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

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	
EDWARD M. MEZVINSKY	:	CRIMINAL NO. 01-156

MEMORANDUM

Dalzell, J. May 10, 2002

Defendant Edward M. Mezvinsky has filed a motion for recusal of the assigned judge, largely predicated on events that took place in an in camera hearing occasioned by Mezvinsky's prior counsel's motion to withdraw. As this most recent motion was filed on the eve of a resumed hearing on Mezvinsky's mental health defense, we ordered the Government to file an expedited response, which it has done.[1]

In order to consider Mezvinsky's motion, it is necessary to set it in context. After Mezvinsky's second defense counsel, Thomas Bergstrom, Esquire, on February 25, 2002 filed an amended notice of mental health defense pursuant to Fed. R. Crim. P. 12.2(b), the Government filed a motion to exclude that defense. In accordance with United States v. Pohlot, 827 F.2d 889, 905-06 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988), we commenced a hearing on March 15, 2002 to hear a number of expert witnesses.

[1] The Government responded even though it did not have a transcript of the in camera proceeding. This impediment also did not prevent defense counsel from filing the motion, since he apparently relied on Mezvinsky's recollection of the proceeding.

Shortly before the second day of the Pohlot hearing was to resume on April 9, 2002, Mr. Bergstrom filed a motion to withdraw as defense counsel. By this point, with the financial aid of his supporters, Mezvinsky had retained Bryant Welch, Esquire as special counsel to deal with the mental health defense, and thus Mr. Bergstrom had been reduced to a consultative role as to that issue.

When we convened on April 9, at the Government's suggestion, see N.T. of Apr. 9, 2002 at 324,[2] we held an in camera conference with only Messrs. Bergstrom and Mezvinsky present. We agreed with the Government's suggestion that we convene such a hearing because of our awareness of our duty to make inquiry[3]; we were also aware of cases in other circuits that have established three factors that a district court must

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[2] "I believe that the Court does have discretion to have an ex parte meeting without me, with Mr. Mezvinsky and Mr. Bergstrom, to assess what this disagreement is, because all I'm hearing here is that there's a disagreement regarding strategy or tactics. And, under the law, it's clear that a defendant is not entitled to any lawyer he wants."

[3] As our Court of Appeals put it in United States v. Vastola, 899 F.2d 211, 237 (3d Cir. 1990), rev'd on other grounds, 497 U.S. 1001 (1990):

> Under United States v. Welty, 674 F.2d 185, 190 (3d Cir. 1982), a district court, faced with a request for substitution of counsel, has a duty to "inquir[e] as to the reason for the defendant's dissatisfaction with his existing attorney" and should grant the request if "good cause" is shown. Id. at 187-88. See also McMahon v. Fulcomer, 821 F.2d 934, 942 (3d Cir. 1987).

consider in considering the substitution of new defense counsel in criminal cases:

> (1) the timeliness of the motion; (2) the adequacy of the court's inquiry into the defendant's motion; and (3) whether the conflict was so great that it resulted in a total lack of communication preventing an adequate defense.

United States v. Golden, 102 F.3d 936, 941 (7th Cir. 1996).

At the start of this in camera hearing, we advised Mr. Mezvinsky that it would be transcribed, and "is not going to be in the public record, so the Government won't see it unless it becomes necessary". N.T. of Apr. 9, 2002 Ex Parte Discussion at 1 (hereinafter "N.T."). Because Mezvinsky's motion for recusal is predicated on what was said in that in camera proceeding, he has made it necessary to reveal some of what was transcribed that day. We will endeavor, however, to minimize our disclosure of what was said, although the full transcript will be available if this matter is brought to the Court of Appeals's attention.[4]

In making our inquiry into whether, in fact, Messrs. Bergstrom and Mezvinsky had irreconcilable differences that would preclude Mr. Bergstrom's continued service, we asked Mr. Bergstrom if "you could speak to me about your view of what necessitated your filing the motion that surprised me so." Id.

[4] As Mezvinsky was present for that proceeding and Mr. Welch has a copy of the transcript, if Mezvinsky submits this issue to the Court of Appeals, fairness will then require our unsealing of the transcript for the Government.

Mr. Bergstrom then (reluctantly) made disclosures over several pages of transcript, which we summarized as follows:

> THE COURT: So, is the basis then for your motion twofold. One -- and I'm not trying to put words in your mouth. I'm just trying to understand why you filed what you filed.
>
> One: Differences with Mr. Mezvinsky about how this case should be fundamentally handled.
>
> And, Two: Your concerns and your duties under Rule of Professional Conduct 3.3?
>
> MR. BERGSTROM: Yes, sir.

Id. at 4-5. Given the reference to counsel's duty under Rule of Professional Conduct 3.3,[5] present counsel argues on Mezvinsky's

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[5] In its Pennsylvania form, the Rule provides:

> **Rule 3.3. Candor Toward the Tribunal**
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> (a) A lawyer shall not knowingly:
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> (1) make a false statement of material fact or law to a tribunal;
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires

(continued...)

behalf "that the average judge, having heard so damning an assessment of defendant and his theory of defense, would probably be prejudiced against him and his witnesses." Def's. Mot. at 3. Mezvinsky then notes that, after the in camera hearing, newspaper accounts "conveyed the strong impression that the Court had expressed incredulity at the testimony of the doctor then testifying for the defendant." Id. at 4. Mezvinsky then suggests that the better practice would have been that another judge should have heard Mr. Bergstrom's disclosure "so as to avoid having to express so negative an anti-defense opinion before Your Honor". Id.

