IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
THE STATE ENGINEER,

Plaintiff-Appellee,

v.

Ct. App. No. A-1-CA-33535
See also
Nos. A-1-CA-33437, -33439, and -33534
San Juan County
D-1116-CV-1975-00184 and AB-07-1

THE UNITED STATES OF AMERICA,

Defendant-Appellee,

v.

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION; HAMMOND CONSERVANCY DISTRICT; BLOOMFIELD IRRIGATION DISTRICT; VARIOUS DITCHES AND VARIOUS MEMBERS THEREOF,

Defendant-Appellants,

v.

NAVAJO NATION,

Defendant-Intervenor-Appellee.

BRIEF IN SUPPORT OF EMERGENCY MOTION TO ENFORCE RULE 21-211

INTRODUCTION

This motion is filed reluctantly, but it is required by the Code of Judicial Conduct and the Rules of Professional Conduct. See *State v. Barnett*, 1998-NMCA-105, 125 N.M. 739 (prosecutor was disqualified because she had previously represented the defendant in a substantially related matter; defense counsel fell below the standard of a reasonably competent attorney when he failed to investigate the scope of the prior representation and to assert the right to disqualify).

PART I

JUDGE WECHSLER AND THE NAVAJO NATION DID NOT DISCLOSE THAT THE NAVAJO NATION HAD EMPLOYED HIM AS AN ATTORNEY FOR APPROXIMATELY 6 YEARS.

The record in this case demonstrates that the disclosures required by Rule 21-211 were never made. Neither Judge Wechsler nor the Navajo Nation disclosed that he had been employed by the Navajo Nation as an attorney. The acequia defendants and the undersigned counsel had no inkling about this until January 2018, when counsel heard rumors and therefore became obligated to investigate them.

Judge Wechsler and the Navajo Nation knew these facts, but chose not to reveal them. This is not a case of oversight or forgetfulness. It is likely that

the United States also had this information. Whether the Office of the State Engineer was privy to these facts cannot be determined at this time.

A preliminary investigation has revealed the following information so far:

James Wechsler worked for the Navajo Nation as a lawyer from approximately 1970 to 1976. He was employed by DNA Legal Services at the DNA bureau in Crownpoint, New Mexico, where he lived with his family.

DNA is an abbreviation for the Navajo phrase Diné Bee´iiná´ Náhiilnah Bee Agha´diit´aahii, which means "Attorneys Who Contribute to the Economic Revitalization of the People."

DNA was and is an agency or instrumentality of the Navajo Nation. The head of the DNA, Peterson Zah, was elected Chairman of the Navajo Nation in 1982. More information on DNA is set forth in Exhibit 1, Peter Iverson, *Diné A History of the Navajos* (2002) (excerpts).

As a DNA attorney, James Wechsler was involved as a lawyer in several major cases on behalf of the Navajo tribe:

- *Haceesa v. Heim*, 1972-NMCA-088, 84 N.M. 112. The parents of Indian children at boarding schools are entitled to receive AFDC benefits so that their children could come home on weekends and holidays. Mr. Wechsler was the lead attorney on the appeal.

- *Natonabah v. Board of Ed. of Gallup-McKinley Cnty. Sch. Dist.*, 355 F. Supp. 716 (D.N.M. 1973). The federal court in New Mexico ruled that Gallup school officials were discriminating against Navajo Indian children and diverting federal monies allocated exclusively for the benefit of Indian children. James Wechsler participated as one of the attorneys for plaintiffs.

- *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973). This is a landmark decision in favor of Indian sovereignty. The U.S. Supreme Court held that states have no power to impose income tax on Indians who live on a reservation and derive their income from reservation sources. It is not clear in what manner Mr. Wechsler participated in various stages of this case. DNA Attorney Wechsler commented, "If the decision had gone the other way, Indian independence from state control would have been threatened." Exhibit 1, *Diné* at 252 and n.46.

- *Morton v. Mancari*, 359 F. Supp. 585 (D.N.M. 1973), *rev'd*, 417 U.S. 535 (1974). The Supreme Court held that the employment preference for Native Americans in the Bureau of Indian Affairs was not repealed by the Equal Employment Opportunities Act of 1972. The preference for Indians did not constitute invidious racial discrimination but was designed to further Indian self-government. Mr. Wechsler is listed as the lead attorney before the three judge panel in the United States District Court for New Mexico.

