

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>CORNELIUS ALEXANDER ALBERT,</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 97-404-01</b>

**MEMORANDUM**

**Reed, J.**

**December 11, 1997**

Judges and the courts over which they preside strive to be icons of impartiality and fairness. Ordinarily, this goal requires that a judge consider the arguments of all parties before the court without advocating for or taking up the banner of any position. Today, however, this Court is called upon to be an institutional advocate, to proactively protect the rights of the public and all parties before it to a fair trial of this criminal case, and to maintain the high ethical standards that are demanded of the legal profession and this Court. The issue before the Court is whether counsel for one of the defendants in this case should be disqualified because of a potential conflict of interest. The role of this Court is clear because none of the parties actively argued for the result I reach today.

The government made a motion to hold a hearing regarding a conflict of interest and the status of counsel (Document No. 13) in this criminal case because Philip Deitch (“Deitch”), counsel for Cornelius Alexander Albert (“Albert”), one of the defendants, also represents a co-defendant in this case, but in another criminal matter currently pending in California. Because I find that there is a serious potential for a conflict of interest arising

from Deitch's continued representation of Albert, I will refuse to accept the waiver of the conflict by Albert, and Deitch will be disqualified from representing Albert in this case.

## **I. BACKGROUND**

All the defendants in this case have been charged with conspiracy to commit credit card fraud in violation of 18 U.S.C. § 1029(b)(2). Albert was arrested on August 15, 1997 in Los Angeles, and on August 27, 1997, a grand jury in Philadelphia indicted him and four others, including Lonnie Jackson ("Jackson"), a co-defendant in this case. Jackson was arrested in April of 1997 on a separate charge of credit card fraud under 18 U.S.C. § 1029. Deitch, counsel for Albert in the case before the Court, was and still is counsel for Jackson on the separate charge of credit card fraud which is pending in the United States District Court for the Central District of California.

The government claimed in its motion for a hearing that Deitch's representation of Albert in this case and Jackson in the California case created a conflict of interest for Deitch in his representation of Albert. The government argued that because Jackson is a co-defendant of Albert, Deitch will not be able to fully advise Albert to accept the government's offer to cooperate with the government because Albert's cooperation may be detrimental to Jackson. In addition, the government contends, Deitch's representation of both defendants could present a conflict in that Deitch could be faced with the opportunity to cross-examine Jackson to discredit his testimony or implicate Jackson, a situation in which to effectuate this result he may be required under his duty to Albert to disclose confidential information gained during his representation of Jackson.

In response, while Albert did not oppose the hearing, he argued that he waived any conflict that Deitch may have and further, that he rejected requests by the government for cooperation in the case and would continue to reject such requests, even if he were represented by other counsel. (Document No. 48 at ¶¶ 6 and 9).

This Court held a hearing on November 20, 1997. Both Albert and Jackson were present. Deitch stated to the Court that he did not foresee a conflict of interest in his representation of Albert. The Court conducted a colloquy of Albert and Jackson to inquire into their knowledge of the potential for conflict. Both defendants expressed to this Court that they were aware of the potential for conflict but were willing to waive the conflict so that Deitch could continue to represent Albert. The Court, in an abundance of caution, admonished Albert to seek a replacement counsel or at least consult with independent counsel about his best interests on this issue, but he refused the invitation. At the close of the hearing, the government stated that it was taking no position on whether Deitch should be disqualified other than that the decision was within the discretion of the Court.

## **II. DISQUALIFICATION OF COUNSEL WITH POTENTIAL CONFLICTS OF INTEREST**

The standard for determining whether to disqualify counsel in the Third Circuit is clear and well-established. Three important rights must be carefully balanced in determining whether counsel should be disqualified in a criminal case. First, the Sixth Amendment guarantees the right to effective assistance of counsel for criminal defendants; included within this protection is the right to representation that is free of conflicts of

interest. See United States v. Moscony, 927 F.2d 742, 748 (3d Cir. 1991); United States v. Gambino, 864 F.2d 1064, 1069 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989). Conflict-free representation is necessary so that counsel for defendant can fully take up his client's case without reservation and in an adversarial manner. See Moscony, 927 F.2d at 748.

