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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

UNITED STATES OF AMERICA Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff, Intervenor v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants. UNITED STATES OF AMERICA WALKER RIVER PAIUTE TRIBE Counterclaimants, vs. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	Case No: 03:73:cv-127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **OPENING BRIEF ON APPEAL TO JUDGE EDWARD C. REED, JR. RE: MAGISTRATE JUDGE'S ORDER DENYING MOTION TO DISQUALIFY COUNSEL GORDON DePAOLI; DECLARATION OF ELISA MARINO IN SUPPORT THEREOF**

PLEASE TAKE NOTICE that Defendants Joseph and Beverly Landolt hereby bring this Appeal on Magistrate Judge's Order Denying Motion to Disqualify Gordon DePaoli. Said motion was heard by Judge McQuaid and was denied on March 10, 2006. Defendants challenge the factual findings of fact made by Judge McQuaid set forth in the Order dated March 10, 2006.

Defendants seek to disqualify Gordon DePaoli from further representing his existing clients, the Walker River Irrigation District (WRID) and other individual stakeholders. This motion is made on the grounds that Mr. DePaoli's dual representation of WRID and the multitude of stakeholders creates a conflict of interest. As was ordered by the Court, WRID was permitted to participate in confidential mediation regarding the water rights in dispute, but the individual stakeholders were not. This absolutely created a conflict because Gordon DePaoli obtained privileged and confidential information on behalf of WRID that was not to be disclosed to the stakeholders. Under these circumstances, there exists a reasonable possibility that Mr. DePaoli has disclosed this confidential information to his stakeholder clients, which is unfair to the other stakeholders that are not represented by him, such as Beverly and Joseph Landolt. Further, if Mr. DePaoli has not disclosed this information to his stakeholder clients, he has breached his duties to them.

This motion is based upon these points and authorities, the Declaration of Elisa Marino filed in support of this motion, any pleadings on file with the court and any oral or documentary evidence presented at the hearing.

Date: April 26, 2006

/s/ John W. Howard

John W. Howard

INTRODUCTION

Gordon DePaoli and his law firm, Woodburn and Wedge, represent Walker River Irrigation District (WRID) in the instant case. WRID and several other parties to this case have, for the last several years, with this court's imprimatur and pursuant to its protective order, engaged in mediation of the dispute that brings the parties before the court. Over the vigorous objections of the individual stakeholders, the mediation has proceeded without their participation and has, pursuant to this court's order, been conducted under a cloak of secrecy. Participants in the mediation process are prohibited from discussing its processes, discussions or results with any other person or entity. The participants have indicated that it is their intention to present to this court a proposal for settlement at the end of the process, a proposal that will certainly carry considerable weight as the parties move into the trial phase of this action.

Mr. DePaoli and his firm also represent many individual stakeholders with decree rights to water; whose rights to water will be determined in this action; whose interests might well diverge from those of WRID and other mediation participants; from whom all information regarding the mediation proceedings has been withheld pursuant to this court's order and who will have to prepare for trial at the end of the mediation process presumably without access to recent information governed by the mediation process. (A list of the clients Mr. DePaoli and his firm represent is attached as Exhibit "A" to the Declaration of Elisa Marino.) This dual representation presents a clear conflict of interest since these two groups have opposing objectives in exercising their rights to water.

As counsel for WRID, Mr. DePaoli has participated in the confidential mediation process. However, Mr. DePaoli's individual stakeholder clients, and other parties to this case,

are forbidden from attending the mediation. (Paragraph 3 of the Order governing the Mediation Process provides for confidentiality and incorporates paragraphs 8 and 9.3 of the Mediation Agreement as part of the Order.) The parties excluded from the process are not entitled to even know about the discussions held during those mediations. (Paragraph 3 of the Order governing the Mediation Process provides for confidentiality and incorporates paragraphs 8 and 9.3 of the Mediation Agreement as part of the Order.) One of two things is true: either (1) Mr. DePaoli is sharing information regarding the mediation process with his individual stakeholder clients in violation of this court's order; or (2) he is withholding from his clients information in which they would or could be vitally interested, regarding those discussions, in violation of his duty to his clients under the Nevada Rules of Professional Conduct to provide them with all information which would bear on their rights in this litigation. Either way, it presents a clear conflict that must not be tolerated by this court.