This Court can take judicial notice of these cases.

Mr. Wechsler participated in many other lawsuits besides these, and some of those can be provided to the Court if the Court instructs movants to conduct further investigation. The San Juan acequias reserve the right to conduct further investigations, but they would prefer not to.

Accordingly, the acequias hereby move this Court to order Judge Wechsler and the Navajo Nation to make complete disclosures about his service to the Navajo Nation, because full disclosure was required by Rule 21-211. The disclosures should have been made years ago.

In fairness to Judge Wechsler, it should be emphasized that there is nothing reprehensible about Mr. Wechsler's work for the Navajo Nation and its members. On the contrary, providing legal services to underserved segments of the population is one of the highest traditions of the bar.

And there can be no doubt that Mr. Wechsler acted as a zealous, effective, loyal, and dedicated advocate for his clients – just as he was required to do by the Rules of Professional Conduct for lawyers.

But that is exactly why Judge Wechsler cannot sit on this case. As a lawyer for the Navajo Nation, he had a duty to act with zeal and undivided loyalty as a champion for the interests of the Navajo Nation. That is the polar opposite of the duty of impartiality which is imposed on every judge in every case.

The American system of justice depends on lawyers who zealously represent their clients against all adverse parties. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."

Preamble to the Rules of Professional Conduct. At the same time, the rules of the adversarial system entrust the decision to a judge who must be completely impartial and disinterested.

For these reasons, the American justice system has always strictly separated the role of the judge from the role of the lawyer. For example, in 1792 the first session of the second Congress passed "An Act for Regulating Processes in the Courts of the United States." It mandated

> That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, [to transfer the case] to the next circuit court of the district . . . .

Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (emphasis added).

PART II

JUDGE WECHSLER HAS EXTRAJUDICIAL KNOWLEDGE ABOUT THE FACTS THAT ARE BEING CONTESTED IN THIS CASE, INCLUDING: CONDITIONS IN THE NAVAJO HOMELAND, THE NAVAJO INDIAN IRRIGATION PROJECT (NIIP), AND THE FACTORS WHICH HE USED TO AWARD WATER UNDER *GILA V*.

Rule 21-211 prohibits a judge from sitting on a case if he or she has personal knowledge about the matters at issue in the case. Rule 21-211(A)(1). When the judge has extrajudicial knowledge relating to the case,

disqualification is mandatory, not optional. Rule 21-211(C). The judge must recuse even if the judge has no bias for or against any party.

Recusal is mandatory because the law requires a judge to decide each case solely on the admissible evidence presented in court, not on what he or she might already know or believe about the parties or the events in question. Judges, like jurors, must "determine the facts . . . solely upon the evidence received in court." Uniform Jury Instruction 13-110. When a judge has extrajudicial knowledge, it is difficult or impossible for the judge to segregate the information in court from information learned elsewhere. The information from elsewhere may well be faulty or incomplete, because human beings do not have perfect knowledge or perfect recollection.

Furthermore, the litigants and their advocates have no way of knowing what the judge might or might not know, so they have no way to confront and refute the knowledge that comes from outside the courtroom.

Because Judge Wechsler spent six years living on the reservation working for the Navajo Nation, he has a huge amount of extrajudicial knowledge, far more than he could ever consciously recollect.

Judge Wechsler has vast personal knowledge and experience about the conditions on the Navajo reservation – the homeland for the Navajo people he so ably served.

When Judge Wechsler adopted the "homeland theory" under *Gila V* to award 635,000 acre-feet of water to the Navajo reservation in New Mexico, Judge Wechsler made conditions on the reservation into one of the central matters in this litigation. Yet Judge Wechsler never disclosed that he had his own knowledge about those matters, from years of personal experience on the reservation.

Furthermore, Judge Wechsler's summary award to the Navajo Nation could not have been based solely on evidence admitted and tested in court, because there was no trial in this case. Judge Wechsler's handling of this case contrasts sharply with Justice Oman's adjudication of water rights for the Mescalero Apache Indian Reservation. *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194. Justice Oman conducted a full trial in order to quantify the water rights of the Mescalero Apache under the *Winters* doctrine.

