The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys under the Joint Defense Doctrine

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You're putting bad guys in jail. You're trying to get every edge you can on those people who are devising increasingly more intricate schemes to rip off the public, hiring the best lawyers, providing the best defenses. So you're constantly pushing the edge of the envelope out to see if you can get an edge for the prosecution.

Richard Thornburgh

A federal court may disqualify a criminal defense attorney from participating in a case when the attorney has a potential conflict of interest. Although fatal conflicts of interest arise in a


This Note addresses the issue of attorney disqualification in criminal cases. Federal courts, however, also disqualify attorneys who suffer client-related conflicts of interest in civil cases. See generally Steven A. Goldberg, The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly, 72 Minn. L. Rev. 227, 228 (1987) (stating that civil disqualification motions had become “infamous” by 1984). The applicability of the Sixth Amendment right to counsel of choice in criminal cases, however, distinguishes criminal disqualification analysis from civil disqualification analysis. See United States v. Armedo-Sarmiento, 524 F.2d 591, 592-93 (2d Cir. 1975) (refusing to apply civil disqualification precedent in criminal case because civil cases do not “involve the crucial factor of the criminal defendant’s Sixth Amendment rights”).

This Note primarily focuses on federal disqualification issues, although state courts disqualify criminal defense attorneys under similar principles. See generally Linda A. Winslow, Comment, Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest, 62 Wash. L. Rev. 863, 863 n.5 (1987) (noting that federal courts generally tend to adopt the rules.
variety of situations, disqualification often occurs when an attorney has divided loyalties between past and present clients, or between two or more current clients. For example, when an attorney represents a client with interests materially adverse to those of a past client ("successive representation"), a court may disqualify the attorney to protect the interests of the past client. Similarly, when an attorney represents two or more parties in a single case ("multiple representation"), a court may order that each party retain separate attorneys and bar the current attorney from playing any further role in the case. Although a dramatic increase in the number of disqualifications for successive and multiple representation has generated widespread controversy, the Supreme Court, in Wheat v. United


3. A criminal defense attorney's interests conflict with her client's if that attorney participated in the same criminal conduct. See, e.g., United States v. Arrington, 867 F.2d 122, 129 (2d Cir.), cert. denied, 493 U.S. 817 (1989). Even when the defense attorney did not participate in the crime, if the government calls the attorney as a fact witness against her client, that attorney should withdraw as defendant's trial counsel. See, e.g., United States v. Cunningham, 672 F.2d 1064, 1074-75 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984). Lastly, if a third party pays the defendant's legal fees, the attorney might have divided loyalties between the actual client and the third party, which also can require disqualification. See, e.g., Wood v. Georgia, 450 U.S. 261, 268-71 (1981); United States v. Locascio, 6 F.3d 924, 931-33 (2d Cir. 1993).

4. See infra note 106 (discussing the basic rationale for successive representation qualification).

5. See infra note 105 (discussing multiple representation disqualification).


States,\(^8\) recently affirmed the power of courts to disqualify criminal defense attorneys in both situations.\(^9\)

This Note addresses a third basis for attorney disqualification which has received less attention than successive or multiple representation. Over the last few years, federal prosecutors have moved to disqualify criminal defense attorneys under the "joint defense" doctrine.\(^10\) The joint defense doctrine allows attorneys who represent separate targets of criminal investigations\(^11\) to exchange information about their clients without jeopardizing the confidentiality of the information.\(^12\) In complex

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\(^6\) Coliver, supra note 6, at 227; Peter W. Tague, Multiple Representation of Targets and Witnesses During a Grand Jury Investigation, 17 Am. Crim. L. Rev. 301, 302-03 (1980).

\(^8\) 486 U.S. 153 (1988).

\(^9\) See infra notes 107-112 and accompanying text.


\(^11\) The joint defense doctrine also protects the secrecy of communications between codefendants' attorneys after the government has indicted them. See Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964). Additionally, the doctrine protects communications made in confidence by a joint defense member to any joint defense attorney. See infra note 71.

\(^12\) The attorney-client privilege ordinarily protects the secrecy of communications between clients and their attorneys. A classic statement of the privilege provides that:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar or of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.


The attorney-client privilege thus does not protect communications that the client intentionally discloses to a third party. See Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976), cert. denied, 444 U.S. 1025 (1980). Thus, a client who discloses confidences to a codefendant's attorney would lose the protection of the attorney-client privilege. The joint defense doctrine solves this problem by obligating each attorney to protect the secrecy of joint defense communications that otherwise would lose protection under the attorney-client privilege. Susan K. Rushing, Note, Separating the Joint-De-
federal prosecutions, defense attorneys often establish joint defense "arrangements" to facilitate such communications.\textsuperscript{13} Occasionally, however, a member of a joint defense arrangement becomes a government witness, usually to incriminate the remaining joint defense members.\textsuperscript{14} In such a case, the government claims that the remaining joint defense attorneys cannot remain in the case without violating their ethical duties to the former member.\textsuperscript{15} Arguing that the defendants must receive legal representation free from any conflicts of interest, the government seeks the disqualification of the remaining joint defense attorneys.\textsuperscript{16}

The willingness of federal courts to accept the premises of the government's argument has "caused great concern and uncertainty in the white-collar defense community."\textsuperscript{17} Joint de-
Joint Defense Disqualification not only impinges on a defendant's Sixth Amendment right to counsel of choice, it also threatens the very existence of joint defense arrangements, which serve important purposes in complex criminal cases. Moreover, joint defense disqualification unfairly denies the right to counsel of choice to individuals who retain separate attorneys specifically to avoid conflicts of interest that multiple representation would otherwise present. Traditional disqualification doctrine, particularly the Court's decision in Wheat, does not adequately address these unique considerations and courts should therefore take steps to strictly limit joint defense disqualification.

This Note proposes a per se rule against joint defense disqualification. Part I details the competing tensions that underlie joint defense disqualification and discusses the roles of the right to counsel of choice and joint defense arrangements in complex, white collar criminal cases. Part II contends that, although joint defense attorneys have ethical obligations to maintain the confidentiality of specific joint defense communications, a member's decision to become a government witness should not deprive the arrangement's remaining members of their chosen attorneys. Part III sets forth the per se rule and provides two exceptions that protect the secrecy of specific joint defense communications and prevent abuse of the joint defense doctrine. This Note concludes that a per se rule against joint defense disqualification, subject to the proposed exceptions, will ensure fairness in the adversarial system of criminal justice.

Conflict of Interest Kill the Joint Defense Privilege? The Prosecution Viewpoint, CRIM. JUST., Spring 1992, at 7 (arguing that courts should disqualify criminal defense attorneys under the joint defense doctrine); White Collar Prosecutors Probe Joint Defense Agreements, DOJ ALERT, July 1991, at 3 (observing that federal prosecutors believe that the joint defense doctrine may require disqualification).

18. The Court has consistently held that the Sixth Amendment affords protection to a criminal defendant's choice of counsel. Wheat, 486 U.S. at 159; Powell v. Alabama, 287 U.S. 45, 53 (1932); see also Chandler v. Fretag, 348 U.S. 3, 9 (1954) (denying criminal defendant opportunity to obtain counsel deprived defendant of due process of law guaranteed by Fourteenth Amendment).


20. See Rushing, supra note 12, at 1283.
I. THE PROCESSES AND INTERESTS UNDERLYING JOINT DEFENSE DISQUALIFICATION IN WHITE COLLAR CRIMINAL PROSECUTIONS

A. FEDERAL PROSECUTION OF WHITE COLLAR CRIME

The phrase "white collar crime" encompasses a broad variety of federal law infractions.21 The white collar label applies to anyone violating a host of statutes and regulations, not just the socioeconomically elite miscreant.22 From antitrust violations to wire fraud, Congress has criminalized many "tawdry business practices."23 Administrative agencies have demonstrated similar industriousness. According to one estimate, the federal government can use criminal penalties to enforce at least 300,000 regulations.24 In the early 1970s, the federal government began a vigorous campaign against white collar crime.25 Since then, the number of white collar prosecutions has increased significantly.26

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21. For example, one authority defines white collar crimes as "various types of unlawful, nonviolent conduct committed by corporations and individuals including theft or fraud and other violations of trust committed in the course of the offender's occupation (e.g., embezzlement, commercial bribery, racketeering, anti-trust violations, price-fixing, stock manipulation, insider trading, and the like)." BLACK'S LAW DICTIONARY 1596 (6th ed. 1990).

22. Originally, "white collar crime" identified a class of perpetrators rather than a type of substantive offense. See EDWIN SUTHERLAND, WHITE COLLAR CRIME 9 (1949). This definition distinguished otherwise "respectable" individuals committing crimes in the course of their occupations from so-called "ordinary" criminals. See id. at 9-10. Prior to the early 1970s, white collar criminals found themselves in a rather exclusive club. Although many high status individuals committed sufficiently unseemly acts to arouse the wrath of a civil plaintiff, only rarely did they inspire a federal criminal prosecution. See generally John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections On The Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193 (1991) (criticizing recent expansion of federal criminal law).


