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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
WAYNE WHITTAKER	:	NO. 01-107

MEMORANDUM

Dalzell, J. June 12, 2001

Because the same United States Attorney's Office regarded him a perpetrator and a victim of the same alleged insurance fraud, defendant Wayne Whittaker has filed a motion to disqualify that office for its ethical breaches. As we have found no other case presenting such extraordinary conduct on the part of the Government, we consider Whittaker's motion at some length.

Background

On February 22, 2001, a Grand Jury indicted Whittaker for mail fraud in violation of 18 U.S.C. § 1341, arising out of what was claimed to be an "insurance give-up". Specifically, the Government alleges that Whittaker, who once leased a 1998 Jeep Cherokee from World Omni Financial Corporation of Bridgeton, Missouri, defrauded Colonial Penn Insurance Company, the car's insurer, when he arranged to have his vehicle stolen in order to relieve himself of further payments to World Omni. It is undisputed that on or about June 6, 1999, the Jeep Cherokee was indeed stolen, and that ultimately Colonial Penn sent an insurance check to World Omni through the United States mails.

According to the Government, the Jeep Cherokee was delivered to AOK Auto Parts, a chop shop, where it was disassembled.

On January 29, 2001, the same United States Attorney's Office sent Whittaker a three-page, single-spaced letter, which he received, which began with the following sentence:

> Following a four-year investigation, we have identified you as a victim of a federal crime involving the theft of your motor vehicle as part of a massive chop shop ring centered in Philadelphia, Pennsylvania.

Although the United States Attorney's Office at the time knew that Whittaker was represented by Samuel C. Stretton, Esquire, it did not send the letter to Mr. Stretton, nor did it send a copy of the letter to Mr. Stretton.

After Whittaker was charged, he filed what he styled a motion to dismiss the indictment, based upon the Government's "outrageous conduct". He contended that the January 29, 2001 letter not only demonstrated a conflict of interest within the United States Attorney's Office, but also violated his due process rights, citing, e.g., United States v. Pitt, 193 F.3d 751 (3d Cir. 1999) and the dicta in United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637 (1973).

After a hearing on May 24, 2001 at which the author of the January 29, 2001 letter testified, Whittaker amended his motion to make it one for disqualification in view of the prosecutors' apparent breaches of the Pennsylvania Rules of

Professional Conduct.[1] We have now received additional briefing from the parties on the issue, and, as will be seen, find that, as a motion to disqualify, it has merit.

The Parties' Contentions

In his supplemental submission, Whittaker identifies no less than eight Rules of Professional Conduct which he believes the Government breached when its left hand called him a criminal and its right hand called him a victim of the same scheme. Specifically, Whittaker cites:

- Rule 1.7, which generally bars conflicts of interest (Whittaker contends that as the January 29 letter purported to be helping him at the same time the Government was seeking to prosecute him, this constituted such a conflict);
- Rule 1.9, which bars a lawyer from taking a position adverse to a former client in the same or a related matter;
- Rule 3.8, which outlines the professional responsibilities of a prosecutor, and in particular Rule 3.8(a), which bars a prosecutor from bringing a claim that he knows is "not supported by probable cause";
- Rule 4.1(a), which bars attorneys from making false statements of fact to third persons (Whittaker maintains that the January 29 letter's statement that he was a "victim" constitutes a false statement pursuant to this Rule);

[1]In his supplemental brief filed after the May 24, 2001 hearing, Whittaker continues to press his contention that the Government's behavior here was sufficiently "outrageous" to warrant dismissal of the Indictment. As we further note in the margin below, we cannot find that the behavior of the United States Attorney's Office here rises (or sinks) to that level of misfeasance, and we decline to dismiss the action.

- Rule 4.2, which precludes contact with someone the Office knew was "represented by another lawyer";
- Rule 4.4, which bars the collection of evidence by methods that could compromise the rights of a third party (Whittaker asserts that the letter constituted an effort to obtain a statement in violation of this Rule);
- Rule 8.4(c), which bars conduct involving "misrepresentation"; and
- Rule 8.4(d), which bars conduct "prejudicial to the administration of justice".

