**IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO**

January 13, 2022

NO. S-1-SC-37698

**IN THE MATTER OF
VICTOR R. MARSHALL**

**An Attorney Licensed to Practice Law
Before the Courts of the State of New Mexico**

ORDER

(Filed Jan. 13, 2022)

WHEREAS, this matter came on for consideration by the Court upon recommendation of the disciplinary board for discipline, full briefing by the parties, and oral argument on January 12, 2022, and the Court having considered the pleadings, record, and oral argument, and being otherwise sufficiently advised, Chief Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice David K. Thomson, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED that the findings of fact of the hearing committee are supported by substantial evidence, and those findings support the conclusions of law of the hearing committee, as adopted by the disciplinary board panel, that respondent violated Rules 16-301, 16-802, and 16-804(D) NMRA of the Rules of Professional Conduct;

IT IS FURTHER ORDERED that the findings and conclusions of the disciplinary board are ACCEPTED,

and the disciplinary board's recommendation for discipline is GRANTED as modified herein;

IT IS FURTHER ORDERED that respondent, VICTOR R. MARSHALL, is INDEFINITELY SUSPENDED from the practice of law pursuant to Rule 17-206(A)(3) NMRA, effective upon the filing of this order, for a period of time of no less than one (1) year;

IT IS FURTHER ORDERED that respondent may file a petition for reinstatement with the disciplinary board in accordance with Rule 17-214(B)(2) NMRA no sooner than one (1) year from the effective date of this suspension, subject to the conditions that respondent shall complete a minimum of four (4) hours of Minimum Continuing Legal Education (MCLE) ethics credits, take the Multistate Professional Responsibility Examination (MPRE) and pass with a minimum score of eighty (80), and pay to the disciplinary board the costs of this proceeding; and

IT IS FURTHER ORDERED that a formal opinion will follow.

IT IS SO ORDERED.

[SEAL]

WITNESS, the Honorable Michael E. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of January, 2022.

/s/ Jennifer L. Scott

Jennifer L. Scott, Chief Clerk
of the Supreme Court of the
State of New Mexico

I CERTIFY AND ATTEST:
A true copy was served on all parties
or their counsel of record on date filed.
/s/ Jennifer L. Scott
Chief Clerk of the Supreme Court
of the State of New Mexico

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of Victor R. Marshall, Esq., Respondent, an Attorney licensed to practice before the Courts of the State of New Mexico	**Disciplinary No. 05-2018-782**

BOARD PANEL'S DECISION, REPORT, AND RECOMMENDATION

(Filed May 14, 2019)

THIS MATTER having come before the Panel (David C. Kramer, Irene Mirabal-Counts, and Vickie Wilcox) upon referral by the Chair, and the Panel having reviewed the record in this matter (including the transcript and record of the hearing held before the Hearing Committee), reviewed the submissions of the parties, and having heard oral argument by Respondent and Disciplinary Counsel on May 10, 2019, and being otherwise fully advised, the Panel therefore hereby:

FINDS THAT:

1) The Disciplinary Panel ("Panel") has been duly appointed to hear this matter and has jurisdiction over the parties and the subject matter of the action. The Panel issues its Report and Recommendation pursuant to Rule 17-315(C) NMRA.

2) The Panel defers to the Hearing Committee's factual findings where those findings are supported by substantial evidence. *In Re Bristol*, 2006-NMSC-041, ¶ 16, 140 N.M. 317.

3) The Disciplinary Panel reviews the Hearing Committee's legal conclusions and recommendations for discipline *de novo*. The Disciplinary Panel adopts and incorporates by reference the Hearing Committee's Conclusions of Law.

4) And after reviewing the record, the briefing of the parties, and hearing argument, the Panel CONCLUDES THAT:

   A. The focus at the Hearing Committee was where it should have been: on whether Respondent had "an objectively reasonable basis" to make the statements he made *at the time that he made them* about Judge Wechsler in public pleadings and in a press release, and so evidence obtained after these assertions were made is legally irrelevant and it was not error (or a denial of due process) for the Hearing Committee to exclude, or discount that information, to the extent that it did so. *In Re Cobb*, 838 N.E.2d 1197, 1212-1214 (Mass. 2005) (stating that a "system that permits an attorney without objective basis to challenge the integrity, and thereby the authority, of a judge presiding over a case elevates brazen and irresponsible conduct above competence and diligence, hallmarks of professional

conduct"). *See also Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 431 (Ohio 2003) (holding that the "standard assesses an attorney's statements in terms of what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances and focuses on whether the attorney had a reasonable factual basis for making the statements considering their nature and the context in which they were made") (internal quotation marks and citations omitted). B) *In Re Bristol* does not require that this Panel "re-open" the taking of evidence or testimony under these circumstances – the findings of the Hearing Committee were not "incomplete[1]." *In Re Bristol*, 2006-NMSC-041, ¶ 17, 140 N.M. 317.

B. Respondent does not have a First Amendment right to clearly and publicly impugn the integrity or character of a judge without a sufficient factual foundation. *In Re Cobb*, 838 N.E.2d at 1214.

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[1] It appears that Respondent believes he can and should go to the "ends of the Earth" to try to prove some connection between Judge Wechsler and the Navajo Nation in the late 1960's to bolster the contentions that he made in the pleadings he filed and the statements he made in 2018. Again, the Panel concludes that even if such efforts resulted in new information, such information would not assist in locating the truth as to the question of what Respondent knew in 2018 when he made various assertions about Judge Wechsler.

C. Similarly, the litigation privilege does not apply here, and the primary case relied upon by Respondent, *Helena Chemical Co. v. Uribe*, 2012-NMSC-021, 281 P.2d 237 is neither a disciplinary case nor is substantially similar to the facts of this case.

D. This is not a defamation case and the Uniform Jury Instructions for defamation claims in New Mexico are not relevant.

E. It was not legal error for the Hearing Committee to decline to issue a subpoena to the Navajo Nation to further explore Respondent's allegations that Judge Wechsler was the attorney for (or the employee of) the Navajo Nation.

F. An objectively reasonable person would not "wonder whether" Judge Wechsler "fixed the case" in favor of the Navajo Nation based upon his work as a staff attorney for DNA Legal Services ("DNA") roughly forty-five (45) years prior. There is no clear or convincing evidence that DNA was acting as the "law firm for" the Navajo Nation – the various memos, newsletters, or articles unearthed by Respondent do not unequivocally evidence that DNA *actually represented* the Navajo Nation in any matter, including the water rights case. If DNA had represented the Navajo Nation, there would be clear evidence of that, including the

appearance of DNA attorneys in Court on behalf of the Navajo Nation. In the view of the Panel, gratuitous memoranda by one or more DNA attorneys do not, without more, make the Navajo Nation "the client of" DNA.

G. Sufficient evidence supports the finding that a reasonable attorney *would not* objectively and reasonably believe that Judge Wechsler either had an actual conflict or a material appearance of a conflict in the case.

H. Even assuming Respondent's argument to be true that DNA was an arm of, or instrumentality of, the government of the Navajo Nation (which is disputed), then Judge Wechsler would not be disqualified pursuant to Rule 21-211 NMRA because Respondent has offered no evidence that Judge Wechsler *personally participated* in the underlying water case while he was employed at DNA, which is the standard for a former government attorney who becomes a judge. Rule 21-211(5)(b) NMRA. In short, Judge Wechsler was not obligated to disclose such a conflict because it was neither actually disqualifying nor *reasonably potentially disqualifying* under any fair reading of the Code of Judicial Conduct.

I. The passage of a significant amount of time (over forty years) between Judge Wechsler's work for DNA tends to remove

any real or perceived bias or conflict even if DNA had some connection to the water case back in the late 1960's or early 1970's.

5) Respondent argues for no discipline, while Disciplinary Counsel seeks a public censure. The Hearing Committee recommended an indefinite suspension.

6) The Panel has substantial concern (because Respondent continues to deny that he did anything improper and displays no remorse) that Respondent could engage in similar conduct in the future unless Respondent's conduct has a serious repercussions. That Respondent's conduct was intentional and threatened serious harm to the integrity of the legal system (as well as caused distraction and delay in the underlying case) are important considerations. *See Florida Bar v. Ray*, 797 So.2d 556, 560 (Fla. 2001) (holding that "[a]lthough attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence of the judicial system without assisting to publicize problems that legitimately deserve attention").

After considering all of the mitigating and aggravating factors cited by the Hearing Committee, and the entire record, the Panel RECOMMENDS that:

i. The Supreme Court approve the decision of the Hearing Committee and suspend Respondent for an indefinite period pursuant to Rule 17-214(B)(2) NMRA, and;

ii. that Respondent be required to take and pass the Multistate Professional Responsibility Examination ("MPRE") prior to re-admission; and

iii. Respondent pay the costs of this proceeding.

IT IS SO REPORTED AND RECOMMENDED.

By the Panel,

/s/ David C. Kramer

David C. Kramer

/s/ Irene Mirabal-Counts

Irene Mirabal-Counts

/s/ Vickie Wilcox

Vickie Wilcox

CERTIFICATE OF SERVICE:

The foregoing pleading was served
via e-mail or U.S. Mail on this
14th day of May, 2019, upon:

Mr. Jeffrey L. Baker
Counsel for Respondent

Ms. Jane Gagne via e-mail only
Mr. Bill Slease via e-mail only
Disciplinary Counsel

/s David C. Kramer

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

VICTOR R. MARSHALL, ESQ.
An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 05-2018-782

HEARING COMMITTEE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DISCIPLINE

(Filed Dec. 14, 2018)

The Hearing Committee composed of Members Martin Lopez III, Matthew Conrad, and Chair Roy A. Anuskewicz, Jr. adopt the following Findings of Fact, Conclusions of Law, and Recommended Discipline in ruling on disciplinary proceedings in this matter.

FINDINGS OF FACT

1. Respondent Victor R. Marshall is licensed to practice law before the Courts in the State of New Mexico and has been since January 1, 1975. Specification of Charges ("SOC"), at 2, ¶ 2; Answer to Specification of Charges ("Answer"), at 2, ¶ 2. His practice involves commercial litigation, constitutional and statutory litigation, defamation and news media law, and water law. Exhibit KKK (Marshall CV at 2-5). Respondent served as a State Senator from 1985 through 1992. Exhibit KKK.