24. Coffee, supra note 22, at 216 & n.94.

25. Id. at 202 & n.27 (citing KATHLEEN F. BRICKLEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS XXV (1990)). Commentators offer two basic explanations for this sudden, yet prolonged offensive. Some suggest that the federal government abruptly realized the "tremendous cost" of white collar crime. See, e.g., Genego, supra note 6, at 789. Others explain that crime simply became more complex. See, e.g., Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. REV. 393, 393 (1992); Henning, supra note 17, at 408.

26. In the 1980s, as white collar crime remained one of the federal government's "top national priorities," ROGER J. MAGNUSON, THE WHITE COLLAR-CRIME EXPLOSION 6 (1993) (quoting statement of William Sessions), Congress nearly quadrupled the DOJ's budget. Bennett, supra note 17, at 441. By 1993, the DOJ had $3.3 billion in its war chest. Id. Today prosecution of white collar crime remains one of the DOJ's top priorities. See Reno Sets Priorities at Con-
A white collar actus reus typically involves an unobtrusive swindle or regulatory violation, rather than violence or physical intrusion.\textsuperscript{27} Thus, when investigating white collar crime, the government seeks to identify a series of transactions that constitute a criminal scheme, as well as a combination of otherwise innocent circumstances from which to infer criminal intent.\textsuperscript{28} To this end, the government often must penetrate intricate criminal networks to pursue paper trails that can easily disappear.\textsuperscript{29}

After an investigation reveals improprieties, often the prosecution still must show that a white collar defendant has done something morally wrong to secure a conviction.\textsuperscript{30} Otherwise a jury might nullify the charge by finding a technically guilty defendant innocent.\textsuperscript{31} Adding to this problem the difficulty of explaining exactly what the defendant did, the government assigns its most talented attorneys to white collar cases and

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\textit{firmation Hearing, DOJ ALERT, April 1993, at 1 (quoting Janet Reno as identifying “complex economic crime that cuts across state lines” as a prosecution priority).}
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27. “[W]hite collar crime rarely involves violence directed toward victims or innocent bystanders, which is frequently an object of street crimes.” Henning, \textit{supra} note 17, at 406 n.3. White collar crime instead “involves a process of events, many of which are common business occurrences that may be otherwise socially desirable.” \textit{Id.} at 406.


29. “Complex investigations involving fraud in health care, housing, government contracts, and securities implicate a wide range of business activities that routinely involve the creation of thousands of pages of documents by numerous legitimate organizations.” Henning, \textit{supra} note 17, at 413.


funds their efforts accordingly.\textsuperscript{32} After all, unlike civil litigants, the government has only one opportunity to establish guilt.\textsuperscript{33}

B. \textbf{THE WHITE COLLAR CRIMINAL DEFENDANT'S CONSTITUTIONAL INTERESTS}

American criminal procedure affords criminal defendants an array of protections against the government's law enforcement "machinery."\textsuperscript{34} One protection, however, stands out from the rest. Courts consider the Sixth Amendment's guarantee of legal representation a defendant's most vital right,\textsuperscript{35} because it ensures that the defendant has access to other constitutional rights.\textsuperscript{36} The Court has interpreted the Sixth Amendment to include the right to effective assistance of counsel.\textsuperscript{37} The right to effective assistance of counsel, in turn, encompasses the right to counsel of undivided loyalty.\textsuperscript{38} A court will therefore vacate a

\textsuperscript{32} MAGNUSON, supra note 26, at 12-13.

\textsuperscript{33} "Neither shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

\textsuperscript{34} "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime." Gideon v. Wainwright, 372 U.S. 335, 344 (1963). For background on American criminal procedural protections, see generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 2.1 (2d ed. 1992) (describing "constitutionalization" of criminal procedure).

\textsuperscript{35} The Supreme Court has stated that "[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." Lakeside v. Oregon, 435 U.S. 333, 341 (1978); see also United States v. Cronic, 466 U.S. 648, 654 (1984) (stating that Sixth Amendment is defendant's "most pervasive" right); Argersinger v. Hamlin, 407 U.S. 25, 29-30 (1972) (finding right to legal representation more fundamental than right to a jury trial).

\textsuperscript{36} "Without counsel, the right to a fair trial itself would be of little consequence . . . for it is through counsel that the accused secures his other rights." Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) (citations omitted). The Fifth Amendment's Due Process Clause also provides limited protection against prosecutorial practices that threaten adversarial fairness in the criminal justice system. See, e.g., Genego, supra note 6, at 834-840 (noting, however, that Court has recently been unwilling to apply due process analysis in such cases).

\textsuperscript{37} Strickland v. Washington, 466 U.S. 668, 686 (1984) ("[T]he Court has recognized that "the right to counsel is the right to effective assistance of counsel."" (citation omitted)).

\textsuperscript{38} Glasser v. United States, 315 U.S. 60, 70 (1942) ("the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests"); see also Cuyler v. Sullivan, 446 U.S. 355, 345-46 (1980) (holding that defendant cannot receive effective assistance of counsel from attorney with a conflict of interest); Holloway v. Arkansas, 435 U.S. 475, 483-87 (1978) (holding that court violates Sixth Amendment by forcing attorney to jointly represent parties with conflicting interests).
criminal conviction if the defendant shows that an actual conflict of interest caused unreasonably deficient representation.39

The Sixth Amendment also provides a limited right to counsel of choice.40 This right rests mainly on the understanding that a criminal defendant ought to have control over his fate.41 In this regard, courts have recognized that criminal defense attorneys are not fungible.42 Many defense attorneys specialize their practices to meet the needs of specific clients, particularly white collar defendants.43 Also, defense attorneys differ on strategic issues and styles of advocacy,44 and an effective attorney-client relationship often depends on the defendant's trust in, and rapport with, a particular attorney.45 Nevertheless, the right to counsel of choice does not allow a defendant to retain counsel


40. The Court has stated that “[i]t is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.” Powell v. Alabama, 287 U.S. 45, 53 (1932); see also Chandler v. Fretag, 348 U.S. 3, 9 (1954) (holding that court must grant defendant reasonable opportunity to secure counsel of choice); Glasser, 315 U.S. at 70 (same). The Court has interpreted this right to protect a defendant's choice of pro se representation. Faretta v. California, 422 U.S. 806, 820-21 (1975). Recently, however, the Supreme Court emphasized that courts should recognize only a presumption in favor of a defendant's chosen counsel. Wheat v. United States, 486 U.S. 153, 159, 164 (1988) (stating that Sixth Amendment does not ensure that “a defendant will inexorably be represented by the lawyer whom he prefers.”); see also Morris v. Slappy, 461 U.S. 1, 13 (1983) (holding that the Sixth Amendment does not guarantee a “meaningful attorney-client relationship”).

41. The right to counsel of choice “stem[s] largely from an appreciation that a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense. . . . [I]t is he who suffers the consequences if the defense fails.” Wheat, 486 U.S. at 165-66 (Marshall, J., dissenting) (quoting Faretta, 422 U.S. at 819-20).

42. See, e.g., United States v. Laura, 607 F.2d 52, 56 (1979) (discussing differences in criminal defense representation that, “within the range of effective and competent advocacy, may be important in the development of a defense”).


44. Laura, 607 F.2d at 56.

45. Id.
whose presence in the case might create a ground for reversal, namely a conflict of interest.\footnote{46}

C. A CRIMINAL DEFENSE ATTORNEY'S ETHICAL DUTIES TO HER CLIENT

The extent of a criminal defendant's Sixth Amendment right to conflict-free counsel depends partly on the nature of the attorney's ethical responsibilities.\footnote{47} Under the American Bar Association's Model Rules of Professional Conduct ("Model Rules"),\footnote{48} a criminal defense attorney owes two primary ethical duties to a client.\footnote{49} First, an attorney must serve her client with absolute fidelity.\footnote{50} In addition, an attorney must not reveal her client's confidential communications.\footnote{51} A "conflict of interest"

