

Sheppard from continuing to represent Defendant Matthew Kolodesh.¹

II. BACKGROUND

On October 12, 2011, Matthew Kolodesh ("Defendant") was arrested pursuant to an indictment charging him with a conspiracy to defraud Medicare under Title 18 U.S.C § 1349, twenty-one counts of health care fraud under Title 18 U.S.C § 1347, two counts of mail fraud under Title 18 U.S.C § 1341, and eleven counts of money laundering under Title 18 U.S.C § 1957. Indictment 1, ECF No. 1.

On October 14, 2011, attorney Mark B. Sheppard entered his appearance on behalf of Defendant. Trial is scheduled to commence on June 4, 2012, before this Court.

The charges set forth in the indictment arise from Defendant's ownership and control of Home Care Hospice ("HCH"), a for-profit hospice provider situated at 2801 Grant Avenue in Philadelphia, Pennsylvania. Id. The Government's motion to disqualify Mr. Sheppard stems from allegations arising out of the mail fraud scheme set forth in the indictment and charged in Counts 23 and 24. Id. at 15-18. In essence, the indictment

¹ The disqualification will also be imputed to Mr. Sheppard's firm pursuant to the Pennsylvania Rules of Professional Conduct. See 204 Pa. Code § 81.4 (Rules 1.10, 3.7(b)); infra text accompanying note 7.

alleges that Defendant perpetrated a mail fraud scheme to secure a \$2.5 million low interest loan from the Philadelphia Industrial Corporation ("PIDC") by creating the false appearance that one of his businesses, Community Home Health ("CHH"), was a tenant at the HCH address and that CHH employees actually worked at that location on Grant Avenue in Philadelphia. See id. The Government contends that Mr. Sheppard is a fact witness to certain transactions and events involving the PIDC loan and, as such, is a potential witness at Defendant's trial.

The indictment specifically alleges that in order to obtain the financing from PIDC, Defendant and A.P., as business applicants under the name KP Grant Enterprises LP (KP), represented that the project would result in the creation of fifty (50) full time jobs for individuals within the City of Philadelphia. Indictment 15. The terms of the loan also required written reports provided twice annually to PIDC regarding the project status and the submission of applicable employment forms related to the creation of the fifty jobs in Philadelphia. Id. at 16.

The Government contends that around September 2007 Defendant believed that as a result of the termination of several HCH employees, the PIDC loan was in jeopardy because the number of created staff positions fell below the requisite fifty

jobs. Id. The Government further argues that to prevent defaulting on the PIDC loan, Defendant ordered the construction of sham office space for CHH, a home health agency owned and controlled by Defendant, at the office site of HCH. Id. Moreover, from on or about June 2008 through 2009, Defendant perpetrated the false appearance that CHH was a bona fide tenant fulfilling the job quota required by: (1) submitting a semi-annual report on August 20, 2008, stating that CHH had been a tenant at the HCH office site since July 2005; (2) submitting Employment Eligibility Verification Forms ("Forms I-9"), documenting that approximately 73 CHH employees worked at the office site of HCH, when in reality no such employees worked at that location; and (3) submitting a semi-annual report on June 25, 2009, representing that CHH continued to be a tenant and was consistently hiring new staff. Id. at 16-17.

The Government represents that the evidence will demonstrate that Mr. Sheppard was inextricably intertwined with the creation of the false semi-annual report submitted by Defendant on June 25, 2009. Mot. to Disqualify 6, ECF No. 27. The Government intends to call Luiza Roitshtein, an accountant and HCH employee, to testify in connection with the PIDC fraud, that she submitted the allegedly false reports and Forms I-9 at Defendant's direction. Id. She will also testify that relevant

to the June 2009 summary report, Defendant dictated the contents of the document and signed it, but this time she told Defendant to check the report "with his attorney." Id. at 7. Ms.

Roitshtein subsequently received a telephone call from Mr. Sheppard during which he asked her whether a CHH office existed at 2801 Grant Avenue, to which she replied it did. He also asked her if she saw CHH employees in the office, to which she replied it was hard to say since the office had a separate entrance. He lastly asked whether previous narratives had been signed, to which she replied they had not. Mr. Sheppard then advised Ms. Roitshtein not to send a signed version to PIDC and she complied with his direction. Id.; see also FBI 302 of Roitshtein, Mot. to Disqualify Ex. A. Curiously, and according to Ms. Roitshtein, Mr. Sheppard did not ask about the history of the office during this conversation. Id.

The Government also intends to submit into evidence an e-mail exchange between Defendant and Ms. Roitshtein regarding the report of June 2009. Mot. to Disqualify 7. In an e-mail dated June 26, 2009, referencing the June 2009 report for PIDC, Defendant advised Ms. Roitshtein to "Save your nerves and stay cool. Here is the final draft, it is approved by Mark and ready to be sent out. We have made all the changes he requested. Best

regards, have a nice weekend and lots of money in your bank account. Matthew." E-mail Exchange 1, Mot. to Disqualify Ex. B. The Government believes that "Mark" is attorney Mark Sheppard. Mot. to Disqualify 7.

