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**FOR PUBLICATION**

**IN THE SUPERIOR COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**COMMONWEALTH OF THE  
NORTHERN MARIANA ISLANDS,**  
  
**Plaintiff,**  
  
**v.**  
  
**EDWARD T. BUCKINGHAM,**  
  
**Defendant.**

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) **CRIMINAL CASE NO. 12-0134**  
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)  
) **ORDER GRANTING THE  
COMMONWEALTH’S MOTION TO  
DISQUALIFY COUNSEL AND  
DENYING DEFENDANT’S CROSS-  
MOTION TO DISQUALIFY COUNSEL**  
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**I. INTRODUCTION**

**THIS MATTER** came before the Court on July 16, 2013, in Courtroom 223A at 1:30 p.m. The Commonwealth of the Northern Mariana Islands (“the Commonwealth”) moved to disqualify the counsel (“Sers Nicholas”) of Edward T. Buckingham (“Defendant”) because he allegedly undertook the representation of multiple persons with a conflict of interest, which constitutes a presumed breach of the duties of loyalty to these individuals. Defendant opposed the Commonwealth’s motion and cross-moves to disqualify the Commonwealth’s counsel (“Hasselback”) because he is allegedly conflicted twice-over as a prosecutor and will be called as a witness. After considering the oral and written arguments of the parties, the Court **GRANTS** the Commonwealth’s motion and **DENIES** Defendant’s motion for the

1 reasons set forth below.<sup>1</sup>

2 **II. LEGAL STANDARD**

3 It is within a court’s sound discretion whether to disqualify an attorney. *See Feliciano v.*  
4 *Commonwealth Superior Court*, 1999 MP 3 ¶ 38. In its exercise of this discretion, the court must “make  
5 a reasoned judgment which complies with the legal principles and policies applicable to the issue at  
6 hand.” *Id.* (citations omitted).

7 **III. DISCUSSION**

8 The Court will address the Commonwealth’s and Defendant’s motions to disqualify in turn.

9 **A. MOTION TO DISQUALIFY SERS NICHOLAS**

10 The Commonwealth moves to disqualify Sers Nicholas because Sers Nicholas allegedly  
11 represented multiple clients with conflicting interests. Specifically, Sers Nicholas undertook  
12 representation of Buckingham on August 24, 2012, and then represented law enforcement officers  
13 Jermaine Nekaifes (“Nekaifes”), Myron Laniyo (“Laniyo”), and Stanley Patris (“Patris”) (collectively,  
14 “the officers”) before the 17<sup>th</sup> CNMI House of Representatives Special Committee on Impeachment  
15 (“Impeachment Committee”). The Commonwealth argues (1) representing one or more clients that have  
16 a concurrent conflict of interest raises a presumption of conflict and requires automatic disqualification  
17 per Model Rule of Professional Conduct (“MRPC”) 1.7(a)(2); (2) regardless of whether the officers will  
18 not ultimately become co-defendants with Buckingham, they are likely to be called as witnesses in the  
19 Commonwealth’s case-in-chief against Buckingham;<sup>2</sup> and (3) although Nekaifes is now represented by  
20 different counsel, Sers Nicholas cannot now ethically represent anyone in this case without breaching  
21 his duties of loyalty, especially if a situation occurs where Nekaifes is called to the stand and Sers  
22 Nicholas has to choose whether to adhere to his duty of loyalty toward Buckingham or Nekaifes.

23 \_\_\_\_\_  
24 <sup>1</sup>Defendant also moved to strike the Commonwealth’s reply to the opposition to the motion to disqualify as untimely.  
25 During the hearing regarding this matter, Defendant indicated he filed the motion based on the belief that no  
26 scheduling order had been issued by the Court with regard to timing of filings, and that said scheduling order was  
issued thirty minutes before he filed his motion to strike. Defendant then indicated that if he had been aware of the  
scheduling order, he would not have filed the motion to strike. The Court therefore considers the issue moot.