Additionally, Whittaker cites R.P.C. 3.7(a) which holds that "a lawyer shall not act as advocate at a trial at which the lawyer is likely to be a necessary witness" (absent exceptions inapplicable here). Whittaker contends that Assistant United States Attorney Robert Reed, the author of the January 29 letter, may be a witness at trial, and that it would be unfair to have one Assistant United States Attorney as a witness being examined by another Assistant United States Attorney because Reed's credibility would wrongly be bolstered by such an arrangement.

While not disputing that Assistant United States Attorney Reed mailed the January 29 letter to Whittaker at the same time another Assistant United States Attorney was preparing an Indictment against Whittaker for the Grand Jury, the Government nevertheless argues that the mailing of the letter was "inadvertent". It relies for this contention on AUSA Reed's testimony on May 24, 2001. AUSA Reed was visibly bemused as he recounted how the letter came to be sent to Whitaker, and rather seemed to regard the whole episode with the seriousness of a

misdirected letter from Publisher's Clearinghouse. This view is perhaps understandable, as AUSA Reed admitted that he not only allowed a paralegal to assemble the list of about 200 victims,[2] but permitted her to copy his signature for each letter. Reed testified that he never reviewed this list of victims, which he believed the FBI had supplied to the unsupervised paralegal. On questioning from us at the May 24 hearing, however, AUSA Reed acknowledged that he had drafted the January 29 letter, authorized his signature, and knew of ongoing investigations of many chop shop-related people. He did not, however, work with AUSA Mark Miller, the prosecutor in Whittaker's case.

It is undisputed that the January 29 letter was never formally retracted.[3] N.T. 54-55. AUSA Reed also admitted, "I knew that you [Mr. Stretton] represented one of the people in the insurance part of the case", N.T. 47, but never checked whom, exactly, Mr. Stretton represented. Reed also acknowledged that Whittaker was "about to be a defendant with the pending Indictment two or three weeks" after sending the January 29 letter. N.T. 53-54.

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[2]Reed at one point in his testimony mentioned "200 vehicles . . . identified as being stolen or part, turned over as part of insurance jobs", N.T. 28, and "300 of those things" [i.e., victim letters], N.T. 47. To be conservative, we use the lower number.

[3]The Government takes the position that the subsequent conversation between Whittaker's counsel and AUSA Miller, which occurred after Whittaker informed his counsel about the contents of the January 29 letter, and in which AUSA Miller apparently informed defense counsel that the letter was a mistake, constituted an oral retraction of the letter's contents.

Analysis

Since April of 1999, lawyers "for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a). Thus, the two Assistant United States Attorneys involved here, Mark Miller and Robert Reed, are as subject to the Pennsylvania Rules of Professional Conduct as any other lawyer licensed to practice in the Commonwealth of Pennsylvania.

Perhaps because § 530B, popularly known as the "McDade Amendment"[4], is so new, the parties have not cited to us, nor have we readily been able to locate, cases applying state ethical rules to Government prosecutors. Putting aside the newness of the McDade Amendment, however, we also have found no case involving state or federal prosecutors that addresses the left hand-right hand problem presented here. We nevertheless draw here on the large body of attorney disqualification decisions developed in civil cases, including our Court of Appeals's teaching in In re Corn Derivatives Antitrust Litigation, 748 F.2d 157 (3d Cir. 1984), cert. denied 472 U.S. 1008, 105 S. Ct. 2702 (1985).

[4]Named after former Congressman Joseph McDade, whom this United States Attorney's Office unsuccessfully prosecuted in the 1990's before his retirement.

At the threshold, we must determine the exact nature of the relationship, if any, contemplated in the January 29, 2001 letter before we consider what consequences that letter had under the Pennsylvania Rules of Professional Conduct. As will be immediately seen, this, too, sends us to what appears to be an unexplored realm.[5]

A. Is A Victim A "Client" of the United States Attorney?

In the January 29, 2001 letter, where AUSA Reed informed Whittaker that "we have identified you as a victim of a federal crime", Reed specifically referenced 42 U.S.C. §§ 10606 and 10607. Section 10606(a) imposes upon "employees of the Department of Justice" and other federal law enforcement agencies the duty to use "their best efforts to see that victims of crime are accorded the rights described in subsection (b)" of that statute. Among other things, those subsection (b) crime victims' rights include, "(5) The right to confer with [the] attorney for the Government in the case." Subsection (c) provides that the statute does not create a private right of action against the Government.

