Barajas, were represented by an attorney named Iredale, while Wheat was represented by a different attorney. Gomez-Barajas went to trial first. According to the district judge, Iredale did a "fantastic job" at trial,³⁸ and managed to secure his client's acquittal on the narcotics charges. Iredale also represented Gomez-Barajas in connection with unrelated charges and arranged for his client to plead guilty to two relatively minor counts. In addition, with Iredale's assistance, Bravo entered a guilty plea to a narcotics charge that was less serious than the charges contained in the indictment.³⁹

Several days before his trial was scheduled to commence, Wheat sought to be represented by Iredale in place of, or in addition to, his original trial lawyer. Although Iredale agreed to take Wheat's case, the prosecutor objected on the ground that Iredale's representation of the two other defendants created a conflict of interest. The government's principal assertion was that Bravo might be called to testify against Wheat, in which case Iredale's duty to preserve Bravo's confidences would preclude him from conducting a meaningful cross-examination. The government also argued that, if Gomez-Barajas's plea was not accepted and he went to trial, Wheat might be called to testify against Gomez-Barajas. In that event, Iredale might be impeded in his efforts to cross-examine Wheat.

In response, the defense argued that the purported conflict arising out of Bravo's potential testimony was unduly speculative, since Bravo was unlikely to implicate Wheat and there would thus be no need to discredit him. Similarly, the defense argued that it was highly unlikely that Gomez-Barajas would go to trial after tendering a plea of guilty, and that, if he did, it was equally unlikely that Wheat would be called to testify against him. More importantly, the defense asserted that Wheat, Bravo, and Gomez-Barajas each had agreed to the representation and were prepared to waive any future conflict-of-interest claims. The defense argued that, under these circumstances, Wheat was entitled to his

integrity and to subject the trial judge to subsequent challenges to the fairness of the proceedings. See *Dolan*, 570 F.2d at 1184.

The Supreme Court had an earlier opportunity to resolve this disagreement when it reviewed the Third Circuit's decision. *Flanagan*, 465 U.S. 259 (1984). However, the Court reversed on jurisdictional grounds, finding that an order disqualifying defense counsel is not immediately appealable.

37. 108 S. Ct. at 1698-1700.

38. *Id.* at 1703 n.3 (Marshall, J., dissenting) (quoting record below).

39. *Id.* at 1694-95.

choice of counsel. However, at the prosecutor's urging, the district judge decided to override Wheat's waiver of his right to conflict-free representation. Wheat was forced to go to trial without Iredale's assistance and was convicted.

In an opinion upholding the trial judge's decision, the Court adopted a two-step analysis. The Court first determined that a defense attorney may be disqualified when the trial court finds that he actually represents conflicting interests. The Court acknowledged that a defendant has an interest in retaining the attorney of his choice; this does not justify an absolute right to counsel of choice, however, but only a constitutional "presumption in favor of counsel of choice."⁴⁰ Where legitimate countervailing interests are sufficient, this presumption can be overcome. Thus, in determining whether the sixth amendment forbids the trial judge from depriving criminal defendants of their choice of counsel in a particular class of cases, the court must engage in a balancing of interests.

In the Court's view, federal courts have three legitimate interests that are jeopardized by a defense attorney's representation of conflicting interests. First, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession."⁴¹ The Court cited ethical standards contained in the American Bar Association (ABA) and California codes of professional ethics which "impose limitations on multiple representation of clients," and which, the Court implied, are violated whenever defense counsel has an actual conflict of interest.⁴² Second, the Court found that the judiciary has an institutional interest in ensuring "that legal proceedings appear fair to all who observe them," and that this interest may also be jeopardized when defense counsel represents conflicting interests.⁴³ Finally, the Court pointed to "the legitimate wish of District Courts that their judgments remain intact on appeal."⁴⁴ The Court opined that this desire may not be fully satisfied by the defendant's waiver because of "the apparent willingness of Courts of Appeals to entertain ineffective assistance claims from defendants who have specifically waived the right to conflict-free counsel."⁴⁵ In the Court's view, there was "no doubt" that these interests were of sufficient magnitude to permit a trial judge to reject a proffered waiver and disqualify

40. *Id.* at 1697. The presumption in favor of counsel of choice applies only to those defendants who can afford to retain their chosen counsel. It does not extend to those indigent defendants whose counsel is appointed by the court. See, e.g., *Caplin & Drysdale v. United States*, 57 U.S.L.W. 4836, 4838 (1989); *Burgos v. Murphy*, 692 F. Supp. 1571, 1575 (S.D.N.Y. 1988) (citing cases).

41. 108 S. Ct. at 1697.

42. *Id.* at 1697-98.

43. *Id.*

44. *Id.* at 1698.

45. *Id.*

an attorney who has an actual conflict of interest.⁴⁶

This initial determination did not resolve the question posed by *Wheat*, since at the time the trial judge denied *Wheat*'s motion to substitute or add Iredale as defense counsel it was uncertain whether Iredale would have a conflict of interest at trial. Accordingly, the second step of the Court's analysis was a determination that a trial judge's discretion to disqualify defense counsel extends beyond those "rare cases where an actual conflict may be demonstrated before trial,"⁴⁷ to include those cases in which defense counsel has only a potential conflict. The Court began by observing that, in advance of trial, "relationships between parties are seen through a glass, darkly," and, as a consequence, "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict."⁴⁸ Because of these uncertainties, a defendant's pre-trial waiver of the right to conflict-free representation is suspect. The Court emphasized the difficulty that defense counsel faces both in assessing the risk that a conflict will ensue and in explaining that risk to the accused; in addition, the Court suggested that defense attorneys cannot be trusted to convey all of the relevant information to their clients. For these reasons, a trial judge must be "allowed substantial latitude in refusing waivers of conflicts of interest . . . in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses."⁴⁹ However, the Court limited the trial judge's authority to disqualify defense counsel to those cases in which counsel is discovered to have "a serious potential for conflict."⁵⁰ Absent a serious potential for conflict, a trial judge must allow a defendant to waive potential conflicts of interest and proceed to trial with chosen counsel.

In drawing the line as it did, the Court was allocating the risk of a potential conflict, although it did not employ that language. The question was: Who should bear the risk that the trial judge will err in predicting that defense counsel will have an actual conflict of interest? The Court's conclusion was that, when the potential for conflict is serious, it is constitutionally acceptable to place the risk of error on the

46. *Id.* The Court may have had other institutional concerns that went unexpressed. For example, the Court may have had an aesthetic concern: that it is unseemly for a lawyer to cross-examine a present client. The Court may also have been concerned that the fairness of the proceedings would have been undermined in a manner favorable to *Wheat*. Because Iredale was representing Bravo, a potential government witness, he would have the opportunity to coach Bravo to give testimony that was shaded in *Wheat*'s favor. See *infra* note 94.

47. 108 S. Ct. at 1699.

48. *Id.*

49. *Id.*

50. *Id.* at 1700. The Court could have reached the same result by reasoning that proceeding to trial when there is a serious potential for conflict is itself an ethical violation, either because it creates an appearance of impropriety, or because defense counsel has an ethical duty to withdraw from the representation when he cannot discount the possibility of a conflict. See *Developments in the Law*, *supra* note 7, at 1474 n.24.

defendant, just as in the unusual case in which a trial judge can determine with certainty before trial that defense counsel will have an actual conflict of interest.⁵¹ Yet the Court's recognition of the trial judge's difficulty in predicting whether a conflict will arise would seem to justify striking the balance more favorably to the defendant. Although the defendant's interest in counsel of choice seems just as compelling whether counsel has an actual or nascent conflict, the judicial interests which justify the disqualification of counsel seem less compelling when there is a possibility that defense counsel's loyalties ultimately will remain undivided.

II. THE SUPREME COURT'S VIEW OF THE TRIAL JUDGE'S ROLE IN CONFLICT-OF-INTEREST CASES

A. *The Ethical Responsibilities of Lawyers*

Although the ethical standards governing conflicts of interest have evolved over the past half decade, the Supreme Court's understanding of those standards has not kept pace. At the time of the Court's earliest conflict-of-interest case, *Glasser v. United States*,⁵² the relevant professional standard was encapsulated in a single provision of the Canons of Professional Ethics.⁵³ Canon 6 deemed it "unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts."⁵⁴ This provision was consistent with the common law of agency,⁵⁵ from which the Canons were in large part derived. It enjoined *undisclosed* conflicts, but did not compel an attorney

51. Although four Justices dissented in *Wheat*, none challenged the underlying legal premises that a defendant's right to counsel of choice is not absolute, and that a defendant's choice of counsel may be rejected in order to avert a potential conflict of interest. In a dissenting opinion joined by Justice Brennan, Justice Marshall agreed with the Court that "[w]hen a defendant's selection of counsel, under the particular facts and circumstances of a case, gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice," since "a serious conflict may indeed destroy the integrity of the trial process." 108 S. Ct. at 1700 (Marshall, J., dissenting). Similarly, in a dissenting opinion joined by Justice Blackmun, Justice Stevens "agree[d] with the Court's premise that district judges must be afforded wide latitude in passing on motions" to disqualify defense counsel on the basis of a potential conflict. *Id.* at 1704 (Stevens, J., dissenting). However, in the dissenters' view, the trial judge in *Wheat* had erred in disqualifying Iredale because there had not been a serious possibility that a conflict would arise if Iredale were to represent *Wheat*. *Id.* at 1702-03 (Marshall, J., dissenting); *id.* at 1704 (Stevens, J., dissenting).

52. 315 U.S. 60 (1942).

53. Canons of Professional Ethics (1908).

54. *Id.* Canon No. 6. This provision defined conflicts of interest narrowly, explaining: "Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." *Id.*

55. See, e.g., Restatement (Second) of Agency § 387 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.") (emphasis added); *id.* § 394 ("Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his

to abjure from representing conflicting interests with the informed consent of his clients.⁵⁶

In *Glasser*, the Court overturned the conviction of a defendant whose attorney was ordered to represent a codefendant simultaneously. The Court perceived defense counsel's failure to object to the introduction of certain evidence, which would have been admissible only against the codefendant, to be clearly "indicative of [defense counsel's] struggle to serve two masters,"⁵⁷ an observation to which the Court repeatedly has adverted in its more recent decisions.⁵⁸ Yet, consistent with Canon 6, the *Glasser* opinion contained no suggestion that, absent the defendant's objection to this arrangement, the joint representation would have been improper. To the contrary, in language with which the majority expressed no disagreement, a dissenting Justice Frankfurter underscored the potential advantages of joint representation: "Joint representation is a means of insuring against reciprocal re-creation. A common defense often gives strength against a common attack."⁵⁹ The contemporary Court has reiterated this language frequently.⁶⁰

In the past two decades, however, the professional standards governing conflicts of interest have become longer, more restrictive, and more complex. Contemporary professional standards, unlike the Canons of Professional Ethics, establish that sometimes joint representation may not be undertaken even with the clients' informed consent. Under the Model Code of Professional Responsibility ("Model Code"), an attorney may accept the representation, with the informed consent of the joint defendants, only if it is "obvious" that the attorney can represent both defendants "adequately" despite their potentially con-

agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.") (emphasis added).

56. Ethics opinions of the American Bar Association concerning Canon 6 held that, when a conflict of interest involved a client that was a government entity, a lawyer could not engage in the representation, because the "public" cannot give its consent to a conflict. See, e.g., ABA Comm. on Professional Ethics and Grievances, Formal Op. 77 (1932); id. Formal Op. 34 (1931); id. Formal Op. 16 (1929). Except to that extent, the prevailing view appears to have been that, although the representation of clients with conflicting interests might sometimes be unwise or unseemly, see, e.g., H. Drinker, Legal Ethics 299 app. (1953) (reporting ABA Comm. on Professional Ethics and Grievances, Dec. No. 297), it was not unethical if both clients consented. But cf. id. at 120 ("The Canon does not sanction representation of conflicting interests in every case where such consent is given, but merely forbids it *except* in such cases.").

57. 315 U.S. at 75.

58. See, e.g., Cuyler v. Sullivan, 446 U.S. 335, 349 (1980) (quoting *Glasser*); Holloway v. Arkansas, 435 U.S. 475, 482 (1978) (same). The biblical injunction against "serving two masters," Matthew 6:24, is often invoked by the courts as an expression of a traditional principle of agency law. See, e.g., Young v. United States ex rel. Vuitton, 481 U.S. 787, 814 (1987).

59. 315 U.S. at 92 (Frankfurter, J., dissenting).

60. See, e.g., Burger v. Kemp, 483 U.S. 776, 784 (1987); Sullivan, 446 U.S. at 348; Holloway, 435 U.S. at 482-83.

flicting interests.⁶¹ Similarly, under the Model Rules of Professional Conduct ("Model Rules"), an attorney may represent codefendants, with their informed consent, only when "the lawyer reasonably believes the representation will not be adversely affected" by the potential conflict.⁶²

Neither the Model Code nor the Model Rules categorically forbid the representation of codefendants simply because there is a possibility that a conflict will arise. Nor is the representation forbidden in all instances in which a conflict is *likely* to arise. While it may be prudent to avoid potential conflicts arising out of multiple representation, the professional standards do not require a lawyer to do so. If defense counsel reasonably concludes that the codefendants' interests will not in fact conflict, or that a conflict will not significantly affect the representation, he is free to accept the representation upon his clients' informed consent.⁶³

The decision in *Wheat* bespeaks the Court's failure to grasp the complexity of the professional standards as they have developed over time. The fundamental premise of *Wheat* was that, when the trial judge

61. Model Code of Professional Responsibility DR 5-105 (1981). Some commentators have interpreted DR 5-105 to establish virtually a per se prohibition of multiple representation. See, e.g., I G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 132-33 (1985); Geer, *supra* note 5, at 155. This view finds support in EC 5-15, which states that "[a] lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests." Model Code of Professional Responsibility EC 5-15. Since the interests of codefendants are "potentially differing" in almost all cases, this Ethical Consideration would suggest that the representation of codefendants is almost never appropriate. But this Ethical Consideration is undercut, at least to some extent, by the one that follows: EC 5-16 discusses the obligation to make full disclosure "[i]n those instances in which a lawyer is justified in representing two or more clients having differing interests," and a footnote meant to provide some illustration quotes extensively from the *Glasser* decision, in which a single attorney did represent jointly charged defendants. *Id.* EC 5-16 & comment.

62. Model Rules of Professional Conduct Rule 1.7(b)(1) (1983). By the time *Wheat* was decided, the Model Rules had supplanted the Model Code in approximately half the states. See *Lawyers' Manual on Professional Conduct* 01:3-4 (Aug. 30, 1989).

63. Commentators have argued that the once common practice of representing codefendants in criminal cases should be categorically forbidden. See, e.g., Geer, *supra* note 5, at 155-56; Lowenthal, *supra* note 7, at 983-84; *Developments in the Law*, *supra* note 7, at 1394-96. However, the prevailing professional norms do not appear to go that far. Indeed, neither the Model Code nor the Model Rules treat multiple representation in criminal and civil cases differently.

The ABA Standards for Criminal Justice would place greater restrictions on the representation of jointly charged defendants in criminal cases. Standards for Criminal Justice (2d ed. 1980). Standard 4-3.5(b) provides that an attorney should not represent more than one defendant at trial, even with the defendants' informed consent, unless it is clear, after full investigation, that no conflict is likely to develop. The Standards generally have not been adopted by state courts or legislatures, however, and for that reason are entitled to less weight as an expression of the prevailing professional standards.

denied Wheat's motion for substitution of counsel, there was a serious possibility that Iredale's representation of Wheat would have resulted in Iredale's violation of the ethical "limitations on multiple representation of clients."⁶⁴ As a result, the disqualification of Iredale was thought to promote "the ethical standards of the [legal] profession."⁶⁵ The Court arrived at this conclusion without examining the relevant standards governing conflicts of interest or considering how they would have applied to the facts in *Wheat*.⁶⁶ Had it done so, the Court would have found no reason to believe that Iredale's representation of Wheat and two of his codefendants would have violated the professional standards.

The *Wheat* Court apparently proceeded on the assumption that all potential conflicts of interest are as troublesome as those addressed in the Court's previous cases, in which an attorney was engaged to represent codefendants who awaited either a joint trial⁶⁷ or successive trials.⁶⁸ Such cases bear out the Court's generalization that "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict" in advance of trial because the interests of joint defendants, while appearing to be substantially similar at the outset, may later diverge in material ways.⁶⁹ If a conflict does emerge between the interests of joint defendants, it may pervade defense counsel's representation, substantially impairing his conduct of pretrial negotiations or of the trial itself.⁷⁰

However, the Court failed to recognize that the type of conflict envisioned by the trial judge in *Wheat* would have been far less significant than the conflicts arising out of the representation of multiple defendants at joint or successive trials. *Wheat* was not a case in which defense counsel would represent codefendants at trial. It was a case in which, at worst, defense counsel would simultaneously represent a defendant and a government witness, since the government's case against two of attorney Iredale's three clients was essentially over and only Wheat was still awaiting trial.⁷¹ As a result, the potential conflict faced by Iredale

64. 108 S. Ct. at 1697.

65. *Id.*

66. The Court cited, but did not paraphrase, quote, or analyze, the professional standards that applied in California, where *Wheat* was tried. *Id.* at 1697-98. This was not unusual. Although the Court has occasionally cited the standards governing conflicts of interest, it has never analyzed them in detail. See, e.g., *Sullivan*, 446 U.S. at 346 n.11; *Holloway*, 435 U.S. at 486 n.8.

67. *Holloway v. Arkansas*, 435 U.S. 475, 476 (1978); *Glasser v. United States*, 315 U.S. 60, 63 (1942).

68. *Burger v. Kemp*, 483 U.S. 776, 781 (1987); *Cuyler v. Sullivan*, 446 U.S. 335, 338 (1980).

69. 108 S. Ct. at 1699; see also *Geer*, *supra* note 5, at 145.

70. See, e.g., *Geer*, *supra* note 5, at 125-35.

71. See *supra* note 38 and accompanying text.

would not be proscribed by prevailing ethical norms to the same extent as the conflicts in the Court's prior cases.

