New York Inn of Court

Historical Trial Program

Wednesday, May 31, 2023

Orrick, Herrington and Sutcliffe

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New York American Inn of Court

Historical Trial Program

Wednesday, May 31, 2023

Host: Orrick, Herrington and Sutcliffe

The Historical Trial Team Presents:

The Last Trial of John Gotti

TIMED AGENDA

Historical Trial Reenactment – 70 minutes

1. Introductory narration
2. Motion to disqualify counsel
3. Trial testimony of Salvatore (Sammy) Gravano
4. Government and defense summations
5. Conclusion

Panel Discussion of Legal Issues – 20 minutes

1. Discussion
2. Questions and answers

Participants: Daniel Alonso, Clement Colluci, Evan Fensterstock, Hon. Helen Freedman, Henry Freedman, Peter Guirguis, Hon. Debra James, Bruce Lederman, Ira Matetsky, Matthew Tobias, Chryssa Valletta, Edward Sponzilli, Dawn Baker

Host: Orrick, Herrington and Sutcliffe

CAST BIOGRAPHIES

P. Dawn Baker-Miller is a judicial hearing officer at the New York City Office of Administrative Trials and Hearings. She formerly was Senior Counsel at the New York City Office of the Corporation Counsel, where she served in the General Litigation Division, the Labor and Employment Division, and the Special Litigation Unit. Prior to that, she was an associate in private practice. Her background includes general pretrial litigation experience as well as trial and appellate experience in both federal and state courts. Dawn is a member of the Federal Bar Council and the New York City Bar Association, where she served on the Litigation Committee from 2000 through 2009. She is admitted to practice in the Southern and Eastern Districts, the Second Circuit, and the Supreme Court of the United States. Ms. Miller is a graduate of the University of South Carolina School of Law, where she was Associate Editor-in-Chief of the Law Review.

Clement J. Colucci is an Assistant Attorney General in the New York City Litigation Bureau of the Office of the Attorney General, and has been for 30 years. He defends actions against state agencies and officials in state and federal court, except in the Court of Claims. Before that, and during a brief hiatus in his public service, he was an associate at both large and small firms in New York City. He is a graduate of the Columbia Law School and was an editor of the Law Review.

Evan S. Fensterstock is a New York City trial lawyer and founder of the complex commercial and employment litigation law firm, Fensterstock, P.C. Evan focuses his practice on all aspects of complex commercial and employment litigation and arbitration in state, federal, and bankruptcy courts from pre-complaint analysis through trial and post-trial appeals. Evan has represented companies and individuals on both the plaintiff and the defense side in a wide range of industries including insurance, employment, recruiting, financial services, banking, pharmaceutical, advertising, entertainment, media, hospitality, and gaming. Evan provides employment advice to executives and companies, negotiates compensation packages and separation agreements, and consults on covenants not to compete (non-compete agreements) and non-solicitation clauses. Evan also provides outside general counsel services to businesses that do not require full-time in-house representation or who are looking for a second opinion.

Evan recently won a nearly five-million-dollar ($5,000,000.00) judgment for his client after a four-day bench trial in the Commercial Division in the Supreme Court of the State of New York concerning indemnification and breach of contract claims arising out of a sixty-three-million-dollar ($63,000,000.00) purchase and sale of an insurance company and its subsidiaries pursuant to a stock purchase agreement.

Evan is also a mediator. Evan completed advanced commercial mediation training making him eligible under Part 146 of the Rules of the Chief Administrative Judge of New York to serve on court mediation rosters. Evan is currently on the roster of mediators in the prestigious Commercial Division in New York County. Evan enjoys serving on this prestigious court roster

and assisting parties in facilitating productive negotiations and resolutions in commercial disputes.

Prior to founding Fensterstock, P.C. in 2018, Evan was a Partner at Fensterstock & Partners LLP from 2015-2017. From 2009-2015, he was an Associate at Kasowitz, Benson, Torres & Friedman LLP. Following in the footsteps of his father, Blair C. Fensterstock, and grandfather, Hon. Nathaniel Fensterstock, Evan is highly dedicated to pro bono work. In 2013, he received the Legal Aid Society Pro Bono Publico Award for his service to Hurricane Sandy victims. He spearheaded the Holocaust Survivor Representation Pro-Bono Project while at Kasowitz, which helps Holocaust survivors recoup pensions and payments from the German government for work performed in ghettos during World War II. Evan served as Executive Literary Editor of the New England Law Review at New England Law|Boston, where he graduated from law school cum laude and received the Cali Excellence for the Future Award in Civil Procedure. While in attendance, Evan interned for the Honorable Raya S. Dreben in the Massachusetts Appeals Court, the Honorable Charles T. Spurlock in Suffolk Superior Court, and the Legal Division of the Massachusetts Department of Correction in Boston, Massachusetts. In 2007, he was elected Vice Magister of the Bradlee Inn Chapter of the International Legal Honor Society Phi Delta Phi, and in 2008 he received the Phi Delta Phi Balfour Scholarship for outstanding service to Bradlee Inn. Evan holds a Bachelor of Arts degree from Bowdoin College where he double majored in Government and Spanish, played varsity golf and squash, and served as Class President. From 2015-2022, Evan has been named a New York Metro Area Super Lawyers Rising Star in Business Litigation.

Honorable Helen E. Freedman (Ret.) is currently a neutral with JAMS. She was an Associate Justice of the Appellate Division of the New York State Supreme Court, First Department, from 2008 to 2014 and served as a Justice of the Supreme Court from 1984 to 2008. She served on the Appellate Term of the Supreme Court from 1995-99 and in the Commercial Division of the New York County Supreme Court, for eight years.

Justice Freedman was the Presiding Judge of the Litigation Coordinating Panel for multi-district litigation in New York State from 2002 until 2014. She has been a member of the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of the State of New York since 1994 and is a member of the Advisory Council of the New York State and Federal Judicial Council. She is also a Trustee of the Historical Society of New York Courts. She is the author of New York Objections, a book on trial practice and the making of objections, and of a chapter in the treatise Commercial Litigation in New York State Courts. She is a graduate of Smith College and of the New York University School of Law.

Henry A. Freedman retired in 2014 after serving as Executive Director of the National Center for Law and Economic Justice since 1971. Before becoming Executive Director, he had been in private practice in New York City and taught at Catholic University Law School in Washington, DC. He has also taught at Columbia and New York University Law Schools, and Columbia and Fordham Schools of Social Work. He has chaired the Committee on Legal Assistance of the Association of the Bar of the City of New York, and was the only "welfare recipient advocate" on HEW Secretary Califano's 32-member group formed to study welfare

reform alternatives in 1977. He successfully argued Califano v. Westcott before the United States Supreme Court in 1979. Mr. Freedman has received the National Legal Aid and Defender Association's Reginald Heber Smith Award for Dedicated Service (1981), the New York State Bar Association's Public Interest Law Award (1998), the William Nelson Cromwell Medal of the New York County Lawyers' Association (2001), and an honorary Doctor of Laws degree from Amherst College in 2008. He is a graduate of Amherst College and Yale Law School.

Peter Guirguis is a partner at Mintz & Gold LLP, where he advises clients in a wide range of disputes and investigations involving commercial contracts, complex financial instruments, mergers and acquisitions, financial reporting, corporate control and governance, data use and privacy, executive compensation and employment, bankruptcy, real estate construction and financing. He also advises individuals and entities in a wide variety of investigatory, regulatory and enforcement matters. He represents diverse clients, from individuals to major financial institutions, insurers, manufacturers and retailers, and numerous software and technology companies. Before joining Mintz & Gold, Peter practiced at large firms including Norton Rose Fulbright, Akin Gump Strauss Hauer & Feld, and Dechert. He also clerked for the Honorable Judge Kevin T. Duffy in the United States District Court for the Southern District of New York. He has been a member of the Inn since its founding year, and a member of the historical team since the musical team finally accepted that he cannot sing.

Hon. Debra A. James is a Supreme Court Justice, New York County, elected to that office in 2013. She began her judicial career as a New York City Civil Court judge in 1995. Judge James started her legal career as an Assistant Corporation Counsel, New York City Law Department, where she represented municipal corporations in New York state and federal trial and appellate courts. Immediately prior to ascending to the bench, Judge James served as the first general counsel of the Roosevelt Island Operating Corporation. Judge James is a member of the New York City Bar Association, and member emeritus of its Executive Committee. She is also president emeritus of the Association of Justices of the Supreme Court of the State of New York, Inc. A member of the National Association of Women Judges, Judge James is former chair of its Women in Prison Committee, New York chapter, and a recipient of NAWJ's Mattie Belle Davis Award. Judge James earned her B.A. degree (cum laude) in American Government and Politics at Cornell University and received her J.D. degree from Cornell Law School.

Bruce N. Lederman has more than 43 years of complex commercial, real estate, and intellectual property litigation experience. He presently practices as a solo practitioner, and is also Counsel to London House Chambers, a Guyana-based law firm. An AV preeminent rated attorney by both the Judiciary and his peers, Bruce was a founding partner of Fischbein Badillo Wagner Harding. For more than 15 years, Bruce headed that firm's litigation department. He has tried numerous civil matters in both bench and jury trials, and has handled appeals in the State and Federal Courts. He has appeared as trial counsel to other attorneys, and has often worked with local counsel throughout the United States. He is currently a member of the JHO Selection Advisory Panel for the First Judicial Department, the Panel of Referees for the First Judicial Department Attorney Grievance Committee, and the New York County Commercial

Division ADR Panel. Bruce earned his BA from Colgate University in 1975 and his JD from the Benjamin N. Cardozo School of Law in 1979.

Ira Brad Matetsky is a partner at Ganfer Shore Leeds & Zauderer LLP in Manhattan, where he concentrates his practice in litigation and arbitration matters, including corporate, commercial, securities, and trust-and-estates litigation and appeals. Mr. Matetsky is a 1984 graduate of Princeton University and a 1987 graduate of the Fordham University School of Law, where he received awards in Contracts and Constitutional Law and served on the Fordham Law Review. Prior to joining Ganfer & Shore, Mr. Matetsky served as a litigation attorney at Skadden, Arps, Slate, Meagher & Flom LLP as well as five years as in-house counsel at Goya Foods, Inc. He has authored several published articles in legal periodicals on historical and other topics, including "Clerking for 'God's Grandfather': Chauncey Belknap's Year with Oliver Wendell Holmes," a 2018 Journal of Supreme Court History article which he co-authored and co-edited. He also was co-editor of The Green Bag Almanac and Reader (an annual collection of the year's best legal writing) for 2012, 2015, 2016, and is editor-in-chief of The Journal of In-Chambers Practice (formerly the annual supplements to In Chambers Opinions by the Justices of the Supreme Court of the United States). He is also a New York Super Lawyer and a past recipient of the President's Pro Bono Service Award from the New York State Bar Association.

Edward G. Sponzilli, a member of Norris McLaughlin, P.A., is a New Jersey Supreme Court Certified Civil Trial Attorney with 44 years' experience in complex corporate and commercial litigation and education matters, as well as employment litigation relating to restrictive covenant, wrongful termination, CEPA, employment discrimination and sexual harassment. Ed is a Fellow of the American Bar Association and is a 2008 recipient of the Professionalism Award. In 1999 he was awarded the New Jersey Supreme Court's Fund for Client Protection's "Client Protection" Award for his outstanding service on behalf of the public and the Bar of New Jersey in his role as Chancery Court-appointed Receiver in the case of Montano v. Cohen & Cohen. Ed is a past president of the C. Willard Heckel Inn of Court and the Rutgers—Newark Law School Alumni Association. He is Trustee of the Trial Attorneys of New Jersey. He has been on the faculty of the National Institute for Trial Advocacy for over seventeen years and, for the past nine years, has been one of only two non-government faculty members in the New Jersey Attorney General's Trial Advocacy Institute. Ed is currently also a master of the Lifland (federal practice) American Inn of Court. He has served as a federal arbitrator and state court certified mediator. Ed was a Judicial Law Clerk for The Honorable James A. Coolahan, U.S. District Court for the District of New Jersey (D.N.J.) from 1975-77. During his two-year clerkship, Judge Coolahan held a temporary assignment to the Court of Appeals for the Third Circuit. Ed was a 1971 Phi Beta Kappa, magna cum laude graduate of Rutgers College. He received a masters in American History in 1972 from Columbia and his law degree from Rutgers, Newark in 1975. Ed has been selected for inclusion in The Best Lawyers In America and New Jersey Super Lawyers, as well as Marquis' Who's Who In American Law and Who's Who in America. He is a member of the New Jersey Supreme Court Committee, Bench, Bar and Media, as well as chair of the New Jersey State Bar Association's Higher Education Section.

Matthew N. Tobias is a litigation associate at Ganfer Shore Leeds & Zauderer LLP, where he concentrates his practice on commercial litigation. Mr. Tobias received his B.S. from Cornell University in 1996, with a major in communication. While an undergraduate, he also studied geography and economics at University College London in London, England. Mr. Tobias received his J.D. from Fordham University School of Law in 2000, where he served as a member of the Fordham Law Review and was on the Dean's List. Prior to joining his current firm, Mr. Tobias was in private practice in trusts and estates and commercial litigation, including contract, real estate, securities, trademark and general commercial disputes.

Chryssa V. Valletta is Acting Head of Legal at Trusted Health, a healthcare staffing and technology company. She is a graduate of the University of Scranton and Columbia Law School, where she served as the director of the Jerome Michael Jury Trials moot court program. Prior to joining Trusted Health, she was a partner in the New York office of a multinational law firm.

Rita Wasserstein Warner is a Senior Partner at Warner Partners, P.C., which specializes in family law and commercial litigation. She has been an active matrimonial practitioner for over 30 years and has an "AV" rating in Martindale-Hubbell, that publication's highest rating. She has been with Warner Partners, P.C. (formerly known as Coblence & Warner) since the firm was founded in 1980.

Ms. Warner has been involved at the trial court level in a wide range of high profile cases. She has also handled appeals of recognized and significant precedential value in the matrimonial field and has appeared on television and radio on family law matters. She has lectured and moderated at Bar Association forums and CLE programs. She has lectured annually at the ABA/NYSBA International Boot Camp on the Hague Convention and "Spotting Legal Issues When People Move Across Borders" and at the NYSBA Fundamentals of International Practice.

Ms. Warner is Chair of the Matrimonial Committee of the International Section of the New York State Bar Association and former Co-Chair of the Matrimonial Law Section of the New York County Lawyers Association. She is on the Board of the Women's Rights Division of the Human Rights Watch. Ms. Warner has just concluded her tenure as Chair of the Entertainment Committee of the City Bar Association, and is currently co-chair.

Ms. Warner obtained her law degree from New York University School of Law.

U.S. v. Gotti, 771 F.Supp. 552 (1991)
United States District Court, E.D. New York.

UNITED STATES of America, Plaintiff,
v.
John GOTTI, et al., Defendants.

Attorneys and Law Firms
John Gleeson, Asst. U.S. Atty., Brooklyn, N.Y., forplaintiff.
Samuel H. Dawson, Gallop, Dawson, Clayman & Rosenberg,New York City, for Bruce Cutler.
Herald Price Fahringer,, New York City, for Gerald L.Shargel.
Victor J. Rocco, Gordon, Hurwitz, Butowsky, Witzen, Schlov& Wein, New York City, for John L. Pollok.

