Working Paper Series

Villanova University Charles Widger School of Law *Year* 2010

Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?

Anne Poulin
1567, poulin@law.villanova.edu

Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?

43 American Criminal Law Review __ (forthcoming 2010)

Anne Bowen Poulin[1]

I. Introduction

Suppose that you face charges for driving under the influence. Knowing that a conviction will expose you to incarceration, fines, and loss of your driver's license, you hire an attorney in whom you have confidence. Guided by counsel, you go through trial, and are convicted. After sentencing, you ask counsel about filing an appeal. When counsel informs you that she cannot represent you on appeal you learn for the first time that a few days before your trial your lawyer accepted a position as Chief Assistant District Attorney with the office prosecuting you in the case.[2] Are you confident that counsel gave you the zealous representation you expect, or do you fear that counsel may have pulled her punches or, even worse, shared information with her new employer? Should someone have told you that your attorney had agreed to switch sides? Was the trial fair? Are you entitled to any relief?

---

[1] Professor of Law, Villanova University School of Law. I am indebted to Christian Piccolo, Meghan Klaric, Keri Engelman, and Jacqueline Gorbey for their excellent research assistance, and to Villanova University School of Law for its generous support.

[2] This hypothetical is based on the facts of Reeves v. State, 497 S.E.2d 625 (Ga. App. 1998)

Put yourself in the shoes of a different criminal defendant. You are charged with a sexual offense and facing a possible life sentence. You hire a criminal defense attorney with a strong reputation. On the eve of trial, the attorney moves to withdraw, but the court denies the motion. Rejecting the prosecution's offer of a plea to reduced charges, you go through trial and are convicted of the most serious charges. Only after conviction do you learn that your attorney had personally been battling the criminal justice system while representing you. The attorney was indicted on felony drug charges shortly after being hired for your case and pleaded guilty to reduced charges about a month after your conviction.[3] At sentencing you are represented by a new, court-appointed attorney, since your attorney's license has been suspended. You receive a long sentence of incarceration. As you sit in prison, do you question the quality of the representation you received? Would you have chosen to continue with your retained attorney had you known that the attorney was charged with a felony? Did your attorney, the prosecutor, or the trial judge have a duty to inform you of your attorney's legal problem? Was the trial fair? Are you entitled to any relief?

For our criminal justice system to function properly both the prosecution and defense must free to provide robust representation uninhibited by conflicts of interest.[4] Currently, concerns raised by wide-spread ineffective assistance of counsel undermine confidence in our criminal justice system.[5] Deficient assistance of counsel can result from counsel's incompetency or from a conflict of interest. Claims based on a conflict of interest are of special importance because a conflict – the claim that the attorney served two masters -- creates an even greater appearance of unfairness both to the defendant and to the general public than a mere claim that the attorney was incompetent.[6] As lawyers, we should be concerned with the appearance of unfairness as well as provable unfairness and should seek actively to eliminate deficient defense representation.[7]

---

[3] This hypothetical is based on the facts of Smith v. Hofbauer, 312 F.3d 809, 811-13 (6th Cir. 2002).

[4] In United States v. DeFalco, 644 F.2d 132 (3d Cir. 1979), the Third Circuit elaborated on the importance of uninhibited counsel:

> If there is any constraint on counsel's complete and exuberant presentation, our system will fail because the basic ingredient of the adversary system will be missing. The essence of the system is that there be professional antagonists in the legal forum, dynamic disputants prepared to do combat for the purpose of aiding the court in its quest to do justice.

644 F.2d at 136. *See also* GEOFFREY C. HAZARD AND W. WILLIAM HODES THE LAW OF LAWYERING, 10-12-10-13 (3d ed. 2006) (noting that "[i]n the modern view, a conflict of interest exists whenever the attorney-client relations or the quality of the representation is 'at risk,' *even if no substantive impropriety – such as a breach of confidentiality or less than zealous representation - in fact eventuates*") (emphasis in original).

[5] See, e.g., Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 CORN. L. REV. 679, 680-88 (2007) (discussing problem); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 20 (1997) (criticizing standard for protecting defendants from ineffective assistance).

[6] *See* Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!*, 51 WAYNE L. REV. 129, 152-53 (2005).

[7] *See* Indiana v. Edwards, 128 S.Ct. 2379, 2387 (2008) (emphasizing trial court's concern with appearance of fairness); Wheat v. United States, 486 U.S. 153, 166 (1988) (recognizing importance of fairness in trial process). *See also* HAZARD AND HODES, *supra note 4*, at 10-12 (stating that interest in maintaining public confidence in legal system may outweigh individual interests).

This article explores two types of conflicts of interest which threaten to inhibit zealous defense representation: (1) when defense counsel has, had, or seeks employment as a prosecutor; and (2) when defense counsel is faced with criminal charges while simultaneously representing a criminal defendant. Both these situations pose a conflict for counsel and also create an appearance of unfairness. The common thread in cases involving these types of conflict is that, the prosecution has ready access to information pertinent to the conflict, while neither the court nor the defendant, and sometimes not even counsel, will be aware of the problem.

When such a conflict threatens to impair the defendant's representation, it is critical to raise it as early as possible. If the conflict is raised before trial, the trial court can determine whether there is a serious problem, let the defendant decide whether to waive conflict-free representation for that case, or disqualify counsel.[8] If the issue not raised until after conviction, the defendant will have difficulty obtaining relief. The mere appearance of unfairness is not a basis for post-conviction relief. Instead, if the conflict comes to light only after conviction, the defendant must either show that the conflict adversely affected counsel's representation of the defendant in some specific way or must meet the more demanding standard of showing that counsel was incompetent and that the incompetence prejudiced the defendant.

The article examines conflict situations in which the prosecution has special access to information regarding the conflicts – 1) cases in which defense counsel has an employment relation with the prosecutor's office and 2) cases in which defense counsel faces criminal investigation or charges. Section II provides an overview of the constitutional analysis of and relief for defense counsel conflicts of interest. Section III discusses the importance and benefit of early intervention. Section IV considers the possible conflict when counsel has, had, or is seeking employment as a prosecutor. Section V examines cases in which counsel is charged with a crime or is under investigation for criminal activity. Section VI argues that, given the difficulty of obtaining post-conviction relief and the benefit of early intervention, the prosecution should have the burden of discovering and disclosing the relevant facts before trial and raising the question of counsel's possible conflict.

II. The Constitution and Post-Conviction Relief for Conflicts of Interest

When a defendant is represented by an attorney who arguably labored under a conflict of interest, the defendant may be entitled to post-conviction relief based if the

[8] Of course, in some cases the trial court is made aware of the conflict but nevertheless fails to properly address the problem. *See, e.g.,* Holloway v. Arkansas, 435 U.S. 475 (1978); People v. Good, 877 N.Y.S.2d 766 (N.Y. App. Div. 2009) (discussing how County Court permitted defense counsel to withdraw after accepting position with District Attorney's office but failed to inform defendant of possible conflict or give defendant opportunity to waive conflict); People v. Gaines, 716 N.Y.S.2d 207, 209 (N.Y. App. Div. 2000) (noting that trial court was informed when counsel took a job with the prosecutor's office and permitted counsel to withdraw but did not inform defendant or seek a waiver).

defendant's constitutional rights have been violated.[9] Once the defendant has been convicted, the courts ask whether counsel had a conflict of interest that interfered with the representation of the defendant to a degree that violated the defendant's sixth amendment right to counsel.[10] The court will be concerned only with the reliability of the trial's outcome, requiring the defendant to demonstrate why the court should not trust the outcome, and thus creating a high hurdle for the defendant to overcome.[11] Even if the defendant was represented by a conflicted attorney, the conviction is likely to stand.[12] The Supreme Court limits reversals on constitutional grounds to cases in which the defendant's trial was demonstrably unfair or the circumstances raise a serious question about the fairness of the trial.

---

[9] The defendant does not necessarily prevail simply because counsel failed to comply with the Rules of Professional Conduct. The Supreme Court has made it clear that the Constitution does not encompass the rules of professional responsibility. *See* Mickens v. Taylor, 535 U.S. 162, 166 (2002) (explaining that defects in assistance which do not affect the trial's outcome do not violate constitutional rights); Strickland v. Washington, 466 U.S. 668 (1984); Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("[A] court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct . . . ."); Strickland v. Washington, 446 U.S. 668, 688 (1984) (noting that the Sixth Amendment does not establish specific "requirements of effective assistance"). *See also* Moss v. United States, 323 F.3d 445, 461 (6th Cir. 2003) (noting that rules governing conflicted defense counsel are not intended to enforce the rules of professional responsibility); Skinner v. Duncan, 2003 WL 21386032 at * 48 n.85 (S.D.N.Y. 2003) (noting that Court has repeatedly rejected argument that a breach of ethical standards violates the right to effective assistance). Conversely, there is no reason to assume that defendant must establish that the conflicted representation also violated the rules of professional responsibility in order to prevail on a constitutional claim. *See* Jeffrey Scott Glassman, Note, Mickens v. Taylor: *The Court's New Don't Ask, Don't Tell Policy for Attorneys Faced with a Conflict of Interest*, 18 ST. JOHN'S J. LEGAL COMMENT., 919, 972-73 (2004) (suggesting that violation of ethical rule should raise rebuttable presumption of prejudice).

[10] The question is somewhat different when a state prisoner challenges a state court conviction. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), state court action is reviewed deferentially and will be upheld unless it represents unreasonable application of Supreme Court precedent. 28 U.S.C. § 2254(d) (West 2008). *See* Plumlee v. Masto, 512 F.3d 1204, 1209-10 (9th Cir. 2008) (noting that trial court credited counsel's testimony and consequently rejected defendant's claim of conflict); Tueros v. Greiner, 343 F.3d 587, 591 (2d Cir. 2003) (discussing standard); Rubin v. Gee, 292 F.3d 396, 400-01 (4th Cir. 2002) (stating standard); Smith v. Hofbauer, 321 F.3d 809, 817-18 (6th Cir. 2002) (discussing ambiguity about what constitutes a conflict of interest under *Sullivan*).

[11] *See* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153 (2005) (discussing courts' assessment of reliability and centrality of concept to effective assistance of counsel guarantee). Some states grant more protection under the state constitution. *See, e.g.*, State v. Cottle, 946 A.2d 550, 562 (N.J. 2008) (discussing difference between state and federal constitutional protection).

[12] *See, e.g.*, Bridges v. United States, 794 F.2d 1189, 1195 (7th Cir. 1986) (holding that although defense counsel was equally involved in the cocaine related transactions, the conviction stood since defendant was fully aware and understood the conflict); Sanchez v. Arkansas, 756 S.W.2d 452, 453 (Ark. 1988) (noting that defense counsel was charged with assault during the time when he represented defendant but defendant did not suffer any prejudice to warrant post-conviction relief). For a discussion of the various standards applied by courts, *see infra* notes 13-41 and accompanying text. The difference in perspective between pre-trial and post-conviction consideration of conflicts may explain why the Court departs from standard terminology ("conflict of interest") and instead discusses actual conflicts, looking for identifiable adverse effect on counsel's conduct. *See* Mickens v. Taylor, 535 U.S. 162,172 n.5 (2002) (explaining use of "actual conflict"). *See also* Craig M. Bradley, *Supreme Court Review: The Right to Unconflicted Counsel*, 38 TRIAL 62, 62-64 (June 2002) (discussing difference between conflicts, actively representing conflicting interests, and adverse effect); Joy, *supra* note 12, at 41 (Spring 2002) (discussing terminology).

The Court's approach to challenges based on violations of the defendant's right to counsel does not even effectively protect defendants from the deficiencies of defense counsel. In most cases where the defendant complains of counsel's poor representation, the standard defined in *Strickland v. Washington*[13] controls. Under *Strickland*, the defendant must establish some specific incompetent act or omission by counsel. Additionally, the defendant must prove that counsel's incompetence prejudiced the defendant by showing a reasonable probability that, but for the incompetence, the result would have been different. The *Strickland* standard is difficult to satisfy, making it hard for defendants to get relief for ineffective assistance of counsel based on incompetence.[14] This approach ensures that some convictions will be affirmed simply because the defendant cannot identify the specific failure of the counsel or prove the prejudice even though the defendant in fact suffered prejudice due to counsel's shortcomings.

The Court has taken a more protective stance in cases where counsel suffered from a conflict of interest. In *Holloway v. Arkansas*, [15] the Court presumed prejudice and granted the defendants' reversal based on the trial court's failure to fulfill its obligations. In *Holloway*, defense counsel was assigned to represent three codefendants. Counsel objected and asked for substitute counsel, informing the court that the multiple representation created a conflict of interest.[16] The trial court took no action, forcing counsel to proceed through trial representing all three defendants. In that situation, the Court held the defendant was entitled to relief without any specific showing of prejudice or even impact on counsel's performance.

The Court also recognized the obligation of the trial court in *Wood v. Georgia*.[17] In *Wood*, the Court realized when it was reviewing the defendants' equal protection claim that the three indigent defendants had been represented by a single lawyer who worked for their employer and their employer had paid the attorney's fees.[18] The record also suggested a divergence between the defendants' interests and those of the employer. As a result, the Court concluded that the trial court had a duty to inquire about the possible conflict and remanded the case, directing the trial court to determine whether there was an actual conflict.[19]

In *Cuyler v. Sullivan*,[20] the Court established a somewhat more lenient test in cases where the defendant proved that counsel had labored under an actual conflict of

---

[13] 466 U.S. 668 (1984).
[14] *See* Williams, *supra* note 5, at 139-41 (discussing difficulty of satisfying *Strickland* test); Blume, *supra* note 11, at 1165-68(discussing *Strickland* test); Donald J. Hall, *Effectiveness of Counsel in Death Penalty Cases*, 42 BRANDEIS L.J. 225, 225-29 (2003-04) (criticizing test, particularly as applied in capital cases); Glassman, *supra* note 9, at 926-33 (discussing *Strickland*). *See also* State v. Cottle, 946 A.2d 550, 561-63 (N.J. 2008) (illustrating difficulty of satisfying *Strickland* test and benefit of more protective test applied when counsel has a conflict).
[15] 435 U.S. 475 (1978).
[16] 435 U.S. at 478-480.
[17] 450 U.S. 261 (1981).
[18] 450 U.S. at 272.
[19] 450 U.S. at 273.
[20] 446 U.S. 335 (1980).

interest, even if the trial court was not on notice of the conflict.[21] *Sullivan* established that if the defendant shows that counsel actively represented conflicting interests and that the conflict had an adverse effect on counsel's performance, the court will presume prejudice.[22] The *Sullivan* presumption serves as a prophylactic protection in cases where prejudice is likely and the *Strickland* test provides inadequate protection of the defendant's right to counsel.[23]

More recently, in *Mickens v. Taylor*,[24] the Court limited the impact of *Sullivan*. The *Mickens* Court advanced two critical limitations on the constitutional rules governing post-conviction relief for conflicts of interest.[25] First, the Court questioned whether the full range of conflicts that the lower courts have evaluated under the *Sullivan* test warranted such treatment, suggesting that the *Sullivan* presumption may apply only in cases of concurrent representation of codefendants.[26] Second, the Court restricted the cases in which the trial court's failure to identify and address a conflict would result in reversal, emphasizing that in most conflict cases the defendant must establish that a conflict adversely affected defense counsel's performance.[27]

First, *Mickens* seems to suggest that only conflicts arising from concurrent representation of codefendants are to be analyzed under the *Sullivan* standard[28] and that

---

[21] 446 U.S. at 348-50. The defendant must establish an actual conflict. If counsel subjectively but mistakenly believes she has divided loyalty, the possibility that counsel's subjective belief resulted in a violation of the defendant's right to effective assistance is more likely to be evaluated under *Strickland* than *Sullivan*. *See* Tueros v. Greiner, 343 F.3d 587, 597-98 (2d Cir. 2003).

[22] *See* Hall v. United States, 371 F.3d 969, 973 (7th Cir. 2004) (discussing the two tests and describing *Sullivan* as imposing a "lighter burden"); Tueros v. Greiner, 343 F.3d 587, 592 (2d Cir. 2003) (discussing the two tests). *See also* McFarland v. Yukins, 356 F.3d 688, 705 (6th Cir. 2004) (explaining adverse effect); Wright v. Smith, 2007 WL 2412248 at *7 (N.D.N.Y. 2007) (discussing meaning of adverse effect).

[23] Earp v. Ornoski, 431 F.3d 1158, 1184 (9th Cir. 2005); Alberni v. McDaniel, 458 F.3d 860, 874 (9th Cir. 2006) (holding it was proper to apply *Sullivan* to successive representation); People v. Rundle, 180 P.3d 224, 548 (Cal. 2008).

[24] 535 U.S. 162, 172 n.5 (2002).

[25] I will not fully reprise the facts and opinions in *Mickens*. A number of other authors have already done so. *See generally* Bradley, *supra* note 12, at 62-63(discussing *Mickens*); *The Supreme Court, 2001 Term* — Leading Cases, 116 HARV. L. REV. 242, 242-51 (2002) (discussing *Mickens*); Joy, *supra* note 12, at 40(discussing *Mickens* and tests applied in conflict cases before *Mickens* and defined in *Sullivan*, *Wood*, and *Holloway*); Glassman, *supra* note 9, at 947-65(discussing *Mickens*). This article does not critique *Mickens*, but only seeks to consider how the law should develop going forward.

[26] Mickens v. Taylor, 535 U.S. 162, 174-75 (2002).*See also* Echols v. State, 127 S.W.3d 486, 493 (Ark. 2003) (noting that Court did not determine whether *Sullivan* test applies to conflicts other than those created by concurrent representation).

[27] 535 U.S. at 173-74. *See also* United States *ex rel.* Unger v. Pierce, 2003 WL 22872123 at *4 (N.D. Ill. 2003) (noting that *Mickens* requires proof of actual conflict and adverse effect).

[28] Whiting v. Burt, 395 F.3d 602, 618-19 (6th Cir. 2005) (holding that *Sullivan* applies only to concurrent representation). *See* Scott A. Levin, Note, *An Open Question? The Effect of* Cuyler v. Sullivan *on Successive Representation After* Mickens v. Taylor, 40 CRIM. LAW BULLETIN 3 (2004) (looking at question of whether *Mickens* extends *Sullivan* standard to future successive representation questions); Mark W. Shiner, Note, *Conflicts of Interest Challenges Post* Mickens v. Taylor: *Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts*, 60 WASH. & LEE L. REV. 965, 980-96(2003) (discussing reach of *Sullivan* rule before and after *Mickens*). *See also* Caban v. United States, 281 F.3d 778, 782 (8th Cir. 2002) (considering the question before *Mickens* was decided and remarking that "loyalties divided between codefendants necessarily will infect the very core of at least one's defense, and

conflicts other than concurrent representation should be assessed under the *Strickland* standard. One way of conceptualizing the *Mickens* limitation of the *Sullivan* test is to view conflicts as falling into three categories – cases of concurrent representation, cases of successive representation, and cases where counsel's self-interest is at odds with the defendant's – and to apply *Sullivan* only in cases of concurrent representation.[29] Read this way, *Mickens* leads to the conclusion that a defendant complaining of a conflict of interest based on something other than concurrent representation can get post-conviction relief only by establishing actual prejudice.[30] This reading of *Mickens* fails to adequately protect against the full range of conflicts that undermine counsel's representation of the defendant.[31]

One crucial question about *Mickens*' impact, then, is whether some conflicts not involving concurrent representation of codefendants warrant a presumption of prejudice if shown to have adversely affected counsel's performance. It can be argued that *Sullivan*'s presumption of prejudice should extend to any case in which prejudice from defense counsel's conflict is likely and proof of prejudice sufficiently elusive.[32] Some

---

prejudice should be presumed. However, the same impact will not be found automatically in other conflict situations").

[29] For a further discussion of *Mickens*, see *supra* notes 24-28, and *infra* notes 30-31 and accompanying text. *See also* Shiner, *supra* note 28, at 996-98 (drawing line between concurrent representation and conflicts involving the attorney's self-interest, arguing that conflicts involving the attorney's personal interest are less serious). However, Shiner focuses on conflicts arising from counsel's pecuniary interests – the prospect of profiting from the defendant's case. *Id.* at 1003-04. He argues that the *Sullivan* standard should apply only in cases of concurrent representation. *Id.* A defendant who complains that counsel suffered from a conflict because counsel's self-interest was at odds with the defendant's interest would have to satisfy the outcome-oriented test of prejudice established in *Strickland*. *Id.* at 1004-05.