27 <sup>2</sup>The Commonwealth cites the United States Supreme Court case of *Wheat v. United States*, 486 U.S. 153, 163 (1988),  
28 wherein the Supreme Court found the trial court was correct to refuse to allow representation of multiple members of  
the same alleged conspiracy, also finding it problematic that one of the alleged co-conspirators was a potential witness.

1 Defendant argues (1) the presumption of conflict and automatic disqualification are only  
2 appropriate where there is a concurrent representation; (2) the officers are former clients which does not  
3 violate MRPC 1.7(a)(2) because there is no risk that representation of Buckingham will be materially  
4 limited because of Sers Nicholas's responsibilities to the officers as his former clients; and (3) the charges  
5 against Nekaifes are under a different case number, and the other officers have not yet been charged.<sup>3</sup>

### 6 **1. Concurrent Representation Conflict**

7 MRPC 1.7<sup>4</sup> prohibits a lawyer from representing a client in one matter from also engaging in a  
8 representation that is adverse to that client in another matter:

9 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the  
10 representation involves a concurrent conflict of interest. A concurrent conflict of interest  
11 exists if:

- 12 (1) the representation of one client will be directly adverse to another client; or  
13 (2) there is a significant risk that the representation of one or more clients  
14 will be materially limited by the lawyer's responsibilities to another client,  
15 a former client or a third person or by a personal interest of the lawyer.

16 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph  
17 (a), a lawyer may represent a client if:

- 18 (1) the lawyer reasonably believes that the lawyer will be able to provide  
19 competent and diligent representation to each affected client;  
20 (2) the representation is not prohibited by law;  
21 (3) the representation does not involve the assertion of one client against  
22 another client represented by the lawyer in the same litigation or other  
23 proceeding before a tribunal; and  
24 (4) each affected client gives informed consent, confirmed in writing.

25 A lawyer's representation of multiple clients in criminal proceedings is disfavored and may also  
26 violate a defendant's Sixth Amendment right to effective assistance of counsel.<sup>5</sup> *See Holloway v.*  
27 *Arkansas*, 436 U.S. 475 (1978), *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court  
28 has noted:

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29 <sup>3</sup>Defendant also alleges the officers are not co-conspirators because there were no conspiracy charges against  
30 Buckingham initially, and the Second Amended Information containing the conspiracy charge is defective. The Court  
31 declines to address this argument as it is not an issue properly before the Court at this time.

32 <sup>4</sup> The Model Rules, as adopted by the ABA, are applicable in the CNMI through the Commonwealth Disciplinary  
33 Rules and Procedures. NMI Disc. R. 2; *Bisom v. Commonwealth*, 2002 MP 19 ¶ 55.

34 <sup>5</sup> The Supreme Court held a defendant's Sixth Amendment right to be represented by the attorney of his choice was  
35 not violated by disqualifying of counsel because of a conflict of interest. *See Wheat v. U.S.*, 486 U.S. 153, 161. The  
36 Court noted that granting a waiver of a conflict of interest could later be challenged by a defendant alleging ineffective  
37 assistance of counsel, which could result in a conviction reversal. *Id.*

1 Joint representation of conflicting interests is suspect because of what it tends to prevent  
2 the attorney from doing . . . [A] conflict may . . . prevent an attorney from challenging  
3 the admission of evidence prejudicial to one client but perhaps favorable to another, or  
4 from arguing at the sentencing hearing the relative involvement and culpability of his  
5 clients in order to minimize the culpability of his clients in order to minimize the  
6 culpability of one by emphasizing that of another.  
7 *Holloway*, 436 U.S. at 489-90.