Based on the above witness statement and related e-mail, the Government contends that Mr. Sheppard was used by Defendant to make inquiries of Ms. Roitshtein with respect to the June 2009 report. The inference the Government would like the trier of fact to draw is that Mr. Sheppard's inquiries were intended to "reassure"² Ms. Roitshtein in sending out the June 2009 report to PIDC.

The Government further contends that thereafter Mr. Sheppard also suggested changes to the report, which constituted an allegedly false instrument used to perpetrate the mail fraud alleged in Count 24 of the indictment. Id. at 8. The Government argues that Mr. Sheppard's actions implicate him in a number of issues that result in unwaivable conflicts of interest.

Mr. Sheppard began representing Defendant in this matter in October 2008, when the Government executed a search warrant at the premises of HCH. Def.'s Response in Opp'n 2, ECF No. 33. Mr. Sheppard continues to be Defendant's counsel in this

² Whether Ms. Roitshtein's request that Defendant "check with his attorney" was meant to ensure the accuracy of the report, or to obtain "legal cover" for what she knew was a false report, or for some other reason, will be an issue at trial.

matter and has worked a significant number of hours on Defendant's defense, including but not limited to, overseeing an extensive shadow investigation, participating in status conferences, preparing pre-trial and trial motions, and familiarizing himself with the voluminous discovery in this case. Id. Defendant also has other counsel in this case, Jack J. McMahon, who entered his appearance on behalf of Defendant on February 9, 2012. While Mr. McMahon only recently began representing Defendant Kolodesh in this matter, he is intimately familiar with the legal and factual circumstances of the case due to his previous representation of Defendant Kolodesh's wife, Malvina Yakobashvilli, during the course of the grand jury investigation. McMahon Aff. ¶ 3, Def.'s Response in Opp'n Ex. A. Moreover, in addition to being co-counsel in this case Mr. McMahon purports to be conflict counsel on behalf of Defendant with respect to the current motion. Id. Defendant maintains that he would be substantially prejudiced if Mr. Sheppard were to be disqualified from acting as one of his counsel at trial. Def.'s Response in Opp'n 13-14.

III. MOTION FOR DISQUALIFICATION

The Government seeks to disqualify Mr. Sheppard from representing Defendant because of an actual and serious

potential for conflict of interest.³ The Government argues first, that the Defendant may assert an advice of counsel defense, in which case Mr. Sheppard will face an actual conflict of interest by serving as both Defendant's advocate and a potential fact witness at trial. Second, even if Defendant waives an advice of counsel defense, Mr. Sheppard's first-hand knowledge of the events surrounding the mail fraud scheme and the fact that the Government might call him as a fact witness creates a serious potential for conflict and an unsworn witness problem. Last, Mr. Sheppard as counsel will vigorously cross-examine Ms. Roitshtein about the events in question, which raises another serious potential for a conflict of interest as he will be placed in the dual role of witness and advocate before the jury. Mot. to Disqualify 8-9.

Mr. Sheppard argues that the Government's Motion should be denied because: (1) he is not a necessary witness to a disputed fact at trial and, in fact, his testimony would be irrelevant; (2) Defendant, with advice of separate and independent counsel, has indicated his willingness to waive his

³ Before filing its motion for disqualification, the Government discussed the situation with Mr. Sheppard and afforded him an opportunity to determine for himself whether withdrawal was warranted. Mot. to Disqualify 3. Mr. Sheppard, in a letter to the Government dated February 22, 2012, elected not to withdraw and sought additional information from the Government, including among other things the factual basis for its assertion. Id.

right to call Mr. Sheppard as a witness and will not dispute his involvement in the preparation of and mailing of the document at issue; (3) even if the facts regarding Ms. Roitshtein's interview were relevant and in dispute, the ability of separate trial co-counsel to cross-examine her removes any possible prejudice to the Government; and (4) depriving Defendant of his longstanding counsel will result in substantial hardship on Defendant's ability to prepare and defend himself at trial. Def.'s Response in Opp'n 2.

In assessing each of the Government's arguments, the Court will undertake a two-step analysis. First, it will determine whether the Government has demonstrated the existence of an actual conflict of interest or a serious potential for a conflict of interest concerning Mr. Sheppard's representation of Defendant in this case. Second, if the Court determines that an actual conflict or a serious potential for conflict exists, the Court must then determine whether a waiver of the conflict is both permissible and appropriate in this case. See United States v. Massimino, No. 09-496-04, --F. Supp. 2d.--, 2011 WL 6371883, at *1 (E.D. Pa. Dec. 20, 2011) (Robreno, J.).

