

1 **FOR PUBLICATION**

2
3 **IN THE SUPERIOR COURT**
4 **FOR THE**
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **COMMONWEALTH OF THE**
7 **NORTHERN MARIANA ISLANDS,**

8 **Plaintiff,**

9 **vs.**

10 **BENSON DIONADULA DELA CRUZ,**

11 **Defendant.**

) **CRIMINAL CASE NO. 06-0237**
) **DPS CASE NO. 06-09872**

) **MEMORANDUM OF DECISION**
) **DENYING DEFENSE COUNSEL’S**
) **MOTION TO WITHDRAW**

12 **I. Introduction**

13 THIS MATTER came before the Court on the Office of the Public Defender’s motion to
14 withdraw as defense counsel based on a claimed conflict of interest. After receiving and reviewing the
15 parties’ legal briefs, and after hearing the arguments of counsel, the Court denied the motion for the
16 reasons stated on the record on January 30, 2008. The Court now memorializes its decision.

17 **II. Factual and Procedural Background**

18 On October 10, 2006, the Defendant was brought before the Court for an initial appearance bail
19 hearing after being arrested for the crime of Sexual Abuse of a Minor in the First Degree. The Office
20 of the Public Defender was appointed counsel for the Defendant on the same date, and the next day, the
21 Public Defender’s Office made an application for a bail modification for the Defendant’s release. The
22 Defendant secured his release pending trial by posting bail, and was formally charged by an
23 Information filed on October 13, 2006 charging him with one count of Sexual Abuse of a Minor in the
24 First Degree.

1 At the October 23, 2006 arraignment hearing, the Defendant appeared with an assistant public
2 defender who notified the Court that their office needed to verify if a conflict existed. The Court
3 continued the arraignment for one week, and on October 30, 2006, the Defendant appeared with an
4 assistant public defender again. There was no further mention of a potential conflict, and the Defendant
5 was arraigned on the one count in the Information. At the first status conference of the case before the
6 undersigned judge, the defense acknowledged receipt of discovery in the case, which should have
7 included the declaration of probable cause signed by the detective assigned to investigate the case. The
8 declaration clearly identified the complaining witness by name, who is the minor victim's mother.
9 After several status conferences, on April 11, 2007, the case was finally set for a jury trial to begin on
10 July 23, 2007.

11 Based on the stipulation of the parties, the Court re-set the jury trial date to October 1, 2007, and
12 a new attorney within the Public Defender's Office took over the case. In preparation for the October
13 jury trial, the Commonwealth filed its witness and exhibit list on September 12, 2007, and clearly
14 identified the victim's mother as one of the potential witnesses who may be called to testify at trial.

15 Prior to the October 1st jury trial date, counsel for both parties met in chambers with the Court,
16 and based on the discussion, it was stipulated that the October jury trial date would be continued again
17 until December 10, 2007. The current defense attorney assumed responsibility of the case. Thereafter,
18 Defendant filed various motions that were opposed by the Commonwealth. The Defendant's motions
19 were argued on November 7, 2007, and the Court entered its ruling denying the Defendant's motions
20 from the bench on the same date. The December 10th jury trial date remained.

21 The Commonwealth subsequently filed a motion to continue the December 10th jury trial date
22 based on the prosecutor's important medical appointment. The motion was granted without an
23 objection by the defense, and the jury trial was continued for the third time until February 18, 2008.

1 In early January, 2008, the current defense counsel realized that one of the Commonwealth's
2 witnesses, the victim's mother, was a former client of the Public Defender's Office ("PDO") when she
3 presented herself at their office to seek legal advice on her prior cases. The PDO had previously
4 represented the mother in two prior misdemeanor DUI traffic convictions that were fully adjudicated
5 and no longer pending.¹ Because the PDO was actively representing Defendant Dela Cruz in this case,
6 she was denied further representation and asked to leave the PDO's premises. Based on this discovery,
7 defense counsel believed his office had a conflict of interest because of confidential information
8 obtained from its former client, and informally sought, through an in-chambers meeting with opposing
9 counsel, leave of court to withdraw as counsel for the Defendant in this pending criminal case. Given
10 the impending jury trial date, the age of the case with its numerous continuances of the trial date, and
11 the amount of work defense counsel had already invested in defending this case, the Court required
12 defense counsel to submit a written motion, by stipulation with opposing counsel if appropriate, with
13 legal authority justifying their withdrawal as counsel, before the Court would grant the motion.

14 The PDO filed its written motion to withdraw due to a conflict of interest in the course of its
15 continued representation of the Defendant on January 16, 2008, the same date the case was set for a
16 pre-trial conference hearing. The Office of the Attorney General ("AGO") filed its own memorandum

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18 ¹ In Traffic Case No. 97-4891, a judgment was entered against the PDO's client on her plea of guilty to misdemeanor charges
19 of reckless driving, driving without a valid license and failure to submit to a breathalyzer test. On September 3, 1997, she
20 was sentenced to 30 days of imprisonment, all of which was suspended except for three days, revocation of her driving
21 privileges for six months, a fine of \$850 (half of which was converted to community service) and probation for a period of
22 one year.