[30] *See* Schwab v. Crosby, 451 F.3d 1308, 1327-28 (11th Cir. 2006) (rejecting application of *Sullivan* where counsel refrained from vigorous cross examination of fellow attorneys in public defender's office); Alberni v. McDaniel, 458 F.3d 860, 873 (9th Cir. 2006) (concluding that *Mickens* suggests a more stringent rule for successive representation cases); Earp v. Ornoski, 431 F.3d 1158, 1184 (9th Cir. 2005) (reading *Mickens* as clearly limiting *Sullivan* analysis to cases of concurrent representation); United States v. Young, 315 F.3d 911, 915 n.5 (8th Cir. 2003) (summarizing Eighth Circuit's understanding that *Mickens* extends *Sullivan* only to "multiple or serial representation"); Smith v. Hofbauer, 312 F.3d 809, 818 (6th Cir. 2002) (refusing to extend *Sullivan* to conflict based on counsel's pending drug charges); Skinner v. Duncan, 2003 WL 21386032 at *47 (S.D.N.Y. 2003) (refusing to extend *Sullivan* test to conflict claims involving counsel under indictment); People v. Rundle, 180 P.3d 224, 548 (Cal. 2008) (concluding that defendant did not satisfy *Strickland* although he did establish that conflict arising from counsel's self-interest affected counsel's performance). *See also* Schwab v. Crosby, 451 F.3d 1308, 1324-25 (11th Cir. 2006) (summarizing authority and concluding question is open); Wright v. Smith, 2007 WL 2412248 at *7 n.13 (N.D.N.Y. 2007) (discussing lack of clarity after *Mickens*).

[31] Some courts continue to assess other types of conflicts under the *Sullivan* test. *See, e.g.*, Hall v. United States, 371 F.3d 969, 973 (7th Cir. 2004) (disregarding dissent and applying test to concurrent representation stating that the test also applies when counsel must choose between counsel's personal interests and those of the defendant); Alessi v. State, 969 So. 2d 430, 432 (Fla. Dist. Ct. App. 2007) (noting that the Florida courts continue to apply *Sullivan* to all conflicts).

[32] *See* John Capone, *Supreme Court Review, Facilitating Fairness: The Judge's Role in the Sixth Amendment Right to Effective Counsel*, 93 J. CRIM. L. & CRIMINOLOGY 881, 905 (2003). *See also* Rugiero v. United States, 330 F. Supp. 2d 900, 906 (E.D. Mich. 2004) (concluding that the reasons for presuming prejudice under *Sullivan* were present where counsel faced criminal investigation while representing the defendant and noting that the *Sullivan* rule rests on "(1) the high probability of prejudice arising from the conflict and (2) the difficulty of proving that prejudice"); People v. Rundle, 180 P.3d 224, 548 (Cal. 2008)

courts have adopted this approach and applied *Sullivan* to cases involving conflicts other than concurrent representation, reasoning that the conflict before the court raised at least as serious concerns.[33]

Second, in *Mickens*, the Court severely limited the circumstances in which the trial court's failure to identify and address a conflict of interest would lead to automatic reversal. *Mickens* held that a presumption of prejudice is justified only if counsel objects to being required to represent conflicting interests and the trial court does not determine whether there is a conflict.[34] Even though the trial court in *Mickens* had failed to inquire into a potential conflict about which it knew or should have known, the defendant's burden was not reduced; the defendant was required to demonstrate that counsel labored under an actual conflict which adversely affected his performance.[35] Thus the defendant is entitled to reversal based on the trial court's failing only if counsel makes a timely objection and the trial court forces counsel to represent codefendants, unless the trial court determines there is no conflict.[36] This appears to be the rule that will govern cases going forward.[37]

(declining to apply presumption and stating that presumption will apply "[o]nly when the court concludes that the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel"). *Cf.* Whiting v. Burt, 395 F.3d 602, 619 (6th Cir. 2005) (declining to extend *Sullivan* and noting that defendant would not encounter difficulty proving prejudice if it was present).

[33] *See* Rubin v. Gee, 292 F.3d 396, 402 n.2 (4th Cir. 2002) (concluding that standard applied to conflict created by counsel's involvement in defendant's acts to evade being arrested for murder because conflict was so serious); People v. Miera, 183 P.3d 672, 675 (Colo. App. 2008) (stating that question of standard for conflicts other than concurrent representation is open after *Mickens* and applying *Sullivan* to serious conflict resulting from successive representation). *See also* State v. Lopez, 835 A.2d 126, 133 (Conn. App. Ct. 2003) (holding trial court did not fulfill its obligation and reasoning that strict standard applied because counsel's role as a material witness was an actual conflict and compromised the structural integrity of the trial); Moss v. United States, 323 F.3d 445, 462 (6th Cir. 2003) (reasoning that *Sullivan* applied in the particular case of consecutive representation because the earlier and later representations were so closely related). Conversely, if the situation is both common and not fraught with prejudice, the court will not extend *Sullivan*. *See* Whiting v. Burt, 395 F.3d 602, 619 (6th Cir. 2005) (explaining that the Supreme Court has only applied the *Sullivan* standard in cases where: "(1) prejudice was obvious . . . or where there was a 'high probability of prejudice;' and (2) it was difficult to prove that prejudice") (citing Mickens v. Taylor, 535 U.S. 162, 175 (2002)).

[34] Mickens v. Taylor, 535 U.S. 162, 173-74 (2002). *See also* Glassman, *supra* note 9,at 959 (discussing limitation on duty of court). *See generally* Capone, *supra* note 32, at 907-10 (discussing and criticizing *Mickens*' approach to the trial court's limited role in identifying and addressing conflicts); Glassman, *supra* note 9, at 959 (discussing Court's approach to trial court's obligation).

[35] Mickens v. Taylor, 535 U.S. 162, 174 (2002). *See also* Alberni v. McDaniel, 458 F.3d 860, 872 (9th Cir. 2006) (holding that defendant must show actual conflict and adverse affect even though trial court failed to inquire properly); Pratt v. Upstate Corr. Facility, 413 F. Supp. 2d 228, 246 (W.D.N.Y. 2006) (noting that defendant must establish adverse effect even though trial court knew of possible conflict and took no action).

[36] Mickens v. Taylor, 535 U.S. 162, 168 (2002).

[37] *See* Wright v. Smith, 2007 WL 2412248 at *8 (N.D.N.Y. 2007) (understanding that *Mickens* does not provide for per se reversal when the trial court does not inquire concerning potential conflict due to successive representation); Townsend v. State, 85 S.W.3d 526, 528-30 (Ark. 2002) (holding defendant was not entitled to reversal merely because court failed to explore alleged conflict created by defendant's civil suit against counsel filed shortly before trial was scheduled to start); People v. Cornwell, 117 P.3d 622,

Thus, even if the trial court should have known of the conflict, a defendant whose counsel suffered from a conflict based either on counsel's employment relationship with the government or counsel's own criminal charges is unlikely to win automatic reversal based on the failure of the trial court. Instead, the defendant will have to argue for reversal on other grounds, generally seeking relief under the *Sullivan* rule (proving an actual conflict that adversely affected counsel's performance) or under *Strickland* (proving incompetence and prejudice).

Although the *Sullivan* standard is easier to satisfy than the *Strickland* requirement that the defendant show prejudice, the defendant receives the presumption of prejudice only if she can show an actual conflict that had an adverse impact on counsel's performance.[38] Courts have recognized the challenge of establishing an adverse effect.[39] Ordinarily, to do so, the defendant must persuade the court to hold a hearing and then demonstrate a link between counsel's compromised position and some specific action taken (or not taken) in defense of the case.[40] The prosecutor and counsel may testify at the hearing, both with a strong interest in refuting the defendant's claim that counsel did not provide effective assistance.[41] As a result, a defendant who succeeds in getting a hearing and establishing a conflict may nevertheless be unable to prove adverse effect.

639-40 (Cal. 2005) (concluding that even if trial court's inquiry was not adequate, defendant would have to establish that counsel's conflict based on his prior representation of government witness adversely affected his conduct); Duvall v. State, 923 A.2d 81, 95-98 (Md. 2007) (holding that *Mickens* required reversal where counsel informed court of conflict and court took no action but forced counsel to continue). *But see* State v. Lopez , 835 A.2d 126, 130-33 (Conn. App. Ct. 2003) (concluding that defendant's rights were violated because trial court failed to inquire and concluding that duty to inquire was triggered even though counsel did not raise the issue).

[38] *Mickens* appears to raise a question about the necessary showing, stating "prejudice will be presumed only if the conflict has significantly affected counsel's performance-thereby rendering the verdict unreliable." 535 U.S. 162, 173 (2002). Whether the requirement that the defendant show significant effect and the specific requirement that the showing suggest unreliability of the verdict represent an enhanced burden on the defendant is unclear. Exploration of these questions is beyond the scope of this article.

[39] *See, e.g.*, Armienti v. United States, 313 F.3d 807 (2d Cir. 2002) (affirming trial court determination that defendant had not shown conflict or adverse effect); United States v. Novaton, 271 F.3d 968, 1011-12 (11th Cir. 2001) (discussing requirement and concluding defendant could not establish adverse effect); United States v. DeFalco, 644 F.2d 132, 135 (3d Cir. 1979) ("[A] reviewing court cannot reliably determine to what extent the decisions were based on legitimate tactical considerations and to what extent they were the result of impermissible consideration(s) . . . .") (quoting United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512, 520 (3d Cir. 1979)); Skinner v. Duncan, 2003 WL 21386032 at * 44-*46 (S.D.N.Y. 2003) (discussing assessment of adverse effect). *See also The Supreme Court, 2001 Term*,*supra* note 25, at 247-50 (discussing difficulty of establishing adverse effect); Joy, *supra* note 12, at 42 (noting challenges defendants face when trying to establish adverse impact).

[40] *See* United States v. Fuller, 312 F.3d 287, 291 (7th Cir. 2002) (noting that trial record is rarely complete enough to support claim that counsel was ineffective); Stoia v. United States, 22 F.3d 766, 768 (7th Cir. 1994) (discussing need for hearing). *See also* Alberni v. McDaniel, 458 F.3d 860, 872 (9th Cir. 2006) (remanding for evidentiary hearing); Armienti v. United States, 234 F.3d 820, 825 (2d Cir. 2000) (remanding for evidentiary hearing in case where trial court denied petition without hearing two and a half years after it was filed); Briguglio v. United States, 675 F.2d 81, 83 (3d Cir. 1982) (remanding for hearing); Hall v. United States, 371 F.3d 969, 974-75 (7th Cir. 2004) (discussing whether defendant was entitled to evidentiary hearing); State v. Chandler, 698 S.W.2d 844, 848-49 (Mo. 1985) (describing hearing).

[41] *See, e.g.*, Armienti v. United States, 313 F.3d 807, 810 (2d Cir. 2002) (noting that trial court credited testimony of counsel and the prosecutor and therefore rejected defendant's claim). In some cases, so much

The courts' approach to conflicts of interest suffers from an additional shortcoming. The courts generally focus narrowly on counsel's conduct and do not factor in the likelihood that the prosecution's actions are negatively influenced by defense counsel's criminal problems or employment relation. If the prosecutor views defense counsel either as a criminal or as an employee, the prosecutor may make discretionary decisions that disfavor the defendant by taking steps adverse to the defendant or refraining from actions that could benefit the defendant.[42] A more protective approach would consider the impact on the prosecutor when evaluating whether counsel's conflict had a detrimental effect on the representation of the defendant.

Conflicts in each of the two categories on which this article focuses are highly likely to impact counsel's representation in ways that cause subtle prejudice to the defendant, yet that prejudice will be extremely difficult to prove. These categories of conflicts should therefore be analyzed under the *Sullivan* rule, granting the defendant relief on a showing of actual conflict and adverse effect. However, given the difficulty of satisfying *Sullivan*, the defendant will not generally be able to obtain relief after the fact. Even when the defendant can point to specific omissions of counsel, the court will not readily view the omissions as a result of counsel's self-interest flowing from counsel's own criminal case or employment relationship with the prosecutor's office.[43] Only a per

---

time has passed that one must question the ability of those involved to recall what motivated specific actions. *See, e.g.*, Armienti v. United States, 234 F.3d 820, 822 (2d Cir. 2000) (remanding for hearing three and a half years after petition was filed and seven years after conviction).

[42] *See* Mannhalt v. Reed, 847 F.2d 576, 583 (9th Cir. 1988) (noting that the accusation against defense counsel likely diminished the prosecution's willingness to deal with defendant, but instead emphasizing that counsel could not pursue a plea bargain for the defendant because it might implicate counsel himself). For example, the prosecutor may opt for more limited discovery, performing to the letter of the rule but giving nothing more, not wishing to open the file to an attorney accused of criminal conduct. Similarly, the prosecutor may refrain from offering a favorable plea bargain to the defendant or may offer a less favorable bargain than would otherwise be the case. Of course, the defendant may have difficulty establishing such an effect. *See, e.g.*, Armienti v. United States, 313 F.3d 807, 813 (2d Cir. 2002) (reporting that the prosecutor testified that her decisions were not influenced by the fact that defense counsel was the target of an ongoing grand jury investigation).

[43] *See, e.g.*, Covey v. United States, 377 F.3d 903, 908-09 (8th Cir. 2004) (rejecting defendant's argument that conflict of interest led to adverse effect); Skinner v. Duncan, 2003 WL 21386032 at * 46 (S.D.N.Y. 2003) (rejecting argument that counsel's omissions resulted from conflict of interest). In some cases, the defendant can garner evidence that persuades the court that the most likely explanation for counsel's shortcomings is the conflict of interest. In Stoia v. United States, 22 F.3d 766, 773 (7th Cir. 1994), for example, the defendant presented affidavits from the other lawyers on the defense team attesting to counsel's conduct as a member of the team and describing the conflicted counsel's efforts to direct their actions as well as his failure to perform tasks assigned to him. The Seventh Circuit concluded that, if the defendant established a conflict, the conduct described would satisfy the adverse effect requirement. 22 F.3d at 773. If counsel had not been part of a larger defense team, the defendant would have had to rely entirely on counsel's self-serving assessment of his actions. 22 F.3d at 773. *See also* United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987) (concluding that counsel's conflict had led him to allow defendant's trial to drag on and to fail to press for a negotiated plea); United States v. Levy, 25 F.3d 146, 157-58 (2d Cir. 1994) (concluding that counsel's numerous conflicts explained the failure to adopt what the prosecution had referred to as defendant's best defense); Mannhalt v. Reed, 847 F.2d 576, 582 (9th Cir. 1988) (pointing both to objective indication in record and to counsel's admission that he was "shaken and furious" while cross-examining government witness who accused him of criminal conduct); Rugiero v.

se rule of reversal – protection granted by some states but most unlikely to be adopted as a matter of federal law – would fully protect the defendant. As a result, early preventive intervention is critical to protect the defendant from possible severe repercussions of these conflicts and to maintain the fairness of the process.

The balance of the Article discusses two specific types of conflicts, the importance of early intervention, and the resulting need to impose an ethical duty on the prosecutor to disclose facts pertinent to conflicts of these two types. Section III explores the advantages of early intervention, offering better protection to the defendant as well as to the public interest. Section IV discusses conflicts that arise because defense counsel has an employment relationship with the prosecutor's office. Section V discusses conflicts when defense counsel faces criminal charges or is under investigation for criminal wrong-doing. Finally, Section VI argues for imposing on prosecutors a duty to disclose relevant information when defense counsel has employment relationship with the prosecutor's office or a criminal problem.

III. Early Intervention

Because the attorney's situation can compromise the fairness of the proceeding and yet not provide a basis for reversing the conviction, legal mechanisms must foster early intervention. After the fact, it is extremely difficult to determine the effect of the conflict.[44] The justice system will function more fairly if the court is able to confront possible conflicts early in the case and determine whether there is a substantial risk that the lawyer's own interest or duty to another would materially and adversely affect the lawyer's representation of the defendant.[45] In the early stages of the case, the court has several options: it can (1) assess the situation and decide there is no actual or potential conflict and, hence, no problem,[46] (2) accept a waiver from the defendant, or (3) disqualify counsel.

By addressing the issue early, the court may avoid the problems posed by counsel's situation. Early intervention by the court gives the defendant the opportunity to

---

United States, 330 F. Supp. 2d 900, 907-09 (E.D. Mich. 2004) (concluding that counsel was adversely affected in four specific ways).

[44] In *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978), the Court noted the difficulty of proving prejudice in conflict cases:

> But in a case of joint representation of conflicting interests the evil-it bears repeating-is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

[45] Restatement (Third) of the Law Governing Lawyers § 121; Joy, *supra* note 12,at 41.

[46] *See, e.g.*, Plumlee v. Masto, 512 F.3d 1204, 1206-07 (9th Cir. 2008) (trial court held hearing on alleged conflict and rejected defendant's request for relief).

make an informed decision. If the defendant elects to proceed with counsel despite the threatened conflict, the defendant will do so with open eyes. In addition, discussion of the issues may encourage defense counsel to assess the ethical risks carefully, prompting a more complete discussion with the defendant or perhaps a request to withdraw from the case. Further, early intervention permits the prosecution and defense counsel to discuss the possible conflict on the record, giving the court the best available assessment of the situation.[47] If the court either accepts a valid waiver of the conflict from the defendant or removes counsel from the case after proper consideration of the defendant's preference, the fairness of the process will be preserved and the conviction and sentence will be better insulated from challenge.

A. Waiver of the Conflict

One reason to seek early and open disclosure of defense counsel's predicament is to require the defendant to respond on the record. Like concurrent representation of co-defendants, these types of conflicts can be waived.[48] The defendant may prefer to continue with counsel, regardless of the existence of counsel's own criminal charges or counsel's employment relation with the government.[49] If so, the defendant may act on this preference and seek to waive the right to conflict-free counsel. In turn, if the defendant waives the conflict on the record, the prosecution will be in a stronger position to defend any eventual conviction in the case.

The trial court should evaluate the proffered waiver in the context of the specific case. Due to the numerous factors that go into assessing the validity of a waiver, the courts should not establish a rule that these conflicts are categorically non-waivable. However, there are some cases in which the court may properly refuse to accept the defendant's waiver.[50] The court's concern with the appearance of impropriety, ethical

---

[47] Of course, any pretrial discussion of the possible conflict will lack all the facts. In Wheat v. United States, 486 U.S. 153 (1988), the Court emphasized the challenge posed when the trial court must assess a conflict before trial. 486 U.S. at 162-63. That said, the court cannot be expected to detail every possible problem raised by the conflict. For example, if counsel is under investigation, neither the court nor the defendant will have access to the details of the government's case against the attorney. *See, e.g.*, United States v. Lowry, 971 F.2d 55, 61-62 (7th Cir. 1992) (concluding that defendant had sufficient information to make a valid waiver even though defendant did not know details of case against counsel). For further discussion on the importance of early intervention, *see infra* notes 187-214 and accompanying text.

[48] United States v. Levine, 794 F.2d 1203, 1206 (7th Cir. 1986) (holding defendant had waived conflict free representation and could not then complain). *See also* People v. Waddell, 24 P.3d 3, 8-11 (Colo. Ct. App. 2000) (holding that defendant had effectively waived conflict when defense counsel was also under prosecution by same district attorney); Bridges v. United States, 784 F.2d 1189, 1992-94 (7th. Cir. 1986) (holding defendant waived the right to conflict free counsel since defendant knew about defense counsel's possible conflict problems because both defendant and defense counsel were involved together in the cocaine-related transactions for which defendant was being charged).

[49] In some cases, the defendant is willing to waive some other right in order to resolve the conflict. *See, e.g*., United States v. Levy, 25 F.3d 146, 150 (2d Cir. 1994) (defendant was willing to forgo the right to testify to prevent the prosecution from calling counsel as a witness and thereby permit counsel to continue in the case). For a further discussion of waiving conflicts, see *infra* notes 51-66 and 223.