Because Wheat was the only client awaiting trial, the most significant ethical concern identified in *Wheat* was the possibility that, if codefendant Bravo's testimony was to tie Wheat to particular deliveries of marijuana, attorney Iredale "would have been unable ethically to provide" the vigorous cross-examination that would have been needed to impeach Bravo.⁷² This was essentially the same problem that typically arises when a defense attorney is called upon to cross-examine a former, rather than a current, client.⁷³ The defense attorney has a duty under such circumstances to preserve his former client's confidences and is not permitted to exploit those confidences in cross-examining the former client.⁷⁴ However, there is a danger that, in the course of cross-examination, the lawyer will inadvertently reveal the the former client's confidences.⁷⁵ Of greater significance to the accused, there is also a danger that, in an effort to avoid misusing confidential information, defense counsel may fail to explore fully legitimate areas of cross-examination, thereby depriving his present client of the most vigorous defense possible.⁷⁶

Under the prevailing professional standards, a potential conflict arising out of the need to cross-examine a former client is appropriately deemed less serious than a conflict arising out of the joint representation of codefendants. Indeed, the drafters of the Model Code apparently did not consider this conflict important enough to address explicitly.⁷⁷ Because there was no clear pronouncement in the Model

72. 108 S. Ct. at 1699.

73. For more extensive discussions of this question, see *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984); *United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980), cert. denied, 450 U.S. 922 (1981); *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976). See generally Lowenthal, *supra* note 8, at 18-23 (discussing duties owed to former and current clients under rules of ethics).

74. Model Code of Professional Responsibility EC 4-6, DR 4-101(B)(1) (1981).

75. Cf. *United States v. Alberti*, 470 F.2d 878, 881 (2d Cir. 1972) (client "actually derived some advantage from the fact of [attorney's] earlier representation of [government witness]"), cert. denied, 411 U.S. 919 (1973); *Harrison v. United States*, 387 F.2d 614, 615 (5th Cir. 1968) ("[a]ppellant was helped rather than harmed" by counsel's former representation of government witness).

76. See, e.g., *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973).

77. See Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 Minn. L. Rev. 227, 227 n.5, 241 (1987) (noting that the Code deleted references to former clients that had been contained in the Canons of Professional Ethics); see also C. Wolfram, *Modern Legal Ethics* 363 (1986) ("[I]t is not clear that accepting a subsequent representation adverse to a former client on a substantially related matter is a violation of any mandatory rule in the Code."); cf. Canons of Professional Ethics Canon 6 (1967) ("The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.").

Code, a substantial body of decisional law developed in civil cases in which a party moved to disqualify former counsel from representing an adversary.⁷⁸ The decisions were mainly premised on the attorney's ethical duty to preserve the confidences of a former client, rather than upon the conflict-of-interest provisions of the Code.⁷⁹ The standard that gained greatest currency was subsequently codified in the Model Rules, which states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."⁸⁰

One might think that, under this standard, an attorney for a criminal defendant is almost never required to withdraw from representing a new client in order to avoid cross-examining a former client: the Model Rule is directed at cases in which the former client is not only a potential witness, but also an *adversary* of the new client.⁸¹ This standard would not, by its terms, forbid an attorney from representing a criminal defendant in most cases in which a former client will be a witness, since the criminal defendant's interests are rarely adverse to those of a mere witness.⁸² However, many courts have either ignored the requirement of adversity⁸³ or have found that there is an adversity of interest be-

78. See, e.g., *Freeman v. Chicago Musical Inst. Co.*, 689 F.2d 715 (7th Cir. 1982); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020 (5th Cir.), cert. denied, 454 U.S. 895 (1981); *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980). Decisions after the adoption of the Model Code generally built upon the common law that developed prior to its adoption, including, most notably, Judge Weinfeld's decision in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 267 (S.D.N.Y. 1953). See Lowenthal, *supra* note 8, at 28-31; C. Wolfram, *supra* note 77, at 363, 368.

79. See, e.g., *Trone*, 621 F.2d at 998-99; *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975); see generally Goldberg, *supra* note 77, at 241-51 (discussing case law under the Code).

80. Model Rules of Professional Conduct Rule 1.9 (1983). See Goldberg, *supra* note 77, at 230 (Rule 1.9 "codified the disqualification rulings of a majority of courts").

81. See Lowenthal, *supra* note 8, at 21-22 & n.73; see generally C. Wolfram, *supra* note 77, at 366-68 (discussing requirement of adversity).

82. As a witness, the former client would generally have no personal interest at issue in the proceeding. Compare *United States v. Cunningham*, 672 F.2d 1064, 1072 (2d Cir. 1982) (no precedent for disqualifying attorney who formerly represented government witness "solely at the behest of a person other than the former client or its privy") with *United States v. Ostrer*, 597 F.2d 337, 340 (2d Cir. 1979) ("[A]llowing an attorney to represent a client in a situation where he may use information obtained in the course of former representation of the client's *adversary* gives the client an 'unfair advantage.'") (emphasis added). Although an exception might be made in a case where vigorous cross-examination will reveal misconduct by the witness which had not previously been known to the authorities, it is doubtful that this is the type of adversity contemplated by the ethical rules.

83. See, e.g., *United States ex rel. Stewart v. Kelly*, 870 F.2d 854, 857 (2d Cir. 1989); *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989).

In *Stewart*, the Second Circuit dispensed not only with the requirement of adversity, but also with the requirement that the current client's case be "substantially related" to

tween the former and present clients simply because the former client is a witness for the prosecution.⁸⁴

that of the former client. The defendant, Tineo, retained an attorney, Linn, to represent him at a trial on narcotics charges in New York State court. At a pretrial proceeding, the judge informed Linn that one of the prosecution's key witnesses against Tineo would be an informant whom Linn had previously represented in an unrelated matter. Under the prevailing professional standards, Linn would not have been required to withdraw from the representation, since the case was unrelated to the former client's representation, the former client's interests did not appear to be adverse to defendant Tineo's, attorney Linn believed that he was not in possession of any confidential information regarding the former client, and the former client apparently did not object to Linn's representation of Tineo. The trial judge nevertheless denied Tineo's request to continue with Linn's representation.

The federal district court issued a writ of habeas corpus, finding that Tineo had been denied the right to counsel. The Second Circuit reversed, determining that disqualification was proper under *Wheat*:

It is hard to conceive of a conflict of interest between clients that would not be serious. . . . In the circumstances presented by this case, there can be no doubt that Linn's potential conflict was serious, that his loyalty was divided between a client and a former client, and that representing Tineo would have created a strong appearance of impropriety. This is no less true simply because Linn's representation of the clients did not concern the same matter, as was the case in *Wheat*. Two clients' interests in separate matters may be just as opposed, and the potential for conflict just as serious.

870 F.2d at 857. Notably, the court's determination was made entirely without reference to such factual considerations as the importance of the former client's testimony, the extent of Linn's former relationship with the prosecution witness, or the nature of any confidential information in Linn's possession. In effect, the court found that disqualification is permissible whenever a former client of defense counsel will be called as a prosecution witness.

Stewart illustrates a double standard between civil and criminal cases that courts sometimes seem to employ. Both the New York Court of Appeals and the Second Circuit have overturned disqualification orders in civil cases that had a far more substantial basis under the professional standards than did the order in *Stewart*. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), vacated, 449 U.S. 1106 (1981); *S & S Hotel v. 777 S.H. Corp.*, 69 N.Y.2d 437, 508 N.E.2d 647, 515 N.Y.S.2d 735 (1987).

84. See, e.g., *United States v. Cheshire*, 707 F. Supp. 235, 239 (M.D. La. 1989) ("There is no question but that the interests of [defense counsel's] present client, Mr. Dyer, are materially adverse to the interests of his former client, Mr. Jones, because it is largely upon the basis of Mr. Jones' testimony that the government hopes to convict Mr. Dyer.").

Notwithstanding the district judge's view in *Cheshire*, it is in fact doubtful that the accomplice witness can be said to have an "interest" in the outcome of the trial that is materially adverse to the defendant's interest in securing an acquittal. To be sure, the witness may have a *perceived* interest that would provide a fertile basis of cross-examination. As the Second Circuit has noted:

An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial. An accomplice so testifying may *believe* that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony.

United States v. Padgett, 432 F.2d 701, 704 (2d Cir. 1970) (emphasis added). It does

Even if this standard applies in criminal cases, it is clear that an attorney may accept a case in which his former client will testify as long as both his former client and current client consent.⁸⁵ Unlike the standards governing joint representation, this standard does not identify circumstances in which informed consent is insufficient. The more liberal treatment of this potential conflict, as compared to the conflict arising out of joint representation, has several justifications. The potential impact of the conflict arising from the former representation of a government witness is on a single, discrete aspect of the representation—the cross-examination of that one witness. It is therefore comparatively easy to anticipate whether a conflict will arise and to determine its effect upon the representation.⁸⁶ Moreover, it is possible to avoid any harm

not follow, however, that the witness's perceived interest or emotional stake in securing the defendant's conviction is a genuine interest that should be recognized by Rule 1.9.

It is, in fact, the rare case in which an accomplice witness has a concrete penal or financial stake in the outcome of a criminal case, since it generally would be unethical for the prosecution to make its favorable treatment of the witness contingent on convicting the defendant. See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987), cert. denied, 108 S. Ct. 749 (1988). Thus, as prosecutors sometimes tell their witnesses in the course of preparing for trial, and as they often remind the trial jury during closing arguments, the accomplice witness has no interest in the result of the trial—his only interest is in telling the truth. See Green, *The Ethical Prosecutor and the Adversary System*, 24 *Crim. L. Bull.* 126, 144 n.62 (1988). It would be disingenuous—but not, perhaps, unexpected—for the prosecutor in a case like *Cheshire* to move for defense counsel's disqualification based on the former client's purported interest as witness, but later to argue to the jury that the witness has no interest that would cause him to accuse the defendant falsely.

85. See Goldberg, *supra* note 77, at 271–72; Lowenthal, *supra* note 8, at 35–36; see also *Theodore v. State of New Hampshire*, 614 F.2d 817, 822 (1st Cir. 1980); *United States v. Partin*, 601 F.2d 1000, 1007 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1984). Although Rule 1.9 calls for the consent of only the former client, the current client's consent should also be required because of the possibility that his representation will be impaired by the conflict.

Note that a case in which defense counsel is willing to cross-examine a former client should be distinguished from a case in which, notwithstanding the former client's consent, defense counsel seeks to withdraw from the representation out of the belief that he will be unable to cross-examine his former client vigorously. As Professor Lowenthal has argued, some defense attorneys may feel uncomfortable about facing a former client on the stand or using that client's confidences in cross-examining him. See Lowenthal, *supra* note 8, at 51. When defense counsel's concern is genuine and not a pretext for obtaining a mistrial, he should be permitted to withdraw from the representation.

86. In order to predict whether a conflict will arise and to determine its scope, the defense attorney must consider the nature of the witness's testimony and the nature of the confidences and secrets previously entrusted by the former client. If, for example, the former client's testimony is consistent with the defendant's theory of the case, so that there will be no need to impeach the witness, then defense counsel will not have a conflict arising out of the need to preserve the former client's confidences. Similarly, if the attorney does not possess confidential information that will be useful on cross-examination or if the confidential information merely duplicates the impeachment material received from the prosecution or from other sources, then it is unlikely that the cross-examination will be significantly curtailed. This is also likely to be true if the defense has received other impeachment material that is so significant that there would be no need

to the interests of either the former or present client by carefully conducting the cross-examination so as to make vigorous use of nonconfidential, and only nonconfidential, information.⁸⁷

Most importantly, the former client's consent eliminates or substantially reduces the principal dangers against which the rule protects. If the former client's consent is regarded as a waiver of the attorney-client privilege with respect to confidential information that is subsequently used on cross-examination, then the attorney has no need to circumscribe his questioning of the witness.⁸⁸ At minimum, the former client's consent must be viewed as an acceptance of the risk that confidences will be used inadvertently, so that defense counsel may err on the side of disclosure. Thus, defense counsel may conduct as vigorous a cross examination as he would if he had not represented the govern-

to utilize confidential information that would otherwise have been relevant on cross-examination. Because the defense attorney knows the nature of confidential information received from the former client and can generally discover what the former client's testimony will be at trial, he can make a reasonable determination about whether his cross-examination will be impaired.

In addition, defense counsel can assess the extent to which the representation as a whole will be affected by a foreshortened cross-examination of the former client. If the former client's testimony is not particularly important, the inability to cross-examine that witness as vigorously as possible may not matter.

Defense counsel's ability to gauge the likelihood, scope and impact of a potential conflict is important for two reasons. First, it justifies greater deference to a defense lawyer's determination that his representation will not be impaired by a conflict of interest at trial. Second, it better enables him to obtain informed consent to the potential conflict. This is quite different from a case of joint representation at trial, which may give rise to unforeseen conflicts or to conflicts which may have unforeseeable effects.

For discussions of the unique types of problems arising in joint representations, see, e.g., Geer, *supra* note 5, at 141, 145; Lowenthal, *supra* note 7, at 971; Moore, *supra* note 7, at 277-78; Tague, *supra* note 7, at 1102-03.

87. See, e.g., *United States v. Cunningham*, 672 F.2d 1064, 1073 & n.8 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984). In *Cunningham*, the trial judge granted the government's motion to disqualify an attorney who had formerly represented an indicted coconspirator whom the government planned to call as a witness. The court of appeals reversed, partly because it accepted the defense lawyer's assertion that he would be able to avoid using nonpublic information in cross-examining the witness. *Id.* at 1071.

Because it is possible to conduct an effective cross-examination while avoiding the use of confidential information, defendants have had difficulty demonstrating that they were prejudiced by defense counsel's former representation of a government witness when the potential conflict did not come to light until after trial. See Lowenthal, *supra* note 8, at 26-28.

Similarly, Rule 1.9 itself seems implicitly to recognize that an attorney can avoid the misuse of confidences while cross-examining a former client. Thus, the rule permits representation in cases in which the former client's interests are not adverse to the present client's as well as in cases which are not substantially related to the past representation. Although the attorney may possess confidences that would be relevant to cross-examining the former client in such cases, the rule assumes that the lawyer will overcome the temptation to exploit those confidences.

88. See, e.g., *Partin*, 601 F.2d at 1009; *United States v. McClean*, 528 F.2d 1250, 1258 (2d Cir. 1976).

ment witness. While the attorney might still pull his punches out of sympathy for the former client, this possibility ordinarily is so remote that, if it can be regarded as a potential conflict of interest at all, it is surely one to which an informed client should be allowed to consent.⁸⁹

In light of the nature of the potential conflict in *Wheat* and the manner in which it is addressed by the prevailing ethical standards, the district judge in that case had no basis for concluding that, if Bravo were to be a government witness at Wheat's trial, Iredale's representation of Wheat would violate the prevailing ethical norms. To begin with, the trial judge had no reason to believe that Iredale had received confidential disclosures which Iredale would have to bend over backwards to avoid using in cross-examining Bravo. Moreover, as Justice Marshall noted in his dissent, Iredale could have permitted cocounsel to cross-examine Bravo, while himself conducting the remainder of the trial. Had Iredale agreed not to reveal Bravo's confidences to his cocounsel, this would have eliminated any possible conflict.⁹⁰

Even if Iredale were called upon to cross-examine Bravo, the clients' consent to the potential conflict would have eliminated the ethical barrier to the representation, notwithstanding Iredale's possession of confidences that needed to be preserved. All three defendants had consented to Iredale's representation of Wheat and had agreed to waive any conflict-of-interest claims.⁹¹ The professional standards applicable in California, like the Model Code and the Model Rules, allowed the representation of conflicting interests with client consent.⁹² Moreover, unlike cases involving joint representation at trial, the consent in this case would have eliminated not only the ethical barrier, but the conflict itself. By authorizing Iredale to make use of his confidences, or at least to err on the side of using them, Bravo would have eliminated any danger to Wheat's defense.⁹³ At the same time, Wheat

89. See, e.g., *Fiumara v. United States*, 727 F.2d 209, 211-12 (2d Cir. 1984), cert. denied, 466 U.S. 951 (1984).

90. See 108 S. Ct. at 1703 (Marshall, J., dissenting); see also *infra* note 243 and accompanying text. Justice Marshall's dissent did not otherwise consider whether professional norms would have proscribed Iredale's cross-examination of Wheat. Instead, Justice Marshall emphasized that there was only a remote possibility that Bravo would give damaging testimony at Wheat's trial. As he recognized, the potential conflict identified by the district court when it barred Iredale from participating in Wheat's defense was premised on a series of contingencies, the most important being that Bravo would be called as a government witness to give testimony that needed to be challenged on cross-examination. It was extremely unlikely that this would occur, since Bravo did not even know Wheat, and was therefore unable to tie Wheat to the narcotics conspiracy. 108 S. Ct. at 1702-03 (Marshall, J., dissenting).

91. 108 S. Ct. at 1695.

92. See California Rules of Professional Conduct Rule 5-102(B) (1975) ("A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."); see also *supra* notes 61-63 and accompanying text (discussing Model Code and Model Rules).

93. Cf. *United States v. Cunningham*, 672 F.2d 1064, 1073 (2d Cir. 1982) ("While

could have agreed that, insofar as possible, Iredale's cross-examination of Bravo would be based only on nonconfidential matters; in doing so, Wheat would simply forego the unfair advantage that would otherwise result from having hired the lawyer for a government witness—an advantage which Wheat could never have obtained with another lawyer.⁹⁴

Thus, the *Wheat* decision is bottomed on the Court's misunderstanding of the ethical rules. If Iredale obtained the informed consent of Wheat and his codefendants, there was virtually no possibility that his representation of Wheat would have violated the prevailing ethical norms. As a consequence of the Court's misunderstanding, the Court upheld the denial of Wheat's choice of counsel in a case where the ethical rules plainly would have permitted that choice.⁹⁵

[the government witness] does not waive his right to assert his attorney-client privilege with regard to [his former attorney], neither [the witness] nor his counsel views the risk of an intrusion into that privilege as substantial enough to justify endorsing the government's motion for disqualification."), cert. denied, 466 U.S. 951 (1984).

Had Bravo not consented to Iredale's representation of Wheat, the argument for disqualification would have been more persuasive. In deciding whether to disqualify Iredale, the court would then have been compelled to consider not only the judiciary's interests, but also those asserted by Bravo. See, e.g., *United States v. O'Malley*, 786 F.2d 786, 790, 792-93 (7th Cir. 1986); *United States v. James*, 708 F.2d 40, 44-45 (2d Cir. 1983); *United States v. Perez*, 694 F. Supp. 854, 857-58 (S.D. Fla. 1988). Bravo's interests would have been particularly strong because he was a present, not former, client of Iredale. He could reasonably have argued that it would be an act of unfairness or disloyalty for his current lawyer to cross-examine him, even without exploiting confidential communications. This concern was, of course, eliminated when Bravo consented to Iredale's representation of Wheat.