STANDARD OF REVIEW

Magistrate judges' rulings on nondispositive motions, such as a motion to disqualify counsel, may be set aside or modified by the district court only if found to be "clearly erroneous" or "contrary to law." (28 USC § 636(b)(1)(A); FRCP 72(a); *Bhan v. NME Hospitals*, Inc. (1991) 929 F. 2d 1404, 1414; *Castillo v. Frank* (1995) 70 F.3d 382, 385-386) The "clearly erroneous" standard applies only to the magistrate judge's findings of fact. The magistrate judge's legal conclusions are freely reviewable *de novo* to determine whether they are contrary to law." (See *United States v. McConney* (1984) 728 F.2d 1195, 1200-1201.)

APPLICABLE LAW

A lawyer's conduct is governed by the laws of the state in which he is admitted to practice. As such, this Court must apply the professional rules governing Nevada attorneys, the Nevada Supreme Court Rules. (In 1986, the Supreme Court of Nevada adopted the Nevada Rules of Professional Conduct. *Robbins v. Gillock*, (1993) 109 Nev. 1015, 1016; citing Supreme Court Rule 150.)

District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case. (*Brown v. Eighth Judicial District Court of the State of Nevada* (2000) 116 Nev. 1200, 1205 citing *Robbins, supra at* 1018.) In a situation involving the disqualification of an attorney, any doubt should be resolved in favor of disqualification. (*Cronin v. Eighth Judicial Dist. Court*, (1989) 105 Nev. 635, 640.)

If a court finds that a conflict exists that threatens an injustice, it must disqualify the offending lawyer. (*Tessier v. Plastic Surgery Specialists, Inc.* (1990) 731 F.Supp. 724: "Chief among the reasons for avoiding conflicts of interest is the preservation of the public's confidence in the integrity of lawyers and the judicial system. To allow a conflict to remain unaddressed until an affected party complains about the quality of justice he or she has received is to betray the public trust granted to the bar as a self-regulating organization.") *Id*, at 729. In disqualifying counsel in that case, the court held that any lawyer involved in the litigation has standing to bring the motion for the purpose of protecting the integrity of the process. The right to retain counsel of a client's choosing, it wrote, is secondary in importance to the court's maintaining the highest ethical standards and to preserve trust in the integrity of the bar. *Id.*

GORDON DePAOLI MUST BE DISQUALIFED AS COUNSEL AND MAY NOT BE ALLOWED TO CONTINUE REPRESENTING ANY PARTY IN THIS CASE

A. Mr. DePaoli's Representation of Both WRID and the Individual Stakeholder clients Is An Undeniable Conflict of Interest.

The Nevada Supreme Court Rules governing lawyers' conduct prohibits dual representation in situations where a conflict of interest exists. Nevada Supreme Court Rule 157 (1) provides:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (a) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (b) Each client consents, preferably in writing, after consultation.

Nevada Supreme Court Rule 157 (2) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (a) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (b) The client consents, preferably in writing, after consultation.
>
> When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Mr. DePaoli cannot represent WRID in a secret negotiation, the fruits, methods and discussions of which he cannot disclose to other clients who have a vital interest in the outcome of those discussions. (Paragraph 3 of the Order governing the Mediation Process provides for confidentiality and incorporates paragraphs 8 and 9.3 of the Mediation Agreement as part of the Order.) Mr. DePaoli's duty to WRID is to maintain the secrecy of the mediation discussions. His duty of loyalty to the individual stakeholders is to disclose all information he has at his disposal that bears or might bear on their individual cases. In this instance, Mr. DePaoli cannot do both. It is a real and potential conflict and a clear violation of Nevada Supreme Court Rules 157 (1) and (2). Mr. DePaoli cannot represent WRID without violating his duty of loyalty to the stakeholders and cannot represent the stakeholders without violating his duty of confidentiality to WRID.