2. Judge James J. Wechsler is the *pro tem* judge in the water rights adjudication of the San Juan River Basin, *State of New Mexico ex rel. State Engineer v. United States of America, et al.*, D-1116-CV-1975-00184, including in the "sub-file" cases ("Water Rights Adjudication" hereinafter referred to as "WRA"). SOC, at Paragraph 8; Answer, at Paragraph 8; Exhibit 2, at 1 Paragraph 3.

3. The WRA was filed in district court "to determine the water rights of the major claimants," including the Navajo Nation. SOC, at 2, ¶ 6; Answer, at 2, ¶ 6.

4. A "sub-file" of water rights adjudication involves persons and entities that claim a right to the water in question. Transcript of October 3 2017 Hearing ("TR"), at 96:1-20.

5. On March 16, 2006, Respondent first entered his appearance in the WRA on behalf of the San Juan Agricultural Water Users Association (hereinafter referred to as "Association"). Exhibit 1.

6. On November 10, 2009, the New Mexico Supreme Court appointed Judge James J. Wechsler, then a Judge sitting on the Court of Appeals, as the presiding judge over four water rights adjudications, including the WRA. *See* Exhibit 2, at 1, ¶ 3.

7. On July 5, 2011, Respondent entered an appearance in the WRA on behalf of other water groups and individuals. *See* SOC, at 2, ¶ 7; Answer, at 2, ¶ 7; Exhibit 3.

8. From 1970 to 1973, Judge Wechsler worked as an attorney for DNA Legal Services, Inc. ("DNA"). TR 69:21-25.

9. DNA was founded in 1967 as "a private, non-profit corporation organized under the laws of Arizona for charitable, benevolent purposes." *Law in Action* (Vol. 1, No. 1, August 27, 1968), Exhibit 16 at 1.

10. The inaugural DNA newsletter indicates that DNA would and did represent individuals within the Navajo Nation, and contains no language stating that DNA would or did represent the Navajo Nation. *See* Exhibit 16.

11. The purpose of DNA was to help Navajos on the Navajo Reservation and in surrounding areas who could not afford an attorney. TR 8283:23-25.

12. In 2013, Judge Wechsler approved a settlement in the WRA among the United States of America, the Office of the State Engineer of New Mexico, and the Navajo Nation, awarding the Navajo Nation over 635,000 acre feet of water from the San Juan River. TR, 97-98:20-4; 163:4-8.

13. On November 1, 2013, Judge Wechsler entered a *Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* and a *Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (collectively, the "Decree"). SOC, at 2, ¶ 8; *see also*, Answer, at 2, ¶ 8.

14. On December 2, 2013, on behalf of his clients, Respondent filed a *Notice of Appeal* in the WRA with

the New Mexico Court of Appeals. SOC, at 2, ¶ 9; Answer, at 2, ¶ 9.

15. On February 26, 2018, after briefing on the merits of the Decree had been completed, but before the Court of Appeals had ruled on the appeal, Respondent filed an *Emergency Motion to Enforce Rule 21-211* ("*Emergency Motion*"). SOC, at 2, ¶ 10; Answer, at 2, ¶ 10.

16. On April 3, 2018, the Court of Appeals entered its opinion affirming Judge Wechsler's Decree: *State ex rel. State Engineer v. United States of America, et al.*, 2018-NMCA-053, 425 P.3d 723, *cert. granted*, August 13, 2018, No. S-1-SC-37068. SOC, at Paragraph 20; Answer, at Paragraph 20.

17. Rule 21-211 of the Code of Judicial Conduct in part governs situations in which a judge must recuse from "any proceeding in which the judge's impartiality might reasonably be questioned." Rule 21-211(A) NMRA.

18. Respondent testified that the fact that the Judge ruled for the Navajo Nation was an indication of bias. TR 187:13-16; 190-191:18-8.

19. Respondent testified that he was aware of the legal principle that adverse rulings cannot form the basis of a claim of judicial bias. *See* Exhibit 10, at 11.

20. In the *Emergency Motion*, Respondent wrote in part:

a. "In January 2018, disquieting rumors about Judge Wechsler began to circulate in the New Mexico Legislature. . . ." Exhibit 5, at 3.

b. Judge Wechsler was employed by and represented the Navajo Nation in the 1970's in his capacity as attorney for "DNA Legal Services, an agent and instrumentality of the Navajo Nation." Exhibit 5, at 3-5.

c. "Judge Wechsler did not disclose to all the parties on the record that he had worked as an attorney for the Navajo Nation." Exhibit 5, at 4.

d. Judge Wechsler violated Rule 21-211. Exhibit 5, at 4-5.

21. Respondent's purpose in bringing his *Emergency Motion* was to have Judge Wechsler's rulings vacated, and the case remanded for a "*de novo* [trial] by an impartial judge." Exhibit 5, at 7.

22. In his *Brief in Support of Emergency Motion to Enforce Rule 21-211* ("*21-211 Brief*"), Exhibit 6, Respondent wrote:

a. "James Wechsler worked for the Navajo Nation as a lawyer from approximately 1970 to 1976." Exhibit 6, at 2; *see also*, *id.* at 4, 6, 9, 10.

b. "Although it is not necessary to prove actual bias, the record provides ample bias and favoritism. . . . in favor of the Navajo Nation." Exhibit 6, at 29.

c. "[T]he public might reasonably wonder whether the judge fixed this case for his former client." Exhibit 6, at 31.

23. Respondent did not contact the lawyer for the Navajo Nation prior to filing his *Emergency Motion* and *21-211 Brief. See* Exhibit 5, at 6.

24. On February 27, 2018, the day after Respondent filed his *Emergency Motion*, Respondent drafted a press release in which he stated by inference that Judge Wechsler did not accord "honesty and fairness" to Respondent's clients. *See* Exhibit 18-a.

25. The matter received media attention. Exhibit 18.

26. Respondent claims that the Office of Navajo Economic Opportunity (ONEO), which funded DNA for a time in the late 1960's, was a "Navajo government agency." TR 185:9-10.

27. Respondent attached as an Exhibit to his *21-211 Brief an* excerpt from the book by Peter Iverson, *Diné: A History of the Navajos* ("*Diné*"). That excerpt contains the following statements:

a. "The ONEO was not a Navajo idea. The office emerged because of money available through the federal government's 'War on Poverty' during the 1960's." *Diné*, at 236.

b. The Navajo Nation's general counsel "could count on harsh criticism from a variety of quarters, including the DNA attorneys." *Diné*, at 251.

28. The excerpt quoted by the Respondent contains no reference that any lawyer from DNA Legal Services, Inc. ("DNA"), including James Wechsler, ever represented the Navajo Nation or was an agent or instrumentality of the Navajo Nation.

29. The excerpt is clear that the Navajo Nation had General Counsel who were not DNA attorneys.

30. Also, Peter Iverson's *Legal Counsel and the Navajo Nation Since 1945*, American Indian Quarterly, Vol. 3, No. 1 (Spring 1977), makes clear that the Navajo Nation's General Counsel were not DNA attorneys, and nothing in the article indicates that any DNA attorney ever represented the Navajo Nation. Exhibit 15.

31. In response to Respondent's *Emergency Motion* and *Rule 21-211 Brief* lawyers for the Navajo Nation specifically denied that Judge Wechsler was ever an attorney for the Navajo Nation or that DNA was "an agency and instrumentality of the Navajo Nation." Exhibit 7.

32. On March 26, 2018, Respondent filed in the Court of Appeals a *Motion for Leave to File Reply Brief* with his proposed *Reply.* Exhibit 10.

33. The proposed *Reply* accused the Navajo Nation of "trying to conceal the truth about the relationship between Mr. Wechsler and the tribe's government." Exhibit 10, at 10.

34. Respondent states in his proposed *Reply in Support of Emergency Motion for Enforcement of Rule 21-211* that the Navajo Nation's Response brief

"quibbles with [Respondent's description of DNA] as an 'agent or instrumentality' of the Navajo tribe . . . by arguing the DNA was *reconstituted* at some point as a nonprofit legal services corporation." Exhibit 10, *Reply*, at 5 (emphasis added). That was an inaccurate statement. DNA was from its inception a nonprofit legal services corporation. Exhibit 16.

35. After acknowledging the rule that adverse rulings cannot form the basis for a claim of judicial bias, Respondent disavowed that rule because recusal is necessary "when the judge fails to make full disclosures to all the parties and shows pervasive favoritism to one side of the case." Exh. 10, at 11.

36. On May 10, 2018, after the Court of Appeals imposed sanctions against Respondent, Respondent filed in the Court of Appeals a *Combined Motion and Brief for Rehearing Concerning Sanctions* ("*Rehearing Motion*"). Exhibit 12.

37. Respondent attached to the *Rehearing Motion* a law review article which states, in part:

> The Tribal Council has apparently been resentful of DNA since its beginning, primarily because it felt DNA was "changing things." The tribe also resented the fact that DNA opposed it in tribal court. . . .

Phil Khrebiel, *Legal Aid: New Mexico's Unfulfilled Responsibility*, 1 N.M. L. Rev. 299, 309 (Winter 1971) ("Khrebiel law review article") (attached to Exh. 12).

38. The Khrebiel law review article also states: "DNA is 100% federally funded." *Id.* at 308.

39. The Khrebiel law review article which Respondent attached to his *Rehearing Motion* disproves Respondent's allegations that Judge Wechsler was an attorney for the Navajo Nation, or that DNA was an agent or instrumentality of the Navajo Nation. *See id.* at 306-310.

40. Respondent also attached to his *Rehearing Motion* a *Law in Action* newsletter (Vol. 1, No. 12, June 13, 1969), entitled "The Navajos and Water." Exhibit 12. Nothing in that newsletter indicates that the newsletter constitutes legal advice to a client, or that DNA and the Navajo Nation had an attorney-client relationship.

41. Respondent also attached to his *Rehearing Motion* a *Washington Post* a 1969 news article that discusses, in part, the antagonistic relationship between DNA and the Navajo Nation. *See*, *e.g.*, Exhibit 12, article at 2 ("DNA lawyers have been called troublemakers by a lot of people, including tribal officials.")

42. The *Washington Post* article also discusses "a 23-page brief to the trial [*sic*; should be "tribal"] council" written by "DNA Director Theodore Mitchell." Exh. 12, article at 1; Exhibit V ("Mitchell Memorandum").