\footnote{46. Wheat v. United States, 486 U.S. 153, 159-162 (1988).}
\footnote{47. See supra note 38 and accompanying text.}
\footnote{48. MODEL RULES OF PROFESSIONAL CONDUCT (1983) ("Model Rules"). The Model Rules constitute the majority rule regarding the legal profession's ethical responsibilities. Drafted by the American Bar Association ("ABA") in 1983, the provisions of the Model Rules pertinent to attorney disqualification have become, in whole or in part, the official ethical code for 39 states and the District of Columbia. See AMERICAN BAR ASSOCIATION, LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 1, at 3-4 (1992). Given that a United States District Court typically applies the ethical rules of the state in which it sits, the Model Rules have become the primary authority for analyzing client-related conflicts of interest in the federal system. See Winslow, supra note 2, at 863 n.5.}
\footnote{49. The ABA drafted the Model Rules in 1983 to replace the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) ("Model Code"). Although a few states have retained the Model Code's provisions, this Note addresses only the Model Rules. The main difference between the Model Rules and the Model Code in the context of attorney disqualification is that the Model Rules codified the disqualification case law developed under the Model Code prior to 1983. Goldberg, supra note 2, at 230. Thus, discussion of the Model Rules essentially incorporates the provisions of the Model Code. For a detailed comparison of the provisions of the Model Rules and the Model Code, see AMERICAN BAR ASSOCIATION, ANNOTATED RULES OF PROFESSIONAL CONDUCT (2d ed. 1992).}
\footnote{50. The term "client" includes one for whom a lawyer renders legal service, or one who consults a lawyer with a view to obtaining such services. WEINSTEIN'S EVIDENCE, supra note 19, ¶ 503(a)(1)(01), at 503-21 to 503-22. "There is no requirement that the services so long as they are legal services have been rendered in conjunction with litigation or that a fee has been paid." Id.}
\footnote{51. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 & cmt. "Preservation of confidences, a concept almost as old in the law as loyalty... was originally a matter of social morality -- an ethical imperative for all good members of society." Goldberg, supra note 2, at 232. Now the obligation of the attorney to protect confidences, like the attorney-client privilege, serves the utilitarian purpose of promoting client candor. Id. at 233; see also infra note 60 (discussing distinction between ethical duty of loyalty and attorney-client privilege).}
exists whenever an attorney cannot abide by either rule. In the event of a conflict, the attorney must protect the interests of the client or face disqualification from the case. Moreover, attorneys who violate their ethical duties possibly face disciplinary sanctions.

Rule 1.6 of the Model Rules sets forth an attorney's duty of confidentiality. Except in certain limited circumstances, a "lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." The Comment to Rule 1.6 explains that "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Protection of confidentiality facilitates development of facts and "encourages people to seek early legal assistance." The attorney's obligations in this regard endure even after the attorney-client relationship ends. In essence, Rule 1.6 codifies an attorney's duty to maintain the secrecy of communications protected by the attorney-client privilege.


53. See discussion infra part I.F.

54. "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings." MODEL RULES OF PROFESSIONAL CONDUCT pmbl.

55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a).

56. A "Comment" accompanies each Model "Rule." The Comments explain the scope and purpose of the Rules, "but the text of each Rule is authoritative." MODEL RULES OF PROFESSIONAL CONDUCT pmbl.

57. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt.

58. Id.

59. Id. ("The duty of confidentiality continues even after the client-lawyer relationship has terminated.").

60. The Comment to Rule 1.6 explains the distinction between an attorney's duty of confidentiality and the attorney-client privilege as follows: The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt.
Rules 1.7 and 1.9 articulate an attorney's duty of loyalty to current and former clients. Rule 1.7(a) bars an attorney from representing a client whose interests are directly adverse to another current client.\footnote{61} Rule 1.7(b) forbids an attorney from representing a client when obligations to another client or third person would be "materially limited" by such representation.\footnote{62} Rule 1.7, however, permits the attorney to represent a client in either situation if the attorney reasonably believes that representation would not "adversely affect" the other client, or if the other client consents to the representation.\footnote{63} Similarly, Rule 1.9(a) provides 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."\footnote{64} Thus, the attorney's duty of absolute fidelity precludes the attorney from switching sides on a current or former client.\footnote{65}

\section*{D. Joint Defense Agreements in White Collar Cases}

 Defendants\footnote{66} in complex federal criminal investigations and their separate attorneys often unite to mount a joint defense.\footnote{67}

\footnote{61. Model Rules of Professional Conduct 1.7(a).}

\footnote{62. Id. 1.7(b).}

\footnote{63. Id. 1.7(a)(1)-(2) & (b)(1)-(2). "Consideration should be given to whether the client wishes to accommodate the other interest involved." Id. cmt.}

\footnote{64. Id. 1.9(a).}

\footnote{65. Id. cmt. (establishing inquiry of whether the attorney's "subsequent representation can be justly regarded as a changing of sides in the matter in question"). Importantly, for purposes of Rule 1.9(a), it does not matter whether such representation would jeopardize the confidentiality of attorney-client communications. See supra text accompanying note 64. If the attorney has switched sides, Rule 1.9(a) mandates disqualification. Additionally, Rule 1.9(c)(1) bars an attorney from using a former client's confidences against the former client. Model Rules of Professional Conduct 1.9(c)(1).}

\footnote{66. Technically, the government considers an individual suspected of criminal activity a "target" until a grand jury indicts the individual. A target is a "person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." U.S. Dep't of Justice, U.S. Att'y's Manual § 9-11.151 (1990). The term "defendant" in this Note includes targets of federal criminal investigations.}

\footnote{67. It might seem counterproductive for targets of an investigation to retain separate attorneys, for a single attorney could better coordinate information sharing. See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 Minn. L. Rev. 1095, 1172 (1991). Disqualification for multiple representation, however, necessitates separate representation for those targets who want to ensure that their attorney will remain in the case.}
An effective joint defense requires uninhibited communication among the member defendants and their attorneys. To ensure that communications within the group remain confidential under the attorney-client privilege, the defendants typically invoke the joint defense doctrine. This doctrine maintains the secrecy of communications among parties sharing common interests in defending against a common adversary. Parties to such an arrangement, at least in theory, can prevent a fellow...
member or attorney from disclosing joint defense communications.\textsuperscript{74}

Cooperation under the joint defense doctrine offers numerous practical advantages to defendants.\textsuperscript{75} When defendants share factual information, they can better present a "coherent and plausible defense rather than one riddled with immaterial inconsistencies."\textsuperscript{76} Similarly, group discussions on strategic issues help each member better develop an individual theory of defense, particularly if the defendants all expect to be indicted.\textsuperscript{77} An alliance among defendants also provides a potent way of monitoring the government's investigation.\textsuperscript{78} For these reasons, courts recognize that the joint defense doctrine "can be necessary to a fair opportunity to defend" in white collar cases.\textsuperscript{79}

Prosecutors have emphasized, however, that joint defense arrangements can present two significant problems. A joint defense arrangement allows its members to shape testimony and

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\item[74.] A troublesome limitation arguably exists with respect to the duration of the joint defense privilege. If parties to a joint defense agreement develop materially adverse interests in subsequent litigation, some courts have said that the privilege collapses among them. \textit{See, e.g., In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975)} (dicta). Although no court has actually held that the joint defense doctrine collapses when former joint defense members find themselves at each others' throats, a number of courts have endorsed the court's reasoning in \textit{In re Grand Jury Subpoena}. Rushing, \textit{supra} note 12, at 1298-99 & nn.164-166 (discussing cases); \textit{see also} Vincent C. Alexander, \textit{The Corporate Attorney-Client Privilege: A Study of the Participants}, 63 St. John's L. Rev. 191, 292-93 (1989) (finding the subsequent litigation rule a "well-settled principle" with respect to joint defense agreements); Perito et al., \textit{supra} note 69, at 39 (assuming validity of subsequent litigation rule in joint defense situations).
\item[75.] "A common defense often gives strength against a common attack." Glasser v. United States, 315 U.S. 60, 92 (1941) (Frankfurter, J., dissenting), \textit{cited with approval in Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) and Holloway v. Arkansas, 435 U.S. 475, 482-83 (1978)}.
\item[76.] Perito et al., \textit{supra} note 69, at 40.
\item[77.] "Cooperation between defendants in such circumstances is often not only in their own best interests but serves to expedite the trial or... the trial preparation." United States v. McPartlin, 595 F.2d 1321, 1327 (7th Cir.), \textit{cert. denied}, 444 U.S. 833 (1979).
\item[78.] \textit{See} Burke et al., \textit{supra} note 13, at 538; Henning, \textit{supra} note 17, at 455; Kathryn W. Tate, \textit{Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?}, 23 Ind. L. Rev. 1, 50 (1990).
\item[79.] \textit{See McPartlin}, 595 F.2d at 1336. The Virginia Supreme Court forged the joint defense doctrine well over a century ago in a criminal conspiracy case, Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 842 (1871) (ruling that jointly indicted defendants and their individual attorneys have a "right... to consult together about the case and the defense").
\end{itemize}
perhaps even coordinate perjury. Moreover, in the hands of sophisticated criminal networks, a joint defense arrangement can effectively keep innocent or less culpable subordinates in line with a "stonewall" defense. In such circumstances, the ringleaders of a criminal conspiracy may coerce or deceive their subordinates into keeping them aware of all facts about a criminal investigation, including contacts by law enforcement agents. Armed with such knowledge, the ringleaders may, through coercion or deception, prevent the subordinates from cooperating with the government.