Judge Wechsler also has extrajudicial knowledge about another key issue in this case – the Navajo Indian Irrigation Project (NIIP). NIIP was a major development project for the Navajo Nation during the years that Mr. Wechsler

worked for the Navajo government. NIIP began construction in 1964 and completed the main canals and lateral distribution systems by 1977. https:/www.usbr.gov (Select a project: Navajo Indian Irrigation Project; Tab: Construction). During Mr. Wechsler's time on the reservation, from 1970 to 1976, the Navajo Nation promoted NIIP as a gigantic step forward to "Contribute to the Economic Revitalization of the People".

Unfortunately, after Mr. Wechsler left in 1976, NIIP proved to be a miserable failure:

> Most disappointing was the failure of the Navajo Agricultural Products Industries (NAPI) to become a viable operation. The Navajo Nation kept pouring money into this enterprise designed to develop irrigated farmland in conjunction with the irrigation project along the San Juan River. The Navajo Indian Irrigation Project (NIIP) had not been a very high priority for [Tribal Chairman] Raymond Nakai, who laughed scornfully about it. He told Shiprock Council delegate Carl Todacheene that such an undertaking was unimportant, except for Navajos who "only knew the tail of the sheep." MacDonald thought that the NIIP was more important, but other issues more fully engaged his attention. Mismanagement, administrative turnover, and the lack of progress on the irrigation system itself plagued the NAPI.

Exhibit 1, *Diné* at 264.

During the summary judgment proceedings in 2013, the acequia defendants presented evidence from government reports proving that NIIP had never come close to breaking even, not even with massive government

subsidies. RP15291-92. The Navajo Nation finally admitted to Judge Wechsler that NIIP was not viable. The Nation's attorney, Stanley Pollock, conceded that NIIP was not "practicably irrigable acreage", or PIA. RP16948, 16954-56. PIA is the legal standard imposed by the United States Supreme Court and the New Mexico courts for awarding water rights to Indian tribes, and the Navajo Nation admitted that it could not meet that legal standard for NIIP.

Nevertheless, Judge Wechsler awarded 508,000 acre-feet of water for NIIP, in violation of the PIA standard. RP17930. In order to do this, he rejected the law of the United States and New Mexico, and substituted the *Gila V* "homeland theory". In Judge Wechsler's opinion, he gave himself the legal authority to award water based on his own evaluation of conditions on the Navajo Reservation, unconstrained by beneficial use and the PIA test. RP33749-813.

As it now turns out, Judge Wechsler had extensive knowledge about the Navajo homeland, but this was based on his undisclosed employment by the Navajo Nation, not on evidence that was admitted and confronted in open court.

There is yet another problem created by Judge Wechsler's undisclosed extrajudicial knowledge. Because Judge Wechsler once served as an attorney for the Navajo Nation, Rule 16-109 requires him to use the information he learned only for the benefit of the Navajo Nation, not its detriment. See Rule 16-109 – Duties to Former Clients, especially Rule 16-109(C):

> C. Former Representation. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

See also In re C'de Baca, 1989-NMSC-070, ¶ 7, 109 N.M. 151.

A lawyer's obligation to use information only for the client's benefit continues in perpetuity, long after the client has become a former client. Under Rule 16-109 Judge Wechsler still has a continuing duty to use his information only for the benefit of the Navajo Nation. To protect the prior attorney-client relationship between Mr. Wechsler and the Navajo Nation, Rule 16-109 imposes an actual bias in favor of the Navajo Nation. Thus Judge Wechsler is disqualified from deciding this case, because he has extrajudicial

knowledge, and because he has an ongoing ethical duty to use his knowledge only for the benefit of the Navajo people.

A lawyer's continuing obligation to use information only for the benefit of his former clients is part of his broader obligation of loyalty to clients. **"In the practice of law, there is no higher duty than one's loyalty to a client. This duty applies to current and former clients alike."** *Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 1, 292 P.3d 466; *Living Cross Ambulance Serv., Inc. v. New Mexico PRC*, 2014-NMSC-036, ¶¶ 13, 22, 338 P.3d 1258 (vacating PRC decision vacated due to attorney's prior representation of a party in the case).

Given the circumstances in this particular case, Mr. Wechsler's continuing loyalty to his former clients clashes with Judge Wechsler's duty to be impartial to all parties.