20 In Traffic Case No. 03-04723, judgment was entered on the client's plea of guilty to a single misdemeanor count of driving
21 under the influence of alcohol, a violation of 9 CMC § 7105. This judgment was entered on May 12, 2004. On that day she
22 was sentenced to a 30-day suspended term of imprisonment, excepting three days with credit for 10 hours served, a 30-day
23 suspension of her driver's license, a \$600 fine (payable by installment over 10 months), and placed on supervised probation
24 for one year.

23 The last item appearing in the Court's file for the relatively more recent Traffic Case No. 03-04723 is a memorandum to the
24 Court from Probation Officer Joaquin U. Palancios dated April 4, 2005, stating that, as of March 17th of that year, there was
an unpaid balance of \$380 on the \$600 fine imposed in that case. There is no record in either case of any post-judgment
motion by the Commonwealth, however, and the probationary period imposed in the latter case presumably expired on May
10, 2005.

1 regarding defense counsel's potential conflict on January 15, 2008. The Court continued the matter to
2 January 23, 2008 to review the briefs and to hear the arguments of counsel on the PDO's motion.
3 Based on the Court's review of the parties' legal memoranda, and having conducted its own research,
4 the Court concluded that Defendant was entitled to an "in-camera" hearing without the AGO's presence
5 to have the PDO provide sufficient facts to establish how the PDO's prior representation was
6 substantially related to the Defendant's current case, or what kind of impeachment information the
7 PDO obtained from the Commonwealth's witness during the course of its attorney-client relationship.
8 The "in-camera" hearing was held on January 24th and continued to January 30, 2008. For the reasons
9 stated on the record and herein, the Court denied the PDO's motion to withdraw.

10 **III. Issue**

11 **Whether the Office of the Public Defender must be allowed to withdraw as counsel for its**
12 **current client when it previously represented a person who will be called as a government's**
13 **witness in the pending criminal case under the current client's Sixth Amendment right to a**
14 **conflict-free attorney?**

14 **IV. Analysis**

15 The United States Supreme Court has held that the United States Constitution's Sixth
16 Amendment right to counsel ensures that a criminal defendant has the right to representation that is free
17 from conflicts of interest and the assistance of counsel whose loyalties are not divided. *Wood v.*
18 *Georgia*, 450 U.S. 261, 271 (1981); *Lewis v. Mayle*, 391 F.3d 989, 997 (9th Cir. 2004).

19 The PDO has asserted that it has a conflict of interest because it represented the alleged victim's
20 mother, who is currently a witness for the prosecution in this case, in two prior misdemeanor DUI
21 convictions, and as recently as two weeks prior to filing the motion, the witness has sought legal advice
22 and further representation from the PDO on those matters. It further asserted that "there is no reasonable
23 and ethically permissible alternative to withdrawal at this time," and in moving to withdraw, cites to the
24 U.S. Supreme Court decision of *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173 (1978) for the legal

1 premise that “[a]n attorney’s request for the appointment of separate counsel, based on her
2 representations as an officer of the court regarding a conflict of interest, should be granted.” (Mot. To
3 Withdraw Due to Conflict of Interests, at 2, n.1) (“Motion”). In its written motion as well as the
4 hearings on this matter, the PDO is steadfast that an attorney should not be permitted to represent a
5 criminal defendant if the adverse testimony of a former client is required at trial. For the reasons stated
6 on the record and herein, this Court disagrees.²

7
8 **A. Trial Court’s Standard for Determining Defendant’s Objection to Representation Based
Upon Defense Counsel’s Prior Representation of Government Witness.**

9 Defense counsel PDO argues this Court is applying the wrong standard. (Suppl. To Mot. To
10 Withdraw Due to Conflict of Interests, at 2) (Jan. 24, 2008) (“Supplemental”). At the motions hearing
11 held on January 23rd, this Court advised the parties of additional case law that it found to be more
12 particularly relevant to the issue at hand, including the United States Supreme Court decision of *Mickens*
13 *v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237 (2001), which interpreted the *Holloway* decision that defense
14 counsel relies so heavily upon, as well as the recent Ninth Circuit decision of *Alberni v. McDaniel*, 458
15 F.3d 860 (9th Cir. 2006). The PDO nevertheless asserted that the numerous appellate cases cited by the
16 Court were inappropriate, and supplemented its motion with a hard copy of the *Holloway* decision and
17 two U.S. district court cases holding that criminal defense attorneys were required to be disqualified
18 from representing their respective clients when the attorneys had previously represented potential
19 witnesses in matters concerning the current case. (Supplemental at 1.)³