MEMORANDUM AND ORDER
GLASSER, District Judge:
The government has moved this court for an order disqualifying Gerald Shargel, Bruce Cutler and John Pollok from representing any of the defendants in this case at trial. The motion is based upon the assertion that there are several actual and numerous potential conflicts of interest to which their continued participation would give rise and that those conflicts can neither be waived nor remedied except by disqualification. The government alleges that the inevitability of their disqualification must follow from the assertions that:
1. The named attorneys are "house counsel" to the "enterprise" charged in the indictment, namely, the Gambino Organized Crime Family, and that their representation of and services to various members of that enterprise whose obligations for legal fees were paid by John Gotti will be "part of the proof of the association-in-fact charged in the indictment." Their presence at trial will, therefore, violate DR 5–102(A) of the American Bar Association's Code of Professional Responsibility.
2. The named attorneys, and more specifically Shargel and Cutler, were witnesses to various events of significance that will be proved at trial also requiring their disqualification from participating in the trial pursuant to DR 5–102(A).
3. Shargel and Cutler previously represented their predecessor as "house counsel," who will be an "important government witness." Pollok has also previously represented another prospective government witness. Both witnesses were represented by one or more of those attorneys during their testimony before the grand jury in this case.
4. The insinuation of their own improper conduct could inhibit their pursuit of a vigorous defense on behalf of their clients who will thus be deprived of representation by conflict free counsel.
INTRODUCTION
The superseding indictment contains thirteen counts which will be summarized briefly. The defendants are charged in Count One with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), unlawfully conducting and participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity. The "enterprise" is alleged to be the Gambino Organized Crime Family of La Cosa Nostra. The predicate acts of racketeering are, as to one or more of the defendants, alleged to be the conspiracy to murder and the murder of Paul Castellano (John Gotti); the murder of Thomas Bilotti (John Gotti); the conspiracy to murder and the murder of Robert DiBernardo (John Gotti and Salvatore Gravano); the conspiracy to murder and the murder of Liborio Milito (John Gotti and Salvatore Gravano); the solicitation of murder of Louis DiBono (Salvatore Gravano); the conspiracy to murder and the murder of Louis DiBono (John Gotti, Frank Locascio and Salvatore Gravano); the conspiracy to murder Gaetano Vastola (John Gotti, Frank Locascio and Salvatore Gravano); illegal gambling business in New York (John Gotti, Frank Locascio and Salvatore Gravano); illegal gambling business in Connecticut (John Gotti, Frank Locascio, Salvatore Gravano and Thomas Gambino); loansharking conspiracy (John Gotti, Frank Locascio, Salvatore Gravano and Thomas Gambino); extortionate collections of credit (John Gotti, Frank Locascio, Salvatore Gravano and Thomas Gambino); obstruction of justice—the Thomas Gambino trial (John Gotti); obstruction of justice—the Castellano murder investigation (John Gotti, Frank Locascio and Salvatore Gravano). In Count Two they are charged with racketeering conspiracy and bribery as a predicate act. Counts Three through Twelve charge the substantive offenses listed in Count One as predicate acts. Count Thirteen charges John Gotti and Frank Locascio with conspiring to defraud the United States in connection with the collection of income taxes.
That indictment was the result of an extensive investigation of the named defendants and of a group of individuals alleged to be associated in fact as the Gambino Organized Crime Family of La Cosa Nostra, characterized in that document as an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1959(b)(2). The investigation entailed visual surveillance of many persons and places; gathering, analyzing and appraising the value of information supplied by persons familiar with the targets of the investigation and their activities and electronic surveillance.
The electronic surveillance was conducted pursuant to the authority of orders issued in accordance with 18 U.S.C. §§ 2510–2521 by Judge Duffy of the United States District Court for the Southern District of New York on September 25, 1989. Those orders authorized the interception of oral communications and visual, non-verbal conduct of John Gotti, Jack D'Amico, Frank Locascio, Salvatore Gravano and others as yet unknown at specified locations in and about the Ravenite Social Club, 247 Mulberry Street, New York, New York and at Scorpio Marketing, 229 West 36th Street, New York, New York. Many conversations were intercepted and recorded. The defendants sought to suppress the fruits of that electronic surveillance, asserting violations of constitutional dimension, the violation of statutes and of common law

principles. The briefs, affidavits, transcripts, prior decisions, orders and other assorted documents submitted by each side in support of and against the motion to suppress can fairly be described as voluminous. That motion was denied in a Memorandum and Order issued on July 19, 1991.

The motion to disqualify counsel is predicated to a very large extent upon the electronically intercepted conversations. Pending the resolution of the motion to suppress the interceptions, defense counsel urged the court not "to rush to judgment" on the disqualification motion for the reason, among others, that that motion "should not be decided before it is known whether the Title III surveillance can pass constitutional muster." (Letter from Gerald L. Shargel to the court dated March 5, 1991.) The court acceded to this urging, and having determined that the electronic surveillance does pass constitutional muster, now turns to this motion to disqualify.

STATEMENT OF FACTS

A. *The Attorneys as "House Counsel" for the Enterprise*

The factual bases upon which the government relies for this and the other grounds for disqualification are excerpts of intercepted conversations, the accuracy of which is not controverted in the defendants' submissions in opposition and which are set out in the Government's Memorandum in Support of its Motion for an Order Disqualifying Counsel ("Gov't Mem.") at 10–52. Those excerpts will be summarized in part and reproduced verbatim in part as is deemed appropriate.

John Gotti described the commencement of his relationship with Gerald Shargel and, after complimenting him on his legal ability, assured him that "our friends will use you." Thereafter, "two guys took him on right away" and "I brought him six." (Gov't Mem. at 10–11.)

At another time Gotti is heard to say to Gravano:

Some of them love us because we did put them on the map. I remember Gerry when Gerry was an ambulance chaser.
(Gov't Mem. at 28.)

He also described the commencement of his relationship with Bruce Cutler (Gov't Mem. at 12) who, at the time, was associated with Barry Slotnick:

Bruce, I don't know him all my life. I know him five years.... Without us he wouldn't be on the map.
(Gov't Mem. at 28.)

In a subsequent conversation between John Gotti, Salvatore Gravano and Frank Locascio, Gotti expressed displeasure at the amounts of money he was paying his lawyers, in these words:

You know these are "rats" Sam. And I gotta say, they all want their money up front. And then you get four guys that want sixty-five, seventy-five thousand apiece, up front. You're talking about three hundred thousand in one month....

I paid 135,000 for their appeal. For Joe Gallo and, and "Joe Piney's" appeal, I paid thousands of dollars to Pollok. That was not for me.
(Gov't Mem. at 13.)

Then I gave him 25,000 for Carneg's.... Johnny's a wealthy kid, thank God, and he, he don't want none of my money. But he refused to pay. So there wasn't even no appeal. What, what do we do? So, I says, "What do you mean? How much is it?" Gerry can tell you. He says, "25." "Well, you got it. Pete, bring him 15. And then, you got ten in two weeks.... The other guy's appealing. I'm paying John, I paid his 50.
(Gov't Mem. at 14.)

I gave youse 300,000 in one year. Youse didn't defend me. I wasn't even mentioned in none of these * * *[1] things. I had nothing to do with none of these * * * people.... What the * * * is your beef? ... Before youse made a court appearance, youse got 40,000, 30,000 and 25,000. That's without counting John Pollok.... You standing there in the hallway with me last night, and you're plucking me.... "Tony Lee's" lawyer but you're plucking me. I'm paying for it.... Where does it end? Gambino Crime Family? This is the Shargel, Cutler and who do you call it Crime Family.
(Gov't Mem. at 14–15.)

Later on during the course of this conversation and after dissatisfaction with their lawyers is expressed by each ("They're overpriced, overpaid and underperformed ... and they ain't got the balls to do what they gotta do." (Gov't Mem. at 15)), Gotti is heard to say:

Don't you know why they ain't got the balls, too? I told them yesterday, I told them why.... You don't get up and holler when you could because nothin' you could do. You can't even come to court six hours. You write a stay and you're out automatically. They got you for six hours, tops, they keep you. You don't wanna do it because, you * * * you know and I know that they know that you're taking the money under the table. Every time you take a client, another one of us on, you're breaking the law.

* * * * * *

If they wanna really break Bruce Cutler's balls, what did he get paid off me. He ain't defending me three years ago. I paid tax on 36,000. What could I have paid him?

* * * * * *

You, you see me talk for ten minutes in the hall? What do we talk about? Nothing. I say "Go find out information what's going, when, when the 'pinch' is coming, you * * * " "You're making me an 'errand boy.' " High-priced errand boy. Bruce, worse yet!
(Gov't Mem. at 16–17.)

The government lists twenty cases[2] in which the attorneys represented persons who the government asserts are associated with John Gotti and the Gambino Organized Crime Family.

Michael Coiro and Anthony Gurino will be government witnesses. For a period of approximately twenty years, Coiro represented John Gotti and many of his associates in a variety of criminal cases. He himself was represented by Shargel and Cutler. Pollok previously represented Gurino. As regards the representation of Coiro by Shargel and Cutler, in an affidavit dated January 17, 1991 by Patrick Cotter, an Assistant United States Attorney, the government proffers

that Michael Coiro will testify that he never compensated in any way either Shargel or Cutler for representing him in pretrial proceedings, at trial, at sentencing and on appeal in *United States v. Ruggiero, et al.,* 83–CR–412 (E.D.N.Y.), in which Coiro was a defendant. Coiro will testify that when it became apparent that Shargel could not represent him at trial due to a scheduling conflict, Coiro went to Gotti with that problem and was subsequently represented by Cutler at trial. Coiro will also testify that he did not compensate Shargel in any way for representing him in connection with his appearances before the grand jury in this case. Attorney's fees for Gallo, Armone, Carneglia and Guerrieri were paid by Gotti.

There are additional conversations from which the only conclusions to be drawn are that the lawyers represent not merely an individual client, but the enterprise with which that individual is associated and receive instructions calculated to further the interests of that enterprise. One or two excerpts will suffice to demonstrate the point. In a conversation on November 28, 1989, Gotti, unhappy with the content of Jerry Capeci's column in the Daily News, portions of which he attributed to Shargel, was heard to say:

Gerry came down. I gave him a little blast last night.... He admits he told him things in the past, this Capeci. But he thought he was being helpful.

But ... we'll give him the benefit of the doubt.... I told Gerry. Gerry said, "Listen John, you know I got one love, you." "Good, all well and good. But let me tell you something," I told him "you know I ain't got one love," I told him, "you know how I feel, Gerry. I wanna know the truth about everybody. I'll help everybody."

(Gov't Mem. at 22.)

In a conversation on January 24, 1990, Gravano is heard to tell Gotti:

Mister Gambino, ... Tommy grabs me when he walks in. So he says, "I got a message." "From whom?" "Johnny Gambino," he says. "They understand that you were reaching out for him. He's almost under like a house arrest," he says. "I got in touch with him. He'd like to make an appointment. If youse wanna see him, in the lawyer's office." ... [Y]ou want me to meet him in the lawyer's office, I'll meet him Wednesday.

(Gov't Mem. at 23.)

B. *The Attorneys as Witnesses to Events Which May be the Subject of Proof at Trial*

During the course of the trial of Thomas Gambino who was indicted for giving false, evasive and misleading grand jury testimony, subpoenas were served on John Gotti, Joseph Corrao and George Remini. Gotti anticipated that immunity orders would be obtained in regard to their testimony. Gambino was represented by Michael Rosen; Corrao and Remini were represented by Gerald Shargel. Racketeering Act Eleven and Count Eleven of the Superseding Indictment arise out of those events. They charge John Gotti and others with obstructing justice by unlawfully persuading and intimidating others not to testify in that case. Intercepted conversations were offered by the government to establish that the lawyers and others suggested that contempt for refusing to testify pursuant to the trial subpoenas could be avoided by having Gambino plead guilty. The excerpts of those conversations reflect Gotti's veto of that suggestion and his direction to Gambino and his lawyer to fight the case. Gotti, indicating that he, Corrao and Remini stood ready to go to jail, stated: "Get my cell ready; get Joe Butch's' cell ready, and get Fat Georgie's cell ready. And nobody is taking the stand. Tell them to go fight! Don't worry about it." (Gov't Mem. at 31–32.)

The determination by Gotti that no one will testify in the Gambino case gave rise to an ancillary concern, captured on this excerpt of a conversation in the hallway of 247 Mulberry Street on November 8, 1989:

So now everybody was there, Bruce Cutler. And I told him, I says "What about 'Joe Butch?' Is he one of my guys?" He said, "What do you mean?" I says, "His bail pending appeal condition is that he doesn't commit another crime. Refusing to ... answer immunity is a crime punishable by five years." Bruce Cutler goes, "Gee ... I hadda take—Gerry Shargel goes, "Gee, I didn't think about it. You might be right." ... "He paid you the hundred thousand and I gotta be right." ... But I don't know if it's true. They're gonna look up the statute today. But I think it's true. If it's true, we lose.... No way he'll get the bail. But what are you gonna do? This is us.

(Gov't Mem. at 33–34.)

Excerpts of other conversations reflect counsel's awareness of Gotti's resolve that Corrao and Remini commit the crime of contempt and of Gotti's effort to assure Remini that he would not be indicted if he did. (Gov't Mem. at 34–36.) Excerpts also reflect Gotti's resolve that the lawyers understand that their concern must be not only for their client, but that they "got no right [to] jeopardize other people" by their representation. "Who you working for?" he asked Shargel. "Did I tell you to do this?" (Gov't Mem. at 37–38.)

A conversation between Gotti and Cutler on March 29, 1990 concerning the prospective appearance of Anthony Rampino before the grand jury is probative of obstruction of justice charged in Count Eleven of the Superseding Indictment and raises the spectre of a patent conflict arising from Cutler's presence at events sought to be proved at trial. Other portions of that conversation, at which Gravano was also present, implicate Cutler as a medium through which messages are to be transmitted between Gotti and Raymond Patriarca, Jr. of Rhode Island and are probative of the existence of an enterprise. Cutler is thus once again cast in the role of a potential witness to rebut inferences which may logically and reasonably be drawn from those conversations. (Letter dated July 18, 1991 and attachments thereto from John Gleeson to the court.)

Excerpts of other conversations to which Shargel or Cutler or both were parties or during which they were present, not one of which is shrouded in a cloak of privilege, are relevant to the charges in the indictment and concerning which their

testimony would be significant. (Gov't Mem. 38–52.)
One illustration may suffice. Gotti learned that Coiro declined to speak on his own behalf prior to being sentenced. Gotti was critical of Coiro for remaining silent and was heard to say:
... so he should'a spoken ... for himself. There's reasons why we don't say nothing. We're sworn not to say nothing. Even when we're ... 100 percent innocent, we're sworn not to say anything. And you sit there and take it on the chin. But he's not. He's an officer of the court. I mean, he chose that, didn't he? So he gets up and he speaks like one.
(Gov't Mem. at 48.)