E. WHEN A JOINT DEFENSE MEMBER BECOMES A GOVERNMENT WITNESS

No matter how impregnable a joint defense arrangement appears, the possibility always exists that one member will become a government witness. Just as white collar criminal defense attorneys consider it their duty to erect and maintain a common defense, a dutiful prosecutor will work to recruit in-

80. See Henning, supra note 17, at 455.
82. Id. at 696.
83. Henning, supra note 17, at 458-59.
84. See Burke et al., supra note 13, at 543 (noting that joint defense members should recognize "ever-present potential for today's ally to become tomorrow's adversary"); see also Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 47 (1992) (observing that "one could simply be thankful that it is in criminals' nature to cut each others' throats"). One former prosecutor observed that informants will do anything to avoid prison, including "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and doublecrossing anyone with whom they come into contact." Monroe Freedman, The Lawyer Who Hates Snitches, Champion, Apr. 1994, at 25. He also commented that some view informants as "conscienceless sociopaths to whom 'truth' is a wholly meaningless concept." Id.
85. One commentator asserts that the white collar criminal defense attorney's principal function is "information control," or keeping incriminating evidence out of the government's hands. MANN, supra note 28, at 6. The most fearsome form of information leakage occurs when one target of a criminal investigation becomes a government witness. See infra notes 87-89 and accompanying text. Joint defense arrangements, however, "enable individual defendants to know the status of each other's efforts and to be sure that none of the codefendants is cooperating with the government. This knowledge, in turn, makes it less likely that a defendant will agree to cooperate with the government." Genego, supra note 6, at 797 n.69; see also Karlan, supra note 81, at 694 (describing how a joint defense can negate the "prisoner's dilemma").
formers from the joint defense to testify against the others.\(^{86}\) Often the prosecutor has little choice; a witness familiar with the intricacies of a white collar criminal enterprise might offer the only evidence of how a complex scheme worked.\(^{87}\) Also, given the ability of white collar criminals to destroy documentary evidence,\(^{88}\) a witness familiar with the enterprise’s records might provide the only proof that an unlawful transaction even occurred.\(^{89}\)

Cooperating with the government may offer a government witness many benefits. Sometimes the witness avoids indictment altogether.\(^{90}\) If the individual appears relatively less culpable than the remaining joint defense members, or creates that image by foisting blame on the others,\(^{91}\) a prosecutor might choose to formally or informally immunize him from future prosecution in exchange for the witness’s testimony.\(^{92}\) More com-

86. See United States v. Kenney, 911 F.2d 315, 321 (9th Cir. 1990) (disqualifying attorney who represented targets that government was trying to turn against each other); In Re Taylor, 567 F.2d 1183, 1187 (2d Cir. 1977) (acknowledging that government brought motion to disqualify to break apart “stonewall” defense).

87. “Since many white collar and drug offenses are committed in private, among groups of willing participants, the government often relies on confidential informants to gather information.” Genego, supra note 6, at 791-92.

88. See Henning, supra note 17, at 413 (noting prosecutors’ reliance on documentary evidence).


91. “These are agreements to sell a commodity — knowledge. The witness usually gains that knowledge through participation in criminal conduct, and the offer of testimony is a calculated attempt to gain immunity or leniency.” Hughes, supra note 84, at 13.

92. Immunity becomes necessary when a witness asserts the Fifth Amendment privilege against self-incrimination. U.S. Const. amend. V (“No persons . . . shall be compelled in any criminal case to be a witness against himself . . .”). A prosecutor may formally request that a court immunize a witness under 18 U.S.C. § 6003 (1988), which requires a showing that the witness’s testimony is “necessary” and that the witness would otherwise likely assert his Fifth Amendment rights. Id. Formal immunity (or “use and fruits” immunity) extends only to prevent the government from prosecuting the witness on the basis of the immunized testimony. Kastigar v. United States, 406 U.S. 441, 460 (1972). Informal immunity (or “transactional immunity”) totally bars the government from prosecuting the criminal conduct to which the witness’s testimony relates, provided that the witness cooperates in a satisfactory manner. See Hughes, supra note 84, at 7-13 (discussing informal immunity agreements.
A joint defense member's defection has grave practical consequences for the arrangement's remaining members. The government deals only with those who offer helpful evidence. Thus, whereas before the joint defense kept the government's investigation in the shadows by maintaining uniform silence, a defecting joint defense member's insights will provide a window to the facts of the case. Moreover, a joint defense member will have knowledge about the strategies of the joint defense itself. If the defecting member knows that a reduced sentence depends largely on the "significance and usefulness" of the information provided, presumably he will surreptitiously disclose information that the joint defense doctrine would otherwise protect.

and noting that disputes have arisen over whether the witness adequately "performed").

93. See supra note 90.

94. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 5K1.1 (1994). Section 5K1.1 allows a court to depart below the United States Sentencing Guidelines ("Guidelines") sentencing range "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Id. In determining the "appropriate reduction," the court may consider a variety of factors, including the "significance and usefulness" of the witness's testimony. Id.

95. A "substantial assistance" departure, for example, allows a court to sentence a witness even below the statutory minimum sentence for his offense. Id. comment. (n.1) (citing 18 U.S.C. § 3553(e)). For a discussion of other motions the government can make to reduce a witness's sentencing exposure, see Hughes, supra note 84, at 44.


97. See supra notes 86-89.

98. See, e.g., FDIC v. Cheng, No. 3:90-CV-0353-H, 1992 WL 420877, *2 (N.D. Tex. Dec. 2, 1992) (individual who secretly cooperated with government for two years while purportedly remaining a member of a joint defense arrangement stated that he had "tactically outmaneuvered" the other members of the arrangement); see also Uelmen, supra note 17, at 38, 60 (observing that former member can easily disclose joint defense secrets).

99. See supra text accompanying note 94.

100. Uelmen, supra note 17, at 37. The joint defense is virtually powerless to prevent such disclosure. Id.; see infra note 177.
F. THE GOVERNMENT'S MOTION TO DISQUALIFY

A joint defense member's defection can pose an additional and far more meaningful problem for the arrangement's remaining members: the government may seek the disqualification of their attorneys.\textsuperscript{101} Disqualification of a criminal defense lawyer for client-related conflicts of interest generally serves two purposes.\textsuperscript{102} First, by entirely removing the criminal defense attorney from the case, it ensures that the attorney will not violate any ethical duties to a government witness or codefendant.\textsuperscript{103} In addition, disqualification protects a client's right to effective

\textsuperscript{101} Although a court may disqualify an attorney sua sponte, Wheat v. United States, 486 F.2d 153, 160 (1988), courts usually disqualify pursuant to a government motion. See Bruce A. Green, \textit{Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest}, 16 Am. J. Crim. L. 323, 353 (1989) [hereinafter Green, \textit{Her Brother's Keeper}]. The government bases its disqualification argument on the superficially anomalous concern that the defendant should receive effective assistance of counsel. See supra notes 37-39. Defendants and their lawyers often consider the government's argument paternalistic at best, noxious at worst. See, e.g., Bennett, supra note 17, at 450 (criticizing attempts by prosecutors to disqualify defense attorneys while rejecting the application of ethics rules to themselves). The prosecutorial desire for effective assistance of counsel, however, merely results from the legitimate governmental interest in safeguarding any resulting conviction from a Sixth Amendment challenge on appeal. See supra note 39 and accompanying text; \textit{infra} note 104.

\textsuperscript{102} Defense attorneys maintain that the government often harbors sinister designs when seeking disqualification. According to two commentators, "the government's primary motive in bringing [disqualification] motions is to disqualify the most competent lawyers and firms . . . ." Margolin & Coliver, supra note 6, at 229. Other commentators also recognize that tactical motivations might prompt the government to move for disqualification. See, e.g., Gershmans, supra note 25, at 402-03; Green, \textit{Her Brother's Keeper}, supra note 101, at 348; Lowenthal, supra note 6, at 53 n.226. In this regard, one district court made the following observation:

[T]he court should be extremely careful not to let the government's attempted disqualification of defense counsel "transform the sixth amendment right to conflict-free counsel into a two-edged sword with which the government would be able to sever defendants from those most able to protect their legitimate legal interests."


\textsuperscript{103} In other words, the court exercises its power to "ensur[e] that criminal trials are conducted within the ethical standards of the profession." Wheat, 486 U.S. at 160. In a case of successive representation, the attorney owes ethical duties the past client (now a government witness) and the current client (the defendant on trial). See supra notes 64-65 and accompanying text. When an attorney represents multiple clients (usually codefendants) at once, a conflict of interest arises from the attorney's ethical obligations to each defendant. See supra notes 61-63, 65 and accompanying text.
assistance of counsel, which the attorney's conflict of interest would otherwise threaten.\textsuperscript{104}

Disqualification of attorneys on these grounds traditionally occurs in cases of multiple\textsuperscript{105} and successive\textsuperscript{106} representation. Recently, in Wheat v. United States, a case involving both situations, the Supreme Court ruled that trial courts may disqualify defense attorneys even when only a potential conflict of interest exists.\textsuperscript{107} Notwithstanding the "right to select and be repre-

\textsuperscript{104} The desire to protect the defendant's right to effective assistance of counsel "arises in part from the legitimate wish of district courts that their judgments remain intact on appeal." Wheat, 486 U.S. at 161. A criminal defendant has a Sixth Amendment right to cross-examine prosecution witnesses. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "). Unless the defendant represents himself pro se, he can exercise this right only through his attorney. To provide effective assistance of counsel, the attorney must be able to cross-examine each government witness free from any conflicts of interest. Wheat, 486 U.S. at 163-64.