Upon careful consideration of the full transcript of the in camera hearing, we conclude that no reasonable person could question our impartiality based upon Mr. Bergstrom's

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[5](...continued)
disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

As the Supreme Court put it in a case involving outright perjury,

> For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully.

Nix v. Whiteside, 475 U.S. 157, 173-74 (1986).

disclosures. Indeed, the thrust of what we said after that disclosure was that Mezvinsky should carefully reconsider his position, given Mr. Bergstrom's experience and deserved reputation as one of the pre-eminent criminal defense practitioners in this district. See N.T. at 8-10. Mezvinsky agreed to reflect further, and to advise this Court's Deputy Clerk as to his ultimate decision.[6] No fair reader of the transcript after Mr. Bergstrom's disclosure would detect any lack of impartiality, or presence of bias, from what we said or did.

Upon close analysis, it is apparent that Mezvinsky's motion stakes out a rather extravagant position. If, as settled appellate authority requires, the district judge convenes an in camera hearing to determine whether, in fact, irreconcilable differences exist that require the substitution of counsel, and if in the course of that inquiry the court is confronted with unbidden disclosures that the defendant regrets, Mezvinsky maintains that such defendants automatically get another judge to preside over their cases.

It is hard to conceive of a limiting principle for Mezvinsky's idea. For example, although a defense counsel's expression of Rule 3.3 concerns is of course serious, it pales by

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[6] As it turned out, Mezvinsky adhered to the view that he preferred not to accept Mr. Bergstrom's services any longer. We then afforded Mezvinsky time in which to secure retained counsel, and indeed granted prospective retained counsel additional time to try to make satisfactory financial arrangements. When this ultimately failed, we succeeded in finding Mezvinsky another seasoned practitioner to serve as chief defense counsel, Stephen Robert LaCheen, Esquire.

comparison to the significance of, for example, a failed motion to suppress. When a judge denies a motion to suppress, say, a quantity of cocaine, the judge knows for a fact that the defendant is guilty of drug trafficking. On Mezvinsky's theory, that judge is now so polluted that none of her later rulings can be regarded as untainted by her absolute certainty of the defendant's factual guilt.[7]

Indeed, Mezvinsky's point here collides directly with the Supreme Court's holding in Liteky v. Untied States, 510 U.S. 540, 550-51 (1994):

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

By contrast, all we have here is Mr. Bergstrom's doubtless sincere view under R.P.C. 3.3. Suffice it to say that

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[7] It is also worth stressing that our gatekeeper role in a Pohlot hearing is not a cognate of what a jury does; as Pohlot put it,

> Notions of intent, purpose and premeditation are malleable and at their margins imprecise. But the limits of these concepts are questions of law. District courts should admit evidence of mental abnormality on the issue of mens rea only when, if believed, it would support a legally acceptable theory of lack of mens rea.

Pohlot, 827 F.2d at 905-06.

nothing Mr. Bergstrom disclosed had not been earlier mentioned, and in much greater detail, by the Government in its motion to exclude the mental health defense and in the Government's cross-examination in open court that very day. By the time of Mr. Bergstrom's disclosure, it was also evident that Bryant Welch, Esquire, a practitioner of over twenty-five years' experience, apparently did not harbor the same ethical reservations Mr. Bergstrom did.

Mezvinsky also makes much of our expressed esteem for Mr. Bergstrom.[8] While we do not retreat from those expressions, as Mr. Bergstrom would doubtless be the first to point out, that esteem is not so great as to give him an unbroken record of success before this district judge. See, e.g., United States v. Miller, 871 F. Supp. 232 (E.D. Pa. 1994). As should be needless to say, no lawyer, of whatever stature, bats 1.000 with this judge.

As we assured Messrs. Bergstrom and Mezvinsky on April 9, 2002, "I am going to decide the [Government's] motion based on the evidence and the law." N.T. at 1-2.[9] No reasonable observer

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[8] The Government seconded such expressions. As the prosecutor put it on the record when he referred to the possibility of Mr. Bergstrom remaining in the case, "Mr. Mezvinsky would be going to trial represented by the best criminal defense attorney we know." N.T. of Apr. 9, 2002 at 324.

[9] Our responses to some of Dr. Claudia Baldassano's testimony may well have reflected certain incredulity, but it is long past time to attribute any recusal relevance to "expressions of impatience, dissatisfaction, annoyance, and even anger" from judges responding to testimony or lawyers' argument. Liteky, (continued...)

canvassing this record could come to any other conclusion. Mezvinsky's motion is, therefore, wholly without merit.

[9](...continued)
supra, 510 U.S. at 555-56. Our responses had nothing to do with Mr. Bergstrom's disclosure and everything to do with the content of Dr. Baldassano's testimony.

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ORDER

AND NOW, this 10th day of May, 2002, upon consideration of defendant's motion for recusal, and the Government's opposition thereto, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion is DENIED.

BY THE COURT:

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Stewart Dalzell, J.