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Immediate Appeal from Counsel Disqualification in Criminal Cases

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NOTES

IMMEDIATE APPEAL FROM COUNSEL DISQUALIFICATION IN CRIMINAL CASES

The expanding number of lawyers and the overwhelming caseloads with which both federal and state courts are struggling demand that the legal profession "maintain high standards of professional conduct."[1] In the courtroom, concern about competent representation and proper professional conduct has led to an increasing number of motions for disqualification of counsel.[2] Disqualification motions occur in both civil and criminal cases, although for different motives and reasons.[3] In either context, any party may move to disqualify opposing counsel.[4] A judge also may disqualify counsel *sua sponte* if a conflict of interest exists or a question arises concerning a particular lawyer's competence. Regardless of who raises the issue of counsel disqualification, or the reasons for doing so, a motion to disqualify counsel creates problems that transcend the merits of the particular case. A disqualification motion delays the trial, increases litigation costs, and may even prompt ethical investigations. If the motion is granted, the disqualification deprives a party of his chosen counsel and causes further delay while a new attorney becomes familiar with

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1979). The care taken by the drafters of the new MODEL RULES OF PROFESSIONAL CONDUCT indicates the importance of professional standards to the legal profession. The Commission on Evaluation of Professional Standards began work on a draft of the new Model Rules in 1977, but the American Bar Association has not yet adopted a final form of the new rules. The need for a commission to evaluate the Code arose less than ten years after the American Bar Association adopted the Code in 1969, which indicates the concern for adequate regulation of professional conduct.

2. *See* Armstrong v. McAlpin, 625 F.2d 433, 437 n.9 (2d Cir. 1980) (attributing increased disqualification motions primarily to dilatory trial tactics), *vacated*, 449 U.S. 1106 (1981).

3. *See infra* notes 114-15 and accompanying text.

4. Attempts by criminal defendants to disqualify prosecutors occur infrequently, and enjoy only limited success. *See, e.g.*, United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); State v. Powell, 186 Conn. 547, 442 A.2d 939 (1982).

the case.[5]

Following the trial court's resolution of the disqualification motion, the most compelling question for litigants is whether they immediately can appeal the court's order. An appellate court's willingness to hear an appeal of a disqualification order hinges primarily upon the nature of the case—criminal or civil—and the disposition of the motion—a grant or denial. These two variables create four distinct classes into which counsel disqualification cases fall, each requiring a separate analysis to determine whether an immediate appeal is appropriate.

The first class of counsel disqualification cases results from criminal actions in which a court denies a disqualification motion. Little appellate litigation has occurred in this area, primarily because criminal defendants rarely attempt to disqualify prosecutors.[6] Although a prosecutor occasionally does move to disqualify the defendant's counsel, an immediate appeal of the trial court's denial rarely furthers the prosecutor's interests. An immediate appeal delays the pending prosecution, a situation most prosecutors seek to avoid. In the few criminal cases in which a party has attempted to appeal an order denying a disqualification motion, courts have not found the order immediately appealable.[7]

The second class of disqualification cases concerns denials of disqualification motions in civil actions. A recent Supreme Court decision resolved previously conflicting decisions in this area.[8] In *Firestone Tire & Rubber Co. v. Risjord*,[9] the Court held that orders denying disqualification motions in civil suits are not immediately appealable. The Court, however, did not address the appealability of orders, in either the criminal or civil context, granting

5. *See* Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450 (1978).

6. Reasons for the scarcity of attempts by criminal defendants to disqualify the prosecuting attorney are speculative. Perhaps many lawyers for criminal defendants never consider the possibility of disqualifying the government's counsel, or do not think that filing a disqualification motion would be in the client's best interest.

7. *See, e.g.*, United States v. Caggiano, 660 F.2d 184, 191 (6th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *In re* April 1977 Grand Jury Subpoenas, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, 440 U.S. 934 (1979).

8. *See* Comment, *supra* note 5.

9. 449 U.S. 368 (1981).

disqualification motions.[10]

The third class encompasses orders granting disqualification motions in civil cases. Since *Firestone*, three circuits have considered the appealability of these orders. The United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits have found that orders granting disqualification motions in civil cases are immediately appealable.[11] These courts have distinguished orders that grant disqualification motions from orders that deny disqualification motions, as in *Firestone*. The distinction is based upon the immediate and substantial disruptive effects that result when a court disqualifies either party's counsel.[12]

The fourth class concerns criminal cases in which the trial court has granted counsel disqualification. Before *Firestone*, several circuits had held that a party could appeal immediately an order granting disqualification in criminal cases.[13] Since *Firestone*, the circuits that have considered such appeals have reached varying conclusions. In *United States v. Greger*,[14] the United States Court of Appeals for the Ninth Circuit held that an order granting a disqualification motion in a criminal case was not immediately appealable. In contrast, the Eighth Circuit in *United States v.*

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10. For further discussion of *Firestone*, see *infra* text accompanying notes 38-47. *See also* Braverman, *A Blow for Injustice*, 69 ILL. B.J. 408 (1981); Note, *Civil Procedure— Interlocutory Appeals: Orders Denying Disqualification of Counsel are not Appealable Pursuant to the Collateral Order Exception*, 56 TUL. L. REV. 1035 (1982); *Eighth Circuit Survey—Civil Procedure*, 14 CREIGHTON L. REV. 1021 (1981). *See also* Significant Development, *The Collateral Order Doctrine After* Firestone Tire & Rubber Co. v. Risjord: *The Appealability of Orders Denying Motions for Appointment of Counsel*, 62 B.U.L. REV. 845 (1982).

11. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981).

12. Unlike orders denying a motion for counsel disqualification, "[w]hen a district court grants disqualification, the effect of the court's action is immediate and measurable. The party opposing the motion is abruptly deprived of his counsel and, provided he desires to proceed with his action, the litigation is disrupted while he secures new counsel." Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1027 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981). For further discussion of the differences between orders that grant disqualification and those that deny disqualification, see *infra* text accompanying notes 107-11.

13. *See, e.g.*, United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977); United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

14. 657 F.2d 1109 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983).

Agosto,[15] and the Second Circuit in *United States v. Cunningham*,[16] held that a defendant may appeal immediately the disqualification of his counsel.

This Note discusses the conflicting positions among the courts concerning the appealability of counsel disqualification in criminal cases, the rationale behind each court's holding, and the policies that each court has considered persuasive. The Note concludes that the decisions of the Eighth and Second Circuits are better reasoned, and that an order granting counsel disqualification in criminal cases should be immediately appealable because it satisfies the collateral order exception to the final-judgment rule.

THE FINAL-JUDGMENT RULE AND ITS EXCEPTIONS

The Final-Judgment Rule

The federal judicial system limits the availability of interlocutory appeals.[17] Section 1291 of the Judicial Code provides the primary means by which a federal circuit court may hear an appeal of a federal district court's decision,[18] giving the federal courts of appeals jurisdiction over any "final decision" of the district courts.[19] The final-judgment rule advances the policy of judicial economy by avoiding the delay and expense that piecemeal appellate review of disputed issues would entail.[20]

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15. 675 F.2d 965 (8th Cir.), *cert. denied*, 103 S. Ct. 77 (1982).