Second, courts have interpreted the Sixth Amendment to provide a presumptive right of counsel of defendant's choice. See e.g. Wheat v. United States, 486 U.S. 153, 160 (1988); United States v. Gambino, 864 F.2d 1064, 1069 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989); United States v. Flanagan, 679 F.2d 1072, 1075 (3d Cir. 1982), rev'd on other grounds, 465 U.S. 259 (1984). Thus, a defendant should be allowed a "fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53 (1932). Third, against this bundle of rights provided by the Sixth Amendment, however, a court must balance the importance of preserving both the public impression and the de facto ethical integrity of the court and the legal profession in considering a motion to disqualify counsel. The ethical rules of conduct that govern the legal profession protect the right of a client not to have his confidences disclosed or his attorney work against his interests. See Moscony, 927 F.2d at 748. In addition to these rights of clients under the ethical rules of conduct, the court has an "institutional interest in protecting the truth-seeking function of the proceedings over which it is presiding by considering whether the defendant has effective assistance of counsel." Id. at 749.

A defendant's rights to conflict-free representation and representation of his choice are at times in tension. Thus, in many cases involving a motion to disqualify counsel, in addition to balancing the interests above, a court is faced with a defendant who wants to

waive any conflict his attorney may have so that he may continue to be represented by his counsel of choice. Quoting the Court of Appeals for the Third Circuit in United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978), the Supreme Court stated in Wheat that:

“[W]hen a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant’s chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant’s comprehension of the waiver.”

486 U.S. at 162. The Supreme Court in Wheat went a step farther than the Dolan court to hold that because “[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict,” courts must be given “substantial latitude” to reject a defendant’s waiver of a conflict even in cases in which the conflict is only a “serious potential.” Wheat, 486 U.S. at 163, 164; see also Moscony, 927 F.2d at 750.

Consistent with this reasoning, courts have refused waiver of conflicts of interest from defendants in cases in which the attorney may have to cross examine current or former clients. For example, in United States v. Voigt, the Court of Appeals for the Third Circuit reasoned that “[s]ince there was a strong possibility that [a co-conspirator] might face cross-examination by a former attorney, there was a serious potential for a conflict of interest which, notwithstanding [the defendant’s] attempt to downplay it on appeal, warranted disqualification.” 89 F.3d 1050, 1078 (3d Cir. 1996); see also Wheat, 486 U.S. at 156; Moscony, 927 F.2d at 748-49; United States v. Traboscia, 1994 WL 59357, \*2 (E.D. Pa.) (holding that the defendant’s right to effective assistance of counsel would be undermined

by his attorney's ethical duties to a cross-examinee); United States v. Cannistraro, 794 F. Supp. 1313, 1327 (D.N.J. 1992). In addition, Rule 1.7 of the Pennsylvania Rules of Professional Conduct, as adopted by Local Rule of Criminal Procedure 2, provides that:

[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.

The comments to Rule 1.7 explain that "[l]oyalty is an essential element in the lawyer's relationship to a client. . . . Thus, a lawyer ordinarily may not act as an advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."

### **III. ANALYSIS**

While the standard for disqualification of counsel is well-established, its application to the facts in this case is a formidable and delicate task, given the important constitutional rights and ethical concerns at stake. Although I find that there is no actual conflict of interest in Deitch's representation of Albert present in this case at this time, I must determine if there is a serious potential for a conflict. Deitch did not relinquish the right to cross-examine Jackson, nor could he under his ethical duties to zealously represent Albert. Jackson did not waive the attorney-client privilege with respect to confidential information that Deitch may have that could become relevant at trial. In addition, Jackson did not close the door on the possibility that he may cooperate with the government between now and the trial, resulting in potentially sharp adversity between Albert and Jackson and hence, their attorney, Deitch.