43. At the hearing in this matter, Respondent relied on the Mitchell Memorandum—his Exhibit V—as the "key" to Respondent's claim that DNA represented

the Navajo Nation. TR 319-320; *see also* TR 138-139 (Judge Wechsler testimony). Exhibit V.

44. The Mitchell Memorandum was not attached to any of Respondent's pleadings with the Court of Appeals.

45. Nothing in the Mitchell Memorandum indicates that Mitchell or DNA had an attorney-client relationship with the Navajo Nation. *See* Exhibit V.

46. In 1968, the Navajo Nation tried to ban Mitchell, then the Director of DNA, from the Navajo Reservation. TR 85-86:24-11; TR 141-142; *see also*, Exhibit 17 (*Dodge v. Nakai*, 298 F.Supp. 26 (U.S. D. Arizona 1969) (presenting history of DNA, including strife with the Advisory Committee of the Navajo Tribal Council, and ruling that the ban of Mr. Mitchell was unconstitutional)).

47. On June 13,2018, after the Specification of Charges was filed in this proceeding, Respondent filed with the New Mexico Supreme Court *Acequias' Petition for Certiorari Concerning Rule 21-211 and Sanctions* ("*Cert. Pet.*"). Exhibit 13.

48. In his Petition for Certiorari, Respondent persisted with his allegation that Judge Wechsler "previously worked as an attorney for the Navajo Nation" and that "DNA also provided legal advice to the Navajo Nation about the matter of his lawsuit—the Navajo Nation's claims to the waters of the Colorado system." Exhibit 13, at 2.

49. In his Petition for Certiorari, Respondent also stated:

a. "Judge Wechsler concealed his ties to the Navajo Nation in order to award water to his former clients without a trial." Exhibit 13, at 5.

b. "These violations [of Rule 21-211] cast a shadow of doubt over the summary judgment issued by the judge in this case, and that is unfair to all the judges who work hard every day to act with absolute impartiality in all of their cases." Exhibit 13, at 15.

50. On August 13, 2018, the Supreme Court denied Respondent's *Cert. Pet.* on the Sanctions motion. No. S-1-SC-37100.

51. Respondent, without a factual basis, falsely impugned the integrity of a judge.

52. Respondent's statement in his *Rule 21-211 Brief* that "the public might reasonably wonder whether the judge fixed this case for his former client," Exhibit 6, at 31, impugns the integrity of a judge; and Respondent had no basis in fact for that statement when he filed the pleadings.

53. Respondent's claim at the hearing that "he did not accuse the judge of fixing the case for his former client," TR 193:51-54, is untrue.

54. When Respondent filed his pleadings as afore described, he had no evidence that Judge Wechsler was biased in favor of the Navajo Nation; Respondent provided no factual basis for numerous statements that

Judge Wechsler was biased in favor of the Navajo Nation.

55. When Respondent filed his pleadings as afore described, he had no factual basis for his allegation that Judge Wechsler was ever an attorney for the Navajo Nation.

56. When Respondent filed his pleadings as afore described, he had no factual basis for his allegation that DNA represented the Navajo Nation.

57. When Respondent filed his pleadings as afore described, he had no factual basis for his allegation that DNA was an agent or instrumentality of the Navajo Nation.

58. Judge Wechsler credibly testified that he was never an attorney for the Navajo Nation, and that he had no knowledge that DNA ever represented the Navajo Nation in any water rights matters. TR 90-91:20-10.

59. There was no factual basis produced by the Respondent to support his claim that Judge Wechsler had a conflict of interest in the WRA and a bias towards any party. TR 100-101:18-3

60. Respondent knew or should have known from the very documents that he attached to his pleadings in the Court of Appeals in which he attacked Judge Wechsler's impartiality that there was no basis to allege that Judge Wechsler was ever an attorney for the Navajo Nation; that any DNA lawyer was ever an

attorney for the Navajo Nation; or that DNA was an agent and instrumentality of the Navajo Nation.

61. Respondent claimed at the hearing that DNA was a tribal governmental agency. TR 184:16-17. Even if DNA was a governmental agency of the Navajo Nation, which it was not, Rule 21-211(A)(5) would apply, and Respondent would have to prove that Judge Wechsler participated personally and substantially in the very matter which he heard: the adjudication of water rights to the San Juan River Basin. Respondent produced no such evidence.

62. Respondent also alleged in Court of Appeals pleadings that Judge Wechsler had *ex parte* communications in the WRA.

63. Judge Wechsler credibly testified that the only *ex parte* communications he had were pursuant to Rule 1-71.4 NMRA, which specifically permits *ex parte* communications in water rights adjudications, on administrative and managerial topics. In mid-November 2013, Respondent was present at the New Mexico Supreme Court building. He observed Judge Wechsler and Adrianna Singer (state engineer attorney). Respondent testified that he did not hear the context of the discussion, but that when they saw him, in his opinion, they looked startled and embarrassed and stopped talking (Tr. Vol.II Marshall at 269:8-14).

64. Respondent produced no evidence that Judge Wechsler's communications under Rule 1-71.4 were improper.

65. When Judge Wechsler was appointed to serve as the judge in the San Juan water case, he did not perform any formal conflict checks. (Judge Wechsler at 95:3-14).

66. Judge Wechsler did not make any disclosures about any conflicts under Rule 21-211. (Judge Wechsler at 138:7-15).

67. Judge Wechsler did not make any disclosures about ex parte communications pursuant to Rule 21-209 (A)(1)(b). (Judge Wechsler at 131 16-24, 132 17-19).

68. In January 2018 Mr. Marshall first heard rumors about Judge Wechsler and possible connections to the Navajo reservation. The initial rumors turned out to be inaccurate, but they prompted Marshall to look further. (Respondent at 163: 9-18, 164: 12-16, 168: 20-25). Respondent did not disclose during his testimony the specific source of the rumors.

69. The fact that Judge Wechsler had worked as a lawyer for DNA was known to Arianne Singer. (Exhibit RRR: Singer deposition 42:16-25, 43:1-7, 44:5-21).

70. Marshall and his staff conducted additional research, using the sources that were readily available without discovery, such as using the internet; books regarding DNA and the Navajo Nation during the 1970's; reading articles in The Navajo Times, the Navajo government newspaper; and searching documents at the University of New Mexico law library. (*Id.* & Tr. Vol. II Marshall at 288:5-8).

71. Marshall and his firm already had considerable knowledge about the laws concerning judicial disclosure and recusal, because the question had arisen in an earlier case in federal court. The applicable rules of law are summarized in Rule 21-211 and in 28 U.S.C. § 144, which is almost identical. (Tr. Vol. II Marshall at 241:14-18; 242:1-4, 247:11-20; Exhibit H Drinan affidavit).

72. Marshall testified that he believed he had an ethical obligation to file a motion on behalf of his clients to obtain information about why Judge Wechsler did not disclose his prior employment with DNA in accordance with Rule 21-211, although Marshall anticipated that there would be some repercussions if he did so. (Tr. Vol. II Marshall at 294:14-18, 295:17-17, 296:6-19-25).

73. Marshall also testified that time was of the essence because there is a timeliness requirement associated with challenging a judge's impartiality, and the Court of Appeals could issue its decision on the merits of the appeal at any time. (*Id.* at 293:18-25, 294:24-25, 295:1-2, 298:22-25, 299:1-11).

74. Marshall did not contact Judge Wechsler informally to discuss the matter before he filed the Emergency Motion to Enforce 21-211 ("Emergency Motion"), because he believed that the issue needed to be on the record. (*Id.* at 297:1-11).

75. Marshall did not contact the Navajo Nation lawyer, Stanley Pollack, before filing the emergency

motion, because he believed that Mr. Pollack would not be forthcoming. (*Id.* at 297:1-11, 18-20).

76. The Navajo Nation filed its response to the emergency motion through its attorney, Stanley Pollack, seeking sanctions among other things. (Exhibit 7). The United States and the State of New Mexico also filed responses in opposition to Marshall's Motion. (Exhibits 8-9).

77. Marshall sought leave to file a reply brief, in order to correct a number of, what he believed, were misrepresentations contained in the response briefs. (Exhibit 10).

78. Marshall filed simultaneous motions requesting that the case be remanded and assigned to a new judge, that discovery pertaining to Judge Wechsler's employment with DNA be authorized, and that any ex parte communications between Judge Wechsler and Plaintiffs or their counsel be disclosed, because the Court of Appeals cannot engage in any fact finding and discovery necessary to learn the facts surrounding Judge Wechsler's employment with DNA. (Exhibit 11-12; Tr. Vol II. Marshall at 298:2-5, 311:17-25, 312:1-5).

79. The Court of Appeals rejected Marshall's requests for a reply brief, for discovery, and for disclosure of ex parte communications. (*Id.* at 298:6-11, 311:6-15; SOC Exhibit 1).

80. The Court of Appeals adopted the arguments asserted by Pollack, awarded Pollack's request for

sanctions, and ordered that the matter be forwarded to the Disciplinary Board. (SOC, at Exhibit 1).

81. Arianne Singer denied that any *ex-parte* communications occurred with Judge Wechsler under Rule 21-209 or Rule 71.4. (Exhibit RRR 30: 8-9, 20-22, 31:21-23).

82. NMRA 21-209 applies to the special *ex parte* rule created for stream adjudications; NMRA 1-071.4 (Ex Y at pp. 2).

CONCLUSIONS OF LAW

1. The allegations in the SOC have been proven by clear and convincing evidence.

2. Judge Wechsler's and other DNA attorneys' representation of members of the Navajo Nation, does not equate to representation of the Navajo Nation. *See*, *e.g.*, Rule 16-113 and comments (distinguishing between representation of an entity and representation of an entity's constituents.)

3. Respondent, in this proceeding, erroneously relies on Rule 16-109 as barring Judge Wechsler from deciding a case in which the Navajo Nation is a party. Even if various public articles, newsletters, and newspapers had constituted legal advice to a client, which they did not, the matters discussed therein are not "substantially related" to the Water Rights Adjudication and nothing indicates that Judge Wechsler acquired confidential information from the Navajo Nation. *See* Rule 16-109 NMRA; *see also*, *Mercer v.*

Reynolds, et al., 2013-NMSC-002, 292 P.3d 466 (holding that "when an attorney has played a substantial role on one side of a lawsuit and subsequently joins a law firm on the opposing side of that lawsuit, both the lawyer and the new firm are disqualified from any further representation, absent informed consent of the former client.").

