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U.S. DISTRICT COURT
DISTRICT OF NEVADA
FILED

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CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY Debbie Roberts DEPUTY

CAROL G. FITZGERALD, CLERK
BY Debbie Roberts DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT,
a corporation, et al.,

Defendants.

IN EQUITY NO. C-125

ORDER

The United States has filed a memorandum opposing the legal representation of the United States Board of Water Commissioners (hereinafter the "Board of Water Commissioners") by the same attorney who represents the Walker River Irrigation District (hereinafter the "District") (document #118). The United States requests that Mr. Gordon DePaoli be disqualified from representing the Board of Water Commissioners, since the Board of Water Commissioners is a court-appointed body. The Board of Water Commissioners and the District thereafter filed a joint memorandum concerning their legal representation, wherein they oppose disqualification.

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1 The United Stated Board of Water Commissioners was
2 created by court order in 1937, to "act as a board to constitute
3 a water master or board of commissioners to apportion and
4 distribute the waters of the Walker River, its forks and
5 tributaries " United States v. Walker River Irrigation
6 District, Order entered by Judge Norcross, filed May 12, 1937. The
7 Board of Water Commissioners was created and is obliged to
8 administer the waters of the Walker River in accordance with water
9 rights set forth in the Walker River Decree. The Board functions
10 in a ministerial, as well as a quasi-judicial, capacity.

11 According to the Decree, both the Walker River Irrigation
12 District and the Tribe own a significant number of water rights on
13 the Walker River. In addition to owning water rights in its own
14 right, the District is responsible for distributing the waters of
15 the Walker River to those lands located within the boundaries of
16 the District, in accordance with their respective rights. The
17 District encompasses a large geographical area, and is governed by
18 a Board of Directors selected from representatives of that area.

19 Historically, there has been significant overlap between
20 the District and the Board of Water Commissioners. Through the
21 years, several members of the Board of Water Commissioners also
22 have been members of the District's Board of Directors, and the two
23 organizations share the same office facilities. In addition, since
24 1937, several attorneys have acted in a representative capacity to
25 both organizations. The Court is aware of the convenience and
26 efficiency such an arrangement has fostered. However, such

1 historical practices do not persuade this Court to overlook the
2 potential for conflict that exists as a result of this dual
3 representation.

4 The Board of Water Commissioners occupies a special
5 position relative to the District on the one hand, and the United
6 States and the Tribe, on the other. The Board of Water
7 Commissioners is obligated by its order of appointment to oversee
8 the distribution of the waters of the Walker River to all who hold
9 water rights under the Decree, including both the District and the
10 Tribe. It is understandable that the Tribe, and the United States
11 acting on its behalf, objects to the Board's continued
12 representation by the same attorney who represents its major
13 competitor for water under the Decree.

14 In United States v. Lewis, 308 F.2d 453, 457 (9th Cir.
15 1962), in reviewing a ruling on a motion to disqualify two court-
16 appointed commissioners in an eminent domain case, the Ninth
17 Circuit stated that the district court must balance all
18 considerations and probabilities when ruling on such a motion. We
19 adopt this balancing approach in ruling on this motion to
20 disqualify. The central issue in this case is whether the dual
21 representation of the District and the Board of Water Commissioners
22 creates a conflict of interest. At the heart of all conflict of
23 interest cases is whether there is a "struggle to serve two
24 masters." See Cuyler v. Sullivan, 446 U.S. 335, 349 (1980).

25 In analyzing whether such a struggle to serve two masters
26 exists, we are guided by two considerations. First is the duty of

1 the Board of Water Commissioners, in its capacity as a special
2 master, to adhere to the Code of Judicial Conduct for United States
3 Judges. Second is an attorney's obligation to abide by the
4 applicable rules of professional responsibility.

5 Code of Judicial Conduct

6 The Code of Judicial Conduct for United States Judges
7 requires that a judge "disqualify himself or herself in a
8 proceeding in which the judge's impartiality might reasonably be
9 questioned." Code of Judicial Conduct for United States Judges,
10 Canon 3.C(1); see also, 28 U.S.C. § 455(a) (same standard
11 applicable to "any justice, judge, or magistrate of the United
12 States"). The Code further provides that "[a]nyone, whether or not
13 a lawyer, who is an officer of a judicial system performing
14 judicial functions, including an officer such as a . . . special
15 master, . . . is a judge for the purpose of this Code. All judges
16 should comply with this Code except as provided below." Code of
17 Judicial Conduct, at I-58. The court-appointed Board of Water
18 Commissioners acts as a special master in the Walker River Action.
19 Clearly, then, the Board of Water Commissioners is bound by the
20 Code of Judicial Conduct, and is obligated to conduct itself in an
21 impartial, unbiased manner.