[5]As discussed above, Whittaker has cited a substantial number of the Pennsylvania Rules of Professional Conduct that he believes are implicated by the United States Attorney's Office's behavior here. In our discussion below, we find it necessary and appropriate only to assess the application of some, but not all, of these allegedly pertinent Rules.

In its description of "Services to victims", § 10607(c) lists, in pertinent part, the duty of the "responsible official" to:

> (A) inform a victim of the place where the victim may receive emergency medical and social services;
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> (B) inform a victim of any restitution or other relief to which the victim may be entitled under this or any other law and manner in which such relief may be obtained;
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> (C) inform a victim of public and private programs that are available to provide counseling, treatment, and other support to the victim; and
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> (D) assist a victim in contacting the persons who are responsible for providing the services and relief described in subparagraphs (A), (B), and (C).

Again, this statute provides, in subsection (d), that it does not create a private right of action "in favor of any person arising out of the failure of the responsible person to provide information" as the statute requires.

In fulfillment of these statutory duties, AUSA Reed, on the third page of his January 29 letter, directed Whittaker to "contact any of the following people", and then identified by name his secretary, the FBI case agent, and himself; the letter supplied the phone numbers of all three individuals.

It is not obvious what, if any, relationship §§ 10606 and 10607 creates. For example, in giving victims "[t]he right to confer with [the] attorney for the Government in the case", § 10606(b)(5) imposes upon the AUSA the duty to "inform a victim of any restitution or other relief to which the victim may be entitled under this or any other law and [the] manner in which

such relief may be obtained", § 10607(c)(1)(B). It is unclear whether the victim, in exercising these rights, or the AUSA in fulfilling them, are covered by the attorney-client privilege. It is also not clear whether the victim's likely and understandable expectation of confidentiality transforms the statutorily mandated relationship into one of attorney and client. What is clear is that Congress, in adopting what it called the Victims' Rights and Restitution Act of 1990, manifested an intention to grant significant real world rights to the victims of crime. In order to afford meaning to the victim's "right to confer" with a Government attorney, it involves no great reach to infer that there must be some degree of confidentiality in that right of conference, and therefore something resembling what is usually thought of as a client-attorney relationship or the expectation of one.

On the other hand, Congress explicitly refused to "create a cause of action or defense in favor of any person arising out of the failure to accord a victim the rights enumerated in subsection (b)" of § 10606, and denied a cause of action in the cognate language "arising out of the failure of a responsible person to provide information as required by subsection (b) or (c)" of § 10607. It thus would appear that Congress negated anything that could be construed as a malpractice right usually associated with clients and their attorneys.

Though the question is by no means free from doubt, we conclude that §§ 10606 and 10607 do not create a client-attorney relationship or a reasonable expectation of one. As a result, Rules of Professional Conduct 1.7 and 1.9, which concern clients and former clients, do not apply.

B. The Government's Admitted Falsehood

Although the never-retracted January 29, 2001 letter at a minimum suggested the Government's equivocation as to whether Whittaker is a criminal or a victim, in its submission to us after the May 24 hearing, signed by no less than the interim United States Attorney himself, the Government has communicated its definitive position: Whittaker is a criminal, and not a victim. Gov't's Opp'n to Def.'s Mot. for Disqualification at 5 n.1. But in at last stating this conclusion, the Government reveals the January 29 victim letter to be a palpable falsehood, thereby triggering Pennsylvania Rules of Professional Conduct 4.1(a) and 4.3(c). These Rules provide:

> **Rule 4.1 Truthfulness in Statements to Others**
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> In the course of representing a client a lawyer shall not knowingly:
> (a) make a false statement of material fact or law to a third person. . . .
>
> **Rule 4.3 Dealing [with] the Unrepresented Person and Communicating with One of Adverse Interest**
>
> * * *
>
> (c) When the lawyer knows or reasonably should know that the unrepresented

> person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

It is indisputable on this record that, even though AUSA Reed knew some of the target-victims had lawyers, and indeed that Samuel Stretton was one of those lawyers, he wrote the January 29 letter to Whittaker as if he were an unrepresented person. As will be seen in the next section, dealing with RPC 4.2, Reed's constructive knowledge that Whittaker was a represented person implicates additional duties, but the point of this section is to demonstrate that, even regarded as unrepresented, the United States Attorney's Office violated two Pennsylvania ethical rules.

