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U.S. DISTRICT COURT
DISTRICT OF NEVADA
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BY _____ DEPUTY

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.	In Equity No. C-125-ECR Subfile No. C-125-B NOTICE OF MOTION AND MOTION TO DISQUALIFY COUNSEL, GORDON DePAOLI

PLEASE TAKE NOTICE that Defendants Joseph and Beverly Landolt bring the instant Motion 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: November 28, 2005

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.

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.

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.

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.

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.

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."

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CONCLUSION

Defendants Joseph and Beverly Landolt respectfully request that the Court disqualify Gordon DePaoli from any further representation of the individual stakeholders and Walker River Irrigation District (WRID).

Date: November 28, 2005

John W. Howard