In addition, the parties indicated at the hearing that they currently had no current plan for a joint defense. If each defendant presents his or her own defense to the charge of conspiracy, it is foreseeable that Albert or Jackson may try to shift substantial involvement in the conspiracy to the other defendant or reveal information that is detrimental to the other. For example, it is possible that another one of the indicted co-conspirators could produce evidence or testimony that is adverse to Jackson in that it shows his dominant leadership in the conspiracy, of which Deitch becomes aware. Such information may be helpful to Albert, but Deitch would be restrained by his duty to Jackson to fully exploit such information to Albert's advantage. Further, severance of the defendants in this case is unlikely and thus does not provide an alternative solution. See Cannistraro, 794 F. Supp. at 1324 (rejecting defense counsel's arguments that severance of the trial would be "viable alternative" to disqualification).

Finally, Deitch's continued representation of Albert is likely to create the appearance of disloyalty to Jackson; such appearance is damaging to the public's perception of the legal system and the courts. Thus, this Court has a duty to guard against this perceived impropriety in order to preserve and maintain the integrity of the judiciary.

As the Supreme Court pointed out in Wheat,

[a] few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

486 U.S. at 163. This Court agrees that assessment of these potential conflicts is difficult for

the lawyers and the clients; indeed, it is an arduous task for the judge, who must make the decision on whether to disqualify counsel. This difficulty is compounded in a complex case with many defendants, as in the case at bar. See Cannistraro, 794 F. Supp. at 1327 (noting the “complexity of the case and the magnitude of the potential conflicts of interest in this case” in its decision to reject the defendant’s waiver and to disqualify counsel).

This Court is under a disability in that it cannot know with certainty what information would come to light in a cross-examination of Jackson by Deitch or what yet unforeseeable complication may arise because that information remains unknowable or confidential with Deitch, Jackson, or other third parties unknown to the Court. If Deitch were allowed to proceed in his representation of Albert through trial, a plethora of scenarios may arise in which Deitch may be in possession of confidential information, relevant to the case, use of which would be beneficial to Albert’s case, but detrimental to Jackson, either in the present case or the matter in California. Deitch would then be sharply conflicted under the Rules of Professional Conduct and would be hindered in his representation of both clients. At that point, it would be too late for this Court to put the genie back in the bottle; the best approach to these potential problems is not to try to remedy them after they manifest, but rather to prevent the conflict from impairing the future of the litigation by resolve at the outset.

#### **IV. CONCLUSION**

Based on the foregoing, this Court will disqualify Deitch from representing Albert in this case.

An appropriate Order follows.

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<b>CORNELIUS ALEXANDER ALBERT,</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 97-404-01</b>

**ORDER**

**AND NOW**, this 11th day of December, upon consideration of the government’s Motion for Hearing on the Conflict of Interest and Status of Counsel (Document No. 13), the defendant’s response (Document No. 49), the attendant memoranda submitted by the parties, and the declaration of waiver of conflict of interest by defendant Cornelius Alexander Albert (“Albert”) (Document No. 48), and after a hearing was held on November 20, 1997, in which the Court heard arguments from the parties and conducted colloquies of Albert and his co-defendant, Lonnie Jackson, and for the reasons given in the foregoing memorandum, it is hereby **ORDERED** that defendant’s counsel, Phillip Deitch, Esquire, (“Deitch”) is **DISQUALIFIED** from representing Albert in the above captioned action.

**IT IS FURTHER ORDERED** that Deitch shall assist Albert in securing substitute counsel and that substitute counsel shall enter an appearance on the docket by December 31, 1997. If Albert is unable to retain substitute private counsel by reason of financial inability to secure those services, Deitch shall assist Albert in presenting to this Court, no later than

December 31, 1997, the necessary financial disclosure affidavit to support the court appointment of counsel pursuant to the Criminal Justice Act. The issuance of this Order and the substitution of counsel shall not delay compliance with the scheduling Order of this Court or the trial of this case.

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**LOWELL A. REED, JR., J.**