16. 672 F.2d 1064 (2d Cir. 1982). *See also* United States v. Curcio, 680 F.2d 881 (2d Cir. 1982).

17. *See* 28 U.S.C. §§ 1291-1292 (1976). If limiting the number of interlocutory appeals were not a problem, then a strict interpretation of § 1291 would be unnecessary, *see infra* notes 19-23 and accompanying text, and no need would exist for § 1292, *see infra* notes 24-25 and accompanying text.

18. The courts of appeals shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1291 (1976).

19. *Id.*

20. *See* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). The final-judgment rule also promotes efficient decisionmaking by the appellate courts. "[M]any potential points of appeal are corrected in the course of trial, prove non-prejudicial, or are mooted by the outcome." Comment, *supra* note 5, at 452. For an historical analysis of the final-judgment rule, see Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

Determining whether a particular order represents a final decision depends on several factors. A federal court of appeals may deny jurisdiction if the appellant has an adequate remedy absent an immediate appeal.[21] In criminal cases, therefore, the appellate court must determine whether a new trial is an adequate remedy for a defendant who is convicted after the trial court has disqualified the defendant's counsel. The defendant must demonstrate that the order appealed from had a final and irreparable effect on his rights.[22] The final and irreparable effect may involve any of the defendant's rights, not just those rights most closely connected with the substantive concerns of the case. Because counsel disqualifications in civil and criminal cases are not "final decisions" on the merits, appealable orders must satisfy one of three exceptions to the final-judgment rule of section 1291.[23]

Discretionary Appeals

Three exceptions to the final-judgment rule allow an appellate court to review a trial court's decision before the trial court enters its final judgment. The Interlocutory Appeals Act[24] provides the first exception, allowing an appellate court to exercise discretionary review of a trial court's interlocutory orders in civil cases. The trial judge must state in writing that the order involves a control-

21. Whether an adequate remedy exists if the appellate court denies an immediate appeal is a major point of contention in many of the cases discussing the collateral order doctrine. Most of the cases discussed in this Note ultimately have turned upon the adequacy of an alternative remedy. *See, e.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); United States v. MacDonald, 435 U.S. 850 (1978) (rejecting a direct appeal of an order denying defendant's motion to dismiss for alleged violations of defendant's sixth amendment right to a speedy trial); Abney v. United States, 431 U.S. 651 (1977) (permitting a direct appeal of an order denying defendant's motion to dismiss on double jeopardy grounds); Stack v. Boyle, 342 U.S. 1 (1951) (permitting a direct appeal of an order denying a motion to reduce bail).

22. *See* Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) (after final judgment, "it will be too late effectively to review the present order, and the rights conferred by the statute [28 U.S.C. § 1292], if it is applicable, will have been lost, probably irreparably").

23. For a thorough discussion of the collateral order doctrine, exceptions to the final-judgment rule, and counsel disqualifications, see Comment, *supra* note 5. For a discussion of the collateral order doctrine and motions for appointment of counsel, see Significant Development, *supra* note 10.

24. 28 U.S.C. § 1292(b) (1976).

ling question of law about which a difference of opinion exists, and that an immediate appeal may materially advance the ultimate resolution of the litigation.[25] The Act, however, is beyond the scope of this discussion.

The writ of mandamus offers a second exception to the final-judgment rule and is available in both criminal and civil cases.[26] Courts exercise discretion in granting mandamus and limit its use to exceptional situations to avoid disrupting ordinary appellate procedures.[27] Appellate courts considering immediate appeals of counsel disqualification orders in criminal cases have discussed the use of mandamus, but have found that the particular cases under consideration have not warranted such "extraordinary relief."[28]

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25. Under § 1292(b), the trial judge must "be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." *Id.*

After the trial court certifies the order, the court of appeals has discretion to hear or dismiss the appeal. This certification procedure for counsel disqualification orders in civil cases has created some disagreement among the circuits. *Compare* Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022 (D.C. Cir. 1976) (endorsing the use of § 1292(b) in limited situations) *with* Trone v. Smith, 553 F.2d 1207 (9th Cir. 1977) (holding § 1292(b) certification improper for obtaining review of denials of disqualification) *and* Waters v. Western Co. of N. Am., 436 F.2d 1072 (10th Cir. 1971) (dismissing an appeal from a disqualification denial as improvidently granted).

Section 1292 applies to civil actions only. In addition, the interlocutory appeal permitted by section 1292(b) is available only for "an order not otherwise appealable." Counsel disqualification orders in criminal cases are otherwise appealable if they come within the *Cohen* collateral order exception. *See infra* notes 29-37 and accompanying text.

26. 28 U.S.C. § 1651 (1976).

27. C. WRIGHT, THE HANDBOOK OF THE LAW OF THE FEDERAL COURTS § 102, at 516 (3d. ed. 1976).

28. *See, e.g.*, United States v. Greger, 657 F.2d 1109, 1114 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983). In *Greger*, the Court noted that a writ of mandamus is appropriate if

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. . . . (3) The district court's order is clearly erroneous as a matter of law. . . . (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . . (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. (citations omitted) (citing Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977)).

Some recent cases support the use of mandamus in discretionary appeals of counsel disqualification orders in civil cases. Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022 (D.C. Cir. 1976); Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th

Mandamus would not be necessary in an appeal of a counsel disqualification order if the appellate court determined that the order came within the third exception to the final-judgment rule, the collateral order doctrine.

The United States Supreme Court first enunciated the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*[29] *Cohen* involved an order denying the defendant's motion to require the plaintiff to post security for the defendant's reasonable expenses incurred in a stockholder derivative action.[30] The United States District Court for the District of New Jersey refused to apply the New Jersey statute requiring such security,[31] but the United States Court of Appeals for the Third Circuit reversed.[32] The Supreme Court then interpreted section 1291 as including decisions that "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[33] The Court found that the order was appealable as a final disposition of a claimed right which was not a basic element of the cause of action, and that did not require consideration with the substantive aspects of the case.[34]

In *Cohen*, the Supreme Court identified the general elements of an immediate right of appeal under section 1291. In recent decisions applying the collateral order doctrine, the Court has developed three specific requirements.[35] The Court stated in *Coopers &*

Cir. 1966), *cert. denied*, 389 U.S. 820 (1967); Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), *clarified* 370 F.2d 418 (9th Cir. 1966). Arguments supporting the use of mandamus in appeals of counsel disqualification in civil cases are considerably stronger than arguments for its use in criminal cases. *See generally* Comment, *supra* note 5, at 472-482.

29. 337 U.S. 541 (1949).

30. *Id.* at 543.

31. 7 F.R.D. 352 (D.N.J. 1947). *See* N.J. STAT. ANN. § 14:3-15 (West 1939).

32. 170 F.2d 44 (3d Cir. 1948).

33. 337 U.S. at 546.

34. *Id.* at 546-47.