94. That Bravo was still a client of Iredale was important in one respect: It meant that, while preparing Wheat's case for trial, Iredale would be advising Bravo with regard to his testimony as a government witness at Wheat's trial. This would create a potential conflict. For example, it would be in Wheat's interest for Bravo to avoid inculcating Wheat directly or otherwise harm Wheat's defense. On the other hand, if Bravo intentionally gave false testimony, he would be subject to criminal prosecution for perjury, whereas if he cooperated willingly and truthfully against Wheat, he might later receive the government's endorsement of a motion to reduce his sentence. Thus, in advising Bravo concerning his upcoming testimony, Iredale would have a conflict between serving the interests of Bravo and serving those of Wheat, but only if Bravo's truthful testimony would in fact inculcate Wheat. This was not the case; to the contrary, it was undisputed that Bravo had never had dealings with Wheat. In any event, this was a potential conflict to which informed consent could be given if Iredale determined, as he apparently did, that his representation of both Wheat and Bravo would not be impaired by the potential conflict. See *supra* notes 61-63 and accompanying text.

95. See *The Supreme Court*, 1987 Term, *supra* note 3, at 186 n.51.

The Court's misunderstanding of the prevailing professional standards has not been limited to the area of conflicts of interest. In criminal cases, the Court has relied on questionable or overstated constructions of other professional standards governing the conduct of criminal defense attorneys. See *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (finding that "both the Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure"); *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (finding that, except for the decision whether to plead guilty, to waive a jury trial, or to testify, all "strategic and tactical decisions are the exclusive province of the defense counsel"). This may simply reflect the Court's lack of inter-

B. Defense Counsel's Role in Maintaining Ethical Standards

Prior to *Wheat*, the Supreme Court and lower federal courts traditionally professed faith that most defense attorneys would uphold the general ethical standards of the legal profession,⁹⁶ and, in particular, the standards governing conflicts of interest.⁹⁷ For example, in both *Holloway v. Arkansas*⁹⁸ and *Cuyler v. Sullivan*,⁹⁹ the Supreme Court interpreted the trial judge's role with reference to the expectation that lawyers will conduct themselves ethically.

In *Holloway*, the trial court appointed one attorney to represent three indigent defendants at a joint trial on charges of robbery and rape. Before the trial began, the trial judge denied the defense attorney's request that separate lawyers be appointed to represent each of the defendants who, counsel asserted, had conflicting interests. At trial, defense counsel called all three defendants to testify, but complained—again failing to evoke a sympathetic response—that he could not elicit testimony from one client while protecting the interests of the other two. All three defendants were convicted. On appeal, the Arkansas Supreme Court concluded that the defendants had not been deprived of their sixth amendment right to counsel. Emphasizing that the defense attorney never explained to the trial judge precisely how the defendants' interests differed, the court concluded that the record failed to establish that defense counsel had an actual conflict of interest.¹⁰⁰

The Supreme Court reversed, adopting the view shared by most lower courts that when a defense lawyer, "as an officer of the court," represents that he has a conflict of interest, separate counsel should be

est in giving close scrutiny to provisions of lawyers' codes which are drafted by the American Bar Association and adopted by state courts, and concerning which the Court has no authority to issue binding interpretations. See *Whiteside*, 475 U.S. at 176 (Brennan, J., concurring); G. Hazard & W. Hodes, *supra* note 61, at 360.2-2-1 (1988 Supp.). On the other hand, this may reflect the desire of some members of the Court to influence the interpretation of the ethical rules by state courts and advisory committees of the bar.

96. See, e.g., *McKinney v. Meese*, 831 F.2d 728, 731 (7th Cir. 1987); *Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 429 (4th Cir. 1987), *aff'd*, 108 S. Ct. 2260 (1988). Likewise, the federal judiciary presumed that defense attorneys acted competently. See, e.g., *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983); *Henderson v. Morgan*, 426 U.S. 637, 647 (1976).

97. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978), discussed *infra* notes 100-103 and accompanying text; *Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980), discussed *infra* notes 104-110 and accompanying text; *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975) (recognizing "the presumption that the lawyer will subordinate his pecuniary interests and honor his primary professional responsibility to his clients"), *cert. denied*, 423 U.S. 1066 (1976).

98. 435 U.S. 475.

99. 446 U.S. 335.

100. See *Holloway v. State*, 260 Ark. 250, 255-57, 539 S.W.2d 435, 438-39 (1976).

appointed to represent jointly charged defendants.¹⁰¹ The Court rejected the State's argument that it would be inappropriate, in effect, to "transfer[] to defense counsel the authority of the trial judge to rule on the existence or risk of a conflict," because "unscrupulous defense attorneys might abuse their 'authority.'"¹⁰² The Court referred to three interrelated considerations, each of which turned on the defense attorney's ethical obligation:

[First, a]n "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." . . . Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. . . . Finally, attorneys are officers of the court, and "when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath."¹⁰³

Two years later, in *Cuyler v. Sullivan*,¹⁰⁴ the Court again defined the trial judge's responsibilities with reference to the responsibilities of defense counsel. In that case, counsel's potential conflict was patent, inasmuch as Sullivan's retained counsel also represented two of Sullivan's codefendants.¹⁰⁵ However, counsel did not move to withdraw, and the trial judge did not initiate an inquiry to determine whether the conflict was real or whether the defendant would formally waive any potential conflict. The Court found that when a defense attorney apprises a trial judge of an actual conflict or when the judge himself "knows or reasonably should know that a particular conflict exists," the trial judge has a duty to conduct a hearing to determine whether the defendant will knowingly and voluntarily waive his constitutional right to an independent attorney.¹⁰⁶ However, where he does not and reasonably could not know that the codefendants' interests are in conflict, a trial judge has no constitutional duty "to initiate inquiries into the propriety of multiple representation."¹⁰⁷ Instead, a trial judge may rely on defense counsel to carry out his ethical responsibility to avoid potential conflicts to which his client has not consented. The Court explained:

Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that

101. 446 U.S. at 485.

102. *Id.* at 486.

103. *Id.* at 485-86 (citations omitted).

104. 446 U.S. 335 (1980).

105. See *id.* at 348 ("[A] possible conflict inheres in almost every instance of multiple representation . . ."); accord *Burger v. Kemp*, 483 U.S. 776, 783 (1987); *United States v. Renda*, 669 F. Supp. 1544, 1547 (D. Kan. 1987).

106. 446 U.S. at 347.

107. *Id.* at 346.

multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. . . . [T]rial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel.¹⁰⁸

Thus, in determining that the judiciary's independent obligation to safeguard the sixth amendment rights of the criminal accused does not encompass a responsibility to inquire into potential conflicts of interest,¹⁰⁹ the Court relied heavily on the expectation that defense attor-

108. *Id.* at 346-47 (citations omitted). At the same time, the *Sullivan* Court acknowledged that several federal courts of appeals, pursuant to their supervisory authority, required trial judges to inquire into potential conflicts of interest in cases involving multiple representation. *Id.* at 346 n.10 (citing First, Second, and Eighth Circuit cases); see also *United States v. White*, 706 F.2d 506, 509 (5th Cir. 1983); *United States v. LaRiche*, 549 F.2d 1088, 1095 n.5 (6th Cir.), cert. denied, 430 U.S. 987 (1977); *United States v. Gaines*, 529 F.2d 1038, 1044 (7th Cir. 1976). The *Sullivan* Court noted that this was a "desirable practice." 446 U.S. at 346 n.10. Shortly after the *Sullivan* decision, Federal Rule of Criminal Procedure 44(c) was amended to require the federal district judge, in all cases of joint representation, to inquire into any potential conflicts of interest before trial, to advise the defendant of his right to separate representation, and to take other appropriate measures to protect the defendant's right to counsel. This rule does not require any inquiry into potential conflicts other than those arising out of joint representation. See *Cerro v. United States*, 872 F.2d 780, 786-87 (7th Cir. 1989). Nor does it apply in state courts. See *Moore v. Morris*, 663 F. Supp. 677, 681 (W.D. Mo. 1987) (urging Missouri Supreme Court to "give appropriate consideration to whether, in the exercise of its supervisory power, it should adopt a rule similar to that of the amended federal Rule 44(c)").

109. One year after *Sullivan*, the Court issued an opinion which appears to expand the trial court's duty by requiring judges to inquire not only into actual conflicts, but also into potential conflicts. See *Wood v. Georgia*, 450 U.S. 261 (1981). The defendants in that case, employees of a pornographic movie theater and a book store, were represented by an attorney who had been hired and paid by their employer. The defendants were convicted of distributing obscene materials, placed on probation, and ordered to pay \$5000 fines in installments of \$500 per month. When the defendants failed to make the required payments, the state court revoked their probation, rejecting the defendants' argument that it was a denial of equal protection to imprison them for failing to pay fines that they could not afford.

The Supreme Court found, *sua sponte*, that the receipt of a fee from the defendants' employer created a possible conflict of interest for defense counsel, who might have been inclined to serve the interests of the employer at the expense of the defendants. *Id.* at 267 ("[T]he risk of conflict of interest in this situation is evident."); see also Model Code of Professional Responsibility DR 5-107(A)(1) (1981); Model Rules of Professional Conduct Rule 1.8(f) (1983). For example, the lawyer might have initially refrained from vigorously opposing the imposition of heavy fines because he wanted the opportunity later to establish a legal precedent that would benefit the employer. 450 U.S. at 267, 270. Although the Court had granted certiorari in order to decide the petitioners' equal protection claim, *id.* at 264, the Court instead reversed the revocation of probation on the grounds that the judge failed to conduct an inquiry as required by *Sullivan*. *Id.* at 272-73 & n.18. According to the Court, the trial judge should have known that a possible conflict existed since, at the revocation proceedings, the State's attorney asked the court to conduct an inquiry and to appoint separate counsel for the defendants. *Id.*

The *Wood* Court directed the state court to determine on remand whether a conflict of interest actually existed at the time of the revocation hearing and, if so, whether the

neys will generally comply with the ethical rules governing conflicts of interest.¹¹⁰

The assumption that defense counsel will comply with clearly defined ethical standards governing conflicts of interest would have weighed heavily against disqualifying defense counsel in *Wheat*. As the Court recognized in *Holloway*, defense counsel is invariably more familiar with the criminal accusations, the government's evidence, and his client's own defense than is the trial judge. He is, therefore, better situated than the trial judge to determine whether the representation of multiple defendants would entail a conflict of interest.¹¹¹ Indeed, the defense attorney in *Wheat* would have been much better able to assess the potential for conflict than would the attorney in *Holloway*, in which codefendants were represented jointly at trial.¹¹² If one accepts the as-

defendants had validly waived their right to independent counsel. *Id.* at 273-74. The Court purported to be applying, and not expanding, the holding of *Sullivan*, see *id.* at 272 n.18, and some courts have accepted that interpretation of *Wood*. See, e.g., *Cerro*, 872 F.2d at 783. However, the decision is better understood as an expansion of the trial court's duty to inquire, since the trial judge in *Wood*, like the trial judge in *Sullivan*, had been aware of no more than the possibility of a conflict of interest. See, e.g., *United States v. Taylor*, 657 F.2d 92, 94 (6th Cir.) ("The recent Supreme Court decision in *Wood v. Georgia* . . . indicates that where a possibility of a conflict of interest on the part of counsel in a criminal case is sufficiently shown, a duty is imposed upon a trial court to inquire further."), cert. denied, 454 U.S. 1086 (1981). Even if *Wood* leaves some uncertainty regarding the scope of the trial court's constitutional responsibility, it leaves little doubt that, if only as a matter of prudence, a trial judge should always inquire into potential conflicts.

110. A majority of the Court recently reaffirmed its faith in the defense bar, noting that "we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client." *Burger v. Kemp*, 483 U.S. 776, 784 (1987). The Court identified this presumption as one of its reasons for concluding that the defense attorneys in *Burger* did not have an actual conflict of interest. *Id.* See also *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (sixth amendment relies upon "legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions").

111. See *Holloway*, 435 U.S. at 485; see also *United States v. Aiello*, 814 F.2d 109, 110 (2d Cir. 1987) ("[D]efense counsel are best positioned to know when a conflict exists or will likely develop during the course of trial . . .").

In some cases, however, the court may be in a position to facilitate defense counsel's determination. For example, where the likelihood of a conflict depends on the content of a government witness's testimony, the court can order the government to make pretrial disclosure of the witness's expected testimony. See Fed. R. Crim. P. 44(c) advisory committee's note ("[E]ven the most diligent attorney may be unaware of facts giving rise to a potential conflict, so it is not enough to rely on counsel in making a determination concerning a conflict of interest.").

112. When the potential conflict arises out of the need to cross-examine a former client, a defense lawyer is generally well-suited to gauge the nature and dimensions of the conflict. See *supra* note 86. In *Wheat*, moreover, defense attorney Iredale was even better situated because he would be cross-examining a current client. Since Iredale had continuing access to Bravo, the government witness, he would be in a unique position to determine the extent to which Bravo's testimony would implicate Wheat, and thus, the extent to which Bravo would need to be impeached.

sumption that trial counsel will act ethically in making this assessment, a trial judge would ordinarily have little if any justification for second-guessing a defense attorney who did not believe that an actual conflict would impair his performance at trial.

In *Wheat*, however, the Court stood the traditional assumption on its head. The Court described the difficulties that confront an attorney who contemplates undertaking the representation of codefendants, including the difficulty of acquiring all of the facts needed to assess the likelihood and dimensions of a potential conflict and the difficulty of explaining this assessment "to a criminal defendant untutored in the niceties of legal ethics."¹¹³ The Court then stated somewhat enigmatically: "Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them."¹¹⁴ Inspired, perhaps, by the Ninth Circuit's decision in *Wheat*, which expressed some skepticism about whether economically self-interested defense attorneys can be relied on to avoid conflicting interests,¹¹⁵ the Supreme Court seemingly has gone even farther. The Court seems to assume that any attorney who, rather than declining multiple representation, accepts the representation upon his clients' consent to potential conflicts is more likely than other lawyers to be unethical.

The Court's rejection of its previously optimistic assumption about the conduct of defense lawyers is not entirely without foundation. In general, two principal criticisms may be leveled at the general expectation that defense counsel will carry out an ethical obligation to avoid conflicting interests. First, there is the possibility that many defense attorneys may be either unaware of the ethical standards governing conflicts of interest or insensitive to the existence of potential conflicts when they arise. The Supreme Court itself suggested these possibilities in *Sullivan*, when it observed that "[t]he private bar may be less alert [than public defenders] to the importance of avoiding multiple representation in criminal cases."¹¹⁶ In his dissenting opinion in *Burger v.*

113. 108 S. Ct. at 1699.

114. *Id.*

115. 813 F.2d 1399, 1403 (9th Cir. 1987) (" 'Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested . . . ' " (quoting *United States v. Lawriw*, 568 F.2d 98, 104 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978))), *aff'd*, 108 S. Ct. 1692 (1988).

116. 446 U.S. at 346-47 n.11 (citing commentators).

The defense bar's susceptibility to conflicts of interest cuts across all types of criminal cases. It is not uncommon in organized crime cases, for example, for a defense lawyer to represent one defendant while receiving payment from a different defendant or target. See, e.g., *United States v. Aiello*, 814 F.2d 109 (2d Cir. 1987); *United States v. Padilla-Martinez*, 762 F.2d 942 (11th Cir.), cert. denied, 474 U.S. 952 (1985); see also Lowenthal, *supra* note 7, at 960-61. Similarly, in white-collar criminal cases, it is not uncommon for corporations that are targets of grand jury investigations to hire attorneys to represent corporate employees in the grand jury. See, e.g., Cohen, *Issue of Lawyer's Loyalty Is Raised By Drexel Employee's Conviction*, *Wall St. J.*, Mar. 24, 1989,

Kemp,¹¹⁷ Justice Blackmun reprised this concern, which he found to be supported in that case by defense counsel's testimony "that he never even considered that a conflict might arise out of the representation of two defendants facing the death penalty for the commission of the same murder."¹¹⁸

Second, even assuming that attorneys are generally aware of the prevailing ethical norms, a retained attorney's financial stake in the representation may create a disincentive to comply with the particular standards governing conflicts. Because he will lose a fee if he is forced to relinquish a client in order to avoid a conflict of interest, an attorney has an incentive, consciously or unconsciously, to ignore the full scope of a potential conflict or to play down its significance when counselling the accused.¹¹⁹

For these reasons, the *Wheat* Court would have been justified in concluding that no assumptions could fairly be made about the good faith of defense attorneys who have potential conflicts of interest. Moreover, even if such assumptions can be made, the Court could reasonably have concluded that such assumptions should not be the basis for fashioning constitutional rules. The Court might have acknowledged that its past expressions of faith in the defense bar probably had no real impact on the decisions in the earlier cases. Certainly, in most cases, defense counsel's presumptively proper conduct is invoked merely as a rhetorical trope when a court decides to reject a claim that defense counsel committed some misconduct which necessitates a new trial.¹²⁰

^ Rather than recognizing that it is inappropriate to rely on generalizations about the ethical probity of defense attorneys, the *Wheat* Court interpreted the sixth amendment right to counsel narrowly in light of its assumption that defense attorneys will act *unethically* by failing to instruct their clients carefully concerning waivers of conflicts of interest. Yet *Wheat* seems like a curious case in which to disavow one's faith in defense counsel, since there was much more reason to rely on counsel to act ethically in *Wheat* than there had been in *Sullivan*, where the Court reaffirmed its faith.

In *Sullivan*, unlike *Wheat*, the reason for defense counsel's failure to call to the trial court's attention the potential conflict arising out of his

§ 2, at 3, col. 5 (employee of Drexel Burnham Lambert, Inc. represented by company's counsel before grand jury that was investigating company was subsequently convicted of lying to grand jury and obstructing justice).

117. 483 U.S. 776 (1987).

118. *Id.* at 797 n.2 (Blackmun, J., dissenting).

119. See Lowenthal, *supra* note 7, at 961-63, 966-67.

120. For example, in ineffective assistance of counsel cases, courts frequently refer to the presumption that defense counsel acted competently. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

representation of codefendants was ambiguous. Counsel, complying with the ethical standards, might have concluded that the defendants' interests would not conflict and properly obtained his clients' informed consent to the multiple representation; on the other extreme, counsel might also have deliberately disregarded his ethical obligations. Counsel's silence also might have been the result of an inadvertent failure to comply with the prevailing professional norms. For example, counsel may not have been aware of an ethical obligation regarding conflicts of interest; he may not have recognized the conflict inherent in the multiple representation; or he may not have understood the extent of his duty to investigate and assess the likelihood of the conflict and to obtain informed consent from his clients.