8 Although multiple representation engenders special dangers, it is not *per se* violative of the  
9 constitutional guarantees of effective assistance of counsel. *See Wheat v. U.S.*, 486 U.S. 153, 160.<sup>6</sup>  
10 Rather, a court alerted to possible conflicts is required to take steps to determine whether separate  
11 counsels should be ordered. *Id.* In the instant case, the Government may call the officers, including  
12 Nekaifes, as witnesses for the prosecution against Buckingham. This would create an actual conflict  
13 because the officers would then be subject to cross-examination by Sers Nicholas. Although the officers  
14 are not co-defendants, Nekaifes is being charged under a different case number with charges arising out  
15 of the present matter.

16 Accordingly, the Court finds there is a significant risk that the representation of Buckingham  
17 would be materially limited by Sers Nicholas’s representation of his former clients,<sup>7</sup> the officers. *See*  
18 MRPC 1.7(a)(2).

19 Sers Nicholas claims he obtained informed consent,<sup>8</sup> from the officers, but concedes the  
20 concessions were not confirmed in writing,<sup>9</sup> as required from each affected client. He indicated that he  
21 merely obtained consent and waiver from Buckingham via email. Even if Sers Nicholas had obtained  
22 effective consent from all parties, this is a type of conflict that cannot be waived because MRPC

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23 <sup>6</sup>The Supreme Court stated the following regarding the determination of a waiver of conflict of interest in the pretrial  
24 context when it was difficult to clearly ascertain the relationships between parties:

25 <sup>7</sup> “In addition to conflicts with current clients, a lawyer’s duties of loyalty and independence may be materially limited  
26 by responsibilities to former clients under Rule 1.9 . . .”. MRPC 1.7, cmt. 9.

27 <sup>8</sup> “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has  
28 communicated adequate information and explanation about the material risks of and reasonably available alternatives  
to the proposed course of conduct.” MRPC 1.0(e).

<sup>9</sup> “‘Confirmed in writing,’ when used in reference to the informed consent of a person, denotes informed consent that  
is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral  
informed consent . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed  
consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.” MRPC 1.0(b).

1 1.7(b)(3) prohibits a lawyer from representing adverse parties in litigation.

2 **2. Former Client Conflict**

3 MRPC 1.9(a) provides as follows:

4 A lawyer who has formerly represented a client in a matter shall not thereafter represent  
5 another person in the same or a substantially related matter in which that person's  
6 interests are materially adverse to the interests of the former client unless the former  
7 client gives informed consent, confirmed in writing.

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Sers Nicholas represented the officers at the Impeachment Committee and thereafter terminated representation of them. Sers Nicholas continued representation of Buckingham in the same or a substantially related matter. *See* MRPC 1.9 cmt. 3.<sup>10</sup> It is undisputed by Sers Nicholas that the interests of Buckingham and the officers are materially adverse. Sers Nicholas may not represent Buckingham because this matter is substantially related to the matter with Nekaifes, Buckingham's interests are materially adverse to Nekaifes's interests, and Sers Nicholas has not acquired the written, informed consent of his former client.

Accordingly, for the reasons set forth above, Sers Nicholas is disqualified from further representation of Defendant.

**B. CROSS-MOTION TO DISQUALIFY HASSELBACK**

Defendant cross-moves to disqualify Hasselback on the alleged grounds that (1) Hasselback has no legal authority to prosecute the case, as he is not an Attorney General, (2) Hasselback is conflicted because the Public Auditor, Mike Pai, is conflicted and is Hasselback's supervisor, which imputes conflict to Hasselback, (3) Hasselback is also conflicted because he solicited the aid of the Office of the Attorney General ("OAG") when it had been disqualified because of a conflict, thus imputing the OAG's conflict to Hasselback, (4) Hasselback worked as an investigator in this matter, and will be called as a witness at trial, and (5) the Commonwealth's motion is untimely because it has been seven months since Hasselback became aware of the multiple client representation.

**1. Legal Authority to Prosecute**

Hasselback was recently appointed to prosecute this case by the Attorney General. Therefore,

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<sup>10</sup> Per comment 3 to MRPC 1.9, matters are substantially related "if they involve the same transaction or legal dispute . . .".