DISCUSSION

I begin this discussion with the deep sense of humility a judge reading *United States v. Wheat,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) must inevitably feel. I paraphrase, as indicated, that portion of the opinion to which I refer:
Unfortunately for all concerned, a district court must pass on the issue of whether [to disqualify counsel for a criminal defendant] not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interests are notoriously hard to predict, even for those thoroughly familiar with criminal trials.
I am also conscious at the outset of the recognition by the Court that the government may seek to invent reasons for disqualification "to prevent a defendant from having a particularly able defense counsel at his side," *id.* at 163, 108 S.Ct. at 1699; that I "must recognize a presumption in favor of petitioner's counsel of choice, ... that ... may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id.* at 164, 108 S.Ct. at 1700. I am conscious too of the observation of Justice Marshall in dissent that "[a]n obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative." *Id.* at 166, 108 S.Ct. at 1700. And of Justice Stevens' reminder in his dissent "of the function of the independent lawyer as a guardian of our freedom." *Id.* at 172, 108 S.Ct. at 1704. Why then, am I driven to the conclusion that the government's motion to disqualify Cutler, Shargel and Pollok must be granted? I begin with a review of general principles.
The Sixth Amendment to the constitution which is the core of this motion guarantees that "[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense." A plain reading of that guarantee does not support the interpretation that the accused shall have the assistance of counsel of his choice. It is, however, late in the day to gainsay the fact that "the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). That is not to say that the right to counsel of choice is absolute. It is not. What then, is the purpose of the Sixth Amendment and what are the qualifications of the right it guarantees?
The Court in *Wheat* provided the answers to those inquiries. It wrote:
We have ... recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," *Strickland v. Washington,* 466 U.S. 668, 689 [104 S.Ct. 2052, 2065, 80 L.Ed.2d 674] (1984), and that in evaluating Sixth Amendment claims, "*the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.*" *United States v. Cronic,* 466 U.S. 648, 657, n. 21 [104 S.Ct. 2039, 2046, n. 21, 80 L.Ed.2d 657] (1984). *Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See* *Morris v. Slappy,* 461 U.S. 1, 13–14 [103 S.Ct. 1610, 1617–18, 75 L.Ed.2d 610] (1983); *Jones v. Barnes,* 463 U.S. 745 [103 S.Ct. 3308, 77 L.Ed.2d 987] (1983).
486 U.S. at 159, 108 S.Ct. at 1696–97 (emphasis added).
The Court went on to consider the various respects in which the right to counsel of one's choice is circumscribed. Among those are the inability to choose as a lawyer one who is not a member of the bar; the inability to insist upon being represented by a lawyer he can't afford or who declines to represent him; the inability to insist upon the representation of a lawyer who had a previous relationship with an opposing party; and the inability to insist upon representation by an attorney who has a conflict of interest, as where the attorney represents multiple defendants. The Court rejected the view that the Sixth Amendment presumption of counsel of choice compels the acceptance of a defendant's knowing waiver of his lawyer's conflict of interest. It stated:
[N]o such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.... Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.
Id. at 160, 108 S.Ct. at 1697–98.
Justice Marshall, in his dissent, echoed that view in observing that:
The right to counsel of choice, as the Court notes, is not absolute. *When a defendant's selection of counsel, under the particular facts and circumstances of a case, gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice.*
Id. at 166, 108 S.Ct. at 1700 (emphasis added).
In speaking of "the institutional interest in the rendition of just verdicts" and of "gravely imperil[ing] the prospect of a fair trial" there can surely be no disagreement that the government, no less than the defendant, is entitled to a just verdict and a fair trial.

Before turning to the application of the principles reviewed to the facts underlying this motion, I feel constrained to make reference to one further observation made by the court in *United States v. Dolan,* 570 F.2d 1177, 1184 (3rd Cir.1978), which the Court in *Wheat* quoted approvingly:

"[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 defendants' comprehension of the waiver." *United States v. Wheat,* 486 U.S. at 162, 108 S.Ct. at 1698–99 (emphasis added).

A. *The Role of Attorneys as House Counsel*

The significance of the government's assertion of this basis for disqualifying counsel is inexorably tied to Count One of the indictment, which charges the defendants with unlawfully conducting the affairs of an enterprise through a pattern of racketeering activity. In a leading and oft-cited case, the Supreme Court defined an "enterprise" for purposes of the RICO statute as "an entity ... [or] group of persons associated together for a common purpose of engaging in a course of conduct" which is unlawful, and went on to hold that an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981).

Excerpts of tape recorded conversations which have been set out above may leave a jury with little doubt that Gotti paid significant sums of money for legal services rendered to others. He is heard to say that he paid "thousands of dollars to Pollok that was not for" him; that he paid the attorneys for prosecuting the appeals of Joe Gallo, Joe Piney and John Carneglia; that he gave the lawyers $300,000 in one year to defend cases in which he wasn't even mentioned. Evidence of these "benefactor payments" are relevant to prove a relationship between the benefactor and his beneficiaries and "highly relevant to whether the benefactor is the head of a criminal enterprise as defined by the RICO statute." *United States v. Simmons,* 923 F.2d 934, 949 (2d Cir.1991); *In re Grand Jury Subpoena Served Upon John Doe,* 781 F.2d 238, 251 (2d Cir.) (en banc) ("Moreover, payment for legal representation may be a form of compensation to members of a crime 'crew'."), *cert. denied,* 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986).

In an insightful footnote, an en banc court in *In re Grand Jury Subpoena Served Upon John Doe* made this observation:

If in fact Slotnick accepted benefactor payments, he should have heeded the warning of the Model Code of Professional Responsibility against accepting payment of clients' fees from a third party. DR 5–107(A), EC 5–21, 5–22. Accepting payment of clients' fees from a third party may subject an attorney to undesirable outside influence, *particularly where the attorney is representing clients in criminal matters,* Model Rules of Professional Conduct, Rule 1.7, *and the third party is the head of a criminal enterprise of which the clients are members.* In such a situation, an ethical question arises as to whether the attorney's loyalties are with the client or the payor. *See* Judd, *Conflicts of Interest—A Trial Judge's Notes,* 44 Fordham L.Rev. 1097, 1099–1101, 1105 n. 41 (1976).

781 F.2d 238, 248 n. 6 (emphasis added).

The evidence the government proffers and which is reflected in the excerpted conversations may leave the jury with little doubt about the roles of Shargel, Cutler and Pollok as house counsel, which, in turn, will materially aid in establishing the existence of an enterprise.

The significance of the foregoing for this motion to disqualify counsel speedily becomes apparent when examined in the revealing light of precedent. *United States v. Castellano,* 610 F.Supp. 1151 (S.D.N.Y.1985) is particularly relevant. In that case the government moved to disqualify Shargel from representing Richard Mastrangelo based upon Shargel's receipt of benefactor payments from Roy DeMeo on behalf of members of DeMeo's crew. The court, after a hearing, determined that the government "presented a substantial case for using Shargel's activities and practices as an attorney to help establish the existence of a relationship among several of the defendants suggestive of an organized crime 'enterprise' under the Racketeer Influenced and Corrupt Organizations Act ('RICO')." *Id.* at 1153. The court then went on to note that:

Shargel concedes that if the government is permitted to present this theory to the jury then "obviously I have no place represent[ing] Mastrangelo." Transcript of Pre–Hearing Conference at 22 (Mar. 1, 1985).

I have examined the transcript of that conference and, in the interest of complete accuracy, that transcript reads as follows, at page 22, lines 5–7:

Obviously, if the government wants to go to trial with a claim that I am a coconspirator, an agent, obviously I have no place represent (sic) Mr. Mastrangelo. That is clear.

The proof of Shargel's receipt of benefactor payments is considerably stronger in this case than it was in *Castellano,* given the explicit acknowledgement of such payments by Gotti. In *Castellano,* not only did Shargel deny receiving such payments but the court disqualified him based upon the observation that:

"If the jury believes Witness A, they might conclude that Shargel's activities were probative of the existence of an enterprise in which DeMeo, and other crew leaders treated attorneys' fees as a cost of doing business, and as a means for selecting attorneys who would function with the crew's interest in mind."

Id. at 1159. Here, the words of the benefactor speak for

themselves.
Reference was previously made to twenty cases in which the attorneys represented persons the government claims are or were associated with these defendants in the Gambino Organized Crime Family. That reference was not gratuitous. I am aware of the observation in *United States v. Simmons,* 923 F.2d 934, 949 (2d Cir.1991) that "the fact that a lawyer has multiple clients in no way implies a connection between them." The court quickly added that: "This observation, however, was made under circumstances in which there was no other evidence of a criminal association between the attorney's clients. We specifically noted that had appellants consulted with an attorney as a *group* rather than as *individuals,* the evidence would have been probative of concerted activity among the several clients."
In his brief in opposition to this motion Shargel inexplicably argues that "No evidence has been presented to this Court that Gerald Shargel, ... made any 'benefactor payments' or engaged in conduct that can be labeled illegal or unethical." (Shargel's Memorandum in Opposition ("Shargel Mem.") at 13). The significance of those payments is derived from their payment by the benefactor (Gotti) on behalf of others, not by Shargel to others. But even as to that, in an excerpt from a conversation between Gotti, Gravano and Locascio on January 4, 1990 Gotti speaks of payments of $5,000 per week to Edwin Schulman, who assisted Shargel and Cutler in their representation of John Carneglia and Michael Coiro, respectively. (Shargel Mem. at 14). As to the receipt of benefactor payments being unethical, *see In re Grand Jury Subpeona served upon John Doe,* 781 F.2d at 248 n. 6, quoted *supra.*
That benefactor payments have indeed been made to Shargel, Cutler and Pollok is a conclusion the jury can readily and justifiably reach. Reference has already been made to the government's representation that Michael Coiro will testify that he paid nothing to Shargel or Cutler for their services to him. Pertinent in this connection is this observation in *Castellano:*
The jury might also wonder why Shargel performed services for several alleged crew members without compensation, as he testified. They might view his explanation as a device for masking the fact that his principal clients—the crew leaders—paid him enough to cover all his assigned activities.
Id. at 1161.
The pernicious effect of benefactor payments upon the "institutional interest in the rendition of just verdicts in criminal cases" and the extent to which they "gravely imperil the prospect of a fair trial" was recognized by Justice Powell in *Wood v. Georgia,* 450 U.S. 261, 268–69, 101 S.Ct. 1097, 1102, 67 L.Ed.2d 220 (1981) in these words:
Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise.
Judge Sofaer captured the essence of the problem in *Castellano:* "Benefactor payments potentially strike at the heart of the attorney-client relationship and thus at the heart of the adversarial process." *United States v. Castellano,* 610 F.Supp. at 1164.
I will now address the impact DR 5–102 of the Code of Professional Responsibility on this motion to disqualify counsel. That disciplinary rule provides:
DR 5–102. Withdrawal as Counsel When the Lawyer Becomes a Witness
(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5–101(B)(1) through (4).
(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to this client.
The Code of Professional Responsibility "although lacking the force of legislation, provides guidance on issues of professional conduct." *United States v. Wallert,* 733 F.Supp. 570, 572 (E.D.N.Y.1990) (DR 5–102(B) provided a basis for disqualifying counsel).
Shargel asserts in his Memorandum in Opposition at page 6 that "the prosecutor has 'no present intention' of calling any of the attorneys, who are the subject of this application, as witnesses for the government." Putting aside for the moment the government's Reply Memorandum in Support of its Motion at page 3, n. 3 in which it says "The likelihood that Shargel will be a government witness has increased significantly since our motion was filed." (*Cf.* Gov't Mem. at 64), whether the government will or will not call Shargel or Cutler or Pollok has no significance for this motion. Shargel should surely know, in view of the holding in *Castellano,* that:
In the light of the government's claims regarding Shargel's involvement, *even if the government were to decline to call Shargel,* he ought to be called as a defense witness to controvert Witness A's testimony about benefactor payments....
United States v. Castellano, 610 F.Supp. at 1161.
I wish to make it clear that although the quotations from *Castellano* make reference to Shargel, for purposes of this decision they are deemed to have the same force and effect as to Cutler, Pollok and Shargel.
United States v. Melo, 702 F.Supp. 939, 943 (D.Mass.1988) bears resemblance to this case in some respects. In disqualifying counsel, the court said:
In this case, Weiner's mere presence as counsel at trial may create an appearance of impropriety because the

government will no doubt refer to the tape recorded conversations, and introduce Wall's records as evidence of the alleged conspiracy to provide attorneys' fees and support for members of the organization who face criminal proceedings.

The government does not allege that the attorneys acted improperly. The government does allege, however, that Acquilino Melo was using the attorney to take actions that served the conspiracy—the provision of legal services to co-conspirators who were apprehended and charged.... In these circumstances, if Weiner is identified in the evidence as the attorney referred to in Wall's records and in the taperecorded conversations, any argument made by Weiner to the jury in this trial concerning the defendants' participation in the alleged scheme to provide attorneys fees to persons within the organization accused of a crime would be problematic in that Weiner would be implicitly arguing as an "unsworn witness" for the propriety of his own conduct as well as explicitly arguing that the government had failed to prove the elements of the crimes charged against his client.

And in *United States v. Castellano, supra,* the court concluded that Shargel's appearance at counsel table would itself engender a distortion of the factfinding process. *Id.* at 1167. So too would the appearance at counsel table of Cutler and Pollok. *See also United States v. Wallert, supra,* at 573 ("In any event, almost inevitably Wall would be considered an unsworn witness.").

Cutler, Shargel and Pollok assure the court in their respective memoranda that their clients will waive any conflicts of interest or other infirmities which may afflict their lawyers. Reference has already been made to the teaching of *Wheat* that a flat rule that waiver can cure any problem of representation cannot be deduced from the Sixth Amendment presumption in favor of counsel of choice. *United States v. Wheat,* 486 U.S. at 160, 108 S.Ct. at 1697. Moreover, "waiver would hardly ensure that the trial could be 'conducted within the ethical standards of the profession' and 'appear fair to all who observe them.' " *United States v. Wallert,* 733 F.Supp. at 574; *accord United States v. Melo,* 702 F.Supp. at 943.

B. *Defense Attorneys' Representation of Government Witnesses*

The disqualification of Cutler, Shargel and Pollok is also dictated by the fact that their continued participation is instinct with a conflict of interest. Shargel and Cutler previously represented Michael Coiro and Pollok previously represented Anthony Gurino. Coiro and Gurino will be government witnesses at trial.

The issue thus presented was before the Court in *United States v. Iorizzo,* 786 F.2d 52 (2d Cir.1986). In that case, one Tietz testified under oath at a hearing before the State Tax Commission. He was represented by a lawyer paid for by Iorizzo and who thereafter represented Iorizzo at the trial which is the subject of this appeal. The government's key witness at that trial was Tietz. Following his conviction, Iorizzo argued on appeal that he did not have the assistance of conflict-free counsel. The court agreed and reversed his conviction.

In attempting to represent Iorizzo in this matter, trial counsel was confronted with an unavoidable conflict of interest.... Because Tietz's prior statements had been made at a time when defense counsel was representing him, the prior testimony could not be used to attack Tietz's credibility without putting defense counsel's role before the State Tax Commission in issue. Any such attempt would open the way for Tietz to be asked on redirect about his legal representation at the State Tax Commission hearing and about any advice he had received from defense counsel at that time.... Finally, whether or not he [trial counsel] actually testified, *his firsthand involvement in Tietz's testimony would cause any argument to the jury about that testimony to be as a statement of a witness as well as of an advocate. Our prior decisions indicate that such circumstances constitute a disqualifying conflict under Disciplinary Rule 5–102(A). United States v. McKeon,* 738 F.2d 26, 34–35 (2d Cir.1984).

Id. at 57 (emphasis added).

It is particularly significant to take note of the Court's unequivocal position in this regard as expressed in *McKeon,* 738 F.2d at 35:

Although we have adopted a "restrained approach" with respect to disqualification of counsel ... disqualification *will* occur where the presence of counsel will taint the trial.... *Such a taint occurs where counsel assumes a role as an unsworn witness whose credibility is in issue.* (Emphasis added and citations omitted).