35. *See* United States v. Hollywood Motor Car Co., 102 S. Ct. 3081 (1982) (per curiam); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Abney v. United States, 431 U.S. 651, 658 (1977). Several lower courts also have applied three requirements to collateral orders. *See, e.g.*, United States v. Greger, 657 F.2d 1109 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983); Armstrong v. McAlpin, 625 F.2d 433, 438 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981).

Lybrand v. Livesay[36] that "[t]o come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." The *Cohen* collateral order doctrine, however, is essentially a fiction. The orders excepted from the final-judgment rule still must satisfy the requirements of section 1291 before an appellate court may exercise jurisdiction.[37] To allow immediate appeals, the Court has simply labelled a limited class of orders "final decisions." Therefore, an order granting or denying a counsel disqualification motion is immediately appealable under the collateral order doctrine if the order conclusively determines a question that is separate from the merits and is effectively unreviewable after the trial.

Counsel Disqualification Orders and the Collateral Order Doctrine: Firestone Tire & Rubber Co. v. Risjord

Of the four categories of cases in which a direct appeal of a counsel disqualification order may arise,[38] the Supreme Court has addressed only one. In *Firestone Tire & Rubber Co. v. Risjord*,[39] the Court held that the denial of a motion to disqualify counsel in a civil case did not constitute a collateral order, and thus was not immediately appealable. Firestone, the defendant in four consolidated product-liability suits, had filed a motion to disqualify the plaintiff's counsel. The district court denied Firestone's motion. On

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By contrast, one commentator has identified four distinct requirements:

> The order must be (1) collateral—the issues bearing on the order must be essentially unrelated to the issues of the main dispute; (2) conclusive—the order must be final, neither tentative nor incomplete; (3) impracticable of appeal from final judgment—the asserted right "will have been lost, probably irreparably" if review is delayed; and (4) of public importance—the order should involve "a serious and unsettled question," and not simply the exercise of trial court discretion.

Comment, *supra* note 5 at 454-55 (citations omitted).

36. 437 U.S. 463, 468 (1978). The Court in *Livesay* found that an order denying a request for class certification was not within the " 'small class' of decisions excepted from the final-judgment rule by *Cohen*." *Id.*

37. *See supra* notes 17-23 and accompanying text.

38. *See supra* text accompanying notes 6-16.

39. 449 U.S. 368 (1981). For further discussion of *Firestone*, see the articles cited *supra* note 10.

appeal, the United States Court of Appeals for the Eighth Circuit held that the proponent of a motion to disqualify may not seek immediate appeal of an order denying the motion.[40]

After reviewing the history of the collateral order doctrine, the Supreme Court recognized that an order denying a counsel disqualification motion in a civil case met the conclusive-determination requirement of the collateral order rule.[41] The Court assumed that the disqualification order also satisfied the second requirement of the collateral order test, that the disqualification issue be collateral to the merits of the action.[42] The Court then focused on the third requirement of the *Cohen* test and determined that Firestone had failed to demonstrate that the denial of an immediate appeal prejudiced Firestone's rights. An appellate court could review the trial court's denial of the disqualification motion effectively on an appeal of the final judgment.[43]

The Court based its decision in *Firestone* on policies related to judicial integrity and the efficient use of judicial resources. The Court feared that "[p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that the individual plays in our judicial system."[44] The Court also sought to protect the opposing party from the harassment and cost of successive appeals from various trial court rulings during the course of litigation.[45] Apparently, the Court feared that al-

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40. 612 F.2d 377 (8th Cir. 1980), *vacated*, 449 U.S. 368 (1981). The Eighth Circuit also decided the merits of the district court's order. 612 F.2d at 377. The Supreme Court agreed that the order was not immediately appealable, but vacated the Eighth Circuit's decision on the merits. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." 449 U.S. at 379.

41. "It 'conclusively determine[s] the disputed question,' because the only issue is whether challenged counsel will be permitted to continue his representation." 449 U.S. at 375-76.

42. *Id.* at 376.

43. "An order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not." *Id.* at 377.

44. *Id.* at 374.

45. "In addition, the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.'" *Id.* at 374 (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)).

lowing immediate appeals in civil cases might encourage dilatory tactics, particularly in situations like *Firestone* in which a major corporation could substantially raise litigation costs for all parties by repeatedly filing such appeals. By narrowly construing the final-judgment rule of section 1291, the Court fostered the policy of efficient judicial administration.[46]

Although the policy considerations are significant, they fail to overcome an appellant's right to effective review of the order denying his disqualification motion once he satisfies all three requirements of the *Cohen* test. The Court in *Firestone* recognized that a party in some situations might suffer irreparable damage if he could not appeal a disqualification order until final resolution of the primary litigation.[47] An order granting counsel disqualification in criminal cases represents such a situation.

APPEALABILITY OF ORDERS GRANTING COUNSEL DISQUALIFICATION IN CRIMINAL CASES

Prior to *Firestone*, several circuits considered the immediate appealability of orders granting counsel disqualifications in criminal cases.[48] More recent federal circuit court decisions in criminal cases have focused on the policies that the Supreme Court weighed in *Firestone*.[49] Because *Firestone* addressed denials of disqualification motions in civil cases, the circuits have disagreed on whether *Firestone* controls grants of disqualification in criminal cases.

United States v. Greger

In *United States v. Greger*, [50] the United States Court of Appeals for the Ninth Circuit considered for the first time *Firestone's* effect on the appealability of an order granting counsel disqualification in a criminal case. The government indicted Greger after investigating potential criminal activity in four Las Vegas casi-

46. 449 U.S. at 374.

47. *Id.* at 378, n.13.

48. *See supra* note 13.

49. The consideration of *Firestone* has varied from the detailed analysis in United States v. Greger, 657 F.2d 1109, 1111-12 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983), to the cursory treatment in United States v. Agosto, 675 F.2d 965, 968 n.1 (8th Cir.), *cert. denied*, 103 S. Ct. 77 (1982).

50. 657 F.2d 1109 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983).

nos.[51] Greger's lawyer, Oscar B. Goodman, also represented several other defendants who were targets of the investigation.[52] The government intended to call several of Goodman's clients and former clients to testify against Greger.[53] Because of the potential conflict of interest, the government moved to disqualify Goodman as Greger's counsel.[54] Both Goodman and Greger denied any conflict of interest and believed that Greger need not waive his right to conflict-free representation.[55] The district judge rejected the defendant's arguments and disqualified Goodman.[56]

On appeal, the Ninth Circuit found that it lacked jurisdiction to hear an immediate appeal of the order. The court reasoned that a pretrial order disqualifying counsel in a criminal case was not a "final decision" within the *Cohen* collateral order doctrine and, therefore, was not appealable under section 1291.[57] The court found that the Supreme Court's reasoning in *Firestone* applied to criminal as well as civil cases.[58] In fact, the Ninth Circuit reasoned that the Supreme Court's concern with efficient judicial administration was even more appropriate in criminal cases than in civil ones.[59] The court suggested that the *Cohen* collateral order doctrine should be "more sparingly applied in the criminal context"[60]

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51. Greger was the manager of a casino, and the government alleged that he extorted bribes and kickbacks from purveyors. *Id.* at 1114.