PART III

THE MODERN RULES ON JUDICIAL DISQUALIFICATION AND DISCLOSURE ARE ESSENTIAL TO PROTECT PUBLIC CONFIDENCE AND THE INTEGRITY OF THE JUDICIAL PROCESS.

As promulgated by the New Mexico Supreme Court, Rule 21-211 of the Code of Judicial Conduct is substantially identical to Rule 2.11 of the ABA Model Code of Judicial Conduct and 28 U.S.C. § 455, enacted in 1974. The organization and numbering of sections varies, but their substance is almost

identical. Collectively, this brief refers to the three codes as "the modern rule" on judicial disqualification and disclosure.

In 1974, as part of the reforms during the Watergate era, Congress determined that the old recusal statute allowed federal judges too much subjectivity and discretion in deciding when to disqualify themselves, weakening public confidence in the fairness of the judiciary. Congress was also concerned about cases in which judges should have recused themselves, but did not. Congress also wished to conform federal law to the newly adopted Canon 3C of the American Bar Association's Model Code of Judicial Conduct. Some members of Congress also believed that on matters of recusal, attorneys and judges had displayed a lawyerly tendency to draw distinctions too fine and to parse matters too closely, while missing the main point – the trust of the public at large.

Congress included a subsection that requires recusal when a judge may have had some involvement during his previous government employment which relates to the controversy before the court. At 1974 U.S.C.C.A.N. 5355-56, H.R. Report No. 93-1453, the Report of the House of Representatives on the proposed amendments states that (b)(3) was added to the ABA canon on disqualification to solve problems like the one that arose in the case of *Laird v.*

Tatum, 408 U.S. 1 (1972). *Laird* was one of the most controversial decisions of the Vietnam era, in which Justice William Rehnquist cast the deciding vote in a 5-4 decision upholding the validity of a government surveillance program. Justice Rehnquist wrote a separate decision, 409 U.S. 824 (1972), explaining why he felt it was appropriate for him to sit on the case even though it involved the validity of a statute which he had defended before Congress while at the Department of Justice. Justice Rehnquist asserted a number of arguments under the old version of § 455, invoking among other things the limited nature of his involvement while in government service; a judge's "duty to sit"; and the subjective discretion vested in each judge to decide matters of recusal. Although such reasoning may have been permitted under the old statute, Congress found the result to be unacceptable, and amended the statute accordingly.

During the hearings on the new disqualification statute, the federal judiciary expressed the view that legislation was not necessary to effect these changes. However, Congress determined that its views on judicial impartiality should be given the force of a federal statute, not merely a rule of court. H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351. The Senate passed the bill by unanimous consent (119 Cong. Rec. 33029-30 (Oct. 4,

1973)), the House amended the bill and passed it by a vote of 317 to 31 (120 Cong. Rec. 36271-72 (Nov. 18, 1974)), and the Senate passed the amended final bill by unanimous consent (120 Cong. Rec. 36921-22 (Nov. 21, 1974)). There was broad support for the bill from both political parties. Such congressional intervention in the affairs of the judiciary has been rare, but in this instance Congress felt strongly that it needed to supply new rules and a different perspective for the judiciary to follow, consistent with the principle of checks and balances among co-ordinate branches of government.

The 1974 amendments changed the rules of law on disqualification and disclosure in substance and in form. Before the 1974 amendments, "a federal judge was required to recuse himself when he had a substantial interest in the proceedings, or when 'in his opinion' it was improper for him to hear the case." Subsection (a) was drafted [expressly] to replace the subjective standard of the old disqualification statute with an objective test." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 870-71 (1988) (Rehnquist, C.J., dissenting). As Justice Rehnquist noted, "The amended statute also had the effect of removing the so-called 'duty to sit,' which had become an accepted gloss on the existing statute." *Id.* at 871. By eliminating the "duty to sit" rule,

Congress hoped to "promote public confidence in the impartiality of the judicial process . . . ." *Id.* *See also* H.R. Rep. No.93-1453.

The first sentence of the statute contains a plain mandate from Congress to the judiciary: "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) as amended (emphasis added). Congress enacted this general standard "to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." House Report at 5, *reprinted in* 1974 U.S.C.C.A.N. at 6354-55. The focus under the statute is on the possibility or the appearance that the judge might be biased, rather than bias-in-fact.