4. There was no evidence produced at hearing that Judge Wechsler represented the Navajo Nation 46-48 years ago during his employment with DNA, any information he might have obtained would probably "have been rendered obsolete by the passage of time." Rule 16-109, cmt.3.

5. "Recusal is only required when a judge has become so embroiled in the controversy that he or she cannot fairly and objectively hear the case." *State v. Trujillo*, 2009-NMCA-128, ¶ 11, 222 P.3d 1040; *see also State ex rel. CYFD v. Casey J.*, 2015-NMCA-088, ¶ 76, 355 P.3d 814.

6. No evidence or law was produced to indicate that Judge Wechsler should have recused himself.

7. An allegation of bias based on an adverse ruling constitutes a violation of Rule 16-802(A). *In re Montoya*, 2011-NMSC-042, ¶ 39. ("[P]ersonal bias cannot be inferred from an adverse ruling. . . .").

8. An objective standard is the proper application of the law.

9. Respondent had no good faith basis for making the allegations against Judge Wechsler, whether

determined under an objectively reasonable standard or a subjective standard. *See Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶ 18, 808 P.2d 955 (quoted case omitted):

> [T]he fact that a subjective standard is applicable does not mean that a party can pursue a claim on nothing more than the unreasonable hope that he may discover a basis for the lawsuit. These circumstances in themselves are evidence of the absence of a subjective good-faith belief.

10. Respondent's own documents attached to his Court of Appeals pleadings did not support Respondent's allegations.

11. Neither *Mercer v. Reynolds, et al.*, 2013-NMSC-002, 292 P.3d 466, nor *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) nor *Living Cross Ambulance Service Ind. V. New Mexico Public Regulation Comn.*, 2014-NMSC-036, 338 P.3d. 1258 ("*Living Cross*"), cited by Respondent, support Respondent's claims in this matter.

12. In *Mercer*, an attorney who moved from one law firm that represented one side of the case to another law firm that represented the opposing side *in the same case, had participated substantially* in the litigation while with the first firm. Thus, the attorney had a conflict of interest that imputed to the second law firm and which required written informed consent of the client. *Mercer*, 2013-NMSC-002, ¶ 1. In this case, Respondent has not shown that either Judge Wechsler

or any attorney participated substantially in the WRA.

13. *Liljeberg* involved a Judge who sat as a Trustee for a university when the university had a financial interest in the litigation; thus, there was an appearance of impropriety, and the Judge should have recused. *Liljeberg*, 486 U.S. at 850, 858. No such factual situation exists here.

14. *Living Cross* involved an attorney, Ann Maggiore, who had not long before represented Living Cross Ambulance (LCA), but thereafter represented American Medical Response (AMR) in its quest to obtain a certificate to provide ambulance service in the same county that LCA serviced; LCA opposed the issuance of the certificate to AMR. *See Living Cross*, 2014-NMSC-036, ¶ 1. The attorney was found to have "previously represented Living Cross in 'substantially related matters,'" *id.* ¶ 15, and had acquired confidential information from Living Cross that the Court "presume[d] . . . was used against Living Cross." *Id.* ¶ 18. In this case, there is no evidence that Judge Wechsler ever represented the Navajo Nation.

15. There was no basis in law or fact for Respondent's allegations against Judge Wechsler.

16. Respondent has violated the following Rules of Professional Conduct:

a. Rule 16-301, by filing frivolous pleadings;

b. Rule 16-802, by making statements with reckless disregard as to the truth of the statements concerning the integrity of a judge; and

c. Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

17. Indefinite suspension pursuant to Rule 17-206 A (3) is appropriate discipline. Respondent is an experienced attorney and his actions were intentional, not negligent.

18. NMRA 16-301 reads in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . "

19. Committee note [2] to Rule 16-301 states:

The filing of an action or defense or similar action taken for a client **is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery**. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken . . . (emphasis added)

20. Personal knowledge of an attorney may serve as an appropriate basis to make allegations in a pleading. See e.g. Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992) ("whether an attorney reasonably investigated the law is to be determined under all the circumstances. If we were to discount personal knowledge so easily, we effectively would be requiring attorneys to disregard their experience and repeat their legal research for each new case, no matter how similar or close in time the new case is to previous cases.").

21. The Preamble to the New Mexico Rules of Professional Conduct under Scope states in relevant part:

> The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and **in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors** and whether there have been previous violations. (Emphasis added).

22. NMRA 16-804(D) states:

> It is professional misconduct for a lawyer to:
>
> (D) engage in conduct which is prejudicial to the administration of justice

23. An appeal that is not ultimately successful is not frivolous or vexatious absent proof that pleadings were submitted in bad faith or for purpose of delay or harassment. See e.g. Brannock v. Lotus Fund, 2016-NMCA-030, ¶ 41, 367 P.3d 888.

24. Rule 21-209(A)(1)(b) requires the prompt disclosure of all *ex parte* communications with a judge: "the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond."

25. When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention. *In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976) (citing *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 93, 98 (S.D.N.Y. 1972).

26. The Preamble to the Rules of Professional Conduct, which are approved by the Supreme Court, requires lawyers to represent their clients with zealousness.

27. DNA was a law firm as that term is defined by Rule 16-100(C). In addition, the general rule regarding imputation of conflicts of interest, Rule 16-110.

28. Rule 16-109. Duties to former client states:

> A. Subsequent representation. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related

> matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

29. "Loyalty is an essential element in the lawyer's relationship to a client." NMRA 16-107 Comment [1]

30. A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

31. NMRA 21-211 states in relevant part:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> (5) The judge:
>
> > (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

32. The Committee Comments to NMRA 21-211 specifically state:

> [1] Under this rule, 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. The terms "recusal" and "disqualification" are often used interchangeably.
>
> [2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.
>
> [3] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

33. A judge is required to recuse him or herself " . . . even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all of 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); affirmed at *id.* (also observing that "the 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.

34. Judges have an ethical duty to voluntarily "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc., 190 F.3d 729, 742 (6th Cir. 1999) (rejecting district court's holding that litigants or their attorneys had duty to investigate a judicial impartiality) (*citing* Porter v. Singletary, 49

F.3d 1483, 1489 (11th Cir.1995) ("[B]oth litigants and counsel should be able to rely upon judges to comply with their own Canons of Ethics.").

35. Under New Mexico jurisprudence, " . . . courts must not only be impartial, unbiased and fair but, in addition, that no suspicions to the contrary be permitted to creep in. "State ex rel. Anaya v. Scarborough, 1966-NMSC-009, 1121, 75 N.M. 702, 710 (citations omitted)

36. An impartial judge is an essential constitutional requirement under the due process clause. See e.g. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"); *see also* Los Chavez Cmty. Assn v. Valencia County, 2012-NMCA-044, ¶ 23, 277 P.3d 475 (Due process requires a "neutral and detached judge in the first instance.") (citing Ward v. Vill. of Monroeville, 409 U.S. 57, 62 (1972).

RECOMMENDED FACTORS IN AGGRAVATION

The following aggravating factors apply:

1. Respondent has engaged in a pattern of allegations made without a basis of fact and law in this matter.
2. Respondent has refused to acknowledge the wrongful nature of his misconduct.
3. Respondent has substantial experience in the practice of law.

RECOMMENDED FACTORS IN MITIGATION

1. Respondent has no prior disciplinary offenses. *Id.* § 9.32(a).
2. Respondent has cooperated in this proceeding. *Id.* § 9.32(e).

RECOMMENDED DISCIPLINE

1. Respondent should receive an indefinite suspension by the Supreme Court with reinstatement upon application as provided under Paragraph B of Rule 17-214 NMRA unless timely objections are filed.
2. Respondent should be ordered to pay the costs of this proceeding.

Respectfully Submitted,

/s/ Roy A. Anuskewicz, Jr.
Roy A. Anuskewicz, Jr., Esq.
Hearing Committee Chair
4001 Indian School Rd NE, Ste. 107
Albuquerque, NM 87110

Approved by email 12-14-18
Martin Lopez II, Esq.
Hearing Committee Member
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Albuquerque, NM 87104

Approved by email 12-13-18
Matthew Conrad
Hearing Committee Member
2112 Erbbe NE
Albuquerque, NM 87112

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2018, the foregoing was emailed to the following:

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**BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

In the Matter of

VICTOR R. MARSHALL, ESQ.
Disciplinary No. 05-2018-782

An Attorney Licensed to
Practice Before the Courts
of the State of New Mexico

SPECIFICATION OF CHARGES

(Filed May 7, 2018)

1. Rule 17-105(B)(3)(d) NMRA of the Rules Governing Discipline empowers counsel for the Disciplinary Board to file a specification of charges against an attorney with the Disciplinary Board.

2. Respondent Victor R. Marshall is an attorney currently licensed to practice law before the courts of the State of New Mexico; he was issued a license on January 1, 1975.

3. The factual allegations set forth in this Specification of Charges state acts of professional misconduct in violation Rules 16-301, 16-802, and 16-804 of the Rules of Professional Conduct.

4. Pursuant to Rule 17-309(A) NMRA of the Rules Governing Discipline, cause exists to conduct a hearing on the following charges so that the Disciplinary Board

and the Supreme Court can determine whether further action is appropriate.

5. This matter concerns Respondent's actions in his appeal of a decree entered by the Honorable James J. Wechsler accepting a Settlement Agreement ("Settlement") in the water rights case of *State of New Mexico ex rel. State Engineer v. United States of America, et al.*, D-1116-CV-1975-00184; Court of Appeals No. A-1-CA-33535 (the "Adjudication").

6. In 1975, the Adjudication was filed in district court "to determine the water rights of the major claimants," foremost including the Navajo Nation.

7. On March 16, 2008, Respondent entered an appearance in the Adjudication on behalf of water groups and individuals not associated with the Navajo Nation.

8. On November 1, 2013, based on the Settlement Judge Wechsler entered a *Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* and a *Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (collectively, the "Decree").

9. On December 2, 2013, Respondent filed a *Notice of Appeal* with the Court of Appeals.

10. On February 26, 2018, after extensive briefing on the merits of the Decree had been completed, Respondent filed an *Emergency Motion to Enforce Rule 21-211* ("*Emergency Motion*").

