

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JULIA BEATRICE KELEHER,

Defendant.

CRIMINAL CASE NO.: 19-431 (PAD)

**DEFENDANT’S SUPPLEMENTAL RESPONSE IN OPPOSITION TO THE
GOVERNMENT’S MOTION FOR INQUIRY INTO POTENTIAL CONFLICT OF
INTEREST**

TO THE HONORABLE COURT:

COMES NOW Defendant Julia Beatrice Keleher (“Defendant”), through the undersigned counsel, and respectfully files her *Supplemental Response in Opposition to the Government’s Motion for Inquiry into Potential Conflict of Interest* (Docket No. 139), in compliance with the Court’s October 3, 2019 Order (Docket No. 144) in the above-entitled case.

PROCEDURAL BACKGROUND

1. On July 9, 2019, a Federal Grand Jury returned an indictment against the Defendant and charged her with conspiracy to commit wire fraud, in violation of 18 U.S.C. §1349; wire fraud, in violation of 18 U.S.C. §1343; and conspiracy to commit an offense against the United States (theft), in violation of 18 U.S.C. §§ 371, 641. *See* Docket No. 3. On July 16, 2019, the Defendant appeared before Magistrate Judge Marcos E. Lopez for her arraignment and detention hearing and pled not guilty to all the charges brought against her. She was released on bond.

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2. On July 10, 2019, Attorneys Maria Domínguez and Javier Micheo filed their respective *Notices of Appearance* on behalf of Defendant. *See* Docket No. 11, 12.
3. On October 1, 2019, the Government filed a meritless *Motion for Inquiry into Potential Conflict of Interest* (Docket No. 139) urging the Court to inquire as to whether Attorneys Domínguez and Micheo's representation of Defendant was precluded by conflict. The Government's motion was rife with speculation and baseless allegations. Defendant responded the following day with a meticulous disarming of the Government's frivolous arguments. *See* Docket No. 141.¹
4. On October 3, 2019, the Court ordered both undersigned attorneys and the Government's attorneys to file supplemental pleadings with "supporting case law and authorities discussing the issues brought forth in the context of identical or analogous factual settings." Docket No. 144.
5. Several moments ago, the Government filed its brief in compliance with the Court's order. *See* Docket No. 145. In sum, the Government once again sets forth absolutely zero facts regarding the alleged representation by counsel of the entities discussed below. The Government merely concludes that the representation in and of itself creates an unwaivable conflict. As will be shown by the wholly analogous case law discussed below, most of which is case law from this circuit, the Government's motion should be summarily denied.
6. Defendant posits that the Government should have been ordered to file a supplemental brief before Defendant, insofar as the Government's decision to file a frivolous and unsealed motion imputing ethical violations on counsel triggered this exchange of pleadings.

¹ The arguments contained in Defendant's response in opposition are herein incorporated in their totality by reference.

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However, in compliance with the Court's order, Defendant hereby files this supplemental response to the Government's motion.

FACTUAL BACKGROUND²

The facts of this matter are simple. During the grand jury's investigation of the instant matter and until sometime after the filing of this indictment, both undersigned counsels were employed by McConnell Valdes LLC ("McV"). Banco Popular de Puerto Rico ("Popular") and Oriental Bank ("Oriental") were and continue to be clients of McV³. During their time at McV, neither Dominguez nor Micheo ever represented Oriental in any capacity nor did they sustain any communications with representatives from Oriental that could be protected by the attorney-client privilege.

At one point during the investigation of this case, Popular was served with a subpoena to produce documents related to Company C and Individual K. Concerned with the timetable for complying with the subpoena, the attorney in charge of the Popular account at McV requested Attorney Dominguez's limited intervention in the matter, solely for the purpose of requesting an extension of time to comply with the subpoena. Attorney Dominguez's intervention was strictly confined to requesting an extension of time for Popular to comply with the subpoena via electronic mail sent on February 21, 2019. She never reviewed the documents produced and did not sustain any meaningful communications regarding the matter with Popular's representatives.⁴ The

² "Attorneys are officers of the court and a judge has the right, in most circumstances, to rely on their representations to him." *Theodore v. State of N.H.*, 614 F.2d 817, 822 (1st Cir.1980).