The modern rule has one overriding objective: preservation of the public's confidence in the judiciary, on which the rule of law ultimately depends. In changing the standards for judicial recusal in 1974, Congress adopted the viewpoint of a lay citizen observing the courts from the outside, rather than the viewpoint of a judge within the system. As several cases have correctly observed, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."

Liljeberg, at 864-65. Judges "may regard asserted conflicts to be more innocuous than an outsider would." *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998), *cert. denied*, 526 U.S. 1137 (1999); *United States v. Jordan*, 49 F.3d 152, 156-57 (5th Cir. 1995) (the average person on the street as "an observer of our judicial system is less likely to credit judges' impartiality than the judiciary"); *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (lay observer would be less inclined to presume a judge's impartiality than other members of the judiciary); *In re Kensington Int'l Ltd.*, 368 F.3d 289, 303 (3d Cir. 2004) (reaffirms that the "appearance of impropriety must be viewed from the perspective of the objective, reasonable layperson").

Furthermore, under the modern rule, "Whether a judge actually has a bias, or actually knows of grounds requiring recusal is irrelevant – section 455(a) sets an objective standard that does not require scienter." *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*) (citing *Liljeberg*, 486 U.S. at 859-60); *Alexander v. Primerica Holdings, Inc.,* 10 F.3d 155, 162 (3d Cir.1993) ("For purposes of § 455(a) disqualification, it does not matter whether the district court judge actually harbors any bias against a party or the party's counsel.").

By design, the modern rule lowers the threshold for recusal to encompass any case in which the public might have questions about the judge's ability to be completely impartial. If the public might have a reasonable doubt about the judge's ability to be impartial, then recusal is required even if the judge is in fact completely unbiased. If any of the statutory grounds are present, recusal or disqualification is required even though the judge is actually capable of being impartial. Some of the cases have accurately perceived the Congressional purpose behind the 1974 amendments. As Justice Rehnquist said in *Liljeberg*, Congress enacted § 455(b) "to remove any doubt about recusal in cases where a judge's interest is too closely connected with the litigation to allow his participation." 486 U.S. at 871; *see also United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987) ("The statute also did away with the 'duty to sit' so the benefit of the doubt is now to be resolved in favor of recusal.").

Among other things, the modern rule reflects a considered policy judgment that judges and litigants might tend to focus too narrowly on the perceived effects of recusal on the case at hand, forgetting that the paramount objective must be to maintain the respect and trust of the citizenry in the courts. This broader perspective is reflected most strongly in the provisions which prohibit the waiver of certain conflicts. Even if all the parties and their

counsel know all the pertinent facts, and would like to stipulate that the judge can continue on the case, Congress has forbidden them from doing so.

From a systemic perspective, the judiciary operates more efficiently by reassigning questionable cases to another judge, rather than expending the resources of the court and the parties on resolving a tangential dispute. This perspective can be seen in the first federal statute on recusal, enacted in 1792. The 1792 statute required district judges to recuse themselves when the judge "has been of counsel for either party". In that era federal judges were scattered across the country, so transferring a case might delay it by months or years. Nevertheless, Congress decided that the judiciary and the public were better served by transferring the case to another judge, rather than battling over the fairness of the first judge.

The concept of impartiality is so essential to justice that Congress wrote it into the oath of office taken by every member of the judiciary. A judge must swear to "administer justice without respect to persons, and do equal right to the poor and to the rich," and "faithfully and impartially discharge and perform all the duties incumbent upon [him]. . . ." 28 U.S.C. § 453.

The modern rule requires a judge to recuse himself or herself:

- Whenever the judge's impartiality might reasonably be questioned.

- If the judge has a personal bias or prejudice for or against any party.

- If the judge has personal knowledge of disputed evidentiary facts concerning the controversy.

- When in prior government service the judge served as lawyer or advisor relating to the matters in controversy.

- The list of circumstances enumerated in Rule 21-211 is not exclusive, because "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of Subparagraphs (A)(1) through (A)(5) apply." New Mexico Committee Comment [1]. Recusal cannot always be reduced to a simple set of rules, and recusal may be required in instances that do not fall neatly into the specified categories.

In *Liljeberg*, the United States Supreme Court vacated a trial decision by a federal judge who sat on the board of Loyola University in New Orleans, an institution of the Roman Catholic Church. Loyola University would have been indirectly impacted by the court's decision, even though the University and its affiliates were not parties to the action. Even though the judge was unaware of the University's indirect economic interest in the litigation, both

the Fifth Circuit and the Supreme Court held that the judge should have recused himself when he learned of the connection.