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21 _____
22 ² The AGO’s position is that if a valid conflict exists, then PDO should be removed from the case. (Mem. Re: Def Counsel’s
Potential Conflict at 2.) However, based on its examination of the facts of this case and the legal authorities, it concluded that no valid
conflict exists, and that neither the current client nor the previous client will be prejudiced in any way should PDO proceed to trial. *Id.*

23 ³ At the January 24th continued hearing on PDO’s motion held *in camera*, defense counsel summarily rejected the applicability
24 of the *Mickens* decision without making any factual or legal distinction from the legal authorities the PDO was relying upon. It was at this
hearing that the Court discovered that defense counsel had not even read the *Mickens* decision but continuously rejected its applicability.
The Court reminded defense counsel of his legal duty of candor to the Court, continued the matter until January 30th, and ordered counsel
to review the caselaw provided by the Court prior to the next hearing.

1 This Court agrees that under the *Holloway* decision, the Court must defer to the judgment of
2 counsel regarding the existence of a disabling conflict and recognizes that a defense attorney is in the
3 best position to determine when a conflict exists, that he has an ethical obligation to advise the court of
4 any problem, and that his declarations to the court are “virtually made under oath.” *Holloway v.*
5 *Arkansas*, 435 U.S. 475, 485-486, 98 S.Ct. 1173 (1978). The Supreme Court more recently elaborated
6 on the *Holloway* decision in *Mickens v. Taylor*, 535 U.S. 162, 168, 122 S.Ct. 1237, and stated that:

7 *Holloway* presumed, moreover, that the conflict, “which [the defendant] and his counsel
8 tried to avoid by timely objections to the *joint representations*, undermined the
adversarial process.
9 535 U.S. at 168 (emphasis added; citations omitted).

10 The *Mickens* Court explained

11 The presumption was justified because *joint representation* of conflicting interest is
12 inherently suspect, and because counsel’s conflicting obligations to *multiple defendants*
13 “effectively seal his lips on crucial matters” and make it difficult to measure the precise
harm arising from counsel’s errors. *Holloway* thus creates an automatic reversal rule
14 only where defense counsel is forced to represent *codefendants* over his timely objection,
15 unless the trial court has determined that there is no conflict.
16 *Id.* (emphasis added).

17 In this case, there is no joint representation because Defendant Dela Cruz is the sole
18 defendant. Therefore, *Holloway* and all other cases involving joint representation of clients are
19 distinguishable from this case.

20 The *Mickens* case involved a conflict situation rooted in defense counsel’s obligations to his
21 former client. In *Mickens*, the defendant’s attorney previously represented the murder victim in an
22 unrelated juvenile matter at the time of the murder. When the juvenile case was dismissed, the same
23 judge appointed the juvenile’s attorney to represent the criminal defendant in the murder case. The trial
24 court failed to inquire into a potential conflict, and the criminal defendant alleged a Sixth Amendment
violation. There was no danger that defense counsel would have to cross-examine the deceased former

1 client, but counsel’s prior confidential relationship with the victim, undisclosed to the defendant, raised
2 the question of a possible division of loyalties that may have hampered the effectiveness of counsel’s
3 legal representation of the defendant.

4 As a general matter, a defendant challenging the trial court’s judgment on the basis of a Sixth
5 Amendment violation of the right to effective counsel must demonstrate “a reasonable probability that,
6 but for counsel’s unprofessional errors, the result of the proceeding would have been different.”
7 *Mickens* at 166, citing to *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). The
8 exception to this general rule from *Strickland* is when assistance of counsel is “denied entirely” or
9 denied “during a critical stage of the proceeding,” or in other “circumstances of that magnitude,” in
10 which case prejudice will be presumed and the defendant is spared the need of showing probable effect
11 upon the outcome. *Id.* The *Mickens* Court then proceeded to decide whether, under the facts of the
12 case, the trial judge’s failure to inquire into counsel’s potential conflict arising from his duty of loyalty
13 to his former client presented an error comparable to that arising when the defendant’s attorney is forced
14 to **actively represent conflicting interests**. *Id.* The Court concluded that it was not comparable and that
15 “automatic reversal” was unwarranted, affirming the Fourth Circuit’s finding that defendant had failed
16 to demonstrate an “actual conflict of interest” that affected his counsel’s performance. 535 U.S. at 173-
17 174, 122 S.Ct. at 1245.⁴

18 There are three aspects of the *Mickens* opinion that are of primary significance for this Court.
19 First, the U.S. Supreme Court distinguished the line of authority involving cases of “joint
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21 ⁴ The issue was presented to the Supreme Court on review of a 7-3 en banc decision by the Fourth Circuit Court of Appeals
22 affirming the decision of a Virginia District Court, issued after an evidentiary hearing, to deny the defendant’s petition for
23 habeas corpus relief. The Court limited its ruling on the basis that “the only question presented was the effect of the trial
24 court’s failure to inquire into a potential conflict upon the rule... that deficient performance of counsel must be shown,”
noting that the courts below had found no such effect. 535 U.S. at 174. The Court refrained from ruling on the question of
whether or not a prophylactic rule of presumed prejudice should generally be made applicable to attorney-conflict cases
involving successive representation, designating it “an open question.” *Id.*, at 176.