A. Legal Standards Of Review

The Court recently reviewed the legal framework guiding district courts faced with motions to disqualify a criminal Defendant's attorney. These legal principles are reproduced here:

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Roe v. Flores-Ortega, 528 U.S. 470 (2000). The purpose of the right to counsel is "to protect the fundamental right to a fair trial." Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)). Derivative of the right to effective assistance of counsel is a defendant's right to representation by the counsel of his choice. United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006); see also United States v. Moscony, 927 F.2d 742, 748 (3d Cir. 1991) ("[A] presumptive right to the counsel of one's choice has been recognized as arising out of the Sixth Amendment."). The primary purpose of these rights is to grant a criminal defendant control over the conduct of his defense--as "it is he who suffers the consequences if the defense fails." Moscony, 927 F.2d at 748 (quoting Farretta v. California, 422 U.S. 806, 820 (1975)).⁴

⁴ The Court must carefully consider the circumstances before deciding to disqualify counsel because an erroneous deprivation of a defendant's choice of counsel is a structural error, which requires a new trial regardless of prejudice. Gonzalez-Lopez, 548 U.S. at 148 ("Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."). Even so, Supreme Court precedent affords district courts broad discretion to disqualify attorneys in order to avoid conflicts of interest, and to enforce compliance with professional rules. Id. at 151-152 (concluding that the Court's holding in Gonzalez-Lopez does not cast any doubt or place any qualification upon the Court's previous holdings in which it recognized a trial court's "wide latitude

However, one ground for denying a defendant the counsel of his choice is when the attorney has an actual conflict or a serious potential for conflict in representing the defendant. Wheat v. United States, 486 U.S. 153, 159 (1988).

Another set of "rights" also guides the Court in this case, "[s]temming not from the Sixth Amendment but from the ethical precepts that govern the legal profession." Moscony, 927 F.2d at 748. The Supreme Court explained that "[w]hen a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant." Wheat, 486 U.S. at 162. In delineating the ethical duties governing a given situation, the Pennsylvania Rules of Professional Conduct, 204 Pa. Code § 81.4 ("RPC"), provide a useful template against which to measure the conduct of lawyers subject to a disqualification motion.⁵ See In Re Grand Jury Investigation, No. 03-123, 2006 WL 2385518, at *3 (E.D. Pa. May 16, 2006) (finding that the RPC provide a useful guide for considering the ethical conduct of lawyers subject to a disqualification motion).

In evaluating a motion to disqualify an attorney, there is a presumption in favor of a defendant's choice of counsel. United States v. Stewart, 185 F.3d 112, 121 (3d Cir. 1999) (citing Wheat, 486 U.S. at 164). When seeking disqualification, the Government bears the burden of overcoming this presumption by showing that the attorney in question has an actual or serious potential for conflict. Wheat, 486 U.S. at 164; Stewart, 185 F.3d at 121-22. In determining whether

in balancing the right to counsel of choice against the needs of fairness").

⁵ The Local Rules of Civil and Criminal Procedure for the Eastern District of Pennsylvania require attorneys practicing in the district to comply with the RPC. See E.D. Pa. R. Civ. P. 83.6; E.D. Pa. R. Crim. P. 1.2.

the Government has met this burden, the trial court must balance "a defendant's Sixth Amendment right to counsel of choice against the interests of the proper and fair administration of justice."⁶ United States v. Voigt, 89 F.3d 1050, 1074 (3d Cir. 1999). As the Third Circuit noted, this "is no simple task" as "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.'" Id. at 1076 (quoting Wheat, 486 U.S. at 162-63).

Massimino, --F. Supp. 2d.--, 2011 WL 6371883, at *2-3 (original footnotes omitted).

With these principles in hand, and in light of the evidence submitted for the purpose of the Government's motion, the Court turns to apply these teachings here.

B. Discussion

The Government contends that Mr. Sheppard should be disqualified from representing Defendant because he is a fact witness to events relevant to a charge in the indictment. As such, he is a potential Government witness at trial, and faces a serious potential for conflict of interest if he is allowed to act as both advocate and fact witness at trial. Further, the

⁶ The "fair and proper administration of justice" side of the equation merely "includ[es] the interests governing the practice of law"; it is neither defined nor circumscribed by these standards." Voigt, 89 F.3d at 1076 n.12 (quoting Davis v. Stamler, 650 F.2d 477, 479-80 (3d Cir. 1981)). "[T]he disqualification of a defendant's chosen counsel need not be . . . predicated on a finding of a specific RPC violation." Id.

Government asserts that Mr. Sheppard will be placed in the position of having to defend his own conduct regardless of whether that conduct ultimately turns out to be improper. The Government lastly argues that the hardship that Defendant might incur if his attorney were disqualified does not negate the seriousness of the conflict or render the conflict waivable. The Court will address each of these arguments in turn.