³ It is important to note that both of these entities, large local banks, have numerous counsel that represent them across various legal fields. For example, upon information and belief, Oneill & Borges LLC and Pietrantonio Mendez & Alvarez LLC, large law firms similar to McV, also represent Popular and Oriental.

⁴ The Government's reference to the publication of the grand jury subpoena is of no consequence to the instant proceedings. Neither Attorney Dominguez nor Micheo intervened in the matter and the Popular employee responsible for the illegal disclosure was not represented by McV.

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Government concedes this point, insofar as their motion fails to provide any evidence of further intervention by Attorney Dominguez in the matter.

Several months later, Individual K requested the services of McV through the firm's managing director. McV referred the matter to Attorney Dominguez, who spoke with Individual K several times to discuss the parameters of the grand jury's investigation into his ties with Defendant Alberto Velazquez-Piñol ("Velazquez-Piñol"). Prior to sustaining any substantive conversations with Individual K, Attorney Dominguez expressly inquired as to whether Individual K had any information regarding Defendant Julia Beatrice Keleher ("Defendant"). Individual K disclaimed having any information regarding Defendant. Nevertheless, Attorney Dominguez reached out to counsel for the Government to corroborate that her limited representation of Individual K would not trigger a conflict with her representation of Defendant. An affirmative response was never received and, accordingly, Attorney Dominguez proceeded to counsel Individual K in the limited context of complying with the investigation into Company C and its relation to Velazquez-Piñol. Individual K never mentioned Defendant's name during counsel's conversations with Individual K.

On July 9, 2019, a Federal Grand Jury returned an indictment against the Defendant and Velazquez-Piñol. *See* Docket No. 3. A superficial review of the Indictment in this case reflects that Individual K and Company C are not mentioned until Paragraph 155 of the Indictment. Paragraph 155 falls within Count Nineteen of the Indictment, which charges Conspiracy to Commit an Offense Against the United States in violation of 18 U.S.C. § 371. Defendant is not charged in Count Nineteen of the Indictment nor is she even remotely mentioned therein.

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LEGAL STANDARD⁵

Rule 1.7 of the ABA Rules of Professional Conduct (the “Model Rules”) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. Model Rules of Prof'l Conduct Rule 1.7(a). A concurrent conflict of interest exists if: “(1) the representation of one client will be **directly adverse** to another client; or (2) there is a **significant risk that the representation of one or more clients will be materially limited** by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” *Id.* at 1.7(a)(1)-(2)(emphasis ours). The concerns underlying the establishment of Rule 1.7 are that the client to whom the representation is directly adverse is likely to feel betrayed and the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue the client’s case less effectively. *See* Model Rules of Prof'l Conduct Rule 1.7, cmt. 6 (2016).

Rule 1.10 of the Model Rules specifically governs the imputation of conflicts of interest and provides that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.” Model Rules of Prof'l Conduct Rule 1.10(a) (2016) (emphasis ours). As suggested by the language of Rule 1.10(a), this Rule only operates among lawyers currently associated in a firm. Comment 2 to Rule 1.10 explains that when a lawyer moves from one firm to another, the situation is instead governed by Rule 1.9(b). *See* Model Rules of Prof'l Conduct 1.10, cmt. 2 (2016).⁶

⁵ The standards for the professional conduct of attorneys in the U.S. District Court for the District of Puerto Rico are the Model Rules of Professional Conduct adopted by the American Bar Association, as amended. *See* Local Rules Dist. P.R. R. 83.5(a); *see also* 28 U.S.C. § 332(d) (2004).

⁶ Comment 2 to Rule 1.10 also states that when a lawyer moves from one firm to another, the situation is governed by 1.10(a)(2) and 1.10(b). However, Rules 1.10(a)(2) and 1.10(b) are of inapplicable to the facts of this case.