22 Not only does our system of justice seek to prevent
23 actual bias, but also "to prevent even the probability of
24 unfairness." In re Murchison, 349 U.S. 133, 136 (1955). See also
25 Taylor v. Hayes, 418 U.S. 488, 501 (1974) ("[T]he inquiry must be
26 not only whether there was actual bias on [the judge's] part, but

1 also whether there was 'such a likelihood of bias or an appearance
2 of bias that the judge was unable to hold the balance between
3 vindicating the interests of the court and the interests of the
4 accused.'" (quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964)).
5 The Code of Judicial Conduct reflects this interest in avoiding the
6 appearance of impropriety or partiality, and specifically guards
7 against it by requiring a judicial officer to step down where such
8 an appearance is given.

9 The agency relationship between attorney and client
10 demands that the Board's attorney be viewed as an extension of the
11 Board itself, and therefore subject to the same standards. Mr.
12 DePaoli's dual representation creates an impression that the Board
13 would favor the District over other water rights holders. In
14 addition, that an actual conflict might arise under the
15 representation of an attorney less principled than Mr. DePaoli is
16 not so far-fetched. The Court's interest in the administration of
17 justice, and in preserving public confidence in the integrity of
18 the judicial system, requires that the Court scrupulously guard its
19 appointments of both special masters and those ultimately appointed
20 to act as counsel for court-appointed bodies. Therefore, under the
21 strictures of the Code of Judicial Conduct, Mr. DePaoli is required
22 to cease his simultaneous representation of both the Walker River
23 Irrigation District and the Board of Water Commissioners.

24 Professional Responsibility

25 Another aspect of this case is the duty imposed on Mr.
26 DePaoli under the rules of professional responsibility.

1 Local Rule 120-8 for the District of Nevada provides that
2 the standards of conduct of the members of the bar of the District
3 of Nevada "shall be those prescribed by the Code of Professional
4 Responsibility and the Model Rules of Professional Conduct as such
5 may be adopted from time to time by the Supreme Court of Nevada
6 except as such may be modified by this court." Nevada Supreme
7 Court Rule 150 adopts the ABA Model Rules of Professional Conduct
8 as the Nevada Rules of Professional Conduct, which govern
9 professional conduct for lawyers practicing in Nevada. Under the
10 Nevada Rules of Professional Conduct, an attorney is prohibited
11 from representing a client if representation of that client would
12 be adverse to another client, or if representation of that client
13 would be materially limited by the attorney's responsibility to
14 another client, to a third person, or by lawyer's own interests.
15 However, if the lawyer reasonably believes that the representation
16 would not be adversely affected, and each client consents after
17 consultation, such representation is permitted. Rule 157, Nevada
18 Rules of Professional Conduct (1989). See also Rules 156, 158,
19 159, 166, and 167, Nevada Rules of Professional Conduct (1989).

20 Most cases addressing attorney disqualification relate
21 to rules of professional responsibility governing conflict of
22 interests, such as Rule 157, cited above. For example, numerous
23 cases address issues of multiple representation, where one attorney
24 represents two clients whose interests are potentially adverse.
25 See, e.g., In re Coordinated Pretrial Proceedings in Petroleum
26 Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), cert.

1 denied, 455 U.S. 990 (1982). As the Board of Water Commissioners
2 and the District point out in their joint brief, however, this is
3 not a pure multiple representation case. Mr. DePaoli represents
4 only one party to this action, that being the District. The Board
5 of Water Commissioners is not a party herein. Therefore, the
6 Nevada Rules of Professional Conduct do not speak directly to the
7 issue at hand.

8 In the event that the Nevada Rules of Professional
9 Conduct are deemed to control this dispute, Mr. DePaoli has guarded
10 against future conflicts by full disclosure to each client of the
11 potential for those future conflicts to arise, and both the
12 District and the Board of Water Commissioners have chosen to retain
13 Mr. DePaoli as their counsel. They do not perceive that their dual
14 representation creates any conflict of interest, nor do they feel
15 that their interests are potentially adverse. The Board of Water
16 Commissioners and the District also have been made aware of their
17 attorney's obligation to cease representation of one or both of
18 them in the event that an actual conflict arises in the future.
19 Having taken these steps to inform his clients about his
20 relationship with both the Board of Water Commissioners and the
21 District, Mr. DePaoli has acted properly and within the
22 requirements of the Nevada Rules of Professional Conduct.