1. Mr. Sheppard Faces an Actual and Serious Potential for Conflict of Interest

It is beyond dispute that the Sixth Amendment guarantee of effective assistance of counsel encompasses the right to counsel's undivided loyalty. Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984) (citing Wood v. Georgia, 450 U.S. 261, 271 (1981)). The Pennsylvania Rules of Professional Conduct ("RPC") proscribe the representation of conflicting interests in order to avoid interference with a counsel's fiduciary obligations to maintain undivided loyalty to the client. See 204 Pa. Code § 81.4 (Rules 1.7, 1.8). Conflicting interests can arise out of personal interests of counsel that are "inconsistent, diverse or otherwise discordant" with those of his client and which affect the exercise of his professional judgment on behalf of his client. Zepp, 748 F.2d at 135; 204 Pa. Code § 81.4 (Rules 1.7 cmt. 1) ("Loyalty and independent

judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the . . . lawyer's own interests."). A lawyer's own interests should not be permitted to have an adverse effect on the representation of a client and because it may be difficult or impossible for the lawyer to give a client detached advice in such circumstances, these conflicts are generally unwaivable. See Zepp, 748 F.2d at 135.

The Third Circuit addressed attorney/client conflicts of interest in United States v. Merlino, 349 F.3d 144 (3d Cir. 2003), and in Zepp. In Merlino, one of the defendant's attorneys improperly engaged in an effort to persuade a represented witness not to cooperate with the government. 349 F.3d at 151. The Third Circuit held that the attorney's alleged attempt to influence the witness raised the potential for conflict for two reasons. First, there was a serious potential for conflict because "an attorney who faces criminal or disciplinary charges for his or her actions in a case will not be able to pursue the client's interests free from concern for his or her own." Id. Second, the fact that the attorney could have been called as a witness was also a source of potential conflict, "as it is often impermissible for an attorney to be both an advocate and a witness." Id. at 152. The Court further noted that

"disqualification may also be appropriate where it is based solely on a lawyer's personal knowledge of events likely to be presented at trial, even if the lawyer is unlikely to be called as a witness." Id. (citing United States v. Loscacio, 6 F.3d 924, 933 (2d Cir. 1993) ("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.")).

In Zepp, the Third Circuit reversed a judgment of conviction and granted the defendant a new trial because the defendant had not been apprised of her attorney's conflicts of interest nor had she knowingly waived the conflicts. 748 F.2d at 127, 136. The defendant's attorney in Zepp faced potential criminal liability on the same charges for which defendant was tried, specifically destruction of evidence, and acted as a prosecution witness through stipulating that he had not participated in the destruction of evidence. Id. at 129, 136. Regarding the attorney's potential criminal or professional liability, the court explained that direct evidence of participation in the destruction of the evidence was unnecessary to conclude that the attorney had an actual conflict of interest because he had been alone in the house with the defendant during the destruction of evidence, and thus had "independent personal

information regarding the facts underlying his client's charges." Id. at 136. Under these circumstances, the Court concluded that it was "unrealistic" to assume that the attorney had "vigorously pursued his client's best interest entirely free from the influence of his concern to avoid his own incrimination." Id.

The Court also determined that the attorney's testimony, as admitted via the stipulation, "impaired [his] exercise of independent professional judgment on behalf of his client." Id. at 138. In light of the fact that defense counsel was actually permitted to testify against his own client in order to exculpate himself, the Court concluded that the admission of such testimony constituted "a total abandonment of the loyalty which counsel owes his client." Id.

Pertinent to the conflict issues raised in the instant case, RPC 3.7(a) provides, in relevant part, that "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" unless certain exceptions are met. 204 Pa. Code § 81.4 (Rule 3.7(a)). The exceptions include: (1) testimony related to an uncontested issue; (2) testimony related to the nature and value of legal services rendered in the case; and (3) disqualification of the lawyer would work

substantial hardship on the client.⁷ Id. The Government maintains that such a conflict exists in the instant case because Mr. Sheppard is a witness to key facts integral to the mail fraud scheme alleged in the indictment and none of the above exceptions are applicable here.

“The roles of an advocate and of a witness are inherently inconsistent.” Zepp, 748 F.2d at 138. While a witness is required to state facts objectively on the basis of personal knowledge, an advocate is expected to explain and comment on evidence given by others to advance the cause of his client. Id.; 204 Pa. Code § 81.4 (Rule 3.7(a) cmt. 2). A myriad of problems arise when these roles are combined within the same individual, including prejudicing the opposing party and impairing the integrity of the judicial process.

a. Mr. Sheppard faces an actual conflict of interest

⁷ Rule 3.7 further states, “A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.” 204 Pa. Code § 81.4 (Rule 3.7(b)). Rules 1.7 and 1.9 address conflicts of interest a lawyer may face in representing a current client. Thus, Rule 3.7 imputes the rule against being an advocate and witness in the same case to the lawyer’s firm in situations where the lawyer faces a conflict of interest in representing the client. As the Court finds the Mr. Sheppard faces an actual and serious potential for conflict of interest between his interests and those of his client, his firm is also precluded from representing Defendant Kolodesh.