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Rule 1.9(b) provides that “[a] lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are **materially adverse** to that person; and (2) about whom the lawyer had **acquired information** protected by Rules 1.6 and 1.9(c) that is **material** to the matter; unless the former client gives **informed consent, confirmed in writing.**” Model Rules of Prof’l Conduct 1.9(b)(emphasis ours). In the context of Rule 1.9, this district court has stated that the purpose of the Rule is to prevent confidential information, from a prior representation, from being used for the benefit of another who is now the adversary of the prior client. *See Southwire Co. v. Ramallo Bros. Printing, Inc.*, 2009 WL 4937726 at 7 (D.P.R. 2009) (citing *Reyes Canada v. Rey Hernandez*, 193 F. Supp. 2d 409, 411 (D.P.R. 2002)).

Admittedly, where the Government has reasons to believe that defense counsel has a direct conflict with his client, the Government must alert the court. *See United States v. Matta-Timmins*, 81 F. Supp. 2d 193, 195 (D. Mass. 2000) (citing *United States v. Levy*, 25 F.3d 146, 152 (2d Cir. 1994)). Not surprisingly, defense attorneys are held to the same standards than the Government. *Id.* In the context of conflict of interests and disqualification of a defendant’s counsel of choice, however, the First Circuit has cautioned that the Government bears a “heavy burden” in demonstrating that a conflict exists and that disqualification of a defendant’s counsel is justified. *See United States v. Moreno*, 132 F. Supp. 3d 265, 270 (D.P.R. 2015) (citing *In re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988)).

ARGUMENT

Here, the Government claims that there is a serious potential for conflict between Defendant, Banco Popular, Oriental, Company C, and Individual K because: 1) Attorney Domínguez represented Popular, Company C, and Individual K in connection with a grand jury

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investigation that ultimately resulted in the Indictment charging Defendant; 2) the Government expects to elicit testimony from representatives of Popular, Oriental, Company C, and Individual K; and 3) Attorneys Domínguez and Micheo were both attorneys at McV, who represents Popular and Oriental, and, thus, said representation must be imputed to them based on their prior association with the firm. The Government's position is not supported by the Model Rules of Professional Conduct nor by analogous case law.

A. Individual K and Company C

In *United States v. Morales-Laureano*, 947 F.Supp.2d 184 (D.P.R. 2013)(Besosa, J.), this Court declined to find a conflict of interest where counsel for the defendant had represented an individual who later stood to cooperate against the defendant. In that case, involving a narcotics conspiracy, the defendant's counsel had previously represented a former co-conspirator of the defendant, later turned potential cooperating witness at trial. Facing arguments very similar to those levied by the Government here, this Court provided that “[t]here must be a direct link between the clients of an attorney—or at least some concrete evidence that one client, such as an immunized witness, has information about another client . . . before the right to counsel of choice is barred by disqualification.” *Id.* at 187 (quoting *In re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988)). Finding insufficient evidence of conflict on the record, this Court denied the Government's motion.

In *United States v. Donatelli*, 484 F.2d 505 (1st Cir. 1973), the First Circuit faced an appeal from a defendant whose trial attorney had represented one of the witnesses against him at the witness' bond and preliminary hearing. On appeal, the defendant argued that his trial attorney did not effectively cross-examine his prior client because of their previous attorney-client relationship.

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Id. at 507. The First Circuit swiftly disrobed the defendant's argument. Upon review of the trial record, the Circuit court found that the defendant's trial attorney had vigorously cross-examined the witness, had given no indication that any avenue of interrogation was foreclosed to him because of his prior representation of the witness, and did not demonstrate that he was impaired by adequately representing the defendant due to privileged information regarding the witness. *Id.* The First Circuit thus held that, absent concrete facts suggesting a conflict of loyalty, it was "unwilling . . . to assume that an attorney who has severed his attorney-client relationship with a government witness retains a conflict of interest at trial." *Id.*; see also *United States v. Kliti*, 156 F.3d 150 (2d Cir. 1998)(Finding no conflict of interest existed where the defendant's attorney represented a potential witness at a bond hearing and did not acquire any confidential information from the witness that might affect his ability to cross-examine the witness and represent the defendant.)

