

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

United States of America,

Plaintiff,

vs.

Donald Clark Luger, a/k/a Jody Luger,

Defendant.

Criminal No. 1:13-cr-92

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISQUALIFY UNITED STATES
ATTORNEY'S OFFICE**

Defendant Donald Clark Luger has moved to disqualify the United States Attorney's Office for the District of North Dakota on a theory of conflict of interest.¹ Luger seeks disqualification of the entire United States Attorney's Office because he was previously represented by former United States Attorney Timothy Q. Purdon ("Purdon") in a 2009 criminal matter in this court. The representation predates Purdon's installation as United States Attorney.²

On May 14, 2013, Luger was indicted on charges of aggravated sexual abuse of a child, abusive sexual contact, and child abuse in Indian Country.³ The indictment was signed by Lynn C. Jordheim, acting under authority conferred by 28 U.S.C. § 515.⁴ Luger proceeded to trial on November 17, 2014. At the close of the evidence on November 20, 2014, the court dismissed the abusive sexual contact and child abuse charges. On

¹ Doc. #116.

² Timothy Purdon was confirmed by the United States Senate on August 5, 2010, and his last day as United States Attorney was March 12, 2015.

³ Doc. #2.

⁴ Id.

November 21, 2014, the jury convicted Luger on the remaining charge, aggravated sexual abuse of a child.⁵ Sentencing is scheduled for May 8, 2015.⁶

Luger seeks to disqualify the United States Attorney's Office for the District of North Dakota because Purdon represented Luger in a 2009 criminal case in this court. Luger asserts that, as his former attorney, Purdon obtained information that was privileged information and, further, that he was in possession of information obtained from and relating to witnesses in the present case. It should be noted that count 1 of the indictment alleged conduct occurring in 1999. Luger also asserts that he had an ongoing relationship with Purdon until the charges in this case were filed. Specifically, he asserts that he had contact with Purdon on various issues, including economic development on Indian Lands, problems Luger was having with local authorities, and people associated with the instant case.

Gary Delorme, Assistant United States Attorney assigned to this case, contends that the United States Attorney's Office recognized the conflict of interest prior to indictment. Delorme asserts that the United States Attorney's Office followed Department of Justice policy and received an official memorandum⁷ from the Executive Office of United States Attorneys acknowledging the conflict of interest and directing Purdon's recusal. He further asserts that the file was marked "USAtty RECUSED" and Purdon was "walled" off from

⁵ Doc. #97.

⁶ Doc. #120.

⁷ The memorandum approved the recusal request of Purdon and directed and authorized First Assistant United States Attorney Lynn Jordheim to perform all authorized functions. The memorandum specifically directed that the signature block used in connection with the case to reflect Mr. Jordheim "Attorney for the United States, Acting Under Authority Conferred by 28 U.S.C. § 515." Doc. #125-1.

contact with either the file or the prosecution team.

The court took seriously its duty to inquire into Luger's contentions and also to offer the United States an opportunity to provide evidence to the contrary. A hearing was held on March 27, 2015. Surprisingly, the United States declined to offer any evidence of the procedures that were undertaken to screen Purdon from the prosecution. Likewise, the defense offered no evidence beyond the evidence already contained in the record. Unfortunately, this evidentiary footing leaves the court to decide the motion on a limited record.

Delorme argues that Luger waived any conflict because he would have known about the conflict and the conflict was discussed with his former attorneys. Delorme, however, presented no evidence that any such conversations ever actually took place between Luger and his former attorneys. On this record, the court is left without any substantial evidence that would support a finding that Luger waived the conflict. Without such evidence, waiver cannot be a basis to deny the motion.

Moreover, the issues in this case are guided, at least in part, by the North Dakota Rules of Professional Conduct. Rule 1.9 provides that a lawyer should obtain the former client's consent, in writing, before undertaking representation in a substantially related matter. "Substantially related" for purposes of this rule includes matters in which there is a substantial risk that confidential factual information obtained in the prior representation would materially advance the client's position in a subsequent matter. Luger claims that Purdon, as his former criminal defense attorney, obtained extensive knowledge of Luger and the past allegations, including the ones that led to this prosecution involving conduct in 1999. The United States has failed to offer any evidence to refute Luger's contentions.