[50] *See, e.g.*, United States v. Hobson, 672 F.2d 825, 829 (11th Cir. 1982) (holding that defendant could not waive the problem); United States v. Snyder, 707 F.2d 139, 145 (5th Cir. 1983) (agreeing with trial court that "likelihood of public suspicion outweigh[ed] the social interest served by [counsels] continued

standards, and unfairness if counsel continues in the case may persuade the court not to accept the defendant's proffered waiver.[51] While the court must give adequate consideration to the defendant's constitutional right to counsel of choice, the right is not absolute.[52] The trial court's obligation to oversee the fairness of the process and protect the integrity of the justice system will sometimes justify denying a defendant counsel of choice.[53]

The court may also fear a later challenge based on counsel's conflict. If the court accepts the defendant's waiver and the defendant proceeds with conflicted counsel, the defendant may later argue that counsel's particular conflict was a non-waivable problem.[54] Even though the defendant's post-conviction argument is unlikely to prevail,[55] the trial court may anticipate that later challenge and exercise its discretion to head it off, declining to accept the waiver.

If the court allows the representation to continue despite counsel's conflict, the court must establish a valid waiver because the defendant's constitutional right to effective assistance of counsel is at stake. The court should not find a waiver unless the court first engages the defendant in a colloquy, explaining the nature of the problem and the defendant's options.[56] Responsibility for addressing the issue and obtaining the

---

representation of defendant"); United States v. Melo, 702 F. Supp. 939, 943 (D. Mass. 1988) (concluding that waiver could not cure problem presented by evidence relating to counsel). *See also* Wheat v. United States, 486 U.S. 153, 160 (1988) (noting that the courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them").

[51] *See* cases cited *supra* n. 50.

[52] *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (holding that trial court did not give adequate consideration to defendant's right to counsel of choice); Wheat v. United States, 486 U.S. 153, 159 (1988) (holding that trial court could deny defendant counsel of choice); United States v. Hobson, 672 F.2d 825, 828-29 (11th Cir. 1982) (concluding over dissent that trial court gave adequate consideration to defendant's right).

[53] *See* Wheat v. United States, 486 U.S. 153, 159-62 (1988); United States v. Snyder, 707 F.2d 139, 146 (5th Cir. 1983) (affirming despite defendant's complaint that trial court improperly disqualified counsel of choice). *See generally* Patrice McGuire Sabach, Note, *Rethinking Unwaivable Conflicts of Interest After* United States v. Schwarz *and* Mickens v. Taylor, 59 N.Y.U. ANN. SURV. AM. L. 89, 92-101 (discussing interplay between waiver decisions and defendant's right to counsel of choice). *Cf.* Indiana v. Edwards, 128 S.Ct. 2379, 2387 (2008) (recognizing concern with appearance of fairness as one basis on which trial court could decline marginally competent defendant's request to proceed pro se). For example, if the criminal case against counsel proceeds to the point where counsel is suspended from practice, the court may take the position that counsel cannot properly represent anyone before the court and decline the waiver. *See* United States v. DeFalco, 644 F.2d 132, 141-44 (3d Cir. 1979) (Adams, J., dissenting) (concluding that counsel suspended from practice before the district court should not be permitted to represent defendant on appeal to the circuit court of appeals).

[54] United States v. Fulton, 5 F.3d 605, 612-14 (2d Cir. 1993). *See also* United States v. DeFalco, 644 F.2d 132, 143-44 (3d Cir. 1979) (Adams, J., dissenting) (concluding that counsel's post-guilty plea suspension from practice before the district court could not be waived by defendant); Sabach, *supra* note 53, at 101-06 (discussing and criticizing unwaivable conflicts).

[55] For further discussion on courts' hesitation to apply a rule of per se reversal see *infra* notes 87-88, 118-120 and accompanying text. *See generally* Sabach, *supra* note 53, at 106-08 (noting that Second Circuit limits the class of unwaivable conflicts to those which represent per se constitutional violations).

[56] *See* United States v. Levy, 25 F.3d 146, 153 n.4 (2d Cir. 1994) (summarizing steps court should take to obtain waiver). *See also* Mannhalt v. Reed, 847 F.2d 576, 581 (9th Cir. 1988) (conversation with counsel

waiver should not be left to counsel.[57] Although the Rules of Professional Responsibility direct counsel to explain the conflict to the client and obtain the client's consent,[58] counsel's private conversation with the defendant may not serve adequately to explore the possible conflict.[59] Moreover, the defendant's mere knowledge of counsel's situation does not translate into a waiver.[60] In the absence of a careful colloquy by the court, the defendant may not understand the issue and has no one other than the conflicted attorney from whom to seek advice.[61] Only a full colloquy by the court will convey to the defendant the risks inherent in the conflict.

---

not sufficient to establish waiver; waiver must appear on the record); People v. Edebohls, 944 P.2d 552, 557-58 (Colo. App. 1996) (holding that trial court's colloquy was inadequate where court did not determine whether defense counsel and defendant had discussed the conflict of interest, did not explain the conflict, and did not advise defendant of his right to conflict-free representation, and defendant responded equivocally to the court's questions); State v. Cottle, 946 A.2d 550, 563 (N.J. 2008) (rejecting argument that waiver could be presumed and holding that valid waiver requires colloquy in court). The court may also insist on an assurance from counsel that the situation will not compromise her representation of the defendant. *See, e.g.*, State v. Cottle, 946 A.2d 550, 563 (N.J. 2008) (requiring that counsel who also served as prosecutor "aver that despite the conflict [between counsel's interest and the defendant's] he 'reasonably believes that [he] will be able to provide competent and diligent representation").

[57] United States v. Levy, 25 F.3d 146, 158 (2d Cir. 1994) (cautioning against leaving the responsibility in the hands of the conflicted attorney); United States v. White, 706 F.2d 506, 509 (5th Cir. 1983) (criticizing court's reliance on conflicted counsel); Phillips v. Warden, 595 A.2d 1356, 1364 n.12 (Conn. 1991) (describing counsel's inadequate discussion of his situation with defendant). The courts may assume that counsel will be forthright with the client, but the courts should not rely exclusively on the accuracy of that assumption. United States v. Lowry, 971 F.2d 55, 62 (7th Cir. 1992). *See* Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 339-40 (discussing failure of defense counsel to take appropriate steps).

[58] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7. Rule 1.7(b)(4) gives requirements of informed consent in writing. The lawyer must have "communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROFESSIONAL CONDUCT 1.0 (e). The client may revoke consent at any time.

[59] Commonwealth v. Agbanyo, 872 N.E.2d 758, 761 n.4 (Mass. App. Ct. 2007) (reflecting that in conversation with defendant, attorney did not explain nature of conflict). *But see* People v. Waddell, 24 P.3d 3, 6 (Colo. Ct. App. 2000) (relying primarily on conversation between counsel and defendant to satisfy waiver requirement).

[60] In some instances, where the defendant was aware of counsel's criminal charges or dual role, the prosecution later argues that the defendant waived the conflict by proceeding with counsel even though aware of the problem. In those situations, no waiver should be found. *See, e.g.*, United States v. Levy, 25 F.3d 146 (2d Cir. 1994) (holding that valid waiver did not exist when conflicted attorney informed defendant about his conflicts and the court failed to explain to defendant the defense counsel's conflicts nor provide adequate time to defendant to reflect on decision to waive); United States v. Fulton, 5 F.3d 605, 631 (2d Cir. 1993) (holding that valid waiver cannot be obtained if a government witness implicates the defense counsel in a crime related to the one which the defendant is being charged); United States v. Curcio, 680 F.2d 881, 889 (2d Cir. 1982) (holding that a knowing and intelligent waiver of conflict free counsel did not exist since defendants were not given adequate time to contemplate risks associated with retaining conflicted counsel). *But see* Bridges v. United States, 794 F.2d 1189, 1193 (7th Cir. 1986) (holding defendant was not entitled to relief where defendant was fully aware of counsel's criminal involvement).

[61] *See, e.g.*, United States v. Levy, 25 F.3d 146, 151-52, 158 (2d Cir. 1994) (when the defendant complained about his lawyer, he was unclear how to respond to the court's query as to whether he was moving to disqualify counsel; yet, when the conflict issues were raised post-conviction, the court concluded that the defendant had waived the issues); United States v. White, 706 F.2d 506 (5th Cir. 1983) (noting that court failed to inform defendant of risks flowing from counsel's conflict); United States *ex rel.* Stewart v. Scott, 501 F. Supp. 53, 57-58 (N.D. Ill. 1980) (rejecting argument that defendant waived conflict where he

The court's colloquy should be thorough. Even when the issue is raised in court, the ensuing colloquy is sometimes deficient.[62] Beyond conveying information to the defendant, the court must ensure that the defendant understands the dangers posed by counsel's conflict.[63] Even if the defendant is aware of counsel's personal criminal situation or employment relationship to the prosecution, the court should not assume that the defendant therefore understands how counsel's situation may impact the defendant's representation.[64] In addition to explaining the risks that the conflict may pose to the defendant's representation, the court should assure the defendant that changing lawyers would not derail the defense of the case.[65]Although the colloquy protects not only the defendant's interest, but also the government's interest in the finality of the conviction if the defendant continues with counsel.[66]

---

was aware of counsel's involvement but was actively misled by counsel); State v. Chandler, 698 S.W.2d 844, 847 (Mo. 1985) (concluding that defendant's partial awareness of conflict situation did not give rise to waiver); Commonwealth v. Duffy, 394 A.2d 965, 968 (Pa. 1978) (noting that defendant's awareness of counsel's possible criminal behavior was not sufficient to apprise defendant of counsel's interest and the possible effect on counsel's judgment). *See also* Wheat v. United States, 486 U.S. 153, 162 (1988) (remarking that "the willingness of an attorney to obtain [waivers of conflict] from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them"). The court should ideally give the defendant time to consider the issue and perhaps seek advice from an un-conflicted source. *See* United States v. Levy, 25 F.3d 146, 153 n.4 (2d Cir. 1994) (suggesting that court should give the defendant "time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel" before accepting a waiver); United States v. Levine, 794 F.2d 1203, 1205 (7th Cir. 1986) (trial court offered defendant opportunity to consult with another lawyer before waiving conflict). *See also* People v. Edebohls, 944 P.2d 552, 557 (Colo. App. 1996) (suggesting that court could appoint temporary counsel to advise defendant). *But see* United States v. Lowry, 971 F.2d 55, 62-63 (7th Cir. 1992) (defendant does not have right to consult with outside counsel, and such consultation would have added little to the defendant's decision to waive conflict-free representation).

[62] *See* People v. Washington, 461 N.E.2d 393, 397-98 (Ill. 1984) (holding that knowing and understanding waiver by defendant was absent because record does not show any explanation of conflict to defendant). *See also* Commonwealth v. Agbanyo, 872 N.E.2d 758, 762 n.5, 763 (Mass. App. Ct. 2007) (recounting colloquy and noting that its brevity makes it insufficient).

[63] United States v. Curcio, 680 F.2d 881, 888-889 (2d Cir. 1982) (recommending that the court address the defendant and invite narrative answers to gauge the defendant's understanding).

[64] In Cerro v. United States, 872 F.2d 780 (7th Cir. 1989), the Seventh Circuit rejected the defendant's conflict argument in part because:

> If Ewers [counsel] was involved in criminal activity, Cerro probably knew about it. If we accept the underlying premise of Cerro's argument, we must find that Ewers was actively involved in the same criminal conspiracy that Cerro headed according to the overwhelming testimony of Cerro's coconspirators. If this was the case, Cerro was clearly aware of the potential conflict well in advance of trial. Cerro's argument at this point is disingenuous and incongruous. He wants us to overturn his conviction because his attorney had previously been deeply involved in helping him run his criminal conspiracy.

872 F.2d at 785 (citations omitted). The public may not understand the waiver and still perceive the situation as unfair.

[65] United States v. Balzano, 916 F.2d 1273 (7th Cir. 1990) (rejecting defendant's argument that his waiver was not valid because the trial date was close and counsel would not refund his fee); United States v. Levine, 794 F.2d 1203, 1205-06 (7th Cir. 1986) (recounting court's thorough colloquy). The trial court should have explored these issues with the defendant at the time of the waiver discussion.

[66] *See, e.g.*, United States v. Balzano, 916 F.2d 1273, 1293 (7th Cir. 1990) (declining to give weight to defendant's "newly discovered alleged 'hidden' motivations for his decision to continue to retain his trial counsel").

B. Disqualification of Counsel

Alternatively, early consideration of counsel's conflict may prompt the trial court to disqualify counsel.[67] If defense counsel will be compromised by personal criminal difficulties or an employment relationship to the prosecutor's office, both the actual and apparent fairness of the proceeding may best be protected by removing the challenged lawyer from the case.[68]

Of course, in deciding whether to disqualify defense counsel, the court must consider the defendant's right to counsel of choice.[69] Nevertheless, as the Court made clear in *Wheat v. United States*,[70] the trial court may remove counsel if the court perceives a risk of serious conflict. The trial court is not charged merely with protecting the defendant's rights. In some cases, the court may disqualify counsel to avoid unfairness to the government or harm to the government's case.[71] In other cases, the court may act based on its responsibility for ensuring that ethical standards are followed.[72] The court may also discharge counsel to protect the actual and apparent

---

[67] *See* Wheat v. United States, 486 U.S. 153, 162-63 (1988) (upholding trial court's pretrial disqualification of counsel and emphasizing trial court's authority to decline to accept defendant's proffered waiver); In re Goodman, 210 S.W.3d 805, 816 (Tex. App. 2006) (issuing writ of mandamus disqualifying prosecutor who previously represented defendant), *rev'd sub nom.* State *ex rel.* Young v. Sixth Judicial Dist., 236 S.W.3d 207, 213 (Tex. Crim. App. 2007). If the defendant objects, the defendant can bring an interlocutory appeal. United States v. Hobson, 672 F.2d 825, 826-27 (11th Cir. 1982).

[68] This solution may also assist in similar situations where the prosecutor previously represented the defendant.

[69] *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (concluding that trial court violated defendant's Sixth Amendment right to counsel of choice); Wheat v. United States, 486 U.S. 153, 164 (1988) (holding the trial court did not violate defendant's Sixth Amendment right to counsel of choice by disqualifying counsel); *see also* United States v. Register, 182 F.3d 820, 828 (11th Cir. 1999) (the defendant argued that the trial court violated his sixth amendment right by disqualifying his attorney where the prosecution suggested that there was evidence that his attorney was involved in criminal activity). In *United States v. Hoffman*, 926 F. Supp. 659 (W.D. Tenn. 1996), the court explained the challenge for the court when defense counsel faces a conflict of interest:

> Courts have competing concerns in the context of potential conflicts of interest for retained counsel. On the one hand, the right to conflict-free representation requires courts to investigate potential conflicts of interest and determine if a defendant has sufficient information to decide to waive this right and continue with potentially conflicted counsel. On the other hand, the right to retain counsel of one's choice dictates that a court does not have a free hand to remove retained counsel when the defendant expresses a desire that potentially conflicted counsel should continue. It is not the place of the court to substitute its own judgment that it is unwise to continue to retain counsel in the presence of a conflict of interest. Once the defendant has expressed the desire to keep his counsel despite a conflict of interest, the court can not attempt to change the defendant's mind.

926 F. Supp. at 669 n.16.

[70] 486 U.S. 153 (1988).

[71] *See* Green, *supra* note 57, at357-58 (discussing risk that counsel who was accused of crime by government witness might be perceived by jury as having special knowledge of the facts, to the detriment of the prosecution's case and also suggesting that in rare cases the government might need to call counsel as a witness).

[72] 486 U.S. at 160-61.

fairness of the proceeding.[73] The appearance of propriety is particularly important in criminal cases.[74] The courts must strive to assure that the public perceives the justice system as fair and its outcomes as legitimate.[75]

IV. Defense Counsel with Employment Relation to Prosecutor's Office

Defense counsel in a criminal case who also serves as a prosecutor, who obtains employment as a prosecutor while representing the defendant, or who moves to the prosecutor's office while the defendant's case is ongoing faces a likely conflict of interest.[76] A defendant who discovers that defense counsel is also employed as a

---

[73] 486 U.S. at 160-61. *See also* State v. Loyal, 753 A.2d 1073, 1088 (N.J. 2000) (emphasizing that trial court declared mistrial after learning of counsel's conflict to assure fairness of trial, not to avoid appearance of impropriety).

[74] *See generally* Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Propriety Stands to Prosecutors*, 63 MO. L. REV. 699 (1998) (discussing history of Appearance of Impropriety Standard); *see also* Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593 (1992) (discussing standard). This article does not suggest the adoption of a formal standard, but merely argues that the appearance of impropriety should be a factor in determining when to disqualify counsel and that the importance of the issue warrants imposing a disclosure obligation on the prosecution. The inclusion of language in rules of professional responsibility prohibiting the appearance of impropriety has been criticized as too vague to provide an adequate standard. *See, e.g.*, Kathleen Maher, *Keeping Up Appearances*, 16 PROFESSIONAL LAWYER 1 (2005) (discussing history of standard)

[75] *See generally* Flowers, *supra* note 74, at 728-32 (1998) (arguing that public perception of fairness of justice system is critical).

[76] One cannot discuss the issues raised when defense counsel becomes a prosecutor without considering the military model, where such movement from defense to prosecution has traditional been common. By statute, military counsel cannot serve two disparate functions in the same case. 10 U.S.C.A. § 827(a) provides:

> (1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.
>
> (2) No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

Of course, the defendant can waive the protection. *See* United States v. Sparks, 29 M.J. 52 (United States Court of Military Appeals 1989). *See generally* Kwasi L. Hawks, *Whose Side Are You On? Conflict, Argument, and Disqualification in Last Year's Court Term* 2009 ARMY LAWYER 64 (2009) (discussing conflicts in military cases); Nancy Higgins, *USALSA Report: Trial Defense Service Note: Avoiding Conflicts of Interest in Trial Defense Practice*, 1990 ARMY LAW. 24 (1990) (discussing avoidance of conflicts within military defense/prosecution structure). Even within this established structure, the courts recognize the hazard to the defendant when defense counsel does not respect the ethical limitations. United States v. Lee, 66 M.J. 387 (Court of Appeals for the Armed Forces). In *Lee*, defense counsel allegedly misinformed the defendant regarding counsel's prosecution function. Counsel told the defendant that he would be completing his defense duties and moving to prosecute minor offenses and assured the defendant

prosecutor or is moving from defense practice into the prosecutor's office has good reason to question counsel's undivided loyalty and effectiveness and the fairness of the proceedings.[77] Likewise, the public may disrespect a justice system that permits counsel to represent both the state and the prosecuted. This section of the article explores the implications of three different employment relationships. Section A evaluates cases where defense counsel accepts a position with the prosecutor's office while actively representing the defendant. Section B considers instances in which defense counsel simultaneously serves as a prosecutor. Section C discusses cases in which an attorney who previously worked in the prosecutor's office steps into the role of defense counsel. Section D assesses the issues related to early intervention in these cases.

A. Defense Counsel Who Obtains Employment in the Prosecutor's Office

In some cases, defense counsel accepts employment with the prosecutor's office before the defendant's case is resolved.[78] Once defense counsel accepts a position with the prosecutor's office, a serious question arises as to whether counsel should continue to litigate cases against that office.[79] The change in sides creates an appearance of impropriety as well as the risk of an actual conflict.

Where the former defense counsel enters into an employment relationship with a prosecutor's office, counsel is not ethically precluded from representing the government in future criminal cases against a former client.[80] Nevertheless, counsel is subject to

---

there was no conflict. 66 M.J. at 388. In fact, the defendant alleged that while representing the defendant counsel was actively prosecuting a serious case under the supervision of the lawyer prosecuting the defendant. 66 M.J. at 388. *See generally* Hawks, *supra*, at 65-67 (2009) (discussing *Lee*).

[77] *See, e.g.*, Fenner v. Berghuis 2006 WL 374171 at *12-14 (W.D. Mich. 2006); Reeves v. State, 497 S.E.2d 625 (Ga. App. 1998) (granting reversal where counsel accepted position with prosecutor's office shortly before defendant's trial began). Occasional cases arise in which counsel simultaneously represents the defendant and the prosecutor. In such cases, a clear conflict exists. *See, e.g.*, People v. Castro, 657 P.2d 932, 943-45 (Colo. 1983) (holding that simultaneous representation of defendant and district attorney created conflict of interest). Such cases are beyond the scope of this article.