1 representation,” where defense counsel concurrently represented parties with conflicting interests, from
2 those cases in which the attorney’s potentially conflicting duties to others might have impaired the
3 attorney’s effective representation of the current defendant. *Mickens*, 535 U.S. at 174-175,
4 distinguishing *Holloway*, 435 U.S. at 490-491, and quoting *Cuyler v. Sullivan*, 466 U.S. 335, 350, 100
5 S.Ct. 1708 (1980) (“[U]ntil... a defendant shows that his counsel *actively represented* conflicting
6 interests, he has not established the constitutional predicate for his claim of ineffective assistance.”).

7 Second, it recounted its earlier decisions to provide a definition of “actual conflict of interest” for
8 Sixth Amendment analysis. “An ‘actual conflict’ for Sixth Amendment purposes, is a conflict of
9 interest that adversely affects counsel’s performance.” 535 U.S. at 172. This means there is *no*
10 mandated “inquiry into actual conflict as something separate and apart from adverse effect.” *Id.* The
11 Court clarified its earlier remand in the case of *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097 (1981)
12 by explaining that “[W]e think ‘an actual conflict of interest’ meant precisely a conflict *that affected*
13 *counsel’s performance*—as opposed to a mere theoretical division of loyalties.” 535 U.S. at 171.

14 Finally, the Supreme Court still recognized in all cases a “duty to inquire further” on the part of a
15 trial judge upon actual notice of a potentially disqualifying conflict of interest, even though the failure to
16 inquire is not *itself* a violation of defendant’s Sixth Amendment rights. 535 U.S. at 168-170, 122 S.Ct. at
17 1242-43. The Court made clear that “The purpose [of its Sixth Amendment precedent] is not to enforce
18 the Canons of Legal Ethics.” 535 U.S. at 176. A conflict arising under the Model Rules of Professional
19 Responsibility is neither necessary nor sufficient to constitute an impermissible impairment of counsel’s
20 effective representation of the defendant, but it may *cause* such impairment and therefore become an
21 “actual conflict” under Sixth Amendment jurisprudence.

22 Of course, the trial court has an inherent responsibility to ensure that attorneys appearing before
23 it in proceedings of any nature are adhering to proper ethical standards, including those governing client
24 confidentiality and the avoidance of conflicts of interest. *Feliciano v. Superior Court (In re Estate of*

1 *Hillblom*) 1999 MP 3 ¶ 18, 5 N.M.I. 211. In criminal matters, however, the defendant’s right to the
2 effective assistance of counsel requires the additional and separate consideration of the effect of the
3 potential conflict as it appears in the context of the defendant’s actual defense. *Mickens*, 535 U.S. at
4 175-176; *See*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 129, cmt. d (2000)
5 (“RESTATEMENT”).

6 The Ninth Circuit recently examined *Mickens* and applied its definition of “actual conflict” to a
7 case involving successive representation. *Alberni v. McDaniel*, 458 F.3d 860 (9th Cir. 2006). In *Alberni*,
8 a rebuttal witness for the government produced during the defendant’s murder trial was a former client
9 of the defense counsel. Defendant was the only witness to the killing, which he claimed was accidental,
10 and the prosecution relied heavily upon circumstantial evidence of the defendant’s violent propensities
11 and animus toward the victim. The credibility of the defendant’s testimony was therefore critical.
12 Defendant testified regarding a violent confrontation with the witness, resulting from an earlier
13 encounter with the witness that had led to the arrest of both men on drug charges. Defendant’s counsel
14 previously represented the witness in connection with charges flowing from that arrest, as well as on a
15 prior felony drug offense. After the defense rested, the witness was called in rebuttal and defense
16 counsel objected. The court questioned the witness regarding the prior representation, determined that
17 the core proceedings were not substantially related and, after eliciting a simplistic waiver of
18 confidentiality from the witness, ordered counsel to proceed. Defense counsel then cross-examined the
19 witness, but neglected to impeach the witness with his prior felony conviction, probation status or on
20 other possible points.

