

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
: :
: :
v. : :
: :
THOMAS WINTER and WILLIAM : :
LAWLER : NO. 98-341

M E M O R A N D U M

Padova, J.

September , 1998

This case presents the difficult issue of whether counsel for one of the Defendants should be disqualified because of a potential conflict of interest. The Government filed a request for a hearing on a potential conflict of interest involving Robert Mozenter, counsel for Defendant Thomas Winter.¹ Between 1978 and 1983, Mr. Mozenter represented Co-Defendant William Lawler in two prior drug-related cases. Both Defendants Winter and Lawler expressed their willingness to waive any conflict of interest that may attend Mr. Mozenter's representation of Defendant Winter in this case. Despite Defendants' waivers, the Court finds that a serious potential for conflict exists with Mr. Mozenter's representation of Defendant Winter. Therefore, the

¹In its Motion, the Government did not seek to disqualify Mr. Mozenter, but requested only that the Court hold a hearing to question both Defendants as to their waiver of any potential conflict of interest. Neither Mr. Mozenter nor Defendants Winter or Lawler filed a response to the Government's Motion.

Court will refuse to accept the waivers by Defendants Winter and Lawler, and will disqualify Mr. Mozenter from representing Defendant Winter in this case.

I. BACKGROUND

The Government charges in this case that on eight separate occasions during the period of May through July 1998, Defendants Winter and Lawler were participants in a conspiracy whereby Defendant Winter illegally secured prescription drugs from a pharmacy and sold those drugs to Defendant Lawler.

The Indictment includes the following counts:

Count One (against Defendants Winter and Lawler) for conspiracy, in violation of 21 U.S.C. § 846, for knowingly and intentionally distributing hydromorphone, the generic drug of the brand Dilaudid, a Schedule II narcotic, in violation of 21 U.S.C. § 841(a)(1), from May to July 1998.

Counts Two through Nine (against Defendant Winter) for knowingly and intentionally distributing hydromorphone on eight occasions between May 14, 1998 and July 9, 1998, in violation of 21 U.S.C. § 841(a)(1).

Counts Ten through Seventeen (against Defendant Lawler) for knowingly and intentionally distributing hydromorphone on eight occasions between May 14, 1998 and July 9, 1998, in violation of 21 U.S.C. § 841(a)(1).

The Court held a hearing on September 24, 1998. Both Defendants, their counsel, and counsel for the Government were present. Counsel for the Government stated that the Government's request for a hearing was based on the following: (1) Mr. Mozenter had represented Defendant Lawler in at least two prior drug-related cases, including one in 1978 in federal court, in which Defendant Lawler entered a plea of guilty, and one in 1983 in state court; (2) Defendant Lawler is cooperating with the Government and will be a witness for the Government against Defendant Winter in this case; and (3) the existence of a relationship between Defendants Winter and Lawler that dates back over 20 years. These representations were not disputed by Defendants or their counsel.

Although Mr. Mozenter acknowledged that he had previously represented Defendant Lawler, Mr. Mozenter stated that he had not seen Defendant Lawler since 1983, that he had no present recollection about his prior representations of Defendant Lawler, and that he did not believe that a conflict of interest existed in his current representation of Defendant Winter because of his prior representations of Defendant Lawler. At the hearing, the Court explained the nature of the potential conflict and asked the Defendants if they understood the conflict. Defendant Lawler, through his counsel, and Defendant Winter, speaking on his own behalf, informed the Court that they understood the

potential for conflict but were willing to waive the conflict to allow Mr. Mozenter to represent Defendant Winter in this case.

II. LEGAL STANDARD

The United States Court of Appeals for the Third Circuit ("Third Circuit") in United States v. Moscony, 927 F.2d 742 (3d 1991), set forth the standard by which a district court must determine whether disqualification of counsel for a defendant in a criminal case is warranted. To make this determination, the Court must balance three important rights. First, a criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Moscony, 927 F.2d at 748. Included within this right is that the representation be free of conflicts of interest. Id. Counsel's undivided loyalty is necessary to ensure that counsel advocates his client's case fully and without reservation and that the Government's proofs against the defendant are tested in an adversarial manner. Id.; United States v. Albert, Civ.A.No. 97-404-01, 1997 WL 773155, at *2 (E.D. Pa. Dec. 12, 1997). Second, a defendant has a presumptive right to counsel of his or her choice; this right also derives from the Sixth Amendment right to effective assistance of counsel. Moscony, 927 F.2d at 748; Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697 (1988). Finally, against these Sixth Amendment rights, the Court

must balance ethical rules of conduct that govern the legal profession and certain concerns that are necessary to preserve the institutional integrity of the courts and the adversarial process. Moscony, 927 F.2d at 748-49; Albert, 1997 WL 773155, at *2.

Although the right to counsel of choice exists, this right is not absolute. United States v. Voigt, 89 F.3d 1050, 1074 (3d Cir. 1996). “[W]here considerations of judicial administration supervene, the presumption in favor of counsel of choice is rebutted and the right must give way.” Id. (citation and quotation omitted). The United States Supreme Court has determined that the presumption in favor of a defendant’s counsel of choice may be overcome by either an actual conflict of interest or “a showing of a serious potential for conflict.” Wheat, 486 U.S. at 164, 108 S. Ct. at 1700; United States v. Traboscia, Civ.A.No. 93-530-02, 1994 WL 59357, at *1 (E.D. Pa. Feb. 25, 1994). As the Third Circuit has recognized, “[d]etermining whether such a potential conflict exists is no simple task.” Voigt, 89 F.3d at 1076. The Court now turns to that task.