This court faced a situation similar to that of Attorney Dominguez's representation of Individual K and Company C in the seminal case of *United States v. Morrell-Corrada*, 343 F. Supp. 2d 80 (D.P.R. 2004)(Pérez-Giménez, J.). In that case, a cooperating witness ("CW") against the defendant had met with the defendant's counsel, referred to as Attorney A, three times at the onset of the relevant investigation in the hopes of hiring the defendant's counsel. See *id.* at 83. The CW did not hire Attorney A, hired another counsel, and became a witness against the defendant in the Government's case-in-chief. *Id.* Attorney A later appeared as counsel on behalf of the defendant and the Government moved to disqualify counsel based on an alleged conflict of interest. The Court denied the Government's motion.

The court instructed that the "determinative element in a finding of no conflict" was "material adversity" of interests. *Id.* At 84 (citing ABA Comm. on Ethics and Professional

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Responsibility, Formal Op. 99–415 (1999)). In supporting its finding that no conflict of interest existed, the court stated as follows:

[The CW's] anticipated testimony is adverse to defendant only in the sense that the indictment charges a conspiracy, in which defendant is allegedly involved. In his grand jury testimony, Mr. X made no mention whatsoever of defendant. Furthermore, there are only three references to defendant in Trial Attorney's notes of the debriefings with [the CW]. The first reference dates from October 28, 2003, when Mr. X stated that he had never heard of defendant. The following day, Mr. X informed that, he [defendant] had a bad reputation in PR—he [the CW] knew he was a party official, papers talked bad about him. Most significantly, the final reference on April 30, 2004, reads, [r]emember I did not know about him.

Id. at 85 (citations and marks omitted). As is the case here, Attorney A's prior client had no knowledge of the defendant and provided no information directly and materially adverse to the defendant. The Court found the situation to fall "far short of the direct adversity required under Model Rule 1.9," which applies to this situation. *Id.* (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99–415 (1999)). Accordingly, "[g]iven that the contours of [Individual K's] anticipated testimony do not encompass defendant, it cannot be concluded that his testimony will be directly adverse to defendant." *Id.*

In this Circuit's most recent published decision on this topic, the court found that the relevant question in this analysis is "whether [counsel's] representation of [a new client] 'can be justly regarded as changing sides in the matter [substantially related to that of a former client's]?" *United States v. Liberty*, 2019 WL 1512711, at *3 (D. Me. 2019)(Singal, J.)(quoting M. R. Prof. Conduct 1.9, cmt. 2.). The court in *Liberty* did not find a conflict of interest where counsel for the defendant had previously represented a witness at trial that could not and would not testify as to the defendant's guilt. *See id.* at *2.

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As the Court can readily ascertain, the analogous case law from the First Circuit and beyond does not support a finding of conflict in this case regarding Individual K or Company C. Neither the individual, nor the company, have interests that are materially adverse to those of the defendant. The Court's inquiry should end there, insofar as material adversity is the outcome-determinative prong of the Court's analysis. The Government's motion, however, also fails on the second prong of the analysis, as Attorneys Dominguez nor Micheo obtained any confidential information from Individual K or Company C that is related to Defendant's case in any way. Consequently, the Court should deny the Government's motion for an inquiry into Attorneys Dominguez and Micheo's representation of Individual K and Company C outright.

B. Popular

The case law detailed above applies with the same force to Attorneys Dominguez and Micheo's representation of Popular. Neither counsel reviewed the documents produced by Popular, nor did they sustain any conversations with representatives from Popular that would shed light on confidential information that may be related to Defendant's case. Most importantly, Popular's interests are not materially adverse to Defendant's. Popular's anticipated participation in this case is confined to custodial testimony. Pursuant to Fed.R.Evid. 803(6)(D), custodial testimony is not necessary to introduce these records into evidence. In the situations where live testimony is presented, rarely are the witnesses cross-examined. Oftentimes, the authenticity of these records is stipulated. Therefore, the Government's preoccupation with counsel potentially cross-examining Popular's witness is misguided. In any event, counsel can assure to the Court that they have no intention of cross-examining Popular's witnesses regarding the authenticity of the records produced. *See Liberty* at *3 ("Needless to say, Attorney Merrill's representations that he will in no way participate in any cross-examination of [his former client] are critical to this finding

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[of no potential conflict].”). The Court’s inquiry should end here with a denial of the Government’s motion as it pertains to Attorneys Dominguez and Micheo and Popular.