Of course, the Government is now at pains to heap ashes on the January 29 victim letter, calling it a "mistake"[6] or the product of a sloppy paralegal or of overworked FBI agents or of beleaguered AUSAs that really amounts to no more than a misdirected piece of junk mail.

But no fair-minded person could read the letter as junk mail. It looks in every way like an individually typed and manually signed official communication from the United States Department of Justice. Indeed, the reproduction of Reed's signature was so realistic that even he could not on May 24 tell

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[6]As AUSA Reed put it in his testimony on May 24, "I'm sorry that I have to be sitting here to tell you that it's a mistake, but a mistake it is." N.T. 40. "I mean I guess – I don't see it as a 'big mistake'. I see it as an error, just sheer. . . ." N.T. 38.

whether it was manual or copied. N.T. 29-30; 32-33.[7] The three-page letter begins with the words, "Following a four-year investigation . . .," suggesting that the letter was the product of a long period of gestation. It then states, "we have identified you as a victim," an unqualified statement of a conclusion, fortified by a preface that says that conclusion was the culmination of a four-year investigation.

In sum, had there been specific intent to deceive, the letter would have been a sophisticated and doubtless successful fraud. Since there is no evidence of such scienter, it is instead both a "false statement of material fact" and one that would lead any reasonable person in Whittaker's position to "misunderstand[] the lawyer's [read "United States Attorney's"] role in the matter." Astonishingly, the attorneys involved made no effort, much less "a reasonable" one, "to correct the misunderstanding" until May 31, 2001, and only in the face of this Court's grave concerns articulated at the May 24 hearing.

C. Communications With Non-Clients

Whittaker's circumstances would also appear to implicate Rule of Professional Conduct 4.2, which provides:

> **Communications With Person Represented By Counsel**
>
> In representing a client, a lawyer shall not communicate about the subject of the

[7]In his testimony, Reed said, "I was surprised that I had signed so many." N.T. 29. We are now told that he signed only once.

> representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Here, there is no dispute that Whittaker was in fact represented by counsel, and indeed that the United States Attorney's Office was well aware of this fact. Moreover, there can be no doubt that the United States Attorney's Office, in the person of AUSA Reed, in fact communicated with Whittaker regarding the subject of the representation, namely the characterization of the fate of Whittaker's Jeep Cherokee. Nonetheless, this behavior does not fall under Rule 4.2 because, as he had not yet been indicted, Whittaker was not a "party" under the meaning of this Rule.

In United States v. Balter, 91 F.3d 427 (3d Cir. 1996)[8], a panel of our Court of Appeals considered a claim by a criminal defendant that certain tape-recorded evidence against him should have been suppressed because the tapes were procured in violation of New Jersey Rule of Professional Conduct 4.2, a provision that is "virtually identical" to Pennsylvania R.P.C.

[8]Balter was decided before the McDade Amendment became law; in holding the Government attorneys to the requirements of Rule 4.2, the panel relied on the District of New Jersey's local rule applying New Jersey Rules of Professional Conduct to attorneys appearing before the District Court, Balter, 91 F.3d at 435. The panel noted that the application of the Rule to Government attorneys was a "question of first impression", but, at least for the purposes of its opinion, found that the district court's decision to apply the Rule was "no doubt . . . correct," Balter, 91 F.3d at 435 & n.5. The McDade Amendment removes any doubt on this issue.