In addition, Mr. DePaoli cannot represent both WRID and the individual stakeholders because these two groups have conflicting interests. WRID is exclusively a water storage organization, as is stated in its organizing charter. There is evidence to suggest that WRID has repeatedly increased its storage of water during the period of major use, when no additional storage is supposed to be permitted. Some individual stakeholders were, at the same time, being told that their allotment – a high priority water right – had run out. Therefore, the interests of WRID and the individual stakeholders are opposing inasmuch as individual stakeholders' interests are in obtaining for themselves the maximum amount of water necessary for their individual uses. These opposing interests put any lawyer representing both in the position of obtaining information that would be useful to the other but which must be withheld

from the other on the basis of confidentiality – precisely the situation that has already arisen herein.

Finally, Nevada Supreme Court Rule 157 (2) requires that a lawyer representing multiple parties in any litigation obtain the consent of each, preferably in writing, after consultation which "shall include explanation of the implications of the common representation and the advantages and risks involved." There is no evidence before this Court that Mr. DePaoli has done this in this instance. If for no other reason, the instant motion should be granted on this basis.

B. There is a Reasonable Possibility That A Specifically Identifiable Impropriety occurred.

The impropriety here is that Mr. DePaoli continues to represent clients with opposing interests despite the conflict of interest. Further, the conflict of interest is that he has participated in numerous private mediations on behalf of WRID, the same mediations from which the individual stakeholders are excluded. Pursuant to the Court's Order, neither Mr. DePaoli nor any of the other participants in the mediation are permitted to disclose the discussions held at those mediations. (Paragraph 3 of the Order governing the Mediation Process provides for confidentiality and incorporates paragraphs 8 and 9.3 of the Mediation Agreement as part of the Order.) Thus, Mr. DePaoli cannot disclose to his stakeholder clients what progress is being made and what solutions have been proposed. He may not disclose to them sufficient information from which they may discern whether or not their interests are being protected in those discussions. He cannot even tell them enough to allow them to

determine what their best interests are. He cannot, in short, give them information he is bound, by his duty under the law as their attorney, to give them. That is a clear impropriety.

An additional impropriety by Mr. DePaoli is that, in acting on behalf of the stakeholders, he cannot ignore what he knows through representing WRID in the mediation process. Thus, Mr. DePaoli's stakeholder clients have an advantage over the other stakeholders, such as the Landolts, who have no means of protecting their water rights in the mediation process. The Landolts and others are prejudiced as a result of Mr. DePaoli's representation of stakeholders whose interests Mr. DePaoli will presumably protect with confidential information to which they are not entitled (and which he may not disclose to them) but which he may marshall to their benefit to the exclusion of all of those not represented by him. It must be presumed that Mr. DePaoli will take steps during the mediation process to ensure that his individual stakeholder clients' interests are protected, since that is his duty, under the law, to those clients. That, however, does not mitigate the conflict with the interests of the individual stakeholders that Mr. DePaoli represents because they do not have the right to sufficient information with which to make that determination.

Mr. DePaoli's conflict between his clients and the resulting impropriety cannot be remedied unless he is disqualified from representing any party in this case. Because Mr. DePaoli cannot disclose to his stakeholder clients any information he derives from his representation of WRID in the mediation process, they cannot be told whether or not he is protecting their interests of working against them. He cannot, in short, disclose to the individual stakeholders sufficient information from which they can determine whether or not he has a conflict which they would consider unacceptable. He cannot, therefore, obtain from them a knowing and intelligent waiver of the conflict since he cannot tell them enough about the

mediation process to enable them to do so. Therefore, there is no way to overcome this obvious conflict.

STANDING

A party has standing to bring a Motion to Disqualify Counsel "where the ethical breach so infects the litigation that it impacts the moving party's interest in a just and lawful determination of her claims". (*Colyer v. Smith* (1999) 50 F.Supp. 966., 971-972) "Where the ethical breach is so severe that it 'obstructs the orderly administration of justice' the party who finds his claims obstructed has standing." (Id.)

Defendants have standing to bring this motion because Mr. DePaoli has as clear and obvious a conflict that constitutes an ethical breach. (Nevada Supreme Court Rules 157 (1) and (2)) That ethical breach is so severe that it will impact the defendants' interest in a just and lawful determination of their claims.

