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VIRGINIA:

BEFORE THE NINTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

JUN 30 2014

SSB CLERK'S OFFICE

IN THE MATTER OF
Carter Benjamin Garrett

VS B Docket No. 14-090-097167

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITHOUT TERMS)

On June 19, 2014 a meeting was held in this matter before a duly convened Ninth District Subcommittee consisting of James Frederick Watson, Esq., Chair; Nora Jane Miller, Esq.; and William Ken Van Allen, Jr. During the meeting, the Subcommittee voted to approve an Agreed Disposition for a Public Reprimand without Terms pursuant to Part 6, § IV, ¶ 13-15.B.4 of the Rules of the Supreme Court of Virginia. The Agreed Disposition was entered into by the Virginia State Bar, by Edward James Dillon, Jr., Assistant Bar Counsel, and Carter Benjamin Garrett, Respondent, *pro se*.

WHEREFORE, the Ninth District Subcommittee of the Virginia State Bar hereby serves upon Respondent the following Public Reprimand without Terms:

FINDINGS OF FACT

1. At all relevant times, Respondent Carter Benjamin Garrett ("Respondent") has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. In or about November 2011, Respondent represented Bryant E. Reynolds on two felony drug distribution charges in Bedford County Circuit Court.
3. In or about October 2012, the two felony drug distribution charges pending against Mr. Reynolds in Bedford County Circuit Court were *nolle prossed* after Mr. Reynolds was indicted on federal drug charges, including conspiracy to distribute methamphetamine (the "Federal Meth Conspiracy Case").
4. In or about November 2012, Respondent represented Matthew T. Barlow on felony drug distribution charges in Bedford County Circuit Court (the "State Drug Charges").
5. In or about February 2013, the State Drug Charges pending against Mr. Barlow in Bedford County Circuit Court were *nolle prossed* after both Mr. Barlow and Mr. Reynolds were

- indicted on federal drug charges, including conspiracy to distribute Schedule II controlled substances (the “Federal Schedule II Conspiracy Case”).
6. The conduct that gave rise to the State Drug Charges also gave rise to the Federal Schedule II Conspiracy Case. Moreover, the United States asserted that there was some overlapping evidence between the Federal Meth Conspiracy Case and the Federal Schedule II Conspiracy Case.
 7. Respondent, along with another attorney, represented Mr. Reynolds in the Federal Meth Conspiracy Case. The Federal Meth Conspiracy Case is Case No. 6:12-cr-0031 in the United States District Court for the Western District of Virginia.
 8. In a February 2013 proffer session, Mr. Barlow stated that Mr. Reynolds told him, during the summer of 2012, that he had begun manufacturing methamphetamine and that he had a \$1,000 recipe for cooking methamphetamine. Accordingly, Respondent’s former client, Mr. Barlow, became a potential witness against Respondent’s current client, Mr. Reynolds, in the Federal Meth Conspiracy Case.
 9. Paul Beers represented Mr. Barlow in the Federal Schedule II Conspiracy Case. The Federal Schedule II Conspiracy Case is Case No. 6:13-cr-00003 in the United States District Court for the Western District of Virginia.
 10. On or about March 19, 2013, the United States filed a Motion to Resolve the Conflict of Interest Issue in the Federal Meth Conspiracy Case (the “Conflict Motion”), asserting that Respondent’s prior representation of Mr. Barlow in regard to the State Drug Charges and his then current representation of Mr. Reynolds in the Federal Meth Conspiracy Case created a conflict of interest. The Conflict Motion asked the Court to disqualify Respondent from representing Mr. Reynolds in the Federal Meth Conspiracy Case.
 11. On March 22, 2013, Respondent asked his legal secretary to contact Mr. Beers and arrange a meeting between Respondent; Mr. Beers; and Mr. Beers’ client, Mr. Barlow. Respondent’s legal secretary told Respondent that she left a voicemail message for Mr. Beers.
 12. Mr. Beers has stated that his office has no record of Respondent’s secretary leaving a voicemail message for either Mr. Beers or Mr. Beers’ assistant on March 22, 2013. Mr. Beers also stated to the Virginia State Bar: “If [Respondent] had asked for my permission to confer with Mr. Barlow, I would not have consented.”
 13. Later on March 22, 2013, Respondent asked his legal secretary to contact Mr. Barlow’s father to determine where Mr. Barlow was located. When Respondent’s legal secretary called the residence of Mr. Barlow’s father, Mr. Barlow answered the telephone.
 14. Respondent has stated that, after learning that Mr. Barlow was at his father’s residence, Respondent spoke with Mr. Barlow by telephone on March 25, 2013. Respondent further stated that, during that telephone call, he discussed his prior representation of Mr. Barlow with Mr. Barlow in the context of Rule of Professional Conduct 1.9. Respondent’s prior representation of Mr. Barlow occurred in regard to the State Drug Charges, which were *nolle prossed* when both Mr. Barlow and Mr. Reynolds were indicted in the Federal Schedule II Conspiracy Case.
 15. Mr. Beers was not a party to the March 25, 2013 telephone conversation between Respondent and Mr. Barlow. Moreover, at no time did Mr. Beers authorize or otherwise agree to Respondent contacting his client, Mr. Barlow.
 16. On April 2, 2013, the United States District Court for the Western District of Virginia held a hearing on the Conflict Motion filed by the United States in the Federal Meth Conspiracy Case (the “Hearing”).