III. DISCUSSION

In this case it is undisputed that Mr. Mozenter represented Defendant Lawler in two prior drug-related cases. It is also

undisputed that Defendant Lawler has been cooperating with the Government, is scheduled to plead guilty in this case, and will be called at trial as a witness by the Government against Defendant Winter. It is without question that Defendant Lawler will be a critical witness, if not the critical witness, against Defendant Winter. As Mr. Mozenter concedes, under these circumstances he will be under a duty to vigorously cross-examine his former client, Defendant Lawler, in furtherance of his representation of Defendant Winter. In the course of this cross-examination, the credibility of Defendant Lawler will be at issue, including Defendant Lawler's two prior convictions in which he was represented by Mr. Mozenter.

The Third Circuit has recognized that "[c]onflicts of interest arise whenever an attorney's loyalties are divided, and an attorney who cross-examines former clients inherently encounters divided loyalties." Moscony, 927 F.2d 742, 750 (3d Cir. 1991). Waivers have been refused where an attorney may have to cross-examine current or former clients. Id.; Albert, 1997 WL 773155, at *3; Traboscia, 1994 WL 59357, at *2. The Government has represented that Defendant Lawler will testify against Defendant Winter at trial. Under the worst case scenario, Mr. Mozenter may be faced with a situation where his loyalties will be divided between Defendant Winter and Defendant Lawler. At the very least, the cross-examination by Mr. Mozenter of his former

client will give the appearance of divided loyalties.² Under

²The Court notes that Rule 1.7 of the Pennsylvania Rules of Professional Conduct ("Conflict of Interest: General Rule"), as adopted by Local Rule of Criminal Procedure 2, provides as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

PA ST RPC Rule 1.7 (West 1998).

Rule 1.9 of the Pennsylvania Rules of Professional Conduct ("Conflict of Interest: Former Client") provides as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

these circumstances, the Court finds that there is a serious potential that a conflict of interest will arise during the course of the trial.

As noted above, at the September 24 hearing, Mr. Mozenter represented to the Court that he has no present recollection of his prior representation of Defendant Lawler. The Court accepts without reservation Mr. Mozenter's statements in this regard and agrees that an actual conflict does not exist at this time. The Court's concern, however, is not with an actual conflict of interest but with a potential conflict of interest. During the course of the trial and Mr. Mozenter's cross-examination of Defendant Lawler, Mr. Mozenter's recollection may be refreshed by "bits of unforeseen testimony or a single previously unknown or unnoticed document" that may affect Mr. Mozenter's effective representation of Defendant Winter and may implicate Defendant Lawler's right to confidentiality in his privileged communications with his former counsel. Wheat, 486 U.S. at 163, 108 S. Ct. at 1699.

Mr. Mozenter also argued that because his prior representations of Defendant Lawler occurred in 1978 and 1983, he did not believe that a potential conflict of interest could exist. Despite the fact that Mr. Mozenter's representations of

PA ST RPC Rule 1.9 (West 1998).

Defendant Lawler occurred a number of years ago, Defendants Winter and Lawler knew each other during the period of time that Mr. Mozenter represented Defendant Lawler. Although the Court does not know the nature of Defendants' relationship during the period of 1978 through 1983, in this case the Government charges that Defendants were participants in a drug conspiracy. Under these circumstances, the Court believes that the fact that Defendants have known each other for over 20 years increases the likelihood that a potential conflict of interest may ripen into an actual conflict at trial.

The Supreme Court has recognized that in deciding whether or not to allow a waiver of a conflict of interest by a criminal defendant in the pretrial context, "the relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict." Wheat, 486 U.S. at 162-63, 108 S. Ct. at 1699. In reaching its decision, the Court has carefully considered and weighed Defendant Winter's Sixth Amendment rights to effective representation and counsel of choice against the ethical concerns of the legal profession and the institutional interests in engendering respect for the court and protecting the truth-seeking function of these adversarial proceedings. Moscony, 927 F.2d at 749. The Court seeks to protect Defendant Winter's right to effective representation and a fair trial while as well as to

safeguard the proper and fair administration of justice. Voigt, 89 F.3d at 1076 n.12 (the "fair and proper administration of justice," encompasses the Court's "independent interests in protecting its judgments against later collateral attacks, preserving the integrity of its proceedings, and protecting the truth-seeking function of the proceedings.") In this regard, the Court finds that a serious potential for a conflict of interest exists in this case and therefore declines to accept the waiver from Defendant Winter.

IV. CONCLUSION

For the foregoing reasons, the Court will disqualify Mr. Mozenter from representing Defendant Winter in this case.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	
v.	:	
	:	
THOMAS WINTER and WILLIAM	:	
LAWLER	:	NO. 98-341

O R D E R

AND NOW, this 25th day of September, 1998, upon consideration of the Government's Motion for Hearing Regarding Potential Conflict of Interest (Doc. No. 28) and after a hearing was held by the Court on September 24, 1998 on the Government's Motion, **IT IS HEREBY ORDERED** that the Government Motion is GRANTED. **IT IS HEREBY FURTHER ORDERED** that Mr. Mozenter is disqualified from representing Defendant Winter in the above-captioned case.

BY THE COURT:

John R. Padova, J.