11. The *Emergency Motion* and accompanying Brief allege, in part, that:

a. Judge Wechsler was employed by the Navajo Nation in the 1970's, in his capacity as attorney for "DNA Legal Services, an agent and instrumentality of the Navajo Nation."

b. Judge Wechsler wrongfully failed to disclose his alleged employment with the Navajo Nation;

c. As a result of his alleged employment, and his attendant residence on the Navajo reservation, Judge Wechsler had "extrajudicial knowledge" about the contested facts in Respondent's clients' appeal of the Decree;

d. Judge Wechsler's alleged "extrajudicial knowledge" and his alleged representation of the Navajo Nation, led him to rule in favor of the Navajo Nation in the Adjudication;

e. Judge Wechsler was biased toward the Navajo Nation.

12. However, Judge Wechsler was never employed by the Navajo Nation.

13. DNA Legal Services is a 501(c)(3) non-profit entity independent of the Navajo Nation.

14. A simple internet search of "DNA Legal Services" would have found its home page, which states in part that DNA Legal Services is a

> nonprofit law firm in the Southwestern United States that provides free civil legal

> services to low-income people who otherwise could not afford to hire an attorney. . . . Since 1967, DNA's services have helped people living in poverty use existing policies and laws to protect their property and assets, stay safe from physical, mental and financial abuse, avoid exploitation and safeguard their civil rights.

https://dnalegalservices.org/about/ (visited on May 2, 2018).

15. Respondent has no information or evidence that any of the matters Judge Wechsler handled on behalf of any Navajo clients in the 1970's were related in any way to any issue in the Adjudication.

16. On March 12, 2018, the Defendants Navajo Nation and the United States of America each filed *Responses* in opposition Respondent's *Emergency Motion* which made clear that Respondent was never employed by the Navajo Nation and that DNA Legal Services is an independent non-profit entity which provides "free legal aid portions of three states and seven Native American nations. . . ." Navajo Nation's *Response to Emergency Motion to Enforce Rule 21-211 and Request for Sanctions and Attorney Fees*, at 3 (quotation omitted).

17. Yet, on March 26, 2018 Respondent persisted in his attack by filing in the Court of Appeals (1) *Acequias' Motion for Disclosure and Discovery Concerning Disqualification*; and (2) *Acequias' Motion for*

Disclosure of Ex Parte Communications as Required by Rule 21-209.

18. In the former Motion, Respondent alleged that Judge Wechsler failed to comply with certain Rules governing judicial conduct, including the following allegation:

> Judge Wechsler has not complied with Rules 21-100 and 21-102, which require judges to act with independence, integrity, and impartiality, to avoid impropriety or even the appearance of impropriety, and to promote public confidence in the judiciary.

19. In the *Acequias' Motion for Disclosure of Ex Parte Communications as Required by Rule 21-209* Respondent alleged:

> Upon information and belief, there were ex parte communications during this case including, but not limited to, communications between Judge Wechsler and Arianne Singer, one of the attorneys for the state engineer, and others.

20. On April 3, 2018, the three-judge Court of Appeals Panel, with the honorable Bruce D Black as the Judge *Pro Tem*, issued a thirty-one page *Opinion* affirming the district court, and finding that the Settlement "was fair, adequate, reasonable, and consistent with the public interest as well as all applicable New Mexico and federal laws." The *Opinion* rejects all of Respondent's arguments as to the merits.

21. Also on April 3, 2018, the appellate Panel issued its *Order Denying Emergency Motion to Enforce Rule 21-211 and Subsequent Motions filed by Appellants and Order Imposing Sanctions and Awarding Attorney's Fees*. ("Sanctions Order," attached hereto as **Exhibit 1** and incorporated herein).

22. Respondent's various Motions attacking Judge Wechsler 's integrity had no basis in fact or law and were frivolous.

23. Wherefore, by reason of the foregoing, Respondent has violated the following provisions of the Rules of Professional Conduct:

a. Rule 16-301 by filing frivolous pleadings;

b. Rule 16-802, by making statements with reckless disregard as to the truth of the statements concerning the integrity of a judge;

c. Ryle 16-80(D), by engaging in conduct prejudicial to the administration of justice.

FACTORS IN AGGRAVATION

24. Respondent has refused to acknowledge the wrongful nature of his conduct. *ABA Standards for Imposing Lawyer Sanctions*, § 9.22(g).

25. Respondent has substantial experience in the practice of law. *Id.* § 9.22(1).

26. The names and addresses of witnesses presently known to disciplinary counsel are:

Respondent

27. It is anticipated that this matter will be prosecuted by assistant disciplinary counsel Jane Gagne.

28. Therefore, it is respectfully requested pursuant to Rule 17-309(C) NMRA that a hearing committee be designated to hear evidence and make findings of fact, conclusions of law, and recommendations to the Disciplinary Board and, if any of the charges are sustained, that Respondent be disciplined and assessed the costs of this proceeding.

DATED: 5/7/18

Respectfully Submitted,

/s/ Jane Gagne

Jane Gagne
Assistant Disciplinary Counsel
20 First Plaza NW, Suite 710
Albuquerque, NM 87102
(505) 842-5781

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
ex rel. STATE ENGINEER,

Plaintiff-Appellee,

v.

UNITED STATES
OF AMERICA,

Defendant-Appellee,

v.

NAVAJO NATION,

Defendant/
Intervenor-Appellee,

v.

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

Defendants-Appellants.
_____/

A-1-CA-33535
San Juan County
D-1116-CV-1975-
00184

ORDER DENYING EMERGENCY MOTION TO ENFORCE RULE 21-211 AND SUBSEQUENT MOTIONS FILED BY APPELLANTS AND ORDER IMPOSING SANCTIONS AND AWARDING ATTORNEY'S FEES

(Filed Apr. 3, 2018)

THIS MATTER is before this Court upon Appellants' "Emergency Motion to Enforce Rule 21-211" filed on February 26, 2018. After due consideration of the motion, brief in support, and Appellees' responses thereto, the Court concludes as follows:

1. Appellants' statement in the motion that Judge Wechsler represented the Navajo Nation is void of any factual foundation.

2. Appellants' statement in the motion that DNA Legal Services is "an agency and instrumentality of the Navajo Nation" is void of any factual foundation.

3. Appellants' statement in the motion that Judge Wechsler has "personal extrajudicial knowledge from living on the reservation" that biased him in favor of the Navajo Nation is void of any factual foundation.

4. Appellants' contention that Judge Wechsler violated Rule 21-211 NMRA is frivolous.

5. When an attorney files a motion with this Court, that attorney is inherently representing to the Court that there is good ground to support the motion.

6. Basic inquiry and simple investigation would or should have informed Appellants' counsel, Victor R.

Marshall, that the motion was without factual foundation. Appellants' motion itself states that it was filed after only a "preliminary but incomplete investigation."

7. By filing a frivolous motion, Mr. Marshall has needlessly caused this Court and the parties to expend resources and in so doing has violated the Rules of Professional Conduct. Further, and more troubling, Mr. Marshall has attempted to discredit a judge with absolutely no basis for doing so.

8. This Court has inherent authority to impose sanctions and award attorney's fees to protect its judicial process against improper and frivolous actions.

9. Appellants have also filed, on March 26, 2018, a Motion for Leave to File a Reply Brief, a Motion for Disclosure of Ex Parte Communications, and a Motion for Disclosure and Discovery Concerning Disqualification. There is no merit to any of those motions.

IT IS THEREFORE ORDERED that Appellants' emergency motion to enforce Rule 21-211 is DENIED.

IT IS FURTHERED ORDERED that Appellants' Motion for Leave to File a Reply Brief, Motion for Disclosure of Ex Parte Communications, and Motion for Disclosure and Discovery Concerning Disqualification are DENIED.

IT IS FURTHER ORDERED that Appellant's attorney, Victor R. Marshall, is HEREBY SANCTIONED and shall pay the costs and attorney's fees incurred by the other parties in responding to the Emergency

Motion to Enforce Rule 21-211. Any party seeking to recover costs and attorney's fees shall file with this Court an affidavit setting forth those costs and fees within 15 days of the date of this Order.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to forward this Order to the Disciplinary Board of the New Mexico Supreme Court for any action it sees fit.

/s/ Linda M. Vanzi
LINDA M. VANZI, Chief Judge

/s/ J. Miles Hanisee
J. MILES HANISEE, Judge

/s/ Bruce D. Black
BRUCE D. BLACK, Judge Pro Term

BEFORE THE SUPREME COURT
OF THE STATE OF NEW MEXICO

In the Matter of:

VICTOR R. MARSHALL **No.: S-1-SC-37698**
An Attorney Suspended from
the Practice of Law Before the
Courts of the State of New Mexico

MOTION FOR RECONSIDERATION
and REHEARING

(Filed Jan. 28, 2022)

Respondent Victor R. Marshall respectfully moves for reconsideration and rehearing of this Court's order of January 13, 2022, affirming the findings of fact and the conclusions of law of the New Mexico Disciplinary Board and imposing an immediate Indefinite Suspension from the practice of law on respondent, including certain conditions that he would be required to meet before he could be reinstated. As more fully described below and in respondent's affidavit attached to this motion as **Exhibit 1**, under the New Mexico rules applicable to immediate suspensions from the practice of law, respondent is forbidden from seeking to assist his current clients in any way in obtaining suitable replacement counsel. This motion also asks this Court to relax those conditions for a period of sixty (60) days to enable respondent's clients to obtain new counsel in respondent's ongoing litigation matters. Based on past communications with opposing counsel, it is assumed this motion is opposed.

Respondent's argument on reconsideration and rehearing is that the New Mexico Rules of Professional Conduct, as applied to the facts of this case, cannot be applied consistent with the First Amendment to the United States Constitution.

Before the Disciplinary Board and this Court, respondent mainly argued that his conduct did not violate the New Mexico Rules and that they were a legitimate and proper effort to protect his clients from having their case heard before a judge who, it appeared from the evidence known to respondent at the time, had a conflict of interest that required the judge to recuse himself. In his reply brief to this Court, respondent specifically invoked the First Amendment . Subsequently, law professor Alan Morrison sought leave to file an amicus brief in support of respondent that focused on the First Amendment defense. However, disciplinary counsel objected, on the ground that the brief was redundant, and this Court denied the motion to file. Thereafter, in response to a letter brief filed by disciplinary counsel citing a recent case from Ohio, and in order to be certain that the Court was aware of the First Amendment defense, respondent filed a responsive letter brief which contained citations to the following two U.S. Supreme Court cases that directly support respondent's First Amendment defense. **See Exhibit 2 attached hereto** filed on December 10, 2021.