The presumption of a right to counsel of choice is yet again overcome by a clear "demonstration of actual conflict" or at the very least, by a clear demonstration "of a serious potential for conflict." *United States v. Wheat,* 486 U.S. at 164, 108 S.Ct. at 1700.

The defendants Gotti, Gravano and Gambino rely upon *United States v. Cunningham,* 672 F.2d 1064 (2d Cir.1982) as authority for denying the government's motion to disqualify their attorneys Cutler, Shargel and Pollok. In *Cunningham,* the government moved to disqualify Michael Tigar, Esq. from representing the defendant Cunningham based upon Tigar's prior representation of John Spain whom the government proposed to call as a witness at Cunningham's trial. Tigar stated that "his meetings with Spain were limited in number, duration and scope, and he represented that he had learned no facts from Spain that Spain had not thereafter revealed on the record during his trial. Tigar represented that he would not exploit any information as to which Spain had a valid and existing attorney-client privilege." *Id.* at 1068. Spain was not represented by Tigar at his trial for perjury. The relationship between Tigar and Cunningham extended over a period of six years during which Tigar had successfully defended Cunningham on five occasions and was thoroughly familiar with the details of the government's case against Cunningham. The court reversed the district court's order of disqualification holding that, balancing Cunningham's right

to counsel of his choice against the government's interest in disqualifying Tigar, disqualification was not warranted. The disqualification of Tigar in *Cunningham* is readily distinguishable. Given the limited relationship which Tigar said he had with Spain, the court concluded that "[t]he government's interest in disqualifying Tigar ... is relatively weak." *Id.* at 1071. That is clearly not the case here.
The relationship between Coiro and Shargel and Cutler is considerably more extensive and the government's interest in disqualifying them is quite strong. And although there is a similarity between that case and this one regarding the nature and duration of the attorney-client relationships between Tigar and Cunningham and Gotti and Cutler and Gravano and Shargel, *Cunningham* cannot be read to decide that the duration of a lawyer's relationship with his client gives him a prescriptive right to ignore the Canons of Professional Responsibility or give him a prescriptive right to subvert the institutional interest in fair trials and just verdicts. *See United States v. Arrington,* 867 F.2d 122, 128 (2d Cir.1989) ("Moreover, conditioning the admissibility of a statement by counsel on the defendant's interest in retaining counsel would produce the anomalous result of admitting statements made by a co-conspirator who had recently become defendant's counsel, but not admitting the statements if the co-conspirator had long been defendant's counsel.").
The *Cunningham* case is far more relevant to this one insofar as it addresses the disqualification of Kennedy, the defense attorney for Sweeney, who was Cunningham's partner. Sweeney and Cunningham were charged with conspiracy to obstruct the perjury trial of Spain by fabricating and then destroying evidence. Ms. McCreery, a receptionist in their office, was expected to testify for the government to a conversation she had had with Kennedy in which Kennedy's statements could be construed to support the charges against Cunningham and Sweeney. It was thus clear that Kennedy *ought* to be a rebutting witness to deny the conversation or to furnish an innocent explanation. The court concluded that Kennedy could offer neither the denial nor an explanation
[w]ithout implicitly testifying as an unsworn witness. Since as an unsworn witness, he would not be subject to crossexamination
or explicit impeachment, the interest sought to be protected by the Disciplinary Rules would be even more seriously eroded than if Kennedy appeared as a sworn witness. We therefore conclude, in balancing Sweeney's interest in retaining counsel of his own choice against that of the government in disqualifying Kennedy as trial counsel, that the disqualification of Kennedy must stand—assuming that McCreery's testimony is admissible.
Id. at 1075.
The recorded conversations in which it was suggested by Shargel, Cutler and Rosen that Thomas Gambino plead guilty to avoid the necessity of Gotti and others risking contempt by refusing to testify pursuant to a trial subpoena would be admissible on Count Twelve of the superseding indictment, charging Gotti with obstructing justice in the Gambino trial. The analogy between the Kennedy–McCreery conversation and those in this case is complete and requires the same result. It is also important to note that *Cunningham* was decided six years prior to *Wheat* and its continued viability is questionable. In *United States ex rel. Stewart v. Kelly,* 870 F.2d 854 (2d Cir.1989), the defendant claimed a denial of his Sixth Amendment right to counsel by the disqualification of counsel of his choice when it became known that he previously represented a key prosecution witness. The defendant desired to be represented by that attorney notwithstanding the conflict of interest. On appeal, the defendant placed principal reliance upon *Cunningham.* The court held that the trial judge has broad discretion in balancing the competing interest of the right to counsel and the right to a fair trial. In addressing the defendant's right to waive that conflict, a right which was recognized in *Cunningham,* the court said that it is not clear that "*Cunningham* retains any force in light of the subsequent holding in *Wheat. Cf. Arrington,* 867 F.2d at 128–29 (affirming district court's disqualification of defendant's attorney despite defendant's consent to representation.)" *Id.* at 857. *See also United States v. Reeves,* 892 F.2d 1223, 1227 (5th Cir.1990); *United States v. O'Malley,* 786 F.2d 786 (7th Cir.1986); *United States v. Defazio,* 899 F.2d 626 (7th Cir.1990); *United States v. Falzone,* 766 F.Supp. 1265 (W.D.N.Y.1991).
The disqualification of Shargel and Cutler is also required because of their participation in the events underlying the obstruction of justice count discussed above. It is difficult to comprehend how Shargel and Cutler could present a defense against this charge without becoming unsworn witnesses.
C. *The Receipt of Income by Gotti and the Attorneys*
[8] Set out above were excerpts in which Gotti is heard to say that he gave the lawyers $300,000 in one year and that they were taking money under the table. That statement is relevant and admissible in the government's case on Count Thirteen of the superseding indictment, conspiracy to defraud the United States in relation to the collection of taxes. Those statements require disqualification for two reasons. First, Shargel contends that Gotti's statement is merely theoretical or speculative. (Shargel Mem. at 35.) Cutler contends the statement to be of "dubious reliability." (Cutler Mem. at 7.) Those are arguments which they cannot make to a jury without becoming unsworn witnesses who implicitly testify to their version of the statement. *See United States v. Cunningham,* 672 F.2d at 1074. Disqualification is also required because a jury might well conclude from those statements that the lawyers aided and abetted Gotti's tax fraud by not reporting the moneys he pays them. The clear implication that they, too, were committing crimes—"Every time you take a client, another one of us on, you're breaking the law"—gives rise to the type of conflict of interest recognized in *United States v. Cancilla,* 725 F.2d 867 (2d Cir.1984), or at the very least, gives rise to a serious potential for conflict which justifies disqualification. *Wheat*

v. United States, 486 U.S. at 164, 108 S.Ct. at 1699.
I have balanced the defendants' Sixth Amendment right to counsel of their choice against the grave peril the continued representation by those counsel poses to the integrity of the trial process. Having done so, I am driven to conclude that the scales weigh heavily in favor of the integrity of the trial process.
I shall not discuss the many other grounds which virtually mandate disqualification for which the government has made a substantial showing in its Memorandum and Reply Memorandum. Those that I have discussed I believe to be sufficient to compel that result.
I have considered the possibilities of less drastic alternatives and have concluded that there are none that are viable. The extensive redactions which the defendants propose would not only emasculate the intercepted conversations but would deprive the government of its right to present its case as it deems best as well as deprive it of the right to present evidence which is relevant and admissible. The conflicts of interest and other grounds for disqualification are, in my view, so egregious that waivers cannot be accepted without seriously and adversely affecting the independent interest of the federal courts in ensuring that "criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160, 108 S.Ct. at 1697.
In arriving at my decision to disqualify counsel, I was mindful of the concern expressed by Justice Marshall in his dissent in *Wheat* "that a trial court may not reject a defendant's chosen counsel on the ground of a *potential* conflict of interest absent a showing that both the likelihood and the dimensions of the feared conflict are substantial." *Id.* at 166, 108 S.Ct. at 1700–01 (emphasis added). He also expressed the view that the "trial court that rejects a criminal defendant's chosen counsel on the ground of a *potential* conflict should make findings...." *Id.* at 168, 108 S.Ct. at 1701 (emphasis added). Although his concerns are addressed to *potential* conflicts, I have endeavored to address them notwithstanding my firm belief that the conflicts here are actual and not potential. I am satisfied that the government has made a substantial showing which is reflected in my findings.
On page 2 of his Memorandum of Law, Pollok indicates that he will not deliver an opening statement, cross-examine witnesses, present evidence on behalf of the defense, nor will he sum up, and therefore asserts his right to continue as counsel. He further contends that his limited role as counsel to Gambino does not require his presence at counsel table nor does it require that he be introduced to the jury. He may, therefore, "participate in all aspects of the defense except the actual trial" and "may ... be present in the courtroom so long as he does not appear as counsel and is not situated at the counsel table." *United States v. Cunningham,* 672 F.2d at 1074.
Intercepted conversations to which reference has previously been made indicate that Michael Rosen was a party to the plan that Gambino plead guilty, which is the basis for the obstruction of justice charge in Count Twelve and Racketeering Act Thirteen of the superseding indictment. Because Gambino is not named in either, Rosen need not become an unsworn witness by addressing the jury or by cross-examining witnesses with respect to the events surrounding the formulation and discussion of that plan. His exclusion from the trial is, therefore, not required on condition that he abides by this limitation.
Many of the issues raised by this motion were thoroughly considered and eloquently discussed by Judge Sofaer in *United States v. Castellano,* 610 F.Supp. 1151, 1166–67 (S.D.N.Y.1985). His observations are peculiarly appropriate here and bear repeating:
Whatever the reality of [the attorney's] practice ... his conduct makes clear that his disqualification will not deter appropriate attorney behavior. The evidence presented ... creates an appearance that enables the government to argue that he is an attorney who serves and has an intimate connection with a criminal enterprise. This appearance of impropriety reflects conduct that should be discouraged, both because it is inherently unethical and because it poses a significant danger to defendants at a trial in which one of the contested issues will be the existence of a criminal enterprise.... Permitting attorneys to act ..., by precluding the government from calling them as witnesses or presenting evidence about their actions, would ill serve the goals of ethical and effective representation, as well [as those] of the full and fair enforcement of substantive criminal law.
Counsel, in opposition to this motion and with a singular voice, express the fear that disqualification will have a chilling effect on vigorous advocacy and that criminal defendants will be at the mercy of the prosecutor as regards their right to counsel of choice. I am neither persuaded nor impressed by their "forensic forebodings of indeterminate future disaster," confident in the conviction that judges will, when required, safeguard that precious right. I am equally confident that judges will not be deterred from discharging their responsibility to ensure that "criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." It is in the discharge of that responsibility that I grant the government's motion. The defendants will appear before me at 9:30 A.M. on August 7, 1991 with new trial counsel and for such other purposes as may be required.
SO ORDERED.

Footnotes

1 "****" indicates expletive deleted.

2 *U.S. v. Ruggiero, et al.,* 83 CR 412 (E.D.N.Y.) (Michael Coiro represented by Shargel, Cutler); *Grand Jury* (this case, Michael Coiro represented by Shargel); *U.S. v. Ruggiero, et al.,* (John Carneglia represented by Shargel, Pollok); *U.S. v. Ruggiero, et al.,* 83 CR 412 (E.D.N.Y.) (Angelo Ruggiero represented by Pollok); *U.S. v. Gallo, et al.,* (Angelo Ruggiero represented by Pollok); *People v. Gotti,* No. 358/89 (N.Y. County) (Angelo Ruggiero represented by Shargel); *U.S.*

v. Gallo, et al., 86 CR 452 (E.D.N.Y.) (John Corrao represented by Shargel); *U.S. v. Russo, et al.*, 906 F.2d 77 (2d Cir.1990) (John Corrao represented by Shargel); *U.S. v. Gambino, et al.*, 89 CR 431 (E.D.N.Y.) (John Corrao represented
by Shargel); *U.S. v. Gallo, et al.*, 86 CR 452 (E.D.N.Y.) (Joseph N. Gallo represented by Pollok); *U.S. v. Gallo, et al.*, 86 CR 452 (E.D.N.Y.) (Joseph Armone represented by Pollok); *People v. Gotti, et al.*, No. 358/89 (N.Y. County) (Anthony Guerrieri represented by Shargel); *U.S. v. Gambino, et al.*, 89 CR 431 (E.D.N.Y.) (George Remini represented by Shargel); *U.S. v. Remini*, 90 CR 964 (E.D.N.Y.) (George Remini represented by Pollok); *Grand Jury* (this case) (Salvatore Gravano represented by Shargel); *U.S. v. Gravano*, 85 CR 271 (E.D.N.Y.) (Salvatore Gravano represented by Shargel); *U.S. v. Squitieri, et ano.*, 87 CR 198 (D.N.J.) (Arnold Squitieri represented by Shargel); *U.S. v. Squitieri, et ano.*, 87 CR 198 (D.N.J.) (Alphonse Sisca represented by Pollok); *U.S. v. Ruggerio, et al.*, 83 CR 412 (E.D.N.Y.) (Anthony Gurino represented by Pollok); *Grand Jury* (this case) (Anthony Gurino represented by Pollok); *U.S. v. Gigante, et al.*, 90 CR 446 (E.D.N.Y.) (Peter Gotti represented by Cutler); *U.S. v. Gambino, et al.*, 88 CR 919 (S.D.N.Y.) (John Gambino represented by Pollok); *U.S. v. Gambino, et al.*, 88 CR 919 (S.D.N.Y.); (Joseph Gambino represented by Cutler, Pollok); *U.S. v. Gambino, et al.*, 88 CR 919 (S.D.N.Y.) (Matteo Romano represented by Shargel); *U.S. v. Dellacroce, et al.*, 85 CR 178 (E.D.N.Y.) (Armand Dellacroce represented by Shargel); *U.S. v. Dellacroce, et al.*, 85 CR 178 (E.D.N.Y.) (Charles Carneglia represented by Shargel); *U.S. v. Coonan*, 87 CR 247 (S.D.N.Y.) (James Coonan represented by Shargel); *U.S. v. Gravano*, 88 CR 271 (E.D.N.Y.) (Edward Garafola represented by Pollok).

UNITED STATES of America, Appellee,

v.

Frank LOCASCIO, and John Gotti, Defendants-Appellants.

Nos. 817, 931, 1305 and 1782, Dockets 92-1382, 92-1384, 92-1671 and 93-1181.

United States Court of Appeals, Second Circuit.

Argued June 17, 1993.

Decided Oct. 8, 1993.

John Gleeson, James Orenstein, Asst. U.S. Attys., New York City (Mary Jo White, U.S. Atty., E.D.N.Y., New York City, David C. James, Asst. U.S. Atty., E.D.N.Y., New York City, of counsel), for appellee.

Charles Ogletree, Boston, MA (Ephraim Margolin, Margolin, Arguimbau & Battson, San Francisco, CA, of counsel), for defendant-appellant John Gotti.

Michael E. Tigar, Austin, TX (Dennis P. Riordan, Riordan & Rosenthal, San Francisco, CA, Michael Kennedy, Michael Kennedy, P.C., New York City, of counsel), for defendant-appellant Frank Locascio.

Before: KEARSE, MINER, and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

Defendants-appellants John Gotti and Frank Locascio appeal from judgments of conviction entered on June 23, 1992 in the United States District Court for the Eastern District of New York (Glasser, *J.*). They also appeal from the district court's October 30, 1992 order denying their motion for a new trial and a subsequent denial of a renewed motion for a new trial.