In contrast, in a case in which the prosecution seeks to disqualify defense counsel, like *Wheat*, the attention of both attorney and client is called to the attorney's ethical responsibility. By questioning, the trial judge can obtain assurances that the attorney has investigated the possibility of conflicts, made an assessment that no conflict would arise, and carefully explained that assessment to his client. Under these circumstances, the possibility that counsel will deliberately or inadvertently disregard his ethical responsibilities is greatly diminished.¹²¹

Moreover, in deciding whether to consent to multiple representation and to accept the risks created by the potential conflicts that result, a defendant can receive the advice of an independent attorney who does not himself have a conflict and who will not benefit financially from the defendant's waiver. As Justice Stevens pointed out in his dissent, this was true of *Wheat*, who had received advice about the wisdom of his waiver from his original attorney.¹²² An independent attorney is in a far better position than the trial judge to assess the likelihood of a conflict.¹²³ Not only is he disinterested, but he has access to information about the defense that could not ordinarily be acquired by the trial judge without invading the attorney-client privilege.

For these reasons, the *Wheat* Court took a step backward in deciding to limit the scope of a defendant's right to counsel of choice based in part on an assumption that attorneys representing multiple defendants cannot be trusted to comply with the ethical standards. First, the Court should not have made a constitutional rule on the basis of any

121. Under the particular facts of *Wheat*, it would have been especially appropriate to assume that Iredale was complying with the ethical rules. *Wheat* was not a case in which the legal fees of a low-level member of a narcotics conspiracy were paid by the lead defendant. In that case, there would be cause for concern that defense counsel would serve the interests of the lead defendant rather than his client. Here, *Wheat* sought out and retained Iredale, whose other clients, like *Wheat*, apparently were not the principal defendants in the conspiracy.

122. 108 S. Ct. at 1704 (Stevens, J., dissenting); see also *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982) (court should allow reasonable time for defendant to make decision, including time to consult chosen counsel and independent counsel).

123. See *supra* note 111.

generalization concerning the ethics of the defense bar. And, second, if any generalization was appropriate, it was not the one on which the Court relied. The Court assumed that, unlike the presumptively ethical defense lawyer in *Sullivan*, an attorney in Iredale's situation was likely to be unethical. Yet *Wheat*, in which the trial judge was required to rule on a disqualification motion, was the paradigmatic case for assuming that the codefendants' attorney is complying with the rules governing conflicts of interest.

C. *The Attorney-Client Relationship*

The decisions of both the Supreme Court and the lower federal courts prior to *Wheat* reflected concern for preserving the attorney-client relationship coupled with a recognition that a trial judge's inquiry into a potential conflict of interest could threaten the effectiveness of that relationship. The Court first expressed its concern in *Holloway*. The Court cautioned that, while a trial judge was free to "explor[e] the adequacy of the basis of defense counsel's representations regarding a conflict of interests," such an inquiry must be conducted "without improperly requiring disclosure of the confidential communications of the client."¹²⁴ In a separate opinion in *Cuyler v. Sullivan*, Justice Marshall suggested that trial judges should exercise similar restraint when inquiring into the adequacy of waivers of conflict-of-interest claims. He emphasized "[t]he dangers of infringing the defendants' privilege against self-incrimination and their right to maintain the confidentiality of the defense strategy."¹²⁵

In another right-to-counsel case, *Strickland v. Washington*,¹²⁶ the Court gave fuller expression to this concern. In that case, decided four years after *Sullivan*, the Court was called upon to determine the scope of the sixth amendment right to effective assistance of counsel. The Court held that in cases in which, in the absence of a conflict of interest, defense counsel allegedly provided inadequate assistance, "the proper standard for attorney performance is that of reasonably effective assistance. . . . [T]he defendant must show that counsel's representation fell below an objective standard of reasonableness"¹²⁷ and that counsel's errors "actually had an adverse effect on the defense."¹²⁸ This standard was intended to be difficult to meet, said the Court, in order to discourage post-trial judicial inquiries into the competence of counsel, which ultimately could work to the detriment of the interest in affording effective representation to criminal defendants:

Counsel's performance and even willingness to serve could be

124. 435 U.S. at 487.

125. 446 U.S. at 354 n.1 (Marshall, J., concurring in part and dissenting in part); accord Margolin & Coliver, *supra* note 26, at 228.

126. 466 U.S. 668 (1984).

127. *Id.* at 687-88.

128. *Id.* at 693.

adversely affected [by the proliferation of hearings concerning the effectiveness of counsel]. Intensive scrutiny of counsel . . . could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.¹²⁹

The *Wheat* decision implicitly rejected, or at least minimized the significance of, the Court's earlier concern for the sanctity of the attorney-client relationship. By upholding a trial judge's discretion to disqualify an attorney when there is "a showing of a serious potential for conflict,"¹³⁰ the Court implicitly authorized trial judges to undertake an inquiry that potentially imperils the defendant's ultimate interest in receiving the effective assistance of counsel.

The factual inquiry that must be undertaken to decide whether to disqualify a defense attorney is far more intrusive than the inquiry that must be conducted to determine whether a defendant's waiver is knowing and voluntary. To ensure that a defendant's waiver of conflict-free representation is a knowing one, the trial judge generally is not required personally to advise the defendant in detail about the likelihood that a conflict will arise and about its potential impact on the defense. The trial judge need only explain to the defendant, in the abstract, the types of problems inherent in being represented by an attorney who has a potential conflict, allow defense counsel an opportunity to discuss the potential conflict with the defendant in greater detail, and determine whether the defendant desires to continue with his present attorney.¹³¹ For example, in *United States v. Curcio*,¹³² the Second Circuit exercised its supervisory authority to prescribe the following specific steps for a district judge to take when he becomes aware of a potential conflict:

[T]he court should advise the defendant of the right to separate and conflict free representation, instruct the defendant as

129. *Id.* at 690. The Court went on to note that hearings concerning conflicts of interest were different from hearings concerning the competence of counsel, because of "the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts." *Id.* at 692. The Court's observation, while endorsing pretrial inquiries into a defense lawyer's potential conflict of interest, also suggested that, in the Court's view, hearings concerning potential conflicts of interest could be conducted unobtrusively, unlike the post-trial proceedings necessitated by an ineffective assistance of counsel claim.

130. 108 S. Ct. at 1700.

131. See, e.g., *United States v. Roth*, 860 F.2d 1382, 1388-89 (7th Cir. 1988), cert. denied, 109 S. Ct. 2099 (1989); *United States v. Williams*, 809 F.2d 1072, 1085 (5th Cir.), cert. denied, 108 S. Ct. 228, 259, 506 (1987); *In re Paradyne Corp.*, 803 F.2d 604, 611 (11th Cir. 1986); *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1982); cf. *United States v. Agosto*, 675 F.2d 965, 975-76 (8th Cir.) (finding that district court erred in overriding defendant's waiver based on inability to foresee conflicts), cert. denied, 459 U.S. 834 (1982); *Tague*, *supra* note 7, at 1112-13 (suggesting that court may not constitutionally override informed defendant's waiver of separate representation).

132. 680 F.2d 881.

to problems inherent in being represented by an attorney with divided loyalties, allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision.¹³³

This circumspect inquiry can be explained, in part, by the judiciary's administrative interest in avoiding a burdensome fact-finding,¹³⁴ and perhaps also by its expectation that defense attorneys will carry out their ethical responsibility to give the accused appropriate advice.¹³⁵ But an additional virtue is that this approach avoids intruding on the attorney-client relationship. In order to give more detailed advice, the trial court would first have to elicit a substantial amount of otherwise confidential information from the defense.¹³⁶ For example, in a case in which defense counsel formerly represented a government witness, the court might have to ascertain not only the scope and importance of the witness's prospective testimony and the nature and extent of any attorney-client confidences received from the witness by defense counsel, but also the extent to which the testimony will be contrary to the defendant's theory of the case. This fact-finding would potentially compromise privileged communications, undermine the defendant's faith in his attorney, and chill the attorney's enthusiasm for the case. Courts have appropriately entrusted this inquiry to defense counsel, rather than undertaking it themselves,¹³⁷ since such an inquiry could inadver-

133. *Id.* at 890.

134. In a case involving the representation of codefendants, such an inquiry might be so burdensome that, for practical purposes, it could not be undertaken. See *United States v. Garafola*, 428 F. Supp. 620, 624 (D.N.J. 1977) ("Respectfully it is submitted that the trial judge cannot conduct a meaningful inquiry. He does not know the case. He does not know the facts or the inferences which may be fairly drawn from them. He is unaware of the quality of the witnesses and the trial strategy the government and the defendant will pursue.").

135. Before accepting a waiver of conflict-free representation, courts sometimes require both the defense attorney and the defendant to affirm on the record that the defendant did in fact receive detailed advice from his attorney. See, e.g., *United States v. Bradshaw*, 719 F.2d 907, 912 (7th Cir. 1983).

136. See *United States v. Garafola*, 428 F. Supp. 620, 624 (D.N.J. 1977); Lowenthal, *supra* note 7, at 981-82; C. Wolfram, *supra* note 77, at 417.

137. See *supra* notes 131-133 and accompanying text.

A minority of courts have declined to rely on defense counsel and, instead, concluded that trial judges should assume a greater responsibility for ensuring that the defendant understands the consequences of continuing with counsel's representation. See, e.g., *Gray v. Estelle*, 616 F.2d 801, 803-04 (5th Cir. 1980) (extensive inquiry is not necessary to establish a constitutionally sufficient waiver, but such an inquiry has nevertheless been required of district judges pursuant to the appellate court's supervisory authority). Some trial judges have conducted hearings to determine whether the defendant has actually been apprised in sufficient detail about his attorney's possible conflict and its potential dangers, and whether he has a sufficient understanding, to enable him to make a meaningful decision to proceed with his present attorney. See, e.g., *United States v. Padilla-Martinez*, 762 F.2d 942, 946-49 (11th Cir.), cert. denied, 474 U.S. 952 (1985); *United States v. Renda*, 669 F. Supp. 1544, 1550-51 (D. Kan. 1987); cf.

tently undermine the very right to counsel it is intended to protect.

Proceedings precipitated by a disqualification motion entail substantially greater intrusion into the attorney-client relationship than proceedings concerning the validity of a defendant's waiver. As the *Wheat* Court observed, the likelihood of a potential conflict is hard to predict even for a defense attorney who possesses far more information than the trial judge.¹³⁸ The trial judge ruling on a disqualification motion would have to acquire the same sort of information that defense counsel would use to make his assessment, without which the judge would scarcely be justified in substituting his own assessment for that of the defense attorney. Moreover, unless he conducted a probing inquiry to garner all of the facts relevant to ascertaining whether there is a "serious potential for conflict," the judge's decision would not be "informed," as required by *Wheat*,¹³⁹ but would be unduly speculative.¹⁴⁰

Such an inquiry, however, threatens precisely the interests that led the Court to conclude in *Strickland v. Washington* that hearings regarding the competence of counsel are disfavored.¹⁴¹ The judicial inquiry may undermine the defendant's confidence in his attorney by causing him to question whether defense counsel is qualified to provide a vigorous defense. It may also threaten the effectiveness of counsel's representation by dampening counsel's ardor. And, unless the trial judge receives information from defense counsel ex parte or precludes the prosecution from making evidentiary and investigative use of defense counsel's representations to the court, a hearing on a disqualification motion may result in the disclosure of otherwise confidential information, which may then be used by the prosecutor against the defendant. The *Wheat* decision's failure to address these concerns, and its adoption of an analysis which substantially discounts them, reflects the Court's abandonment of the wisdom of its prior decisions.

D. *The Autonomy of the Individual Defendant*

In cases prior to *Wheat*, the Court recognized that the judiciary must accord deference to a criminal defendant's choices concerning

United States v. Welty, 674 F.2d 185, 189 (3d Cir. 1982) (when defendant seeks to waive right to counsel and proceed to trial pro se, "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances'" (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948))).

138. 108 S. Ct. at 1699.

139. 108 S. Ct. at 1700 ("The evaluation of the facts and circumstances of each case . . . must be left primarily to the informed judgment of the trial court.").

140. See, e.g., *United States v. Reese*, 699 F.2d 803, 805 (6th Cir. 1983); *United States v. Renda*, 669 F. Supp. 1544, 1547 (D. Kan. 1987) ("To the extent that the trial judge is not fully apprised of the details of the case and the facts and circumstances to be drawn therefrom, it is unrealistic to believe that an accurate prediction concerning a conflict of interest can be made with any degree of certainty.").

141. *Strickland v. Washington*, 466 U.S. 668, 689-90, 693 (1984).

matters of significance to his defense. In *Glasser*, for example, the Supreme Court deferred to a defendant's decision *not* to accept an attorney with divided loyalties, stating: "Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected."¹⁴²

The Supreme Court relied more extensively on this concern for the autonomy of the accused in *Faretta v. California*,¹⁴³ which held that a criminal defendant's voluntary, informed choice to waive the right to counsel and to represent himself at trial must be honored. The decision was based in large part on a historical analysis of the sixth amendment and on the language of the "assistance of counsel" guarantee,¹⁴⁴ as well as on the recognition that self-representation may enable the defendant to present his case more effectively.¹⁴⁵ But the Court also emphasized that "[t]o force a lawyer" on an unwilling defendant would deny him "that respect for the individual which is the lifeblood of the law."¹⁴⁶ As the Court observed, "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."¹⁴⁷

These cases provided strong support for the argument that when a criminal defendant decides to be represented by an attorney who has a potential conflict of interest, respect for the autonomy of the individual defendant should counsel a court to uphold that decision. Thus, in his dissenting opinion in *Wheat*, Justice Stevens chides the Court for its

142. *Glasser v. United States*, 315 U.S. 60, 75 (1942).

143. 422 U.S. 806 (1975).

144. *Id.* at 818-32.

145. *Id.* at 834. In a recent article, William Stuntz suggested that the right of self-representation recognized in *Faretta* rests exclusively on the possibility that the accused will be better off without a lawyer. Stuntz, *supra* note 3, at 795-96. He explained that in "exceptional case[s]" the accused could better represent himself, either because appointed counsel is particularly unskilled or because the defendant himself is well-versed in courtroom procedure or would appear more sympathetic standing alone before the jury. *Id.* at 796. In this view, the right to waive counsel is meant to promote precisely the same interest as the right to counsel: the interest in protecting against an unjust conviction. *Id.* at 796.

This reading of *Faretta* seriously understates the importance of the defendant's autonomy in decision making. If the right of self-representation were designed only for the defendant's protection, trial courts would be permitted to override the defendant's waiver of counsel whenever the court determined that the defendant would be better off with a lawyer. Yet *Faretta* allows a trial court to override a voluntary waiver of counsel only in the rare case, in which a defendant, although competent to stand trial, is not competent to understand the importance of the right to counsel. See 422 U.S. at 835-36. That *Faretta* requires the trial judge to defer to a defendant's ill-advised decision to represent himself demonstrates that *Faretta* is more concerned with allowing defendants to make a free choice than with allowing them to make a wise choice.

146. 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

147. *Id.* at 833-34. The Court noted that freedom of choice is built into the procedural protections afforded to the accused at trial; for example, an accused has the right to decide whether to testify at trial. *Id.* at 834 n.45.

“paternalistic view of the citizen’s right to select his or her own lawyer,” as reflected in the Court’s failure to give adequate “weight to the informed and voluntary character of the clients’ waiver of their right to conflict-free representation.”¹⁴⁸ As Justice Stevens suggests, the *Wheat* majority did not so much repudiate as deemphasize the importance of the criminal defendant’s interest in having decisions regarding his defense respected.

The Court’s lack of concern was reflected, in part, in its view of the relative insignificance of the defendant’s right to counsel of choice:

[W]hile the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.¹⁴⁹

The novelty of the Court’s ordering emerges particularly clearly when one considers that historically the sixth amendment was understood to guarantee only “the assistance of counsel of [the accused’s] own selection.”¹⁵⁰ The sixth amendment right to appointed counsel has been recognized by the Court only in the past 50 years,¹⁵¹ while the sixth amendment right to effective representation has been recognized by it only in the past two decades.¹⁵²

The Court’s lack of concern for the autonomy of the accused was also reflected in the analysis that it adopted. The decision to subject the right to counsel of choice to a balancing test was not clearly ordained by the Court’s prior decisions. The Court had previously determined that a trial judge does not have to make a special accommodation, by postponing a trial, in order to enable the defendant to be represented by his preferred attorney, who was unavailable at an earlier date.¹⁵³ But the Court had never before determined that, in order to promote countervailing public interests, a trial judge could forbid a defendant from being represented by an attorney who was ready, willing and able to try the case on the date scheduled.

Moreover, a genuine concern for the autonomy of the accused

148. 108 S. Ct. at 1704 (Stevens, J., dissenting).

149. *Id.* at 1697; see also *Fuller v. Diesslin*, 868 F.2d 604, 608 (3d Cir. 1989) (approving state’s argument that, in *Wheat*, “the Court implies that the right to counsel of choice is grounded in the right to effective assistance of counsel”).

150. *Andersen v. Treat*, 172 U.S. 24, 29 (1898); see *Caplin & Drysdale v. United States*, 57 U.S.L.W. 4836, 4843 (U.S. June 22, 1989) (Blackmun, J., dissenting) (“[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.” (quoting *Powell v. Arkansas*, 287 U.S. 45, 53 (1932))); *Winick, Forfeiture of Attorneys’ Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. Miami L. Rev. 765, 786–99 (1989) (tracing historical origins of right to counsel of choice).

151. See *Johnson v. Zerbst*, 304 U.S. 458 (1938).

152. See *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970).

153. *Morris v. Slappy*, 461 U.S. 1 (1983).

should have led the Court to view disqualification as a measure of last resort. In seeking to disqualify defense counsel in *Wheat*, the prosecutor relied on the fact that codefendant Gomez-Barajas had not yet pleaded guilty pursuant to a plea bargain. According to the prosecutor, there thus remained the possibility that the trial court would reject the plea agreement, that Gomez-Barajas would stand trial, that Wheat would be called as a government witness at the trial, and that Iredale would be unable to conduct an effective cross-examination because of his duty to preserve Wheat's confidences. The possibility that this chain of events would occur could have been entirely eliminated, however, had the trial judge simply adjourned Wheat's trial until after Gomez-Barajas's plea had been accepted. Had the plea been accepted, the potential conflict between Wheat's interests and those of Gomez-Barajas would have vanished. Yet the majority in *Wheat* thought the defendant's autonomy of such slight importance that it failed even to consider holding trial judges responsible for seeking procedural alternatives to disqualification.