17. During the course of the Hearing, Respondent acknowledged to the Court that he had spoken with Mr. Barlow about the matter outside of the presence of Mr. Barlow's attorney: "I got tired of waiting on [Mr. Beers] to call me back; and so I did contact Mr. Barlow without [his] counsel being present. And I'll take that up with the Virginia State Bar of [sic] Ethics Committee if somebody filed a Complaint[.]"
18. Respondent also stated during the Hearing that he obtained "verbal consent" from Mr. Barlow to allow Respondent to represent Mr. Reynolds in the Federal Meth Conspiracy Case.
19. In a Memorandum Opinion entered on April 8, 2013, the United States District Court for the Western District of Virginia found the Federal Meth Conspiracy Case and the Federal Schedule II Conspiracy Case to be substantially related, granted the Conflict Motion, and disqualified Respondent from representing Mr. Reynolds in the Federal Meth Conspiracy Case.
20. The Memorandum Opinion stated:

[D]uring the February 2013 proffer session, Mr. Barlow presented information to the government regarding Mr. Reynolds' role in an alleged conspiracy to manufacture methamphetamine, including statements and requests that Mr. Reynolds allegedly made. Now, Mr. Reynolds will need to challenge any evidence used against him at trial, both in this conspiracy matter regarding methamphetamine, as well as the conspiracy matter regarding Schedule II controlled-substances, in which Mr. Barlow is a co-defendant. If [Respondent] had any useful information, as his counsel, Mr. Reynolds would expect him to reveal it. On the other hand, [Respondent] had an ethical obligation to not reveal confidential information he obtained in the course of his representation of Mr. Barlow in state court Furthermore, Mr. Barlow has an interest in keeping his communications with his attorney confidential, but if Mr. Barlow testifies inconsistently as to anything he previously told [Respondent], his former attorney could potentially become a witness for Mr. Reynolds at trial. At bottom, [Respondent's] continued representation of Mr. Reynolds in this matter presents both an actual and potential conflict, warranting his disqualification.

See Memorandum Opinion at p. 5. A copy of the Memorandum Opinion is attached hereto as Exhibit A and incorporated herein as if recited fully herein.
21. The Court further found that Mr. Barlow had not waived the conflict of interest:

"[Respondent] eventually contacted Mr. Barlow, without permission from Mr. Beers, his current counsel. Without discussing the other ethical implications of his conduct, I find that [Respondent's] actions do not constitute a proper consultation." See Memorandum Opinion at p. 6.
22. The Court also held that Respondent's co-counsel in the Federal Meth Conspiracy Case was not tainted by Respondent's conflict and, thus, could continue to represent Mr. Reynolds in the Federal Meth Conspiracy Case.

NATURE OF MISCONDUCT

Such conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

Rule 1.9 Conflict of Interest: Former Client

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

Rule 4.2 Communication with Persons Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

PUBLIC REPRIMAND WITHOUT TERMS

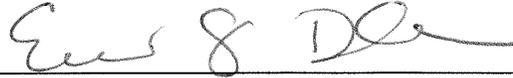
Accordingly, having approved the Agreed Disposition, it is the decision of the Subcommittee to impose a Public Reprimand Without Terms and Carter Benjamin Garrett is hereby so reprimanded. Pursuant to Part 6, § IV, ¶ 13-9.E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs.

NINTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By: 
James Frederick Watson
Subcommittee Chair

CERTIFICATE OF MAILING

I certify that on JUNE 30, 2014, a true and complete copy of the Subcommittee Determination (Public Reprimand Without Terms) was sent by certified mail to Carter Benjamin Garrett, Respondent, at Garrett & Garrett, P.C., P.O. Box 534, Bedford, Virginia, 24523-0534, Respondent's last address of record with the Virginia State Bar.

A handwritten signature in cursive script, appearing to read "E. J. Dillon, Jr.", written over a horizontal line.

Edward James Dillon, Jr.
Assistant Bar Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

UNITED STATES OF AMERICA

v.

BRYANT E. REYNOLDS,

Defendant.

CASE NO. 6:12-cr-00031-1

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

This matter is before the Court on the government's motion to resolve a conflict of interest regarding Carter B. Garrett's representation of the defendant, Bryant E. Reynolds (docket no. 41). Mr. Reynolds did not respond, and a hearing on the government's motion took place on April 2, 2013, in Lynchburg. For the following reasons, I will disqualify Mr. Garrett as Mr. Reynolds's counsel in this case.

I. BACKGROUND

In the pending motion, the government requests that the Court disqualify Mr. Garrett from this case, because Mr. Garrett recently represented a potential trial witness against Mr. Reynolds in state court. The government states that sometime in November 2011, Mr. Garrett represented the defendant, Mr. Reynolds, on two felony drug distribution charges in Bedford County Circuit Court. Both charges were nolle prossed after a federal grand jury returned an indictment charging Reynolds with conspiracy to manufacture methamphetamine and related charges, under Case No. 6:12-cr-00031 (docket no. 17). Mr. Garrett continued to represent Mr. Reynolds on these charges through the April 2, 2013 hearing.

Mr. Garrett also represented Matthew T. Barlow on November 2, 2012, on a felony drug

distribution charge in Bedford County Circuit Court. That charge was nolle prossed in February 2013, following an indictment charging Reynolds and Barlow, among others, with conspiracy to distribute various Schedule II controlled substances. *See* Case No. 6:13-cr-00003 (docket no. 13). A superseding indictment was filed in that case on March 21, 2013, featuring five counts against Mr. Reynolds, and seven counts against Mr. Barlow. Thomas M. Blaylock was appointed to represent Mr. Reynolds on those charges, and Paul G. Beers was appointed to represent Mr. Barlow. The government now states that Mr. Barlow has cooperated with the government, and is a potential witness against Mr. Reynolds in his upcoming jury trial for Case No. 6:12-cr-00031, regarding the alleged conspiracy to manufacture methamphetamine, scheduled to begin on June 3, 2013.

II. LEGAL STANDARD

“[T]rial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment.” *Wheat v. United States*, 486 U.S. 153, 161, 108 S. Ct. 1692, 1698 (1988). “The District Court must recognize a presumption in favor of [defendant’s] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.” 486 U.S. at 164, 108 S. Ct. at 1700.¹

¹ In *Wheat*, one alleged member of a drug conspiracy had sought to retain a lawyer who had already represented and might again represent two other alleged members of the conspiracy. In upholding the district court’s decision to disqualify counsel, despite waivers from all three clients of their rights to conflict-free representation, the Supreme Court emphasized that the Sixth Amendment right to counsel has more to do with ensuring the fairness and integrity of the adversarial process in a general sense, rather than vindicating a defendant’s desire to have a particular lawyer. 486 U.S. at 159, 108 S. Ct. at 1697. In order to ensure this requisite integrity, the Fourth Circuit later explained, “[*Wheat*] made plain that . . . the court must have sufficiently broad discretion to rule without fear that it is setting itself up for reversal on appeal either on right-to-counsel grounds if it disqualifies the defendant’s chosen lawyer, or on ineffective-assistance grounds if it permits conflict-infected representation of the defendant.” *United States v.*

III. DISCUSSION

Mr. Garrett's prior representation of Mr. Barlow and his current representation of Mr. Reynolds presents an actual and serious potential conflict of interest regarding Mr. Reynolds's upcoming trial. An actual conflict exists when a lawyer's "continuing duty to former clients may interfere with his consideration of all facts and options for his current client." *U.S. v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991). In other words, when an attorney's legal representation "requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one." *Id.* at 376. As detailed in *Wheat*, even a potential conflict of interest suffices for disqualification. 486 U.S. at 164, 108 S. Ct. at 1700 (showing a serious potential for conflict overcomes presumption in favor of defendant's counsel of choice).