The Government argues that there is an actual conflict of interest because evidence at trial will allow a fact finder to infer that Mr. Sheppard as Defendant's counsel has engaged in conduct that could make him subject to professional disciplinary sanctions or even criminal liability. Specifically, the Government states that "[a]lthough the Government is not averring that Mr. Sheppard is involved in criminal conduct, it could be inferred by the finder-of-fact that Mr. Sheppard was complicit in the narrative in some way," Mot. to Disqualify 9, because "the evidence suggests that Mr. Sheppard actively engaged in the process of attempting to legitimize the documentation of a sham office." Gov't's Reply 3, ECF No. 36. Mr. Sheppard argues that the Government's assertions are both unwarranted and ultimately unfair. Def.'s Response in Opp'n 3 n.1.

From the evidence provided, it appears that Defendant asked Mr. Sheppard to discuss the PIDC report with Ms. Roitshtein. What is unresolved is whether Mr. Sheppard's inquiry into the contents of the report reflects his complicity in the allegedly fraudulent mailing, or his innocent participation in quelling Ms. Roitshtein's concerns over sending the allegedly false report through providing his stamp of approval. Under these circumstances, it is problematic for this Court to accept

that Mr. Sheppard would vigorously pursue his client's best interest entirely free from the influence of his concern to avoid even the mere suggestion that his conduct was professionally improper. See Merlino, 349 F.3d at 151; Zepp, 748 F.2d at 136. It is true that in contrast to this case, in Zepp and Merlino, the inference of impropriety was clearer or admitted to by counsel. However, Ms. Roitshtein's testimony combined with the e-mail exchange could lead a fact finder to infer that Mr. Sheppard had personal knowledge of, was willfully blind to, or knowingly participated in the mail fraud scheme, if one is shown to exist at all.⁸ See United States v. Evanson, 584 F.3d 904 (10th Cir. 2009) (disqualifying counsel after determining that counsel was involved in the creation of documentary evidence in a tax fraud, which was relevant to defendant's intent).⁹ The Government does not need to provide

⁸ The Court recognizes the Government's argument that Mr. Sheppard was involved in the drafting of the PIDC report based on an e-mail Defendant sent to Ms. Roitshtein, which stated that Defendant had made "'all the changes he requested.'" Gov't's Reply 7 (quoting E-mail Exchange 1, Mot. to Disqualify Ex. B). The Government believes that the e-mail was in reference to changes Mr. Sheppard suggested. If the jury accepts this inference as true, it could conclude that Mr. Sheppard was either involved in falsifying the report or was willfully blind to the mail fraud scheme.

⁹ Mr. Sheppard argues that Evanson is inapplicable to the facts of the current case because among other reasons in Evanson "counsel participated in drafting of the key documents and was copied on others." Def.'s Response in Opp'n 9. Mr. Sheppard

direct evidence tying Mr. Sheppard to impropriety with respect to the mail fraud charge, as long as it provides evidence from which a fact finder could reasonably infer that Mr. Sheppard was involved in or had intimate knowledge of Defendant Kolodesh's alleged efforts to intentionally conceal facts from and defraud PIDC. See Zepp, 748 F.2d at 136. Accordingly, the Court finds that there is an actual conflict of interest here, and the conflict exists between Mr. Sheppard's interest and Defendant Kolodesh's interest.

b. Mr. Sheppard as a potential prosecution witness and unsworn witness faces a serious potential for conflict

Even if the Court found that an actual conflict of interest did not exist, the Government has also overcome the presumption in favor of defendant's choice of counsel by showing

contends that the Government provided no evidence that Mr. Sheppard was referenced in, or copied on any of the documents at issue, nor is there evidence that he was involved in the drafting. However, the e-mail exchange concerning the June report references changes suggested by "Mark." In the motion briefings and at the hearing held on this motion, Mr. Sheppard and Defendant Kolodesh have represented that Defendant Kolodesh does not intend to dispute that he provided the content of the report, nor does he intend to raise an advice of counsel defense based on the advice rendered to him by Mr. Sheppard with respect to the report. From these representations, it is clear that contrary to his assertions, Mr. Sheppard was involved in suggesting changes to the final draft sent to PIDC, which is of evidentiary significance because it is one of the vehicles Defendant allegedly used to perpetrate his mail fraud scheme.