[78] *See, e.g.*, Plumlee v. Masto, 512 F.3d 1204 (9th Cir. 2008). A preliminary question is whether even seeking employment in the office prosecuting the defendant creates a conflict of interest. The courts tend to conclude it does not. *See, e.g.*, United States v. Horton, 845 F.2d 1414, 1420 (7th Cir. 1988) (rejecting argument that counsel who was finalist for position of United States Attorney suffered from conflict of interest that violated defendant's rights, characterizing the risk of conflict as too fanciful); People v. Clark, 22 Cal. Rptr. 2d 689, 717-18 (Cal. Ct. App. 1993) (no conflict where counsel was campaigning to be elected district attorney while representing the defendant). While counsel may have some incentive to ingratiate herself to those in the prosecutor's office, the situation is not viewed as raising the divided loyalty that characterizes conflicts of interest. However, The Law Governing Lawyers discusses the example of an attorney who seeks employment with opposing party or law firm and identifies this as a conflict regardless of who initiates the discussions. *See* American Law Institute, Restatement of the Law Third, Restatement of the Law Governing Lawyers, § 125 pp. 314-15 (2000).

[79] *See* Atley v. Ault, 191 F.3d 865, 872-73 (8th Cir. 1999) (recognizing problem when counsel representing defendant has accepted and is about to assume a position in the prosecutor's office).

[80] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (comment) provides guidance:

> When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually

ethical restrictions. These restrictions both prohibit counsel from using confidential information obtained from the former client and limit counsel's representation of the government in a matter in which the interests are adverse to the former client.[81] The critical ethical question is whether counsel's role as a prosecutor will lead to a breach of confidence or improper adverse representation.

The ethical rules set the bar too low. Even if counsel appears to be within the boundaries set by the ethical rules, the change in sides creates both an appearance of unfairness and the risk that former counsel will exploit client confidences. If counsel will have any contact with the prosecution of the former client, the risk of impropriety is great. Because the prosecutor controls a range of discretionary decisions in every criminal case, the prosecutor is likely, consciously or not, to call on prior knowledge of the defendant to inform these decisions.[82]

When counsel actually moves to the prosecutor's office before the defendant's case is resolved, both the risk of conflict and the apparent unfairness increase. The defendant may understandably – even justifiably - fear that counsel will share privileged information with the prosecution.[83] In such a case, the prosecutor's office must take steps to create a barrier between the former defense counsel and the defendant's case, ensuring

---

> distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[81] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 governs duties to former clients. The rule provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> > (1) whose interests are materially adverse to that person; and
> >
> > (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
> >
> > unless the former client gives informed consent, confirmed in writing.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[82] *See* WAYNE LAFAVE, ET AL., CRIMINAL PROCEDURE §§ 13.1-13.4 (4th ed. 2004) (discussing prosecutorial discretion).

[83] Fenner v. Berghuis 2006 WL 374171 at *14 (W.D. Mich. 2006). *See also* People v. Gaines, 716 N.Y.S.2d 207, 209 (N.Y. App. Div. 2000) (concluding that defendant should not have to rely on good faith of former counsel who was employed by prosecutor's office by time defendant pleaded guilty).

that no client confidences leak through to the prosecution.[84] Only if counsel can be entirely cordoned off from the defendant's case, does the risk of breach disappear.[85] However, even if the office establishes an effective barrier, the defendant and the public are likely to perceive the system as unfair if the defendant's counsel now works for the other side.[86]

Nevertheless, the courts will not generally apply a per se rule granting the defendant relief.[87] They do not see a conflict of interest when counsel merely accepts employment in the prosecutor's office while continuing to represent the defendant.[88] Further, it will be difficult for the defendant to find evidence of improper communication between the prosecutors working on the defendant's case and the defendant's prior counsel.[89] In *Commonwealth v. Agbanyo*,[90] for example, counsel informed the defendant on the morning of his trial that she had accepted a position with the county prosecutor's office. The defendant, unclear of his options, continued through trial with the same attorney. After conviction, the defendant's conflict claim was not strong because counsel

---

[84] *See, e.g.*, People v. Shinkle, 415 N.E.2d 909, 910 (N.Y. 1980) (when former defense counsel joined prosecutor's office, "conflict" stickers were placed on all pending cases in which counsel's office had represented a defendant, and counsel was to have no interaction with those cases or the prosecutors handling them). *Cf.* Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489 (2006) (discussing steps necessary when lawyers move between firms in private practice).

[85] This will depend on the structure of the prosecutor's office. In a smaller office, it will be more difficult to create a clear barrier between the defendant's lawyer and the defendant's case. Even some large offices are quite collaborative, giving wide access to files and sharing information, making it difficult to assure client confidences will be respected.

[86] People v. Shinkle, 415 N.E.2d 909, 910 (N.Y. 1980) ("In defendant's perception it was his former attorney who was personally championing the People's cause against him."). *See also* Paul B. Spelman, *Recent Decisions: A Public Prosecutor and the Appearance of Justice*, 65 MD. L. REV. 1222, 1245-53 (2006) (arguing that prosecutor should be disqualified from prosecuting defendant whom he previously represented).

[87] *See, e.g.*, State v. Wilson, 195 S.W.3d 23, 27 (Mo. App. 2006) (rejecting defendant's post-conviction challenge based on fact that prosecutor had represented her when serving a public defendant); People v. English, 665 N.E.2d 1056, 1057 (N.Y. 1996) (concluding that there was no per se rule requiring reversal and that defendant was not entitled to relief on collateral review unless he alleged and established prejudice).

[88] *See* Garcia v. Bunnell, 33 F.3d 1193, 1198-1199 (9th Cir.1994) (counsel's upcoming employment in district attorney's office did not create conflict); People v. Martinez, 98 Cal. Rptr. 127 (Cal. Ct. App. 2000) (actual conflict did not result from counsel's acceptance of position with prosecutor's office); Catala v. State, 897 A.2d 257, 269 (Md. Ct. Spec. App. 2006) (rejecting defendant's argument that counsel's upcoming position with State's Attorney created conflict of interest); People v. Doggett, 625 N.E.2d 923, 927-28 (Ill. 1993) (counsel's upcoming employment in prosecutor's office did not create conflict). *But see* Atley v. Ault, 191 F.3d 865, 871 (8th Cir. 1999) (concluding that trial court did not make proper inquiry when it learned that counsel had accepted employment with the prosecutor's office); People v. Marshall, 242 Cal. Rptr. 319, 321-22 (Cal. Ct. App. 1987) (rejecting defendant's argument that counsel had labored under a conflict because he had accepted a job with the prosecutor's office before representing the defendant).

[89] *See* People v. Shinkle, 415 N.E.2d 909, 910 (N.Y. 1980) (suggesting that such evidence is likely to be "out of defendant's reach"); Landers v. State, 256 S.W.3d 295, 309-10 (Tex. Crim. App. 2008) (discussing evidence contrary to defendant's claim of conflict).

[90] 872 N.E.2d 758 (Mass. App. Ct. 2007).

had never simultaneously served both the defendant and the government.[91] The court acknowledged a possible effect of the impending employment: that counsel would pull her punches for fear that her future colleagues, including the law enforcement officers with whom she would have to work, would be offended if she defended vigorously. Nevertheless, the court concluded that these effects were too speculative to warrant relief.[92]

B. Counsel also Serving as a Prosecutor

In some jurisdictions, prosecution functions are performed by private counsel working part-time for the government.[93] This institutional arrangement creates the likelihood that some defense counsel, retained or appointed, will also work part time as prosecutors.[94] Defendants may therefore be represented by counsel who has dual roles. In these cases, there is a risk of conflict as well as a threat to the appearance of fairness.[95] Such institutional arrangements should be avoided, and counsel should be precluded from serving as both a prosecutor and a criminal defense attorney.[96]

A conflict appears to exist in these cases because counsel owes the defendant a duty of zealous representation and also owes a duty of loyalty to the state.[97] Some states

---

[91] Commonwealth v. Agbanyo, 872 N.E.2d 758, 764 (Mass. App. Ct. 2007) (stating counsel was "never in the position of owing conflicting professional duties to the defendant and to the district attorney's office").

[92] Commonwealth v. Agbanyo, 872 N.E.2d 758, 764 (Mass. App. Ct. 2007). In its discussion, the court did not focus on the appearance of unfairness created by the circumstances of the case.

[93] *See generally* Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1, 10-13 (1993) (describing practice in Kentucky); *see* Susan W. Brenner and James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 419-20 (1993) (discussing states' use of part-time prosecutors).

[94] *See* Underwood, *supra* note 93, at 5 (noting that a large number of ethics questions are posed by part-time prosecutors).

[95] *See, e.g.*, State v. Almanza, 910 P.2d 934, 935 (N.M. Ct. App. 1995) (finding disqualifying conflict where counsel was assigned to represent the defendant because his law firm had a contract with the public defender and law firm also represented the municipality, prosecuting cases for the city); People v. Washington, 461 N.E.2d 393 (Ill. 1984) (concluding that trial court committed error when it denied counsel's motion to withdraw after counsel discovered that his firm was prosecuting defendant for traffic offenses in municipal court). In *Almanza*, the court concluded that "the problem of divided loyalties is so significant in this case that only necessity or compelling public policy could justify continued representation absent waiver by the client." 910 P.2d at 935. *See generally* Underwood, *supra* note 93, at 18-20 (discussing concern with appearance of impropriety).

[96] ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 3-1.3 (3d ed. 1993) (stating that a prosecutor should not serve as defense counsel in the jurisdiction in which he or she serves as a prosecutor). Enforcement of such a rule would have some impact on the ability of governmental units to hire part-time prosecutors and to appoint defense counsel. *See generally* Underwood, *supra* note 93, at 6-9 (criticizing use of part-time prosecutors). A number of states restrict the freedom of part-time prosecutors to serve as criminal defense attorneys. *See generally* Richard H. Underwood, *supra* note 93, at 37-39 (discussing examples). *See* State v. Clark, 744 A.2d 109, 112 (N.J. 2000) (noting that new rule restricting freedom of municipal prosecutors to represent criminal defendants would "likely lead to some resignations by municipal prosecutors") (overruled on other grounds in State v. Rue, 811 A.2d 425 (N.J. 2002)). There is no reason to suppose, however, that sufficient attorneys would not be available to fill all the positions without generating a conflict of interest.

[97] *See* State v. Brown, 853 P.2d 851, 857-58 (Utah 1992) (noting conflicts between the two roles). The Comment to the Rule 1.7 of the Model Rules of Professional Responsibility states:

have therefore taken the position that public policy restricts the extent to which a public prosecutor may also serve as a defense attorney.[98] A number of factors support this position. First, counsel will face subtle pressure to accommodate the governmental unit when acting as prosecutor.[99] Second, the same law enforcement officers who serve as prosecution witnesses when counsel is prosecuting may testify against counsel's client when counsel is defending.[100] As a result, counsel may have to attack the credibility of a

---

> [A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (comment).

[98] *See, e.g.*, State v. Clark, 744 A.2d 109 (N.J. 2000) (holding that in future cases a municipal prosecutor is barred from serving as defense counsel in the same county) (overruled on other grounds in State v. Rue, 811 A.2d 425 (N.J. 2002)); People v. Rhodes, 524 P.2d 363, 365-67 (Cal. 1974) (holding that prosecutors could not also serve as defense counsel); State v. Brown, 853 P.2d 851, 857 (Utah 1992) (reversing conviction because defense counsel also served as part-time prosecutor and holding "that as a matter of public policy and pursuant to our inherent supervisory power over the courts, as well as our express power to govern the practice of law, counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons"). New Jersey already had a rule precluding municipal prosecutors from representing defendants in municipal court. *Clark*, 744 A.2d at 110-11. *See* Brenner, *supra* note 93, at 425-32 (describing various positions states take on whether part-time prosecutors are allowed to engage in criminal defense).

[99] *See* State v. White, 114 S.W.3d 469, 478 (Tenn. 2003) (concluding that counsel's two roles created a conflict of interest because counsel could not simultaneously fulfill his duty to "vigorously prosecute cases on behalf of the State" on one hand and his duty to zealously represent the defendant on the other); State v. Brown, 853 P.2d 851, 858 (Utah 1992) (noting the likelihood of subliminal influence on counsels representation of defendant). The Illinois courts enforce a per se rule based in part on the subliminal, subtle, and subconscious pressure counsel may experience due to the conflict. People v. Washington, 461 N.E.2d 393, 397 (Ill. 1984). The United States Department of Justice Office of Legal Counsel has expressed the opinion that "it is considered unethical for an active prosecutor to represent criminal defendants in his or her own or another jurisdiction," citing "'subliminal or concealed' influences on the attorney's loyalty." 1 Op. Off. Legal Counsel 110, 112 (1977), cited in United States v. Lee, 66 M.J. 387, 388 (Court of Appeals for the Armed Forces).

[100] *See* State v. White, 114 S.W.3d 469, 478 (Tenn. 2003) (noting that representing the defendant could require counsel to cross-examine law enforcement officers or to challenge the laws of the state). Moreover, there is a risk that this dynamic "will extend to examination of law enforcement officers from surrounding areas, whose cooperation is also often critical to enforcement of the local laws." People v. Rhodes, 524 P.2d 363, 365, 367 (Cal. 1974). The court noted that "there inevitably will arise a struggle between, on the one hand, counsel's obligation to represent his client to the best of his ability and, on the other hand, a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities. Such a conflict of interest would operate to deprive a criminal defendant of the undivided loyalty of defense counsel to which he is entitled." ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1235 (1972), stating:

> Depending on whether a lawyer is cast in a defense or prosecutorial role, he may be required to frame and advocate interpretations of established rules of law or procedure that are, or seem to be, poles apart. He may be required to criticize police actions in one case, then turn about to defend the same or similar actions in a subsequent case where the facts may be, or seem to be, the same. He will deal frequently with the same investigative or police personnel; he may appear before the same [judges]. In the course of this, the

law enforcement officer whose credibility counsel vouches for when acting as a prosecutor.[101] This may prompt the attorney when acting as defense counsel to pursue a less vigorous cross-examination to preserve a good working relationship with the officers.[102] Further, counsel may refrain from challenging or criticizing the conduct of law enforcement even though to do so could benefit the defense. Third, if the defendant is aware of counsel's employment as a prosecutor, the defendant may be reticent to confide appropriately in counsel.[103] Fourth, the incompatibility of counsel's dual roles could undermine public confidence in the integrity of the justice system.[104] Finally, the public interest may suffer if counsel's loyalty to the client interferes with counsel's judgment or conduct as a prosecutor.[105]

Nevertheless, such arrangements may not be clearly unethical,[106] and not all courts see any conflict of interest in these situations. Some jurisdictions permit the part-

---

> temptations may be great to mute the force of advocacy, or just the handling of cases in subtle ways.

[101] People v. Washington, 461 N.E.2d 393, 397 (Ill. 1984).

[102] State v. Clark, 744 A.2d 109, 111 (N.J. 2000) (overruled on other grounds in State v. Rue, 811 A.2d 425 (N.J. 2002)).

[103] State v. Brown, 853 P.2d 851, 858 (Utah 1992) (recognizing the counsel's dual employment would discourage defendant from confiding appropriately in counsel).

[104] People v. Rhodes, 524 P.2d 363, 365, 367 (Cal. 1974). The court explained:

> [T]he nature and duties of a public prosecutor are inherently incompatible with the obligations of a criminal defense counsel. When a city attorney represents criminal defendants there arises the possibility that either the defendant's interest in a vigorous and determined advocacy or the public's interest in the smooth functioning of the criminal justice system will suffer. In addition, public confidence in the integrity of the criminal justice system could be adversely affected by the appearance of impropriety incident to a public prosecutor's private representation of a criminal defendant. Thus, the interests of both criminal defendants and the judicial system require that city attorneys who have prosecutorial responsibilities not represent criminal defendants.

524 P.2d at 367 (citations omitted). *See also* State v. White, 114 S.W.3d 469, 476 (Tenn. 2003) (emphasizing trial court's responsibility for assuring the fairness of the proceedings and protecting against a later attack on the defendant's waiver); State v. Brown, 853 P.2d 851, 858 (Utah 1992) (concluding that representation of defendant by attorney who also served as prosecutor created appearance of unfairness and could erode public confidence in the justice system).

[105] State v. Clark, 744 A.2d 109, 112 (N.J. 2000) (noting that dual role may undermine prosecutor's impartiality) (rejecting defendant's challenge to conviction but adopting rule precluding counsel from simultaneously serving as prosecutor and defense attorney in the same county in future cases) (overruled on other grounds in State v. Rue, 811 A.2d 425 (N.J. 2002)).

[106] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 addresses conflicts of interest in relation to current clients and appears to leave room for such representation. Rule 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

time prosecutor to represent criminal defendants provided the cases are not in the same jurisdiction.[107] But many of the factors discussed above threaten to compromise counsel's representation even when the case is in a different jurisdiction.[108]

Furthermore, even a court that recognizes the problematic nature of counsel's dual role will not necessarily grant the defendant reversal on that basis.[109] In *Beaver v. Thompson*,[110] an attorney who served part time as a prosecutor in a neighboring county represented the defendant, who was charged with the capital offense of killing a state trooper.[111] The defendant pleaded guilty and was sentenced to death, but later challenged his sentence on the ground that his attorney had been ineffective and had suffered from a conflict of interest.[112] The state court explored counsel's role and responsibilities as a prosecutor and found no cause for concern given the lack of connection between counsel's work and the office prosecuting the defendant. As a result, the courts concluded that counsel did not suffer from a conflict, despite the attorney's testimony that he had a working relationship with the state troopers.[113]

C. Counsel who Previously Worked in the Prosecutor's Office

There is clearly no broad prohibition against a lawyer who is a prosecutor leaving the office and representing defendants in criminal cases.[114] However, a former prosecutor who participated in the development of a specific case against a defendant or appeared in court on the case cannot ethically represent the defendant in the criminal

---

(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Brenner, *supra* note 93, at 485-93 (discussing ethical challenges facing part-time prosecutors).

[107] Brenner, *supra* note 93, at 419-20 (discussing practice of permitting part-time prosecutors to represent defendants in other jurisdictions).

[108] Brenner, *supra* note 93, at 486-91 (discussing problem).

[109] *See, e.g.*, State v. Clark, 744 A.2d 109 (N.J. 2000) (rejecting defendant's challenge to conviction but adopting rule precluding counsel from simultaneously serving as prosecutor and defense attorney in the same county in future cases) (overruled on other grounds in State v. Rue, 811 A.2d 425 (N.J. 2002)). The court is particularly unlikely to see a conflict if counsel serves in different roles in different locales. State v. Gleason, 88 P.3d 218 (Kan. 2004) (finding no conflict where counsel served as prosecutor in adjoining county during first two months of his representation of defendant).

[110] 93 F.3d 1186 (4th Cir. 1996).

[111] Beaver v. Thompson, 93 F.3d 1186, 1192 (4th Cir. 1996) (finding counsel represented the county in a small number of criminal cases at the trial level and handled appeals for the county).
He later became the county attorney. Beaver v. Thompson, 93 F.3d 1186, 1192 (4th Cir. 1996).

[112] Beaver v. Com., 352 S.E.2d 342, 351 (Va. 1987); Beaver v. Thompson, 93 F.3d 1186, 1192 (4th Cir. 1996).