By participating, for some clients, in a mediation from which others of Mr. DePaoli's clients are excluded, he will learn confidential information that he is prevented, by the Order, from disclosing to his non-mediating clients. That includes those of his clients who are not participating in the mediation. But Nevada Supreme Court Rule 154(1) and (2) requires that Mr. DePaoli disclose to clients under his representation all information that might be of interest or of help to them in the litigation. If he fails to do so, he violates Rule 154. If he does do so, he violates this court's order. It is an untenable position for him and presents him with a conflict as plain as ever existed. Conflicts are ethical violations. (Nevada Supreme Court Rules 157 (1) and (2)) Failing to make disclosures one is bound to make are ethical violations as violations of the duty of loyalty. That demonstrates the first prong of the *Colyer* test.

Mr. DePaoli's multiple ethical breaches will, in fact, so infect the litigation process, that it will presumptively adversely impact the Landolt's interest in a just and lawful determination of their rights in this litigation. There is no way to escape it. And that satisfies the second prong of the *Colyer* case for establishing standing. The Landolt's clearly have standing to bring the instant motion.

STANDARDS ON A MOTION TO DISQUALIFY COUNSEL

To prevail on a motion to disqualify opposing counsel, the moving party must first establish "at least a reasonable *possibility* that some specifically identifiable impropriety did in fact occur," and then must also establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." (Id. citing *Cronin, supra, at* 640. [emphasis supplied]) This likelihood can be established by evidence showing not just the possibility, but a reasonable probability, that the challenged attorney actually received privileged or confidential information (*Brown, supra* at 1206.) or that he received information that he did could not share with his client, thus breaching his duty of loyalty.

If the court finds that in order to properly represent a client in litigation a lawyer would have to engage in conduct that violates his duties under the Nevada Rules of Professional Conduct, it must disqualify him from representing either client.

THE COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS

Judge McQuaid ruled that "...there is no evidence, direct or circumstantial, to support this motion to disqualify." (Order dated March 10, 2006, page 8, lines 10-11.) Further, the

Order stated, "...the court cannot find that an ethical violation has occurred. There is no evidence that Mr. DePaoli has even obtained information that would cause a conflict among his clients under NSCR 154 and 157, and there is no evidence that WRID and Mr. DePaoli's individual clients have adverse interests." (See Order, page 7, lines 12-15.) The Order goes on to state that, "...the court will not allow the Landolts to completely avoid their burden of proof by arguing that because the mediation proceedings are confidential they cannot articulate what information has been obtained by Mr. DePaoli." (See Order, page 14, line14 and page 15, lines 1-2.) Overall, the Court's position is that, "All the Landolts have to offer are their own assumptions and speculations." (See Order, page 7, line 17.)

Given the confidentiality of the mediation as ordered by Judge Reed in conjunction with the fact that the Landolts have been excluded from participating in the mediation or even being informed of the discussions held therein, there is a reasonable possibility that Mr. DePaoli has actually received privileged or confidential information. This meets the standard required to disqualify an attorney as set forth in *Brown v. Eighth Judicial District Court of the State of Nevada, supra.*

The Court claims that the defendants have based their motion on assumptions and speculations. Yet, the moving defendants do not know what information Mr. DePaoli has learned or will learn; whether it is confidential; what impact it might have on the conduct and preparation of a defense and whether or not Mr. DePaoli will disclose it to his non-mediating clients. Of course the moving defendants do not know. *The mediation is confidential*! And that is the very point. The confidentiality section of the *Order* is what creates Mr. DePaoli's conflict. Of course the Landolts don't know how it will impact them; they can't know whether it would be helpful in framing a defense; they don't know if Mr. DePaoli will disclose it to his

non-mediating clients. Even his non-mediating clients cannot know, with confidence, whether or not he is telling them everything they might need to know in framing their defense.

But none of that makes the Landolt's complaint herein speculative. There is nothing speculative about the conflict itself. And it must be presumed that Mr. DePaoli will be exposed to confidential information, else why have a confidentiality clause? We do know that it will be information bearing on the rights and duties of the various parties impacting the adjudication of water rights in the instant action. And we do know that Mr. DePaoli has a duty to disclose any information he has that would be helpful to any client. And we do know that Mr. DePaoli's duty to his mediating client is to keep such information from his other clients, who have a right to have it. So, there is nothing speculative about the *conflict* unless it is claimed that there will be no confidential information exchanged during the mediation process. And if that is true, then we can dispense with the confidentiality clause and release all information arising from the mediation to all parties. But that has not yet been done.

Once Mr. DePaoli learns the many confidential matters to which he will be (or has been) exposed in the mediation process, he will not be able to unlearn them. They will be there, the fruits of his untenable conflict, as he prepares his representation of his mediating and non-mediating clients, alike. And it will affect what he does and how he prepares his case. At the same time, those representing the non-mediating, non-DePaoli parties will be left with preparing without the benefit of all that knowledge Mr. DePaoli has learned as a result of his participation in the mediation.

Given the reasonable possibility that Mr. DePaoli has learned valuable information which cannot be disclosed, this can have a serious impact on the rights of the Landolts and the other non-mediating parties. Suppose the mediating parties learn that a settlement is imminent

and that it will mean a loss of some of their existing water rights. Obviously, that would mean a decline in the value of those existing water rights. Armed with such inside information, the mediating parties could sell off their water rights before the decline. Further, without disclosing the confidential information, Mr. DePaoli could alert his non-mediating clients to sell off water rights before they take a tumble in the marketplace.

One can speculate like this *ad infinitem* to illustrate the potential inequity presented by the confidentiality clause and this conflict of interest problem. The Landolts cannot articulate the important non-disclosed information known by Mr. DePaoli because it was ordered confidential. Prejudice to the Landolts will surely follow if it has not already occurred.

What is certain is that confidential information will be generated by the mediation and that Mr. DePaoli will know it and be unable to share it with his non-mediating clients. The nature and extent of that information is unknown to us, at this point, but we must assume it will exist since the mediating parties took such pains to include a remarkable paragraph that, in six sentences said over and over again that such information was to be held confidential and unavailable to any but the mediating parties. Unless we know what that information is, we cannot know whether or not if would be helpful in framing a defense for the non-mediating parties, but we cannot just take it on faith that it will not.

So, what do we know? (1) Mr. DePaoli represents parties to the mediation; (2) Those parties and Mr. DePaoli will be exposed to information that could be of assistance to other parties to the litigation; (3) Mr. DePaoli is prohibited by this court's order from disclosing any of that information to any parties to the litigation who are not, also, participating in the mediation; (4) Mr. DePaoli also represents parties to the litigation who are not participating in the mediation; (5) Mr. DePaoli has a duty to disclose to those parties anything he learns from

any source that would be helpful to them in the litigation or in which they might be interested; (6) Therefore, Mr. DePaoli is in an unethical conflict; (7) Inasmuch as the mediation has been going on for more than two long years, it defies logic to believe that some such information has not already been generated by the mediation. Otherwise, surely, the mediating parties would not have gone to such lengths not only to keep information regarding the mediation from the other litigants, but they would also not so mightily have resisted the inclusion of other parties in the process. Surely, they would not have been secretive even with this court, when it inquired about the mediation at the status conference on October 1, 2004; (8) Mr. DePaoli's unethical conflict has an adverse impact on those litigants who are not represented by him because they will not have the benefit of the knowledge he gains from the mediation while those he represents will or will at least be warned off of unwise decisions based on his insider information; (9) That will clearly result in a disadvantage to the non-DePaoli litigants in participating in and preparing for trial.

IF DePAOLI IS DISQUALIFIED, HIS ENTIRE FIRM MUST BE ALSO

If Mr. DePaoli is disqualified as counsel, no other attorney from his firm may represent a client in this matter. The Nevada Supreme Court rules prohibit lawyer screening and imputes a lawyer's disqualification to the lawyer's firm. (*Brown, supra* at 1204.) Nevada Supreme Court Rule 160 (1) provides, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 157, 158(3), 159 or 168."

CONCLUSION

Defendants Joseph and Beverly Landolt respectfully request that the Court reverse Judge McQuaid's Order and grant the defendant's motion disqualifying Gordon DePaoli and his firm from any further representation of any of the parties to this case.

Date: April 26, 2006

/s/ John W. Howard

John W. Howard