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a lawyer held a press conference the day his client was indicted and argued that the real defendants should have been the police and not his client. Based

on that statement, the Nevada Supreme Court found that the lawyer violated Nevada's rules of professional conduct and imposed a private reprimand. The U.S. Supreme Court reversed because, in the words of Justice Anthony Kennedy for the plurality, "Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws." *Id.* at 1033. It further described his statement as "classic political speech" protected by the First Amendment which was "critical of the government and its officials." *Id.* at 1034. Similarly, in the other case, the Supreme Court relied on the First Amendment to overturn a defense lawyer's one-year suspension for making a speech that allegedly impugned the integrity of the trial judge while a criminal trial was pending. *In re Sawyer*, 360 U.S. 622 (1959).

There can be no doubt how those First Amendment principles apply here, not just to the press release, but even more so to the emergency motion respondent filed. The subject matter of this litigation – the relative rights to limited water resources that are essential to each of the parties and indeed every person in New Mexico – is a matter of critical public importance to the entire state. The subject of the motion and press release – whether a judge should have disclosed his relationship to one of the parties and its members – is also a matter of great public concern on which this Court has issued detailed Rules delineating when a judge must step aside. Nor is this a case in

which respondent engaged in "abusive or obstreperous conduct," but rather exercised "the advocate's right to speak on behalf of" his clients by filing a motion which could properly bring the issue before the tribunal where the case was pending. Committee Commentary to Rule 16-305.

The order imposed against respondent is certain to have a serious impact on other attorneys who may believe that a judge is required by law to recuse in a case. If his suspension is not set aside, other attorneys will be deterred from making any motion calling into question whether a judge has a basis for recusal, or even be willing to ask the judge to clarify the facts, lest such efforts trigger a disciplinary investigation and a suspension order like that given to respondent. In this case, respondent was seeking to protect the rights of his clients, and if this Court declines to reconsider the impact of the First Amendment on its suspension order, it will be the clients of New Mexico lawyers who will suffer the most from it.

Apart from seeking reconsideration, respondent also moves this Court to amend its suspension order to permit respondent to assist his existing clients in obtaining new counsel. Under the rules of the Disciplinary Board, an order of suspension precludes an attorney from having any contact with a client except to send the form letter (attached to respondent's affidavit as **Exhibit 2-A through C**), which informs the client that the attorney is suspended and can no longer provide the client any assistance, including advising the client of other attorneys who may be qualified to

represent the client. As a result, the client is left adrift in the middle of a case, with the person best able to assist the client in finding replacement counsel, barred from doing so. Under these circumstances, the application of that rule raises further First Amendment issues, both as it affects the speech of the attorney and the right of the client to receive important information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Conclusion

For these reasons, respondent asks the Court to enter an opinion and order (1) granting reconsideration and setting aside respondent's suspension order on the ground that it violates the First Amendment, or, if the suspension order remains in effect, (2) staying the effect of that order for a period of sixty days, solely for the purpose of permitting respondent to assist his former clients, without compensation, in locating counsel to represent them in their pending matters.

Respectfully Submitted:

/s/*Jeffrey L. Baker*
Jeffrey L. Baker
The Baker Law Group
P.O. Box 35489
Albuquerque, NM 87176
505 263 2566
jeff@thebakerlawgroup.com

CERTIFICATE OF SERVICE:

I hereby attest that the foregoing was served to all counsel of record via the Tylerhost system on this 28th day of January, 2022. A courtesy copy of the foregoing was also emailed to Jane Gagne at jgagne@nmdisboard.org

/s/Jeffrey L. Baker
Jeffrey L. Baker

EXHIBIT 1

**IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

NO. S-1-SC-37698

**IN THE MATTER OF
VICTOR R. MARSHALL**

**An Attorney Suspended from
Practicing Law Before the Courts
of the State of New Mexico**

AFFIDAVIT OF VICTOR R. MARSHALL

1. My firm, Victor R. Marshall & Associates, P.C., is the only counsel for clients in several significant pending cases. See the partial list of pending cases attached as **Exhibit D** to this affidavit.

2. I am the only attorney in Victor R. Marshall & Associates, P.C. As regards the San Juan water litigation, since 2006 I have directly or indirectly represented thousands of water owners who depend on water from more than 20 acequias or community ditches in the San Juan basin.

3. **Exhibit E** to this affidavit is a photograph of a court hearing on October 2, 2011 at the county fairgrounds in Farmington, New Mexico. I took these photographs and stitched them into a panorama. The pano photo shows more than 2,500 San Juan basin water owners who were summoned to appear in court on October 2, 2011. This pano photo was offered as Exhibit

SSS in the disciplinary committee hearing on October 2, 2018, but excluded. The Disciplinary Board cannot locate this exhibit.

4. I represent many of these people in opposition to the claims of the United States, the Navajo Nation, and the State of New Mexico. The case involves the water claims of the Navajo Tribe to water in the San Juan River System. My clients, who are not members of the Tribe, depend on that water for their homes, their farms, and their businesses.

5. On January 13, 2022, the New Mexico Supreme Court issued an order for my immediate suspension. The motion that I filed and the public statement that I made that are the basis of the charges against me took place in February 2018. The disciplinary board proceedings against me concluded in May 2019. In that period no other charges have been filed against me, and I continued to practice law. Even if there were some basis for imposing an immediate suspension on me (which I do not believe there is), there is no basis for imposing the immediate hardship on my clients by denying them my help in finding new counsel. The order does not explain why an immediate suspension is necessary to protect the firm's clients or the public. In this case there are no charges, or even a suggestion, that I stole from, lied to, or cheated my clients.

6. The disciplinary charges against me arise from the fact that I raised questions about the possible disqualification of a judge. Although I acknowledge my choice of words could have been different, I was simply

restating the law set forth in Rule 21-211 NMRA, about what "the public might reasonably wonder."

7. Since I received the January 13, 2022 suspension notice, I have tried to carry out the suspension order while also trying to protect my clients, which I understand is a continuing duty imposed by the Rules of Professional Conduct.

8. Unfortunately, because there seems to be a conflict between the Rules Governing Discipline and the Rules of Professional Conduct, I am caught between a rock and hard place. I have always been taught that a lawyer's primary duty is to his or her clients. I have always understood that the primary purpose of the Rules of Professional Conduct is to protect clients.

9. The Office of Disciplinary Counsel is insisting that I send the forms attached to this affidavit as **Exhibits A, B, and C**.

10. I am more than willing to file notices in my court cases that I have been suspended. However, if I am prohibited from communicating with my clients, or advising them what to do next, or helping them find new counsel, as set forth in exhibits A, B, and C, the clients will be harmed. The types of cases I handle are not cases for which clients easily can find substitute counsel.

Under penalty of perjury under the laws of the State of New Mexico, I affirm that this statement is true and correct.

Date: January 28, 2022 /s/ Victor R. Marshall
Victor R. Marshall

EXHIBIT A

BY CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

COURT/AGENCY/TRIBUNAL
Address
City, State, Zip DATE

Re: Notification of Suspension Pursuant to Rule 17-212 NMRA

Dear Court/Agency/Tribunal:

Pursuant to Supreme Court order effective on January 13, 2022, I have been suspended. A copy of the Court's order is enclosed. I am not able to continue to act as an attorney in any matter. I cannot provide anyone with legal advice. [My client has not secured alternate counsel before the date of my suspension and I am automatically withdrawn from participating further in the proceeding.] *OR* [My client has secured alternate counsel and his/her name and address is:]

Sincerely,

_____

EXHIBIT B

BY CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

OPPOSING COUNSEL or PRO SE PARTY
Address
City, State, Zip DATE

Re: Notification of Suspension Pursuant to Rule 17-212 NMRA

Dear Opposing Counsel – OR – Party Pro Se:

Pursuant to Supreme Court order effective on January 13, 2022, I have been suspended. A copy of the Court's order is enclosed. I am not able to continue to act as an attorney in any matter. I cannot provide anyone with legal advice. If alternate counsel cannot be secured, the client in this matter will be pro se. The address of the pro se client is:

Sincerely,

_____

EXHIBIT C

BY CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

OPPOSING COUNSEL or PRO SE PARTY
Address
City, State, Zip DATE

Re: Notification of Suspension Pursuant to Rule 17-212 NMRA

Dear Client:

Pursuant to Supreme Court order effective on January 13, 2022, I have been suspended.. A copy of the Court's order is enclosed. I am not able to continue to act as an attorney in this or in any other matter. I cannot provide you or anyone else with legal advice. I cannot recommend the name of an attorney to you. You will need to seek the legal advice of another attorney. **You may contact the State Bar of New Mexico to speak with a representative of a lawyer referral program.** If you do not retain another attorney, you will be considered to be representing yourself.

Sincerely,

_____

EXHIBIT D

VICTOR R. MARSHALL & ASSOCIATES, P.C. PARTIAL LIST OF CURRENTLY PENDING CASES

WATER LITIGATION.

State ex rel. State Engineer v. United States, *et al.*, No. D-1116-CV-197500184. This case has been pending since 1975. The State Engineer estimates that the case will take 240 more years to complete.

State ex rel. State Engineer v. United States, *et al.*, No. D-1116-CV-197500184, San Juan River General Stream Adjudication, Claims of the Navajo Nation, Case No AB-07-1.

San Juan Agricultural Water Users Association v. KNME-TV, *et al.*, No. D-202-CV-200707606. This case has been pending since 2007. For case history, see 2010-NMCA-012, 147 N.M.643. The NMSC granted cert., reversed and remanded, 2011-NMSC-011, 150 N.M.64. The subsequent ruling of district court on remand was appealed again and partially reversed by an unreported opinion in No. A-1-CA-35839. The case is currently awaiting a decision in the district court.