[113] Beaver v. Thompson, 93 F.3d 1186, 1193 (4th Cir. 1996). The federal courts applied a deferential standard and concurred in the conclusion that there was no conflict. *Id.*

[114] The prosecution may be adamant about disqualification because counsel's prior involvement with the prosecution of the case may benefit the defendant. *See* People v. Kester, 361 N.E.2d 569, 572 (Ill. 1977). Consideration of when the government would want to challenge counsel's involvement in the case is beyond the scope of this article. Generally, however, the defendant will not be concerned; no breach of confidence is threatened and counsel is not actively representing adverse interests.

case.[115] Although the relevant rules principally protect the government's interest, the defendant should also be protected from this improper representation.[116] The potential for conflict and, perhaps more important, the appearance of unfairness are too great when the lawyer first represents the government in a case and then takes on the defense of the same case. It cannot be clear where the lawyer's loyalties lie. Even if the defendant does not recall the earlier encounter with the attorney, the court should take steps to inform and protect the defendant.[117]

D. Early Intervention When Counsel Has an Employment Relation with the Prosecutor's Office

---

[115] MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9 and 1.11 address the obligations of a former prosecutor and restrict the former prosecutor's freedom to provide defense representation.
Rule 1.9 (c) provides:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.11(a) provides

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
>
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

[116] *See* United States v. Clark, 333 F. Supp. 2d 789, 797 (E.D. Wis. 2004) (granting motion to disqualify defense counsel who had worked on case while in United States Attorney's Office); Brown v. State, 568 S.E.2d 727 (Ga. Ct. App. 2002) (upholding trial court's decision to disqualify former prosecutor proposed as substitute defense counsel, noting that trial court could do so to avoid even appearance of impropriety); People v. Lawson, 644 N.E.2d 1172, 1186-87 (Ill. 1994) (applying per se rule to reverse conviction where counsel first represented state in prosecution of defendant and then represented defendant in same case); People v. Kester, 361 N.E.2d 569 (Ill. 1977) (same); Commonwealth v. Maricle, 10 S.W.3d 117, 121 (Ky. 1999) (discussing the state rule governing successive government and private representation and holding associates of former prosecutor were also barred from representing defendant).

[117] *See, e.g.*, People v. Lawson, 644 N.E.2d 1172, 1185-87 (Ill. 1994) (noting that record did not indicate that defendant was aware that counsel had previously served as prosecutor in the case, but holding that defendant was entitled to relief); People v. Kester, 361 N.E.2d 569, 570 (Ill. 1977) (reporting colloquy in which defendant failed to inform court that counsel handled case in prosecutor's office even though court made pointed inquiry). Even where counsel served as a prosecutor in a case against the defendant twenty years earlier, the Seventh Circuit found sufficient threat of actual conflict that an evidentiary hearing was required. United States v. Ziegenhagen, 890 F.2d 937, 941 (7th Cir. 1989). It is not clear, however, whether a public defender's office headed by such a former prosecutor should be entirely disqualified from representing the defendant. *See* People v. Spreitzer, 525 N.E.2d 30, 38 (Ill. 1988) (rejecting defendant's argument that there was per se conflict that disqualified all public defenders where head of office was former prosecutor who had participated in decision to prosecute defendant). *See also* HAZARD AND HODES, *supra note 4*, at 15-10 (noting that a conflict on the part of a single government lawyer does not generally disqualify the entire office).

Early intervention is critical in these cases. While some state courts apply a rule of per se reversal,[118] most courts do not.[119] If the issue is not raised until after the defendant's case is resolved, the defendant will face a difficult showing, either satisfying the *Strickland* test by showing specific instances of incompetence and proving prejudice or establishing the actual conflict and adverse affect required by *Sullivan*. Either requirement is likely to be insurmountable. Even when the defendant can point to specific omissions of counsel, the court will not readily view the omissions as flowing from counsel's relationship with the prosecutor's office.[120] Yet, particularly when the

---

[118] People v. Miller, 771 N.E.2d 386, 389 (Ill. 2002) (finding per se conflict where former defense counsel represented state in later stages of same case); People v. Lawson, 644 N.E.2d 1172, 1183 (Ill. 1994) (explaining that per se rule rests in part on "unfairness to the accused, who could not determine whether his representation was affected, even subliminally, by the conflict"); People v. Waddell, 24 P.3d 3, 6 (Colo. Ct. App. 2000) (adopting per se rule for certain cases). In *People v. Kester*, 361 N.E.2d 569 (Ill. 1977), the Illinois Supreme Court explained why a per se rule was required:

> [T]here is also the possibility that the attorney might be subject to subtle influences which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner. It might be contended, for example, that the advice and performance of court-appointed counsel in such a situation was affected by a subliminal reluctance to attack pleadings or other actions and decisions by the prosecution which he may have been personally involved with or responsible for. A defendant who has entered a plea of guilty might later suspect that his attorney's advice thereon had been influenced to some degree by a subconscious desire to avoid an adversary confrontation with the prosecution as a consequence of his previous participation in the case as the prosecuting attorney. . . . [I]t would be extremely difficult for an accused to show the extent to which this may have occurred. At the same time, a lawyer who may have provided an able and vigorous defense with complete loyalty to the defendant is placed in the difficult and unfortunate position of being subject to unfounded charges of unfaithful representation. The untenable situation which results for both the accused and his court-appointed attorney in such instances is one which can and should be avoided in the interests of the sound administration of criminal justice.

361 N.E.2d 569, 572 (citations omitted).

[119] *See* Catala v. State, 897 A.2d 257, 269 (Md. Ct. Spec. App. 2006) (applying *Sullivan* test where counsel had accepted position with prosecutor's office and concluding that defendant had failed to show either actual conflict or adverse effect); Commonwealth v. Agbanyo, 872 N.E.2d 758, 763 (Mass. App. Ct. 2007) (requiring defendant to show prejudice where counsel informed him on the morning of trial that she had accepted a position with the office prosecuting the case); Reeves v. State, 497 S.E.2d 625, 626 (Ga. Ct. App. 1998) (declining to address per se rule, but granting defendant relief where counsel had accepted position with prosecutor's office before trial); People v. English, 665 N.E.2d 1056, 1057 (N.Y. 1996) (concluding that there was no per se rule requiring reversal where counsel was removed from defendant's case when he received employment in prosecutor's office and did not then work in division that handled defendant's case).

[120] Counsel is likely to testify against the defendant on the hearing to determine whether there was an actual conflict. *See, e.g.*, Plumlee v. Masto, 512 F.3d 1204, 1208 (9th Cir. 2008) (noting that trial court credited counsel's testimony and consequently rejected defendant's claim of conflict). *But see* Blankenship v. Johnson, 118 F.3d 312, 318 (5th Cir. 1997) (concluding that defendant established conflict of interest by establishing that counsel was employed by the prosecutor's office at the time he represented defendant on appeal and that counsel did not take the steps necessary to protect defendant's rights). Some courts approach counsel's testimony with skepticism. The court has good reason to question the testimony of counsel at any later evidentiary hearing. Counsel, now serving the government, has interests entirely aligned with the prosecution attempting to defend the conviction. *See* Reeves v. State, 497 S.E.2d 625, 626-27 (Ga. Ct. App. 1998) (noting that counsel's testimony at the hearing on defendant's motion for a new trial was fatally conflicted because at that time counsel was employed by the prosecutor's office and owed that office his duty of loyalty).

relationship between counsel and the prosecutor's office is very close, a negative impact on counsel's representation of the defendant is likely. Moreover, if the case is allowed to proceed, the risk that counsel will breach the defendant's confidence, providing protected information to the prosecution, increases, as does the likelihood of the appearance of a breach. Delayed resolution of the conflict may thus create an irreconcilable situation in which the prosecutor's office may have received client confidences and cannot fairly continue to handle the case against the defendant.

Of course, in some cases the prosecution views the dual roles as a conflict and moves to disqualify counsel.[121] But the government should not be permitted to raise the issue only when the prosecution's interests are at stake. The prosecution should be required to raise the issue even when it might prefer not to.

To achieve early intervention, the prosecution as well as defense counsel should be charged with raising the possible conflict and bringing the issue to the court's attention. [122] The defendant may not be aware of counsel's other employment. Even if the defendant was in court with the lawyer when the lawyer was representing the prosecution and, at a different time, when the lawyer was representing the defendant, the defendant may not understand the change in roles.[123] The prosecutor's office has ready access to the necessary information and should run a conflict check to determine whether defense counsel has an employment relationship with the prosecution that poses a problem. States should maintain statewide databases including all current full or part time state, county, and municipal prosecutors, allowing the prosecution in each case to determine whether defense counsel is actively prosecuting cases in the state.[124] Once a lawyer is hired as a prosecutor, the lawyer should be included in that database.

When an employment relationship is called to the court's attention, the court must, at the very least, carefully assess the relationship between defense counsel and the prosecutor's office.[125] The implications of counsel's possible conflict will vary with the details of that relationship. Where counsel concurrently holds or has accepted a position with the prosecutor's office, the defendant should be informed and given the chance to

---

[121] State v. White, 114 S.W.3d 469, 479 (Tenn. 2003) (upholding trial court decision to grant the prosecution's motion to disqualify defendant's attorney, who also served as part time municipal and county prosecutor).

[122] Addressing the issue without involving the court does not adequately protect the defendant. *See, e.g., U*nited States v. Ziegenhagen, 890 F.2d 937, 941 (7th Cir. 1989) (counsel discussed issue with prosecutor and defendant, but did not inform court of his prior representation of county against defendant).

[123] *See* People v. Lawson, 644 N.E.2d 1172, 1184-85 (Ill. 1994) (reporting that there was no evidence the defendant knew counsel had served on both sides of the case, even though the defendant was in court with counsel in each capacity). Even substitute counsel may be unaware that defendant's original lawyer was relieved of the assignment because of a relationship with the prosecutor's office. People v. English, 665 N.E.2d 1056, 1057 (N.Y. 1996) (substitute counsel was not aware that defendant's attorney had taken a job with the prosecutor's office until well after defendant's conviction).

[124] *Cf.* Robert W. Martin, *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND & WATER L. REV. 191 (discussing use of conflicts databases).

[125] *See, e.g.*, State v. White, 114 S.W.3d 469, 478-79 (Tenn. 2003) (evaluating structure of counsel's role in prosecutor's office and distinguishing case in which role as county attorney extended only to civil representation).

request a substitution of counsel. Indeed, if the court discusses the question with the defendant before trial, the court should assure the defendant that she can proceed with a new, unconflicted lawyer. Unless the court gives the defendant this assurance, any waiver of current counsel's potential conflict should not be regarded as valid.[126] Even if the court explains the full range of options to the defendant, the validity of the defendant's waiver is suspect because the defendant may fear that severing the attorney-client relationship will prompt counsel to share confidential information with the prosecution.

V. Defense Counsel Facing or Under Investigation for Criminal Charges

When counsel faces criminal investigation or charges, the problem is far stickier. A serious conflict arises when counsel is fighting for her own interest against the hostile force of the criminal justice system while, at the same time, representing the defendant.[127] An attorney who is under criminal investigation or charged with a crime invariably labors under divided loyalties.[128] Not only will the pending charges or investigation pose a distraction to counsel, but counsel will feel pressure to take steps to improve her own situation even to the detriment of the defendant's case. The pressure on an attorney who is threatened with criminal liability is far more severe than that affecting an attorney

---

[126] *See* Atley v. Ault, 191 F.3d 865, 872 (8th Cir. 1999) (concluding that trial court did not make proper inquiry when it learned that counsel had accepted employment with the prosecutor's office); People v. Marshall, 242 Cal. Rptr. 319, 322 (Cal. Ct. App. 1987) (rejecting defendant's argument that counsel had labored under a conflict because he had accepted a job with the prosecutor's office before representing the defendant).

[127] An attorney faces a conflict of interest not only when the interests of two clients diverge, but also when the client's interests conflict with the attorney's self interest. *See* People v. Edebohls, 944 P.2d 552, 556 (Colo. App. 1996) (citing COLO. RULES OF PROF'L CONDUCT R. 1.7(a)). In *United States v. Fulton*, 5 F.3d 605, 609 (2d Cir. 1993), the Second Circuit explained that "[a]situation in which the attorney's own interests diverge from those of the client presents the same core problem presented in the multiple representation cases: the attorney's fealty to the client is compromised." As the Third Circuit pointed out in *DeFalco*, "apparently legitimate decisions are rendered suspect if made by counsel with conflicting loyalties." 644 F.2d at 135.

[128] *See* Stoia v. United States, 22 F.3d 766, 771 (7th Cir. 1994) (noting that a conflict of interest exists where counsel has to choose between advancing personal interests and advancing interests of client); Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (noting that when attorney is under criminal investigation he may be induced "to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer."); United States v. Lafuente, 2008 WL 3849903 (N.D.Ill. 8/14/2008) (stating that actual conflict of interest exists where there is sufficient evidence that counsel faces criminal charges in same court as client); Rugiero v. United States, 330 F. Supp. 2d 900, 907 (E.D. Mich. 2004) (holding attorney had actual conflict of interest that adversely affected representation where attorney faced criminal charges in same district as client). *But see* New Jersey v. Pych, 517 A.2d 871, 875 (Super. Ct. NJ 1986) (stating that because attorney was indicted in different county and indictment was unlikely to compromise his professional reputation, there was no conflict of interest). Counsel may also suffer from a conflict if counsel engaged in criminal conduct that has not yet come to the attention of the authorities. As the Second Circuit pointed out in *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984), "a wrong step by counsel in representing their clients might well have drawn unwanted attention to themselves." 725 F.2d at 871. Even if counsel's criminal wrongdoing is not related to the defendant's cases, counsel has a strong incentive to keep a low profile and stay on the prosecution's good side.

whose self-interest lies in pursuit of a financial benefit or personal benefit.[129] The attorney's entire livelihood, reputation, and liberty are on the line.[130]

Moreover, in addition to the possibility of actual unfairness, the appearance of unfairness is inescapable.[131] Neither the defendant nor the public can be expected to understand a system that places the burden of advising the defendant and mounting the defense on an attorney who is simultaneously being pursued as a criminal.

The gravity of the conflict will vary depending on several factors. First, the relationship between the office prosecuting counsel's case and the office prosecuting the defendant will affect the extent of the conflict. Counsel's pursuit of the defendant's interest may be particularly strongly colored by counsel's concern for her own defense when the prosecutor's office is handling both counsel's and defendant's cases. Second, the stage of the criminal investigation of counsel will affect the conflict. If counsel knows the prosecution is seeking her indictment or if she is actively defending against criminal charges, the conflict may be more acute than if counsel is unaware that she is under investigation or if counsel's case has largely been resolved. Thus the precise timing of the investigation and charges may be critical to determining the extent to which counsel's personal situation creates a conflict of interest.[132] Section A examines the

---

[129] *See, e.g.*, Summerlin v. Stewart, 267 F.3d 926, 935-41 (9th Cir. 2001) (applying *Sullivan* to a situation where defense counsel was involved romantically with the prosecutor); Beets v. Scott, 65 F.3d 1258, 1265-66 (5th Cir.1995) (en banc) (rejecting defendant's challenge where counsel accepted a media rights contract as a fee and also failed to withdraw in order to be available as a defense witness); United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980) (applying *Sullivan* to a situation where counsel's representation of the defendant may be compromised by counsel's pursuit of publication rights to a book). *See* Shiner, *supra* note 28, at 971-72 (discussing personal interest conflicts).

[130] *See* Rugiero v. United States, 330 F. Supp. 2d 900 (E.D. Mich. 2004). In *Rugiero* the court stated:

> First, when an attorney is the subject of a criminal investigation by the same prosecutor who is prosecuting the attorney's client, there is a high probability of prejudice to the client as the result of the attorney's obvious self-serving bias in protecting his own liberty interests and financial interests. The liberty concern at issue is avoiding or minimizing imprisonment. The financial interests include avoiding disbarment and avoiding termination of the attorney's current representation of the client in question. The high probability of prejudice in this situation distinguishes this personal interest conflict from the weaker personal interest conflicts listed in the dicta in *Mickens*, e.g., book deals. Second, such prejudice is difficult to prove because the client could be harmed by the attorney's actions or inactions that are known only to the attorney. In short, the personal interest conflict at issue presents comparable difficulties to situations involving concurrent representation conflicts.

330 F. Supp. 2d at 906 (citation omitted).

[131] *See* State v. Cottle, 946 A.2d 550, 561 (N.J. 2008) (noting that conflict caused by criminal charges pending against counsel would diminish public confidence in the justice system). However, if no attorney-client relationship exists at the time, the government may even use a defendant's former counsel against the defendant. In *United States v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008), the government enlisted the defendant's former counsel to act as a confidential informant. Counsel repeatedly emphasized to the defendant that he was a business partner on the deal and was not acting as a lawyer. 530 F.3d at 152-53. While the defendant had no claim that this arrangement violated his sixth amendment right to counsel, he argued that it was outrageous conduct that violated his right to due process. 530 F.3d at 152-53. The Third Circuit rejected this argument. 530 F.3d at 152-55.

[132] In *DeFalco*, Judge Garth, dissenting, emphasized that counsel had already filed his appellate brief on behalf of the defendant before he was indicted and well before he pleaded guilty and was suspended from

issues that arise if counsel is under criminal investigation but not yet charged. Section B considers the issues that arise when counsel is charged with a crime. Section C assesses the situation in which the charges against counsel have been resolved. Finally, Section D discusses the challenge of early intervention in these three situations.

A. Counsel Under Criminal Investigation

A conflict may arise if counsel is under investigation for possible criminal wrong-doing even though counsel is not yet charged with a crime.[133] The precise impact of the investigation on counsel may depend on factors such as the prosecutor's involvement in the investigation, counsel's awareness of the investigation, and the relationship between the investigation and counsel's representation of the defendant. However, even when the investigation is unrelated to the case against the client, if either the prosecutor or counsel is aware of the investigation, it may threaten counsel's ability to deliver effective representation to the defendant.

In some cases, a criminal investigation focusing on counsel is under-way but counsel is not aware of the investigation.[134] In such cases, counsel will not necessarily confront a conflict of interest as a result of the investigation. Of course, counsel will still suffer from a conflict if counsel's criminal conduct relates in some way to the defendant's case, thereby creating an incentive for counsel to direct the defense in such a way as to avoid disclosure of the criminal conduct or delay prosecution action against counsel.[135] However, even if counsel is not conflicted, the investigation may have a negative impact on defendant's representation: the prosecutor's conduct toward both counsel and the defendant may be influenced by the awareness that counsel is the object of criminal inquiry.[136] For example, the prosecutor may be less willing to offer the defendant the opportunity to cooperate if the prosecutor regards as a criminal the lawyer through whom the communication would flow. Thus even a criminal investigation unknown to counsel may impair the effectiveness of the defendant's representation.

If counsel is aware that she is under criminal investigation, the problem is more acute.[137] Counsel's awareness of the investigation will affect counsel's interaction with

---

practice. 644 F.2d at 144-45. Judge Garth did not discuss whether counsel had been aware of the criminal investigation while preparing the brief and whether that would have posed a greater problem.

[133] *See* Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (finding conflict of interest existed where counsel was under investigation for bribing law enforcement officers to reduce his client's charges and had been given immunity by the prosecutor's office responsible for the client's charges, but affirming conviction because no adverse effect). *But see* Armienti v. United States, 313 F.3d 807, 811 (2d Cir. 2002) (concluding that counsel who was under investigation did not suffer from conflict of interest).

[134] *See* Armienti v. United States, 313 F.3d 807, 813 (2d Cir. 2002) (noting that counsel "did not believe himself to be under investigation at the time of the trial").

[135] *See* United States *ex rel.* Stewart v. Scott, 501 F. Supp. 53, 55-57 (N.D. Ill. 1980) (discussing conflict where counsel planned the burglary with which defendant was charged and protected himself from incrimination at defendant's trial).

[136] For further discussion of the impact on prosecution, see *supra* note 42 and accompanying text.

[137] *See* United States v. Lowry, 971 F.2d 55, 61 7th Cir. 1992) (suggesting that counsel who was under investigation by federal authorities faced conflict because "it was possible that as a result of the pressure of being investigated, [counsel] would either refrain from aggressive cross-examination during the trial in

both the prosecutor's office and the defendant.[138] Counsel's actions will be influenced because every step counsel takes representing the defendant will be colored either by a desire to procure favor with the prosecution or by antipathy toward the prosecution. There are various ways such a situation may affect counsel's representation. First, a lawyer facing criminal investigation may attempt to improve her own relationship with the prosecutor's office even when that involves actions that do not serve the defendant's interest.[139] Second, counsel may be reluctant to advise the defendant to plead guilty and cooperate with the government either out of fear that the defendant might then provide information inculpating counsel or out of hostility toward the prosecution.[140] Third, counsel may structure the defense of the case and the questions addressed to the prosecution witnesses less favorably to the defendant in order to avoid eliciting information that would incriminate counsel.[141] If counsel is accused of criminal conduct by the prosecution's witnesses but is innocent, counsel may not be able to effectively plumb the issue on cross-examination since counsel would be placed in the role of witness for herself as well as advocate for the defendant.[142] Fourth, counsel may have an incentive to drag out the defendant's case, even to the defendant's detriment, to delay

---

order that he might gain the favor of his potential prosecutors, or that he would be unduly hostile toward them, losing objectivity, and thus harm [the defendant]'s rapport with the jury").