21 Applying *Mickens*’ definition of “actual conflict,” the Ninth Circuit found that the trial court’s
22 inquiry into the nature of the conflict was insufficient because the trial court had viewed the issue purely
23 in terms of a formal conflict that could be eliminated by the witness’ waiver of confidentiality. *Alberni*,

24 ///

1 458 F.3d at 871. This caused the court to only question the witness regarding the prior scope of the
2 representation, rather than eliciting from defense counsel the extent of any possible adverse effect on
3 counsel’s representation of the defendant. *Id.* Because defendant’s standing to claim a violation of his
4 right to effective assistance of counsel was dependant upon the presence of actual conflict, defendant
5 would have to demonstrate that his counsel’s omissions compromised his defense and were caused by
6 the perceived conflict. *Alberni*, 458 F.3d at 872. The Ninth Circuit found the record “insufficient to
7 determine whether an actual conflict of interest existed,” and issued a remand for an evidentiary hearing
8 on the issue. *Id.*⁵

9 The published opinions in *Mickens v. Taylor* and *Alberni v. McDaniel* were among those
10 specifically referred by the Court to defense counsel in the present matter for reconciliation with the
11 proposed rule of decision that PDO advocates. The PDO dismisses this authority wholesale on the basis
12 that they are only “appellate cases” addressing, *post hoc*, the prejudicial effect of “the conflict at the
13 lower court level” and should be disregarded as irrelevant by this Court because “[w]e are not at that
14 point.” (Supplemental, at 2). PDO maintains that its representation of a defendant in any case where a
15 potential government witness is a former PDO client creates a disabling conflict of interest *per se*, and
16 the Court is required to approve its automatic withdrawal in every such case upon notice. PDO also
17 contends that *any* inquiry by the Court as to the factual basis or extent of the claimed conflict, far from
18 being required, is actually improper. This proposed rule is contrary to authority and is rejected.

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21 ⁵ Because the U.S. Supreme Court had declared in *Mickens* that the issue of whether or not *Sullivan*’s presumption of
22 prejudice could be made applicable to a case of successive representation was still “an open question,” the Ninth Circuit held
23 that the Nevada Supreme Court’s presumption to that effect in *Alberni* was “not clearly contrary to federal law” for federal
24 habeas purposes. *Alberni*, 458 F.3d at 874. Application of the *Sullivan* exception to cases involving conflicts arising from
successive representation is not uniform among the federal circuits, the determining factor appearing to be the degree of
“substantial similarity” between the particular matters. *See, People v. Miera*, 2008 WL 323765 (Colo.App.) (Feb. 7, 2008)
(collecting cases and noting this distinction). The question of presumed prejudice is not directly a trial court issue, but this
Court is concerned with the distinguishing features of those cases in which counsel’s subsequent representation is determined
to be more or less substantially related to a prior representation.

1 **B. The Presence and Effect of Formal Conflicts of Interest Arising From Successive**
2 **Representation.**

3 Defendant or defense counsel must present adequate grounds for granting counsel leave to
4 withdraw on the eve of trial. *U.S. v. Michelson*, 559 F.2d 567, 572 (9th Cir. 1977). PDO claims that it
5 must withdraw because the ethical duties of loyalty and confidentiality that it owes to its former client
6 conflict with its duty to vigorously represent Defendant, thereby frustrating Defendant’s constitutional
7 right to conflict-free representation. (Motion, at 2). This Court approaches the merits of such a claim on
8 the basis of two related considerations: First, whether or not the circumstances present a formal conflict
9 or potential conflict between defense counsel’s respective ethical duties to its client and former client as
10 expressed in the A.B.A. Model Rules of Professional Responsibility, made applicable by Com. Disc. R.
11 2 (“MRPR”). Secondly, to determine if the claimed conflict, whether extant, waived or even imagined,
12 poses a reasonable threat to the adequacy of counsel’s representation as guaranteed by the U.S Const.
13 amend. XI and N.M.I. Const. Art. I, § 4. The Court may make a proper inquiry, in camera if necessary,
14 as to the factual basis of the alleged conflict. *Alberni, supra*, 458 F.3d at 870; *United States v. Jeffers*,
15 520 F.2d 1256, 1265 (7th Cir. 1975). If there is an unavoidable conflict or a reasonable likelihood that
16 one will develop, counsel should be permitted to withdraw.

17 MRPR Rule 1.9 governs an attorney’s duties to former clients. The applicable duties of loyalty
18 and confidentiality are prescribed in these sections:

- 19 (a) A lawyer who has formerly represented a client in a matter shall not
20 thereafter represent another person in the same or a substantially
21 related matter in which that person’s interests are materially adverse to
22 the interests of the former client unless the former client gives
23 informed consent, confirmed in writing.
- 22 (c) A lawyer who has formerly represented a client in a matter or whose
23 present or former firm has formerly represented a client in a matter
24 shall not thereafter:
 (1) use information relating to the representation to the
 disadvantage of the former client except as these Rules would

1 permit or require with respect to a client, or when the information
has become generally known; or
2 (2) reveal information relating to the representation except as these
Rules would permit or require with respect to a client.
3

4 The duty to a former client as prescribed by Rule 1.9(a) only applies when the attorney
subsequently represents another client in the same or a substantially related matter. “Matters are
5 ‘substantially related’ for purposes of this Rule if they involve the same transaction or legal dispute or if
6 there otherwise is a substantial risk that confidential factual information as would normally have been
7 obtained in the prior representation would materially advance the client's position in the subsequent
8 matter.” Rule 1.9 cmt. 3 (2002); *Feliciano, supra*, ¶ 44. The test for whether matters are “substantially
9 related” begins with a factual determination of the scope of the prior representation, then considers the
10 nature of any confidential information that would reasonably be expected to be given to the lawyer in
11 the course of the prior representation and its relevance to the current matter. *People v. Frisco*, 119 P.3d
12 1093, 1096 (Colo. 2005), citing *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir.
13 1978). If the confidential information may be relevant to advance the client’s interest in the current
14 matter, the matters are “substantially related.” *Id.* If the former and present client’s interests in the
15 matter are “materially adverse,” representation is prohibited without the written consent of the former
16 client. Rule 1.9 Annotation.