Perhaps the full measure of the Court's departure in *Wheat* from its past concern for the autonomy of the accused can be seen not in what the Court said, but in what it did not say about *Faretta*. In *Faretta*, the Court determined that a defendant is entitled to respect for one of the most fundamental, yet most controversial, decisions relating to one's defense—the decision to represent oneself.¹⁵⁴ The decision to be represented by an attorney with a conflict of interest would seem to reflect an equally fundamental choice. Thus, prior to *Wheat*, a number of lower courts had concluded that proper respect for the defendant's dignity and autonomy demanded that the defendant's waiver of conflict-of-interest claims be upheld.¹⁵⁵ In *United States v. Curcio*,¹⁵⁶ for example,

154. *Faretta v. California*, 422 U.S. 806, 832–34 (1975).

155. See, e.g., *United States v. Lopez Andino*, 831 F.2d 1164, 1170 (1st Cir. 1987), cert. denied, 108 S. Ct. 2018 (1988); *United States v. Curcio*, 694 F.2d 14, 25–26 (2d Cir. 1982); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979); *United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975); cf. *United States v. Cirrincione*, 780 F.2d 620, 628 (7th Cir. 1985) (“[O]nly in unique circumstances can a court disqualify counsel over a defendant’s objection when the sole basis for that disqualification is a potential for a conflict of interest of which both defendants are aware.”).

In contrast to *Wheat*, which seems to authorize the disqualification of counsel even where the representation will not result in an ethical violation, these lower court cases permitted a defendant to consent to the representation even when it was likely to involve a conflict of interest to which consent could not be given under the prevailing professional norms. See *supra* notes 61–62 and accompanying text.

In criminal cases, the paternalistic concerns underlying the ethical codes’ conflict provisions would generally weigh heavily against accepting waivers of conflict-of-interest claims, cf. *supra* note 19, and even more heavily against allowing self-representation. Criminal defendants are less able than most clients to make a knowledgeable decision about their representation, both because they tend to be among the least sophisticated of clients and because pending criminal charges place them under unusual pressure. Yet, in assessing the adequacy of a waiver prior to *Wheat*, trial judges generally did not impose upon the defendant their own view of his best interests, either directly or indi-

the Second Circuit opined that the decision whether to be represented by a lawyer with a conflict of interest was analogous to the *Faretta* decision whether to be represented by counsel at all, which the sixth amendment entrusts exclusively to the defendant. In the Second Circuit's view, a defendant had a comparable right to make the "strategic and moral" decision to proceed with a lawyer who had a conflict of interest.¹⁵⁷

Indeed, the argument based on *Faretta* might have been put even more strongly in *Curcio*. At least insofar as the defendant's own interests are concerned, *Faretta* clearly controls cases in which the accused seeks to waive his right to conflict-free representation: if a defendant has the right to decide to have *no* lawyer, a fortiori he can choose to have a conflicted lawyer. Although this does not address the countervailing societal interests in *Wheat*, many of the same or equally compelling interests were also present in *Faretta*.¹⁵⁸ Yet the *Wheat* Court did not acknowledge the lower court decisions that relied on *Faretta*, and it made virtually no mention of *Faretta* itself.¹⁵⁹ The Court did not con-

rectly, under the guise of determining whether the defendant's waiver was knowing and voluntary. That a valid waiver of constitutional rights may be made by even the most unsophisticated criminal defendant facing the most serious charges is in large part a product of respect for the dignity and autonomy of the individual accused.

156. 694 F.2d 14. This was a subsequent opinion in the case that is discussed *supra* notes 132-33 and accompanying text.

157. *Id.* at 25. Similarly, the Third Circuit found that a defendant's qualified right to choose his attorney derived from the broader principle, recognized in *Faretta*, that "a defendant has the right to decide, within limits, the type of defense he wishes to mount." *Laura*, 607 F.2d at 56. The court opined that attorneys "are not fungible," but "may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues." The choice among different lawyers may therefore "become[] critical to the type of defense" that will be made. *Id.* Moreover, "the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." *Id.* at 57.

158. See *infra* notes 165-67 and accompanying text.

159. The Court referred to the *Faretta* decision only once, in a footnote, in order to explain that the right to represent oneself does not encompass the right to be represented by "any advocate" one chooses, such as an individual who has not been admitted to the bar. 108 S. Ct. at 1697 & n.3. The Court declined to elaborate on the defendant's interest in deciding for himself whether to undertake the risks created by counsel's potential conflict. Instead, while acknowledging the defendant's qualified "right to choose [his] own counsel," the Court emphasized that the sixth amendment right to counsel was primarily a "guarantee [of] an effective advocate." *Id.* at 1697.

In determining that the defendant's preferences were not of paramount importance, the Court relied in part on *Jones v. Barnes*, 463 U.S. 745 (1983), a case in which a majority of the Court had devalued the dignitary principles underlying *Faretta*. The defendant in *Barnes* claimed that he should have been allowed to decide which nonfrivolous issues would be briefed and argued by appointed counsel on appeal. The dissenting Justices agreed, based on *Faretta*. 463 U.S. at 755-64 (Brennan, J., dissenting). However, the majority essentially ignored the dissent's concern for the defendant's personal autonomy. See *Berger*, *supra* note 29, at 31 (*Barnes* majority "sidestepped" issue of proper allocation of decision making power between defendant and counsel).

sider at all the dignitary interests underlying both the right of self-representation and the qualified right to counsel of choice; and it did not even remark on the more than superficial anomaly that a defendant should be allowed to waive the right to an attorney altogether, but not to waive the comparatively less important right to an attorney whose loyalties are undivided.

Finally, the rule authorizing judges to override a defendant's waiver departs sharply from the traditional conception of the defendant's decision-making autonomy when the rule is applied to cases like *Wheat*, in which counsel's potential conflict will affect only a discrete aspect of his representation. Suppose, for example, that after Bravo testified for the government at Wheat's trial, Wheat instructed his attorney not to cross-examine Bravo. Wheat may have decided that Bravo's testimony did not strongly implicate him, or he may have decided that he did not want to undermine the interests of a coconspirator. In either case, under the Code of Professional Responsibility, Wheat's attorney would be obliged to carry out Wheat's request, even if it were contrary to the attorney's best professional judgment.¹⁶⁰ In addition, if the trial judge disagreed with Wheat's decision, he too would be unable to countermand it.¹⁶¹ To do so would improperly interfere with defense strategy and with the defendant's right to control his defense. It is anomalous that Wheat's decision to forego cross-examining Bravo altogether would be entitled to respect, but his decision to consent to his lawyer's potential conflict would not be, when the only harm threatened by that conflict was the possibility that the lawyer's cross-examination of Bravo would not be quite as effective as it might otherwise have been.¹⁶²

160. See, e.g., *Foster v. Strickland*, 707 F.2d 1339, 1343 (11th Cir. 1983) (defense counsel "had an ethical obligation to comply with his client's wishes" and not present his preferred defense), cert. denied, 466 U.S. 993 (1984); Model Code of Professional Responsibility EC7-8 (1981) ("In the final analysis, . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.").

161. See, e.g., *United States v. Decoster*, 624 F.2d 196, 229 (D.C. Cir. 1976) (MacKinnon, J., concurring) ("The accused is entitled to the trial judgment of his counsel, not the tactical opinions of the judge." (quoting *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958))).

162. The *Wheat* Court did not entirely lose sight of the importance of the decision-making autonomy of the criminal accused. The saving grace of the Court's decision is its rejection of the view that any risk of conflict, however remote, would justify disqualification. Thus, only a "serious potential for conflict" warrants disqualification. 108 S. Ct. at 1700. In drawing the line as it did, the Court implicitly acknowledged the defendant's interest in receiving judicial respect for choice of counsel. Had the Court determined that the sixth amendment promised no more than an effective advocate, it would have authorized the disqualification of defense counsel when there was merely a remote possibility of a conflict, as long as there was an equally competent attorney to substitute for the defendant's counsel of preference. Cf. *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976) ("[T]he court's discretion permits 'it to nip any potential conflict of interest in the bud . . .'" (quoting *Tucker v. Shaw*, 378 F.2d 304, 307 (2d Cir. 1967))).

E. The Institutional Interests of the Judiciary

In decisions prior to *Wheat*, the Court gave little weight to the judicial interests implicated by a defense counsel's potential conflict of interest. The Court's decisions focused almost exclusively on the rights and interests of the accused, with small regard for the interests of the trial court or, for that matter, the government.

This is not to say that there *were* no relevant judicial interests in those cases. To the contrary, the institutional interests of the judiciary were relevant to every one of those cases. For example, in *Cuyler v. Sullivan*,¹⁶³ the judicial interest in preserving judgments of conviction was significantly implicated. The Court was called upon to determine whether a defendant could challenge his conviction if defense counsel's conflict of interest was never called to the trial judge's attention. If right-to-counsel claims are upheld in cases in which the trial judge and prosecutor were unaware of and could not have been aware of the conflict, then convictions will be overturned because of a problem neither the judge nor the prosecutor could have done anything to avoid. Yet the Court refused to limit post-conviction challenges to cases in which the prosecutor or the judge was remiss.¹⁶⁴ It was apparently not persuaded that the judicial interest in preserving judgments outweighed a defendant's interest in conflict-free representation. Similarly, in *Faretta v. California*,¹⁶⁵ the Court refused to defer to the strong societal interest in promoting the fairness of criminal proceedings. The *Faretta* Court upheld the right of self-representation despite the fact that it "cut against the grain" of earlier decisions to the effect that "the help of a lawyer is essential to assure the defendant a fair trial"¹⁶⁶ and that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."¹⁶⁷

The *Wheat* decision reflected a substantial shift in the Court's emphasis from the defendant's interests to three independent institutional interests which, in the Court's view, justified disqualifying an attorney who had either an actual or a substantial potential conflict. However,

163. 446 U.S. 335 (1980).

164. *Id.* at 344-45, 348-49. Similarly, in *Glasser v. United States*, 315 U.S. 60 (1942), the trial judge appointed Glasser's attorney to represent the codefendant in order to promote very real judicial interests. If the judge had appointed a separate lawyer who was unfamiliar with the case, the judge would have had to sever the trials or delay a joint trial in order to give the new lawyer enough time to prepare. Yet the Court gave no indication that the interest in judicial economy was of particular importance.

165. 422 U.S. 806 (1975).

166. *Id.* at 832-33.

167. *Id.* at 834. The three dissenters believed that the societal interests involved outweighed the interests of the defendant. See *id.* at 839 (Burger, C.J., dissenting) (The "goal [of achieving justice] is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel.").

none of the three interests cited by the Court provided a strong basis for overriding the defendant's interest in choice of counsel.

1. *The Preservation of Judgments.* — The interest in preserving judgments of conviction—an aspect of both the general administrative interest in conserving judicial resources and the broader public interest in the finality of judgments in criminal cases—is the interest that has most concerned courts in conflict-of-interest cases.¹⁶⁸ It is undoubtedly a legitimate and important interest; however, it is unlikely that the disqualification of defense counsel would promote this interest where the accused makes a knowing and voluntary waiver of conflict-of-interest claims in order to be represented by the attorney of his choice.

As noted earlier, a knowing and voluntary waiver of conflict-of-interest claims forecloses a defendant from attacking his conviction on the basis of his attorney's conflict.¹⁶⁹ The *Wheat* Court nevertheless invoked the spectre that a defendant who had waived the right to conflict-

168. The judicial interests in preserving convictions and conserving resources vary during different stages of a criminal proceeding, and the courts' view of the seriousness of conflicts of interest tends to vary accordingly, resulting in a triple standard in the evaluation of potential conflicts of interest in criminal cases.

When potential conflicts are called to a trial court's attention at the outset of a criminal case, the court's administrative interests will be strongly served by the disqualification of counsel for various reasons. Disqualification may forestall future litigation concerning counsel's potential conflict, without significantly interfering with the court's management of its docket or requiring the duplication of judicial resources. Not surprisingly, courts tend to exaggerate the significance of potential conflicts to justify the disqualification of defense counsel. See, e.g., *Wheat v. United States*, 108 S. Ct. 1692, 1699 (1988); *United States ex rel. Stewart*, 870 F.2d 854, 857-58 (2d Cir. 1989); *United States v. Cheshire*, 707 F. Supp. 235, 240-41 (M.D. La. 1989); *United States v. Sanders*, 688 F. Supp. 373, 373-74 (N.D. Ill. 1988).

When a defense lawyer moves on the eve of trial or mid-trial to withdraw because of a potential conflict, the substitution of a new attorney who would need time to prepare for trial would require the court to rearrange its docket and to repeat proceedings. In such cases, courts tend to regard potential conflicts as less significant in order to justify the denial of withdrawal motions. See, e.g., *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); *United States v. Suntar Roofing, Inc.*, 709 F. Supp. 1526, 1540-42 (D. Kan. 1989). See generally Lowenthal, *supra* note 8, at 42-44 (discussing timing of motions to withdraw).

Finally, a court's administrative interest is most seriously implicated when a defendant challenges his conviction based on counsel's alleged conflict of interest. Courts are least likely to take potential conflicts seriously in these cases, because doing so might require a retrial. See, e.g., *Burger v. Kemp*, 483 U.S. 776, 783-88 (1987); *Cerro v. United States*, 872 F.2d 780, 784-86 (7th Cir. 1989); *Mosier v. Murphy*, 790 F.2d 62, 64-66 (10th Cir.), cert. denied, 479 U.S. 988 (1986).

Note that the *Wheat* Court did not address the question whether a court's general interest in preserving limited judicial resources—as distinct from its interest in preserving judgments of conviction—would justify the disqualification of counsel when defense counsel has a serious potential for conflict. This question would be raised in a case in which a conflict could be avoided by severing the trial of codefendants or by granting other relief that would require the duplication of court time. See *infra* note 211 and accompanying text.

169. See *supra* note 15 and accompanying text.

free counsel could later successfully challenge his conviction on grounds occasioned by his attorney's conflict of interest. The Court suggested that the defendant's waiver, while foreclosing conflict-of-interest claims, might not foreclose claims based on a denial of effective representation.¹⁷⁰ The Court expressly declined to "pass[] judgment on" whether a waiver foreclosed these claims as well.¹⁷¹ However, because of the possibility that ineffective assistance claims would survive a waiver, the Court found that trial judges can appropriately override a defendant's waiver to assure "that their judgments [will] remain intact on appeal."¹⁷²

This was a wholly inadequate justification for the Court's decision: it exaggerates the trial judge's prospect of being reversed in spite of the defendant's knowing and voluntary waiver. Although it is not unusual for courts upholding the disqualification of counsel to express doubt about the effectiveness of the defendant's waiver,¹⁷³ the *Wheat* Court failed to find a single case in which a conviction was actually overturned because of attorney errors attributable to a conflict that had been knowingly and voluntarily waived.¹⁷⁴ This is scarcely surprising. To the extent that a defense attorney's errors are attributable to the conflict that the defendant waived, it seems obvious that the ineffective assistance claim is simply another way of characterizing the foreclosed conflict-of-interest claim. A waiver of conflict-free counsel would naturally be, at the same time, a waiver of challenges to attorney errors arising out of the conflict.¹⁷⁵ There is therefore no reason to disqualify an attorney in order to avoid such claims.

170. 108 S. Ct. at 1698.

171. *Id.*

172. *Id.*

173. See, e.g., *United States v. Cheshire*, 707 F. Supp. 235, 239-40 (M.D. La. 1989); *United States v. Sanders*, 690 F. Supp. 677 (N.D. Ill. 1988); see also *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978) (disqualification serves "independent interest of the trial judge to be free from future attacks over the adequacy of the waiver").

174. The Court cited several cases demonstrating the lower courts' "apparent willingness . . . to entertain" such challenges. 108 S. Ct. at 1698.

175. Appellate courts have held a defendant's waiver of conflict-of-interest claims to be ineffective only in cases in which the trial judge failed properly to advise the defendant or adequately to question the defendant to ensure that the waiver was knowing and voluntary. See, e.g., *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986); *United States v. Unger*, 700 F.2d 445, 451-54 (8th Cir.), cert. denied, 464 U.S. 934 (1983); *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir.), cert. denied, 444 U.S. 833 (1979).

On the other hand, when the trial judge fully questioned the defendant and subsequently determined that the defendant's waiver was knowing and voluntary, courts have rejected claims that defense counsel failed to provide adequate assistance because of a conflict of interest. See, e.g., *United States v. Roth*, 860 F.2d 1382, 1387-89 (7th Cir. 1988), cert. denied, 109 S. Ct. 2099 (1989); *United States v. Williams*, 809 F.2d 1072, 1085 (5th Cir.), cert. denied, 108 S. Ct. 228, 259, 506 (1987); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); see also *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978) (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)). There is thus little realistic possibility of reversal on account of errors attrib-

Assuming the Court is correct that federal law is uncertain as to the scope of a waiver of conflict-of-interest claims, it is hard to understand why the Court declined to resolve this uncertainty, and yet authorized the disqualification of defense attorneys in order to protect judgments of conviction from challenges which might be unavailing as a matter of law. The Supreme Court, unlike other courts that rely on this rationale,¹⁷⁶ was in a position to give a definitive answer to the open question. The Court could have confirmed the obvious: that knowing and voluntary waivers of conflict-of-interest claims foreclose ineffective assistance of counsel claims based on attorney errors attributable to defense counsel's conflicts of interest. Announcing this rule would have promoted precisely the same interest that the Court purported to serve by authorizing the disqualification of defense lawyers: the interest in preserving judgments of conviction. However, it would have done so in a way that preserved rather than derogated the defendant's interest in choice of counsel.

2. *Preserving the Ethical Standards of the Legal Profession.* — The *Wheat* Court found that, when defense counsel has a conflict of interest, the defendant's interest in counsel of choice may be outweighed by an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession."¹⁷⁷ This determination is questionable in three respects: First, it authorizes disqualification even when the standards permit representation of conflicting interests. Second, it fails to recognize that in some cases the interests promoted by the conflict-of-interest rules are not implicated or are not particularly compelling. Finally, it ignores the courts' authority to interpret the conflict-of-interest rules to determine whether a lawyer's representation of potentially conflicting interests is in fact a violation.