[138] *See* Stoia v. United States, 22 F.3d 766, 771 (7th Cir. 1994) (noting that conflict of interest exists where counsel has to choose between advancing personal interests and advancing interests of client); Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (stating that attorney under investigation may defend clients less vigorously to avoid retaliation by prosecution); United States v. DeFalco, 644 F.2d 132, 136 (3d Cir. 1979) ("We conclude that inherent emotional and psychological barriers created an impermissible potential of preventing appellate counsel from competing vigorously with the government."). *See also* United States v. Lafuente, 2008 WL 3849903 at *2 (N.D.Ill. Aug. 14, 2008) (noting that while a conflict of interest affecting representation can occur when attorney faces criminal charges in same court, evidence here was insufficient to support such finding).

[139] Armienti v. United States, 234 F.3d 820, 825-26 (2d Cir. 2000) (noting that counsel "may, consciously or otherwise, seek the goodwill of the office for his own benefit" and that these attempts "may not always be in the best interest of the lawyer's client"). *See also* Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (suggesting that attorney under investigation may "pull his punches"); Rugiero v. United States, 330 F. Supp. 2d 900, 908-10 (E.D. Mich. 2004) (suggesting that counsel "pulled his punches" on the question of a government witness' violation of the court's sequestration order and also was influenced in his handling of the question of whether publicity about the investigation of counsel influenced the jurors who heard it). *But see* Skinner v. Duncan, 2003 WL 21386032 at * 44 (S.D.N.Y. June 17, 2003) (noting that counsel who was prosecuted for failure to provide client information to the grand jury had no reason to curry favor with prosecution). In *Skinner*, the court also remarked on counsel's reputation for vigorous advocacy, which the court viewed as inconsistent with the allegation that she was influenced by a conflict of interest. 2003 WL 21386032 at * 44 n.74.

[140] *See* United States v. Fulton, 5 F.3d 605, 610 (2d Cir. 1993); Mannhalt v. Reed, 847 F.2d 576, 581 (9th Cir. 1988); Rugiero v. United States, 330 F. Supp. 2d 900, 907 (E.D. Mich. 2004) (noting that counsel had incentive not to pursue plea negotiations for defendant where counsel was being investigated for failure to report cash payments from clients).

[141] *See Fulton*, 5 F.3d at 610 (stating "a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney"). Even if the prosecution is already aware of counsel's possible criminal activity, counsel may fear that more information will come to light through the defendant's case. *But see* Cerro v. United States, 872 F.2d 780, 786 (7th Cir. 1989) (reasoning that counsel had nothing to fear where the government was already aware of counsel's possible criminal conduct).

[142] *See Fulton*, 5 F.3d at 610.

prosecution action against counsel.[143] Finally, counsel may be unable to act as a skilled attorney simply because of the distraction of the accusation.[144]

When counsel is actually implicated in or accused of criminal activity closely related to the defendant's alleged illegal conduct, a particularly intense conflict arises.[145] The conflict and resulting harm to the defendant is likely to be so severe that counsel should not be permitted to represent the defendant.[146] If counsel is suspected of the same criminal conduct with which the defendant is charged, the impact on counsel's performance is likely to be pervasive and profound, given counsel's strong self-interest in avoiding criminal liability.[147] In such cases, the defendant may receive relief even if the issue is not raised until after conviction, but early intervention better protects both the defendant's and the government's interest.[148]

When counsel's suspected wrong-doing relates to counsel's representation of the defendant, there is also likely to be a serious conflict of interest. In such situations, counsel also has a strong interest in deterring the court or prosecution from exploring those aspects of the case related to counsel's conduct, even when such exploration could benefit the defendant.[149] For example, in *Government of Virgin Islands v. Zepp*,[150]

---

[143] *See* United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987); Rugiero v. United States, 330 F. Supp. 2d 900, 907-08 (E.D. Mich. 2004) (suggesting that counsel delayed the defendant's trial against the defendant's interest).

[144] *See* Fulton, 5 F.3d at 608 (informing defendant that if he proceeded with counsel who had been accused of criminal wrongdoing by one of the prosecution witnesses, counsel would be distracted and unable to cross-examine the witness on the issue).

[145] *See* United States v. Fulton, 5 F.3d 605, 611 (2d Cir. 1993) (counsel was accused of drug violation related to defendant's charges); Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988) (counsel was accused of buying stolen property from defendant); United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984) (counsel likely feared defendant would disclose counsel's crimes if defendant cooperated and therefore could not provide defendant with impartial advice on whether to plead guilty and cooperate); State v. Chandler, 698 S.W.2d 844, 848-49 (Mo. 1985) (granting relief where counsel was suspected of same murder with which defendant was charged).

[146] Conversely, if counsel's conduct is unrelated, the court may see no impact on the representation of the defendant. *See* United States v. Gambino, 838 F. Supp. 749,755 (S.D.N.Y. 1993) (finding counsel's alleged criminal activity was not so related to charges that counsel must be disqualified).

[147] *See* United States v. Reeves, 892 F.2d 1223, 1227 (5th Cir. 1990) (counsel was properly disqualified counsel where counsel was a target of the same investigation that had led to the defendant's indictment, and the government planned to call the defendant before the grand jury to testify against counsel); State v. Chandler, 698 S.W.2d 844, 847-49 (Mo. 1985) (reversing conviction where co-counsel was charged with same murder as defendant).

[148] *See, e.g.*, United States v. Greig, 967 F.2d 1018, 1023 (5th Cir. 1992) (holding that counsel's potential liability for destruction of evidence created conflict of interest); Mannhalt v. Reed, 847 F.2d 576, 583 (9th Cir. 1988) (holding defendant met *Sullivan* standard because counsel was accused of criminal conduct related to defendant's robbery and stolen property charges); United States v. White, 706 F.2d 506, 507 (5th Cir. 1983) (holding that counsel who was under investigation and later indicted for aiding defendant's escape had conflict of interest).

[149] *See* United States v. Levy, 25 F.3d 146,156-57 (2d Cir. 1994) (discussing conflict where attorney was under investigation for possible complicity in wrongdoing by defendant's co-defendant); Rubin v. Gee, 292 F.3d 396, 403 (4th Cir. 2002) (counsel functioned almost as accessories after-the-fact in defendant's crime); Commonwealth v. Duffy, 394 A.2d 965, 968 (Pa. 1978) (discussing conflict where prosecution witness claimed counsel had taken illegal firearms from defendant as legal fee).

defense counsel was with the defendant in the house when the police heard flushing; later investigation suggested that cocaine had been disposed of through flushing.[151] To focus responsibility on the defendant, the prosecution obtained a stipulation that her attorney, if called as a witness, would testify that he did not flush any toilets while he was in the house.[152] Thus counsel faced two problems: (1) he was a witness for the prosecution against his client, and (2) he was at risk of prosecution for criminal charges arising from his actions in relation to the case.[153] Thus the trial court, aware of the situation, should have removed counsel from the case.

In some instances, counsel's alleged wrongdoing comes to light when the prosecution interviews its witnesses in preparation for the defendant's trial, and the witnesses inculpate counsel as well as the defendant.[154] If a witness' likely testimony will inform the jury in the defendant's trial of counsel's illegal conduct, counsel's role in the case is compromised. That disclosure will prejudice the jury against counsel and, possibly, the defendant, thus undermining the fairness of the proceeding.[155] The public's interest in the actual and apparent integrity of the proceeding as well as the defendant's right to conflict-free representation come into play.[156] In such a case, the court should be reluctant to permit counsel to continue in the case.[157]

By contrast, some circumstances will diminish the risk of conflict. If the investigation of counsel is wholly unrelated to the charges against the defendant, the

---

[150] 748 F.2d 125 (3d Cir.1984). *See also* United States v. Snyder, 707 F.2d 139, 146 (5th Cir. 1983) (trial court properly disqualified counsel where proper defense of defendant would have required counsel, a co-conspirator, to inculpate himself).

[151] *See* Gov't of Virgin Islands v. Zepp, 748 F.2d 125, 128 (3d Cir. 1984).

[152] *See Zepp*, 748 F.2d at 128-30

[153] 748 F.2d at 127. Of course, in a case like *Zepp*, counsel's conflict is readily apparent to the court as well as the prosecutor. 748 F.2d at 136. In *Zepp*, a pre-*Mickens* decision, the court concluded that the trial court had failed to fulfill its constitutional duty. 748 F.2d at 139.

[154] *See* United States v. Hobson, 672 F.2d 825, 826 (11th Cir. 1982) (trial court's disqualification of counsel was based on affidavits of two prosecution witnesses reflecting counsel's criminal involvement with defendant). *See also* United States v. Fulton, 5 F.3d 605, 612 (2d Cir. 1993) (holding that conflict of interest arose when government witness stated on the stand that he had knowledge that the defense lead counsel had been personally involved in heroin trafficking); United States v. Hallock, 941 F.2d 36, 38 (1st Cir. 1991) (counsel withdrew because testimony of prospective prosecution witness implicated him in criminal conduct); Mannhalt v. Reed, 847 F.2d 576, 578 (9th Cir. 1988) (noting that government witness testifying against defendant stated in police report prior to trial that defense counsel had purchased stolen property).

[155] *See* United States v. Hobson, 672 F.2d 825, 828-29 (11th Cir. 1982) (affirming order disqualifying counsel on grounds that testimony implicating him in defendant's illegal conduct would erode public confidence in the justice system); United States v. Gotti, 771 F. Supp. 552, 560-62 (E.D.N.Y. 1991) (discussing likelihood that jury would learn of counsel's questionable involvement with defendants). This may be true even if there is no allegation that counsel violated the law. *See* United States v. Melo, 702 F. Supp. 939, 941-43 (D. Mass. 1988) (discussing impact on public interest if prosecution evidence suggested that attorney was used by defendant in criminal enterprise, even though such evidence did not involve allegation of illegal conduct by counsel).

[156] *See* United States v. Hobson, 672 F.2d 825, 828 (11th Cir. 1982); United States v. Melo, 702 F. Supp. 939, 943 (D. Mass. 1988).

[157] *See* Hobson, 672 F.2d at 829 (trial court properly declined waiver).

court is less likely to find a conflict.[158] Similarly, if a different prosecutor's office has jurisdiction over the investigation of counsel, the argument for giving defendant post-conviction relief or for disqualifying counsel is far weaker. For example, in *Taylor v. United States*,[159] the defendant was prosecuted and convicted in federal court. After his conviction, counsel was indicted on state charges.[160] Given the lack of relationship between the two prosecutors' offices, the defendant was unable to establish the necessary nexus between counsel's own difficulties with the criminal justice system and his representation of the defendant.[161] Consequently, the court held that no conflict of interest interfered with counsel's representation.[162] The appearance of fairness would have been better served had the issue been raised early in the process.

Finally, the courts should recognize that a conflict of interest may exist even when the court concludes that counsel who was under investigation while representing the defendant was not actually involved in improper conduct.[163] If counsel was under suspicion and was aware that she was suspected of criminal wrongdoing while representing the defendant, the later determination that the suspicion was baseless does not retroactively neutralize the conflict.[164] The conflict exists because of the accusatory relationship between the prosecution and counsel while the investigation is ongoing, at a time when neither side knows whether it will culminate in charges against counsel.[165]

---

[158] Skinner v. Duncan, 2003 WL 21386032 at * 44 (S.D.N.Y. June 17, 2003) (noting inter alia that attorney's offenses were entirely unrelated to charges against defendant).

[159] 985 F.2d 844 (6th Cir. 1993).

[160] Taylor v. United States, 985 F.2d 844, 846 (6th Cir. 1993).

[161] *See* Taylor, 985 F.2d at 846.

[162] *See* Taylor, 985 F.2d at 846. *See also* United States v. Rubirosa, 100 F.3d 943 (2d Cir. 1996) (unpublished opinion) (finding no per se conflict where counsel was indicted in federal district different from district in which defendant was being prosecuted).

[163] *See, e.g.*, United States v. Fulton, 5 F.3d 605, 610 (2d Cir. 1993) (finding conflict even though counsel had not engaged wrong-doing). *But see* United States v. Knight, 680 F.2d 470 (6th Cir. 1982) (concluding that there was no conflict because counsel had not engaged in wrong-doing); Armienti v. United States, 313 F.3d 807 (2d Cir. 2002) (determining that there was no conflict of interest when counsel's own criminal investigation resulted in no charges being brought against him).

[164] In United States v. Taylor, 657 F.2d 92 (6th Cir. 1981), the court had originally remanded because:

> The record does disclose that documents pertaining to this trial were taken from the United States Attorney's office prior to the trial and that an investigation of this disappearance was underway when the trial began. Among those questioned were the two attorneys who represented Knight. On appeal it is argued that these attorneys were aware that they were under investigation and were probably suspected of having had the purloined documents in their possession at some time prior to the beginning of the trial. Knowing this, appellate counsel argues, these attorneys may have pressed the defense of Knight's claim with less vigor than they would have if these circumstances had not existed. They point to the fact that Knight neither took the stand nor offered any evidence at the trial.

657 F.2d at 94 (citation omitted).

In *United States v. Jones*, 900 F.2d 512, 519-20 (2d Cir. 1990), however, the Second Circuit concluded that no conflict arose where the prosecutor leveled unfounded accusations that counsel had engaged in unethical conduct, and the trial court investigated and rejected the allegations during trial.

[165] *See* United States v. Fulton, 5 F.3d 605, 610 (2d Cir. 1993) (concluding that conflict exists even if attorney is later determined to be innocent of wrong-doing).

B. Counsel Charged With a Crime

Allowing a criminal defendant to proceed through the criminal justice system represented by a lawyer who is also facing serious criminal charges poses serious problems. It appears patently unfair, and some courts see an obvious conflict.[166] On the other hand, some courts do not view counsel as laboring under a conflict of interest even when counsel is faced with charges pressed by the same prosecutor and brought before the same court as the defendant.[167]

To determine whether the charges against counsel create a conflict of interest, the courts consider a range of factors. A court is more likely to find a conflict if defense counsel's criminal case is being handled by the same prosecutor,[168] or office,[169] or is before the same judge.[170] The closer the connection between the prosecution of the defendant and the prosecution of counsel, the greater the risk of harm generated by a conflict of interest.

An attorney facing criminal charges may experience more pressure to disserve the client than an attorney engaged in improper joint representation.[171] The attorney's self-interest will weigh on the side of gaining favor with the prosecution, thus restraining

---

[166] *See* State v. Cottle, 946 A.2d 550 (N.J. 2008) (establishing per se rule); United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987) (finding actual conflict exists when defense counsel was under investigation before and during defendant's trial); People v. Waddell, 24 P.3d 3, 8-10 (Colo. Ct. App. 2000) (holding that defense counsel had conflict of interest due to fact that he was under investigation by same district attorney as client, although defendant properly waived conflict); People v. Edebohls, 944 P.2d 552, 556 (Colo. Ct. App. 1996) (finding conflict of interest exists when defense attorney is being prosecuted by same district attorney's office as his client);
Smith v. Hofbauer, 321 F.3d 809, 823 (6th Cir. 2002) (Oberdorfer, J., dissenting in part) (discussing magistrate judge's conclusion that the conflict of interest "was obvious"). In addition, permitting such representation will undermine the public's confidence in the fairness of the criminal justice system.

[167] *See, e.g.*, Sanchez v. State, 756 S.W.2d 452, 299 (Ark. 1988) (concluding that counsel was "not involved in actively representing his own interest which may have conflicted with those of [the defendant]").

[168] *See, e.g.*, Smith v. Hofbauer, 321 F.3d 809, 816 (6th Cir. 2002).

[169] *See* United States v. DeFalco, 644 F.2d 132, 136-37 (3d Cir. 1979) (noting indictments processed by same United States Attorney's office which prosecuted defendant); Beatty v. United States, 142 F. Supp. 2d 454, 459 (S.D.N.Y. 2001) (stating that conflict exists only if counsel is prosecuted by same agency or office as defendant); People v. Edebohls, 944 P.2d 552, 556 (Colo. App. 1996) (noting that counsel was being prosecuted by the same office as the defendant); State v. Cottle, 946 A.2d 550, 561-62 (N.J. 2008) (adopting per se rule for cases in which counsel is being prosecuted by same office as defendant). The court's analysis may also depend on the bureaucratic structure of the particular prosecutor's office. *See* Hofbauer, 321 F.3d at 822 (Oberdorfer, J., dissenting in part) (discussing whether it was customary for assistants in the Office to negotiate plea bargains with or without approval of their supervisors). *See also* State v. Clark, 744 A.2d 109, 112 (N.J. 2000) (emphasizing that county prosecutor has supervisory authority over municipal prosecutors) (overruled on other grounds in State v. Rue, 811 A.2d 425 (N.J. 2002)).

[170] *See, e.g.*, Hofbauer, 321 at 816; DeFalco, 644 F.2d at 136-37.

[171] Smith v. Hofbauer, 321 F.3d 809, 825 (6th Cir. 2002) (Oberdorfer, J., dissenting in part) (noting that such a conflict has "a stronger tendency to influence, if not compel, [the attorney] to refrain from actions potentially advantageous to his client that an effective counsel would take").

counsel's zeal in representing the defendant.[172] Conversely, if counsel's own case is infected by hostility between the prosecution and defense, the hostility may spread to the defendant's case; counsel may be unable to interact with the prosecution in an appropriate professional manner. Either way, counsel will face difficult choices about how to negotiate for the defendant and how aggressively to fight the charges. If, during the proceedings against the defendant or shortly after their conclusion, counsel strikes a deal in counsel's own case with the same prosecutor's office that is prosecuting the defendant's case, the circumstances suggest that the risk of reducing counsel's own chances for favorable treatment inhibited counsel from providing a zealous defense.[173]

While these problems are particularly intense if counsel is being prosecuted by the same office prosecuting the defendant, the risk of conflict exists even when the prosecution against counsel is being pursued by a different office. Counsel will still be influenced by her own criminal difficulties. She may be motivated to avoid irritating the prosecution, fearing that the prosecution would convey their opinion of her to the prosecutor handling the case. Alternatively, she may be so hostile to the government that her relationship with the prosecutors handling the case against her client is affected.

C. Charges Against Counsel Resolved

In some cases, the charges against counsel are largely resolved by the time counsel is handling the defendant's case. At least in theory, the impact of counsel's own criminal case may diminish when counsel has been convicted and is awaiting sentencing. At that point, counsel's incentive to curry favor with the prosecutor's office is reduced, since whatever concessions the prosecution is willing to make are already established.[174] Nevertheless, counsel's own involvement with the criminal justice system may continue to generate a conflict of interest and a risk of unfairness, even when the charges have been resolved.[175]

In *Stoia v. United States*,[176] defense counsel had previously faced federal charges in two district courts and entered into a plea agreement that provided, in part, that counsel would not represent any defendants charged with federal crimes. Counsel's representation of the defendant threatened to violate this term of the plea agreement and,

---

[172] United States v. Levy, 25 F.3d 146, 156 (2d Cir. 1994); State v. Cottle, 946 A.2d 550, 559-63 (N.J. 2008).

[173] *See, e.g.*, Sanchez v. State, 756 S.W.2d 452, 454 (Ark. 1988) (rejecting defendant's claim where counsel struck a deal with the prosecutor's office shortly after defendant was convicted); State v. Cottle, 946 A.2d 550, 561 (N.J. 2008) (applying per se rule where counsel was negotiating with prosecutor's office on his own behalf at the same time he was representing the defendant).

[174] *See, e.g.*, United States v. Mays, 77 F.3d 906, 908-09 (6th Cir. 1996) (rejecting the defendant's argument that counsel had a conflict where counsel had been prosecuted in a different federal district and had worked as an informant before being reinstated to the bar several months before he commenced his representation of the defendant).