52. *Id.*

53. The government has represented to the court that several of Goodman's clients will be called to testify against Greger and that their testimony "will be directly incriminating" to Greger. The government argues that virtually all of the potential defenses available to Greger will implicate Goodman's other clients. . . . The government further informed the court that it had attempted to secure Goodman's voluntary withdrawal by making available to the defense its evidence against Greger but that this offer, like all of its efforts to initiate plea bargain negotiations, had been rebuffed.

Id.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1110.

58. *Id.* at 1112.

59. *Id.*

60. *Id.* The court recognized "that in a criminal context we deal with the party's Sixth Amendment right to counsel of choice, but if this right may be protected by appeal after final judgment, the addition of this constitutional element makes no difference to our analysis." *Id.*

because the criminal process should move swiftly; immediate appeals of trial and pretrial orders discourage speedy trials. In the court's view, "[a]dherence to [the] rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal', which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.' "[61]

The court in *Greger* based its decision on the assumption that an appeal after final judgment adequately protected the defendant's sixth amendment right to counsel of choice. The court reasoned that the threat to the defendant's right posed by the pretrial disqualification order did not outweigh the interest in economical judicial administration.[62] The Ninth Circuit, however, may have given insufficient weight to the defendant's right to counsel.

Although the court quoted at length two arguments favoring a distinction between orders that grant disqualification motions and those that deny them,[63] the court determined that orders granting

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61. *Id.* (quoting Abney v. United States, 431 U.S. 651, 657 (1977), and DiBella v. United States, 369 U.S. 121, 126 (1962)).

62. For a discussion of the effect that the denial of an appeal from a disqualification order has on a party's right to counsel, see *infra* text accompanying note 130.

63. The court noted that when a disqualification motion is granted,

> the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained. Moreover, the grant of a disqualification motion may effectively terminate the litigation if the party whose counsel is disqualified cannot afford to hire new counsel to begin the litigation anew.

657 F.2d at 1112 (quoting Armstrong v. McAlpin, 625 F.2d 433, at 440-41 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981)).

The court also noted an article discussing the distinction between orders granting motions to disqualify and orders denying them:

> Unlike disqualification denials, orders granting disqualification are [not] subject to appellate review after final judgment. If, after the disqualification, the party wins the case, the disqualification becomes moot despite the cost that disqualification imposed on the party. If the party whose attorney is disqualified loses the case, then the error would be viewed as nonprejudicial, except possibly in the most extreme circumstances. This is because, to prove prejudice, it would be necessary to establish that replacement counsel had been so incompetent and unprepared relative to former counsel as to have affected the case. Such a situation is improbable.

counsel disqualifications in criminal cases should not be treated differently than orders denying counsel disqualifications. The court noted that the defendant might triumph in the criminal proceeding and not appeal the disqualification order—"an obvious boon to the system and . . . just the sort of happy result envisioned by § 1291's requirement that appeals not be taken piecemeal."[64] In the Ninth Circuit's view, the defendant who successfully defended the criminal charge would lose nothing, even if the disqualification order was erroneous.[65]

If a court found the defendant guilty in the criminal case, the Ninth Circuit reasoned that the defendant's post-conviction appeal of a counsel disqualification order would adequately protect his right to counsel. The court recognized that the burden of persuading an appellate court that the replacement counsel's performance caused the defendant's conviction would be insurmountable.[66] The court reasoned that if the defendant demonstrated on appeal merely that the disqualification order was erroneous, however, he would be entitled to a new trial.[67] Although a new trial would result in additional costs for the judicial system, the court preferred those costs to the costs of piecemeal litigation.[68] The court, however, failed to consider the financial and emotional costs to the defendant.[69]

The Ninth Circuit in *Greger* held open the possibility that some orders granting counsel disqualification might be appealable before

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657 F.2d at 1112-13 (quoting Comment, *supra* note 5, at 458 n.39).

64. 657 F.2d at 1113.

65. *Id.*

66. *Id.*

67. *Id.* (quoting Slappy v. Morris, 649 F.2d 718, 723 n.4 (9th Cir. 1981) ("No prejudice need be shown where district court violates defendant's Sixth Amendment right to counsel by unreasonably refusing to grant a continuance. . . .")). The Ninth Circuit also distinguished the right to counsel from the right against double jeopardy on the basis that the latter right is irretrievably lost if not vindicated before trial. 657 F.2d at 1113. *See infra* text accompanying notes 117-18.

68. 657 F.2d at 1113.

69. The court noted that if the defendant could not afford counsel for the second trial, the government would have to provide counsel. *Id.* But the court did not indicate whether the defendant could demand, at government expense, the attorney that the defendant originally had retained. Moreover, a court-appointed counsel is not available to the defendant who can afford counsel for a second trial. The emotional costs to the defendant exist in either case.

final judgment. Although the court found that disqualification orders were not directly appealable under section 1291, the court indicated that it might permit immediate review in some cases under a writ of mandamus.[70] The court, however, did not believe that the circumstances in *Greger* justified such extraordinary relief.[71]

United States v. Agosto

In *United States v. Agosto*,[72] the United States Court of Appeals for the Eighth Circuit heard an appeal of an order granting a motion for counsel disqualification in a criminal case. *Agosto* involved six defendants indicted for mail fraud, wire fraud, misapplication of bank funds, false entries on bank records, and conspiracy.[73] Each defendant had separate counsel when the prosecution moved to disqualify four of the attorneys. Counsel for four of the defendants previously represented other defendants, as well as certain witnesses who had testified at the grand jury proceedings and who were likely to testify at the trial.[74] The district court judge ordered the disqualification of three of the defense counsel because of a conflict of interest.[75] The Eighth Circuit allowed an immediate appeal and affirmed the disqualification of one attorney, reversed the disqualification of the two others, and instructed the district judge to obtain proper waivers from the clients.[76]

The Eighth Circuit's analysis of the counsel disqualifications in *Agosto* is important to the issue of immediate appealability to the extent that it illustrates the rationale for the court's decision to hear the appeal at all.[77] The court's determination that an order

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70. *Id.* at 1114. *See supra* notes 26-28 and accompanying text.

71. 657 F.2d at 1114-15.

72. 675 F.2d 965 (8th Cir.), *cert. denied*, 103 S. Ct. 77 (1982).

73. *Id.* at 968.

74. *Id.* at 969.

75. *Id.* at 974-77. The appellate court identified two methods by which an attorney's prior representation of another defendant might cause a conflict of interest. The court suggested that "privileged information obtained from the former client might be relevant to cross-examination [and] that the attorney's pecuniary interest in possible future business may cause him to make trial decisions with a view toward avoiding prejudice to the client he formerly represented." *Id.* at 971. Three of the attorneys in *Agosto* had previously represented several of the codefendants.

76. *Id.* at 974, 976-77.