Guy Clark, Linda Corwin, Craig Corwin, Wesley Hanchett, Richard Jones, Michael Wright, and San Juan Agricultural Water Users Association v. Deb Haaland, Camille C. Touton, Martha Williams, Dr. Rudy Shebala, David Zeller, John D'Antonio, and Rolf Schmidt-Petersen, No. 1:21-cv-01091-KK-SCY.

FRANK FOY FATA LITIGATION

State ex rel. Foy, *et al.* v. Vanderbilt Capital Advisors, LLC, *et al.*, No. D-101-CV-200801895. This case has been pending since July 2008. In 2015 the Supreme Court ruled in favor of Mr. Foy and the state *sub nom* Austin Capital, No. S-1-SC-38413. This case has resulted in more than $50 million in recoveries for the state. The mandatory statutory reward and attorney fees for qui tam plaintiffs have not yet been determined.

State ex rel. Foy, *et al.* v. Austin Capital Management, LLC, No. D-101-CV-200901189. This case has been pending since 2009.

State ex rel. Foy and Casey v. Day Pitney LLP, No. D-101-CV-201502049. This case has been pending since 2015.

State ex rel. Foy and Casey v. William Blaine Richardson III, Steven K. Moise, Evan Land, Bruce A. Brown, Peter Frank, Charles Wollmann, and Hector Hugo Balderas, No. D-202-CV-202003004.

New Mexico Education Retirement Board v. Renaissance Private Equity Partners, L.P., *et al.*, No. A-1-CA-38096.

State ex rel. Integra REC, LLC v. J.P. Morgan Securities LLC, *et al.*, No. D-101-CV-201400256.

OTHER

New Mexico Public Regulation Commission, *et al.* v. The New Mexican, Inc., No. A-1-CA-38898.

State and County of Lincoln ex rel. Greentree Solid Waste Authority, *et al.* v. Sierra Contracting Inc., *et al.*, No. D-1226-CV-202000081.

Kysar, *et al.* v. Johnson, *et al.*, No. D-1116-CV-200500824, *rev'd*, 2012-NMCA-036. Related cases: Kysar v. Amoco Production Co., 2004-NMSC-025 and 379 F.3d 1150 (10th Cir. 2004).

BP America Production Co. v. Kysar, *et al.*, No. 1-05-cv-00578-KG-JHR.

THERE ARE OTHER CASES IN PREPARATION BUT NOT YET FILED.

[Exhibit E Omitted]

EXHIBIT 2

[LOGO]

The Baker Law Group
P.O. Box 35489
Albuquerque, NM 87176
(505) 263-2566

Jennifer Scott
Chief Clerk of New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
(505) 827-4862
supj1sat@nmcourts.gov

In Re: In the Matter of Victor Marshall S-1-SC-37698
Response to Supplemental Authority submitted by Assistant Disciplinary Counsel Jane Gagne
Via efiling

December 10, 2021

Dear Ms. Scott:

Respondent, Victor Marshall, by and through his attorney of record, Jeffrey L. Baker (The Baker Law Group), is respectfully submitting this letter in response to Assistant Disciplinary Counsel's submission of supplemental authority for the Court's consideration.

The supplemental authority provided only serves to demonstrate that Mr. Marshall's law license should not be suspended.

Assistant disciplinary counsel has submitted *Cleveland Metro. Bar Ass'n v. Morton*, 2021-Ohio-4095, ___ N.E.3d ___, 2021 WL 5456420, as a supplemental authority in this case. Respondent agrees that *Cleveland Metro. Bar* should be considered by this Court, because the cases cited by the dissent relate to the First Amendment points in Respondent's Reply Brief submitted to this Court on December 30, 2019, at Points III, IV, and V; Respondent's Motion To Dismiss submitted to this Court on April 29, 2020, at Point 6; and Respondent's Reply to the Motion To Dismiss submitted to this Court on May 13, 2020, at pps. 2-4. Moreover, the dissent in *Cleveland Metro. Bar* provides additional controlling authorities from the United States Supreme Court, and additional decisions from other courts that support non-sanctionable actions by Mr. Marshall that are at the heart of this disciplinary proceeding. These additional authorities solidify the fact that adopting the Board's recommendations would violate Mr. Marshall's First Amendment rights and create a chilling effect on the profession.

A. The dissent in *Cleveland Metro. Bar* sets forth authorities that protect Mr. Marshall.

The dissent in *Cleveland Metro. Bar* discusses authorities which govern and are material to the disciplinary proceeding against Mr. Marshall. Below are some of the most important supplemental authorities cited in *Cleveland Metro. Bar*:

*_Gentile v. Nevada State Bar_, 501 U.S. 1030 (1991) (Supreme Court reversed the sanctions against an attorney who criticized public officials and their conduct in office; "speech critical of the exercise of the State's power lies at the very center of the First Amendment"; such speech "is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.");

*_In re Sawyer_, 360 U.S. 622 (1959) (reversing the Hawaii Supreme Court's suspension of an attorney accused of impugning the integrity of the judge);

*_New York Times Co. v. Sullivan_, 376 U.S.254 (1964) (defamation of a public figure requires a false statement of fact, and actual knowledge that the statement was false, or reckless disregard);

*_Garrison v. Louisiana_, 379 U.S. 64 (1964) (extending the New York Times standard to protect prosecuting attorney's criticism of local judges; even where the utterance is false, the Constitution precludes adverse consequences except for knowing or reckless falsehoods; "truth may not be the subject of either civil or criminal sanctions where a discussion of public affairs is concerned");

*_Republican Party of Minnesota v. White_, 536 U.S. 765 (2002) (a law abridging speech to maintain the appearance of judicial impartiality is not narrowly tailored to advance a compelling state interest justifying the abridgment);

*_Landmark Communications, Inc. v. Virginia_, 435 U.S. 829, 839 (1978) (protecting judicial integrity and the institutional reputation of the courts is not a sufficient reason for repressing free speech; "The assumption

that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American public opinion.");

*_Standing Comm. on Discipline of the United States Dist. Court for the Cent. Dist. of California v. Yagman_, 55 F.3d 1430, 1438 (9th Cir. 1995) ("attorneys may be sanctioned for impugning the integrity of the judge or the court only if the statements are false; truth is an absolute defense");

A convincing analysis of these First Amendment cases is set forth in the dissenting opinions by Ohio Justices Kennedy and De Wine. ¶¶ 47-106. While the majority of the justices in *Cleveland Metro. Bar* opine that all these First Amendment cases are "nothing but a red herring," ¶ 45, and "a First Amendment smokescreen," ¶46, New Mexico does not subscribe to the *Cleveland Metro. Bar's* majority view. In point of fact, the New Mexico Supreme Court has never subscribed to the view that the First Amendment is a red herring in any context.

B. Mr. Marshall's actions are not comparable to the actions of the attorney in the Cleveland Metro. Bar case.

The facts at issue in *Cleveland Metro. Bar* have no bearing in this matter because Mr. Marshall did not engage in any of the conduct described in that case. For example:

- The attorney from Cleveland (Mr. Morton) "was combative and obstreperous throughout his disciplinary

hearing, was discourteous to the panel members, and often refused to accept the panel chair's evidentiary rulings." Cleveland Metro Bar. *supra* at ¶35. By contrast, Mr. Marshall was cooperative and courteous throughout the disciplinary process. Mr. Marshall and undersigned counsel did object to some of the panels' evidentiary rulings, including the decision to exclude "after acquired evidence" and the decision to deny subpoenas, in order to preserve error. However, Mr. Marshall respected the process and the proceedings after these rulings issued.

• Mr. Morton made no investigation before voicing his "undignified and discourteous statements." *Id.* at ¶11. Additionally, the Court found that Mr. Morton conducted no investigation before accusing the court of acting based on political motives, and failed to consider that the delays at issue could be based upon legitimate and reasonable factors such as the tax case load. ¶23. The Court determined that Morton acted with reckless disregard for the truth of his accusations. *Id.* In contrast, Mr. Marshall investigated his concerns to the best of his ability without the benefit of discovery and under time pressure given the pendency of the Court of Appeals proceeding before he filed an emergency motion in the Court of Appeals. Furthermore, Mr. Marshall requested a remand to the trial court so that formal discovery could occur. He filed his motion based on the information he was able to obtain without formal discovery, and without access to records which were not readily available to the public. He did not attack the judiciary in any way that could be compared to Mr. Morton's behavior. Furthermore, while the Court of Appeals denied Mr. Marshall's emergency motion, his subsequent investigation has confirmed that a logical and reasonable basis in fact existed for the filing

of the emergency motion in the Court of Appeals. Unfortunately, however, the Hearing Committee in this matter has denied the significance of relevant facts because this information has been deemed "after-acquired evidence," and therefore not admissible in this proceeding.

- Unlike Mr. Morton, *Id.* at ¶45, Mr. Marshall and his clients spoke to the press about the case – speech which is clearly protected by the First Amendment. (see the above authorities).

- Mr. Morton was convicted of violating an Ohio rule of professional conduct which prohibits a lawyer from "engaging in undignified or discourteous conduct that is degrading to a tribunal." New Mexico has no such rule. Furthermore, Mr. Marshall was never undignified or discourteous to any tribunal.

The cases cited in *Cleveland Metro. Bar* make it clear that Mr. Marshall did nothing which warrants suspension of his law license. Mr. Marshall asked the appeals court for an opportunity to conduct limited discovery. Instead of simply saying "no," Judge Black instructed the Clerk to refer Mr. Marshall to the discipline authorities. However, the allegations in Mr. Marshall's pleading are far removed from the egregious nature of the allegations and behavior at issue in the *Cleveland Metro. Bar* case.

Furthermore, suspension of Mr. Marshall's law license is antithetical to the rules governing judicial disclosure and recusal and will have an unmistakable chilling effect on any attorney who contemplates the filing of a motion based on concerns about the

appearance of impropriety or lack of disclosure. Mr. Marshall had sufficient information to submit his initial pleading requesting discovery, and discovery to date demonstrates that a good faith basis exists regarding whether Judge Wechsler should have, at the very least, disclosed his past association with DNA and his son's extensive legal work for the Office of State Engineer. Mr. Marshall is a zealous advocate (which this Court has said is required of all lawyers who practice in this state), and his actions were consistent with his obligations to his clients.

Ultimately, the law and facts encompassed in *Cleveland Metro. Bar* provide an ample basis for this Court to dismiss the Specifications of Charges against Mr. Marshall. Any other outcome will not serve the interests of justice, support the profession, nor support the public policy underlying the rules governing judicial disclosure and recusal.