> The judge's forgetfulness . . . is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. . . . Under section 455(a) . . . recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Health Serv. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986). The judge's failure to disclose and recuse required that the judgment he had rendered be vacated, post-judgment and post-appeal.

The district judge in *Liljeberg* was held to have constructive knowledge sufficient to disqualify him and his rulings, regardless of the current state of his recollections:

> At the very least, a reasonable observer would expect that Judge Collins would remember that Loyola had had some dealings with *Liljeberg* and St. Jude and seek to ascertain the nature of these dealings. This is not to suggest that Judge Collins was other than completely candid in denying any recollection of these dealings. It is merely to say that the failure of a judge to recall or perceive information which he had been recently exposed to on a number of occasions would not be expected by the objective observer. The district court properly found that Judge Collins had constructive knowledge of Loyola's interest.

Liljeberg, 796 F.2d at 803.

The Supreme Court severely castigated the trial judge:

> These facts create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent. The violation is neither insubstantial nor excusable. Although Judge Collins did not know of his fiduciary interest in the litigation, he certainly should have known. In fact, his failure to stay informed of this fiduciary interest may well constitute a separate violation of § 455. See § 455(c). Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.

486 U.S. at 867-68. It added, "'[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.'" *Id.* at 869-70. The Court also noted and explicitly rejected the judge's arguments that the University was not a named party in the case; that it was a non-profit educational institution that did not benefit the judge personally; and that the judge was not involved in the particular transactions related to the litigation. *Id.* at 867 n.15. The Court also noted that Judge Collins' failure to police his recusal status might constitute an independent violation of subsection (c) of the statute. *Id.* at 868.

One critical aspect of the modern rule is a judge's ongoing duty to volunteer information that may pertain to the issue of recusal. "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if

the judge believes there is no real basis for disqualification." New Mexico Committee Comment [8] to Rule 21-211; Official Commentary to Canon 3E(1) of the ABA Model Code of Judicial Conduct, which is identical to Canon 3C(1) of the Code of Conduct for United States Judges. *See also* 28 U.S.C. § 455, especially subsection (c); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Every judge has a duty to make full and complete disclosures on these issues relating to impartiality, and to volunteer information that the parties and their counsel might consider relevant to recusal, even though the judge feels that recusal is not necessary. These disclosures must be made, even if it were to be determined ultimately that recusal is not required. The duties of disclosure and recusal are related but not identical. Full disclosure is required so that the parties, their counsel, and the public can judge for themselves whether recusal is appropriate. It is also required so that there is a full record for an appellate court to review a judge's refusal to recuse himself.

There are many reasons, both theoretical and practical, why the duty of full disclosure is placed upon each individual judge:

Full disclosure is required by the objective standard enacted by Congress in 1974, when it amended § 455 so that disqualification is no longer governed

by the judge's own subjective opinions. In amending the statute, Congress recognized that people are not always the best judges of their own biases. Human beings like to believe in their own fairness, and they tend to overestimate their own ability to be impartial. Judges share this tendency, even though they would like to believe that their law school training makes them immune. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001) (study of 167 federal magistrate judges reveals that they are subject to same errors in thinking as laymen); Daniel Kahneman, *Thinking, Fast and Slow* (2011).

Public confidence in the judicial system must be the ultimate deciding factor in determining whether recusal is required. Thus, the judge's subjective faith in his own fairness is no longer the decisive factor.

A judge's failure to disclose may itself constitute sufficient grounds for recusal, even though the undisclosed facts were insufficient. *Liljeberg*; *Moran v. Clarke*, 309 F.3d at 517. This may lead to a tremendous waste of resources if the judge's rulings are later vacated.

The judge has superior knowledge about his own dealings and relationships, which may be unknown to the litigants.

In some cases, one party may have "inside information" about the judge which is not available to the other side, so disclosure levels the playing field.

By its very nature, "[a] section 455 inquiry will always be fact-intensive, making it difficult to glean broad principles of application." *United States v. Tucker*, 82 F.3d 1423, 1429 (8th Cir. 1996). *See also Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (determination in a recusal case "is extremely fact driven").