77. In its analysis of the disqualification order, the court stressed the rights of the defendants whose attorneys had been disqualified. *Id.* at 974-77. The court articulated policies

granting disqualification in criminal cases is immediately appealable appeared in a footnote.[78] Previously, the Eighth Circuit had stated that an order granting a motion for disqualification was appealable under the collateral order doctrine.[79] When *Firestone* was appealed, the Supreme Court decided only the appealability of an order denying a motion to disqualify counsel.[80] The Eighth Circuit in *Agosto*, therefore, saw no reason to abandon its previous position that orders granting disqualification were immediately appealable.[81]

In the same footnote, the court cited *Greger* without discussion.[82] The court also cited other post-*Firestone* decisions that found grants of counsel disqualification motions appealable in civil cases.[83] Without any extended discussion, the court refused to distinguish between the appealability of orders in civil and criminal cases, and agreed with those circuits that had found disqualification orders appealable.[84]

Although the Eighth Circuit did not state the policies that induced it to hear an immediate appeal of the disqualification orders in *Agosto*, [85] the basis for the decision is evident from the court's detailed discussion of each disqualification order. The Eighth Cir-

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that mandated an immediate appeal. *Id.* *See infra* notes 86-87 and accompanying text.

78. *Id.* at 968 n.1.

79. *Firestone Tire & Rubber Co. v. Risjord*, 612 F.2d 377, 378 (8th Cir. 1980), *vacated*, 449 U.S. 368 (1981).

80. The Supreme Court did not discuss whether an order granting a motion to disqualify counsel was immediately appealable. *See supra* text accompanying notes 38-47.

81. 675 F.2d at 968 n.1.

82. *Id.*

83. *Id.* (citing *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); and Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981)).

84. 675 F.2d at 968 n.1. The court also noted several pre-*Firestone* circuit court decisions that had found orders granting disqualification motions immediately appealable in criminal cases: United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977); United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

85. The tenor of the footnote indicated that the court did not consider a defense of the decision to hear the appeal necessary. *Firestone* did not alter the court's earlier position that an order granting a motion for counsel disqualification was immediately appealable. By allowing an immediate appeal, therefore, the Eighth Circuit acted consistently with its earlier position on the issue.

cuit used a balancing test to assess the merits of each order. The court weighed the defendant's sixth amendment right to counsel against the possibility of a conflict of interest and the conflict's effect on the administration of justice.[86] The court emphasized the defendant's right to counsel of his choice and the deferrence that courts must give to that choice.[87] A conflict of interest may weaken the effectiveness of counsel, but the court stated that a defendant may "waive his right to the assistance of counsel unhindered by a conflict of interest, provided that waiver is knowing and intelligent."[88] The court's discussion of the defendant's sixth amendment right to counsel indicates the importance of the counsel disqualification issue and the need to allow an immediate appeal of the disqualification order.[89] If the court did not allow an immediate appeal of the disqualification order, the defendant would lose irretrievably his right to choose his own counsel.

United States v. Cunningham

The United States Court of Appeals for the Second Circuit also has considered the appealability of counsel disqualification orders since *Firestone*. In *United States v. Cunningham*,[90] the Second

86. 675 F.2d at 970 (citing United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) (interests that a court must balance include "individual constitutional protections, public policy and public interest in the administration of justice, and basic concepts of fundamental fairness")).

87. The court noted that "defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice." 675 F.2d at 969 (quoting United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979)).

88. 675 F.2d at 969-70.

89. The Eighth Circuit in *Agosto* was not the first court to distinguish the holding in *Firestone* from cases granting disqualification motions. The Ninth Circuit in *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982), distinguished *Greger* and identified important considerations that made the disqualification order immediately appealable under the collateral order doctrine. The court noted the material change in position of the party whose counsel was removed and the burden on appeal from final judgment of showing that the change of counsel determined the outcome. 658 F.2d at 1357-58. These dual concerns are equally apparent in the criminal context. *See also* Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981).

90. 672 F.2d 1064, 1066 n.1 (2d Cir. 1982). The Second Circuit also allowed an immediate appeal of a disqualification order in a criminal case in United States v. Curcio, 680 F.2d 881 (2d Cir. 1982). As in *Cunningham*, the court did not discuss the basis for jurisdiction over

Circuit held that orders disqualifying counsel in criminal cases are immediately appealable. The government indicted Cunningham and a codefendant, Sweeney, for conspiring "to evade the income tax laws, to obstruct various criminal and grand jury investigations, and to impede the prosecution of an alleged coconspirator."[91]

Following the indictment, the government moved for the disqualification of Cunningham's counsel, Tigar, on the ground that Tigar's previous representation of an unindicted coconspirator whom the government intended to call as a witness created a conflict of interest.[92] Similarly, the government moved to disqualify Sweeney's counsel, Kennedy, on the ground that the prosecution planned to call Kennedy as a witness to explain the testimony of yet another government witness.[93] The trial court ordered the disqualification of both Tigar and Kennedy, and the defendants immediately appealed the orders.[94] The Second Circuit reversed the order with respect to Tigar and vacated the order with respect to Kennedy.[95]

Although the Second Circuit, like the Eighth Circuit in *Agosto*, did not indicate the basis for its jurisdiction,[96] the court's rationale for hearing the appeals emerged in its discussion of the merits of each order. The court stressed that Cunningham's right to representation by counsel of his choice outweighed the government's interest in disqualifying his counsel due to a potential conflict of interest.[97] The court showed equal concern for Sweeney's interest in being represented by counsel of his choice, and remanded the case

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the appeal, but focused on the merits of the disqualification decision and the defendant's right to counsel.

91. 672 F.2d at 1066.

92. *Id.*

93. *Id.* The government anticipated calling Kennedy to explain the testimony of a receptionist at Sweeney's law firm. The receptionist was able to testify about statements that Kennedy made to her concerning an earlier criminal case involving Cunningham—Sweeney's law partner—and a friend of both defendants, John Spain. Kennedy allegedly had made vaguely incriminating statements, suggesting that obstruction of justice had occurred in an earlier trial. *Id.* at 1069-70.

94. *Id.* at 1066.

95. *Id.* The court remanded the order concerning Kennedy for further proceedings to determine whether the testimony of a government witness would be admissible. *Id.*

96. The court merely indicated in a footnote that disqualification orders are immediately appealable. *Id.* at 1066 n.1.

97. *Id.*

to clarify whether the government actually needed to call Kennedy as a witness.[98] If Kennedy were not likely to appear as a witness, then Sweeney's sixth amendment right to choose Kennedy as counsel outweighed the remote possibility that a conflict of interest might arise. As in *Agosto*, the court's reinstatement of one of the disqualified lawyers indicated the appropriateness of an immediate appeal. The Second Circuit reasoned that the defendant would suffer serious harm if he were wrongly deprived of his right to counsel in the criminal proceeding.[99]

Conflicting Policies of Greger, Agosto, and Cunningham

Whether a court allows an immediate appeal of a disqualification order under the collateral order doctrine depends upon which policies the court deems most important. The decisions in *Greger*, *Agosto*, and *Cunningham* reflect the conflicting policies: effective judicial administration and the avoidance of unnecessary delay in litigation must be weighed against the need to protect the defendant's constitutional right to counsel.