that Mr. Sheppard faces a serious potential for conflict. The Government argues that Mr. Sheppard was "inextricably intertwined" with the second mail fraud count (Count 24) and has reserved the right to call Mr. Sheppard as a witness because he reviewed and approved the false report, which was the vehicle for the fraud. Specifically, the Government points to discussions between Ms. Roitshtein and Mr. Sheppard along with the e-mail exchange indicating that "Mark" approved of the final report, to suggest either that Mr. Sheppard "actively engaged in the process of attempting to legitimize the documentation of a sham office" or that unknown to him his services were used to facilitate a fraud on PIDC. Gov't's Reply 3. As the falsity of the report will be disputed by the defense at trial, the Government contends that Mr. Sheppard remains a necessary witness because the evidence suggests that Mr. Sheppard contributed to the contents of the report, approved it, and as counsel to Defendant Kolodesh, advised Ms. Roitshtein to send the report unsigned. Gov't's Reply 4. Furthermore, the Government argues that the conflict cannot be remedied by Defendant's agreement to forgo calling his attorney as a witness, or by Mr. Sheppard's willingness to forgo cross-examination of Ms. Roitshtein to "solve" the unsworn witness

issue because his appearance as co-counsel would prejudice the Government and distort the fact-finding process. Id. at 5.

Mr. Sheppard insists that he is not a witness to the material facts relating the elements of the mail fraud because he has no first-hand knowledge of the truth of the report mailed to PIDC and, even if his testimony were relevant, it is unnecessary because Defendant will stipulate that he provided the contents of the report in question and instructed Ms. Roitshtein to mail the report to PIDC. Def.'s Response in Opp'n 6-9. Moreover, Mr. Sheppard asserts that Defendant's trial defense will be that the report was "substantially accurate," or, in the alternative, did not constitute a basis for the PIDC loan to be placed in default. Id. According to Mr. Sheppard, the Government has not provided enough to rebut the presumption that Defendant should be able to retain the counsel of his choice, since the facts surrounding the conflict are largely uncontested, Defendant is willing to waive his right to call counsel as a witness or raise an advice of counsel defense, and the Government is only speculating that Mr. Sheppard or co-counsel will employ personal knowledge when presenting Defendant's defense.

Despite Mr. Sheppard's arguments to the contrary, the evidence provided suggests that Mr. Sheppard is a potential

witness to explain the statements contained in the report to the PIDC. While Defendant represents that he will not dispute that he was responsible for the report's content, nor will he raise an advice of counsel defense, there is evidence that the Defendant made changes to the content of the report that were, in fact, suggested by Mr. Sheppard¹⁰ and that Mr. Sheppard engaged in an inquiry about the contents of the report that Defendant will assert at trial is "substantially" accurate. Even if the Court accepts Mr. Sheppard's argument that he has no first-hand knowledge of the contents of the report and only attempted to confirm that the information presented in the report was consistent with Ms. Roitshtein's understanding of the facts, his testimony would be material at trial. This is so because his testimony could support a finding of Defendant's intent to defraud PIDC,¹¹ a key element of the mail fraud charge,

¹⁰ The e-mail dated June 26, 2009 from Defendant to Ms. Roitshtein advises her to remain calm as counsel approved the report: "Save your nerves and stay cool. Here is the final draft, it is approved by Mark and ready to be sent out. We have made all the changes he requested. Best regards, have a nice weekend and lots of money in your bank account. Matthew." E-mail Exchange 1, Mot. to Disqualify Ex. B. Moreover, during her interview with the Government, Ms. Roitshtein explained that in response to her protests concerning the allegedly false contents of the report, Defendant signed the document and consulted with his attorney about the report. FBI 302 of Roitshtein 3, Mot. to Disqualify Ex. A.

¹¹ The Court recognizes that the attorney-client privilege would restrict the testimony that Mr. Sheppard could provide and that

by tending to show that Defendant induced his attorney to endorse the report in order to secure Ms. Roitshtein's cooperation and to cloak the report with greater credibility in the eyes of PIDC. Or in the alternative, as stated above, Mr. Sheppard was complicit in the fraudulent mailing through action or omission. Under the circumstances, a fact finder could reasonably draw either or neither of the above inferences. Accordingly, Mr. Sheppard's testimony is relevant to Defendant's intent to defraud and the measures Defendant undertook to execute the scheme, and should he be called as a witness, he would violate the prohibition on an attorney acting as an advocate and a witness simultaneously.¹²

Even if Mr. Sheppard were not a witness at trial, however, he can still be disqualified, since his performance as

the testimony would potentially only corroborate Ms. Roitshtein's testimony. Nonetheless, the Government has the right to present its case as it deems best and the evidence presented here could create an appearance that enables the Government to argue that Ms. Roitshtein's concerns were assuaged by Mr. Sheppard's professional participation and that Mr. Sheppard's services were used to facilitate the fraud.