\textsuperscript{105} See, e.g., Flanagan v. United States, 465 U.S. 259 (1984); United States v. Kenney, 911 F.2d 315 (9th Cir. 1990); United States v. Alex, 788 F. Supp. 359 (N.D. Ill. 1992). These decisions follow the Court's reasoning that: Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of one by emphasizing that of another. Wheat, 486 U.S. at 160 (quoting Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978)). At the time of trial, a federal trial court must advise a jointly represented defendant about the "right to the effective assistance of counsel, including separate representation." Fed. R. Crim. P. 44(c). If the court determines that disqualification is unnecessary, the court still must "take such measures as may be appropriate to protect each defendant's right to counsel." Id.

\textsuperscript{106} See, e.g., United States v. Moscony, 927 F.2d 742 (3d Cir.), cert. denied, 111 S. Ct. 2832 (1991); United States v. James, 708 F.2d 40 (2d Cir. 1983); United States v. Martinez, 630 F.2d 361 (5th Cir. 1980), cert. denied, 450 U.S. 922 (1981). The Eighth Circuit expresses the basic rationale for successive representation disqualification as, "(a) the attorney may be tempted to use that confidential information to impeach the former client; or (b) counsel may fail to conduct a rigorous examination for fear of misusing his confidential information." United States v. Agosto, 675 F.2d 965, 971 (8th Cir.), cert. denied, 459 U.S. 834 (1982). In situation (a), the attorney violates the ethical duty of undivided loyalty to a past client. See supra notes 64-65 and accompanying text. In situation (b), the client fails to receive effective assistance of counsel. See supra notes 37-39 and accompanying text.

\textsuperscript{107} In Wheat, the defendant retained an attorney, Iredale, who already had ties with two codefendants, Gomez-Barajas and Bravo, in the same prosecution. Wheat, 486 U.S. at 154-56. Iredale had won an acquittal for Gomez-Barajas and had negotiated a plea agreement for Bravo. Id. at 155. Pursuant to the government's motion two days before the commencement of the defendant's trial, the district court disqualified Iredale. Id. at 157. In affirming the disqualification, the Court reasoned that Iredale could not effectively cross-ex-
sented by one's preferred attorney," the Court further held that a trial court need not accept a defendant's waiver of the right to effective assistance of counsel. The Court also stated that lower courts need not consider whether the former client or codefendant consents to the representation at issue. Instead, when considering whether to disqualify, "[t]he evaluation of the facts and circumstances of each case . . . must be left primarily to the informed judgment of the trial court," even when the gov-

amine either Gomez-Barajas or Bravo, both of whom were potential witnesses against Wheat. Id. at 163-64. But see id. at 168-72 (Marshall, J., dissenting) (arguing that the Court exaggerated the significance of the potential conflict and noting that the prosecutor decided to call Bravo only after learning of the substitution motion).

Essentially, the Court ruled that the district court correctly disqualified Iredale because of his potential conflicts of interest. In so deciding, the Court expressly rejected the notion that disqualification should occur only when an actual conflict of interest exists. Id. at 161-63. The Court reasoned that "the likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." Id. at 162-63.

108. Id. at 169.

109. Id. at 162-63; see also United States v. Cannistraro, 794 F. Supp. 1313, 1327 (D.N.J. 1992) (refusing to accept defendant's waiver). The Court in Wheat could have held that a defendant may waive his Sixth Amendment right to effective assistance of counsel, which, if knowing and intelligently done, forecloses an ineffective assistance of counsel claim. See, e.g., United States v. Curcio, 694 F.2d 14, 24-25 (2d Cir. 1982). In Curcio, the Second Circuit reasoned that refusing a knowing and intelligent waiver would be "too paternalistic." Id. at 24-25; see also United States v. Nynex Corp., 788 F. Supp. 16, 22 (D.D.C. 1992) (agreeing that refusal of waiver would "imprison a man in his privileges" (quoting Adams v. United States, 317 U.S. 269, 279-80 (1942))), rev'd, 8 F.3d 52 (D.C. Cir. 1993). Yet the Court in Wheat refused to hold that a waiver would cure any conflict of interest problems. 486 U.S. at 163. Instead, the Court noted the "apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel." Id. at 162. The Court suggested that the "willingness of an attorney to obtain . . . waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them." Id. at 163.

110. Both Gomez-Barajas and Bravo consented to Iredale's representation of Wheat. Wheat, 486 U.S. at 156. Lower courts, however, have emphasized the importance of the former client's consent in successive representation cases. Some courts have stressed that the former client's opposition to the attorney's continued presence in the case makes disqualification appropriate. See, e.g., United States v. James, 708 F.2d 40, 46 (1983). Similarly, other courts have refused to disqualify when the former client consents. See, e.g., United States v. Cunningham, 672 F.2d 1064, 1073 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984).

111. Wheat, 486 U.S. at 164. In the end, a court might consider it easiest to resolve all doubts against the defendant and disqualify, for the defendant will generally have the resources to hire another competent attorney. See, e.g., United States v. Locascio, 6 F.3d 924, 932 (2d Cir. 1993) (finding that defend-
government appears to have "manufacture[d]" a conflict.\(^{112}\) As this language indicates, the Court did not articulate a specific test for resolving disqualification motions. Lower courts, however, still recognize the need to balance the government witness's\(^{113}\) interest in the loyalty of the former attorney against the defendant's right to counsel of choice under the particular facts of each case.\(^{114}\)

The Court's decision in *Wheat* pertains to the disqualification of criminal defense attorneys only in cases of multiple and successive representation. Yet many commentators have recognized that courts may treat joint defense attorneys similarly when a member of the arrangement defects.\(^{115}\) In this regard,

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\(^{112}\) Ant's ability to retain "more than competent representation" supported disqualification of original counsel.

\(^{113}\) Considering disqualification "a measure of last resort," many courts recognize two basic alternatives to disqualification. *See, e.g.*, United States v. Diozzi, 807 F.2d 10, 12 (1st Cir. 1986). One alternative calls for the defendant to retain stand-by counsel for the limited purpose of cross-examining the attorney's former or current client. *Compare* United States v. Agosto, 675 F.2d 965, 973 (8th Cir.) (instructing district court to determine feasibility of stand-by counsel alternative), *cert. denied*, 459 U.S. 834 (1982) *with* United States v. Cheshire, 707 F. Supp. 235, 240 (M.D. La. 1989) (rejecting stand-by counsel alternative because court "views it as an almost impossible task for a lawyer to participate throughout the course of a trial but not suggest a single question or style for cross examination of the most important witness against his present client").

The second alternative limits the range of matters on which the attorney can cross-examine the government witness. For example, a court may limit the attorney to questioning the witness about otherwise confidential information that the government witness publicly disclosed. *See, e.g.*, Cunningham, 672 F.2d at 1073. Courts do not allow attorneys to question former clients on confidential matters, however, even when the attorney could have learned of the information from an independent source. *See, e.g.*, *James*, 708 F.2d at 45-46.

*112.* *Wheat*, 486 U.S. at 163; *see also* *In re* Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977) (noting that government "possesses the power to create . . . a 'conflict'" by calling attorney as witness).

*113.* In a case of multiple representation, a court will analyze the codefendant's competing interests. *Wheat*, 486 U.S. at 163-64.

*114.* *See, e.g.*, United States v. Moscony, 927 F.2d 742, 749 (3d Cir.), *cert. denied*, 111 S. Ct. 2812 (1991); *James*, 708 F.2d at 44; *Cunningham*, 672 F.2d at 1073. Many courts erroneously also balance the government's interest in disqualification. *See, e.g.*, United States v. Alex, 788 F. Supp. 357, 363-64 (N.D. Ill. 1992). One court has even stated that the government has an interest in shielding its witnesses from unethical cross-examination. *See* United States v. DeLuna, 584 F. Supp. 139, 145 (W.D. Mo. 1984). The government has no legitimate interest, however, in the disqualification of a criminal defense attorney other than to ensure that a conviction remains intact on appeal, which analysis of the government witness's interest already comprehends. *See supra* notes 101, 104.

joinder defense disqualification in civil cases already occurs under firmly established principles.\textsuperscript{116} The government has persuaded federal courts in at least three instances\textsuperscript{117} that the joint defense doctrine creates conflicts of interest that can also require disqualification in criminal cases.\textsuperscript{118} Although certain facts in

\textsuperscript{116} See, e.g., Wilson P. Abraham Constr. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (per curiam) (holding that court may disqualify joint defense attorney to prevent the use of confidential information to the detriment of a former member).