Before deciding whether to recuse himself, a judge should consider the reactions and views of the parties and their counsel after they are informed of all the facts. In some rare instances under § 455(a), the litigants may decide to waive the grounds for disqualification. Such waiver is void unless it is knowing and fully informed. *See Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998) (remanding for full disclosure of the judge's family members' potential financial interest in the outcome of the class action).

By volunteering information, no matter how inconsequential it may seem to him, a judge reinforces the confidence which the litigants and the public must have in the integrity of the judicial system.

If judges make full and voluntary disclosures, the parties and their counsel are spared the distasteful and unseemly prospect of having to conduct

their own investigation to find out the facts. It is the judge's duty to volunteer information, not the parties' duty to ferret it out. *American Textile Manufacturers Inst. v. The Limited, Inc.*, 190 F.3d 729, 742 (6th Cir. 1999).

Judges and their families have rights of privacy which should be protected. Judges can and should protect their private lives – by recusing themselves from any case in which the judge's private life might intersect with the controversy at issue, or influence his ability to judge the case with complete impartiality. Judges routinely screen cases when they are assigned to them, and recuse themselves from any case that potentially might intersect with their private lives. Judges who recuse themselves are not required to give any reasons. *Gerety v. Demers*, 1978-NMSC-097, ¶ 11, 92 N.M. 396. As a result, for every reported case about disqualification, there are hundreds of unreported cases where judges have recused themselves. In the vast majority of cases, Rule 21-211 is operating as intended. By freely recusing themselves when questions might arise in the minds of the litigants or the public, judges accomplish several objectives at once: they protect themselves and their families from intrusion into their private lives; they adhere to the letter and the spirit of the rule; they reinforce public trust in the judiciary, by allowing the

case to be heard by a judge whose impartiality is beyond any question; and they increase judicial efficiency by avoiding tangential controversies.

The modern rule tries to protect litigants and their counsel so that they will not be so intimidated by judges that they are unwilling to assert their right to a fair tribunal. As one district judge has humorously but accurately noted, "The grounds for statutory disqualification of a federal judge have, of course, changed substantially since I was admitted to the Bar over forty years ago. In those days lawyers who wanted to try to disqualify a federal judge were, in some districts, advised to write out their motion to disqualify on the back of their license to practice law." *School Dist. of Kansas City v. Missouri*, 438 F. Supp. 830, 835 n.2 (W.D. Mo. 1977). Unfortunately, this is not a joke, because parties do run the risk of judicial ire and retaliation if they question the judge's impartiality in any way, even by asking questions. This is why Rule 21-211 requires all judges to make full disclosures on the record without being asked. To minimize the intimidation factor, Rule 21-211(C) requires the judge to let the parties and counsel consider recusal "outside the presence of the judge and court personnel" and "without participation by the judge or court personnel."

When the public has a reasonable doubt about a particular judge's ability to be evenhanded in a particular case, especially a high profile one, the judge is placed in a "no-win" situation which is quite unfair to him personally. Even if all of his decisions are completely correct on the law and the facts, his decisions will be doubted by the public and perhaps vacated by a higher court. The judge's decisions will be suspect, even if another judge would have reached the identical conclusions on the law and the evidence. And there is always a danger that the judge may try to overcompensate, consciously or unconsciously, to "bend over backwards" to demonstrate his impartiality. *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996). Even if a judge makes every conceivable effort to be fair, he has inadvertently placed himself in an untenable position. The modern rule instructs judges to avoid such "no-win" situations at all costs.

The modern rule is also rooted in the most basic notions of justice, due process and equal protection. Every litigant has a right to have his case decided by a tribunal whose impartiality and integrity is beyond question. If there is a reasonable doubt that it appears that a judge might not be able to view all the parties as equals, favoring none, then the case must be heard by another judge.

Just as counsel have duties of candor to the court, the court has duties of candor to the litigants, counsel, and the public. If the judge does not make adequate disclosures, rumor and innuendo may fill the vacuum, and those rumors may be worse than the truth.

Under the modern rule, the correctness of the judge's rulings is not the issue; the issue is whether he should have heard the case in the first place. If a disqualified judge's rulings were correct, then presumably another judge would reach the same conclusions independently. It should be noted that in *Liljeberg*, the Supreme Court vacated Judge Collins' trial rulings even thought the Fifth Circuit had already affirmed those rulings before the recusal issue arose. 796 F.2d at 798.