¹² Mr. Sheppard places substantial weight on the fact that even if his testimony was relevant, he is not "likely to be a necessary witness" pursuant to RPC 3.7. However, the standard to determine whether a conflict of interest warrants disqualification is not set by Rule 3.7, nor does Rule 3.7 define the scope of a defendant's Sixth Amendment rights. See Voigt, 89 F.3d at 1076 n.12. The Court need not identify a strict violation of an applicable ethical rule before disqualifying counsel. Id.

an advocate might be impaired by his relationship to the events charged in Count 24. If he were to represent the Defendant at trial, Mr. Sheppard would run the risk of becoming an unsworn witness by providing implicit testimony when addressing events of which he has first-hand knowledge.¹³ See Locascio, 6 F.3d at 933 (2d Cir. 1993) (finding that "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," enabling the attorney to "subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination").

¹³ At the hearing, Mr. Sheppard suggested that all references to his name could be removed to resolve any potential unsworn witness issue. The Court considered the possibility that any references to Mr. Sheppard be anonymous, such as Ms. Roitshtein stating that "an attorney" called her, but disagrees that this would resolve the issue. This proposal would deprive the Government of the right to present evidence that appears relevant and admissible because Mr. Sheppard's name as Defendant's personal attorney at the time is material to the Government's narrative that Defendant Kolodesh attempted to pacify Ms. Roitshtein's concerns over the contents of the June 2009 report. Defendant Kolodesh did not engage the services of just any lawyer to appease Ms. Roitshtein, but provided her with an attorney whom she knew had represented Defendant previously. As a result, redacting the identification of Mr. Sheppard as Defendant Kolodesh's personal attorney at the time would unnecessarily diminish the credibility of the Government's theory of the case.

While Mr. Sheppard and Defendant have agreed to allow Mr. McMahon,¹⁴ Mr. Sheppard's co-counsel, to undertake the cross-examination of Ms. Roitshtein at trial, this proposal fails to address the prejudice to the Government or the potential distortion of the fact-finding process that Mr. Sheppard's appearance at Defendant's counsel table might engender. See United States v. Castellano, 610 F. Supp. 1151, 1167 (S.D.N.Y. 1985) (disqualifying attorney because attorney's acceptance of benefactor payments could be used to prove existence of

¹⁴ Jack J. McMahon entered his appearance on behalf of Defendant Kolodesh on February 9, 2012. In his affidavit Mr. McMahon attests that he is intimately familiar with the legal and factual circumstances of the case through his previous representation of Defendant Kolodesh's wife, Malvina Yakobashvilli, during the course of the grand jury investigation. McMahon Aff. ¶ 3, Def.'s Response in Opp'n Ex. A. Moreover, Mr. McMahon acknowledges that he is familiar with the legal and factual issues in the instant motion sufficient to advise Defendant Kolodesh as to the issues of conflict of interest. McMahon Aff. ¶¶ 4-6. Mr. McMahon purports to be conflict counsel on behalf of Defendant Kolodesh and has fully discussed all of the issues raised by the Government's Motion and the impact of these issues on Defendant Kolodesh's strategy at trial, such as Defendant's desire not to raise an advice of counsel defense. Id. Mr. McMahon also expressed at the hearing his intention to act as co-counsel on behalf of Defendant Kolodesh at trial. Because of this dual role as conflict counsel and trial counsel, it is unclear whether Mr. McMahon could have been effective as conflict counsel in curing any possible conflicts, even if the Court concluded that the identified conflicts were waivable. This dual arrangement would raise a question of whether the advice of counsel defense could be waived knowingly and intelligently under these circumstances. Mr. McMahon reiterated at the hearing that he is "ready, willing, and able" to start trial on June 4, 2012.

enterprise and his appearance at counsel table would itself distort the fact-finding process). For example, Mr. Sheppard's role as advocate may give Defendant an unfair advantage because Mr. Sheppard in opening or closing arguments or in cross-examination of witnesses could impart to the jury his first-hand knowledge concerning the PIDC report, while framing it as a legal argument or in the form of questions. In doing so, Mr. Sheppard could provide Defendant's version of the facts without being subject to cross-examination. Moreover, his legal arguments could be given added weight by the jury because of his personal knowledge of the events in question.¹⁵ Even if he remained silent at counsel's table, the jury would be left to

¹⁵ The Defendant argues that the facts of this case are similar to those presented in United States v. Fumo, 504 F. Supp. 2d 6 (E.D. Pa. 2007). In Fumo, the district court denied the government's motion for disqualification on the grounds that the attorney was not a necessary witness (as events were testified to by others), the relevant facts were undisputed, and the government and the defense unequivocally stated that they would not call the attorney as a witness. Defendant insists that a similar result is warranted in this case because the pertinent facts are largely undisputed, Defendant has stated he has no intention of calling Mr. Sheppard as a witness and the Government only raised the possibility of doing so, and the Government is merely speculating that Mr. Sheppard will become an unsworn witness. Def.'s Response in Opp'n 11. The Court finds Fumo to be distinguishable because Mr. Sheppard's involvement has more weighty evidentiary significance to the mail fraud scheme alleged in this case, there are no other witnesses or parties to the conversation with Ms. Roitshtein and the falsity of the report and Defendant's intention to defraud PIDC are disputed and central to the case against Defendant in Count 24.

wonder why Mr. Sheppard, who had first-hand knowledge of relevant events related to Count 24, did not testify at trial.