In *United States v. Williams*, 81 F.3d 1321 (4th Cir. 1996), the Fourth Circuit affirmed the trial court's disqualification of defendant's counsel due to "an obvious conflict of interest," where counsel had previously represented the defendant's wife, who was an expected witness at his trial. *Id.* at 1323. The court explained that the conflict could not be remedied by retaining auxiliary counsel for the special purpose of cross-examining the defendant's wife, the former client, because "[s]ignificant, unavoidable risks would have remained." *Id.* at 1325 (noting disqualified counsel "would remain at counsel table and likely be the auxiliary lawyer's chief source of information about the case."). See also *United States v. Clarkson*, 567 F.2d 270, 273 n.3 (4th Cir. 1977) ("[I]n the proper exercise of its supervisory power over the members of the bar and with a view of preventing the appearance of impropriety, [the trial court] is to resolve all doubts in favor of disqualification.") (internal quotation marks and citations omitted).

The Fourth Circuit noted in *Williams* that defendant's counsel faced the same conflict considered in *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994). In that case, the Eleventh

Williams, 81 F.3d 1321, 1324 (4th Cir. 1996) (citing *Wheat*, 486 U.S. at 161-64, 108 S. Ct. at 1698-1700).

Circuit affirmed the trial court's disqualification of an attorney due to his partner's previous representation of a person "who had pled guilty to drug-related charges appertaining to the indictment against [the defendant]" and would be called as a government witness, despite the defendant's unconditional waiver of his right to conflict-free representation. *Id.* at 1522-23 (noting counsel would face the dual risks of improperly using privileged communications from the previous representation or, by protecting those communications, failing to effectively cross-examine the witness as his present client's interest required). Similarly, in *United States v. Davis*, 780 F. Supp. 21 (D.D.C. 1991), the court disqualified a defense attorney whose law partner had previously represented a cooperating witness, finding a conflict of interest despite crediting the attorney's representation that he had learned nothing about the cooperator from his law partner, and no information would flow to him in the future. *Id.* at 23.

In determining whether an actual or potential conflict warrants disqualification, a court examines whether the subject matter of the first representation is substantially related to that of the second. *Ross*, 33 F.3d at 1523. *See also United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991) ("[A]n attorney operates under an 'actual conflict' when he represents a criminal defendant after having previously represented a government witness in a related matter.") (citation omitted). In this case, Mr. Garrett represented a potential government witness (Mr. Barlow) in a criminal matter pertaining to a federal indictment that includes both Barlow and his current client, Mr. Reynolds.² Mr. Garrett now represents Mr. Reynolds in the above-captioned matter, also a drug conspiracy case, for which Mr. Garrett's former client has already provided

² Specifically, on November 2, 2012, Mr. Garrett entered an appearance on behalf of Mr. Barlow in Bedford County Circuit Court. In that case, Mr. Barlow was charged with the distribution of a Schedule II controlled substance, for which his offense date was June 2, 2012. *See Bedford County Circuit – Criminal Division, Case No. CR12010522-00, Virginia Courts Case Information System, <http://wasdmz2.courts.state.va.us/CJISWeb/CaseDetail.do>. As mentioned, that case was nolle prossed on February 12, 2013, following a federal indictment that included five counts pertaining to Mr. Barlow's activities on June 2, 2012, and another count charging both Mr. Barlow and Mr. Reynolds, among others, with conspiracy to distribute Schedule II substances. *See Case No. 6:13-cr-00003 (docket no. 13).**

useful information for the prosecution. The government confirmed during the April 2, 2013 hearing that there is some overlapping evidence between the two conspiracy matters, and I find that they are substantially related, giving rise to both an actual and serious potential conflict if Mr. Garrett continued to represent Mr. Reynolds.