Limiting appeals before final judgment simplifies the judicial process and avoids delays. The judicial system should discourage unnecessary delays, and appellate courts should avoid second-guessing every ruling by a trial judge. The question underlying immediate appeals of disqualification orders in criminal cases, however, is whether the resulting delay is actually unnecessary. Hearing the disqualification motion delays the trial to begin with; hearing an appeal of the resulting decision does not prolong that delay unnecessarily if it is essential to protect a defendant's right

98. *Id.*

99. Cunningham's interest in having Tigar represent him is particularly strong. Unlike many defendants who retain counsel only upon arrest or indictment, Cunningham has relied on Tigar for more than six years in a substantial number of investigations, prosecutions, and related litigations. Tigar's success on behalf of Cunningham, obtaining the dismissal of four criminal indictments and the invalidation by the United States Supreme Court of a state statute, has naturally enhanced Cunningham's confidence in Tigar. . . . The disqualification of Tigar from any further role in Cunningham's defense in this case would not merely defeat Cunningham's abstract right to be represented by counsel of his choice; it would subject him to real prejudice in this criminal prosecution.

Id. at 1070-71.

to counsel.

In *Greger*, the Ninth Circuit addressed the defendant's argument that because the disqualification motion had interrupted the trial in the first instance, no undue delay would result if the appellate court allowed an immediate appeal of the resulting order.[100] The court concluded that the argument was "quite unconvincing, particularly in a criminal case where delay can be so damaging."[101] A closer examination suggests that the court's concern with delay may have been misplaced. Not only does the defendant suffer harm if a court denies a direct appeal, but the defendant also must retain new counsel. Delay occurs because new counsel must become familiar with the case. Thus, delay stemming from an order disqualifying counsel seems inevitable, regardless of whether a court grants or denies an immediate appeal.

If the Ninth Circuit assumed correctly that immediate appeals of counsel disqualifications would cause unnecessary delays, the appeals could have an adverse effect on prosecutors, the legal profession, and the judicial system. A prosecutor who found the potential delay from an immediate appeal harmful to his case might be reluctant to move for counsel disqualification when an apparent conflict of interest arose. If the defendant must await the trial court's final verdict to appeal successfully an erroneous disqualification order, however, a second trial becomes necessary. The likelihood of a second trial is not remote. If the trial courts had convicted the defendants in *Agosto* and *Cunningham*, and the defendants then had appealed the disqualification orders, the appellate courts presumably would have ordered new trials. The time and expense required for a delayed appeal followed by a second trial undoubtedly exceed the time and expense required for an immediate appeal alone. Therefore, denial of an immediate appeal may pose a greater threat to the prosecutor's desire to prevent evidence from becoming stale and to avoid losing potential witnesses; allowing an immediate appeal of the disqualification order actually would promote judicial economy.

The ethical standard of preserving the integrity of the legal profession should preclude the prosecutor from considering the harm

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100. 657 F.2d at 1113.
101. *Id.*

to his case that could result from a disqualification motion based upon a conflict of interest, regardless of the timing of the appeal.[102] Nevertheless, the potential for delay resulting from the appeal of a disqualification order strains the integrity of the legal profession by discouraging the prosecutor from raising potential conflicts of interest. Courts should consider the increased time and expense of a second trial, the strain that the delayed appeal places on the integrity of the legal profession, and the additional burden on judicial resources. Unless the desire to prevent trial delays exceeds the cumulative effect of the court's desire to promote the integrity of the legal profession, the defendant's right to choose counsel, and the prosecutor's desire to avoid retrials, courts should encourage immediate appeals of counsel disqualification orders.

Although the integrity of the legal profession and the time and expense of unnecessary retrials are significant factors, the most critical factor that courts must consider when assessing the need for immediate appeals is the defendant's constitutionally guaranteed right to the counsel of his choice. The defendant's right to counsel of his choice becomes particularly important when the defendant retains counsel instead of relying on appointed counsel.[103] For many defendants, the most important factor in choosing an attorney is the relationship between the client and a particular lawyer. The sixth amendment guarantees a criminal defendant the assistance of an attorney,[104] and much has been written on the right to "effective counsel."[105] If the defendant asserts that a dis-

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102. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1, *supra* note 1.

103. *Greger*, *Agosto*, and *Cunningham* involved retained counsel. Disqualifications of appointed counsel may present other problems. Unlike a defendant who retains an attorney, a defendant who has court-appointed counsel probably will not have as strong an interest in representation by a particular lawyer. But even if a defendant has court-appointed counsel, the arguments concerning efficient judicial administration would apply. *See supra* text accompanying note 101.

104. "In all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense." U.S. CONST. amend. VI.

105. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Erikson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Comment, *The Effective Assistance of Counsel: Chance or Guarantee?*, 11 FORDHAM URB. L.J. 85 (1982); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look after*

qualification order has undermined his right to effective counsel, then immediate review of the order best serves the integrity of the judicial system and the defendant's sixth amendment right. Avoiding delay does not justify denial or postponement of the defendant's constitutional rights.

APPLICABILITY OF *Firestone* TO COUNSEL DISQUALIFICATION IN CRIMINAL CASES

The only Supreme Court case addressing the appealability of counsel disqualification orders is *Firestone Tire & Rubber Co. v. Risjord.*[106] *Firestone* involved the appealability of an order denying a disqualification motion in a civil case. Although disqualification orders in the civil context have some similarities to orders in the criminal context, the Eighth Circuit in *Agosto* properly distinguished orders denying disqualification motions from orders granting such motions.[107]

All orders that decide motions for counsel disqualification have certain similarities. For example, the same delay results from an immediate appeal of an order granting disqualification as from an immediate appeal of an order denying disqualification.[108] The time required to hear an appeal may vary from case to case, but the length of delay does not depend on whether the trial court grants or denies the disqualification motion, or whether the case is civil or criminal. Also, the significance of counsel disqualifications to the parties involved is similar whether the case is civil or criminal. These superficial similarities suggest that the decision in *Firestone* may apply equally to orders granting disqualification motions.

The applicability of *Firestone*, however, ultimately depends upon the appellate court's construction of the *Cohen* collateral order test. As the decision in *Greger* indicates, a narrow interpretation of the collateral order doctrine leads to a rejection of all im-

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United States v. Decoster, 93 HARV. L. REV. 752 (1980); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1435 (1965); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963).

106. 449 U.S. 368 (1981). *See supra* text accompanying notes 38-47.

107. *See supra* notes 80-84 and accompanying text.

108. After *Firestone*, of course, orders denying disqualification motions are not immediately appealable in civil cases. The Supreme Court has not considered such denials in the criminal context.

mediate appeals of disqualification decisions.[109] Conversely, if an appellate court recognizes the dissimilarities between orders granting disqualification motions and those denying them, then the *Cohen* test presents no obstacle to immediate review of an order granting the motion.