17 Rule 1.9(c) is designed to prevent the lawyer from exploiting the former client’s confidential
18 information in any situation in which the use disadvantages the former client. It requires the attorney to
19 maintain and refrain from using the former client’s confidential information against the client, or for the
20 lawyer’s unfair advantage, even in a subsequent representation not involving the same or a substantially
21 related matter. Rule 1.9 cmt. 8; RESTATEMENT § 132, cmt. f., Illus. 6 (prosecutor who formerly
22 defended a defense witness in an unrelated matter but obtained confidential impeachment information
23
24

1 from the client “may not use that information in cross-examining Client, but otherwise Lawyer may
2 cross-examine Client vigorously.”).

3 Here, we have a case of successive representation. At the hearings on the PDO’s motion,
4 defense counsel clarified that the PDO represented the government’s witness in two misdemeanor traffic
5 cases with the most recent case being decided on May 11, 2004. The PDO’s representation of the
6 witness in these cases was conducted by attorneys who are no longer with the PDO and involved the
7 negotiation of the witness’ plea agreements without trial. There were no post-judgment motions in
8 either case. The witness’ term of probation for the latter conviction expired on May 10, 2005. The
9 incident for which the Defendant has been charged occurred on or about May 21, 2006.

10 In the present matter, Defendant has been charged with one count of sexual abuse of a minor in
11 the first degree. A conviction under this offense requires the government to prove that Defendant is over
12 16 years old and that Defendant engaged in an act of sexual penetration with a minor who is under 13
13 years of age. 6 CMC § 1306(a)(1). The former client’s connection to this case is that she is the mother
14 of the alleged victim and was the individual who first alerted authorities to the incident. The witness’
15 name, relationship to the victim, and a summary of her complaints to law enforcement appear in the
16 Rule 5 Complaint filed on October 7, 2006. The PDO appeared and was appointed to represent
17 Defendant on October 10, 2006.

18 There is no relationship between the traffic offenses charged in the prior cases and the crime of
19 sexual abuse of a minor alleged in this case. Neither are there allegations of any common factual events
20 or activities underlying the separate crimes occurring years apart. *Cf., Trone v. Smith*, 621 F.2d 994, 998
21 (9th Cir. 1980). From the scope of PDO’s former representation of the witness in connection with her
22 traffic offenses as apparent from the record, it may be presumed that PDO was privy to such confidential
23 information from the witness as would enable it to successfully negotiate the witness’ pleas to
24 misdemeanor reckless driving and DUI. The Court has received no proffer that PDO actually received

1 confidential information of a nature other than what may be presumed from the record. On this basis,
2 there is no reason to infer that such information would be relevant to the Defendant’s case and the Court
3 determines that the prior matters are not substantially related to the present case. MRPC Rule 1.9(a)
4 does not prohibit PDO from representing Defendant in an unrelated case, even if it were determined that
5 Defendant’s interests in the present matter are “adverse” and “material” to the interests of the former
6 client. MRPC 1.9, comments [2] and [3]; RESTATEMENT § 132, cmt. c.

7 In its written motion, PDO actually asserts that it is forced to withdraw because of its duty to its
8 former client under Rule 1.9(c). (Motion, at 2). This section prohibits the attorney’s *use* of client
9 confidences and not the attorney’s subsequent *representation* of a different client in another matter. *See,*
10 *People v. Frisco*, supra, 119 P.3d at 1096. In support of its position that its withdrawal is mandatory,
11 PDO reads this rule in conjunction with a statement in Section 132(2) of the Restatement, which PDO
12 paraphrases as follows: “absent waiver, a lawyer cannot represent a client if there is a substantial risk
13 that representation of the present client will involve the use of information acquired in the course of
14 representing a former client.” (Motion, at 2, *citing*, RESTATEMENT § 132(2)). PDO’s recital of the
15 Restatement is incorrect. It is clear on its face that subsections (2) and (3) of Section 132 only provide a
16 *definition* of the term “substantially related matter” as it is introduced in the Section as a *limitation* on
17 the rule, and comment c to Section 132 reiterates that the entire section, like MRPC Rule 1.9(a), only
18 applies to legal representation in the same or a substantially related matter.⁶