Given that Mr. Sheppard may be called as a Government witness and has personal knowledge of events that will be presented at trial, through argument or questioning of witnesses, the Court finds that Mr. Sheppard faces a serious potential for conflict arising from acting as both an advocate and a witness to the events charged in the indictment.¹⁶

2. The Conflict at Issue Is Not Waivable

Having decided that Mr. Sheppard's personal knowledge of events related to a charge in Defendant's indictment place him in the fork of divided loyalties, the next issue is whether an informed waiver can be obtained consistent with public policy. The Court is obligated to examine whether a waiver is

¹⁶ The Court also considered Defendant's argument that pursuant to Rule 3.7(a), the Court must give due regard to the substantial hardship disqualifying Mr. Sheppard would work on Defendant Kolodesh, even if Mr. Sheppard was both an advocate and likely witness at trial. Def.'s Response in Opp'n 13. The Court acknowledges that balancing is required between the interests of the client and those of the tribunal and the Government both under Rule 3.7(a) and with respect to the constitutional framework authorizing courts to disqualify a defendant's chosen counsel. As the Court engages in this balancing throughout its opinion, and explicitly with respect to assessing whether a waiver could cure the actual and serious potential for conflicts, the Court need not consider Defendant Kolodesh's substantial prejudice argument within the parameters of a violation of Rule 3.7(a).

feasible under these circumstances and the validity and effectiveness of any waivers submitted to cure the identified conflicts of interest. See Zepp, 748 F.2d at 139 ("The court should also determine whether there has been a waiver of the conflict, whether the waiver was effective or whether a waiver was possible."). Waivers are not dispositive cures to identified conflicts. Moscony, 927 F.2d at 749. "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," and thus the Court may override represented parties' waivers of conflicts of interest. Wheat, 486 U.S. at 160; see also Stewart, 185 F.3d at 122 ("[A] district court has discretion to disqualify counsel if a potential conflict exists . . . even where the represented parties have waived the conflict." (citation omitted)).

The Court recognizes that Defendant may incur hardship if his counsel was disqualified and he was required to relinquish the services of Mr. Sheppard less than three months prior to trial. The length of time, expense and effort that Mr. Sheppard has devoted to this case supports this claim. On the other hand, Defendant's hardship is mitigated because the Government properly raised the conflict of interest issue with

Mr. Sheppard four months prior to trial and before pretrial motions were due. Further, Defendant is also represented by another experienced attorney, Mr. McMahon, who acknowledged at the hearing that he is familiar with the legal and factual issues in the instant case and is ready, willing and able to try the case.

Finally, the Court has an institutional interest in protecting the integrity of the judicial process. As adopted by the Supreme Court in Wheat, the Third Circuit best expressed the district court's independent interest in the rendition of just verdicts and fair trials as follows:

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

486 U.S. at 162 (quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978)).

In consideration of these factors, the Court concludes that the identified actual and serious potential for conflicts of interest are too weighty to be waived without 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 the legal proceedings appear fair to all who observe them." Wheat, 486 U.S. at 160.

IV. CONCLUSION

For the reasons stated above, the Court will grant the Government's Motion to Disqualify Mr. Sheppard. An appropriate order shall follow.

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

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
Plaintiff,	:	NO. 11-464
	:	
	:	
	:	
v.	:	
	:	
MATTHEW KOLODESH,	:	
Defendant.	:	

O R D E R

AND NOW, on this **5th day of April, 2011**, upon consideration of the Government's Motion to Disqualify Mark B. Sheppard, Esq. (ECF No. 27), Defendant Kolodesh's Response to the Government's Motion (ECF No. 33), and a hearing on the

record (ECF No. 37), it is hereby **ORDERED** that the Government's Motion to Disqualify Mr. Sheppard is **GRANTED**.¹⁷

It is further **ORDERED** that, as the Court previously suspended the Government's deadline to respond to Defendant's motions challenging the indictment, seeking suppression of evidence, or raising any dispositive matters (ECF No. 32), the Government shall have until **April 19, 2012**, to respond to Defendant's motions.

AND IT IS SO ORDERED.

s/Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

¹⁷ Jack J. McMahon, Esq. entered his appearance on behalf of Defendant Kolodesh on February 9, 2012 and avers that he is familiar with the legal and factual circumstances of this case. Mr. McMahon shall continue to serve as Defendant's trial counsel.