To illustrate, during the February 2013 proffer session, Mr. Barlow presented information to the government regarding Mr. Reynolds's role in an alleged conspiracy to manufacture methamphetamine, including statements and requests that Mr. Reynolds allegedly made. Now, Mr. Reynolds will need to challenge any evidence used against him at trial, both in this conspiracy matter regarding methamphetamine, as well as the conspiracy matter regarding Schedule II controlled-substances, in which Mr. Barlow is a co-defendant. If Mr. Garrett had any useful information, as his counsel, Mr. Reynolds would expect him to reveal it. On the other hand, Mr. Garrett has an ethical obligation to not reveal confidential information he obtained in the course of his representation of Mr. Barlow in state court.³ Furthermore, Mr. Barlow has an interest in keeping his communications with his attorney confidential, but if Mr. Barlow testifies inconsistently as to anything he previously told Mr. Garrett, his former attorney could potentially become a witness for Mr. Reynolds at trial. At bottom, Mr. Garrett's continued representation of Mr. Reynolds in this matter presents both an actual and potential conflict, warranting his disqualification.

Mr. Garrett argued during the April 2, 2013 hearing that his current client, Mr. Reynolds, does not dispute Mr. Barlow's statements contained within the government's pending motion, and thus there is no potential for conflict regarding future cross-examination. However, the

³ Under Rule 1.6(a) of the Virginia Rules of Professional Conduct, "A lawyer should not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client unless the client consents after consultation."

government's evidence at trial is not limited to what it included in its pending motion. Furthermore, the defendant in *United States v. Williams*, 439 F. App'x 254 (4th Cir. 2011), made a similar argument, when the government moved to disqualify the defendant's counsel on the grounds that she had previously represented the defendant's father, who was willing to cooperate in his son's prosecution in order to receive a Rule 35 sentence reduction. *Id.* at 256. In that case, the defendant contended that there was no potential for a conflict of interest, because the witness's ability to earn a Rule 35 reduction was tied to his truthful testimony, which would not infringe on counsel's ability to cross-examine her former client. *Id.* Nonetheless, the court simply stated that "controlling Fourth Circuit law clearly supports disqualification under these circumstances." *Id.* (citing *Williams*, 81 F.3d at 1324-25) (affirming disqualification of the defendant's attorney because he would be required to cross-examine a former client). This well-established premise in the Fourth Circuit holds true for this case as well.

Mr. Garrett also stated during the April 2, 2013 hearing that he called Mr. Beers's office in order to obtain permission from his former client, Mr. Barlow, to represent Mr. Reynolds in this matter.⁴ Mr. Garrett eventually contacted Mr. Barlow, without permission from Mr. Beers, his current counsel. Without discussing the other ethical implications of his conduct, I find that Mr. Garrett's actions do not constitute a proper consultation. In any case, as discussed, the subject matter from Mr. Garrett's representation of Mr. Barlow is substantially related to his current representation of Mr. Reynolds, and the resulting conflict warrants his disqualification.

Moving forward, the government contends that Mr. Reynolds's co-counsel, Thomas Blaylock, has not been tainted by Mr. Garrett's conflict. Thus, the government argues,

⁴ Under Rule 1.9(a) of the Virginia Rules of Professional Conduct, "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation."

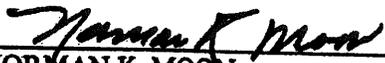
disqualifying Mr. Garrett at this point would neither disrupt nor prejudice Reynolds's defense. Mr. Blaylock and Mr. Garrett work for different law firms, and leading up to the April 2, 2013 motion hearing, during which Mr. Blaylock stated that he had nothing to do with the Motion to Dismiss Mr. Garrett had recently filed on behalf of Mr. Reynolds (docket no. 46), it appears that the two counsels were not working in close tandem. I find that Mr. Blaylock can remain on the case to represent Mr. Reynolds, without implicating any actual or potential conflict that would warrant his disqualification.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's request to disqualify Carter B. Garrett from this case is granted. A jury trial is scheduled to begin on June 3, 2013.

The Clerk of the Court is hereby directed to send a certified copy of this memorandum opinion and accompanying order to all counsel of record.

Entered this 8th day of April, 2013.



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE