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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	3:73-cv-00127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **RESPONSE OF WALKER RIVER IRRIGATION DISTRICT TO OPENING BRIEF ON APPEAL TO JUDGE EDWARD C. REED, JR., RE: MOTION TO DISQUALIFY GORDON DePAOLI**

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I. PROCEDURAL BACKGROUND.

On November 28, 2005, Joseph and Beverly Landolt (the "Landolts") moved the Court for an order disqualifying Gordon DePaoli from further representation of any party in this matter (the "Disqualification Motion"), including the Walker River Irrigation District (the "District") and other individuals on whose behalf Mr. DePaoli has appeared (the "Individual DePaoli Clients"). The Disqualification Motion also sought to prohibit all other attorneys in Mr. DePaoli's law firm, Woodburn and Wedge, from any such representation. (Doc. #795). The only facts supporting the Disqualification Motion were an affidavit to the effect that various persons have designated Mr. DePaoli and his law firm as their attorney in Notices of Appearances and Intent to Participate, and the fact that DePaoli has acted as counsel to the District in this matter and in the ongoing Mediation. Initially, the only rule of ethics referenced was Nevada Supreme Court Rule 157. However, in their Reply filed February 21, 2006, the Landolts for the first time relied upon Nevada Supreme Court Rule 154. (Doc. #835 pgs. 3-4).

The District filed its Opposition to the Disqualification Motion and an Affidavit of Gordon DePaoli in Support of the Opposition on January 30, 2006. (Doc. #826; # 827). The Landolts replied, and oral argument was heard on March 7, 2006.

On March 10, 2006, Magistrate Judge McQuaid entered an order denying the Disqualification Motion. (Doc. #855). The Magistrate Judge ruled that a bare list of names and the confidentiality provisions governing the Mediation were not evidence of an ethical violation. He concluded there was no evidence that the District and the Individual DePaoli Clients had adverse interests. He refused to reach conclusions based upon assumptions and speculations, and would not allow the Landolts to avoid their burden of proof by "arguing that because the mediation proceedings are confidential they cannot articulate what information [had] been obtained . . ." (Doc. #855, pgs. 7-9). The Magistrate Judge also concluded that the Landolts had not established standing because they had not shown how the alleged ethical violation, even if presumed to exist, could affect a just determination of their defenses. (Doc. #855, pgs. 9-11).

By Minute Order dated April 5, 2006, the Landolts' attempt to appeal the Magistrate Judge's decision to the Ninth Circuit Court of Appeals was deemed a request that the District Judge reconsider that decision. (Doc. #859).

II. SUMMARY OF THE ARGUMENT.

Under the provisions of 28 U.S.C. § 636 (b)(1)(A), the Magistrate Judge's order denying the Disqualification Motion may be reconsidered only if the Court finds it to be clearly erroneous or contrary to law. See, *Laxalt v. McClatchy*, 116 F.R.D. 455, 456 (D. Nev. 1986). It is neither.

The Landolts contend that the ethical violation results from DePaoli's representation of the Individual DePaoli Clients and the District in this litigation, the District in the Mediation, and from the confidentiality obligations imposed on him by the *Order Governing Mediation Process*. It appears that they contend that the Magistrate Judge committed clear error in not concluding that that alleged ethical violation impacts their interest in a just and lawful determination of their defenses.

The Landolts contend that DePaoli will somehow use defense critical knowledge gained in the Mediation to the advantage of the Individual DePaoli Clients and to the disadvantage of the non-DePaoli clients in participating in and preparing for trial. (Doc. #861, pgs. 11-15). That contention, in part, is based upon Landolts' claim that the District and individual stakeholders have conflicting interests in this litigation. (Doc. #861, pg. 7).

Those contentions demonstrate a lack of understanding of the matters to be litigated here, and of the sequence in which this litigation will proceed. With respect to the Mediation, the Disqualification Motion distorts the roles of both the District and its counsel in that process, and ignores the relevant provisions of the *Mediation Process Agreement* and the *Order Governing Mediation Process*.

There is no basis in fact for asserting, at this stage of this litigation, that DePaoli's representation of the Individual DePaoli Clients is or will be directly adverse to his representation of the District, and vice-versa. The District and the Individual DePaoli Clients are defendants, and their water rights are already adjudicated by the Walker River Decree or recognized under state law. Those rights will not be redetermined here. See, pgs. 17-19, infra. There is also no basis in

fact for contending now that DePaoli's representation of the District is or may materially limit his representation of the Individual DePaoli Clients, and vice-versa. They share the common goal to ensure that the Tribe and United States do not acquire any more water rights. See, pgs. 20-23, infra. Finally, in either case, if it appears that such a conflict may arise in the future, there is no basis in fact for concluding that the District and Individual DePaoli Clients could not provide informed consent to such representation at an appropriate time. The manner in which this Court has provided for the management of this case provides ideal opportunities to make informed assessments about the issues in the case, and to make the informed judgments required to be addressed by the provisions of Nevada Supreme Court Rule 157. See, pgs. 23-24, infra.

Nevada Supreme Court Rule 154 does not obligate a lawyer to disclose information that a court order provides may not be disclosed. See, pgs. 25-27. The *Mediation Process Agreement* and the *Order Governing Mediation Process* do not protect absolutely all information used in the Mediation. See, pgs. 14-15. To the extent that DePaoli is aware of information which bears on the merits of the Tribal Claims or Federal Claims, that information will also be available to all individual stakeholders in the litigation because it is otherwise available, admissible, or discoverable. Finally, DePaoli's knowledge will not disadvantage the Landolts. See, pgs. 28-29, infra.

III. STATEMENT OF FACTS.

A. The Claims of the United States and Tribe.

In this litigation, the Walker River Paiute Tribe (the "Tribe") and the United States seek recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation and for a federal reserved water right for 167,460 acres of land included in the Reservation in 1936. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the *Walker River Decree*. These claims are made against both surface and underground water.

The United States also makes additional claims to surface water and underground water in the Walker River Basin for the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps, and the

Bureau of Land Management. It also advances claims for surface and underground water for the Yerington Reservation, the Bridgeport Paiute Indian Colony, and several individual Indian allotments.

Neither the United States nor the Tribe seeks to readjudicate the water rights recognized by the Walker River Decree.

B. The Court's Management of the Claims of the United States and Tribe - the Case Management Order.

1. Introduction.

After extensive briefing, on April 19, 2000, the Court entered the Case Management Order ("CMO"). (Doc. #108). In the CMO, the Court recognized that the case as a whole is simply too big and too complex to process on a reasonable basis without bifurcation and other management. Therefore, it entered an order to manage the case, and that management is directly relevant to the issues raised in the Disqualification Motion.

The CMO bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). Except as expressly provided in the CMO, all discovery and other proceedings in the action are stayed. (Doc. #108, p. 4, lns. 20-24). The CMO requires the Tribe and United States to serve their amended pleadings and related service documents on and thereby join numerous individuals and entities who hold surface and underground water rights within the Walker River Basin. It groups these individuals and entities into nine different categories. Id., pgs. 5-6.

2. Requests for Waivers of Personal Service.

The details with respect to service of process were left to the Magistrate Judge. (Doc. #108, pgs. 6-8). Consistent with the CMO, the active parties in Subfile No. C-125-B, through briefing, argument and agreement and with the assistance of the Magistrate Judge, have addressed many of those details. See, *e.g.*, Doc. #206; #207. The details of that

service have involved the United States and Tribe seeking waivers of personal service from water right holders within the District and within the Basin as a whole. Water right holders who waive personal service are also required to file and serve a Notice of Appearance and Intent to Participate in the litigation. They may identify an attorney in that Notice of Appearance.

The United States and Tribe began seeking waivers of personal service in the summer of 2004. *Affidavit of Gordon H. DePaoli in Support of Response of Walker River Irrigation District in Opposition to Motion to Disqualify Gordon DePaoli* (the "*DePaoli Affidavit*"), para. 10. DePaoli and his law firm have agreed to be identified and have been identified as counsel for many District water right holders in Notices of Appearance and Intent to Participate. *DePaoli Affidavit*, para. 13. That was done for three important reasons. First, there was no doubt that completion of service of process would take several years, and that after service is complete, it will be necessary to inform the defendants of how and when the case would proceed. Id., para. 14. Indeed, the CMO recognized the burdens associated with this lapse of time and the number of parties in the action. See, Doc. #108, p. 8, lns. 19-26. Some of those burdens, at least initially, are reduced when service on numerous defendants can be made by service on an attorney. Id.

Second, as is considered in greater detail below, representation of the District in this matter is not directly adverse to representation of individual water right holders within the District, and vice-versa. Similarly, the responsibilities of a lawyer representing the District in this matter do not materially limit his representation of individual water right holders within the District, and vice-versa. *DePaoli Affidavit*, paras. 17-18. Third, the manner in which the Court has phased this case presents opportunities for informed consideration of these questions at an appropriate time.

3. Phased Proceedings for the Tribal Claims.

The CMO expressly provides that no answers or other pleading will be required except upon further order of the Magistrate Judge. It also provides that no default shall be taken for failure to appear. (Doc. #108, p. 12, lns. 22-25).

The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase I will consist of "threshold issues as identified and determined by the Magistrate Judge." Phase II will "involve completion and determination on the merits of all matters relating to [the] Tribal Claims." (Doc. #108, pg. 11, lns. 11-18). Additional phases of the proceedings will "encompass all remaining issues in the case." Id., p. 11, lns. 25-26.

The identification of threshold issues is left to the Magistrate Judge, and those issues shall "not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." (Doc. #108, p. 9). Included among the possible threshold issues to be considered for inclusion by the Magistrate Judge are issues related to the Court's jurisdiction and equitable defenses to the Tribal Claims. See, Doc. #108, pgs. 9-11.

The CMO also directs the procedures to be followed in connection with the disposition of the threshold issues. First, it allows for discovery on those issues. Second, it allows for written discovery concerning the basis for the Tribal Claims. It stays all other discovery. (Doc. #108, p. 13, lns. 4-15). It provides for disposition of the threshold issues by motion, evidentiary hearing, or both. Id., p. 13, ln. 16 - p. 14, ln. 2.

The management of this case as provided in the CMO is directly relevant to the issues raised by the Disqualification Motion. First, at the present time, except for issues related to service of process, all proceedings are stayed until service is complete, and service is not complete. Second, the issues to be litigated and decided in the threshold phase (Phase I) of the Tribal Claims will not be finally known until all parties are joined. Third, the scope of what will be litigated, if anything, with respect to the merits of the Tribal Claims, will not be known until the threshold issues are finally decided.

It is clear that through the threshold issues, the Court seeks answers to two broad questions which will determine the scope of the merits (Phase II) of the Tribal Claims. The first is whether there are equitable defenses which bar some or all of the Tribal Claims. Depending on how that question is answered, the merits (Phase II) of the Tribal Claims may not proceed at all. Alternatively, some, but not all, or all, of those claims will proceed on the merits.

The second question relates to the extent to which the Court may, or should, become involved in issues related to underground water and its uses within the Walker River Basin. The potential outcomes there range from not at all, to in a limited way, to a separate adjudication of rights to underground water, and, finally, to an adjudication of surface and underground water as a single source of supply. Again, depending on how those questions are answered, the scope of the merits (Phase II) of the Tribal Claims may be broad or narrow.

Finally, the CMO recognizes that defenses to the Tribal Claims may be the same or similar to defenses to the Federal Claims. (Doc. #108, p. 2, lns. 17-24). Thus, it is possible, if not likely, that the scope of the litigation of the Federal Claims may narrow as a result of determinations of related threshold issues.

C. The Mediation.

In the fall of 2001, the District joined with Nevada, California, the Walker River Paiute Tribe, Mono County, California, Lyon County, Nevada, Mineral County, Nevada, and the Walker Lake Working Group in requesting that the United States, through the Department of Justice and the Department of the Interior, assemble a team to represent the interests of the Untied States in negotiations with them with respect to issues on the Walker River system. While waiting for a response from the United States, those parties interviewed candidates to act as a mediator and, subject to approval by the United States, selected a mediator. In May, 2002, the United States appointed a team to represent its interests.

It is important to understand the role of the District in the Mediation. The District, through its elected Board, recognized that it would be beneficial to explore the potential to resolve, or at least narrow, issues in a case involving hundreds, if not thousands, of parties, and which the Court has correctly described as enormous and complex. Obviously, it is not possible in a case like this one, to include every party, each with separate representation in a mediation process. If that were a requirement, there could be no mediation. Thus, to pursue alternative dispute resolution here, it was necessary to limit the number of participants in some manner.

The District participates in the Mediation because it is the entity whose electors include most of the individuals and entities whose water rights may be affected, and whose elected directors are among those individuals. It does not participate to simply protect the water rights to which it holds legal title, or the water rights of those electors who happen to constitute its present Board of Directors. It participates for the purpose of protecting the water rights of all of its electors who are the beneficial owners of District held water rights, and who individually own Natural Flow and underground rights. *DePaoli Affidavit*, para. 23.

The *Mediation Process Agreement* was executed by the Mediating Parties in late April and early May, 2003. Section 9.1 of the *Mediation Process Agreement* provided that it could not become effective until the Court entered an order "substantially in accordance with the attached Proposed Order Governing Mediation Process." The Proposed Order had two key purposes. The first was to ensure that the communications in the process would not be admissible or discoverable in the litigation, except as expressly allowed by the *Mediation Process Agreement*. See, Doc. #430, para. 3; see also, 28 U.S.C. § 652 (d). The second was to ensure that, except as to issues related to service of process, the litigation would be stayed. Id. at para. 2.

On May 9, 2003, the Mediating Parties filed a joint motion requesting that the Court enter the proposed *Order Governing Mediation Process*. On May 27, 2003, the *Order Governing Mediation Process* was entered, as proposed. (Doc. #430).

In the Disqualification Motion and in the reconsideration request, the Landolts misconstrue the confidentiality provisions of both the *Mediation Process Agreement* and the *Order Governing Mediation Process*. First, they contend that DePaoli is prohibited from disclosing to the Individual DePaoli Clients the progress of and solutions under consideration in the Mediation. Second, they assume that in the litigation, persons represented by DePaoli, the District, and the Individual DePaoli Clients, will have an advantage over other water right holders in the litigation as a result of information obtained in the Mediation Process. Neither is true.

First, paragraph 8.3.4 of the *Mediation Process Agreement* allows the District to communicate with its constituents on solutions being considered. Through the District, such information in the past has been, and in the future can be, communicated to the Individual DePaoli Clients, all of whom are constituents of the District. *DePaoli Affidavit*, para. 25.

Second, when it comes to litigation use of information obtained in the Mediation Process, neither the District, nor any other party to the Mediation, has an advantage over those who have not participated in the Mediation Process, regardless of who represents them in the litigation. Paragraph 3 of the *Order Governing Mediation Process* provides:

> The Mediation Process is a confidential process. That process shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence and shall not be discoverable in this or any other case. This Paragraph shall apply notwithstanding any request under Nevada or federal freedom of information statutes, see, *e.g.*, 5 U.S.C. 552. This Mediation Process is a "mediation" within the meaning of California Evidence Code § 1115(a). The Parties to the Mediation Process are bound by and shall comply with the confidentiality provisions set forth in Paragraphs 8 and 9.3 of the Mediation Process Agreement. Except as provided in Paragraph 8.3.1 of the Mediation Process Agreement, all Parties to the Mediation Process shall be protected from being required to disclose any information regarding the substance of the

> Mediation Process to any party to the C-125 case, whether or not such party is also a Party to the Mediation Process. Except as provided in Paragraph 8.3.1 of the Mediation Process Agreement, all information that is confidential within the Mediation Process and under the Mediation Process Agreement shall not be admissible for any purpose in the C-125 case or in any judicial or administrative proceeding for any purpose, including but not limited to impeachment.

(Doc. No. 430, para. 3) [Emphasis added].

In applicable part, Paragraph 8.3.1 of the *Mediation Process Agreement* states:

> 8.3.1 **Previously Disclosed, Known or Available Information.** The provisions of Paragraph 8.2 notwithstanding, information or evidence previously disclosed or known or available to a Party outside this Mediation Process or that is otherwise admissible or discoverable shall not be rendered confidential, inadmissible or non-discoverable in any pending or subsequent litigation or administrative proceeding or alternate dispute resolution process or anywhere else solely as a result of its use in this Mediation Process.

[Emphasis added]. Clearly, the provisions of paragraph 3 of the *Order Governing Mediation Process* and paragraph 8.3.1 of the *Mediation Process Agreement* place the Mediating Parties and their attorneys and those who were not Mediating Parties and their attorneys on equal footing with respect to obtaining for litigation use information that may have been used in the Mediation Process.

IV. THE DECISION OF THE MAGISTRATE JUDGE THAT THERE IS NO ETHICAL BREACH, AND THAT EVEN IF THERE WAS, THERE IS NO HARM TO LANDOLTS, IS CORRECT ON THE LAW AND THE FACTS.

A. Introduction.

The Magistrate Judge analyzed the Disqualification Motion based upon the principles in *Colyer v. Smith*, 50 F.Supp.2d 966 (C.D. Cal. 1999). *Colyer* recognized that there is a split of authority on the question of whether a party who is not a client or former client of the attorney alleged to have the conflict possesses the standing necessary to pursue a motion to disqualify. The majority view is that, generally, only a current or former client has standing to move for disqualification. See, *Colyer v. Smith*, 50 F.Supp.2d 966, 969 (C.D. Cal. 1999) (citing *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83 (5th Cir. 1976)); *see also*,

Eikelberger v. Tolotti, 96 Nev. 525, 530, 611 P.2d 1086, 1090 (1980); *United States v. Walker River Irr. Dist.*, D.Nev. Equity No. C-125, Feb. 13, 1990 Order, p. 8 (Doc. 162). The Landolts are neither. *DePaoli Affidavit*, para. 29.

The *Colyer* court recognized an exception to the general rule where an ethical breach is shown and 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*, 50 F.Supp.2d at 971. Based upon *Colyer*, the Landolts must show a concrete and particularized protected interest which is actually or imminently burdened by the alleged ethical violation. Id. at 973.

B. The Magistrate Judge Correctly Concluded There is No Ethical Breach.

1. Introduction.

Disqualification of a party's chosen counsel is a serious matter that cannot be based on imagined scenarios of conflict. See, *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 145 (4th Cir. 1992) ("disqualification of a litigant's chosen counsel for [a conflict of interest] may not be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur"). Assessing whether there is a conflict of interest is primarily the responsibility of the lawyer undertaking the representation. See, *ABA Model Rule 1.7, Official Comment 15* (pre-2002).[1] A party seeking disqualification bears a "high standard of proof" to show that that some specifically identifiable impropriety warrants disqualification. *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F.Supp. 724, 729 (E.D. Va. 1990). This high burden is fitting in light of a party's right to freely choose counsel. Id.

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[1] The preamble and comments to the ABA Model Rules are not enacted in Nevada, but "may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments." SCR 150 (2).

Nevada has a two-prong test for evaluating attorney disqualification motions. First, the moving party must establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Brown v. Eighth Judicial Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000). This prong necessarily requires an examination of the particular ethical rule(s) relied on by the movant to support disqualification, and of the facts relevant to the rule. Second, the movant "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. In this case, the first prong of the test requires an analysis of whether, under SCR 157, DePaoli's representation of the Individual DePaoli Clients is "directly adverse" or "may be materially limited" by his representation of the District to the detriment of the Landolts.[2] It also requires an analysis of whether SCR 154 obligates DePaoli to disclose information that the *Order Governing Mediation Process* provides may not be disclosed.

2. Representation of the District in this Matter is Not Directly Adverse to the Individual DePaoli Clients, or Vice-Versa.

In applicable part, paragraph 1 of Nevada Supreme Court Rule 157 provides:

> 1. 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.

[Emphasis added].

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[2] The Landolts relied primarily on *Cronin v. Eighth Judicial Dist. Court*, 105 Nev. 635, 781 P.2d 1150 (1989) and *Brown v. Eighth Judicial District Court*, 116 Nev. 1200, 14 P.3d 1266 (2000). In both cases, the first prong of the test was virtually not in dispute. In *Cronin*, it was undisputed that Cronin had "repeated and pervasive" ex parte communications with management level employees of a party represented by another attorney. *Cronin*, 781 P.2d at 1153. In *Brown*, it was also undisputed that there was a technical violation of Supreme Court Rule 160 (2).

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent. Paragraph 1 of Rule 157 expresses that general rule. The Rule addresses conflicts in interests that are directly adverse and concurrently represented. See, *Chapman Engineers v. Natural Gas Sales Co., Inc.*, 766 F.Supp. 949, 954 (D. Ks. 1991). The Rule requires direct adversity and operates only when the interests "will be" directly adverse. Id., 766 F.Supp. at 956. Direct adversity exists when an attorney acts as an advocate for one client against another client. *Jaggers v. Shake*, 37 S.W.3d 737, 740 (Ky. 2001). Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is unrelated. Paragraph 1 applies only when the representation of one client would be directly adverse to the other. The representation of opposing parties in litigation is an example. *ABA Model Rule 1.7, Official Comment (pre-2002).*

The Magistrate Judge correctly found there was no evidence that the District and the Individual DePaoli Clients had adverse interests. (Doc. #855, pg. 7). The District and the Individual DePaoli Clients are all defendants. The Tribal Claims and the Federal Claims seek recognition of additional water rights not recognized in the Walker River Decree, or in any permits issued by Nevada or California. On the other hand, the water rights of the District and the water rights of the Individual DePaoli Clients are already recognized in the Walker River Decree, or by permits issued by Nevada and California. The scope and priority date of those rights will not be redetermined in this litigation.

Thus, although an adjudication of water rights on a stream system requires the joinder of all water users on that system because of the interlocking nature of the rights, the interests of the District and the Individual DePaoli Clients will not be directly adverse because their rights have already been adjudicated and determined. They will share the common goal of first seeking to bar the Tribal Claims (and later the Federal Claims) so that no additional water

rights are recognized. Failing that, they will share the common goal of limiting the Tribal Claims (and later the Federal Claims) to as small a quantity of water as possible, with as junior a priority date as possible.

It is only in a situation where the Court undertakes an adjudication of underground water rights, separately or with surface water as a single source of supply, that there may be potential for conflict issues under Supreme Court Rule 157 (1). However, even the concurrent representation of multiple parties in a water rights adjudication is not necessarily improper. See, *ABA Model Rule 1.7, Official Comment 8* ("The propriety of concurrent representation can depend on the nature of the litigation."); see also, Exhibit "A" to *DePaoli Affidavit*, Colorado Ethics Opinion #58 (revised 10/14/1995) (emphasizing the unique nature of water rights litigation).[3]

While SCR 157 asks whether the clients' interests are "directly adverse" and whether the lawyer's representation "may be materially limited," in most water law situations the operative question should be whether the water supply available to the movant will be impaired as a result of the endeavors of the challenged attorney on behalf of other stakeholders. See, *Colorado Ethics Opinion #58* (revised 10/14/1995). Here, DePaoli's efforts on behalf of the District in opposing the Tribal Claims and the Federal Claims will not impair the water supply available to the Individual DePaoli Clients, or vice-versa. However, as is discussed in detail below, because of the manner in which this case will be managed under the CMO, there is no need to speculate now on whether this matter will evolve into an adjudication of underground water or of surface and underground water as a single source of supply, or on which water rights might be directly adverse in such an adjudication. See, pgs. 23-24, infra.

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[3] The Colorado opinion addresses a situation where an attorney who represents a party with an already recognized or adjudicated water right is also representing one who seeks to have a new right recognized. Here, those parties are the Tribe and the United States, not any client represented by DePaoli.

3. Representation of the District Here Does Not Materially Limit DePaoli's Responsibilities to the Individual DePaoli Clients, or Vice-Versa.

In applicable part, paragraph 2 of Nevada Supreme Court Rule 157 provides:

> 2. 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:
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> (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.

[Emphasis added].

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph 2 of Rule 157 addresses this situation. A possible conflict does not, itself, preclude the representation. The critical questions are the likelihood that a conflict will arise and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. *ABA Model Rule 1.7, Official Comment 4 (pre-2002).*

There is no present violation of that Rule, and there is no present need for consultation and consent because, at this stage of this litigation, multiple client representation does not materially limit DePaoli's responsibilities to one client against another. The broad questions to be addressed as threshold issues in Phase I of the Tribal Claims do not present a likelihood of conflict on position or strategy between the District and the Individual DePaoli Clients. All

will uniformly support defenses which bar the Tribal Claims, and all will also oppose the exercise by the Court of broad jurisdiction over underground water rights and use.[4] The same is true with respect to the Federal Claims.

It is also reasonable to expect that, in most if not all, instances, it is unlikely that there will be a conflict in position or strategy on the merits of the Tribal Claims. It is in the interest of the District and the Individual DePaoli Clients that any additional water rights recognized for the Tribe be as small in quantity and as junior in priority date as possible. The same is true with respect to the Federal Claims.

Again, because of the manner in which this case will proceed under the CMO, it is unnecessary to speculate whether disqualification will be required because of differences in strategy on defenses to, or the merits of, the Tribal Claims. A close and informed look at the relevant issues can take place when the threshold issues are finally defined, and yet again after they are decided, thus defining the scope of the merits of the Tribal Claims. *DePaoli Affidavit*, paras. 18-21.

This Court considered Supreme Court Rule 157 (2) in *Duval Ranching Company v. Glickman*, 930 F.Supp. 469 (D. Nev. 1996). In *Duval*, the Elko County District Attorney, representing Elko County in that litigation, also entered an appearance on behalf of the private plaintiffs in the action. The federal defendants objected to the appearance. 930 F.Supp. at 470-471.

Ultimately, this Court considered the applicability of Supreme Court Rule 157 (2) to that unusual situation. Even though the Court believed there was a "reasonable likelihood that,

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[4]Although not directly applicable to the Disqualification Motion, this Court's determination that the District would have been an adequate class representative, at least for Phase I of the Tribal Claims, is at least relevant. There, the Court said "the defendants share a common goal; to ensure that the United States and the Tribe do not acquire any more water rights." *April 29, 2002 Order*, p. 12 (Doc. 179).

at some point in the course of this litigation, the needs or desires of the County Commissioners may diverge from those private plaintiffs," and even though if that occurred, the District Attorney had no freedom to choose between the clients, this Court did not preclude his continued representation of both. 930 F.Supp. at 473. The Court did caution that the District Attorney should exercise great vigilance to ensure continued compliance with the Rule.

The facts here do not present anything close to the same potential for the problems with which the Court was concerned in *Duval*. First, in the threshold issue stage of the Tribal Claims, it is not likely that the needs or desires of the District will diverge from those of the Individual DePaoli Clients, or vice-versa, because the members of the Board of the District are all individual water right holders in the same situation as other water right holders in the District. Second, counsel here is not in the same situation as a District Attorney representing private clients. Third, the phasing and management of this case under the CMO presents timely opportunities for the exercise of vigilance to ensure continued compliance with Rule 157.

Landolts' principal argument appears to be that, through his representation of the District in the Mediation, DePaoli has obtained information crucial to the defense of the Individual DePaoli Clients, and because of his obligations to the District under the *Mediation Process Agreement* and the *Order Governing Mediation Process*, he cannot use that information to carry the day in the litigation. Although DePaoli has obtained no such information (*DePaoli Affidavit* at para. 26), as is clear from the *Mediation Process Agreement* and *Order Governing Mediation Process*, even if he had, the information could not be used by anyone in this litigation, unless it is otherwise available, admissible or discoverable. See, pgs. 14-15, supra. Therefore, if there is a material limit on DePaoli's responsibilities to the Individual DePaoli Clients here, it does not flow from his representation of the District, but rather from the *Order Governing Mediation Process* which affects him in the same way it affects every other attorney appearing in this case, including the attorneys for the Landolts and

the other attorneys who participated in the Mediation. Moreover, if the information is as defense critical as Landolts hypothesize, it is likely to be otherwise admissible or discoverable and thus useable.

4. At Appropriate Times During the Course of This Litigation, Informed Assessments Can be Made and Informed Client Consents Can be Obtained.

The provisions of Rule 157 (1) and (2) clearly provide an opportunity for an attorney to assess the issues in an action, and to make a judgment about whether there will be direct adversity among clients, or whether representation of multiple clients in a single matter will involve a potential for conflicts in responsibilities, and whether such conflicts will adversely affect the representation. In addition, the Rule contemplates that the clients, after consultation about the implications of the common representation and of the advantages and risks involved, may consent to such representation.

Here, as the Magistrate Judge recognized, the manner in which this Court has phased this case presents opportunities for critical and timely analysis by both the attorney and the clients, and, if necessary, the Court, without the need now for broad prospective consents, based in part on some speculation. See, Doc. #855, pg. 12. At the present time, there is no active litigation, and there will be none until service is complete and the threshold issues are identified. Once the threshold issues are finally identified, the attorney assessment, the client consultation, and the client consent can be more fully informed. There is no reason to require that process to occur until that time. Indeed, the CMO expressly states as follows:

> Following completion of service of process on the said counterclaims, the Magistrate Judge shall receive recommendations of the parties for procedures for scheduling and for the efficient management of the litigation given the number of parties to the case. Such procedures may include the use of common counsel, special procedures for service of pleadings, or any other mechanisms deemed likely to reduce the burdens on the parties and the court in a case of this magnitude.

(Doc. #108, p. 8, lns. 19-26). [Emphasis added]. Thus, in the CMO, the Court has at least suggested an appropriate time to consider issues related to the use of common counsel, presumably including ethical issues.

Moreover, after the threshold issues are decided, the scope of the merits of the Tribal Claims will be known. In addition, the extent to which the Court will become involved in underground water will also be known. This will present another opportunity for a second informed assessment, consultation and consent. Compare, *Visa v. First Data Corp.*, 241 F.Supp.2d 1100 (N.D. Cal. 2003) (involving use of a broad prospective waiver letter), with *Zador Corporation, N.V. v. Kwan*, 31 Cal. App. 4th 1285, 27 Cal. Rptr. 2d 754 (1995) (involving initial and successive waivers and consents). Again, there is no reason to require that process to occur before that scope is known. Indeed, the comments to the *Model Rules of Professional Conduct* suggest that the process probably should not occur before that time. See, ABA *Model Rule 1.7, Official Comments 18-22 (post-2002)*; cf.also *Matter of Petition for Review of Opinion 552 of Advisory Committee on Professional Ethics*, 102 N.J. 194, 204, 507 A.2d 233, 238 (N.J. 1986) ("joint representation of clients with potentially differing interests is permissible provided there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants"). [Emphasis added).

Finally, until the threshold issues are decided, the litigation will involve matters of defense, i.e., equitable defenses and issues of subject matter jurisdiction. These are not issues which will involve the need to share confidential information learned about one defendant client with other defendant clients. Until that time, the litigation will be directed at issues not involving such information.[5]

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[5] Indeed, unless this litigation evolves into an adjudication of surface and underground water as a single source of supply, it is unlikely that any defendant will have information which cannot be shared with other defendants.

5. There is No Violation of Supreme Court Rule 154.

The Landolts argue that DePaoli has a duty to disclose to the Individual DePaoli Clients "anything he learns from any source that would be helpful to them in the litigation or in which they might be interested."[6] (Doc. #861, pgs. 14-15.) That is not what Supreme Court Rule 154 provides.

SCR 154, which is identical to the pre-2002 version of ABA Model Rule of Professional Conduct 1.4, provides:

> 1. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> 2. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

On its face, that Rule clearly does not require DePaoli to tell his individual clients everything he has learned in the Mediation, including the "defense critical" information the Landolts believe he must surely have. Indeed, the 2004 Comments to Comparable Rules 1.4 (a)(3) and (4) state:

> (i) ... Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.
>
> (5) The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce

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[6] That assertion is a distortion of the role of an attorney in this and any other litigation. An attorney's role is not to simply tell a client everything he or she knows. An attorney's role is to determine what information is important, and to determine if and how that information can be used. Thus, if DePaoli learns something in the Mediation which is relevant to the defense of the Tribal Claims and Federal Claims, it is his obligation to see if and how that information might be used, consistent with the Order Governing Mediation Process.

> others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

Moreover, as the Comments to Model Rule 1.4 make clear, a lawyer's duty to disclose information to clients is not absolute. Specifically, Comment 4 to Model Rule 1.4 states: "rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders." The Restatement also recognizes that "[s]ometimes a lawyer may have a duty not to disclose information, for example because it has been obtained in confidence from another client or because a court order limits its dissemination." Restatement of the Law Governing Lawyers § 20, p. 172 (2000).

Very few cases have addressed situations involving a court order preventing lawyers from disclosing information to their clients. However, a recent unpublished Wisconsin decision specifically relied on the Comments to Rule 1.4 in rejecting an argument that a court order somehow caused a lawyer to violate his duty to communicate with his client. See, *State v. Soto*, 277 Wis.2d 589, 690 N.W.2d 25 (Wis. App. 2004). In *Soto*, a criminal defendant argued on appeal that the trial court erred when it prohibited his lawyer from disclosing any contact information relating to the State's witnesses. The order was designed to prevent the defendant from using the information to tamper with the State's witnesses. Ultimately, the Wisconsin appellate court rejected the argument that, by agreeing to the order, counsel violated his duty to respond to client requests for information. The court recognized that the ethics rules require lawyers to keep their clients reasonably informed and to promptly comply with reasonable requests for information, but noted that "the rule also acknowledges" '[r]ules or

court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.'" Id.

Rule 3.4(c) referred to in Comment 4 is contained within Nevada Supreme Court Rule 173 (3), which provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." In *Schlafer v. State*, 115 Nev. 167, 979 P.2d 712 (1999), the Nevada Supreme Court considered a situation where prosecutors had failed to provide certain information to the defense as required by court orders. Referring to Supreme Court Rule 173 (3)-(4), the Court said that "wilfull failure to comply with district court orders . . . may constitute professional misconduct." *Schlafer*, 115 Nev. at 174, n. 3.

Therefore, DePaoli's compliance with the requirements of the *Order Governing Mediation Process* is consistent with his ethical obligations under SCR 154 and SCR 173 (3), and there is no ethical violation in his failure to disclose to clients information which the Order prevents him from disclosing.

C. The Magistrate Judge Correctly Concluded That, Even if the Court Were to Assume an Ethical Violation, the Landolts Did Not Show That It Would Affect a Just Determination of Their Defenses.

Assuming arguendo there is an ethical breach here, the Magistrate Judge was correct in concluding that there is nothing more than speculation that it impacts the Landolts' interest in a just and lawful determination of their defenses to the Tribal Claims and Federal Claims. (Doc. #855, pgs. 9-11). Landolts speculate that information gained by DePaoli in the Mediation will allow him to protect the water rights of the Individual DePaoli Clients, and at the same time impose the full burden of the Tribal and Federal Claims on the water rights of the Landolts and others not directly involved in the Mediation. That assertion is nonsense.

First, if there are viable equitable defenses, they will apply to all defendants. Second, a favorable decision on the merits of some or all of the Tribal and Federal Claims will require

recognition of a water right with a quantity and a priority. Those aspects of the right will apply and affect all other water rights similarly. A water right which can be exercised in priority against some, but not all, other water rights will not be recognized.

The Landolts also speculate about the mediating parties learning of an imminent settlement which means a loss of water rights and a decline in the value of existing water rights. (Doc. #861, pgs. 13-14). They speculate that DePaoli will inform the Individual DePaoli Clients before this information is known to the public at large.

That speculation has no basis in reality. First, there are at least three entities involved in the Mediation who are unable to agree to anything without a noticed, open and public meeting, the District, Lyon County, and Mono County. Thus, before any settlement can ever be "imminent", it will have to be public.

Second, there are at least three entities in the Mediation who also cannot sell assets without a noticed open and public meeting, the District, Lyon County, and Mono County. Third, there is one entity, the District, which holds water rights for the benefit of its constituents; it cannot sell that beneficial ownership. Fourth, any settlement like the one hypothesized would have to be approved in a manner which satisfies the due process rights of all concerned, and that can't happen without notice and opportunity to be heard. No such settlement can be imminent without that notice and opportunity having occurred. See, Doc. #855, pgs. 10-11.

As the Magistrate Judge determined, there is no basis for concluding that knowledge DePaoli gains in the Mediation will somehow result in a disadvantage to individual stakeholders not represented by him. (Doc. #855, pg. 11). As noted, information which is otherwise available, admissible or discoverable, does not become confidential simply because it was used in the Mediation. In the context of this litigation, Section 8.3.1 of the *Mediation Process Agreement* is an important provision. When it comes to the litigation of the Tribal

Claims and the Federal Claims, and the defenses to them, the critical facts all happened decades ago when the original Walker River litigation was filed in 1925 and litigated to 1940, when the additional lands were added to the Reservation in the 1930's and when the other federal Reservations were established. Whether or not that information has been or will be used or discussed in the Mediation, it will be discoverable. The Landolts and their attorneys do not need to know anything about what the United States and the Tribe has said in the Mediation to know what information is relevant to the Tribal and Federal Claims, they simply need to know the legal principles which will apply.

In addition, they will see the threshold issues proposed by DePaoli. They will see the final list of threshold issues approved by the Magistrate Judge. Moreover, they will receive copies of the discovery which DePaoli seeks, and of the responses to that discovery; they will attend, hear and receive transcripts of depositions, and copies of documents and things produced. Finally, with respect to the Tribal Claims and the Federal Claims, the Landolts should have the same goals as the District and the Individual DePaoli Clients, i.e., if possible, to bar those claims and, if not, to limit those claims to as small a quantity of water as possible, with as junior a priority date as possible.

In short, even with the wildest of speculation, the Landolts cannot meet the second prong of *Colyer*. They cannot show how any knowledge which DePaoli gains from the Mediation will in any way impact a just and lawful determination of their defenses to the Tribal and Federal Claims.

V. CONCLUSION.

Far from being clearly erroneous or contrary to law, the Magistrate was correct in

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concluding that there is no ethical breach, and that even if there was, there is no impact on the Landolts.

DATED this 2nd day of June, 2006.

WOODBURN AND WEDGE

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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on the 2nd day of June, 2006, I electronically filed the foregoing *Response of Walker River Irrigation District to Opening Brief on Appeal to Judge Edward C. Reed, Jr., Re: Motion to Disqualify Gordon DePaoli* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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