Gotti and Locascio were convicted after a jury trial of substantive and conspiracy violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962(c) and (d) (1988), and various predicate acts charged as separate counts. They were each principally sentenced to life imprisonment. The charges stemmed from their involvement with the Gambino Crime Family of La Cosa Nostra, an extensive criminal organization.

On appeal, Gotti and Locascio raise numerous challenges to their convictions and the subsequent denial of their motion for a new trial. For the reasons stated below, we affirm the judgments of the district court.

On July 18, 1991, a grand jury in the Eastern District of New York returned a thirteen count superseding indictment against Gotti and Locascio. The indictment also named two other defendants, Salvatore Gravano and Thomas Gambino, who are not parties to this appeal. All four defendants were charged with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c)-(d) (1988), for unlawfully conducting and participating in the affairs of a criminal enterprise through a pattern of racketeering activity. The charged enterprise was the Gambino Organized Crime Family of La Cosa Nostra ("the Gambinos," "The Gambino Family," or "the Gambino Crime Family"). Gotti was charged as the head of the organization, and Locascio was accused of being the "underboss," or second-in-command.

Gravano was charged as the "consigliere," or advisor, to Gotti. Following the indictment, Gravano pleaded guilty to a superseding racketeering charge and testified at length at trial against Gotti and Locascio. The charges against Gambino, a "captain" in the organization, were severed.

Counts One and Two of the indictment charged Gotti and Locascio with the substantive and conspiracy violations of RICO. Many of the crimes charged as racketeering acts in the RICO counts were also the basis of separate counts in the indictment. Gotti was charged with the following predicate acts: the conspiracy to murder and the murder of Paul Castellano; the murder of Thomas Bilotti; the conspiracy to murder and the murder of Robert DiBernardo; the conspiracy to murder and the murder of Liborio Milito; and obstruction of justice at the Thomas Gambino trial. Gotti and Locascio were both charged with the following predicate acts: the conspiracy to murder and the murder of Louis DiBono; the conspiracy to murder Gaetano Vastola; conducting an illegal gambling business in Queens, New York; conducting an illegal gambling business in Connecticut; conspiracy to make extortionate extensions of credit; and obstruction of justice in the investigation of the Castellano murder. Gotti and Locascio were also

charged in separate counts for a conspiracy to obstruct grand jury investigations, bribery of a public servant, and a conspiracy to defraud the United States.

Gotti and Locascio were tried before a sequestered anonymous jury in the United States District Court for the Eastern District of New York (Glasser, *J.*). Prior to trial, there were numerous government and defense motions, most of which need not be recounted at length. The motions that are the subject of this appeal included: the government's successful motion to sequester an anonymous jury; the government's successful motion to disqualify counsel for both Gotti and Locascio for various conflicts of interest; and Locascio's unsuccessful motion to sever his trial from Gotti's.

Trial began in February 1992. The government's proof to support the allegations that Gotti and Locascio had been in command of an extensive criminal enterprise was comprised mostly of lawfully intercepted tape-recorded conversations of the defendants-appellants and other alleged members of the Gambino Family. The government introduced tape recordings from four different locations over an eight-year period.

The most significant evidence consisted of conversations intercepted at 247 Mulberry Street in New York during the period from late 1989 until early 1990. The government had installed three listening devices in that building: in the Ravenite Social Club on the first floor, in a hallway behind the club's rear door, and in an apartment two stories above the club ("the Ravenite Apartment"). It was this last location that proved the most fruitful for the government, and the most damaging for the defendants-appellants. In the discussions in the Ravenite Apartment, Gotti, Locascio, and other Gambino Family members discussed various illegal acts. These discussions formed the core of the proof against the defendants-appellants at trial. Another major source of evidence was the testimony of Salvatore Gravano, who cooperated with the government following the indictment. As a high-level insider in the Gambino Family, Gravano's testimony was especially damaging.

The tape recordings, combined with Gravano's testimony, presented to the jury a picture of a large-scale enterprise involved in various criminal activities. The jury heard evidence on the structure and inner workings of the Gambino Family, and learned of the miscellaneous crimes with which Gotti and Locascio were charged: murders, obstruction of legal proceedings, conspiracies, gambling operations, and loansharking activities. It is unnecessary to recount the evidence in detail at this point, since much of it is unnecessary for full understanding of the issues on appeal.

Following a six-week trial, the jury found Gotti guilty of all charges in the indictment. Locascio was found guilty of all charges except the count relating to a gambling operation in Queens, New York. Each defendant-appellant was sentenced by the district court to life in prison on the RICO and murder counts, and the statutory maximum prison terms on all remaining counts, with all sentences to run concurrently. The court also imposed five years of supervised release, a $250,000 fine on each defendant, and mandatory special assessments.

Several months after sentencing, government attorneys discovered previously undiscovered reports that potentially pertained to Gravano's credibility. The government turned over those reports to the defendants-appellants, who subsequently moved for a new trial pursuant to Fed.R.Crim.P. 33, on the ground that the government had not disclosed relevant evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This motion and a later renewed motion were both denied by the district court.

On appeal, Gotti and Locascio raise myriad challenges to their convictions and to the subsequent denial of their new trial motions. They contend that the district court erred in: (1) disqualifying counsel for both Gotti and Locascio for conflicts of interest; (2) allowing certain government expert testimony; (3) instructing the jury; (4) allowing evidence of other crimes that were inadmissible against them; (5) impanelling an anonymous sequestered jury; (6) refusing to sever Locascio's trial; and (7) denying a motion for a new

trial based on the government's suppression of material relating to Gravano's credibility. The defendants-appellants also argue that they were denied a fair trial based on the government's suppression of exculpatory evidence and prosecutorial misconduct.

For the following reasons, we affirm the judgment of the district court.

I. *Disqualification of Counsel*

Prior to trial, the district court disqualified attorneys for both Gotti and Locascio. Gotti and Locascio now contend that these disqualifications were unwarranted and violated their Sixth Amendment rights.

A. *Applicable Law*

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The accused, however, does not have the absolute right to counsel of her own choosing. *See Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). As the Court stated in *Wheat,*

> while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Id. Similarly, although a criminal defendant can waive her Sixth Amendment rights in some circumstances, that right to waiver is not absolute, since "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160, 108 S.Ct. at 1698. The question of disqualification therefore implicates not only the Sixth Amendment right of the accused, but also the interests of the courts in preserving the integrity of the process and the government's interests in ensuring a just verdict and a fair trial. *See id.*

In deciding a motion for disqualification, the district court recognizes a presumption in favor of the accused's chosen counsel, although this presumption can be overcome by a showing of an actual conflict or potentially serious conflict. *See id.* at 164, 108 S.Ct. at 1699; *United States ex rel. Stewart v. Kelly,* 870 F.2d 854, 856 (2d Cir. 1989). We accord the district court's decision to disqualify an attorney "substantial latitude," and review the decision only for an abuse of discretion. *Wheat,* 486 U.S. at 163–64, 108 S.Ct. at 1699.

There are many situations in which a district court can determine that disqualification of counsel is necessary. The most typical is where the district court finds a potential or actual conflict in the chosen attorney's representation of the accused, either in a multiple representation situation, *see Wheat,* 486 U.S. at 159–60, 108 S.Ct. at 1697–98; *United States v. DiTommaso,* 817 F.2d 201, 219 (2d Cir.1987); *United States v. Curcio,* 680 F.2d 881, 886 (2d Cir.1982), or because of the counsel's prior representation of a witness or co-defendant, *see Stewart,* 870 F.2d at 856–57. Courts have also considered disqualification where the chosen counsel is implicated in the allegations against the accused and could become an unsworn witness for the accused, *see United States v. Arrington,* 867 F.2d 122, 129 (2d Cir.), *cert. denied,* 493 U.S. 817, 110 S.Ct. 70, 107 L.Ed.2d 37 (1989); *United States v. Kwang Fu Peng,* 766 F.2d 82, 87 (2d Cir.1985), or where the chosen counsel is somehow unable to serve without unreasonable delay or inconvenience in completing the trial, *see United States v. Scopo,* 861 F.2d 339, 344 (2d Cir.1988), *cert. denied,* 490 U.S. 1048, 109 S.Ct. 1957, 104 L.Ed.2d 426 (1989).

In this case, the government moved to disqualify attorneys for both Gotti and Locascio on multiple theories. We consider each of the defendants-appellants in turn.

B. *Gotti*

1. *Background*

Bruce Cutler served as Gotti's attorney in previous criminal trials in federal court. Prior to trial, the government moved to disquali-

fy Cutler from acting as Gotti's attorney. Although the motion also dealt with the disqualification of other Gotti attorneys, only the disqualification of Cutler has been challenged on appeal.

The district court granted the motion to disqualify on several grounds. *United States v. Gotti,* 771 F.Supp. 552 (E.D.N.Y.1991). Judge Glasser, in a thoughtful and well-reasoned opinion, found that Cutler had acted as "house counsel" to the Gambino Crime Family by receiving "benefactor payments" from Gotti to represent others in the criminal enterprise. *Id.* at 560. The district court based this conclusion on excerpts from the government's taped transcripts, which left "little doubt that Gotti paid significant sums of money for legal services rendered to others." *Id.*

The district court further determined that Cutler's participation in government-taped conversations at which illegal activity was discussed would impair his representation of Gotti. *Id.* at 562–63. Specifically, the court noted that Cutler's mere presence at trial could make him an "unsworn witness" before the jury in explaining his own conduct and interpreting Gotti's conversations on the tapes. *Id.* at 563. Even if Gotti waived the conflict, and even if the government did not intend to call Cutler as a witness, the district court found that Cutler's representation would still compromise the integrity of the proceeding. *Id.*

Third, the district court found that Cutler's prior representation of Michael Coiro, a potential government witness, gave rise to a conflict of interest. *Id.* The court reasoned that this conflict mandated disqualification both because Cutler was privy to events surrounding an obstruction charge, and because Cutler's cross examination of Coiro at trial would be circumscribed by the prior representation. *Id.* at 563–65.

Finally, the district court also found disqualification warranted because of the implication by Gotti in taped conversations that he had paid Cutler money "under the table." *Id.* at 565. This made Cutler a potential accomplice as well as a potential witness to Gotti's tax fraud.

In conclusion, the district court noted that it was mindful that disqualification is a drastic remedy for conflict problems, but that no less severe alternatives were viable. *Id.* at 566. The court therefore held that "the grave peril the continued representation by [Cutler] poses to the integrity of the trial process" mandated disqualification. *Id.*

Gotti now appeals the district court's ruling, arguing that the disqualification was an abuse of discretion. We disagree, and affirm the disqualification on two grounds: (1) Cutler's role as house counsel to the Gambino Crime Family; and (2) Cutler's anticipated role as an "unsworn witness" for Gotti had he been allowed to serve. We note that, importantly, Gotti does not challenge the effectiveness of his replacement trial counsel. Although the government cannot justify an otherwise unwarranted disqualification by arguing that the disqualification did not result in the accused receiving ineffective assistance of counsel, *see United States v. Diozzi,* 807 F.2d 10, 16 (1st Cir.1986), the fact that Gotti received more than competent representation is an additional consideration strongly supporting the district court's otherwise entirely correct ruling.

2. *Cutler's Role as House Counsel*

Gotti argues that the facts before the district court did not merit the conclusion that Cutler had acted as "house counsel" to the Gambino Crime Family. Rather, Gotti argues that Cutler was merely his personal attorney.

Ethical considerations warn against an attorney accepting fees from someone other than her client. As we stated in a different context, the acceptance of such "benefactor payments" "may subject an attorney to undesirable outside influence" and raises an ethical question "as to whether the attorney's loyalties are with the client or the payor." *In re Grand Jury Subpoena Served Upon John Doe,* 781 F.2d 238, 248 n. 6 (2d Cir. 1985) (*in banc*), *cert. denied,* 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986). In this context, proof of house counsel can be used by the government to help establish the existence of the criminal enterprise under RICO, by showing the connections among

the participants. *See United States v. Simmons,* 923 F.2d 934, 949 (2d Cir.) (holding that government can use evidence of benefactor payments to prove existence of enterprise), *cert. denied,* — U.S. —, 111 S.Ct. 2018, 114 L.Ed.2d 104 (1991); *United States v. Castellano,* 610 F.Supp. 1151 (S.D.N.Y. 1985) (disqualifying attorney because attorney's acceptance of benefactor payments could be used to prove existence of enterprise).

Contrary to Gotti's assertions, there was sufficient evidence for the district court to determine that Cutler had acted as house counsel to the Gambino Crime Family. For example, the court cited one conversation in which Gotti, in the time-honored tradition of legal clients, complained about his legal fees:

> I gave youse [sic] 300,000 in one year. Youse [sic] didn't defend me. I wasn't even mentioned in none of these [expletive deleted] things. I had nothing to do with none of these [expletive deleted] people. What the [expletive deleted] is your "beef?" ... Before youse [sic] made a court appearance, youse [sic] got 40,000, 30,000 and 25,000. That's without counting [attorney] John Pollok.... You standing there in the hallway with me last night, and you're plucking me.... "Tony Lee's" lawyer, but you're plucking me. I'm paying for it.... Where does it end? Gambino Crime Family? This is the Shargel, Cutler and who do you call it Crime Family.

771 F.Supp. at 555. Gotti thus demonstrated that he was incurring the legal fees for representation of others. As support for disqualification, the government indicated that it would introduce the testimony of Michael Coiro, who would testify that he had paid nothing to Cutler and another attorney for their services to him, presumably because Gotti paid for his defense.

Cutler's role as house counsel to the Gambinos raised a credible issue of the ethical propriety of his representation of Gotti in this case. An attorney cannot properly serve two masters, and the evidence before the district court indicated that Cutler had represented the Gambino Family as a whole. Moreover, Cutler's status as house counsel was potentially part of the proof of the Gambino criminal enterprise. We cannot say that the district court abused its discretion in disqualifying Cutler on this basis, considering the volume of proof of Cutler's proximity to the affairs of the Gambino Crime Family offered by the government in this case.

3. *Cutler's Role as an Unsworn Witness*

An even stronger basis for disqualification, however, was the possibility that Cutler would function in his representational capacity as an unsworn witness for Gotti. An attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, ethical codes may require him to withdraw his representation. *See* Model Code of Professional Responsibility DR 5-102(A) (1992).

Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. For example, the attorney may be constrained from making certain arguments on behalf of his client because of his own involvement, or may be tempted to minimize his own conduct at the expense of his client. Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross examination. *See United States v. McKeon,* 738 F.2d 26, 34-35 (2d Cir.1984) (requiring disqualification where attorney would be essentially acting as both an advocate and a witness); *United States v. Cunningham,* 672 F.2d 1064, 1075 (2d Cir.1982) (upholding disqualification where an attorney would act as an unsworn witness for defendant); *Castellano,* 610 F.Supp. at 1167 (finding that attorney's appearance at counsel table would itself distort the factfinding process).

This is different from the situation in *Wheat,* since the conflict in *Wheat*—multiple representation—was a conflict inuring to the detriment of the accused. In such a case, waiver by the accused of the conflict can

conceivably alleviate the constitutional defect, so long as the representation by counsel does not seriously compromise the integrity of the judicial process. When an attorney is an unsworn witness, however, the detriment is to the government, since the defendant gains an unfair advantage, and to the court, since the factfinding process is impaired. Waiver by the defendant is ineffective in curing the impropriety in such situations, since he is not the party prejudiced. *See Cunningham,* 672 F.2d at 1074–75.