19
20 ⁶ The text of Section 132 (with emphasis provided) states:

21 Unless both the affected present and former clients consent to the representation under the limitations
22 and conditions provided in § 122, a lawyer who has represented a client in a matter may not thereafter
23 represent another client *in the same or a substantially related matter* in which the interests of the former
24 client are materially adverse. *The current matter is substantially related to the earlier matter if:*

- (1) the current matter involves the work the lawyer performed for the former client; or
- (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

1 Even if defense counsel has received confidential information from a former client that, but for
2 the constraints of the Rules of Professional Responsibility, might be used to advance the current client's
3 interest in the litigation, this fact alone does not disqualify counsel from further representation or require
4 counsel's withdrawal from the matter. Professional competence includes the ability to distinguish, or to
5 recognize when appropriate steps are required to determine, which pieces of information may be used in
6 cross-examination and those which may not. The Seventh Circuit Court of Appeals in *United States v.*
7 *Jeffers* quickly dismissed the notion that defense counsel's mere possession of former-client confidential
8 information that could be used to impeach the government's witness creates a disabling conflict of
9 interest: "[T]here might be a temptation to use the information to impeach the former client. We do not
10 regard this risk as serious, however, for we think the courts can generally rely on the sound discretion of
11 members of the bar to treat privileged information with appropriate respect." *Jeffers, supra*, 520 F.2d at
12 1265. Possession of information that cannot be used or must be disregarded on the basis of public
13 policy is a common facet of legal proceedings affecting both counsel and the Court.

14 In the case at hand, this Court discerns no formal conflict of interest that would prevent PDO
15 from cross-examining the proposed witness regarding any matters as to which she would be permitted to
16 testify. The witness' two prior misdemeanor convictions are inadmissible for impeachment purposes.
17 Com. R. Evid. 609(a)(1),(2). PDO nevertheless adheres to the position that it cannot effectively
18 represent Defendant simply because it *may* have confidential impeachment information in its files and
19 PDO will be frustrated in its performance by what it perceives to be a division of loyalties. Regardless
20

21 Comment d(iii) to Section 132 explains that Section 132(2) is intended as a statement of the "substantial relationship
22 test" used by courts to determine whether successive matters are sufficiently related to warrant application of the former-
23 client conflict of interest rules. Comment c states: "The difference between a former-client conflict under this Section and a
24 present-client conflict considered in Topic 3 is that this Section applies only to representation in the same or a substantially
related matter. The present-client conflict rules prohibit adverse representation regardless of the lack of any other relationship
between them. If the two representations overlap in time, the [present-client conflict] rules apply."

1 of the absence of a valid formal conflict, the Court must still evaluate the possibility of any adverse
2 effect on the Defendant's Sixth Amendment right to the effective assistance of counsel. *Alberni, supra*,
3 458 F.3d at 871 (*citing Mickens, 535 U.S. at 171*).

4 **C. Potential Effect of Particular Circumstances on Defendant's Right to Effective Assistance**
5 **of Counsel.**

6 PDO indicated that it may have discovered a conflict of interest in this case at the initial
7 arraignment hearing on October 23, 2006. It nevertheless advocated vigorously on behalf of Defendant
8 through successive appearances in the matter and raised and argued a number of pre-trial motions.
9 When PDO disclosed its belief that it needed to withdraw due to a conflict of interest in early January of
10 2008, the Court scheduled hearings, including the in camera hearing on January 24, 2008, to provide
11 PDO with the opportunity to show that the nature of the information it possessed might create a genuine
12 conflict. At the in camera hearing, defense counsel was unable to cite the specific nature of the
13 information contained in PDO's files and it emerged that PDO's position is that, because of its present
14 duty to Defendant, it will be "forced to use" any kind of confidential former-client information that will
15 be beneficial to the defense, thus locking PDO into an intractable conflict of interest. Furthermore, it
16 argued that the conflict attaches at the moment PDO is called to cross-examine its former client.

17 As explained above, an attorney *must not use* the former client's confidences against the former
18 client. MRPC Rule 1.9(c). In these circumstances, however, Defendant must show that PDO's
19 possession within its files of confidential information concerning its former client is reasonably likely to
20 render PDO's further representation constitutionally ineffective, and that substitution of counsel will be
21 effective to remove this threat and is necessary. *Alberni, 458 F.3d at 872*. The inhibiting effect of the
22 confidential information on counsel's performance, including "the danger that counsel may
23 overcompensate and fail to cross-examine fully for fear of misusing his confidential information" was
24 considered by the appellate court in *Jeffers. Supra, 520 F.2d at 1265*. The court explained its

1 assessment of the potential conflict and the proper trial procedure for addressing the interests at stake as
2 follows:

3 The risk that an item of confidential information might be misused does not create a
4 conflict of interest which disqualifies an attorney from conducting any cross-examination
at all.