The major distinction between appeals of orders granting disqualification motions and those denying them is the position of the parties filing the appeals. When a court denies a disqualification motion, the party that originally made the motion obviously brings the appeal; when a court grants a disqualification motion, the party that opposed the motion brings the appeal. In the first situation, the original lawyers for both parties remain active in the litigation. In the second situation, however, the court has disqualified one of the original attorneys, possibly prejudicing the effective presentation of his client's case.[110] When a court disqualifies the attorney for one party, that party suffers greater harm than the party who fails to have his opponent's counsel disqualified.[111]

Disqualification in civil and criminal cases presents a more basic distinction between the situation in *Greger* and *Agosto* and the one in *Firestone*. Although disqualification in civil cases may involve large amounts of money, the loss of one's liberty is generally more significant than the loss of one's property. The sixth amendment right to counsel applies to "all criminal prosecutions,"[112] indicating the significance that the drafters of the Constitution attached to the consequences of a criminal case. Anytime a judicial order affects the right to counsel in a criminal case, the constitutional implications are serious enough to warrant immediate attention.[113]

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109. The court in *Greger* cited *Firestone* approvingly: "Emphasizing the narrowness of the *Cohen* exception and the policies served by § 1291's insistence that appeals await final judgment, the Court held that orders denying motions to disqualify counsel are not appealable orders." 657 F.2d at 1111.

110. If the litigant lacks confidence in the replacement attorney, he is not likely to be as forthcoming and his reticence may prevent the second attorney from effectively representing him. This danger is greatest in criminal cases, threatening the defendant's constitutional right to effective counsel.

111. Failure to have an opposing attorney disqualified does not force either party to proceed without the lawyer of his choice.

112. *See supra* note 104.

113. Several landmark decisions of the Supreme Court have involved the right to counsel. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335 (1980) (no affirmative duty for the trial court to inquire into the propriety of multiple representation); Holloway v. Arkansas, 435 U.S. 475

A party may have different tactical reasons for requesting counsel disqualification in civil cases than in criminal cases. In civil cases, either side may use a counsel disqualification motion as a delaying tactic.[114] The danger is that disqualification motions may become simply one of a series of delaying motions, rather than a device to police the integrity of the legal profession. Such tactics also could frustrate the policy of judicial economy. Because of the potential for abuse in civil cases, courts justifiably discourage the use of disqualification motions.

The use of a counsel disqualification motion as a delaying tactic is less likely in criminal cases. The prosecution generally seeks to avoid delay in criminal cases, and the defense rarely makes a disqualification motion.[115] The disqualification issue in a criminal case, therefore, is almost certain to be substantial; otherwise, the prosecution would not move for disqualification. Thus, the need for an immediate resolution of the disqualification issue is greater in criminal than in civil cases because the motion is more likely to involve genuine concerns than mere tactical considerations. These factors bring a disqualification order in a criminal case within the ambit of the collateral order doctrine.

(1978) (recognizing that a lawyer forced to represent codefendants whose interests conflict cannot provide the adequate legal assistance required by the sixth amendment); Faretta v. California, 422 U.S. 806 (1975) (the right to proceed without counsel when voluntarily and intelligently electing to do so); Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending the right to counsel to misdemeanor cases); Gideon v. Wainright, 372 U.S. 335 (1963) (establishing the right to counsel in all felony cases).

114. In *Firestone*, the Court was concerned that the likelihood of tactical delays would increase if immediate appeals of orders denying counsel disqualifications in civil cases were allowed. 449 U.S. at 374.

115. *See supra* note 6. In State v. Powell, 186 Conn. 547, 442 A.2d 939 (1982), the defendants moved to disqualify the prosecuting attorney, alleging that he had a "personal interest in the outcome of the trial." *Id.* at ____, 442 A.2d at 944. Based on *Firestone*, the court dismissed the appeals, concluding that "the order denying the defendants' motions to disqualify is not a final judgment and may not be immediately appealed." *Id.* If the trial court had granted the defendants' motion, the appellate court may have decided the appealability issue differently.

APPLICABILITY OF THE COLLATERAL ORDER DOCTRINE TO COUNSEL DISQUALIFICATION IN CRIMINAL CASES

Supreme Court Application of the Collateral Order Doctrine in Criminal Cases

The Supreme Court has considered the collateral order doctrine in the context of criminal cases on several occasions. In each case, policy considerations have determined the appealability of the lower court's order. On three occasions the Court has found that an order satisfied the collateral order requirements. In *Stack v. Boyle*,[116] the Court held that an order denying a motion to reduce bail was appealable as a "final decision" under section 1291. Similarly, in *Abney v. United States*,[117] the Court held that an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds was immediately appealable. The Court noted that "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of that Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs."[118] Finally, in *Helstoski v. Meanor*,[119] the Court held that a United States Congressman could take an interlocutory appeal to assert the immunity conferred upon him by the speech or debate clause of the Constitution.[120]

The Court found a common element in each of these cases that allowed the Court to apply the collateral order doctrine. Each of the defendants had "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."[121] The decisions suggest that an appellate court should decide whether a trial court's order comes within the collateral order exception by weighing the value of the right impaired by the order against the threat of undue delay.

In contrast, the Supreme Court held in two criminal cases that certain orders did not meet the requirements of the collateral or-

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116. 342 U.S. 1 (1951).

117. 431 U.S. 651 (1977).

118. *Id.* at 662.

119. 442 U.S. 500, 506 (1979).

120. Helstoski had attempted to challenge the validity of his indictment by using a writ of mandamus, but the Court held that a direct appeal was available. *Id.* at 508.

121. United States v. MacDonald, 435 U.S. 850, 860 (1978).

der doctrine. In *United States v. Hollywood Motor Car Co.*,[122] the Court found that an order denying a motion to dismiss based on prosecutorial vindictiveness was not appealable before completion of the trial. Similarly, in *United States v. MacDonald*,[123] the Court held that an order denying the defendant's motion to dismiss the indictment because of an alleged violation of his sixth amendment right to a speedy trial was not immediately appealable. In both cases the Court reasoned that "the right asserted by respondents is simply not one that must be upheld prior to trial if it is to be enjoyed at all."[124] The Court may have feared that virtually all defendants could raise claims of prosecutorial vindictiveness or failure to attain a speedy trial in criminal cases. Counsel disqualification motions, in contrast, do not arise in most criminal cases. Therefore, the potential for delay caused by immediate appeals of orders disqualifying counsel is less significant than the possibility of delay caused by other appeals.

Disqualification Orders and the Collateral Order Exception Requirements

The first element of the collateral order test requires that the order conclusively determine the disputed question.[125] Orders disqualifying counsel in criminal cases easily meet this requirement. In *Firestone*, the Court recognized that an order denying a disqualification motion in a civil case met this aspect of the collateral order test. The Court held that the disqualification order " 'conclusively determine[s] the disputed question,' because the only issue is whether challenged counsel will be permitted to continue his representation."[126] After the trial court has disqualified a litigant's

122. 102 S. Ct. 3081 (1982) (per curiam). Justice Blackmun wrote a vigorous dissent to the per curiam opinion and chastized the Court for its summary decision on such a "substantial and controversial question." *Id.* at 3086 (Blackmun, J., dissenting). The majority failed to convince Justice Blackmun that a motion to dismiss based on prosecutorial vindictiveness was not immediately appealable because "post-conviction review may not suffice to remedy the chilling effect the vindictive prosecution doctrine is designed to prevent." *Id.* at 3087.