1 the constitutional issues raised by Defendant are moot.

2 Second, Pai was not required to recuse himself from this matter, and therefore Hasselback is not  
3 required to recuse himself either. Pai voluntarily recused himself to avoid the appearance of impropriety  
4 on OPA.

5 Defendant argues that Pai's delegation of his authority to Hasselback is invalid because  
6 Hasselback is required to report his findings for review by Pai. *See* 1 CMC § 2305(f). Defendant argues  
7 that Hasselback cannot make decisions reserved for the Public Auditor, and that Hasselback is prohibited  
8 from reporting his findings to Pai because Pai has recused himself. Pai, however, delegated a measure  
9 of his powers as the Public Auditor to Hasselback to act in his stead and effectively stand in his shoes  
10 as the Public Auditor. The statute authorizes such delegation and Defendant has not offered any legal  
11 authority as to why Pai's delegation would be legally invalid. The Court therefore finds no conflict based  
12 on Pai's recusal.

### 13 **2. Conflict**

14 Third, the Court addresses the argument that Hasselback is conflicted because he solicited the  
15 aid of the AGIU after this Court disqualified the OAG, thereby imputing the conflict to Hasselback.  
16 Hasselback has testified that he did not obtain any confidential information when he made contact with  
17 the AGIU. Whether Hasselback's actions were proper is irrelevant to a discussion of whether  
18 Hasselback's exposure to the AGIU contact also exposed him to information that would create a conflict  
19 of interest. There is no evidence that Hasselback was exposed to a conflict when he contacted the  
20 AGIU. Therefore, the Court finds that Hasselback's contact with the AGIU does not require his  
21 disqualification from this case.

### 22 **3. Necessary Witness**

23 Defendant argues Hasselback must be disqualified because he is a necessary witness. *See* MRPC  
24 3.7.<sup>11</sup> A lawyer should be permitted to continue representation at trial if the proposed testimony is  
25 obtainable from another source. *See Mafnas v. Laureta*, Civ. No. 88-696 (NMI Super. Ct. July 10,  
26 1995) (Order Partially Granting Motions to Strike Affirmative Defenses, and to Dismiss Counterclaims,

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28 <sup>11</sup> MRPC 3.7 prohibits a lawyer from acting as an advocate a trial in which he is likely to be a necessary witness.

1 and Third-Party Claims; Order Granting Motion to Disqualify at 18) (“Case law defines a necessary  
2 witness as one whose testimony is both material and unavailable elsewhere.”) (citations omitted).  
3 Defendant merely asserts Hasselback is a necessary witness because he is an investigator in this case.  
4 Hasselback responds that he has no personal knowledge of any event relevant to the prosecution of this  
5 matter and that there are other witnesses available to testify about the investigation. The Court finds that  
6 testimony regarding the OPA investigation may be obtained from other investigators at the OPA.  
7 Accordingly, Hasselback’s participation in the investigation does not require his disqualification from  
8 this case.

9 **4. Timeliness**

10 Finally, Defendant argues that the Commonwealth’s motion to disqualify Sers Nicholas is  
11 untimely as it was filed seven months after the Commonwealth became aware of Sers Nicholas’s  
12 representation of the officers. Defendant fails to cite to any legal authority supporting this allegation of  
13 untimeliness. Therefore, Defendant’s motion is denied.

14 **IV. CONCLUSION**

15 Consistent with the foregoing opinion, the Commonwealth’s motion to disqualify Defendant’s  
16 counsel, Brian Sers Nicholas, Esq., is **GRANTED**, and Defendant’s cross-motion to disqualify the  
17 Commonwealth’s counsel, George L. Hasselback, is **DENIED**.

18 **So ORDERED** this 16<sup>th</sup> day of August, 2013,

19  
20 /s/  
David A. Wiseman, Associate Judge