The district court disqualified Cutler partially on the ground that his representation of Gotti would place him in the role of such an unsworn witness. The clearest support for this finding was Cutler's presence during the Ravenite Apartment discussions taped by the government. The government was legitimately concerned that, when Cutler argued before the jury for a particular interpretation of the tapes, his interpretation would be given added credibility due to his presence in the room when the statements were made. This would have given Gotti an unfair advantage, since Cutler would not have had to take an oath in presenting his interpretation, but could merely frame it in the form of legal argument.

■ Gotti argues, however, that the district court erred in disqualifying Cutler where the government had no intention of calling Cutler. He also maintains that Cutler's presence and participation on the government's tapes could have been redacted to eliminate references to and statements by Cutler, thereby eliminating the unsworn witness problem. The first contention is meritless, since the district court explicitly and correctly noted that "whether the government will or will not call ... Cutler ... has no significance for this motion." 771 F.Supp. at 562. The second contention is equally unavailing, since the district court explicitly found that redaction of the tapes would have eviscerated the government's case. We are not in a position to second-guess the district court's clearly supported factual findings on review. Moreover, we agree with the district court that the government's case should not be unfairly impaired so that an accused can continue with conflicted counsel.

The unsworn witness problem arises not only in relation to the Ravenite tapes, but to other grounds cited by the district court in support of disqualification. For example, the court found that Gotti's references to Cutler's acceptance of fees "under the table" were relevant to the government's case on the tax fraud count. Had Cutler argued Gotti's defense to that count, he would not only have had a conflict of interest but he would have been arguing as to events in which he was allegedly involved.

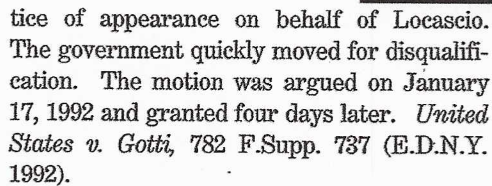
We are aware that disqualification is a drastic remedy to the unsworn witness problem. We are also, however, cognizant that this is an unusual case, in that Cutler had allegedly entangled himself to an extraordinary degree in the activities of the Gambino Crime Family: he is recorded on government tapes when discussions of allegedly illegal activity took place; he is allegedly involved in the tax fraud count against Gotti; his role as house counsel could be used to prove the criminal enterprise; and his representation of government witnesses caused a conflict with his representation of Gotti. Although we are cognizant of the right of the accused to secure representation, we are also conscious of the institutional interest in protecting the integrity of the judicial process. If an attorney will not perform his ethical duty, it is up to the courts to perform it for him. Bruce Cutler had no place representing John Gotti in this case, and the district court properly determined that he should be disqualified.

C. *Locascio*

Locascio challenges the district court's disqualification of attorney George Santangelo, arguing that the district court abused its discretion in disqualifying Santangelo. Santangelo was disqualified for much the same reasons as Cutler: (1) because Santangelo was house counsel to the Gambino Crime Family; and (2) because Santangelo could conceivably become an unsworn witness if he represented Locascio.

1. *Background*

On January 6, 1992, thirteen months after Locascio's indictment, Santangelo filed a no-



tice of appearance on behalf of Locascio. The government quickly moved for disqualification. The motion was argued on January 17, 1992 and granted four days later. *United States v. Gotti,* 782 F.Supp. 737 (E.D.N.Y. 1992).

The district court began by reviewing the evidence presented by the government that Santangelo was house counsel to the Gambino Family. The court noted that Gravano was expected to testify that, after arraignment, Gotti had stated to him that Gotti was going to assign Santangelo to represent either Gravano or Locascio. Gravano was also expected to testify that Gotti controlled the actions of attorneys answerable to him, in the interests not of the individual clients but of the Gambino Family. The court found that this testimony would support the inference that Santangelo was "answerable to Gotti," which was probative of the charged RICO enterprise. The court also reviewed intercepted conversations presented by the government that supported Gravano's allegations that Gotti controlled Santangelo. The district court concluded:

> Santangelo's relationship to Gotti and to Gotti's associates is properly the object of proof by the government in its case in chief. But, as with Cutler, ... Santangelo cannot present himself as counsel for the defendants when his relationship to those defendants is itself an issue under the consideration of the jury. His presence at counsel table could readily serve as a signal to the jury that the court discounts the government's proof on this point—that the court does not believe this evidence. Moreover, Santangelo could not argue against the existence of the charged RICO enterprise without becoming an unsworn witness.

Id. at 741.

2. *Discussion*

We have already discussed the applicable law on the issue of counsel disqualification. *See supra* § I.A. Locascio offers the same arguments that we rejected in our discussion of the disqualification of Bruce Cutler. Simply put, Locascio recharacterizes the record and disagrees that the government proffered evidence to the district court that merits disqualification of Santangelo.

As in our discussion of Cutler's disqualification, we review the district court's rulings only for an abuse of discretion. *Wheat,* 486 U.S. at 163–64, 108 S.Ct. at 1699; *Stewart,* 870 F.2d at 856. Here, the district court specifically found that Gravano's testimony and the intercepted conversations substantiated the argument that Santangelo was house counsel. This raised two serious conflicts of interest: first, that Santangelo's previous representations of Gambino Family members would be used to prove the existence of the enterprise; and second, that his loyalty to Locascio would be compromised by his relationship to Gotti. These findings were supported in the record, and Locascio's recharacterization of the record does not compel us to reverse them.

As discussed previously, Locascio's Sixth Amendment concerns are not the only interests at stake here: the district court has an independent duty to protect the integrity of the judicial process, and the government has its own fair trial interests that should not be unnecessarily impaired so that Locascio can enjoy the services of ethically compromised counsel. This is especially true in these circumstances, since Locascio suffered no prejudice from the disqualification of Santangelo. Although actual prejudice is not determinative of the propriety of a disqualification, it is worth noting that this is not a case where an attorney worked on a case for months only to be disqualified on the eve of trial. Santangelo filed his first notice of appearance on January 6, 1992, and was disqualified fifteen days later. Locascio cannot argue this disqualification impacted his ability to prepare for trial.

D. *Conclusion*

Although disqualification is a drastic measure, the district court is in the best position to evaluate what is needed to ensure a fair trial. Here, the district court made careful findings of fact on each disqualification, and supported its decisions with well-reasoned opinions. We conclude that the district court properly exercised its discretion in disqualifying Bruce Cutler and George Santangelo.

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 19
The People &c.,
Appellant,
v.
Lawrence Watson,
Respondent.

Dana Poole, for appellant.
Renee M. Zaytsev, for respondent.

STEIN, J.:

Notwithstanding the general rule that, for the purposes of conflict of interest analysis, knowledge of a large public defense organization's current and former clients is typically not imputed to each attorney employed by the organization, conflicts may nevertheless arise in certain circumstances

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involving multiple representations within such organizations. In this case, Supreme Court was placed in the difficult position of having to either relieve defense counsel -- thereby depriving defendant of the counsel of his choosing -- or permit counsel to continue his representation despite a potential conflict of interest, thereby impinging on defendant's right to the effective assistance of counsel. Under the circumstances presented here, the court did not abuse its discretion by relieving defendant's assigned counsel and appointing conflict-free counsel to represent him. Therefore, we reverse.

I.

Defendant showed a friend a gun in his waistband and threatened to use it against another person. He then went to a park, where he was seen near Toi Stephens. When police arrived, defendant and Stephens fled separately. Witnesses saw defendant throw a gun during the chase, and a gun was subsequently found in the identified location. Cocaine and marihuana were also found on the ground, and Stephens admitted that the drugs belonged to him. Defendant was charged with criminal possession of a weapon in the second degree (two counts) and resisting arrest. Stephens was charged with drug possession.

Robert Fisher, an attorney employed by New York County Defender Services (NYCDS), was assigned to represent defendant. Eight months later, the People turned over Rosario material that revealed that a different attorney from NYCDS had represented

Stephens on his criminal charge arising from the same incident. Fisher immediately brought this to the attention of Supreme Court. Fisher stated that he had been looking for Stephens as a possible witness for defendant before becoming aware of the potential conflict of interest. Even though defendant wanted Fisher to continue as his attorney, Fisher was not sure it would be appropriate to do so. The court granted an adjournment to determine whether the situation could be resolved.

At an appearance a few days later, Fisher advised the court that Stephens had entered a guilty plea shortly after his arraignment, and NYCDS no longer represented him. However, because Stephens had not waived confidentiality, Fisher's supervisors at NYCDS prohibited him from searching for Stephens, calling Stephens as a witness, or conducting any cross-examination if the People called him to testify. Fisher advised defendant that he could not continue to represent defendant unless defendant agreed to waive even the attempt to call Stephens as a witness. Fisher also asked the court to prohibit the People from calling Stephens, because his supervisors had determined that Fisher could represent defendant only under those conditions.

The court stated that it could not prevent the People from calling a relevant witness, and explained to defendant the potential conflict and the difficult position confronting Fisher. Defendant responded that he wanted to keep Fisher as his attorney

and waive the conflict, but also that he wanted Stephens to testify. After hearing these statements that were incompatible with an unequivocal waiver, the court relieved Fisher of his assignment and assigned a new attorney, who represented defendant at trial. The jury convicted defendant of all charges.

The Appellate Division, with one Justice dissenting, reversed the judgment on the ground that the trial court had abused its discretion in relieving Fisher (124 AD3d 95 [1st Dept 2014]). The majority concluded that, because Fisher did not represent Stephens and was not privy to any of his confidential information, the relationship between NYCDS and Stephens did not constitute a conflict (see id. at 102-104). The dissent would have held that, at the very least, a potential conflict existed, and the trial court properly acted within its discretion in disqualifying counsel (see id. at 107-108 [Tom, J.P., dissenting]). The dissenting Justice granted the People leave to appeal to this Court.

II.

A determination to substitute or disqualify counsel falls within the trial court's discretion (see People v Carncross, 14 NY3d 319, 330 [2010]; People v Tineo, 64 NY2d 531, 536 [1985]). "That discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant

with a basis for appellate review" (Tineo, 64 NY2d at 536; see Carncross, 14 NY3d at 330; People v Robinson, 121 AD3d 1179, 1180 [3d Dept 2014]). Criminal courts faced with counsel who allegedly suffer from a conflict of interest must balance two conflicting constitutional rights: the defendant's right to effective assistance of counsel; and the defendant's right to be represented by counsel of his or her own choosing (see US Const, 6th Amend; Carncross, 14 NY3d at 327; People v Gomberg, 38 NY2d 307, 312-313 [1975]). Thus, a court confronted with an attorney or firm that represents or has represented multiple clients with potentially conflicting interests faces the prospect of having its decision challenged no matter how it rules -- if the court permits the attorney to continue and counsel's advocacy is impaired, the defendant may claim ineffective assistance due to counsel's conflict; whereas, if the court relieves counsel, the defendant may claim that he or she was deprived of counsel of his or her own choosing (see Wheat v United States, 486 US 153, 161 [1988]; Carncross, 14 NY3d at 330).

Courts "should not arbitrarily interfere with the attorney-client relationship," but must protect the defendant's right to effective assistance of counsel (Gomberg, 38 NY2d at 313; see Carncross, 14 NY3d at 327; see also Wheat, 486 US at 159-160). Thus, the court must satisfy itself that the defendant has made an informed decision to continue with counsel despite the possible conflict, yet avoid pursuing its inquiry too far so

as not to intrude into confidential attorney-client communications or discussions of possible defenses (see Gomberg, 38 NY2d at 313; see also Holloway v Arkansas, 435 US 475, 487 [1978]).

Particularly relevant here, the presumption in favor of a client being represented by counsel of his or her choosing may be overcome by demonstration of an actual conflict or a serious potential for conflict (see Wheat, 486 US at 164). The court may appropriately place great weight upon counsel's representations regarding the presence or absence of a conflict (see Gomberg, 38 NY2d at 314), because the attorney is generally in the best position to determine when a conflict of interest exists or is likely to develop during trial (see Holloway, 435 US at 485). Depending on when a potential conflict becomes evident, the court may not be aware of the details and ramifications of any conflict, or of the evidence, strategies or defenses that will emerge at trial (see People v Lloyd, 51 NY2d 107, 111 [1980]; Gomberg, 38 NY2d at 314; see also Wheat, 486 US at 162-163 [court must decide whether to allow waiver of conflict "not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context" where conflicts are hard to predict]; Carncross, 14 NY3d at 328-329 [same]). However, if the court waits until trial -- to ascertain what witnesses testify or what strategy or defenses are employed -- it runs a serious risk of a mistrial based on the conflict (see Carncross, 14 NY3d at

329-330).

Where there have been successive representations of individuals with different goals or strategies, a concern arises that counsel's loyalties may be divided because a lawyer has continuing professional obligations to former clients. Those obligations include a duty to maintain the former client's confidences and secrets (see Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.9), "'which may potentially create a conflict between the former client and present client'" (People v Prescott, 21 NY3d 925, 928 [2013], quoting People v Ortiz, 76 NY2d 652, 656 [1990]; see Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7). Here, prior to defendant's trial, Fisher's NYCDS supervisors noted the institutional duty of loyalty to its former client, Stephens. Those supervisors -- who presumably were familiar with Stephens's file -- determined that there was a potential or actual conflict that prevented Fisher from investigating Stephens, attempting to locate him, calling him as a witness, or cross-examining him if he was called by the People. Under these circumstances, the trial court did not err in concluding that defendant's statements were insufficient to waive the conflict.

Our decision in People v Wilkins (28 NY2d 53 [1971]) does not compel a contrary result. In that case, this Court found that no conflict of interest existed merely because a defendant was represented by the Legal Aid Society and a

different staff attorney from that same organization had previously represented -- in an unrelated criminal proceeding -- the person who was now the complaining witness against Wilkins. There, the purported conflict was not discovered until after Wilkins's trial, and his counsel had no prior knowledge of the separate case involving charges against the complaining witness. Thus, the prior representation could not have affected the representation of Wilkins. We held that, unlike private law firms where knowledge of one member of the firm is imputed to all, large public defense organizations are not subject to such imputation, so there was no inferred or presumed conflict (see id. at 56; compare Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.10 [addressing imputation of conflict to firm]).

The current case is distinguishable from Wilkins, and we do not disturb the general rule against imputation of knowledge created there. In both cases, counsel worked for a large public defense organization and was initially unaware of another staff attorney's representation of a potential witness in the client's case, because there was apparently no free flow of information among staff attorneys. However, unlike counsel in Wilkins, defense counsel here became aware before defendant's trial of NYCDS's prior representation of Stephens, and the organization's representation of Stephens arose from the same incident that led to defendant's arrest. Additionally, Fisher's supervisors expressly prohibited him from attempting to locate

Stephens (apparently even by searching in publicly-available sources) or questioning him. This directly impinged on Fisher's representation of defendant. Not only did the supervisors instruct Fisher to refrain from investigating Stephens, they also directed that he could not cross-examine Stephens if he was called by the People. Therefore, even if the institutional representation of Stephens did not, in and of itself, present a conflict, such a conflict was created by the conditions imposed by Fisher's supervisors, which hampered his ability to zealously and single-mindedly represent defendant. Although the court could have inquired as to why NYCDS took the position of forbidding any investigation into or questioning of Stephens, the court was in a precarious situation because such an inquiry might have intruded into confidential attorney-client information. Thus, the court did not abuse its discretion by relieving counsel once those restrictions were announced.