23 However, Mr. DePaoli's compliance with the professional
24 responsibility rules governing potential conflict of interest
25 between two clients does not end the inquiry. Because this is not
26 a pure multiple representation case, the Nevada Rules of

1 Professional Conduct do not completely dispose of this action. The
2 conflict of interest rules are designed to safeguard the sanctity
3 of the attorney/client relationship, and to prevent an attorney
4 from engaging in any activity which might undermine that attorney's
5 loyalty to the client. A conflict of interest may arise not only
6 in multiple representation cases, but also in a case such as this,
7 where there is only one party being represented. See, e.g., United
8 States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980) (potential
9 conflict in counsel's book contract concerning Patty Hearst trial),
10 cert. denied, 451 U.S. 938 (1981).

11 This is not a situation where a disgruntled client is
12 claiming inadequate representation due to a conflict of interest.
13 On the contrary, both clients represented by Mr. DePaoli are
14 anxious to retain him as their attorney. The objections to the
15 dual representation come from a third party, with whom Mr. DePaoli
16 has no formal relationship, and to whom Mr. DePaoli owes no duty
17 of loyalty. In the typical case, a third party would have no
18 standing to object to an opposing party's choice of counsel.

19 However, this is not a typical conflict of interest
20 case. The potential for conflict is present here because Mr.
21 DePaoli's representation of the Board of Water Commissioners
22 obligates him to ensure that his client (the Board of Water
23 Commissioners) carries out its mandate under the Decree, i.e., to
24 administer and distribute the waters of the Walker River to the
25 various and potentially adverse holders of those water rights.
26 Indeed, Mr. DePaoli himself was appointed by the Court for this

1 very purpose. Therefore, the Board of Water Commissioners and Mr.
2 DePaoli owe an equal duty to all those who are adjudged to be
3 owners of water rights under the Decree. The Board of Water
4 Commissioners is obligated to function in an impartial manner in
5 administering its duties under the Decree, and Mr. DePaoli likewise
6 is obligated to see that the Decree is enforced impartially. Mr.
7 DePaoli's simultaneous representation of the District, one of the
8 largest owners of water rights under the Decree, creates an
9 appearance of favoritism. Such an appearance cannot be sanctioned
10 by this Court, which also has a duty to ensure that the precepts
11 of the Decree are enforced even-handedly.

12 The situation presented in this case is unique. The
13 parties have not cited any case where the attorney for a court-
14 appointed special master also represented a major defendant in
15 related proceedings, nor has the Court unearthed any such case.
16 Although the Nevada Rules of Professional Conduct do not, strictly
17 speaking, prohibit the dual representation, those governing rules
18 of professional conduct cannot be applied to this case in a vacuum.
19 In any event, the spirit of those rules must be does not permit the
20 dual representation. Furthermore, in addition to its obligation
21 to apply the applicable rules of professional conduct, the Court
22 also must ensure that the status of the court-appointed Board of
23 Water Commissioners be untainted by any appearance of impropriety.

24 All parties have presented thorough briefs regarding this
25 dual representation issue. The Court is cognizant of the many
26 advantages attendant to having the same attorney represent both the

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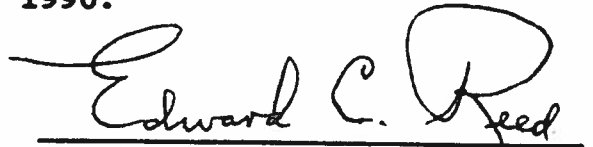
District and the Board of Water Commissioners. The Court also is aware of the need to balance convenience and efficiency on the one hand, with competing interests in impartiality and avoiding the appearance of impropriety. Having conducted a careful review of the history of this action, and having evaluated the benefits and disadvantages associated with dual representation,

IT IS, THEREFORE, HEREBY ORDERED that it would be inappropriate for the same attorney to continue to represent both the Walker River Irrigation District and the Board of Water Commissioners.

IT IS FURTHER ORDERED that Mr. DePaoli shall have ninety (90) days within which to make an election regarding his future representation of either the Board of Water Commissioners or the Walker River Irrigation District. Mr. DePaoli shall advise the Court and shall serve all parties with his election within that time.

IT IS FURTHER ORDERED THAT Mr. DePaoli shall file with the Clerk appropriate documents effectuating his election.

DATED: February 13, 1990.


UNITED STATES DISTRICT JUDGE