\textsuperscript{118} Bicoastal involved a joint defense arrangement formed in response to a criminal investigation into an alleged defense procurement fraud. 1992 U.S. Dist. LEXIS 21445, at *3-*4. Some of the arrangement’s members were indicted (the defendants); others testified before the grand jury and were named as witnesses in the criminal trial (the witnesses). \textit{Id.} Three defense attorneys had represented both their current clients and the witnesses before the grand jury handed down its indictment—a case of successive representation. \textit{Id.} Two other defense attorneys had not represented any witnesses, but had received confidential information from them under the joint defense agreement. \textit{Id.} at *4. The government moved the court to inquire whether any of these arrangements created a conflict of interest requiring the defendants to waive their 6th Amendment right to conflict-free counsel. \textit{Id.} The court applied a \textit{Wheat} analysis to determine whether to disqualify the successive representation attorneys or the joint defense attorneys. \textit{Id.} at *16. Although the court found that both arrangements created similar conflicts of interest, the court held that the defendants’ interests outweighed disqualification because none of the former client’s objected to the defense attorneys’ continued presence in the case. \textit{Id.}

In McDade, a defense attorney briefly represented a suspect in a political corruption case. 1992 U.S. Dist. LEXIS 11447, at *2. Shortly thereafter the attorney agreed to represent another individual in the same case and advised the former client to seek separate counsel, which he did. \textit{Id.} Both individuals and their attorneys thereafter shared information pursuant to a joint defense agreement. \textit{Id.} at *3. Eventually the former client pleaded guilty, terminated the joint defense agreement, and agreed to become a government witness. \textit{Id.} The government moved to disqualify the defense attorney, but the court refused. \textit{Id.} Regarding the successive representation issue, the court noted that the former client did not seek the attorney’s disqualification. \textit{Id.} at *4-*5. To protect the former client’s desire to maintain the secrecy of joint defense communications, however, the court agreed to disqualify unless the defendant would agree to waive his right to cross-examine his attorney’s former client on the joint defense communications. \textit{Id.} at *13-*14.

Finally, in Anderson, another defense procurement fraud case, some members of a joint defense arrangement became government witnesses. 790 F. Supp. at 231-32. The government moved to disqualify one of the remaining defendant’s counsel whom it believed had access to confidential information under the joint defense agreement. \textit{Id.} at 232. The court assumed without discussion that the joint defense agreement created a conflict of interest, but the court adverted to the defendant’s waiver in deciding not to disqualify. \textit{Id.} Moreover, the court noted that the joint defense communications would not impair the defense attorneys’ cross-examination of the witnesses. \textit{Id.} To the contrary, the
each case allowed the courts to avoid actually disqualifying the attorneys, one district court in a multiple representation case employed the joint defense doctrine to bolster its disqualification order. Taken together, these decisions support joint defense disqualification when the government witness supports the government's motion to disqualify, and when the joint defense attorneys possess confidential information that would help them cross-examine the government witness.

II. THE ETHICAL AND CONSTITUTIONAL IMPLICATIONS OF JOINT DEFENSE DISQUALIFICATION

A. THE ETHICAL ANALYSIS: RECOGNIZING THAT JOINT DEFENSE ARRANGEMENTS CREATE CONFLICTS OF INTEREST WHEN FORMER MEMBERS BECOME GOVERNMENT WITNESSES

A court may not disqualify a criminal defense attorney under the joint defense doctrine unless the attorney has a poten-

court doubted that "any" information exchanged in the arrangement required confidentiality. Id.

119. In Bicoastal and McDade, the courts based their decisions principally on the government witnesses' consent to cross-examination. See supra note 118. In Anderson the court did not disqualify because it obviously doubted that the parties exchanged any confidential information under the joint defense agreement. 790 F. Supp. at 232. Additionally, in all three cases the defendants waived the right to representation by counsel free of undivided interests. Id.


121. The government might have lost the battle (i.e., disqualification of a particular group of attorneys) in these cases, but under no circumstances did the government lose the war (i.e., the proposition that a court may disqualify criminal defense attorneys under the joint defense doctrine). On the contrary, in each case the court applied traditional disqualification analysis, see supra note 118 and accompanying text, although joint defense disqualification presents more complex considerations than disqualification for successive or multiple representation. See discussion supra part I.C. For instance, if the former joint defense member in Bicoastal would have supported disqualification, the result in that case could have been different. 1992 U.S. Dist. LEXIS 21445, at *7; see also McDade, 1992 U.S. Dist. LEXIS 11447, at *11 ("Were this witness to tell the court that he . . . does not want [the attorneys] in the case, I would hear him with wide-open ear."). In addition, if the attorneys in Anderson would have gained a significant amount of information under the joint defense doctrine, the court perhaps would have decided to disqualify. 790 F. Supp. at 232. For purposes of the following analysis, this Note assumes that the government witness supports disqualification and that the witness, when he was a member of the joint defense arrangement, divulged confidential information to the attorneys that they could use in cross-examining him. .
tial conflict of interest. Although successive and multiple representation can create conflicts of interest, the issue remains whether a joint defense attorney in a criminal case suffers a similar conflict of interest if a member of the arrangement becomes a government witness. In answering this question, courts will likely turn to the Model Rules to determine whether the proposed representation violates the “ethical standards of the profession.”

Rule 1.9(a) authorizes courts to disqualify an attorney representing a client with interests materially adverse to those of a prior client. A court may disqualify the attorney even when no danger of disclosing confidential information exists. The government has sought disqualification by arguing that Rule 1.9(a) forbids a joint defense attorney from continuing to represent her client when the government obtains the services of a former member of the arrangement. The joint defense doctrine, however, does not support this position. Rule 1.9(a) is concerned with the duty of absolute fidelity to former clients. A joint defense attorney’s duty to a former joint defense member — who is not a “client” in the first place — serves only to protect the confidentiality of information shared while the government participated in the joint defense arrangement. Because joint defense attorneys do not owe their

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122. See discussion supra part I.C.
123. See supra notes 105-106 and accompanying text.
124. See supra note 48 and accompanying text.
126. Rule 1.7 does not apply because a government witness is not a current member of a joint defense arrangement. See supra notes 61-63 and accompanying text. Rule 1.7, which in the context of attorney disqualification pertains to multiple representation, could perhaps become significant if joint defense members as codefendants developed materially adverse interests at trial. See infra text accompanying notes 165-166.
127. Additionally, the parties' interests must be adverse "in the same or a substantially related matter," MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a), which is the case when a former member of the joint defense arrangement testifies against the remaining members.
128. See supra notes 64-65 and accompanying text.
129. See e.g., Seave, supra note 17, at 15-16 (arguing that Rule 1.9 sometimes warrants disqualification of joint defense attorneys when former joint defense member testifies for government); Uelmen, supra note 17, at 37 (recognizing potential for disqualification of joint defense attorneys).
130. See supra notes 64-65 and accompanying text.
131. See supra note 49 and accompanying text.
132. See discussion supra part I.D.
absolute fidelity\textsuperscript{133} to joint defense members other than their own clients, Rule 1.9(a) does not apply.\textsuperscript{134}

Rule 1.6, which forbids an attorney from revealing confidential communications, presents a more significant problem.\textsuperscript{135} A joint defense arrangement functions properly only if its attorneys protect its secrets. Thus, although a joint defense attorney does not have a traditional attorney-client relationship with every member of the arrangement, a duty to not reveal joint defense information or use such information against each member still exists.\textsuperscript{136} This obligation remains even if disclosure of group secrets would ultimately benefit the attorney's client.\textsuperscript{137} Consequently, absent any other considerations,\textsuperscript{138} Rule 1.6 bars the attorney from cross-examining a former joint member when cross-examination would in any way reveal\textsuperscript{139} confidential information.

\textsuperscript{133} See supra note 50 and accompanying text.

\textsuperscript{134} Imposing on a joint defense attorney a duty of absolute fidelity to all joint defense members wrongly puts joint defense arrangements on the same plane as multiple representation arrangements. After all, members of a joint defense arrangement retain separate attorneys specifically to avoid the pitfalls of multiple representation. See supra text accompanying note 20.

\textsuperscript{135} By its plain terms, Rule 1.6 applies only to the attorney-client relationship. See supra notes 55-60 and accompanying text. The term "client" perhaps exempts joint defense attorneys from disqualification under Rule 1.6. See supra note 49 and accompanying text. The essential purpose of Rule 1.6, however, is to preserve the public's trust in the legal profession by preventing attorneys from exploiting information entrusted to them. See supra note 51 and accompanying text. Courts have therefore interpreted the rule to cover joint defense communications. See, e.g., United States v. McDade, No. 92-249, 1992 U.S. Dist. LEXIS 11447, at *4-5 (E.D. Penn. July 30, 1992). Yet even if a court strictly construes Rule 1.6, courts still recognize that joint defense attorneys remain ethically bound as fiduciaries to preserve the confidentiality of joint defense communications. See, e.g., Wilson P. Abraham Constr. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977). These courts analyze joint defense disqualification issues under the same principles that Rule 1.6 sets forth. \textit{Id.} (holding that joint defense attorney may not use information "to the detriment" of a former joint defense member.)