Respectfully Submitted:

/s/ Jeffrey L. Baker
Jeffrey L. Baker
The Baker Law Group
P.O. Box 35489
Albuquerque, NM 87176
505 263 2566
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cc: Jane Gagne at jgagne@nmdisboard.org.

FOR IMMEDIATE RELEASE
Santa Fe, New Mexico
February 27, 2018

ACEQUIAS FILE MOTION TO DISQUALIFY JUDGE FROM NAVAJO WATER CASE BECAUSE HE PREVIOUSLY REPRESENTED THE NAVAJO NATION.

More than 20 acequias and community ditches on the San Juan River have filed a motion asking the New Mexico Court of Appeals to disqualify Judge James Wechsler from adjudicating the water claims of the Navajo Nation.

In 2013 Judge Wechsler awarded 635,729 acre-feet of water to the Navajo Nation, without a trial. According to the motion, that is roughly one quarter of all the river water in New Mexico.

In 2018 an investigation revealed that Judge Wechsler had worked for the Navajo Nation as an attorney for almost six years. Judge Wechsler and the Navajo Nation did not disclose their prior relationship, as required by Rule 21-211 of the Code of Judicial Conduct.

Rule 21-211 provides that "a judge shall disqualify himself or herself from any proceeding in which the judge's impartiality might reasonably be questioned." The motion states that the public would reasonably doubt that Judge Wechsler could be impartial, since he previously represented the Navajo Nation, one of the adversaries in the case.

"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."

Because Judge Wechsler worked as a lawyer for the Navajo Nation, he has personal knowledge about key contested issues in the case, according to the motion. Rule 16-109 prohibits lawyers from using information against their former clients, so Judge Wechsler has a built-in one-way bias imposed by law.

"All we have ever asked for was honesty and fairness through the judicial system," said Mike Sullivan, chairman of the San Juan Agricultural Water Users Association. "How could this have happened?"

The acequias filed their motion and brief in the Court of Appeals on February 26, 2018. Copies are attached with highlighting added.

CONTACT:

Victor R. Marshall, 505-250-7718,
victor@vrmarshall.com
Mike Sullivan, 505-320-3677
Jim Rogers, 505-330-0047

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
ex rel. STATE ENGINEER,

Plaintiff-Appellee,

v.

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

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

EMERGENCY MOTION TO ENFORCE RULE 21-211

(Filed Feb. 26, 2018)

The reasons for this motion are as follows:

In 2013, without a trial, Judge James Wechsler granted summary judgment to the Navajo Nation on its claim for water in the San Juan River basin in New Mexico. Judge Wechsler awarded the Navajo Nation 635,729 acre-feet of water per year, in perpetuity. That is roughly one quarter of all the stream water in the entire State of New Mexico. It is more than six times the amount of water used by the Albuquerque metropolitan area, and twice as much as the City of Phoenix.

To make that award to the Navajo Nation without a trial, Judge Wechsler rejected the beneficial use requirement and the PIA (practicably irrigable acreage) standard for Indian water rights. Judge Wechsler had no legal authority to reject the beneficial use and PIA requirements, because these requirements are imposed by both federal and state law, including: 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).

Instead, Judge Wechsler decided to adopt the amorphous "homeland" concept espoused by the Arizona Supreme Court in *In re General Adjudication of All Rights To Use Water in Gila River*, 35 P.3d 68 (Ariz. 2001) ("*Gila V*"). *Gila V* allows the trial judge to set a number for a tribe's water rights, unconstrained by beneficial use. The award can be based on a "myriad of factors" chosen by the judge, such as tribal history, rituals, culture, topography, human resources, technology, potential employment base, and projected population. *Gila V* is an aberration: it contradicts the water law adopted by the courts of the United States and New Mexico. *Gila V* has been rejected by the other courts that have considered it.

Judge Wechsler also refused to comply with *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562. Without approval from the New Mexico Legislature, he awarded the Navajo Nation more than half of New Mexico's statutory share of water under the Colorado River Compacts, NMSA 1978, §§ 72-15-5 and -26.

In January 2018, disquieting rumors about Judge Wechsler began to circulate in the New Mexico Legislature, prompting some legislators to ask whether or not the rumors could be substantiated.

Since then, a preliminary but incomplete investigation has revealed:

- James J. Wechsler was employed by the Navajo Nation for approximately six years as an attorney at Diné Bee'iiná Náhiilnah Bee Agha'diit''aahii (or "Attorneys Who Contribute to the Economic Revitalization of the People"), commonly known as DNA Legal Services, an agency and instrumentality of the Navajo Nation.

- Upon information and belief, James Wechsler lived with his family on the Navajo Reservation at Crownpoint, New Mexico from approximately 1970 to 1976. He worked primarily at the DNA law offices in Crownpoint, which is the headquarters of the Navajo Nation Eastern agency. Crownpoint is located within the San Juan River basin, in the area for which Judge Wechsler awarded water rights to the Navajo Nation.

- As an advocate for the Navajo Nation and tribal members, James Wechsler participated in several important cases advancing the rights of Navajo people, including: *Haceesa v. Heim*, 1972-NMCA-088, 84 N.M. 112; *Natonabah v. Board of Ed. of Gallup-McKinley Cnty. Sch. Dist.*, 355 F. Supp. 716 (D.N.M. 1973); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973); *Morton v. Mancari*, 359 F. Supp. 585 (D.N.M. 1973), *rev'd*, 417 U.S. 535 (1974).

- Judge Wechsler did not disclose to all the parties on the record that he had worked as an attorney for the Navajo Nation.

- The Navajo Nation also knew that Judge Wechsler had previously worked for it as a lawyer, but it did not disclose these facts either.

VIOLATIONS OF RULE 21-211
NMRA AND OTHER RULES

(A) Judge Wechsler did not disclose to the parties in this case that he had previously represented the Navajo Nation, one of the adversaries in this litigation. Rule 21-211 requires a judge to volunteer on the record information that the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

(B) Judge Wechsler did not comply with the requirements of Rule 21-211(C) for seeking a remittal of disqualification from the parties.

(C) Judge Wechsler did not comply with Rule 21-211(A): "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. . . ."

(D) Because of his service to the Navajo Nation and the years he lived on the reservation, Judge Wechsler has personal extrajudicial knowledge about the Navajo Nation and the "myriad of factors" under *Gila V* which he could select to award water to the Navajo people – the people he represented as an attorney. Rule 21-211(A)(1) requires judges to recuse themselves when they have personal knowledge relating to the matters in controversy.

(E) Having previously worked as a lawyer for the Navajo Nation, Judge Wechsler has a continuing duty under Rule 16-109 not to use information to the

disadvantage of his former clients. Because the information he learned as a lawyer for the Navajo Nation can be used for the benefit of his former clients, but not against them, Judge Wechsler has a one-way bias imposed by Rule 16-109 itself.

(F) Because Judge Wechsler worked as an attorney and advocate for the Navajo Nation and the Navajo people, he has a continuing duty of loyalty to his former 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.

Loyalty to present and past clients is a positive bias which springs directly from a lawyer's ethical obligations under the Rules of Professional Conduct. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system". Preamble to the Rules of Professional Conduct. The undivided loyalty and zeal required of a lawyer advocate cannot be reconciled with the strict impartiality that is required of all judges in all cases.

(G) Judge Wechsler did not comply with Rule 21-211(A)(5) regarding prior involvement or prior government service relating to the matters in controversy.

(H) Judge Wechsler has not complied with Rules 21-100 and 21-102, which require judges to act with independence, integrity, and impartiality, to avoid impropriety or even the appearance of impropriety, and to promote public confidence in the judiciary.

In short, the Code of Judicial Conduct does not allow a judge to sit on a case involving a party that the judge previously represented as a lawyer, while not disclosing the facts to all the parties in the case.

The concurrence of opposing counsel has not been sought, due to the nature of the motion and the virtual certainty that the Navajo Nation will oppose it.

WHEREFORE, the acequia defendants respectfully move this Court to enforce the Code of Judicial Conduct and the Code of Professional Conduct by recusing Judge Wechsler from this case, vacating his rulings, and ordering that this case be heard *de novo* by an impartial judge.

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

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
ex rel. STATE ENGINEER,

Plaintiff-Appellee,

v.

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

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

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

(Filed Feb. 26, 2018)

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. RP 17930. 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. De Temple*, 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 nonprofit 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 (200 1) (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-NMCA063, 116 N.M. 194 ("*Mescalero*"); *State ex rel. Erickson v. McLean*, 1957-NMSC012, 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

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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

[Exhibit Omitted]

STATUTORY APPENDIX

N.M.R. Disc 17-212

Rule 17-212 - Resigned, disbarred or suspended attorneys [Effective December 31, 2021]

A. Notification of clients in pending matters. An attorney who has resigned under Rule 17-209 NMRA or has been disbarred or suspended under the Rules Governing Discipline shall promptly notify by registered or certified mail, return receipt requested, in a form prescribed or approved by disciplinary counsel, all clients being represented by the attorney in pending matters, other than litigated or administrative matters or proceedings pending in any court or agency, of the resignation, disbarment or suspension and consequent inability to act as an attorney after the effective date of the resignation, disbarment or suspension, and shall inform the clients to seek legal advice elsewhere. If accepted by the Supreme Court, an attorney who enters into a conditional agreement under Rule 17-211 NMRA that results in the attorney's resignation, suspension or disbarment shall provide the notice required herein to all clients whom the attorney represented as of the date that the conditional agreement was signed by the attorney. In any matter not involving a conditional agreement but in which the order of the Supreme Court suspending or disbarring an attorney delays the effective date of the resignation, suspension or disbarment, the attorney shall provide the notice required to all clients whom the attorney represented as of the date that the Court entered its order, regardless of the subsequent date that the suspension

or disbarment takes effect. In all cases, the attorney shall also provide to each of the attorney's clients a copy of the order accepting or providing for the attorney's resignation or disbarring or suspending the attorney. An attorney who has resigned, been disbarred or suspended from the practice of law, or who has signed a conditional agreement providing for the attorney's resignation, suspension or disbarment, may not recommend to the attorney's clients any other lawyer to represent them but shall inform the client that the client may contact the State Bar of New Mexico for one of its lawyer referral programs.