Current and former government lawyers are obligated to comply with Rule 1.9 to the extent required by Rule 1.11. The undisputed evidence in the record demonstrates Luger did not consent in writing.

Rule 1.11(d) of the North Dakota Rule of Professional Conduct prohibits a government lawyer from participating in a matter in which the lawyer participated while in private practice unless the appropriate government agency consents. The comments to the Rule explain that “[n]otice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, should be given as soon as practicable after the need for screening becomes apparent.”⁸ Although Delorme represented that the conflict was discussed with Luger’s former lawyers, there is no evidence in the record that notice outlining the conflict and screening procedures employed was given to Luger or anyone outside the Department of Justice. None of the judges in this court were given notice of the conflict, of Purdon’s recusal, or of the screening procedures that would be utilized. Delorme argues that constructive notice was given by the presence of Lynn Jordheim’s signature on the indictment, but given the subsequent decision to file documents under Purdon’s name such constructive notice is inadequate as a matter of law.

The United States Attorney’s Office maintains that proper screening procedures were employed. Delorme initially submitted an affidavit signed by Purdon, but later withdrew that evidence and instead elected to rely on an email that simply stated Associate Deputy Attorney General David Margolis approved Purdon’s recusal and authorized Jordheim to act. Although there is no evidence that Purdon had any substantive conversation with

⁸ Comment 7, N.D. R. Prof. Conduct 1.11.

Luger or any member of his office about Luger or that Purdon was in any way involved in Luger's prosecution, an objective observer might reasonably question whether that is true when many of the pleadings filed in this case are signed under the authority of Timothy Q. Purdon, United States Attorney.⁹

It is apparent from the record and arguments of the parties that the United States Attorney's Office was aware of the conflict and the government lawyers made a good faith effort to comply with the Rules of Professional Conduct. However, the United States Attorney's Office simply fell short in this case. It did not seek the defendant's written consent waiving the conflict, it did not give written notice of the conflict and screening procedures implemented, and it continued to file documents in the case under Purdon's authority. Based on this record, the court is unable to discern whether Purdon was, in fact, "walled" off as claimed by the United States. The combined failures to comply with the Professional Rules of Conduct and the official memorandum directing that the signature block reflect that Jordheim is the acting attorney warrant disqualification of the United States Attorney's Office for the District of North Dakota from this point in the case forward. To the extent that Luger seeks retroactive disqualification, that is an issue he may pursue on appeal or in a motion for post-conviction relief.

The court recognizes that the generally accepted remedy to address a conflict of interest is to disqualify the specific attorney or attorneys with the conflict. The court is also aware that there has been a general reluctance on the part of the courts to disqualify an entire United States Attorney's office. However, this is the very rare case in which the

⁹ Docs. #18 (response to motion to seal detention hearing transcript); #27 (response to motion for release from custody); #44 (response to motion for continuance); #78 (response to motion for continuance); and #84 (stipulation).

actual conflict involves a United States Attorney who was in possession of client confidences and, while given the opportunity to do so, failed to provide evidence that either (1) he was “walled” off from all participation in the case, i.e. there were adequate screening procedures in place, or (2) the defendant was given notice and knowingly waived the conflict. While the court suspects that if either Purdon or Delorme had been called as witnesses they would have established that Purdon was in fact “walled” off. Instead of presenting such evidence, the United States elected to proceed only on an e-mail thread and argument. The e-mail thread, having directed a course of conduct that was not followed by the AUSA and the decision to proceed on argument alone has left the court with no substantial evidence to decide the question. On this record, the court is left with mere suspicions and the undisputable fact that, despite his recusal, pleadings continued to be filed under Purdon’s authority.

For these reasons, Luger’s motion to disqualify the United States Attorney’s Office for the District of North Dakota as of the date of this Order is **GRANTED**.

IT IS SO ORDERED.

Dated this 2nd day of April, 2015.

/s/ Ralph R. Erickson
Ralph R. Erickson, District Judge
United States District Court