Defendant's assertion that he was never given the opportunity to waive the conflict is unavailing. Although defendant indicated that he would be willing to waive the conflict, almost immediately thereafter he said that he wanted Stephens to be called as a witness at trial. These competing statements did not clearly demonstrate a knowing waiver, or that defendant would knowingly waive Fisher's conflict. Moreover, had he attempted to do so, it would have been within the court's authority to decline to accept such a waiver (see Carncross, 14

NY3d at 327-328). A trial "court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses" (Wheat, 486 US at 163).

Further, while defendant might have agreed to allow counsel to refrain from calling Stephens, the People indicated the possibility that they would call him as a witness, depending on the defense that was raised -- including the potential assertion that someone other than defendant possessed and dropped the gun -- which would not be known until trial. Although a waiver of the conflict by defendant would have permitted counsel to refrain from cross-examining Stephens if he was called, that would be a tactic based on loyalty to Stephens as a former NYCDS client, not a strategy employed in the best interest of defendant. Additionally, if the court had waited until trial and the People had decided to call Stephens, a mistrial could have resulted (see Carncross, 14 NY3d at 329-330). Thus, the court could properly decide that it would not accept a waiver in these circumstances, instead choosing to protect defendant's right to the effective assistance of counsel in order to ensure a fair trial (see Carncross, 14 NY3d at 327-328; see also Wheat, 486 US at 162-163).

In sum, the Appellate Division erred in holding that

the trial court abused its discretion. Supreme Court appropriately balanced defendant's countervailing rights, based on the information it had at the time, and reasonably concluded that Fisher could not effectively represent defendant due to NYCDS's representation of Stephens and the duty of loyalty Fisher's supervisors were asserting toward that former client. Accordingly, the Appellate Division order should be reversed and the case remitted to that court for consideration of the facts and issues raised, but not determined, on the appeal to that court.

* * * * * * * * * * * * * * * * *

Order reversed and case remitted to the Appellate Division, First Department, for consideration of the facts and issues raised but not determined on the appeal to that court. Opinion by Judge Stein. Judges Pigott, Rivera, Abdus-Salaam and Fahey concur. Chief Judge DiFiore and Judge Garcia took no part.

Decided February 11, 2016

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. DAVID KAPONE WILLIAMS; MARCELL DEMETRIUS GRAY; SHAWMAINE EUSTACE ARDELL MOORE; SAMUEL LEE BERRELLE RAKESTRAW III; MICHAEL ANTHONY WILLIAMS; KEANA NICOLE IWANKIW; CLIFFTON MARTINEZ; JERMAINE LAMAR MAXWELL; REGINALD COLE JOHNSON; TROY JERMAINE HOWELL; MARK ANTHONY HOLGUIN; TENELL MICHAEL MURE; LABARR MARTINEZ; DAVID GOROSAVE; BUFFIE ANN BRIDGES; DEZIRAE ALEXANDRIA MONTEEN, *Defendants-Appellees*.	No. 22-10174 D.C. No. 4:18-cr-01695-JAS-EJM-1 OPINION

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted December 7, 2022
Phoenix, Arizona

Filed May 18, 2023

Before: Kim McLane Wardlaw and Patrick J. Bumatay, Circuit Judges, and Jack Zouhary,* District Judge.

Opinion by Judge Bumatay

SUMMARY**

Criminal Law

In a criminal case in which the government has charged 19 alleged members of the Western Hills Bloods with multiple offenses, the panel reversed the district court's order disqualifying the entire District of Arizona U.S. Attorney's Office and directing the Department of Justice to supply an attorney from outside Arizona to represent the government in pending motions, brought by 16 defendants, concerning misconduct allegations against one Assistant U.S. Attorney in the Arizona office.

Addressing its jurisdiction over the interlocutory appeal, the panel held that disqualification of an entire U.S.

* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Attorney's Office warrants appellate review under the collateral order doctrine.

The panel held that the district court's sweeping disqualification order was an abuse of discretion. The panel wrote that based on separation-of-powers principles and the consensus among courts, disqualification of an entire U.S. Attorney's Office is an extreme remedy—only appropriate in the most extraordinary circumstances. First, a district court must find a strong factual predicate for blanket disqualification. Second, a district court must determine that the U.S. Attorney's Office's continued representation of the government will result in a legal or ethical violation. These requirements mean a court must not only make specific findings against the accused prosecutors, but it must also determine that any misconduct or conflict so pervades the office that less intrusive remedies would be inadequate to safeguard against a legal violation. The panel held that the record does not support an officewide disqualification, and without any evidence of officewide involvement, it was pure speculation to conclude that any conflict or misconduct pervaded the entire U.S. Attorney's Office. The panel also held that no clear violation of law or ethics supports an officewide disqualification. The panel wrote that the district court—whose decision to disqualify was informed, in part, by a comparison to an internal investigation of a private company—does not appear to have sufficiently appreciated the separation-of-powers concern.

COUNSEL

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OPINION

BUMATAY, Circuit Judge:

The U.S. Attorney's Office in the District of Arizona has 180 federal prosecutors—known as Assistant U.S. Attorneys. In this case, multiple defendants alleged that *one* Assistant U.S. Attorney engaged in potential professional misconduct. Rather than screening out the accused Assistant U.S. Attorney, the district court disqualified *all 180* federal prosecutors from the Arizona U.S. Attorney's Office from defending against the misconduct allegations. The district court then ordered the Department of Justice to supply an attorney from outside Arizona to litigate the defendants' motions. The district court reached this sweeping sanction without making any findings of misconduct involving other members of the U.S. Attorney's Office or the U.S. Attorney himself. Nor did the district court conclude that any member of the U.S. Attorney's Office violated a law or ethical rule. Instead, the district court speculated about possible conflicts and ordered officewide disqualification based on a misguided analogy to the corporate world. But in-house counsels and federal prosecutors are not the same. The Executive branch is a co-equal branch of government—entitled to judicial respect. When disqualifying an entire Executive branch office, separation of powers requires much more than the district court provided. We thus reverse.

I.

The Western Hills Bloods, according to the government, are a violent street gang operating in Tucson, Arizona. In the government's view, members of the gang have been involved in drug trafficking, illegal firearms dealing, assaults, and murders. The government alleges the gang ran

a network of "crack houses" to distribute crack, cocaine, marijuana, methamphetamine, heroin, and other narcotics. It is also believed that gang members have been responsible for several shootings since 2014, including the murders of two rival gang members.

In 2018, the U.S. Attorney's Office for the District of Arizona indicted 19 alleged members of the Western Hills Bloods. The government charged the defendants with 46 offenses, including RICO conspiracy, murder in aid of racketeering, assault with a dangerous weapon, and various drug and firearm offenses. David Williams was the lead defendant in the indictment. Dezirae Monteen was also charged as part of the conspiracy.

In April 2022, Williams, along with 15 other co-defendants, filed a sealed motion alleging "professional misconduct" violating their Fifth and Sixth Amendment rights. Williams claimed that Monteen's former attorney had simultaneously represented Monteen and a defendant arrested for unrelated charges who later agreed to cooperate against the Western Hills Bloods. Williams further claimed that the Assistant U.S. Attorney prosecuting the Western Hills Bloods learned of the potential conflict of interest in August 2021, but failed to notify defendants or the district court of the conflict until March 2022. Williams sought discovery and a sealed evidentiary hearing to investigate the interactions between Monteen's former attorney and the Assistant U.S. Attorney. The defendants also filed a sealed ex parte motion alleging further misconduct by the former attorney. The government was not provided a copy of that motion.

The government requested several extensions of time to respond to Williams's initial motion. The magistrate judge

handling the Western Hills Bloods' prosecution granted the extensions, giving the government until June 2022 to respond. But before the government responded, the magistrate judge issued a sealed scheduling order setting a status conference for May 2022. The sealed order did not provide notice of the issues the magistrate judge wished to discuss at the status conference. An Arizona Assistant U.S. Attorney, who was not involved in the Western Hills Bloods' prosecution, filed a special appearance to litigate the motion and appeared at the status conference.

At the status conference, the magistrate judge disclosed to the government that the court held an ex parte hearing on the defendants' ex parte motion the week before. The magistrate judge stated that "defense counsel raised some concerns about how the motion would be handled procedurally . . . primarily in terms of the government's representation." The magistrate judge advised that defense counsel "thought it would be a good idea to get into court before the government even filed its response" to the motion. The magistrate judge informed the government that the status conference was to "talk about some of those things." The magistrate judge then turned to Williams's defense counsel, who "spearheaded [the defendants'] argument."

Williams's counsel then asked the magistrate judge to appoint "firewall counsel outside the District of Arizona" to handle the defendants' motion. Defense counsel explained that "we don't know how far this . . . conflict issue . . . extended beyond" the one Assistant U.S. Attorney. But she suggested that allowing the Arizona U.S. Attorney's Office to litigate the motion would be like allowing a law firm "to investigate an ethics complaint involving [its] law partner."

In response, the Assistant U.S. Attorney stated he was there to litigate the defendants' motions and that if the magistrate judge wanted him to have "separation" from the Western Hills Bloods' prosecution, he "would be happy to do it." The Assistant U.S. Attorney argued that there was no need to "be walled off," that the "trial team [was] the trial team," and that he could continue to litigate the motions independently. The prosecutor later stated he could review any discovery involved in the motions, and he was prepared to take any privileged information he learned "to [his] grave." He then reiterated that "[i]f [he is] segregated off" from the trial team, "that's fine," and that his goal was to ensure that the "United States [was] represented ably and that [the court got] to the right result."

The magistrate judge expressed concern that it was "too late" to wall off the Arizona Assistant U.S. Attorney because the magistrate judge "imagined" that "th[e] case generally has gone up the food chain," including to the Arizona U.S. Attorney. The magistrate judge also thought that, along with the U.S. Attorney, the "case went to [Main Justice in] D.C." based on the charges. The magistrate judge continued that "there is no doubt in [the court's] mind that th[e instant] motion ha[d] gone up th[e] food chain, and . . . may have leaked horizontally to other people in the [U.S. Attorney's] office." The magistrate judge considered it a "problem" for any Arizona Assistant U.S. Attorney to handle the motion because "that [Assistant U.S. Attorney] is still reporting to the [Arizona] U.S. Attorney."

The Assistant U.S. Attorney "recognize[d] the [magistrate judge's] concerns," but reiterated that he could be "segregated off, do so ably, do so fairly, [and] do so consistent with [his] ethical obligation."

The magistrate judge then compared the situation to an internal investigation at a private company:

> [A]s I started looking at this issue, I kind of looked at it like an internal investigation when a corporation is accused of wrongdoing. When you have an internal investigation, you don't have in-house counsel doing that. You may have in-house counsel helping, but you retain outside counsel, and they report back to the government, for instance, in that context, were there errors? [W]hat were they? [A]nd what are we going to do about it? [A]nd I think that is the proper analysis to do in this case.

The magistrate judge then disqualified the entire Arizona U.S. Attorney's Office and ordered the government to obtain "firewall counsel" from another district or from Main Justice in Washington, D.C., to represent the government in the pending motions.

The government objected to the magistrate judge's verbal disqualification order in the district court. The district court upheld the order as "not contrary to law or clearly erroneous." The district court then set a deadline for the government's out-of-district "firewall counsel" to respond to the pending defense motions. In response, the government sought an interlocutory appeal and asked our court to stay the district court's deadline for firewall counsel to respond. A motions panel of this court stayed the deadline pending this appeal.

II.

Before taking up the merits of the government's appeal, we must determine whether an interlocutory appeal is appropriate here. The government argues that we have jurisdiction over the disqualification order under the collateral order doctrine. In the alternative, the government contends we can assert jurisdiction by exercising mandamus authority. Because we are satisfied that the collateral order doctrine provides us jurisdiction here, we do not reach the government's alternative argument.

Under the collateral order doctrine, courts of appeal have jurisdiction to review "a small set of prejudgment orders that are collateral to the merits of an action and too important to be denied immediate review." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (simplified). "To fall within the limited scope of the collateral order doctrine, a district court order . . . must (1) be conclusive on the issue at hand; (2) resolve important questions separate from the merits; and (3) be effectively unreviewable after final judgment." *United States v. Acad. Mortg. Corp.*, 968 F.3d 996, 1002 (9th Cir. 2020) (simplified). Our application of these requirements is "stringent," and we should be reluctant to expand the doctrine. *Id.*

The disqualification order here satisfies the requirements of the collateral order doctrine. First, the order conclusively precludes the U.S. Attorney's Office from litigating the defendants' misconduct motions. As we've previously said, "the effect" of any attorney disqualification order "is fairly irreversible" because it "materially change[s]" the party's position. *In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1357 (9th Cir. 1981). And, as a practical matter, a disqualification order is not

"subject to reconsideration from time to time." *Id.* (simplified). Here, that's proven true—the district court denied a motion to reconsider the order. Thus, the disqualification order was "clearly conclusive and not tentative" as it pertains to pending misconduct motions. *Hale v. Norton*, 476 F.3d 694, 699 (9th Cir. 2007).

Second, although the disqualification order does not resolve the guilt or innocence of Williams or his co-defendants, it determines an important question. An order is "important enough to merit immediate appellate consideration" when "delaying review would imperil a substantial public interest or some particular value of a high order." *Acad. Mortg. Corp.*, 968 F.3d at 1004 (simplified). Here, we must answer whether a court may properly prevent an entire U.S. Attorney's Office from defending itself against motions alleging the ethical impropriety of an individual Assistant U.S. Attorney. Considering the "special solicitude" owed to Executive branch prerogatives under the separation of powers, *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982), our immediate review is warranted.

Third, the disqualification order will be effectively unreviewable. Orders are effectively unreviewable "when the legal and practical value of the asserted right will be destroyed if not vindicated before judgment." *AdTrader, Inc. v. Google LLC*, 7 F.4th 803, 808–09 (9th Cir. 2021) (simplified). Whether or not the government ultimately prevails on the misconduct motions here, the harm to the separation of powers cannot be remedied after a ruling on the defendants' charges. After a final judgment, it will be too late for our court to undo any improper encroachment on the Executive branch's prosecutorial prerogatives. If a trial results in an acquittal, then double jeopardy bars the government from appealing or re-prosecuting the case. *See*

United States v. Greger, 657 F.2d 1109, 1113 n.1 (9th Cir. 1981). And if the government obtains a guilty plea or verdict, it's unlikely we can rectify the situation because the government has already prevailed. *See United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994).

On appeal, Williams argues that we should follow *Greger*, in which we held that the disqualification of *defense* counsel in a criminal matter was not immediately appealable. 657 F.2d at 1113. But, in that case, we expressly reserved judgment on the question here—whether disqualification of government counsel fits within the collateral order doctrine. *Id.* at 1113 n.1. And, unlike government counsel, the improper disqualification of a defense counsel is redressable on appeal after a guilty verdict. "[I]f the defendant is found guilty and on appeal attacks the order disqualifying his counsel, there is no reason why his right to counsel of choice cannot be vindicated on appeal." *Id.* at 1113. Williams concedes as much and fails to explain how the disqualification of the U.S. Attorney's Office can be remedied on appeal. And it makes little difference that disqualification was limited to the defendants' misconduct motions rather than the whole prosecution of the Western Hills Bloods. All the same issues—irreversibility, separation-of-powers concerns, and the lack of remedy—are implicated in the litigation of the pending motions.