4.2 that we consider here, Balter, 91 F.3d at 435 & n.4.[9] The Government agents in that case had contacted a suspect named Gustavo Gil, and induced him, as the Government's agent, to record numerous phone and live conversations with his alleged co-conspirators, including Balter, despite that the Government was aware that Balter had already retained counsel. Balter, 91 F.3d at 431, 435. Faced with Balter's challenge under Rule 4.2, the panel concluded that because Balter had not yet been indicted, he was not a "party" pursuant to Rule 4.2, since there was no "matter" for him to be a "party" to, Balter, 91 F.3d at 436. Moreover, the panel concluded that the pre-indictment investigation was in any event a contact exempted from the Rule as "authorized by law," Balter, 91 F.3d at 436.[10]

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[9]Favorable though this case is to the Government's argument, the Government failed to cite it in its brief.

[10]In reaching these conclusions, the Balter panel relied, inter alia, on decisions of the New Jersey courts holding that Rule 4.2 did not apply to pre-indictment contacts with a criminal defendant because such defendant was not a "party", and also that Rule 4.2's "authorized by law" exception included the sort of pre-indictment investigations the Government engaged in with respect to Balter. The use of such reasoning might serve to call into question Balter's application to a case such as ours involving Pennsylvania Rules of Professional Conduct.

In this regard, we first observe, as noted in the text, that the language of the New Jersey and Pennsylvania provisions (both of which were adapted from the ABA Model Rules of Professional Conduct) is virtually identical. More importantly, the Balter opinion itself demonstrates that its application is intended to be broader than its state of origin. In arriving at its holding, the panel noted that its "conclusion is supported by the decisions of many other courts of appeals. Indeed, with the exception of the Second Circuit, every court of appeals that has considered a similar case has held, for substantially the same reasons as those noted above, that rules such as New Jersey Rule

(continued...)

While in our case it is less than clear that the false "victim letter" that the United States Attorney's Office sent to Whittaker can be said to have been "authorized by law", there can be no doubt that Whittaker was, at the time he received that letter, not under indictment and therefore was, pursuant to Balter's logic, not a "party" to the matter. We consequently conclude that notwithstanding the McDade Amendment,[11] Rule 4.2 technically does not apply to the Government's actions here.

D. Prejudice to the Administration of Justice

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[10](...continued)
4.2 do not apply to pre-indictment criminal investigations by Government attorneys," Balter, 91 F.3d at 436. This easy reference to the decisions of other circuits, which necessarily involved the conduct rules of other jurisdictions, shows that the Balter panel considered its holding to be one of general application. We can be confident, then, that this holding would extend to the Pennsylvania's rules, which are so similar (in this regard at least) to New Jersey's. We thus find our application of Balter to the circumstances of this case to be non-problematic.

[11]Interestingly, the protections offered by Rule 4.2 were one of the motivations for the McDade Amendment's introduction. At a hearing before the House Judiciary Committee Subcommittee on the Courts and Intellectual Property regarding the "Ethical Standards for Federal Prosecutors Act of 1996" -- an immediate predecessor to the legislation passed as the McDade Amendment the following year -- Representative McDade testified that the Justice Department was "attempting to circumvent" the requirements of Rule 4.2, which he characterized as the "essential Sixth Amendment right 'to have the assistance of counsel'", Hearing on H.R. 3386, the "Ethical Standards for Federal Prosecutors Act of 1996" Before the House Judiciary Comm., Subcomm. on Courts and Intellectual Prop., 1996 WL 520240 (testimony of Rep. Joseph M. McDade) (Sept. 12, 1996).

Whittaker also cites RPC 8.4(d), which states that "[i]t is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice." As we have observed in the context of a disciplinary proceeding, we are well aware of the American Law Institute's caution regarding such generalized language in its newly-adopted Restatement of the Law: The Law Governing Lawyers. In an extended Comment, ¶ c provides:

> General provisions of lawyer codes. Modern lawyer codes contain one or more provisions (sometimes referred to as "catch-all" provisions) stating general grounds for discipline, such as engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" (ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983) or "in conduct that is prejudicial to the administration fo justice" (id. Rule 8.4(d)). Such provisions are written broadly both to cover a wide array of offensive lawyer conduct and to prevent attempted technical manipulation of a rule stated more narrowly. On the other hand, the breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent (see Comment h) and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it. . . . Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.
>
> No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule.