To begin with, the Court presupposed that whenever defense counsel has an actual conflict, the representation is unethical so that the disqualification of counsel is justified by the interest in promoting the ethical standards of the legal profession.¹⁷⁸ To the contrary, a client generally may consent to conflicts which will not impair the representa-

utable to defense counsel's conflict as long as the waiver proceedings are conducted carefully.

Several courts have suggested that if the defendant's waiver of potential conflicts is not sufficiently broad, the defendant's waiver may not foreclose all subsequent claims based on errors attributable to an actual conflict that emerged at trial. See, e.g., *United States v. Fahey*, 769 F.2d 829, 835 (1st Cir. 1985). This concern may easily be addressed by requiring the defendant to make a broad waiver of all claims relating to defense counsel's potential or actual conflict. Cf. *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975) (defendant's waiver of right to counsel and decision to represent himself forecloses later claims that he was denied effective representation).

176. See cases cited *supra* note 173.

177. 108 S. Ct. at 1697.

178. See *id.* at 1698.

tion.¹⁷⁹ *Wheat* is an example of a case in which defense counsel's representation of several clients with their informed consent would not contravene the relevant standards governing conflicts of interest.¹⁸⁰ At best, a trial judge would be justified in overriding a defendant's waiver, in order to promote the ethical conduct of trials, when the attorney has an actual conflict to which consent may not be given under the prevailing professional norms.

Moreover, the *Wheat* Court failed to consider whether the professional standards, insofar as they *do* proscribe the representation of conflicting interests, have a sufficiently compelling justification to overcome a defendant's constitutionally protected interest in being represented by the counsel of his choice. The Court's reference to the "ethical standards of the profession" suggests that it considered such an inquiry unnecessary because the professional standards embody immutable principles of right and wrong. Yet the professional standards are not a moral code. They may protect interests that are not especially compelling, or, while serving important interests, may not be closely tailored to those interests. In considering constitutional challenges to the judicial enforcement of professional standards, the Court has therefore been required to scrutinize those standards to determine whether they serve sufficiently compelling interests to outweigh interests of constitutional magnitude asserted by an individual. On occasion, the Court has found that the professional standards do not withstand such scrutiny.¹⁸¹

The rules governing conflicts of interest might not stand up to this scrutiny, either. It has been argued, for example, that the rules prohibiting the representation of interests adverse to those of a former client generally do not serve a legitimate purpose.¹⁸² The rules are especially susceptible to attack in those cases in which the rule's underlying interests are not clearly implicated.¹⁸³

179. See *supra* notes 61-63 and accompanying text.

180. See *supra* notes 91-95 and accompanying text.

181. See, e.g., *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1921-24 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-44, 647-49 (1985); *Bates v. State Bar*, 433 U.S. 350, 363-72 (1977).

182. See *Goldberg*, *supra* note 77, at 259-86.

183. *United States v. Cheshire*, 707 F. Supp. 235 (M.D. La. 1989), is a good illustration of a case in which the district court granted the government's disqualification motion even though the justifications underlying the prevailing conflict-of-interest standards were not strongly served. In *Cheshire* two defendants were charged with making pay-offs to public housing officials in order to obtain business with the Baton Rouge Housing Authority. *Id.* at 237. The district judge disqualified the first defendant's lawyer, Marabella, because he had previously represented the government's key witness. *Id.* at 240. In addition, the judge disqualified Fournet, counsel for the second defendant, because she sublet office space from Marabella and was associated in practice with him. *Id.* at 240-41. The district judge accepted that, even though the two lawyers' names appeared together on a letterhead, they maintained independent practices, with separate files, clients, bank accounts, secretaries, and office staff. *Id.* at 237-38. More-

In *Wheat*, the Court assumed that the standards governing conflicts of interest were of sufficient weight to overcome a criminal defendant's constitutionally-recognized interest in choosing counsel, without considering the justifications for those standards. This is particularly anomalous given that in civil cases, in which the client does not have a constitutionally protected interest,¹⁸⁴ courts often have regarded disqualification as an inappropriate remedy for conflicts of interest which violate ethical standards but do not taint the trial process.¹⁸⁵ If the interests promoted by the ethical standards are not weighty enough to

over, Fournet had never done any work on behalf of the government witness and had no knowledge of Marabella's work on the witness's behalf. *Id.* at 238. Nevertheless, the court concluded that, because the lawyers held themselves out to the public as a law firm, Fournet's involvement in the case would be forbidden by the ABA Rule providing that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [the rules governing conflicts of interest]." *Id.* at 240-41 (quoting Model Rules of Professional Conduct Rule 1.10(a) (1983)).

The rule of imputed disqualification on which the district judge relied in *Cheshire* embodies an irrebuttable presumption that confidences are shared throughout a law firm. It is thought that if an attorney such as Marabella must be disqualified because of a conflict of interest, then all the lawyers in his firm must also be disqualified to prevent him from leaking confidential information that may be used against his former client. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931) ("The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking."). If, as in *Cheshire*, the trial court is apparently convinced that the conflicted lawyer has not imparted and would not impart confidential information to a second lawyer, there is no genuine need to disqualify the second lawyer. Because application of the irrebuttable presumption has the effect of denying clients their choice of counsel, commentators have criticized its application, and courts in civil cases have been increasingly receptive to an argument that, because there has been and will be no sharing of confidences, disqualification is unnecessary. See, e.g., *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1499 (11th Cir. 1989); *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1580 (Fed. Cir. 1984); *General Elec. Co. v. Industra Products, Inc.*, 683 F. Supp. 1254, 1258 (N.D. Ind. 1988); Note, *The Second Circuit and Attorney Disqualification—Silver Chrysler Steers in a New Direction*, 44 *Fordham L. Rev.* 130, 151-52 (1975); *Developments in the Law*, *supra* note 7, at 1319-20, 1356; Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 *U. Pa. L. Rev.* 677, 679-80, 715 (1980).

In a criminal case, in which the client's interest in his choice of counsel is of constitutional dimension, the district court should be particularly hesitant to apply the rule of imputed disqualification unless there is reason to believe that disqualification is necessary to promote the underlying purposes of the ethical rule. Cf. *United States v. Washington*, 797 F.2d 1461, 1466-67 (9th Cir. 1986) (confidential information held by one lawyer is not necessarily attributed to independent counsel retained to represent defendant jointly, as it would be attributed to member of same law firm).

184. See, e.g., *United States v. Cunningham*, 672 F.2d at 1071 (justifications for disqualifying counsel are weaker in a civil case, since the court is "not concerned with any factor of constitutional dimension").

185. See, e.g., *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677-78 (2d Cir. 1976). See generally Note, *The Advocate-Witness Rule, Let's Call It the Way We See It*, 52 *Alb. L. Rev.* 531 (1988) (advocating flexible balancing approach for application of advocate-witness rule).

justify disqualifying civil practitioners who have potential conflicts of interest, it is hard to see why precisely the same interests should conclusively be presumed weighty enough to justify disqualifying criminal defense attorneys.

Finally, the *Wheat* Court seemed to regard the conflict-of-interest standards as immutable, so that a trial judge would have only two alternatives when defense counsel's representation of conflicting interests would seem to pose a problem: either disqualify defense counsel or condone a violation of the professional standards. What the Court overlooked is that the standards invoked in disqualification proceedings are in fact court-made rules which can be revised or interpreted to accommodate the defendant's interest in choosing his counsel. Unlike the rules governing other professions, the rules governing attorneys are promulgated by the judiciary. Although they are usually drafted by the American Bar Association or by a state bar association, the professional standards are generally adopted and given effect by the courts pursuant to their supervisory authority over attorneys who practice before them.¹⁸⁶ Thus, the courts themselves define the circumstances in which the representation of conflicting interests is improper. In the context of judicial proceedings, courts may exercise broad discretion to adopt rules interstitially to resolve problems not addressed by the professional standards,¹⁸⁷ to decline to apply the professional standards,¹⁸⁸ or, most importantly, to interpret those standards.¹⁸⁹ In civil cases, for example, courts often construe the conflict-of-interest rules narrowly to accommodate a litigant's interest in choice and continuity of counsel.¹⁹⁰

Because the standards that apply to criminal defense lawyers are adopted and interpreted by the judiciary, the courts are not faced with an exclusive choice between disqualifying counsel or condoning unethical conduct. Courts may instead interpret the ethical rules consistently with the criminal defendant's constitutional right to the counsel of his choice.¹⁹¹ If the *Wheat* Court had called for greater deference to a de-

186. See Green, *Doe v. Grievance Committee*: On the Interpretation of Ethical Rules, 55 Brooklyn L. Rev. 485, 530-34 (1989). This is true in California, where *Wheat* stood trial. See California Rules of Professional Conduct Rule 1-100 (1975) ("These rules . . . shall become effective upon approval by the Supreme Court of California.").

187. See *supra* note 78.

188. See *supra* note 185 and accompanying text.

189. It is not unusual for courts to interpret ethical rules narrowly—applying them only insofar as their underlying purposes are served—when they conflict with constitutionally protected interests, such as the interest in free speech. See, e.g., *Markfield v. Association of the Bar of New York*, 49 A.D.2d 516, 517, 370 N.Y.S.2d 82, 85 (App. Div.), appeal dismissed, 37 N.Y.2d 794, 375 N.Y.S.2d 106 (1975) (disciplinary rule regulating extrajudicial remarks by lawyers should not apply unless the lawyer's remarks pose "a clear and present danger to the administration of justice").

190. See, e.g., *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1293-95 (2d Cir. 1975); *S & S Hotel v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987).

191. The reinterpretation of the rules governing client perjury which followed the

fendant's choice of counsel, courts subsequently could have interpreted the conflict-of-interest rules narrowly in criminal cases, just as they now do in civil cases, in order to accommodate that choice.¹⁹² A representation that might now be thought to embody an impermissible conflict of interest would no longer be deemed unethical. As a result, a more stringent limit on the ability of trial judges to disqualify defense lawyers would not necessarily have derogated the prevailing ethical rules.

3. *Promoting the Fairness of Criminal Proceedings.* — While the third independent judicial interest identified in *Wheat*—the interest in ensuring “that legal proceedings appear fair to all who observe them”¹⁹³—is unquestionably a legitimate interest, it is not so clearly implicated in conflict-of-interest cases as to justify the disqualification of counsel. To be sure, the public acceptability of verdicts of guilty in criminal cases depends in large part on a perception that criminal trials are fair.¹⁹⁴

Supreme Court's decision in *Nix v. Whiteside*, 475 U.S. 157 (1986), illustrates how the ethical rules may expand or contract depending on how courts interpret related constitutional provisions. Prior to that decision, it was generally believed that a criminal defense attorney was ethically barred from disclosing to the trial court that his client had committed perjury. See, e.g., ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953). Some also believed that, when a defense attorney knew of his client's intention to commit perjury but was unable to withdraw from the representation, it was proper for the attorney to call his client as a witness to testify in narrative form. See, e.g., Standards for Criminal Justice § 4-7.7(c) (2d ed. 1980) (recording proposed official draft withdrawn prior to submission of charter to ABA House of Delegates). After the Court made clear in *Whiteside* that a criminal defendant had no right to testify falsely and that counsel's disclosure of perjurious testimony was not a denial of the sixth amendment right to effective assistance of counsel, 475 U.S. at 173-75, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion which interpreted the ethical rules more broadly to forbid the elicitation of a false narrative and, in some cases, to require disclosure that the defendant's statements were false. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

192. For example, courts could simply interpret or amend the professional standards to provide that the representation of conflicting interests is permitted in a criminal case with the informed consent of the defendants. At the very least, courts could interpret the standards consistently in criminal and in civil cases, in contrast to the current tendency to disqualify criminal defense attorneys in situations in which civil lawyers would not be thought to have an impermissible conflict. See *supra* notes 83-84 and accompanying text.

193. *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988).

194. The expression of this concern followed an extended explanation of the importance of counsel to the fairness of criminal proceedings. 108 S. Ct. at 1696-97. In the Court's view, representation by an attorney with a conflict of interest would undermine the apparent fairness of a criminal trial because of the possibility that the defendant was receiving inadequate legal assistance.

In a recent article Professor Stuntz proposes that the “more persuasive explanation” for the *Wheat* decision is that it is designed, in effect, to ensure that the proceedings are fair to the *prosecution*. Stuntz, *supra* note 3, at 798-801. Professor Stuntz explains that co-conspirators often decide as a group to refuse to cooperate with the government's investigation and that, to promote this venture, they may retain one lawyer to represent all the members of the conspiracy. He views this as an improper reason for joint representation and suggests that the *Wheat* Court called for deference to a trial judge's decision to disqualify defense counsel because a trial judge is best situated to

But it is doubtful that a defendant's representation by an attorney with a conflict seriously undermines the appearance of fairness when the defendant has not only consented to the conflict but also insisted on the attorney's representation.

The public's perception of whether or not a proceeding is fair does not necessarily turn exclusively on whether, in the abstract, the trial procedures are likely to result in a reliable outcome. A proceeding is just as likely to be deemed fair if the defendant gets the process that he insists on, even if that process is generally not considered to be in the best interests of a criminal accused.¹⁹⁵ Moreover, refusing to allow the defendant to choose his attorney because of a defect which may strike many as technical may be perceived by the public as unfair.¹⁹⁶

determine whether the defendants' motive is to obstruct the prosecution. *Id.* at 799-800.

There are several problems with this reading of *Wheat*. First, there is nothing in the case to suggest that by retaining attorney Iredale the codefendants sought to promote an agreement not to cooperate with the government. To the contrary, the facts of *Wheat* strongly suggest that Wheat's intent was simply to obtain the services of a skilled attorney. For example, Wheat did not retain Iredale until after Iredale's other two clients had worked out plea agreements with the government. 108 S. Ct. at 1694-95. At that point, it was too late for Bravo and Gomez-Barajas to benefit from an agreement with Wheat to obstruct the prosecution. The likelihood of such an agreement, as well as the need for one, was further undercut by the fact that Wheat and Bravo had never even heard of each other before they were arrested. See 108 S. Ct. at 1703 (Marshall, J., dissenting).

Second, there is nothing in the case to suggest that the district judge *believed* that by retaining Iredale, Wheat was seeking to facilitate an agreement to obstruct the prosecution. As quoted by the *Wheat* Court, the trial judge simply found that there was "an irreconcilable conflict of interest" which the judge did not think could be waived. 108 S. Ct. at 1696.

Third, there is nothing in the *Wheat* decision to suggest that the Court itself believed either that Iredale's clients were seeking to obstruct the prosecution or that it considered it appropriate to disqualify an attorney in order to protect against this possibility.

Finally, it is probably not appropriate for a court to disqualify an attorney simply to facilitate the prosecution's strategy of "divide and conquer." A decision by codefendants to stand trial collectively rather than to cooperate with the government, while making the investigation or prosecution of a criminal conspiracy more difficult, is not a crime and might reasonably be considered a legitimate defense. See Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. Rev. 1, 17-20, 52-79 (1979). But see Geer, *supra* note 5, at 156; Lowenthal, *supra* note 7, at 966-67. There is therefore no reason why a trial court should attempt to undermine the defendants' decision by disqualifying counsel, particularly since the disqualification of counsel would not necessarily be effective: codefendants can present a united front even with separate counsel.

195. For example, in *North Carolina v. Alford*, 400 U.S. 25, 38-39 (1970), the Court approved a procedure under which a criminal defendant, while asserting his innocence, could be convicted based on his entry of a plea of guilty together with the prosecution's uncontested proffer of evidence in support of the allegations.

196. See *United States v. Washington*, 797 F.2d 1461, 1466 (9th Cir. 1986). The spectre of public disillusionment with the judiciary has also concerned courts in civil cases. See, e.g., *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976);

The judiciary's concern for the appearance of fairness rings particularly hollow when one contrasts the holding in *Wheat* with the holding in *Cuyler v. Sullivan*.¹⁹⁷ Suppose, for example, that a defendant's attorney had an actual conflict of interest of which the defendant was unaware; thus, the defendant did not consent to the conflicted representation. Notwithstanding the apparent unfairness of the proceeding, that defendant would not be entitled to a new trial if he could not also show that the conflict "adversely affected his lawyer's performance."¹⁹⁸ Unfair or not, the conviction would be upheld out of deference to interests, such as the interest in preserving judgments, that outweigh the interest in preserving the appearance that criminal trials are fair.¹⁹⁹ In contrast, although the defendant strongly insisted upon a lawyer who had a potential conflict after receiving advice from an independent attorney and over the prosecutor's objection, the appearance of fairness was deemed compelling enough in *Wheat* to warrant overriding the defendant's waiver. Obviously, the appearance of unfairness is much greater in the first case than in the second. If nothing else, these results show that, in the pantheon of judicially protected interests, the institutional interest in preserving judgments overshadows the interest in preserving the appearance of fair judicial proceedings, while the defendant's interest in his choice of counsel, although recognized by the sixth amendment, is the least significant of all.

III. A PROPOSED FRAMEWORK FOR DECIDING DISQUALIFICATION MOTIONS

A. *The Trial Judge's Responsibility After Wheat*

The *Wheat* Court established the trial judge's broad discretion to issue rulings in an area of enormous importance to criminal defendants and to criminal trials in general, yet gave virtually no guidance to trial

Trinity Ambulance Serv., Inc. v. G & L Ambulance Servs., Inc., 578 F. Supp. 1280, 1282-83 & n.6 (D. Conn. 1984).

The apparent unfairness of disqualifying defense counsel is exacerbated in most cases by the fact that the court's ruling is made at the request of the prosecution, which may obtain a tactical benefit from disqualifying defense counsel. See Green, *supra* note 34, at 337.

197. 446 U.S. 335 (1980).

198. *Id.* at 350.

199. The administrative interest in conserving judicial and prosecutorial resources may take precedence over the institutional interest in promoting ethical conduct. In *United States v. Hastings*, 660 F.2d 301, 303 (7th Cir. 1981), *rev'd*, 461 U.S. 499 (1983), the Seventh Circuit reversed the defendant's conviction because the prosecutor's closing argument violated the defendant's fifth amendment rights by indirectly referring to the defendant's failure to take the stand. The Court of Appeals action was apparently intended to discipline the prosecutor for ignoring frequent judicial warnings against commenting on a defendant's failure to rebut the government's case. The Supreme Court concluded, however, that, because the prosecutor's misconduct was harmless, it was improper to overturn the defendant's conviction. *United States v. Hastings*, 461 U.S. 499, 510-12 (1983).

judges concerning the exercise of that discretion. The Court noted simply that, under the facts of *Wheat*, the trial judge could have opted to disqualify defense attorney Iredale or not "with equal justification."²⁰⁰ As a consequence, *Wheat* leaves open an important question: How should a court decide whether to disqualify a defense lawyer who is likely to have a conflict of interest?