[175] This article focuses only on charges that are close in time to the period of representation. If counsel's criminal problems have long been resolved, such a criminal infractions that occurred before counsel was admitted to the bar, there is no concern that they will have an ongoing effect on counsels ability to provide effective representation.

[176] 22 F.3d 766 (7th Cir. 1994).

during the post-conviction hearing, the court.[177] Additionally, during the trial, counsel was under investigation for soliciting perjury and obstructing justice in connection with his representation of a codefendant. [178] The court concluded that counsel would be burdened by a conflict if he was at risk of violating his agreement and remanded the defendant's case to determine whether counsel's desire to hide this violation prohibited him from appearing as a witness at trial.[179]

In *Phillips v. Warden*,[180] counsel had been convicted on charges unrelated to the defendant's case. Counsel's conviction for murdering his wife and the ensuing litigation were highly publicized in the district where the defendant was charged and tried.[181] While counsel challenged his conviction, he was not incarcerated and continued to practice law. The defendant, having recently moved to the state, was oblivious to counsel's conviction, and counsel was not forthcoming with that information until well into the process.[182] Even when counsel informed the defendant of his status as a convicted murderer, counsel did not fully discuss with the defendant the problems this could pose for his representation.[183] At the defendant's trial, counsel did not ask the prospective jurors whether they were aware of his murder conviction.[184] At first glance, this case does not appear to present a classic attorney self-interest conflict, where counsel is pulled by loyalty to the defendant on one hand and himself on the other. However, a conflict existed because counsel was aware that his own notoriety could have a detrimental effect on the defendant's case and that he should therefore move to withdraw from the case, but counsel's financial self-interest prompted him to continue.[185] The court concluded that counsel's notoriety placed him in an untenably conflicted situation.[186]

Thus, even when the charges against counsel have been resolved, the court should consider the ongoing effects of counsel's prior charges and their impact on counsel's ability to provide conflict-free representation. If counsel's involvement in the justice system threatens to bleed into the defendant's case and burden counsel's decision-making, a conflict of interest exists.

D. Early Intervention Based on Counsel's Criminal Involvement

---

[177] Stoia v. United States, 22 F.3d 766, 773 (7th Cir. 1994).
[178] Stoia v. United States, 22 F.3d 766, 772 (7th Cir. 1994). The defendant argued that the perjury investigation prevented counsel from allowing the defendant to testify in order to prevent the potential introduction of evidence adverse to counsel.
[179] The court remanded for a hearing to determine whether counsel was at risk of being in violation of the agreement. Stoia v. United States, 22 F.3d 766, 772-73 (7th Cir. 1994).
[180] 595 A.2d 1356 (Conn. 1991).
[181] Phillips v. Warden, 595 A.2d 1356, 1360 (Conn. 1991).
[182] Phillips v. Warden, 595 A.2d 1356, 1362-63 (Conn. 1991).
[183] Phillips v. Warden, 595 A.2d 1356, 1364 n.12 (Conn. 1991).
[184] Phillips v. Warden, 595 A.2d 1356, 1364 (Conn. 1991).
[185] Phillips v. Warden, 595 A.2d 1356, 1374 (Conn. 1991).
[186] The court emphasized that counsel's conflict was acute when he approached voir dire and had to determine the least harmful way of dealing with the jurors' likely knowledge of his conviction.

Early intervention in these cases is often feasible and will serve to best protect the defendant and the fairness of the process. If the issue is brought to the court's attention early in the process, the court can assess the propriety of the continued representation. The court can then decide whether counsel is so compromised by the criminal investigation that counsel cannot continue in the case. Even if the court does not conclude that counsel must be disqualified, early intervention permits the court to explain to the defendant the risks of proceeding with this attorney, allowing the defendant to waive the possible conflict or seek substitution of counsel. To permit the issue to be raised as early as possible, the prosecution should routinely run a criminal record check on defense counsel to make sure counsel does not face prosecution elsewhere, a de minimis burden for the prosecution to assume. However, in cases where counsel is still under investigation and not yet charged, early intervention may pose a challenge.

Early inquiry into the problem will sometimes be the only way to protect the defendant and, at other times, will be the only way to avoid eventual reversal of the defendant's conviction.[187] But not all courts are receptive, and the defendant faces a daunting obstacle regardless of whether the court applies the *Sullivan* rule or the *Strickland* test.[188] Even where danger signals suggest the counsel's conflict had a negative impact, the defendant may fail to establish the specific adverse effect required for relief.[189] The problems that arise because of defense counsel's criminal problems and

---

[187] Courts occasionally view a conflict based on counsel's criminal problems as so severe that the defendant is entitled to relief. *See, e.g.*, Rubin v. Gee, 292 F.3d 396, 403-05 (4th Cir. 2002) (counsels' conflict prevented them from providing testimony critical to the defense); Stoia v. United States, 22 F.3d 766 (7th Cir. 1994); United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987) (granting relief where counsel was under investigation by same office); United States v. Levy, 25 F.3d 146, 157-58 (2d Cir. 1994) (granting relief where counsel's numerous conflicts included both that he was awaiting sentencing on one set of charges and under investigation on another); Mannhalt v. Reed, 847 F.2d 576, 582 (9th Cir. 1988) (granting relief where counsel was accused of buying stolen property from the defendant); Rugiero v. United States, 330 F. Supp. 2d 900, 907-09 (E.D. Mich. 2004) (granting relief where the criminal case against counsel proceeded from investigation through indictment while counsel was representing the defendant); State v. Chandler, 698 S.W.2d 844, 848-49 (Mo. 1985) (grating relief where counsel was suspected of murder with which defendant was charged). One can argue for a per se rule of reversal. One scholar has commented that when counsel "is the subject of an ongoing investigation or has some other special relationship with the prosecution that might lead counsel to place that relationship above the best interests of his client[,] [m]uch can be said for adopting in such cases ... a standard of per se ineffectiveness." 3 LaFave, Criminal Procedure § 11.9(d), at 939-40 (3d ed. 2007); see also id. § 11.9(d), at 918 & nn. 174-75 (noting that some state courts have recognized per se conflicts). Without such a standard, "the issue becomes whether counsel could have done more than he or she did, which seems always to be the case." Id. § 11.9(d), at 940.

[188] For further discussion of the *Sullivan* rule and the *Strickland* test, see *supra* notes 13-14, 20-23, 38-41 and accompanying text.

[189] *See, e.g.*, Armienti v. United States, 313 F.3d 807, 812-13 (2d Cir. 2002) (finding no deficiency in representation when retained counsel, under investigation thus allegedly suffering from a conflict, took over representation from the public defender initially assigned to defendant and never discussed the possibility of pleading guilty); Smith v. Hofbauer, 312 F.3d 809, 814-16 (6th Cir. 2002) (rejecting defendant's claim where counsel sought to withdraw due to conflict); Sanchez v. State, 756 S.W.2d 452, 298-99 (Ark. 1988) (finding counsel's representation was not affected by the charge). In *Smith v. Hofbauer*, 312 F.3d 809, 811-812 (6th Cir. 2002), the defendant's retained counsel, who was facing his own criminal charges, sought to withdraw from the defendant's case on the eve of trial but was required to continue with the case through trial. 312 F.3d at 811. Counsel was replaced prior to sentencing "possibly because [his] license to practice law may have been suspended as of his date of conviction." However,

resulting conflict may be difficult to identify, isolate, and prove to have resulted from the adverse impact of the attorney's conflicted situation. If the court explores the conflict after the fact, counsel's testimony that counsel's own criminal involvement had no impact on the representation may alone be sufficient to defeat the defendant's claim.[190]

If counsel has been charged with a crime, so the charge is a matter of public record, disclosure and discussion of that fact in court poses no problem. However, addressing counsel's situation at the point where the investigation of counsel is ongoing poses some specific problems. Depending on the nature and stage of the investigation, disclosure may 1) compromise the government's effort to enforce the law, 2) harm counsel's reputation and livelihood, perhaps unfairly, and 3) deprive the defendant of choice of counsel.

In some cases, the prosecution is willing to disclose the existence of the investigation. The prosecution may even move to disqualify counsel, arguing that a criminal investigation or charges creates a disabling conflict.[191] In *United States v. Gambino*,[192] for example, the prosecution asked the court to remove the defendant's high-profile counsel from the case, citing its ongoing investigation of counsel.[193] If the prosecution openly raises the investigation, the court is freed from concern about disclosure and should explore the implications of the investigation.

---

reviewing counsel's representation up to that point, the Michigan courts found no evidence that "counsel actively lessened his defense as a result of his pending felony charge" and further concluded that the defendant had not demonstrated an actual conflict. 312 F.3d at 812. Applying *Strickland*, the federal court denied relief.

[190] Reyes-Vejerano v. United States, 276 F.3d 94, 98 (1st Cir. 2002) (counsel testified he was unaware he was under investigation and explained his tactical decisions at trial); Rubin v. Gee, 292 F.3d 396, 408-09 (4th Cir. 2002) (Motz, J. dissenting) (disagreeing with majority assessment that defendant established adverse effect and summarizing testimony of counsel); United States v. Hoffman, 926 F. Supp. 659, 678 n.39 (W.D. Tenn. 1996) (counsel testified that he did not expect to be prosecuted, eliminating any argument that the alleged investigation had an adverse effect). The determination of adverse impact depends on reconstructing the process by which counsel made decisions in the course of the case. *See also* Burger v. Kemp, 483 U.S. 776, 784-85 (1987) (noting that trial court had credited counsel's testimony that his strategic choice was not influenced by conflict); Joy, *supra* note 12, at 42. In *Kemp*, the Court explained why it should defer to the findings of the trial court:

> The district judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witness testify, is in a far better position than we are to evaluate [an alleged conflict of interest].

483 U.S. at 785.

[191] *See, e.g.*, United States v. Gambino, 838 F. Supp. 749 (S.D.N.Y. 1993). *See also* United States v. Levy, 25 F.3d 146, 150-51 (2d Cir. 1994) (explaining that the prosecution did not move to disqualify counsel but that after the prosecution repeatedly raised questions concerning counsel's possible conflict based on concerns including counsel's status as a defendant awaiting his own sentencing in on unrelated criminal charges and counsel's status as the object of a grand jury's investigation into his client's flight).

[192] 838 F. Supp. 749 (S.D.N.Y. 1993).

[193] The government also raised other conflicts. Counsel had been determined to be house counsel to the Gotti crime family and disqualified in earlier decisions. United States v. Gambino, 838 F. Supp. 749, 756 (S.D.N.Y. 1993).

In some cases, however, the disclosure issue is more difficult. The time line in *Rugiero v. United States*[194] illustrates the barriers to disclosure of a possible conflict when counsel is under investigation but also underscores the importance of early disclosure by the prosecution. In *Rugiero* two months before the defendant retained counsel, the government opened an investigation of counsel.[195] Several months later, but eight months before defendant's trial began, counsel learned of the investigation when he was subpoenaed by the grand jury conducting the investigation.[196] While the defendant was on trial, the government was determining whether to charge counsel.[197] The defendant first learned of the investigation only during jury deliberations in his case when local news reported that the attorney was the subject of a criminal investigation.[198] Between the time the defendant was convicted and the date of his sentencing, counsel was indicted.[199] Counsel nevertheless represented the defendant at sentencing and argued on his behalf on direct appeal.[200] Counsel then pleaded guilty and was sentenced to twelve months incarceration.[201] At each stage, the party or parties aware of the criminal investigation withheld that information from the defendant and the court. When all the facts came to light, the defendant ultimately won a new trial.

Even if counsel is merely the target of an investigation, the prosecution may be able to raise the issue.[202] When the investigation is ongoing and not yet public, as in *Rugiero*, even disclosing that counsel is a target may compromise the government investigation or endanger witnesses.[203] But that does not require the government to withhold the information entirely. Instead, the prosecution may protect the defendant as well as the government interest by communicating with the court ex parte.[204] The court can then conduct in camera review of the information provided to determine whether

---

[194] 330 F. Supp. 2d 900, 903 (E.D. Mich. 2004).
[195] Rugiero v. United States, 330 F. Supp. 2d 900, 903 (E.D. Mich. 2004).
[196] Rugiero v. United States, 330 F. Supp. 2d 900, 902 (E.D. Mich. 2004).
[197] Rugiero v. United States, 330 F. Supp. 2d 900, 907 (E.D. Mich. 2004).
[198] Rugiero v. United States, 330 F. Supp. 2d 900, 903 (E.D. Mich. 2004).
[199] Rugiero v. United States, 330 F. Supp. 2d 900, 903 (E.D. Mich. 2004).
[200] Rugiero v. United States, 330 F. Supp. 2d 900, 904 (E.D. Mich. 2004).
[201] Rugiero v. United States, 330 F. Supp. 2d 900, 904 (E.D. Mich. 2004).
[202] *See, e.g.*, Armienti v. United States, 313 F.3d 807, 813-14 (2d Cir. 2002) (noting that the government had raised the possible conflict in other cases handled by counsel while he was being investigated by the grand jury); United States v. Levy, 25 F.3d 146, 150 (2d Cir. 1994) (prosecution raised concerns based on both counsel's existing charges on which he was awaiting sentence and an ongoing grand jury investigation focused on counsel). Of course, in some cases, even the prosecution is not aware of counsel's conflict until after the trial. *See, e.g.*, United States v. Cancilla, 725 F.2d 867, 868 (2d Cir. 1984) (government learned of counsel's possible criminal involvement only after conviction).
[203] *See* Green, *supra* note 57, at 334-36 (discussing prosecution's failure to raise risk of conflict resulting from successive prosecution where to do so might endanger witness).
[204] *See, e.g.*, Reyes-Vejerano v. United States, 276 F.3d 94, 98 (1st Cir. 2002) (court reviewed DEA reports in camera to determine whether counsel was under investigation);
United States v. Fulton, 5 F.3d 605, 606 (2d Cir. 1993) (government met ex parte with judge and revealed that a government witness had implicated defense counsel in criminal conduct); United States v. Register, 182 F.3d 820, 828 n.9 (11th Cir. 1999) (magistrate held ex parte hearing to avoid forcing prosecution to disclose evidence against him to attorney under investigation the prosecution did not want to disclose to the attorney its evidence inculpating him).

there is a conflict and, if so, how much information must be disclosed.[205] If the court fears that counsel's representation will be impaired, the court must take steps to protect the defendant. In some cases, the court may continue the case, allowing the government investigation to reach a point at which disclosure will not harm government interests. But in some cases, the court will have to disclose at least some of the allegations to counsel and the defendant in order to protect the defendant's interests and explain its decision concerning counsel.[206]

If counsel is already aware of the investigation, the prosecution should advise the court and the defendant in camera. Once counsel knows of the investigation, disclosure to the court and defendant will not harm the government interest.[207] Indeed, the government may prefer to inform counsel and the court about the criminal investigation in order to address a problem that may otherwise undermine the conviction.[208] In some cases, the government may want to use the information to bolster its motion to disqualify.[209] The court can then either obtain a waiver from the defendant or allow the substitution of counsel. By handling the matter in camera, the court can protect the defendant's interests without harming counsel's interests through public discussion of counsel's possible criminal conduct. In some cases, however, the court may need more information concerning the case against counsel than the prosecution is willing to reveal to counsel. Even when the prosecution is willing to acknowledge the existence of an ongoing investigation, it may need to keep some details of information secret in order to protect the investigation or witnesses.[210] If that is the case, the court may need to address the issue ex parte in camera.

---

[205] However, the mere fact that the prosecution raises the issue suggests that their treatment of counsel will be affected by the existence of the investigation. It is hard to believe that prosecutors will treat a lawyer who is also a suspected criminal with full professional courtesy.

[206] *See, e.g.*, United States v. Fulton, 5 F.3d 605, 607-08 (2d Cir. 1993) (trial court insisted that information must be disclosed to defense counsel and the defendant).

[207] Briguglio v. United States, 675 F.2d 81, 82 (3d Cir. 1982) (counsel was aware of investigation but did not tell defendant); United States v. Cannistraro, 794 F. Supp. 1313, 1316 (D.N.J. 1992) (counsel had received target letter informing him of grand jury investigation). If disclosure to the defendant would compromise the investigation, the prosecution can seek a protective order. F.R. Crim. P. Rule 16 (d)(1) provides:

> At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

[208] State v. Johnson, 823 P.2d 484, 486 (Utah Ct. App. 1991). In *Johnson*, the prosecution knew its witness would implicate counsel in the defendant's illegal activity and appropriately apprised the court and defense of the perceived conflict before trial, seeking either a waiver or an order disqualifying counsel.

[209] *See, e.g.*, United States v. Cannistraro, 794 F. Supp. 1313, 1316 (D.N.J. 1992) (government sent counsel target letter invoking the investigation as one basis for its motion to disqualify counsel on grounds of conflict). *See also* United States v. Levine, 794 F.2d 1203, 1205 (7th Cir. 1986) (prosecution opposed substitution of counsel because counsel had been implicated in defendant's criminal conduct and defendant appeared to be creating a conflict; prosecution also supplied defendant with recording of conversation inculpating attorney).

[210] United States v. Cancilla, 725 F.2d 867, 868 (2d Cir. 1984) (government refused to provide court details of investigation, but instead urged court to assume that counsel was implicated in criminal conduct similar to the defendant's); United States v. Gambino, 838 F. Supp. 749, 752 (S.D.N.Y. 1993) (court met with prosecutors in camera to discuss relationship between investigation of counsel and the defendant's case).

Cases in which the prosecutors know about the investigation but counsel is not aware that she is being investigated and cannot be told without compromising the government interest pose the greatest challenge. Even in these cases, however, the prosecution should raise the issue with the court. The prosecutor should be required to disclose the circumstances to the judge ex parte, allowing the judge to seek a solution that protects both the government's interest in the secrecy of the investigation and the defendant's interest in appropriate representation. Finding an appropriate solution in these cases will not be easy. If the court disqualifies counsel on the basis of information not shared with the defense, the defendant may later argue that the process violated the right to counsel of choice.[211] Conversely, if the court permits counsel to continue in the case, the defendant's representation may be compromised. But the judge, not the prosecutor alone, should determine how to address the problem.

Of course, in some cases a criminal investigation of counsel is ongoing but the particular prosecutor is not aware of the investigation. If the investigation is being pursued by a different office or even a separate unit within the same office, the prosecutor handling the defendant's case is unlikely to have access to that information. The prosecutor may not even be aware of an investigation overseen by prosecutors in the same office. The secrecy that attends criminal investigation ordinarily precludes the implementation of any system of pre-charge information sharing. In theory, each office could maintain a database of lawyers under investigation. In reality, such a database would be both unfeasible and undesirable. Requiring prosecutors to compile such a database could force them to label an attorney as a possible defendant earlier in the investigative process than they might otherwise. This practice could skew the investigation as well as hamper the investigating prosecutor's pre-charge dealings with the attorney under investigation. It might also unfairly tarnish the reputation and practice of an attorney who is ultimately not charged. In addition, the database itself might be vulnerable to hacking and therefore poses a security challenge. In these cases, the harms inherent in establishing a means of addressing the conflict outweigh the likelihood that a conflict will cause harm to the defendant or the public's interest. When the prosecutor is not aware of the investigation of counsel, early intervention will not be possible unless counsel herself is aware of and raises the issue.

One concern if the courts intervene early and protect defendants by disqualifying counsel is the negative impact on counsel's practice.[212] When a conflict based on counsel's criminal situation comes to light, the trial court should give the defendant the option of seeking new counsel and may refuse to accept a waiver of the conflict. Further, other clients may learn of counsel's problems and opt not to continue being represented by a lawyer who himself was under investigation. Thus, if the attorney's practice is primarily criminal defense, disqualifying counsel from representing criminal defendants

---

[211] *See, e.g.*, United States v. Duklewski, 567 F.2d 255, 257 (4th Cir. 1977) (concluding that defendant's right to counsel of choice was violated and remanding case for further inquiry).