\textsuperscript{136} See supra note 135 and accompanying text.

\textsuperscript{137} See supra note 59 and accompanying text.

\textsuperscript{138} See discussion infra part II.B.

\textsuperscript{139} One commentator has suggested that a joint defense attorney violates no ethical duty by merely \textit{relying} on, rather than revealing, confidential information when cross-examining a former joint defense member. See Nessim, supra note 15, at 10. This argument rests on the assumption that a joint defense attorney's duty of confidentiality prohibits only \textit{direct} disclosure of confidential information. \textit{Id.} Rule 1.6, however, broadly forbids any reliance on, or indirect revelation of, confidential information. See supra text accompanying note 57. Through mere reliance on confidential information a skillful joint defense attorney could manipulate a former member's secrets in a manner that Rule 1.6 forbids. See Seave, supra note 17, at 15.
Maintaining a rigid wall around the secrecy of joint defense communications, while not implanting a duty of absolute fidelity, ensures the doctrine's future vitality. In deciding whether to participate in a joint defense arrangement, prospective members and their attorneys must be aware that the communications will remain eternally confidential, subject only to their agreement\textsuperscript{140} to the contrary. Disclosure of joint defense communications, even to cross-examine a former joint defense member, constitutes a breach of ethical duties. In sum, a joint defense attorney's duty to maintain the confidentiality of information provided by a government witness, which the attorney could use in cross-examining that witness, creates a potential conflict of interest.


Even when prevailing ethical rules support disqualification, however, the Sixth Amendment further requires courts to balance the defendant's right to counsel of choice against the interests of the government witness.\textsuperscript{141} Although the Supreme Court has seemingly reduced the right to counsel of choice to a weak presumption,\textsuperscript{142} lower courts still recognize that adversarial fairness in complex criminal cases largely depends on access to counsel of choice.\textsuperscript{143} For this reason, the idea that "disqualification of defense counsel should be a measure of last resort" endures.\textsuperscript{144}

1. The White Collar Criminal Defendant's Interest in Avoiding Disqualification of His Chosen Counsel

The unique complexity of the typical white collar prosecution makes the Sixth Amendment right to counsel of choice an invaluable asset for a number of reasons.\textsuperscript{145} First, the govern-

\textsuperscript{140} A court may infer such agreement. See infra note 181 and accompanying text.
\textsuperscript{141} See supra note 113-114 (discussing traditional disqualification analysis for client-related conflicts of interest).
\textsuperscript{142} See supra note 40.
\textsuperscript{143} See supra note 42 and accompanying text.
\textsuperscript{144} United States v. Diozzi, 807 F.2d 10, 12 (1st Cir. 1986); United States v. RMI Co., 467 F. Supp. 915, 924 (W.D. Penn. 1979) (calling disqualification a "Draconian Order").
\textsuperscript{145} One commentator has observed that the very nature of white collar defendants' conduct "separates them from others . . . . Many of their crimes are
ment places white collar cases in the hands of its most skilled attorneys. A white collar defendant needs an equally capable advocate on his side. In addition, many white collar criminal defendants litigate substantive issues that require an attorney with specialized knowledge. Finally, white collar cases tend to involve an enormous amount of documentary evidence that the defense attorney must process, understand, and manage. For white collar defendants, an "effective advocate" can be a scarce resource.

A disqualification motion presents additional practical problems for a white collar criminal defendant. The expense of opposing a disqualification motion can further sap a defendant's already dwindling financial resources. Moreover, a government motion to disqualify will distract the defendant's attorney from fully concentrating on the substantive defense as counsel attempts to defuse the appearance of unethical conduct that the government's motion creates. Lastly, the timing of disqualification motions can seriously damage a white collar criminal defendant's cause. A white collar criminal defense attorney often enters a case at the inception of a government investigation. By the time the government has recruited a joint defense member from the arrangement's ranks (thereby creating the conflict of interest), the attorney will often have spent many months on

more complex and more likely to involve manipulation and exploitation of the gray areas of the law. In such cases, the assistance of counsel is critically important." Karlan, supra note 81, at 671. But see Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 (1989) (stating that Sixth Amendment does not necessarily protect the ability of affluent defendants to retain "high-priced legal talent").

146. See supra text accompanying note 32.
147. See discussion supra part I.A.
149. See Wheat v. United States, 486 U.S. 153, 159 (1988) (stating that essential purpose of the Sixth Amendment is to guarantee an "effective advocate").
150. See Goldberg, supra note 2, at 262-63 (discussing "staggering" expense of opposing a disqualification motion).
151. "Simply by inviting the court to consider whether any potential conflicts are likely to develop, the government can succeed in putting defense counsel 'on trial' . . . ." Margolin & Coliver, supra note 6, at 229; see also Tague, supra note 7, at 336 (noting that disqualification motions embarrass counsel even if court rules against government).
152. MANN, supra note 28, at 9.
the case. If the government's disqualification motion succeeds, a replacement attorney—\footnote{153}{The defendant will need to retain a replacement because neither the defendant nor the government may immediately appeal a disqualification decision. Flanagan v. United States, 465 U.S. 259, 268-69 (1984) (holding that defendant may not immediately appeal a disqualification order); United States v. White, 743 F.2d 488, 494-95 (1984) (holding that government may not immediately appeal district court's refusal to disqualify).}—if the defendant can still afford one—\footnote{154}{As a district court observed: \textit{[W]hen facing a complex and protracted trial, an accused can expect to tender a substantial fee, often up front, in order to secure his attorney of choice. Where... the disqualification comes on the eve of trial, after dozens of months of pretrial preparation, the disqualified attorney may have earned most, if not all, of his fee by that time. United States v. Urbana, 770 F. Supp. 1552, 1556 n.11 (S.D. Fla. 1991).}}—will not have the same amount of time to become familiar with the case.\footnote{155}{"In an extremely complicated case it may cause a fundamental injustice to remove the one attorney whose intimate knowledge of the defense and whose close relationship with the defendants make him practically the only available attorney capable of presenting effective assistance of counsel." United States v. Renda, 669 F. Supp. 1544, 1549 (D. Kan. 1987).}

Disqualification under the joint defense doctrine also imperils the existence of joint defense arrangements. If defendants know that they can lose their attorneys merely by cooperating with other targets or codefendants, joint defense arrangements will likely cease to exist.\footnote{156}{"In an extremely complicated case it may cause a fundamental injustice..." United States v. Renda, 669 F. Supp. 1544, 1549 (D. Kan. 1987).} The risk of a member defecting looms over any joint defense arrangement,\footnote{157}{See supra note 84 and accompanying text.} and consequent disqualification of the group's attorneys might make the risk of defection too costly to bear. Yet, as courts have recognized, joint defense arrangements "can be necessary to a fair opportunity to defend,"\footnote{158}{United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833 (1979).} especially in white collar cases.\footnote{159}{See Burke et al., supra note 13, at 538; Henning, supra note 17, at 455-58; Lowenthal, supra note 6, at 62; Perito et al., supra note 69, at 7; Tate, supra note 78, at 46-47; Uelmen, supra note 17, at 36-37; see also supra discussion part I.D.}

2. The Government Witness's Interest in the Disqualification of a Joint Defense Attorney

Presumptively, an individual who shares information under the joint defense doctrine should not have to worry about that
information resurfacing, even if the individual becomes a govern-
ment witness. A former joint defense member expects that joint defense communications will remain confidential in the same way that a former client expects that communications to his attorney will remain confidential.\textsuperscript{160} Courts have consistently held that a former client's interest in the confidentiality of attorney-client communications outweighs a defendant's Sixth Amendment right to counsel of choice;\textsuperscript{161} the same basic notion should presumptively hold true for a former joint defense member.

A crucial distinction, however, separates a former client from a former joint defense member. When an attorney represents a client with interests materially adverse to those of a former client, the former client will almost never have had any reason to expect that the attorney might cross-examine him.\textsuperscript{162} On the contrary, a joint defense member knows that each of the arrangement's members already has retained an individual attorney.\textsuperscript{163} If the joint defense member becomes a government witness, that member should reasonably expect to face the joint defense attorneys in court.

Indeed, if members of a joint defense as co-defendants develop adverse interests during trial, the possibility exists that each will rely on information learned through the joint defense arrangement to undermine the other's defense.\textsuperscript{164} For example, in a fraud prosecution one defendant may want to prove that the allegedly illegal transaction never occurred. Another defendant, however, may want to emphasize that the transaction did occur, but that responsibility for the transaction should lie solely with the first defendant. If the second co-defendant relies on information that the first co-defendant disclosed under a joint defense agreement, the first co-defendant stands in the same position as a former joint defense member who becomes a government witness. This is particularly true if the first co-defendant testifies at trial. In this event, however, disqualification of the co-defendants' attorneys seems unthinkable, because each defendant re-

\textsuperscript{160} See Wilson P. Abraham Constr. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (analogizing former clients to former joint defense members).
\textsuperscript{161} See supra note 16.
\textsuperscript{162} The Model Rules clearly forbid such an event. See supra notes 64-65 and accompanying text.
\textsuperscript{163} See supra note 20.
lies on joint defense information for the arrangement's intended purpose: to assist each defendant in developing their individual defense, including cross-examination of government witnesses. Yet, functionally, no meaningful distinction exists to make joint defense disqualification more plausible when a member becomes a government witness.