123. 435 U.S. 850 (1978).

124. 102 S. Ct. at 3085.

125. *See supra* text accompanying note 36.

126. 449 U.S. 368, 375-76 (1981). In his concurrence in *Firestone*, Justice Rehnquist suggested that an order denying disqualifiation does not meet the first part of the collateral

counsel, he must proceed with alternate counsel if the appellate court does not allow an immediate appeal. Acquiring new counsel and proceeding with the trial makes the order essentially irreversible.[127] The disqualification imposes a material change in the position of the litigant whose counsel is disqualified by forcing the litigant to acquire replacement counsel.

The second element of the *Cohen* test requires that the appeal resolve an important issue completely separate from the merits of the action.[128] Disqualification orders easily meet this requirement as well. The qualifications of a litigant's lawyer do not constitute the basis for the criminal action against the litigant, but are collateral to the primary litigation. The Supreme Court in *Firestone* assumed without discussion that disqualification orders met this part of the collateral order doctrine.[129]

The third requirement of the collateral order test, that the order appealed from be "effectively unreviewable on appeal from a final judgment,"[130] presents the most vexatious problem. The key phrase—"effectively unreviewable"—is open to a variety of interpretations. A defendant can appeal a disqualification order after final judgment, but the damage to the defendant's rights occurs at the time of disqualification. A motion to disqualify a criminal defendant's attorney disrupts the defense and forces the defendant to retain a second attorney or accept court-appointed counsel. Thus, an erroneous disqualification order and the resulting harm to a criminal defendant's sixth amendment right to counsel are effectively unreviewable on appeal from a final judgment.

If the appeal of the disqualification order must await the trial court's final judgment, a question arises concerning the two approaches that the appeals court might take when determining the

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order test. He observed that the denial does not determine conclusively the issue because the trial court can reconsider its decision at any time. If the moving party produces further evidence at some point in the trial, the judge can reverse his decision and grant disqualification. *Id.* at 380-82. If a trial judge grants a disqualification motion, however, he cannot recall the disqualified attorney and resume the trial from the point at which he disqualified the attorney.

127. *See In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation, 658 F.2d 1355, 1357 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).

128. *See supra* text accompanying note 36.

129. 449 U.S. at 376.

130. *See supra* text accompanying note 36.

effect of the disqualification order. An appellate court could treat post-judgment appeals and immediate appeals alike by examining whether the trial court granted the disqualification motion for legitimate reasons. Alternatively, the appellate court could determine whether the defendant received competent representation from his new counsel after the disqualification order.[131] A court following the second approach would examine events that transpired at the trial after the first counsel was disqualified—facts not relevant to the propriety of the disqualification order itself. Because a reversal of the trial court's disqualification order results in a convicted defendant's retrial, an appellate court may focus only on whether the replacement counsel adequately represented the defendant and thus fulfilled the defendant's sixth amendment right to counsel. Questions about adequate representation by a second attorney, however, are peripheral to the disqualification of the defendant's chosen counsel. The confusion surrounding the correct approach for reviewing counsel disqualification orders, and the potentially irreparable damage done to the defendant, make counsel disqualification orders effectively unreviewable on appeal from final judgments. To avoid confusion of the issues and protect the defendant's right to counsel, courts should allow immediate appeals.

Direct Appeals and the Protection of Fundamental Rights

When determining whether counsel disqualification orders satisfy the collateral order doctrine, the ultimate question is whether disallowing an immediate appeal infringes a fundamental right. A counsel disqualification order does not fall into the collateral order exception to section 1291 as easily as an appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds.[132] On the other hand, counsel disqualification orders are not as clearly outside the collateral order doctrine as an order denying a motion to dismiss based on prosecutorial vindictiveness.[133]

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131. The standard for determining what constitutes "effective" counsel has created problems of its own. *See supra* note 105. *See also* United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979).

132. *See, e.g.*, Abney v. United States, 431 U.S. 651 (1977).

133. *See, e.g.*, United States v. Hollywood Motor Car Co., 102 S. Ct. 3081 (1982). Money

Due to the sixth amendment concerns involved, counsel disqualification orders are similar to the situation in *United States v. MacDonald*.[134] In *MacDonald*, the Supreme Court held that an order denying the defendant's motion to dismiss the indictment because of an alleged violation of his sixth amendment right to a speedy trial was not appealable. The distinction that justifies a different result in a disqualification case is the availability of the speedy trial motion to any defendant. Based on a violation of his right to a speedy trial, any criminal defendant could file a motion to dismiss followed by a direct appeal if the trial court denied the motion. A defendant whose counsel has been disqualified, however, deserves an appeal based on the threat to his sixth amendment right. Unlike a speedy trial motion, the decision to file a disqualification motion in a criminal case rests with the prosecution, not with the defendant.[135]

Another distinction involves the basis upon which the Supreme Court reached its decision in *MacDonald*. In *MacDonald*, the Court denied an immediate appeal because "[p]roceeding with the trial does not cause or compound the deprivation already suffered."[136] Allowing immediate appeals of pretrial and trial motions does nothing to ensure the defendant's right to a speedy trial; in fact, it compounds the violation of that right. A refusal to hear an immediate appeal of a counsel disqualification order, however, does "compound the deprivation already suffered." A trial court that erroneously disqualifies a defendant's attorney may harm the defendant irreparably if the appellate court refuses to hear an immediate appeal. If the defendant must wait until after final judgment to appeal, the appellate court faces the impossible task of returning the defendant to the position that he occupied before the order was granted. Review after final judgment, therefore, is ineffective.

Many factors in addition to the disqualification order may become important in the case before the trial court renders a final judgment. These other factors, primarily involving the merits of the criminal case, also affect the defendant materially. After final

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damages could compensate a defendant adequately for prosecutorial vindictiveness.

134. 435 U.S. 850 (1978).

135. *See supra* note 115 and accompanying text.

136. 435 U.S. at 861.

judgment, an appellate court would have difficulty isolating the factors resulting from the disqualification order. In bringing a post-judgment appeal of a counsel disqualification order, the defendant is in a substantially different position than if the trial court had allowed his original counsel to continue. Thus, the collateral order exception should allow immediate appeals of disqualification orders in criminal cases under section 1291.

Conclusion

When a trial court disqualifies a criminal defendant's attorney, the defendant suffers an immediate and direct harm. The defendant seeking to appeal the disqualification order has a strong interest in being represented by his original lawyer. Choice of counsel involves an element of trust and confidence that the court should protect because the defendant's relationship with his attorney is a key factor underlying full and effective representation. Disqualification of counsel in a criminal case affects the defendant's sixth amendment right to counsel. The importance of preserving that right suggests that an immediate resolution of the issue would provide the best protection for the affected party. Therefore, appellate courts should allow immediate appeals under the collateral order exception to the final-judgment rule because the disqualification order conclusively resolves the disputed question of a counsel's qualifications, the issue is collateral to the merits of the particular case, and the disqualification is effectively unreviewable on appeal following the conclusion of the criminal trial.

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