5 The suggestion repeatedly made by the government and adopted by the court would have
6 provided adequate protection to the interests at stake. Thus, if defense counsel was
7 concerned that he might be using confidential information improperly, he could have
8 outlined the nature of the information to the judge and, if necessary, made an in camera
9 disclosure to him. On the basis of such a disclosure it might have become apparent that
the privilege was either inapplicable or had been waived by the witness. Or, it might have
been clear that the information was not usable for other evidentiary reasons. The witness
himself could have been consulted to determine whether he would insist on the
maintenance of the privilege.

10 If it were determined that such information was privileged, the witness could not, of
11 course, have been questioned about it. The fact that an attorney is unable to pursue one
line of inquiry does not mean, however, that the defendant is receiving inadequate
representation.

12 *Jeffers*, 520 F.2d at 1265 (citing, *United States v. Alberti*, 470 F.2d 878, 881 (7th Cir. 1972) cert. denied,
411 U.S. 919, 93 S.Ct. 1557 (1973)).⁷

13 A proper response to the Court's inquiry regarding an attorney's potential conflict of interest
14 does not require the unethical disclosure of client confidences and defense counsel's ability to provide a
15 factual basis sufficient for the exercise of the Court's discretion on the matter is even presupposed by the
16 rules governing concurrent representation of criminal defendants. Com. R. Crim. P. 44(c); *Mickens*, 535
17 U.S. at 174; *Cuyler v. Sullivan*, 446 U.S. at 344-347. Courts inquiring into whether a potential former-
18 client conflict will inhibit defense counsel's effective cross-examination of a prosecution witness have
19

20 ⁷ The Court of Appeals in *Alberti* observed that the effectiveness of defendant's representation would not be enhanced by
21 substitution of another attorney who was ignorant of the same impeachment information that defendant's present attorney
was prohibited from using:

22 [W]e cannot understand how other counsel could be expected to ask the question that *Alberti* suggests; for,
23 unless either [defense counsel] breached the attorney-client privilege or [the witness] waived it, any other
counsel would have been totally without knowledge of what [the witness] had told [defense counsel]. As a
24 result, not only would other counsel not have asked the suggested question, but he would also not have
been in a position to cross-examine [the witness] as thoroughly and vigorously as [defense counsel] did.

Alberti, 470 F.2d at 881; *Cf.*, *Lewis v. Mayle*, 391 F.3d 989, 998 (9th Cir. 2004) (counsel who represented witness in prior
felony matter failed to use felony conviction of record in that matter for important impeachment purpose).

1 focused on three factors: (1) concern that the lawyer's pecuniary interest in future representation will
2 cause the lawyer to avoid embarrassing or offending the witness; (2) the possibility that the lawyer has
3 information relevant to the cross-examination which is privileged; and (3) whether the subject matter of
4 the earlier representation is substantially related to that of the second. *Hill v. State*, 494 S.E.2d 661, 663
5 (Ga. 1998), citing *Jeffers, supra*, 520 F.2d at 1264-65 (citing multiple cases).

6 There is no concern in this case that PDO will be affected by any pecuniary interest. The merits
7 of PDO's policy decision that its mission will be best served by automatically disqualifying itself from
8 all matters in which a former client may potentially be called as an adverse witness is also of no concern
9 in this case. The Court has determined that the subject matter of PDO's current representation of
10 Defendant has no substantial relationship to PDO's prior representation of the Commonwealth's
11 proposed witness. The possibility that PDO has received confidential and privileged information that is
12 relevant to the possible cross-examination of the witness appears to be quite remote and cannot be
13 presumed from the record of these matters, nor is it supported by any further submissions from the
14 defense.

15 **VI. Conclusion**

16 PDO has been given several opportunities, including in camera hearings before the Court, to
17 describe the nature of any such information as may exist in order to permit the Court to at least find
18 some nexus between PDO's claimed knowledge and its ability to effectively represent the Defendant.
19 PDO has made no representation to the Court to alter what may be concluded from the general record;
20 that PDO's representation of the proposed witness in her prior traffic matters terminated well prior to the
21 commencement of its representation of Defendant in this matter, the two matters are substantially
22 unrelated, and there is no reason to find that PDO's prior representation poses a risk that its current
23 representation of Defendant will be rendered ineffective. Because counsel's withdrawal from
24 representation at a time close to the scheduled date for trial frustrates the interest of all parties, including

1 Defendant, in the efficient administration of justice, movant must present a sound basis for withdrawal.
2 *Michelson, supra*, 559 F.2d at 572. PDO has failed to show that such grounds are present in this case.

3 Based on the foregoing reasons, the motion of the Public Defender's Office to withdraw as
4 counsel for Defendant Benson Dela Cruz is hereby denied. The PDO shall continue its zealous
5 representation of the Defendant, and shall effectively cross-examine the complaining witness in this case
6 should she take the stand to testify.

7 SO ORDERED this 3rd day of March, 2008.

8
9 /S/
RAMONA V. MANGLONA, Associate Judge