PART IV

THE RECORD SHOWS THAT JUDGE WECHSLER FAVORED HIS FORMER CLIENT BY REFUSING TO FOLLOW ESTABLISHED LAW AND PROCEDURE.

As explained above, Rule 21-211 does not require the acequias to prove actual bias. The modern rule on disqualification has abandoned that requirement. All that is required is reasonable doubt about the judge's ability to be impartial; or extrajudicial knowledge; or a failure to disclose; or a prior representation. All of these disqualifying factors are present in this case, now

that some of the facts about the judge's connections to the Navajo Nation have come to light.

Although it is not necessary to prove actual bias, the record provides ample evidence of bias and favoritism during these proceedings, when they are viewed in light of the new information. Judge Wechsler has a bias in favor of the Navajo Nation, and in one sense he should, because all attorneys have a duty to favor the interests of their clients. He also committed himself to advancing the interests of the Navajo people. So he has a bias as a matter of law, because the Rules of Professional Conduct impose that bias.

Beyond that, the record on appeal shows several instances where the judge departed from established law and procedure in favor of the Navajo Nation and against the acequias. Here are some of the more pronounced examples:

- Judge Wechsler did not comply with the factual and procedural standards for granting summary judgment to the Navajo Nation. [BIC 3-4];

- Judge Wechsler rejected the beneficial use requirement and the PIA standard, and substituted the vague "homeland theory" espoused by the Arizona Supreme Court. By awarding water without proof of beneficial use and PIA, the lower court violated the Reclamation Act of 1902; Article XVI of

the New Mexico Constitution; NMSA 1978, § 72-1-2; *Winters v. United States*, 207 U.S. 564 (1908); the Colorado Compacts, § 72-15-5 and § 72-15-26; *Arizona v. California*, 373 U.S. 545 (1963); *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194 ("*Mescalero*"); *State ex rel. Erickson v. McLean*, 1957-NMSC-012, 62 N.M. 264; *Mimbres Valley Irrigation Co. v. Salopek,* 1977-NMSC-039, 90 N.M. 410; *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375; and the Colorado River Storage Act, Pub. L. No. 84-485, 70 Stat. 105 (Apr. 11, 1956). [BIC POINT 1];

- Section 13(c) of the 1962 NIIP Act explicitly states that it does not create any water rights, but Judge Wechsler ruled that it did. [BIC POINT 5];

- Judge Wechsler declined to comply with *State ex rel. Clark v. Johnson* and *Pueblo of Santa Ana*. [BIC POINT 6];

- The judge knowingly allowed service of process which did not meet the minimum due process requirements imposed by *Mullane v. Central Hanover Bank*; *Macaron v. Associates Capital;* and *Patrick v. Rice*. [BIC POINT 11];

- To award water to his former client, Judge Wechsler abandoned the preponderance standard and substituted "a reasonable basis", which is not a standard of proof for a trial court. [BIC POINT 26];

- Judge Wechsler excluded the 2010 census data from the United States and the Navajo Nation, which shows that the population on the reservation is shrinking, not growing. [BIC POINT 16];

- Judge Wechsler prevented more than 9,000 water owners (parciantes) from having an attorney to contest the Navajo water claim. [BIC POINT 20];

- The lower court set special rules to favor the three governments before the defendants were even joined as parties, thereby denying all defendants their due process right to be heard on procedural issues. [BIC POINT 21]; and

- Judge Wechsler did not disclose his *ex parte* contacts as required by Rule 21-209. [BIC POINT 24] See *Kensington*, 368 F.3d at 309-12 (ex parte communications contribute to taint).

CONCLUSION

Under these surprising circumstances, given the facts which have now emerged – facts which the judge and the Navajo Nation did not disclose – the public might reasonably wonder whether the judge fixed this case for his former client. Because there is a reasonable question about the judge's ability to be completely impartial in this litigation, the standards in Rule 21-211 have been met, and therefore recusal is required.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall
Attorneys for the San Juan Acequias
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400
victor@vrmarshall.com

I hereby certify that a true and correct
copy of the foregoing was efiled and served
via Odyssey File and Serve to counsel
of record on February 26, 2018.

/s/ Victor R. Marshall
Victor R. Marshall