[212] United States v. DeFalco, 644 F.2d 132, 146-47 (3d Cir. 1979) (Garth, J., dissenting) (Sloviter, J., dissenting) (attorney under indictment is protected by presumption of innocence).

and airing counsel's criminal situation could be devastating.[213] The court must handle the determination relating to continued representation with due regard to counsel's reputation and financial well-being, recognizing in pre-conviction cases that counsel is presumed innocent and in pre-charge cases the counsel may never be charged with any crime.[214]

VI. Raising the Conflict: The Prosecutor's Duty

In most cases involving either government employment or criminal investigation of defense counsel, the problem will not be apparent to the court or the defendant and therefore must be raised by either defense counsel or the prosecution.[215]

Of course, the primary burden rests on defense counsel to identify and address potential conflicts of interest.[216] In cases where defense counsel's employment or

---

[213] The fact that counsel in *Rugiero* never revealed the investigation to the defendant after he became aware of it reflects counsel's strong interest in preserving his income stream and his reputation.

[214] *See, e.g.*, Armienti v. United States, 313 F.3d 807, 812 (2d Cir. 2002) (noting that counsel was investigated for four years but never charged). *But see* United States v. Salinas, 618 F.2d 1092, 1093 (5th Cir. 1980) (holding trial court could properly disqualify counsel where judge "believed" counsel was target of criminal investigation involving defendant).

[215] *See also* Glassman, *supra* note 9, at 969 (discussing difficulty of identifying conflicts that do not arise from concurrent representation). Neither the court nor the defendant can be expected to identify these types of problems. *See* United States v. Levy, 25 F.3d 146, 151 (2d Cir. 1994) (illustrating how difficult it may be for a judge to recognize the presence of conflict issues). In *Levy*, the case was reassigned several times, and even though the prosecution raised its conflict concerns with the first judges, the judge who ultimately presided over the trial was unaware of the conflict issues and consequently did not address them. United States v. Levy, 25 F.3d 146, 151 (2d Cir. 1994). Unlike joint representation, defense counsel's employment or criminal problems do not reveal themselves in the courtroom during the course of the defendant's case. *See, e.g.*, United States v. DeFalco, 644 F.2d 132, 133 (3d Cir. 1979) (explaining that Third Circuit was unaware that counsel representing defendant on appeal had pleaded guilty and been suspended from practice); Stoia v. United States, 22 F.3d 766, 769 (7th Cir. 1994) (conflicted counsel did not enter an appearance and trial court had no obligation to be aware of his out of court contribution to the defense). Federal Rule of Criminal Procedure 44(c) imposes an obligation on the court to inquire into a conflict only when a concern regarding joint representation is obvious. In *Mickens*, the Court suggests that Rule 44 supports differentiation among different types of conflicts. 535 U.S. at 175. *See also* Shiner, *supra* note 28, at 993; Glassman, *supra* note 9, at 967-68 (discussing relationship between Rule 44 and constitutional rules). To the contrary, the rule of procedure simply singles out those situations in which the court can be expected to recognize the conflict -- cases in which the jointly represented defendants are before the same judge. It does not address any other conflict problems because the court has no reliable access to information in other types of cases. Even when the attorney's predicament is reported in the media, the court and defendant may not learn of the problem. *See* Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (counsel apparently relied on the news reports to inform the defendant of the issue; neither the defendant nor the court knew).

[216] Under the Rules of Professional Responsibility, the principal burden falls on defense counsel. *See* MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.7. *See generally* Green, *supra* note 57,at 328-31; *see also* Cuyler v. Sullivan, 446 U.S. 335, 346 (1980) (recognizing defense counsel has ethical obligation to avoid conflicting representations); Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978) ("[D]efense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem."). In some cases, defense counsel properly raises the conflict. *See, e.g.*, State v. Almanza, 910 P.2d 934, 934-35 (N.M. Ct. App. 1995) (reversing conviction where counsel asked to withdraw because his law firm was prosecuting defendant in separate case and trial court required counsel to continue with case). Certainly law firms' and public defenders' conflict checks should include previous or concurrent employment as a prosecutor. However, defense counsel is sometimes blind or even resistant to the conflict.

problems with the criminal justice system threaten a conflict, the obvious course of action is for defense counsel to fulfill her ethical obligation and inform both the client and the court of the problem, thereby allowing the court to address the conflict early in the client's criminal case.[217] The courts rely on counsel to act ethically,[218] but many conflict cases arise because counsel fails to make appropriate and timely disclosure.[219] Moreover, even if counsel identifies the conflict and raises the question in private conversation with

---

In *State v. White*, 114 S.W.3d 469, 473-74 (Tenn. 2003), defense counsel tried unsuccessfully to persuade the court that he should be permitted to represent the defendant even though the prosecutor, armed with an advisory opinion from the state Board of Professional Responsibility expressing the view that counsel could not unethically represent the criminal defendant while also serving as a prosecutor, moved to disqualify counsel. 114 S.W.3d at 473.

[217] *See* JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 13:3, N.17 (2d ed. 1996). According to the ABA, "[d]efense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest." *Id.* § 13:3, n.17 (citing ABA Stds, The Defense Function Std 4-3.5(b)). Further, although counsel's "primary duty is to advance the client's interests," when these interests conflict with the administration of justice, this duty must yield to the public duty and counsel must disclose the conflict to the court. Hall, *supra* at § 3:6. Finally, it is recommended that counsel fully disclose any potential conflict to a defendant in order to save "time and trouble later in cutting off ineffective assistance claims because of an allegedly undisclosed conflict of interest." Hall, *supra* at § 13:3. *See also* United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987) (stating that attorney was under ethical obligation to inform client of ongoing criminal investigation and the possibility it would affect attorney's judgment while counsel for client). *See also* Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (noting that if judge was aware of criminal allegations against attorney in his court, he must inquire and determine whether defendant wishes to continue representation); United States v. Garcia, 517 F.2d 272, 277 (5th Cir. 1975) (noting that individuals are free to waive constitutional protections so long as such waiver is voluntary, knowing and intelligent).

[218] *See* Mickens v. Taylor, 535 U.S. 162, 167-68 (2002) (a court performing the threshold inquiry into a conflict claim must keep in mind the principle that "defense counsel is in the best position to determine if a conflict exists."); Burger v. Kemp, 483 U.S. 776, 784 (1987) ("[W]e generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client."); Cuyler v. Sullivan, 446 U.S. 335, 347 (1980) (trial courts rely on "the good faith and good judgment of defense counsel"); United States v. Kossak, 275 F. Supp. 2d 525, 530 (D. Del. 2003) ("The Government is entitled to presume that [counsel] would act in an ethical manner in dealing with any perceived conflicts.").

[219] *See, e.g.,* Armienti v. United States, 234 F.3d 820 (2d Cir. 2000) (noting that counsel did not inform defendant of counsel's own criminal investigation but defendant discovered it when he inquired about papers that counsel was reading); United States v. Cancilla, 725 F.2d 867, 867-68 (2d Cir. 1984) (explaining that conflict arose when defendant had no knowledge that his defense counsel had been involved in similar criminal activity to which defendant was convicted); United States v. DeFalco, 644 F.2d 132, 134 (3d. Cir. 1980) (explaining that defendant was unaware that his defense counsel had entered a guilty plea for conspiracy and had subsequently been suspended from practicing law in the United States District Court of New Jersey); Rugiero v. United States, 330 F. Supp. 2d 900, 902 (E.D. Mich. 2004) (noting that defendant became aware that his defense counsel had been under criminal investigation through the local news broadcast). In *State v. Cottle*, 946 A.2d 550, 552-53 (N.J. 2008), defense counsel's plea agreement imposed obligations on him in addition to his ethical responsibility. The agreement required counsel to obtain from each client in a criminal case written acknowledgment that he had informed the client that he was participating in the court's pretrial intervention program and also required counsel to provide a copy of the acknowledgement to the prosecutor's office as well as the pretrial program. Despite these obligations, he did not inform the defendant, a juvenile, or the defendant's family of his own criminal situation. *See also* Green, *supra* note 57, at 349 (noting that defense attorneys do not always follow ethical duties).

the defendant, problems may arise. The defendant may not be able to assess the possible impact or determine an appropriate course of self-protective action, and the record may not clearly establish that the defendant consented.[220] Even when the conflict issue is raised and addressed in open court, conflicted counsel sometimes aggressively seeks to remain in the case.[221]

Therefore the prosecution should have a duty to identify and raise these conflicts. The prosecutor has access to key information in these cases and therefore should bear responsibility for avoiding conflicted defense representation. Given the importance of early intervention to protect the fairness of the process and the defendant's right to effective representation, the law should require prosecutors to seek out information concerning these two types of possible conflict and, if a problem exists, to call it to the court's attention.

Prosecutors can identify and raise these problems early in the process. Addressing the conflict early is critical because the risk of impact is both pervasive and subtle and the impact is extremely difficult to evaluate after the case has been resolved. When the conflict is disclosed to the trial court in a timely manner, the court has the opportunity to evaluate the specific alleged conflict in the context of the particular case and, if appropriate, either disqualify counsel or accept a waiver from the defendant.[222] Failure to address the problem early in the case puts both the fairness of the proceeding and the effectiveness of the defense representation in jeopardy. Even delay in raising the issue may result in a mistrial or reversal, forcing the defendant through a second proceeding.[223]

---

[220] *See, e.g.*, Mannhalt v. Reed, 847 F.2d 576, 578 (9th Cir. 1988) (counsel who was accused by a government witness of having purchased stolen goods mentioned the accusation to defendant, but "did not point out a potential conflict of interest); Sanchez v. State, 756 S.W.2d 452, 298 (Ark. 1988) (appearing to credit counsel's testimony that he told defendant of his pending charges, but not mentioning any discussion of issue in open court).

[221] *See, e.g.*, United States v. Levy, 25 F.3d 146, 150-51, 54 (2d Cir. 1994) (outlining procedural history of case throughout which defense counsel sought to continue representing defendant despite several arguable conflicts raised by the prosecution, at one point misrepresenting to the court that the defendant had waived the issue in a colloquy); State v. White, 114 S.W.3d 469, 473 (Tenn. 2003) (defense counsel tried unsuccessfully to persuade the court that he should be permitted to represent the defendant even though the prosecutor, armed with an advisory opinion from the state Board of Professional Responsibility expressing the view that counsel could not unethically represent the criminal defendant while also serving as a prosecutor, moved to disqualify counsel).

[222] *See, e.g.*, People v. Washington, 461 N.E.2d 393, 395 (Ill. 1984) (the prosecutor raised the issue and it was discussed on the record). When the court becomes aware of the situation, the court should apprise the defendant of the relevant facts. *See, e.g.*, People v. Waddell, 24 P.3d 3, 6-7 (Colo. Ct. App. 2000) (noting that same judge was presiding over criminal proceedings against counsel and those against defendant and obtained waiver from defendant). Oddly, courts do not always do so. *See, e.g.*, People v. Gaines, 716 N.Y.S.2d 207, 209 (N.Y. App. Div. 2000) (noting that trial court was informed when counsel took a job with the prosecutor's office and permitted counsel to withdraw but did not inform defendant or seek a waiver). For a further discussion of waiver of conflict, see *supra* notes 48-66 and accompanying text. For a further discussion of disqualification of counsel, see *supra* notes 67-73.

[223] Green, *supra* note 57, at 336

The government has a special interest in ensuring the fairness of the process as well as the legitimacy of the outcome.[224] As a result, the prosecution should raise these conflicts, and should do so early in the process, to permit the court to address the conflict, avoiding unfairness to the defendant and eliminating a possible ground for later challenging the conviction.[225] Prosecutorial discretion should be constrained by the obligation to raise the conflict. The prosecution should not be free to refrain from disclosing the problem in some cases and to raise the issue only in those cases in which the prosecution hopes to gain an advantage by moving to disqualify defense counsel.[226] The prosecution should instead be required to act even when the prosecutor does not see any gain for the government or any strong risk to the defendant; only an open airing of the issues whenever either of these problems exists can protect the defendant and assure the fairness of the process.

One could caution against inviting the prosecutor or the court to be an officious intermeddler, but imposing the burden on the prosecutor will often be the only path to early intervention.[227] In *Strickland*, the Court noted concern that too demanding a

---

[224] *See* Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974); Berger v. United States, 295 U.S. 78, 87 (1935) (explaining that prosecutor has high obligation to see that justice is done); *see generally* Flowers, *supra* note 74, at 728-733 (discussing role of prosecutor).

[225] *See* United States v. Stantini, 85 F.3d 9, 13 (2d Cir. 1996) (pointing out that prosecution could have saved a lot of trouble by raising the conflict early in the proceedings). *See also* United States v. Holley, 826 F.2d 331, 333 (5th Cir.) (suggesting that prosecutor should remind court when F.R. Crim. Pro. 44 applies); United States ex rel. Vriner v. Hedrick, 500 F. Supp. 977, 983 (C.D. Ill. 1980) (suggesting that prosecutor should raise issue of conflict based on joint representation).

[226] In some cases, the prosecution aggressively seeks to disqualify counsel to serve its own interest. *See, e.g.*, United States v. Cannistraro, 794 F. Supp. 1313, 1323-24 (D.N.J. 1992) (government identified three grounds for the successful motion to disqualify, and defendant argued that some of government's arguments were disingenuous); United States v. Gotti, 771 F. Supp. 552, 558 (E.D.N.Y. 1991) (recognizing that government may have ulterior motive in moving to disqualify counsel); Commonwealth v. Maricle, 10 S.W.3d 117 (Ky. 1999) (granting mandamus at prosecution request ordering trial court to disqualify counsel where counsel's associate had previously handled the case for the Commonwealth). *See also* Wheat v. United States, 486 U.S. 153, 163 (1988) (remarking that trial courts are aware of and should take into account the possibility that the government will "manufacture" a conflict to disqualify a particular defense attorney); United States v. Register, 182 F.3d 820, 833 (11th Cir. 1999) (defendant argued that the evidence against counsel was tenuous and claimed that prosecution made the motion to disqualify in bad faith; appellate court deferred to trial court's assessment). *See also* Ephraim Margolin & Sandra Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 AM. CRIM. L. REV. 227, 229 (1982) (stating that the government typically brings a disqualification motion to "disqualify the most competent lawyers and firms"); Green, *supra* note 57, at 354 (advocating limitations on the prosecution's use of disqualification motions).

[227] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983) (suggesting that opposing party's allegation of conflict should be "viewed with caution"); Darryl K. Brown, *Executive Branch Regulation of Criminal Defense Counsel and the Private Contract Limit on Prosecutor Bargaining*, 57 DEPAUL L. REV. 365, 374-79 (2008) (discussing prosecutorial incentives to restrict defense effectiveness); Green, *supra* note 57, at 354 (stating that there should be guidelines governing and limiting use of disqualification motions in an effort to restrain prosecutors from filing for improper purposes). Professor Green later states that in order to assure that disqualification motions do not create a perception of unfairness, their filing should be limited to cases in which "'both the likelihood and the dimensions of the feared conflict are substantial.'" Green, *supra* note 57, at 361 (quoting *Wheat v. United States*, 486 U.S. 153, 166 (1982) (Marshall, J. dissenting)). These conflicts should be such that if counsel "were to continue in the representation, defense counsel would probably become engaged in significant ethical misconduct

standard might intrude excessively into the relationship between the defendant and defense counsel and interfere with counsel's ability to make appropriate decisions.[228] However, the prosecutor can flag the two types of conflicts involved here without drawing either herself or the court into evaluating and overseeing counsel's decision-making. The prosecutor raises the possible conflict on the basis of objective indicators outside the attorney client relationship, and the intervention does not entail any assessment of counsel's performance. A conflict which is raised early in the process will be resolved either by replacing counsel with an un-conflicted attorney or by establishing a valid waiver on the record. Either way, no ongoing scrutiny of counsel's representation will be required. Inquiry into counsel's performance is necessary only if the issue is raised post-conviction and the court must then determine the impact of the situation on counsel's representation.

The obligation should be grounded in the prosecutor's general duty to see that justice is done and that the trial is fair.[229] There is little support for imposing a constitutional duty on the prosecution to inform the defendant or the court of potential conflicts on the part of defense counsel.[230] It could be argued that due process requires

---

which would adversely affect . . . defense counsel's representation." Green, *supra* note 57, at 361. The shortcoming of his approach is that it entrusts to the prosecutor the task of assessing the risk to the fairness of the process and the defendant. When it appears that the prosecution is using a motion to disqualify for strategic reasons, the courts should approach the question with caution. In some cases, the defendant may be able to insist on accommodations in the government's case to avoid forcing counsel's withdrawal. *See* United States v. Hallock, 941 F.2d 36, 44 (1st Cir. 1991) (suggesting that counsel could have made such a motion rather than withdrawing); United States v. Diozzi, 807 F.2d 10, 12-13 (1st Cir. 1986) (once defendant agreed to stipulate to relevant facts, counsel should not have been disqualified on grounds he would be called as prosecution witness).

[228] Strickland v. Washington, 466 U.S. 668, 688-90 (1984). *See also* Green, *supra* note 57, at 341 (discussing difference between prosecutor detecting defense counsel's incompetence and counsel detecting risk of conflict).

[229] Green, *supra* note 57, at 336-37, 355. *See also* United States v. Edelmann, 458 F.3d 791, 801 (8th Cir. 2006) (explaining that government informed district court that defense counsel was under FBI investigation and district court properly removed defense counsel); West Virginia *ex rel.* Humphries v. McBride, 647 S.E.2d 798, 804 (W. Va. 2007) (explaining that State raised issue of conflict of interest at trial and requested that defense counsel step aside). MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment (2003) states:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. The responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

[230] *See* United States v. Morelli, 169 F.3d 798, 812 (3d Cir. 1999) (rejecting defendant's argument that prosecution had duty to apprise him of counsel's conflict); Cerro v. United States, 872 F.2d 780, 787 (7th Cir. 1989) (considering prosecution's duty where government witnesses had implicated counsel in criminal conduct, and noting that whether the prosecutor has a duty to inform is "an open question" but finding no violation in the case); United States v. Iorizzo, 786 F.2d 52 (2d Cir. 1986) (suggesting that prosecution should have moved to disqualify counsel due to prior representation of key witness, but finding no constitutional duty to do so). *But see* United States v. Rahman, 861 F. Supp. 266, 278 (S.D.N.Y. 1994) (suggesting in passing that the prosecution has a duty to disclose potential defense conflicts to the court). *See also* United States v. Mitchell, 572 F. Supp. 709, 713-14 (N.D. Cal. 1983) (rejecting defendant's argument but suggesting that prosecution violated duty by failing to disclose conflict threatened by calling counsel's former client as prosecution witness).

that the prosecutor disclose facts in the government's possession that raise a risk of a serious conflict of interest on the part of defense counsel. However, a constitutional duty would add nothing to the defendant's constitutional protection. Currently, the defendant can get relief if counsel's conflict prejudiced the outcome – either under the *Sullivan* standard, benefiting from presumed prejudice or under *Strickland*, making a showing of incompetence and prejudice. If the Court recognized a constitutional duty on the part of the prosecution, the test would undoubtedly include the requirement that the defendant show that some harm – prejudice – flowed from the prosecutor's failing. The defendant would have to demonstrate that, had the prosecution disclosed the information about counsel's situation, the result of the proceeding would likely have been different. This showing would entail essentially the same analysis as that the courts currently apply when a defendant raises a conflict of interest after conviction.

Instead, the rules of professional responsibility should impose on the prosecutor the duty to identify and raise these types of conflict. The prosecutor should be required to make the necessary inquiry concerning counsel's government employment or criminal problem and, having done so, to inform the court. Such a rule would increase the likelihood that the defendant's and the public's interest would be protected by early intervention.

VII. Conclusion

The two types of conflicts of interests considered in this article - when defense counsel has an employment relation to the prosecutor's office and when defense counsel faces criminal investigation or charges – should give rise to an obligation on the part of the prosecutor to disclose relevant information to the court and the defendant. Both these situations threaten the defendant's representation and the actual as well as apparent fairness of the proceeding. Yet only in extreme cases, do these types of conflicts result in reversal of a conviction. As a result, early intervention by the court is critical.

In the situations that generate these types of conflict, the prosecution generally has ready access to information pertinent to the conflict, and neither the court nor the defendant is likely to be aware of the problem. While defense counsel generally bears the primary obligation to raise the possible conflict, counsel cannot be relied upon to disclose the essential information to the court or even to the defendant. As a result, the prosecution must also be given responsibly for disclosing the problematic situation. Imposing the obligation of disclosure on the prosecution will increase the likelihood that courts will be able to address these types of conflict early and appropriately.