We thus align ourselves with every other circuit to consider the question and hold that disqualification of an entire U.S. Attorney's Office warrants immediate appellate review under the collateral order doctrine. *See United States v. Bolden*, 353 F.3d 870, 874–78 (10th Cir. 2003); *United States v. Whittaker*, 268 F.3d 185, 192–93 (3d Cir. 2001); *United States v. Vlahos*, 33 F.3d 758, 761–62 (7th Cir.

1994); *United States v. Caggiano*, 660 F.2d 184, 189–90 (6th Cir. 1981).

III.

We now turn to whether the district court properly disqualified the entire Arizona U.S. Attorney's Office from litigating the misconduct motions here. We review orders disqualifying counsel for abuse of discretion. *Petroleum Prods. Antitrust Litig.*, 658 F.2d at 1358. A district court abuses its discretion when it applies the incorrect legal standard or if its application of the correct legal standard was illogical, implausible, or without support from the facts in the record. *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1063 (9th Cir. 2022). Reversal is warranted when "the district court misperceives the law or does not consider relevant factors and thereby misapplies the law." *Petroleum Prods. Antitrust Litig.*, 658 F.2d at 1358.

A.

Our Constitution divides federal power into three "defined" branches—the Legislative, the Executive, and the Judicial—to ensure "that each [b]ranch of government . . . confine[s] itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The Executive branch is charged with "tak[ing] Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Thus, certain prosecutorial decisions are considered within the "special province of the Executive [b]ranch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Within the Executive branch, the U.S. Attorney's Office for each district is charged with "prosecut[ing] . . . all offenses against the United States." 28 U.S.C. § 547(1).

"The doctrine of separation of powers requires judicial respect for the independence of the prosecutor." *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991). Such independence generally means that we do not "have a license to intrude into the authority, powers and functions" of prosecutors. *United States v. Jennings*, 960 F.2d 1488, 1491 (9th Cir. 1992) (simplified). To be sure, prosecutorial discretion is not absolute and may, at times, be subject to review. Indeed, "certain potentially vindictive exercises of prosecutorial discretion [are] both reviewable and impermissible." *Chaney*, 470 U.S. at 846 (Marshall, J., concurring) (discussing *Blackledge v. Perry*, 417 U.S. 21, 28 (1974)). *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) ("There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise."). In any event, "[a]bsent a violation of . . . the Constitution, a [federal] statute, or a procedural rule," *Jennings*, 960 F.2d at 1491, we do not dictate to the Executive branch who will serve as its prosecutors. Put differently, we do not stamp a "chancellor's foot veto over activities of coequal branches of government" unless compelled by the law to do so. *United States v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985) (simplified).

We run an even greater risk of offending separation-of-powers principles when disqualifying an entire office of Executive branch attorneys. Such sweeping interference is seldom warranted. Indeed, every circuit court that has reviewed an officewide disqualification has reversed. *See Bolden*, 353 F. 3d at 879; *Whittaker*, 268 F.3d at 194–95;

Vlahos, 33 F.3d at 761–63; *Caggiano*, 660 F.2d at 185. We briefly survey those decisions.

In *Bolden*, the Tenth Circuit reversed an order disqualifying the entire U.S. Attorney's Office based on allegations that the government showed bad faith in denying a defendant's request for a sentence reduction. 353 F.3d at 873. The Tenth Circuit concluded that the record didn't support such a "drastic measure." *Id.* at 878 (simplified). Given the separation-of-powers concerns involved, the Tenth Circuit observed that it "can only rarely-if-ever imagine a scenario in which a district court could properly disqualify an entire United States Attorney's office." *Id.* at 875. Instead, it regarded officewide disqualification as "almost always reversible error regardless of the underlying merits of the case." *Id.* Such a broad disqualification, the Tenth Circuit held, must be based "on clearly stated ethical violations for each attorney" and that courts "must make attorney-specific factual findings and legal conclusions" before ordering disqualification. *Id.* at 880. It then reversed the district court due to the "paucity of facts" indicating a conflict or misconduct in the disqualification order. *Id.* at 879. It also faulted the district court for failing to "even consider[] the separation[-]of[-]powers concerns implicated by . . . disqualification." *Id.* at 879.

In *Whittaker*, the Third Circuit reversed the disqualification of an entire U.S. Attorney's Office after a paralegal in the office inadvertently sent a target of investigation a letter identifying him as a victim in the same investigation. 268 F.3d at 187, 195–96. After being charged, the defendant moved to dismiss the indictment, alleging that the government was acting in bad faith by treating him as both a victim and a suspect in the same case.

Id. at 188. The district court declined to dismiss the indictment but disqualified the U.S. Attorney's Office from prosecuting the defendant. *Id.* at 188–90. Even though the district court found no bad faith on the prosecutor's part, it ordered the Attorney General to appoint an attorney from outside the U.S. Attorney's Office in the case. *Id.* at 191. The Third Circuit found it "perfectly clear that the district court had no basis to disqualify" the whole office. *Id.* at 194. The court emphasized that the defendant had not shown that the receipt of the letter "in any way prejudiced his defense," and the government's action was "simply . . . a mistake." *Id.* at 194. The Third Circuit reversed the district court's "unjustified conclusions," finding they lacked "all sense of proportion." *Id.* at 195–96.

In *Vlahos*, the Seventh Circuit reversed a district court's order disqualifying a U.S. Attorney's Office from prosecuting a criminal contempt charge. 33 F.3d at 763. After disqualifying two Assistant U.S. Attorneys for perceived conflicts of interest, the district court disqualified the entire U.S. Attorney's Office and appointed a private attorney to prosecute the matter. *Id.* at 761. On appeal, the Seventh Circuit found no basis to disqualify the entire office when nothing in the record showed that it was "ill-prepared or lacked sufficient ability to prosecute the case" or that the prosecutors had a conflict of interest. *Id.* at 762–63.

In *Caggiano*, the Sixth Circuit reversed an officewide disqualification after the U.S. Attorney's Office hired a defendant's attorney as a prosecutor. 660 F.2d at 185. After representing the defendant in criminal proceedings, the defendant's defense counsel accepted an offer to join the same U.S. Attorney's Office as an Assistant U.S. Attorney. *Id.* at 186–87. The defendant and his co-defendants moved to disqualify the entire U.S. Attorney's Office, alleging that

the hire created a conflict of interest. *Id.* at 186. Even though the U.S. Attorney's Office detailed plans to screen the former defense counsel from the prosecution, the district court granted the motion based on the "appearance of impropriety." *Id.* at 187–88. The Sixth Circuit disagreed. It emphasized the "difference in the relationship between law partners and associates in private law firms and lawyers representing the government," and thus held it was "not necessary or wise" to disqualify an entire government office after the conflicted attorney was "separated from any participation on the matters affecting his former client." *Id.* at 190–91 (simplified).

And while our circuit has yet to encounter an officewide disqualification, our caselaw shows that we would take an approach similar to our sister courts. In one case, we affirmed a district court's refusal to order officewide disqualification even after a defendant alleged that the U.S. Attorney himself had a personal conflict. *United States v. Lorenzo*, 995 F.2d 1448, 1452 (9th Cir. 1993). In that case, the U.S. Attorney and several Assistant U.S. Attorneys were victims of the defendant's tax scheme and testified against him at trial. *Id.* But we upheld the district court's refusal to disqualify the entire office because the defendant failed to show prejudice and there was no evidence that the "charges were brought because of the victimization of the U.S. Attorney himself" or that "the U.S. Attorney's Office did not exercise its discretionary function in an even-handed manner or that its zeal was not born of objective and impartial consideration of the merits of th[e] case." *Id.* at 1453. And elsewhere, we've held that defendants "must demonstrate prejudice from [a] prosecutor's potential conflict of interest" or present "clear and convincing evidence of prosecutorial misconduct" before a district court may disqualify a

prosecutor. *United States v. Kahre*, 737 F.3d 554, 574–75 (9th Cir. 2013).

Based on separation-of-powers principles and the consensus among courts, we believe disqualification of an entire U.S. Attorney's Office is an extreme remedy—only appropriate in the most extraordinary circumstances. Such extensive interference with Executive branch affairs demands "a clear basis in fact and law." *Gatto,* 763 F.2d at 1046 (quoting *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir. 1977)). This is a two-part requirement. First, a district court must find a strong factual predicate for blanket disqualification. Second, a district court must determine that the U.S. Attorney's Office's continued representation of the government will result in a legal or ethical violation. These requirements mean a court must not only make specific findings against the accused prosecutors, but it must also determine that any misconduct or conflict so pervades the office that less intrusive remedies would be inadequate to safeguard against a legal violation. Only after the district court makes these exacting findings and legal conclusions will we uphold the disqualification of an entire office of a coequal branch. *Accord Bolden*, 353 F.3d at 880 ("[T]he district court must make attorney-specific factual findings and legal conclusions before disqualifying attorneys from the [U.S. Attorney's O]ffice."). As we've previously said, we will only "thwart the will" of the Executive branch when its "behavior is not in accordance with law." *Simpson*, 927 F.2d at 1091. We don't disqualify an entire office of federal prosecutors merely as a precautionary measure.

B.

Applying these considerations, the district court's sweeping disqualification was an abuse of discretion.

Nothing in the magistrate judge's verbal order or the district court's reconsideration order provides a "clear basis in fact and law," *Gatto*, 763 F.2d at 1046 (simplified), to disqualify the entire U.S. Attorney's Office. We thus reverse—for two reasons.

First, the facts do not support an officewide disqualification. Williams's motions only alleged a conflict or misconduct involving one Assistant U.S. Attorney. At the status conference, Williams's counsel admitted that the defendants did not know whether any ethical issues "extended beyond" that one prosecutor. And without any evidence of officewide involvement, it was pure speculation to conclude that any conflict or misconduct pervaded the entire U.S. Attorney's Office. Here, the magistrate judge "imagine[d]" that "th[e] case generally has gone up the food chain" to the Arizona U.S. Attorney. But if the separation of powers means anything, it means we may not disqualify an entire office of a co-equal branch based on an assumption. Indeed, even if the Arizona U.S. Attorney himself was aware of the allegations of misconduct, that alone may not justify disqualifying the whole office. *See Lorenzo*, 995 F.2d at 1452. Rather, "the generally accepted remedy," consistent with separation of powers concerns, "is to disqualify a specific Assistant United States Attorney, not all the attorneys in the office." *Bolden*, 353 F.3d at 879 (simplified).

Second, no clear violation of law or ethics supports an officewide disqualification. The district court did not conclude that the U.S. Attorney's Office's representation would lead to a legal or ethical violation. While Williams's motions allege some eyebrow-raising contacts between the Assistant U.S. Attorney and Monteen's former attorney, the district court had yet to identify any "behavior . . . [of the

whole office] not in accordance with law." *Simpson*, 927 F.2d at 1091. It was therefore premature to resort to an officewide disqualification.

As noted above, any officewide disqualification of a U.S. Attorney's Office must respect the separation of powers. It does not appear that the district court sufficiently appreciated this concern. The magistrate judge's decision to disqualify was informed, in part, by a comparison to an internal investigation of a private company. "When you have an internal investigation," the magistrate judge observed, "you don't have in-house counsel doing that." But that analogy misses the mark. Disqualifying in-house counsel doesn't put courts in the constitutionally precarious position of overriding the will of the Executive branch without a basis in law or fact. This distinction makes all the difference.

IV.

Before disqualifying an entire U.S. Attorney's Office, a district court must make specific factual findings that show that the office's continued representation would result in a clear legal or ethical violation. Because the record does not reveal pervasive misconduct or a blanket conflict here, we reverse the disqualification order. Given our resolution of this matter, we also deny defendants' motions to file their supplemental excerpts of record and answering brief under seal and ex parte. *See* Dkt. Nos. 56 & 58.

REVERSED.

Useful excerpt from and note about *The Enterprise Model Of Managing Conflicts Of Interest In The Tripartite Insurance Defense Relationship*,

Aviva Abramovsky, Cardozo Law Review, Vol. 27, No. 1, 2005 Available on line at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015503

Useful excerpt from this article:

> Recognition of the "house counsel" type effect has not been limited to cases involving organized crime families. In the often-cited case of *In the Matter of Abrams*, 266 A.2d 275 (N.J. 1970). the New Jersey Supreme Court found an inherent conflict in an attorney's acceptance of fees from an illegal gambling syndicate-employer for representation of its employee,121 noting that "the difference [between direct payment and reimbursement] is not an empty form, for a direct understanding with the employer will likely weaken the attorney's resolve to serve exclusively the interest of his client, no matter what the attorney may himself think."122 That court held that "[a]n attorney must realize that the employer who agrees to pay him is motivated by the expectation that [it] will be protected"123 and that "it is . . . *inherently wrong* for an attorney who represents only the employee to accept a promise to pay from one whose criminal *liability* may turn on the employee's testimony."124 *Abrams* was cited with approval by the United States Supreme Court in *Wood v. Georgia*, 450 U.S. 261, 269, 269 n.1 5 (1981) (identifying the "long-range interest" of the party paying the fee in establishing a legal precedent as an additional risk leading to potential unfairness). which likewise found an inherent conflict when an employer, an adult bookstore, paid its employees' legal fees to defend charges of distributing obscene materials.126 In criminal cases, the "liability" implicated is that of the potential criminal sentence. Such consequence is rarely implicated in the insurance context. Nevertheless, the potential for enhanced monetary liability an insurance company faces logically implicate the same referenced "house counsel"-type pressures on the insurance attorney's loyalty and pecuniary interest. As Justice Gonzalez succinctly concluded: The duty to defend in a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking at the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in the middle. There is a lot of wisdom in the old proverb: He who pays the piper calls the tune. The lawyer wants to provide a competent defense, yet *knows who pays the bills and who is most likely to send new business*.127

Note:

This article also has an extensive discussion of similar issues in civil cases, such a divided loyalty of an insurance company lawyer to the insured and to the insurance company.

Citations to Relevant Materials

Materials on Disqualification of Counsel
Other cases related to the *Gotti* decision on disqualification or this trial. *United States v. Castellano*, 610 F. Supp. 1151 (S.D.N.Y. 1985) *United States v. Gambino,* 838 F.Supp. 749 (S.D.N.Y.1993) (government unsuccessfully sought to have Cutler disqualified from the representation of Joseph Gambino at his retrial). *United States. v. Gotti,* 9 F.Supp.2d 320 (S.D.N.Y.1998) ("Government's motion to disqualify Richard A. Rehbock and Robert L. Ellis is granted. The government's motion to disqualify Joseph R. Corozzo and Bruce Cutler is denied
Leading United States Supreme Court case: *Wheat v United States*, 486 US 153 (1988).
New York cases a. *Tekni-Plex v. Meyner and Landis*, 89 N.Y.2d 123, 131-32 (1996) "Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." b. *People v. Watson*, 26 N.Y.3d 620 9(2016) (Court of Appeals affirms disqualification of counsel in large public defender office where a conflict had arisen) (Court's pdf of decision is attached, see also https://pcjc.blogs.pace.edu/2016/02/17/new-nyca-decision-on-attorney-disqualification. c. New York State Appellate Division, First Department, cases concerning NYS Code of Prof. Resp., DR 7-106(C)(3), i.e. the prohibition against trial counsel asserting personal knowledge of the facts in issue., while not directly related to Judge Glasser's order in US v Gotti, involve a corollary lawyer ethics principle. See *Siefring, v Nora Marion et al.,* 22 A.D.2d 765, 253 N.Y.S.2d 619 (1st. Dept. 1964) and Senn v. Scudieri, 165 A.D.2d 346,(1st Dept. 1991).
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