It can be expected that *Wheat* will have a centrifugal effect, causing many trial judges to exercise their discretion at the margins. At one extreme, a significant number of judges will almost invariably refuse to disqualify an attorney when the defendant makes a valid waiver. At the other extreme, many trial judges will almost automatically disqualify an attorney who has a serious potential for conflict, notwithstanding the defendant's proffered waiver. While inconsistent with the traditional notion that a proper exercise of judicial discretion entails the weighing of all relevant considerations,²⁰¹ each of these approaches has both an administrative and a philosophical appeal.

Under the first approach, the crucial question is whether the defendant has made a knowing and voluntary waiver of potential conflict-of-interest claims. If the waiver is valid, the trial judge will respect the defendant's choice of counsel.²⁰² This approach narrows the scope of

200. 108 S. Ct. at 1700. The Court could have provided greater guidance to federal if not state courts pursuant to its supervisory authority. See, e.g., *McNabb v. United States*, 318 U.S. 332, 340-41 (1943); see generally Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1435-55 (1984) (describing Supreme Court's exercise of supervisory power over federal courts in wide variety of situations in order to guide and control administration of criminal justice).

201. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

202. See, e.g., *United States v. Alamo*, 872 F.2d 202, 204 (7th Cir. 1989). The defendants in *Alamo* argued on appeal that the district judge erred in allowing them to be represented by an attorney with a potential conflict of interest. *Id.* at 204-05. They further contended that their waivers were not knowing and voluntary, *id.* at 205, and that the district judge "wrongly believed . . . that she had to accede to the wishes of the defendant without the exercise of any discretion on her part," *id.* at 206.

The Court of Appeals appeared to accept the defendant's novel legal premise: that a defendant may be entitled to a new trial when a district judge abuses the discretion recognized in *Wheat* by granting a defendant's request to waive potential conflicts in order to be represented by counsel of choice. *Id.* However, the court was unconvinced that the district judge had in fact refused to exercise, or had abused, her discretion. *Id.* at 206-07.

A trial judge ruling on a disqualification motion may thus face the prospect of being "whipsawed" in a new way. A defendant who knowingly and voluntarily waives conflict-of-interest claims may subsequently challenge the district court's ruling whether it grants or denies the government's motion. This makes little sense. A defendant whose waiver is valid has no constitutional right to have counsel disqualified over his own objection. While the government might reasonably argue that its disqualification motion should not be rejected summarily, and that the trial judge must engage in a genuine exercise of discretion before accepting the defendant's waiver, the accused should not have the right to raise this claim.

the court's inquiry by eliminating the need to determine the likelihood that defense counsel will in fact have a conflict of interest.

In addition to having the advantage of administrative ease, deference to a defendant's waiver appeals to the dwindling number of judges who believe that the principal interests at stake when a defense attorney has a real or potential conflict of interest are those of the defendant, not the judiciary. The defendant has an interest in receiving the effective assistance of counsel, in receiving the assistance of his attorney of choice, and in deciding for himself whether to undertake the risks attendant to counsel's potential conflict. These interests are obviously undermined by the defense counsel's disqualification, which may deprive the defendant of the possible strategic advantages of being represented by a particular attorney and may derogate his interest in deciding for himself whether to continue with an attorney who may have a conflict or to seek different representation. Courts that consider the defendant's interests to be paramount would therefore hesitate to intrude on the defendant's decision to consent to a conflict.

To a greater extent, however, trial judges can be expected to rule at the outer limit of their discretion by disqualifying virtually all lawyers who have a serious potential for conflict. This approach also has some administrative appeal. It enables a court, while purporting to be exercising its discretion, to avoid serious consideration of such matters as the likely effect of the conflict on counsel's representation and the relative importance of the particular defense attorney to the particular defendant. In contrast to a more nuanced analysis, the trial judge adopting this approach could engage in a comparatively limited inquiry before deciding whether to disqualify defense counsel.

The primary appeal of this approach, however, is philosophical rather than administrative. For many judges, the institutional interests in rendering just verdicts and in preserving public confidence in the integrity of the legal system are more important than the interests of the defendant. To be sure, these institutional interests are no less abstract than those of the accused. They reflect little more than a desire to receive the public's respect for the manner in which trials are conducted. From a disinterested perspective, it is hard to see why the judiciary's desire to receive respect from the public is any more important than the defendant's desire to receive the court's respect for his right to make lawful decisions regarding the conduct of his representation. Nevertheless, although they have no personal stake in the outcome of the case, trial judges will understandably identify more closely with the institutional interests of the judiciary than with the defendant's interests. Moreover, many trial judges will simply be offended by defense lawyers who seek to represent potentially conflicting interests, because they will perceive these lawyers to be mercenary or unethical.

Trial courts may also be encouraged to adopt this approach by a misreading of *Wheat*. These courts will view *Wheat* as the paradigm of a

disqualification ruling, rather than as an example of a ruling that is at the very limit of the trial judge's discretion, if not, as four Justices reasonably believed, beyond the pale. Thus, some trial courts will misuse *Wheat* as a model, reasoning that if disqualification was warranted in *Wheat*, a fortiori disqualification is warranted under the facts before them.²⁰³

Although the federal courts of appeals may simply reinforce the broad discretion accorded by *Wheat*,²⁰⁴ they may instead establish standards for ruling on disqualification motions, just as they have set standards for assessing waivers of conflicts.²⁰⁵ In the absence of guidance from appellate courts, trial judges generally can be expected to take an expansive view of their role when defense counsel has a potential conflict of interest.²⁰⁶

B. *A Proposed Framework for the Trial Court's Exercise of Discretion*

Courts in criminal cases should respond to disqualification motions with a nuanced view of the adversary process—a view which gives

203. See, e.g., *United States v. Sanders*, 690 F. Supp. 677, 679 n.1 (N.D. Ill. 1988).

204. A trial judge's decision to disqualify defense counsel at trial will be accorded extraordinary deference by a reviewing court for four reasons. First, an appellate court must accept the underlying factual determinations on which the trial judge's decision is premised, since the trial judge is in the best position to ascertain the defendant's ability to understand the risks created by a potential conflict, to perceive improper influences that may affect the defendant's decision, and to determine other relevant facts. See *Wheat*, 108 S. Ct. at 1704 n.* (Stevens, J., dissenting).

Second, a reviewing court must give considerable deference to a trial judge's conclusion, based on the underlying facts, that defense counsel is likely to have a conflict of interest at trial. Precisely because this determination is highly speculative, a court of appeals will be unlikely to set aside a district judge's determination. Cf. *Simkin v. United States*, 715 F.2d 34, 38 (2d Cir. 1983) (given highly speculative nature of determination of continued coercive effect of civil contempt sanction, trial judge has "virtually unreviewable discretion" in this area).

Third, the determination of whether the disqualification is necessary in order to avert a likely conflict will be relegated, under the *Wheat* decision, "primarily to the informed judgment of the trial court," 108 S. Ct. at 1700, and overturned only when it is found that the trial court "exceeded the broad latitude which must be accorded it." *Id.* at 1699.

Finally, a defendant can obtain review of a disqualification order only after conviction. See *Flanagan v. United States*, 465 U.S. 259, 263 (1984). Appellate courts may be extremely reluctant to reverse a conviction in a case in which a defendant received a fair trial with the representation of a competent attorney, since the trial court's refusal to honor defendant's preference for another lawyer probably will not have affected the outcome of the trial. But see, e.g., *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 443 (1985) (Stevens, J., dissenting) ("[I]n a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal . . ."). A court might be less reluctant to reverse an order disqualifying defense counsel from representing a witness in the grand jury. See, e.g., *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988).

205. See *supra* notes 132-133 and accompanying text.

206. See *The Supreme Court*, 1987 Term, *supra* note 3, at 184.

weight to a variety of interrelated considerations, including the limited reach of the prevailing ethical standards; the likelihood that, in a given case, an attorney will abide by those standards; the extent to which a judicial inquiry may undermine a defendant's relationship with counsel; and the relative significance of the countervailing interests of the defendant and of the judiciary. In light of these considerations, a decision whether to disqualify counsel is necessarily a matter of some complexity.

This Article proposes three general guidelines for ruling on disqualification motions. First, courts should not undertake unnecessary or unduly intrusive inquiries into defense counsel's potential conflict. In determining the likelihood and dimensions of a potential conflict, courts should give weight to defense counsel's own assessment. Second, courts should seek procedural alternatives to disqualification. Finally, when the trial court concludes that a conflict is likely to occur, it should decide whether to disqualify defense counsel based on an ad hoc balancing of the countervailing interests of the accused and the judiciary.

1. *Inquiries into Potential Conflicts.* — At the threshold, a court should recognize that any inquiry into counsel's potential conflict may damage the defendant's relationship with his present or future attorney.²⁰⁷ For this reason, a trial judge should be circumspect about inquiring into potential conflicts in cases in which the possibility of a conflict appears remote. To the extent that judicial inquiries must be undertaken, they should be conducted in a manner that, as far as possible, reduces any injury to the defendant and to his relationship with counsel. The trial court must walk a fine line, however, since it must probe deeply enough to make an informed evaluation of the seriousness of defense counsel's potential conflict. At the very least, the court should make clear that its inquiry is not a reflection on defense counsel, his integrity, or his ability. It should also press the prosecution for disclosures necessary to its evaluation.²⁰⁸ Insofar as factual and strategic disclosures are elicited from the defense, they should be received ex parte.

In determining whether defense counsel is likely to have a conflict, the trial judge should generally give some deference to defense counsel's own assessment. Defense counsel is almost invariably better situated than a trial judge to predict whether a conflict of interest will arise at trial.²⁰⁹ When it is clear that defense counsel has made such a pre-

207. See *supra* notes 138–141 and accompanying text.

208. For example, when the government plans to call defense counsel's former client as a witness, the government should generally be required to disclose the substance of the witness's testimony and make early production of impeachment material to enable the trial court to assess both the extent to which defense counsel's cross-examination will be impaired and the extent to which a failure to cross-examine vigorously will hamper the defense. See Green, *supra* note 34, at 355.

209. Insofar as the trial judge is able fairly to elicit additional facts that are not

diction, based on a full consideration of the information available to him, the court should hesitate to second-guess counsel. This is especially true where the assessment is made by an independent attorney, as opposed to one who has a pecuniary interest in being retained.

2. *Procedural Alternatives*. — In light of the importance of the defendant's interest in counsel of choice, the "disqualification of defense counsel should be a measure of last resort."²¹⁰ Thus, a judge who finds that defense counsel is likely to have a conflict at trial should begin by exploring procedural alternatives to disqualification. These include not only alternative means of eliminating or reducing the risk that defense counsel will have a conflict of interest, but also means of reducing the threat to legitimate judicial interests. The decision whether to disqualify counsel should be made only if there is still a serious potential conflict even after reasonable procedural alternatives have been considered and employed.

A trial judge may have a variety of alternatives to disqualification. For example, the seriousness of a potential conflict when defense counsel represents joint defendants may be reduced by severing their trial.²¹¹ Similarly, where defense counsel has a potential conflict because of the possible need for his testimony at trial, the trial judge may make a pretrial determination concerning the admissibility of the testimony. If the testimony would be admissible, the trial judge could determine whether the use of stipulations would obviate the need for defense counsel's testimony.²¹²

In an opinion for the Seventh Circuit in *United States v. Jeffers*,²¹³ then-Circuit Judge John Paul Stevens endorsed other procedural options that "would have provided adequate protection to the interests at stake."²¹⁴ In *Jeffers*, defense counsel sought to withdraw from representing a defendant when, in the middle of trial, the government indicated that it would call a witness who had previously been represented

within defense counsel's possession, such as information known only to the prosecution, the judge should do so. See *supra* note 111.

210. *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986); accord, *In re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988). See generally Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173, 1208-12 (1988) (overview of constitutional cases in which the Supreme Court has adopted a "least intrusive alternative" analysis).

211. The Supreme Court has recognized that when codefendants are jointly represented by a single attorney, separate trials will reduce the risk of a conflict of interest. See *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980).

212. See, e.g., *United States v. Diozzi*, 807 F.2d 10, 13 (1st Cir. 1986); *United States v. Cortelleso*, 663 F.2d 361, 363-64 (1st Cir. 1981); see also Green, *supra* note 34, at 356 (prosecutors have ethical obligation to enter into stipulations that would avert need to disqualify defense counsel except where legitimate government interests would be compromised).

213. 520 F.2d 1256 (7th Cir. 1975).

214. *Id.* at 1265.

by defense counsel's law firm. The trial judge rejected defense counsel's assertion that, because his law firm had learned confidential information in the course of representing the witness, defense counsel had a conflict of interest which necessarily precluded the possibility of an effective cross-examination. As an alternative to permitting counsel's withdrawal, the trial judge gave defense counsel an opportunity to make *in camera* disclosure to the court of any confidential information that had been received from the government witness. The court could then determine whether the information would ordinarily be used for cross-examination; if the information was not useful for cross-examination, then defense counsel's possession of the information probably would not limit counsel's ability to cross-examine the witness. In addition, to the extent that information in defense counsel's possession might be useful for cross-examination, the court could determine whether that information was in fact confidential and whether any claim of confidentiality had been waived. The court could also consult the witness to determine whether he would now waive any privilege with respect to the information. If the court determined that the information was not in fact confidential or that confidentiality was waived, then the defense attorney could cross-examine the witness without having to hold back in order to preserve the witness's confidences.²¹⁵

A trial judge might also be able to minimize the extent to which the judiciary would lose the public's respect in the event that an actual conflict did materialize at trial. Among other things, if the judge decided to accept the defendant's waiver, the judge could write an opinion explaining his decision. A decision which explained the importance of allowing the defendant his choice of counsel might in fact promote public respect for the judiciary, even if, as anticipated at the outset, defense counsel did ultimately have a conflict of interest. Moreover, to the extent that counsel's conduct of the trial did turn out to violate prevailing professional norms, the court would have the option of referring counsel to an appropriate disciplinary body as an alternative, and perhaps more effective, means of vindicating the public interest in ensuring that ethical standards are maintained.²¹⁶

215. The *Jeffers* court did not share the concern of other courts that defense counsel's proffer "would require the very disclosure [of confidences that] the [ethical] rule is intended to protect against," *Atasi Corp. v. Seagate Technology*, 847 F.2d 826, 830 (Fed. Cir. 1988), and that counsel's receipt of confidential communications from his former client should therefore be presumed, see, e.g., *United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir. 1980), cert. denied, 449 U.S. 899 (1980).

216. See *Armstrong v. McAlpin*, 625 F.2d 433, 443-44, 446 (2d Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1248 (2d Cir. 1979) (Mansfield, J., concurring); *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976). District judges can also conduct disciplinary proceedings to deal with possible attorney misconduct. See, e.g., *United States v. Cooper*, 872 F.2d 1, 2 (1st Cir. 1989).

3. *Balancing Countervailing Interests.* — A trial judge should not automatically disqualify defense counsel even if, after giving appropriate weight to defense counsel's representations, the judge remains convinced that defense counsel has a serious and irreducible potential for conflict.²¹⁷ In ruling on a disqualification motion, the court should fairly take into account the legitimate competing interests of the judiciary as an institution and of the defendant. This requires a judgment as to who should bear the risk that the court erred in predicting the likelihood that an actual conflict would occur. Deciding on whom to place the risk of error should depend in turn on (a) an assessment of the relative importance of the defendant's interest in being defended by the counsel of his choice and the judiciary's institutional interests, and (b) an assessment of the extent to which these interests would be impaired if counsel were or were not disqualified.

Although it would be difficult to make these judgments with mathematical rigor or precision, administrative difficulty does not warrant the rejection of such an approach in favor of one extreme or the other. Courts have traditionally engaged in a balancing of factors that are not easily quantifiable. A trial court should be sensitive to the manner in which the countervailing interests of the defendant and the judiciary are implicated in the particular case before it. When the defendant's interest in preserving his choice of counsel is compelling,²¹⁸ the likelihood that the conflict will seriously affect the quality of defense counsel's representation is small,²¹⁹ or the institutional interests of the judiciary are threatened to a less serious extent than in the usual case,²²⁰ the trial judge should be willing to require the judiciary, rather than the individual defendant, to bear the risk that an actual conflict will emerge.

The extent of the defendant's interest in preserving his choice of counsel may vary from case to case. In *Wheat*, for example, the defendant's interest in retaining Iredale was comparatively slight. Wheat did not have a long-term relationship with Iredale; the trial judge's unwillingness to allow the representation would not cost Wheat any additional money or delay the trial; Wheat would still be able to retain other counsel. In other cases, however, disqualification of defense counsel may result in the loss of an attorney who has a unique familiarity with the facts of the case or with whom the defendant had developed a long-term relationship of trust.²²¹ It might be difficult to duplicate this rela-

217. Even if the trial judge concludes that defense counsel does not have a serious potential for conflict, the judge would still be well advised to require the defendant to waive potential conflict-of-interest claims.

218. See, e.g., *United States v. Renda*, 669 F. Supp. 1544, 1549 (D. Kan. 1987).

219. See, e.g., *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), cert. denied, 109 S. Ct. 1637 (1989), discussed in Green, *supra* note 34, at 364 n.146.

220. See, e.g., *United States v. Washington*, 797 F.2d 1461, 1466 (9th Cir. 1986).

221. See, e.g., *United States v. Cunningham*, 672 F.2d 1064, 1070-71 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984).

tionship with a new attorney in the short time left before trial.²²²

The defendant's interest in retaining his chosen counsel may be compelling for a variety of other reasons as well. For example, the defendant might have to expend a considerable amount of money to retain a new lawyer who would have to carry out extensive pretrial preparation which had already been done by the original defense lawyer. Or, the defendant might have to suffer a substantial delay of the trial while a new attorney prepared for trial. Or, the effect of disqualification might be to deprive the defendant of any choice of counsel at all. For example, in a case like *Wood v. Georgia*,²²³ a defendant may be able to retain an attorney only if the attorney is paid by the defendant's employer; the disqualification of privately retained counsel will mean that the defendant must proceed with appointed counsel.²²⁴ In cases in which the defendant's interests are particularly weighty, it is less appropriate to require the defendant to bear the risk that the trial judge is incorrect in predicting that an actual conflict will emerge at trial.