1 Restatement of the Law: The Law Governing Lawyers (2000) 50. See also In the Matter of Robert B. Surrick, 2001 WL 120078 * 16, n.14 (E.D. Pa. Feb. 7, 2001)(Report and Recommendation).

Though the Restatement's caution is well taken in the civil law arena, in the criminal context presented here it does not go as far. In criminal cases, courts have a plenary concern for "conduct that is prejudicial to the administration of justice." This concern is made most salient in the “plain error” rule applicable to criminal cases, which provides that an appellate court may correct errors of a lower court even though the defendant had forfeited appeal of such errors by failing to raise objection in the lower court, United States v. Olano, 507 U.S. 725, 731, 113 S. Ct. 1770, 1776 (1993). Under that rule, an error that affects a defendant’s substantial rights warrants reversal where such error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings,” United States v. Evans, 155 F.3d 245, 251 (3d Cir. 1998).

That core concern of criminal jurisprudence is fortified in the ethical context of a motion for disqualification by our interest in protecting the integrity of all proceedings and maintaining public confidence in the judicial system. ILA, Local Union 1332 v. Int'l Longshoremen's Ass'n, 909 F.Supp. 287, 293 (E.D. Pa. 1995) (citing In re: Corn Derivatives, 748 F.2d at 162). As Judge Adams put it so well a quarter century ago,

> Public confidence in the integrity of legal institutions serves as an over-arching consideration beneath which attorneys

> practice their profession. The semblance of unethical behavior by practitioners may well be as damaging to the public image as improper conduct itself.

Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 759 (2d Cir. 1975)(Adams, J., concurring).

Surely "public confidence in the integrity of legal institutions", especially in the lawyers who practice in them, should be at their acme for prosecutors. Against such an ethical and institutional expectation, the cavalier conduct of the United States Attorney's Office falls short. Contrary to AUSA Reed's demeanor on May 24, there is nothing amusing about what occurred here. The prosecutors put Whittaker on a roller coaster, one day, November 6, 2000, subpoenaing him to go for photographs, fingerprints, and handwriting exemplars, N.T. 51-52, and another day, January 29, 2001, telling him that "a four-year investigation" has "identified you as a victim . . . as part of a massive chop shop ring." This is, in short, no laughing matter.

We also know from AUSA Reed's concession, N.T. 46, that Whittaker was not alone in riding this Government-built roller coaster. While these other target-victims are not before us, their existence confirms the seriousness of the fiasco we consider here. In its repeated unprofessional conduct, the Office has here prejudiced the administration of justice and undermined public confidence in a most sensitive part of our legal institutions. The United States Attorney's Office thus transgressed RPC 8.4(d).

Remedy

As noted at the outset, Whittaker originally sought dismissal of the Indictment because of the conduct described here. Upon our stating that such relief was unwarranted[12], Whittaker amended his prayer to seek disqualification fo the United States Attorney's Office. Although we have found breaches of at least two Rules of Professional Conduct, we must engage in a balancing before we decide to disqualify.

The use of a balancing test is necessary "in determining the appropriateness of the disqualification of an attorney," In re Corn Derivatives, 748 F.2d at 162. Factors relevant to our determination here include (i) Whittaker's interest in prosecution by an unconflicted United States Attorney's Office, (ii) the Government's interest in retaining the original counsel, (iii) the risk of prejudice to the Government, (iv) our interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system. See Local Union 1332, 909 F. Supp. at 293 (extracting, in the context of a motion to disqualify under Rule 1.7(a), a

[12]We did so because there is no evidence, for example, of the Government's using the January 29 victim letter to inveigle information or admissions from Whittaker, or of other malign purpose that might have approached outrageousness. These realities also demonstrate that Whittaker's contention is without merit that the Government ran afoul of R.P.C. 4.4 (using "method of obtaining evidence that violate the legal rights of a third person").

similar set of factors from In re Corn Derivatives, 748 F.2d at 161-62).