III. ESTABLISHING A PER SE RULE AGAINST JOINT DEFENSE DISQUALIFICATION

A per se rule against disqualification under the joint defense doctrine adequately reconciles the continued presence of the joint defense attorneys in the case with the need to protect the confidentiality of the former member's specific communications. This rule, however, should be subject to two qualifications. First, the joint defense attorney cannot cross-examine the former member about specific privileged joint defense communications, and the defendant must understand and consent to this limitation on his right to effective assistance of counsel. In addition, if the government clearly and convinc-

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165. One prosecutor has suggested, however, "that there may be grounds to disqualify defense attorneys during trial if the defendants' interests diverge and their attorneys use information obtained through the joint defense agreement to cross-examine various witnesses." White-Collar Prosecutors Probe Joint Defense Agreements, supra note 17, at 3 (quoting statement of Larry Urgenson, chief of the Department of Justice's Criminal Fraud Section).

166. One commentator who also advocates strict controls on joint defense disqualification has called for a provision in the Federal Rules of Criminal Procedure to address joint defense disqualification. Nessim, supra note 15, at 52. Further, the same commentator has proposed an ethical rule to guide attorneys who participate in joint defense arrangements. Id.

167. This proposal assumes that the joint defense attorney represents the same client before and after the cooperating witness defects from the arrangement. If the joint defense attorney switches clients, however, a court should proceed to determine whether the attorney "shopped around" her knowledge of the government witness's confidential communications. If so, the court should consider disqualification under traditional doctrine. See supra notes 113-114 and accompanying text.

168. If the former member has disclosed the otherwise confidential joint defense communication, the court should allow the joint defense attorney to cross-examine on the disclosed matters as well. Cf. United States v. Cunningham, 672 F.2d 1064, 1073 (2d Cir. 1982) (holding that attorney had no duty to maintain confidentiality of communications disclosed by former client), cert. denied, 466 U.S. 951 (1984); see supra notes 12, 111.

169. Some courts note that this waiver does not actually waive anything, because the replacement attorney would not know, and therefore could not use, the confidential information that the otherwise disqualified attorney could not use. In re Paradyne Corp., 803 F.2d 604, 610 (11th Cir. 1986).
ingly proves\textsuperscript{170} that the former joint defense member participated in the arrangement involuntarily\textsuperscript{171} or did not understand that the joint defense attorneys could ultimately cross-examine him if he became a government witness,\textsuperscript{172} the court should proceed with traditional\textsuperscript{173} disqualification analysis.

This proposal wholly rejects the idea that a court may disqualify a joint defense attorney simply because a former member becomes a government witness and consequently has materially adverse interests to the remaining members of the arrangement. Rule 1.9(a) does not require such a result,\textsuperscript{174} and imposing summary disqualification under the joint defense doctrine eviscerates the defendant's right to counsel of choice.\textsuperscript{175} An attorney's duty of undivided loyalty lies with that particular attorney's client, not with other members of the joint defense arrangement.\textsuperscript{176}

The proposed rule restricts joint defense attorneys from cross-examining former members in a manner that would reveal specific confidential communications.\textsuperscript{177} This limitation rests on the assumption that preserving the secrecy of specific joint defense communications adequately protects the former client's interests in light of the defendant's countervailing constitutional interests. The proposal allows joint defense attorneys to rely on confidential information in cross-examining a former member,\textsuperscript{178}

\textsuperscript{170} Courts already place a "heavy burden" on the government to show the necessity of disqualification. See, e.g., United States v. Washington, 797 F.2d 1461, 1465 (9th Cir. 1986).

\textsuperscript{171} See \textit{supra} text accompanying note 83.

\textsuperscript{172} See \textit{supra} text accompanying note 83.

\textsuperscript{173} See \textit{supra} notes 113-114 and accompanying text.

\textsuperscript{174} See \textit{supra} notes 126-134 and accompanying text.

\textsuperscript{175} See \textit{supra} notes 40 and accompanying text.

\textsuperscript{176} See \textit{supra} notes 61-65 and accompanying text.

\textsuperscript{177} Commentators suggest including language in formal joint defense agreements, see \textit{supra} note 69, to prevent a joint defense member from disclosing the arrangement's confidential communications. See Nessim, \textit{supra} note 15, at 12, 51-52; Uelmen, \textit{supra} note 17, at 38. Yet one must question whether courts would rigorously enforce such contracts, considering the perceived policy implications of interfering with candid communications between the government and cooperating witnesses in criminal cases. Furthermore, and most significant, the arrangement will likely never discover whether the cooperating witness disclosed the confidential communications, for neither the witness nor the government has an incentive to confirm whether the witness disclosed confidential communications. \textit{Id.} Thus, "[a]lthough a joint privilege enables the defense lawyers to cooperate with one another, there might be no effective sanction for defection from the stonewall defense." Karlan, \textit{supra} note 81, at 694 (footnote omitted).
even though such reliance poses ethical problems. An order forbidding reliance on confidential information would be unenforceable, however, and barring any cross-examination yields too harsh a result. In the end, the proposed rule makes the possibility of cross-examination by former joint defense attorneys a cost of the former joint defense member's otherwise lucrative defection.

The second qualification to the proposed rule protects against abuse of the joint defense doctrine. Courts essentially must determine whether the former member understood the meaning of the joint defense arrangement and voluntarily participated in it. If the government proves the absence of either condition, disqualification of the joint defense attorneys may be an appropriate remedy to cure the potential conflict of interest. When determining whether the former member understood the arrangement's purpose, a court should consider simply whether the former member reasonably should have understood that becoming a government witness would not prevent cross-examination by the remaining joint defense attorneys.

The proposed per se rule prevents costly, damaging, and disruptive case-by-case litigation of joint defense disqualification motions. In successive and multiple representation situations, courts traditionally weigh the parties' competing

178. More precisely, a joint defense attorney would breach her limited fiduciary duty to the former member by relying on confidential information to cross-examine the former member. See supra note 139 and accompanying text.

179. See discussion supra part I.E.

180. See supra notes 80-83.

181. Given that each joint defense member retains a separate attorney, the government should rarely be able to prove this exception. See supra note 20 and accompanying text. Moreover, courts have traditionally presumed that white collar criminal defendants understand the implications of their decisions to retain a particular attorney. See, e.g., United States v. Friedman, 854 F.2d 535, 572-74 (2d Cir. 1988) (finding waiver of Sixth Amendment rights knowing and intelligent partly because defendant was a former prosecutor), cert. denied, 490 U.S. 1004 (1989). This same presumption should apply to white collar defendants who enter into a joint defense arrangement. Parties to a joint defense arrangement can render this issue virtually moot by signing a formal joint defense agreement that specifically indicates the possibility of cross-examination. See supra note 69, 177 and accompanying text.

182. Federal courts should apply the proposed rule in all criminal cases. The rule might appear overinclusive in the sense that its justification relies significantly on the need to preserve adversarial fairness in complex, white collar cases. But many other types of criminal cases litigated in federal court, particularly large drug conspiracy prosecutions, present similar difficulties. Furthermore, although the proposed rule is designed for complex cases, federal courts should not have to determine whether a case is "sufficiently complex" to warrant application of the proposed rule. In any event, as joint defense ar-
interests under the facts of each particular case.\textsuperscript{183} When the government seeks to disqualify on the basis of the joint defense doctrine, however, the former joint defense member's interests will \textit{never} outweigh the defendant's interests, unless the defendant has abused the doctrine or seeks to reveal specific joint defense communications. This limitation on joint defense disqualification removes any tactical advantage the government might gain by using the disqualification motion against joint defense arrangements.\textsuperscript{184} The proposed rule also saves the defendant's financial resources and his attorney's reputation from needless interference.\textsuperscript{185}

CONCLUSION

The integrity of the American system of criminal justice rests on the fairness of its adversarial processes. The right to counsel of choice and the joint defense doctrine both serve to place the accused on the same playing field as the government. Disqualification under the joint defense doctrine, however, threatens the ability of defendants to effectively defend against complex federal prosecutions. Courts, therefore, should limit disqualification to those instances in which the defendants have abused the joint defense doctrine, or when the defendant seeks to reveal specific confidential communications. In all other cases, disqualification under the joint defense doctrine is legally unnecessary and unjust as a matter of policy.

\textsuperscript{183} See supra notes 113-114 and accompanying text.
\textsuperscript{184} See supra note 102 and accompanying text.
\textsuperscript{185} See supra notes 150-151, 154 and accompanying text.