The strength of the judicial interests may also vary from case to case. For example, the justifications for disqualification will be more compelling when codefendants with apparently divergent interests seek to share an attorney at a joint trial. Generally, in such a case the representation will violate the professional standards governing conflicts of interest and, more importantly, raise doubts about the defense counsel's ability to provide competent representation, thus calling into question the fairness of the trial. The interest in promoting the apparent fairness of criminal proceedings may also be more compelling in a case in which the defendant's waiver, although constitutionally valid, appears nevertheless to be a product of extrinsic pressure or of the defendant's limited understanding of the dangers posed by counsel's potential conflict. Although the public will generally perceive a trial to be fair when the defendant's choice of counsel is upheld because the defendant will be receiving the process that he seeks,²²⁵ this is less likely to be true when the defendant is likely to have been influenced by more powerful codefendants to retain a particular attorney.²²⁶ Similarly, the public perception of fairness will suffer when the defendant seems too unsophisticated to grasp fully the significance of counsel's potential conflict or, as in cases involving multiple representation, when the

222. See, e.g., *Renda*, 669 F. Supp. at 1549.

223. 450 U.S. 261 (1981), discussed *supra* note 109.

224. Cf. Winick, *supra* note 150, at 810-11 (when trial court's ruling deprives defendant of opportunity to retain any private counsel, ruling should be scrutinized more strictly).

225. See *supra* notes 195-196 and accompanying text.

226. Cf. *United States v. Aiello*, 814 F.2d 109, 114 & n.2 (2d Cir. 1987) (reversing trial court's denial of habeas relief and requiring further inquiry into appellant's claims of ineffective counsel); *United States v. Padilla-Martinez*, 762 F.2d 942, 949 (11th Cir.) (affirming disqualification where attorney probably retained in interest of employer rather than defendants), cert. denied, 474 U.S. 952 (1985).

scope and impact of the potential conflict are difficult for anyone to predict.

In a given case, the judicial interests may be especially weak. Suppose that defense counsel's potential conflict is one to which the prevailing ethical standards allow a defendant to give consent.²²⁷ The judicial interest in preserving the ethical standards of the legal profession would not be undermined by upholding the defendant's choice of counsel. Similarly, the judicial interest in ensuring the fairness of criminal proceedings is not strongly implicated if counsel's potential conflict, although forbidden by the prevailing ethical norms, is unlikely to affect the outcome of the defendant's trial.²²⁸

C. Applying the Proposed Analysis

One recent case that might have been resolved differently under the analysis proposed above is *United States v. Sanders*,²²⁹ in which a federal district judge, relying heavily on *Wheat*, filed two published opinions granting the government's disqualification motion.

I. *The District Court's First Ruling.* — Sanders was charged with conspiracy, wire fraud, and false representation in violation of the Commodity Exchange Act. Lassar, one of Sanders's defense attorneys, had previously represented a charged coconspirator and codefendant, Dewey, during the grand jury investigation leading up to indictment. The government moved to disqualify Lassar, alleging that Dewey took flight after receiving notice of the indictment. The government stated that, in the event Dewey went to trial, it would call Lassar to testify regarding Dewey's receipt of notice of the indictment and his subsequent flight. This would create a conflict for Lassar, who could not

227. *Wheat* is such a case. See *supra* notes 88-95 and accompanying text.

228. For example, in *United States v. Micke*, 859 F.2d 473 (7th Cir. 1988), the defendant was charged with assisting two other individuals in the preparation of fraudulent tax returns. He retained as cocounsel an attorney named Gratz who had previously represented two government witnesses and who, according to the government, was himself a potential rebuttal witness. Upon agreement of the government, the trial judge permitted Gratz to sit at counsel table and lend assistance to trial counsel as long as Gratz did not question witnesses. *Id.* at 480. Following the completion of the government's direct case, the defendant decided to take the stand in his own defense. He sought the court's permission for Gratz to conduct the direct examination. The government objected, asserting that the expansion of Gratz's involvement at trial would violate the ethical rules. The trial judge agreed and forbade Gratz from questioning the defendant. *Id.*

Dissenting from the Seventh Circuit's decision to affirm Micke's conviction, Judge Fairchild pointed out that it was unlikely that Gratz would have been called to testify and that, even if he was, his testimony would relate solely to uncontested matters. *Id.* at 482-83 (Fairchild, J., dissenting). Under such circumstances, any violation of the ethical rules would have been purely technical, at worst, and would not have affected either Micke's interest in a fair trial or any governmental interests.

229. 688 F. Supp. 373 (N.D. Ill.), motion for reconsideration denied, 690 F. Supp. 677 (N.D. Ill. 1988). Another good example is *United States v. Micke*, 859 F.2d 473 (7th Cir. 1988), discussed *supra* note 228.

properly serve as both witness and advocate at the joint trial. In addition, the government said there was a possibility that, rather than stand trial, Dewey would plead guilty and agree to testify against Sanders. If that occurred, according to the government, Lassar might have a conflict between his duty to cross-examine Dewey vigorously and his duty to preserve Dewey's confidences. The district judge determined that, in the language of *Wheat*, there was "a serious potential for conflict" that warranted Lassar's disqualification.²³⁰

Under the approach proposed in this Article, however, the district judge would not have concluded so quickly that there was a serious potential for conflict arising out of the possibility that Lassar, Sanders's defense lawyer, would be called as a government witness to testify against Dewey, a codefendant. The trial judge should first have conducted an inquiry to ascertain whether there was an alternative to disqualification that would enable Sanders to preserve his choice of counsel while allowing the government access to relevant evidence. The defense itself proposed one alternative. The defense told the trial judge that Dewey would probably stipulate to the information known to Lassar and thereby obviate the need for Lassar's testimony.²³¹ Instead of rejecting the possibility of a stipulation as "speculative,"²³² the court should have pursued this possibility by eliciting from the government precisely what facts it expected Lassar's testimony to establish and then asking Dewey and his attorney whether they were willing to stipulate to those facts.²³³

As another alternative, the district judge should have considered the possibility of severing the trial of Dewey and Sanders in order to enable Lassar to testify at one trial while acting as an advocate at the other.²³⁴ Had it considered this option, the trial judge might well have found that the interest in judicial economy, which would be served by a single trial, would be outweighed by Sanders's interest in being represented by the counsel of his choice.²³⁵

Even if it found that there was no adequate alternative, the trial judge should not immediately have disqualified Lassar. The judge next should have considered whether Lassar's involvement as both advocate for Sanders and witness against Dewey at a joint trial of the codefendants would be an ethical violation, as well as the extent to which the dual role would affect the fairness of the criminal proceedings. It is not at all clear, for example, that under the Model Code of Professional Responsibility, which applied in this jurisdiction, Lassar's dual role would constitute an ethical violation. Disciplinary Rule 5-102 requires

230. *Sanders*, 688 F. Supp. at 374.

231. *Id.* at 373 n.1.

232. *Id.*

233. See *supra* note 212 and accompanying text.

234. See *supra* note 211 and accompanying text.

235. See *supra* note 171.

an attorney to withdraw from the representation when it becomes obvious either that he ought to testify on behalf of his own client or that he will be called to give testimony on behalf of another party that "is or may be prejudicial to his client."²³⁶ Nothing in the facts before the district court suggested that Lassar's testimony about Dewey's flight might have been prejudicial to his present client, Sanders.²³⁷ Thus, even if Lassar's dual role could have been characterized as a "conflict of interest," the institutional interests identified in *Wheat* would not have been implicated to a significant extent. Lassar did not have a serious potential conflict of interest that would have violated the prevailing norms of ethical conduct. Nor would it necessarily have jeopardized the fairness of the proceedings.²³⁸

The trial judge's decision to disqualify Lassar was also based in part on the possibility that, if Dewey decided to cooperate with the government, Lassar would be forced to cross-examine a former client. The trial judge had an available alternative to disqualification, however. He could simply have reserved judgment on the disqualification motion. At the point when the court issued its decision, the potential conflict arising out of Lassar's need to cross-examine his former client was contingent on an event which might never have occurred—namely, Dewey's decision to enter into a plea bargain rather than to stand trial. There was little need for the court to anticipate that contingency and to dis-

236. Model Code of Professional Responsibility DR 5-102 (1981).

237. The district judge found that "Lassar's potential testimony 'may be' prejudicial to Sanders" because "[t]he flight of one coconspirator 'may be' incriminating as to all conspirators," but did not seek a proffer from the government to permit a pretrial determination under the facts before it whether evidence of Dewey's alleged flight would be probative of Sanders's guilt. *Sanders*, 688 F. Supp. at 373. This was a flimsy ground for disqualification since, except in the most unusual circumstances, evidence of one defendant's flight, even if admissible to show consciousness of guilt on the part of the defendant who fled, could not be used to show consciousness of guilt on the part of others who did not assist in the flight. Indeed, evidence offered to show flight is often not even admissible against the defendant who allegedly fled to avoid prosecution, since the defendant's conduct may be insolubly ambiguous or may not be closely enough connected to the crime charged. See, e.g., *United States v. Beahm*, 664 F.2d 414, 419-20 (4th Cir. 1981). See generally Note, Rule 403 and the Admissibility of Evidence of Flight in Criminal Trials, 65 Va. L. Rev. 597 (1979).

238. Under the Model Rules of Professional Conduct, a similar conclusion might be reached, although for different reasons. Model Rule 3.7(a) provides:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

Model Rules of Professional Conduct Rule 3.7(a) (1983).

Lassar's testimony at a joint trial of Sanders and Dewey would not necessarily have violated this rule since the testimony might not have related to a contested issue and, even if it did, the disqualification of an attorney with whom he had a long-standing relationship might have worked "substantial hardship" on Sanders.

qualify the defense attorney while Dewey continued to await trial.²³⁹ Even if the court had been certain that Dewey would in fact testify against Sanders, the disqualification order might not have been necessary. Lassar asserted in opposition to disqualification that he possessed no confidential information that could be used to cross-examine Dewey.²⁴⁰ Instead of rejecting this claim out of hand, the trial judge should have conducted an inquiry like the one endorsed in *United States v. Jeffers*²⁴¹ to determine (a) whether Lassar was correct; if not, (b) whether any confidential information in Lassar's possession could be useful for cross-examination; and, if so, (c) whether Dewey would waive the confidentiality of the information.²⁴² In conducting this inquiry, the court should have given some weight to the defense attorney's own assessment, since Lassar was in the best position to decide whether any confidential information received from Dewey would be useful on cross-examination. Moreover, the court should have considered the extent to which any potential for conflict could be reduced or eliminated by allowing Lassar's cocounsel to cross-examine Dewey.²⁴³

After taking these steps, the trial judge might well have determined that there was no longer a serious potential for conflict. Moreover, even if a serious potential for conflict remained, the court should not have automatically disqualified the defense attorney. Instead, the court should have considered the special nature of Sanders's interest in preserving his choice of counsel. For example, Sanders's long-term relationship with Lassar might have made the attorney particularly qualified to wage a defense. At the same time, the court should have considered the weakness of its institutional interests: Sanders was a sophisticated white-collar defendant who was fully capable of understanding the limited risks posed by Lassar's potential conflict. After having an opportunity to discuss the matter with unconflicted attorneys, Sanders freely accepted those risks in order to keep Lassar on the defense team. Under these circumstances, it is doubtful that acceding to Sanders's choice of counsel would have made the trial appear unfair or have resulted in an ethical violation.

239. Cf. *In re Taylor*, 567 F.2d 1183, 1187 (2d Cir. 1977) (disqualification was premature because premised on contingent events which had not yet occurred); *In re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600, 608 (D.C. Cir. 1976) (same).

Nothing in *Sanders* suggests concern that the trial would be delayed in the event that Dewey entered into a plea bargain shortly before the trial was scheduled to begin.

240. 688 F. Supp. at 374.

241. 520 F.2d 1256 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976).

242. See *supra* notes 213-215 and accompanying text.

243. The district court rejected this possibility, stating, "[W]e are not sure that this will be quite the miracle cure that Lassar seems to think it will be." 688 F. Supp. at 374. The court implied that Lassar was too active a member of Sanders's defense team to trust him not to disclose Dewey's confidences to cocounsel. *Id.* By allowing cocounsel to cross-examine Dewey, Lassar could have preserved Dewey's confidences while allowing a vigorous cross-examination to be conducted. See *supra* note 183.

2. *The District Court's Second Ruling.* — Less than three weeks after the district court's initial disqualification decision, Dewey pleaded guilty.²⁴⁴ As a result, Lassar asked the court to reconsider its ruling, pointing out that he could no longer be called to testify against Dewey at a joint trial of the two defendants. Moreover, Lassar advised the court that Dewey now had agreed to waive his attorney-client privilege, so there would be no conflict arising out of the need to preserve Dewey's confidences. The court nevertheless rejected Lassar's request, discovering two new potential conflicts. First, the court found a potential conflict arising out of the government's possible need to call Lassar as a witness at Sanders's trial. According to the trial judge, there was a possibility that the government might call Lassar to testify about his conversations with Dewey either for the purpose of rebutting a charge that Dewey's testimony against Sanders was a recent fabrication or for the purpose of impeaching Dewey, its own witness.²⁴⁵ The court also found a potential conflict arising out of the defendant's possible need to call Lassar to impeach Dewey. In so doing, it rejected defendant's offer to forego the use of Lassar's testimony and to waive any claims arising out of this potential conflict.²⁴⁶

The district court made this ruling without conducting an adequate inquiry and analysis. The court found that disqualification was required by the mere possibility that Lassar would have to testify for either the government or the defense.²⁴⁷ Notably, under these circumstances, Lassar's withdrawal was not required by the Code of Professional Responsibility, since it was far from "obvious" that Lassar ought to testify on Sanders's behalf or was likely to testify against him.²⁴⁸ The

244. *United States v. Sanders*, 690 F. Supp. 677, 678 (N.D. Ill. 1988).

245. *Id.* at 678. It is questionable whether the government would have been entitled to impeach Dewey by introducing Lassar's testimony about Dewey's prior inconsistent statements. Although the government is ordinarily allowed to impeach its own witnesses through the introduction of inconsistent statements, see Fed. R. Evid. 607, 613(b), the government "may not call a witness it knows to be hostile for the *primary* purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule." *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985); see, e.g., *United States v. Crouch*, 731 F.2d 621, 622-24 (9th Cir. 1984), cert. denied, 469 U.S. 1105 (1985); *United States v. Morlang*, 531 F.2d 183, 188-90 (4th Cir. 1975). If the government anticipated that Dewey would testify falsely, as its motion implied, then it would have been inappropriate to call Dewey as a witness and then to impeach him through Lassar's testimony.

246. 690 F. Supp. at 678-79.

247. The district court's ruling apparently rested on the assumption that Dewey's agreement to waive the attorney-client privilege so as to permit Lassar's use of his confidences on cross-examination operated as a waiver of the privilege for all purposes, so that Lassar could be disqualified and called as a witness. It is questionable, however, whether Dewey's waiver should have been interpreted so broadly. Cf. *In re von Bulow*, 828 F.2d 94, 100-04 (2d Cir. 1987) (attorney-client privilege waived as to confidential communications disclosed in book, but not as to any other confidential communications on same subject matter).

248. See *supra* note 236 and accompanying text.

district judge should have inquired whether Lassar had actually learned anything from Dewey which might be of use to either party²⁴⁹ and, if so, whether stipulations could be used in lieu of Lassar's testimony.²⁵⁰

CONCLUSION

When defense counsel has a potential conflict of interest, the trial judge may respond in a variety of ways, ranging from total inaction to the disqualification of counsel. One's view of the trial judge's appropriate response must necessarily be colored by a variety of other considerations: one's understanding of the applicable standards of attorney conduct, one's appraisal of the likelihood that defense attorneys will abide by those standards in a given situation, one's conception of the relationship between defense attorneys and their clients and of the criminal defendant's interest in autonomy in the criminal process, and one's view of the relative significance of the judiciary's institutional interests. These are not simple considerations.

In *Wheat*, however, the Supreme Court viewed the adversary process simplistically, defining the trial judge's role in light of both an erroneous understanding of the ethical standards of the legal profession and a dubious assumption about defense counsel's role in maintaining those standards. The Court assumed that the representation of conflicting interests is unethical in all cases, ignoring that, in many cases, the ethical standards either expressly permit or, at least, do not clearly forbid the representation of conflicting interests. Moreover, the Court relied on an unwarranted assumption that if a defendant is willing to waive potential conflict-of-interest claims his attorney probably has not complied with the ethical standards governing the investigation and disclosure of potential conflicts.

In many respects, the *Wheat* decision represents not just a failure to advance, but, indeed, a step backward in the Court's conception of the adversary process. The Court inexplicably retreated from the concern expressed in previous cases for the attorney-client relationship and for the defendant's autonomy. At the same time, the Court exaggerated the significance of judicial interests which arguably justify rejecting a defendant's choice of an attorney who has a potential conflict.

The *Wheat* decision is also disappointing in its failure to illuminate how a trial court should exercise its substantial discretion in cases in which the defendant knowingly and voluntarily chooses an attorney who has a potential conflict of interest. This Article argues that trial judges should take a different approach than that taken in *Wheat*. Giv-

249. The district judge did not know whether Dewey had made any statements to Lassar that might be admissible at Sanders's trial. This is clear from the judge's conjecture that Lassar's testimony might be needed by either the government or the defense. 690 F. Supp. 678-79.

250. See *supra* note 212 and accompanying text.

ing due regard to the defendant's legitimate interest in controlling the conduct of his defense, a trial judge should aggressively seek alternatives to disqualification. Where none exist, a trial judge should exercise his discretion in light of a variety of countervailing considerations. Disqualification should be limited to those cases in which the judiciary's institutional interests are clearly implicated, that is, to cases in which defense counsel's potential conflict is likely to violate prevailing ethical norms and to affect the outcome of the case. At the same time, a defendant's choice of counsel should generally be upheld where the defendant's interests are particularly strong, such as where the defendant has had a long-term relationship with counsel or where the disqualification of counsel will result in a complete denial of the ability to retain counsel. This analysis gives reasonable recognition to the aspects of the adversary system that ought to define the trial judge's role in conflict-of-interest cases.