C. Oriental

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99–415 (1999) is instructive on the issue of representing a client in a matter that may be related to a matter in which a client of the attorney’s former law firm has participation. In those situations, “the lawyer must ask and answer four questions: (1) whether the lawyer represented his former [client] in the matter in question; (2) if so, whether the matter the new client has asked him to undertake is the same matter as, or is substantially related to, the matter in which he represented his former employer; (3) if the matters are either the same or substantially related, whether the interests of his new client are materially adverse to those of his former [client]; and (4), **if the answers to all of the above questions are yes**, whether his former employer has consented to his undertaking the new representation.” *Id.* at 2.

As it pertains to Oriental and Attorneys Dominguez and Micheo, the answer to all of these questions is no. Neither attorney represented Oriental in the investigation of this case and, in any event, the interests of Oriental and Defendant are not materially adverse. *See id.* at 3 (“The Committee is of the opinion that only direct adversity of interests meets the threshold ‘material adversity’ sufficient to trigger the prohibitions established in Rule 1.9.”). If the situations enumerated above do not give rise to a finding of a conflict, Attorneys Dominguez and Micheo’s tenuous relationship with Oriental cannot be said to create a risk of conflict. Accordingly, the Court should summarily deny the Government’s motion for an inquiry into Attorneys Dominguez and Micheo’s representation of Oriental.

CONCLUSION

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In the context of disqualification of an attorney for an alleged conflict of interest, this district court has stated that a motion to disqualify should be approached with **cautious scrutiny** because they are **often used for strategic purposes**. See *Reyes Canada v. Rey Hernandez*, 193 F. Supp. 2d 409, 411 (D.P.R. 2002) (emphasis ours). This excerpt from *Morell-Corrada* is particularly applicable to the case at bar:

The timing of the government's motion for disqualification is also troubling. The government had notice of the potential conflict at the latest by April 30, 2004, the date of the meeting with Mr. X. Nonetheless, the government's motion to disqualify was not filed until July 15, 2004, almost three months later. While even dilatory disqualification motions ought be considered by the Court when an attorney has privileged information about the former client, in this case, no privileged information exists because the privilege was waived, **and the length of the delay only further underscores the tactical purpose of the motion.**

Morrell-Corrada at 92 (emphasis ours)(citations and marks omitted). In situations like this one, the First Circuit has cautioned that the Government bears a “heavy burden” in demonstrating that a conflict exists, and that disqualification of a defendant’s counsel is justified. See *United States v. Moreno*, 132 F. Supp. 3d 265, 270 (D.P.R. 2015) (citing *In re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988)). Ultimately, disqualification of a defendant’s counsel of choice is a **measure of last resort**. See *United States v. Diozzi*, 807 F.2d 10, 12-13 (1st Cir. 1986).

Here, the Government has failed to reach its evidentiary burden. Its motion is full of misrepresentation of facts and assumptions that are unsupported by reality. There is no evidence on the record, nor will there ever be, that Defendant has interests adverse to those of Company C, Individual K, Popular, or Oriental. Moreover, counsel did not obtain any information protected by Rules 1.6 and 1.9(c) that is material to this matter from any of those individuals or entities. Finally, in the event the Court errs and finds that a conflict exists here, both Defendant and

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Individual K have expressed to counsel that they are willing to provide informed consent, in writing, to counsel's continued representation of Defendant. Accordingly, the Government's motion fails in light of the applicable case law, fails on both required prongs for disqualification under Rule 1.9(b), and should be denied without a hearing on the matter, insofar as a hearing would constitute a gross waste of judicial resources.

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests the Court DENY the Government's motion without a hearing on the matter.

Respectfully submitted on this 9th day of October, 2019, in San Juan, Puerto Rico.

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will provide access to all parties of record.

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