Here, Wayne Whittaker holds a clear and strong interest in knowing that the decision to continue his prosecution was made after an objective examination of the circumstances and evidence associate with his case, and in knowing that the contrary views evidently held about him by this United States Attorney's Office[13] have been conclusively reconciled.[14] As to the second factor, we observe that the Government surely has an administrative interest in maintaining this United States Attorney's Office as counsel, since there will be some cost and loss of efficiency associated with the assignment of new counsel. However, this concern is substantially mitigated by the fact that this appears not to be a legally complicated case, and certainly does not involve a large body of evidence.[15] Consequently, we cannot see that any actual prejudice would accrue to the Government by a disqualification of

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[13]At least at one time.

[14]As we have stated above, the Government takes the position that such an interest already has been satisfied, as the interim United States Attorney has now personally -- as attested by his signature on the pleadings before us -- determined that Whittaker is an alleged criminal, and not a victim. However, we find that the defendant, who, as we have described, has been an unwilling rider on an emotional and legal roller coaster of the Government's making, has an interest in knowing that the decision to continue his prosecution was made by an individual who is outside this Office and has no stake or institutional interest in the outcome of the decision to prosecute.

[15]Counsel have represented that the trial should only take two days.

this Office, and the third factor thus militates in favor of disqualification.

As to the final factor, there can be no doubt that our interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system favors disqualification. As we have found above, in this case the Government, albiet without bad faith or malintent, sent to the target of an investigation a letter that falsely informed him that he was a victim of the same crime in which the Government now contends he was complicit. While we concede that this behavior is towards the lower end of the egregiousness spectrum for prosecutorial errors, it nonetheless exactly the sort of behavior that may bring our system into disrepute with the citizenry if condoned by the judiciary. Simply put, when the United States Attorney's Office brings the weight of the federal government to bear against a citizen, it must do so with precision and with an appropriately cautious eye to the rights and interests of the presumed-innocent persons it investigates and seeks to indict. With specific reference to the instant case, we find that the Government's evidently casual attitude towards communications with investigation targets like Wayne Whittaker risks undermining the integrity of the subsequent prosecution where these communications later turn out to have been false.[16] This final factor, then, presses strongly in favor

[16]Or, for that matter, merely "mistaken".

of disqualification, and in consideration of all the factors together we conclude that disqualification is the appropriate remedy here.

Fortunately, Congress has supplied us with a ready tool to effect this remedy in 28 U.S.C. § 543. This statute empowers the Attorney General to "appoint attorneys to assist United States attorneys when the public interest so requires."

The Attorney General thus shall appoint an attorney from outside the Eastern District of Pennsylvania U.S. Attorney's Office, with no connection to that Office,[17] who shall assume responsibility for this prosecution. This appointee will in the first instance determine whether the equivocal record described herein warrants continued prosecution under extant Department of Justice standards.[18] Such review and, if warranted, preparation shall be completed in advance of the September 17, 2001 rescheduled trial.

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[17]By appointing a prosecutor with such a background, we avoid the real RPC 3.7(a) problem that would otherwise arise when AUSA Reed is called as a witness regarding the January 29 victim letter. Given the admission in that letter that Whittaker was a victim, the testimony will hardly relate "to an uncontested issue", RPC 3.7(a)(1).

[18]For example, the appointee should consider whether proof beyond a reasonable doubt exists on this record, bearing in mind the specific intent element of mail fraud, e.g. United States v. Pflaumer, 774 F.2d 1224, 1233 (3d Cir. 1985). The appointee should also be mindful of the natural desire of former counsel to justify what happened without regard to the preceding sentence.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
WAYNE WHITTAKER	:	NO. 01-107

ORDER

AND NOW, this 13th day of June, 2001, upon consideration of defendant's motion to dismiss (document no. 19), later amended to a motion to disqualify, and after a hearing on May 24, 2001 and consideration of the parties' post-hearing submissions, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. The motion is GRANTED IN PART;

2. The United States Attorney's Office for the Eastern District of Pennsylvania is DISQUALIFIED from further participation in this case;

3. The Attorney General is DIRECTED forthwith to appoint an attorney, pursuant to 28 U.S.C. § 543, to represent the Government in this case; and

4. The special attorney appointed shall by August 15, 2001 advise the Court whether he or she intends to continue this prosecution.

BY THE COURT:

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Stewart Dalzell, J.