

McLACHLAN LAW

A PROFESSIONAL CORPORATION
2447 PACIFIC COAST HIGHWAY, SUITE 100
HERMOSA BEACH, CA 90254
PHONE 310-954-8270 FAX 310-954-8271
E-MAIL mike@mclachlan-law.com

September 15, 2021

VIA E-FILING

Hon. Jack Komar (ret.)
c/o Santa Clara County Superior Court
Department D-17
161 N. First Street
San Jose, CA 95113

***Re: Antelope Valley Groundwater Litigation, JCCP 4408
Wood v. Los Angeles County Waterworks Dist. No. 40***

Dear Judge Komar:

Thank you for your further e-mail of September 9, 2021.

I will start by emphasizing my career-long, committed belief that our profession requires substantial respect to sitting bench officers. With that said, although the import of the present circumstances requires me to press this issue, please take no disrespect to you, your office or your prior accomplishments.

I do not enjoy the position I am in here terribly, but at the present moment you control this situation. More specifically, I have requested specific information from you that is relevant to determine your mandatory disqualification pursuant to C.C.P. section 170.1. (I am again not revisiting in detail the ethical concerns set forth in my letter of August 31, 2021, but we believe those also present grounds for your recusal or disqualification (*see, e.g.*, § 170.1(a)(6)(A)(iii)).)

In my letter of September 8, 2021, I requested specific disclosures relevant to your dealings with the County of Los Angeles (“the County”) and its counsel as a private, paid neutral. It is clear from your declaration of September 2, 2021 that you have mediated with the County in recent years. In your e-mail of September 9, you appear to state the proposition that because you are employed by JAMS, and because JAMS was employed by the County in certain matters in recent years to provide alternate dispute resolution services, that you “not employed or retained by Los Angeles City or County or by any lawyer or law firm employed by either entity, including Best Best and Krieger.” (Judge Komar E-mail, September 9, 2021 (a copy of which is attached.))

You appear to be suggesting several things. First, your e-mail strongly implies that if the money the County pays for your services passes through a third party’s hands first, then all is well. Second, your email suggests that lawyers simply call an entity like JAMS and request them to assign a mediator “off the wheel.” In my nearly

26 years of practice, I have never seen that occur. The way this works in essentially every mediation scenario is that the parties identify a neutral and that approach his or her case manager. If your proposition were true, it would turn the ethical rules for judges on its head, would nullify several subsections of Section 170.1, and would if fact contradict a large portion of the pertinent case law.

In short, the fact that the check for your services may be written to JAMS is irrelevant here. There is absolutely no legal authority to support it, and the body of caselaw regarding neutral disclosures runs counter to this notion, as noted in some of the cases cited below).

You have also stated that you have no bias toward me (and presumably my co-counsel Mr. O’Leary), suggesting that is somehow germane to the inquiry at hand. That is incorrect and ignores the central premise that bench officers must stay clear of the appearance of impropriety.

Code of Civil Procedure section 170.1 does not disqualify *only* those judges who have actual bias; it disqualifies judges in situations where the Legislature has presumed bias, or the appearance of possible bias, may exist. (See *Code Civ. Proc, § 170.1, subd . (a)(6)(A)(iii)* [disqualifying a judge if a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial"].)

(*Rossco Holdings Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353, 1362.)

I do not believe you are properly assessing the matter at hand, so I am going to add further detail. I will start with the primary statutory framework:

The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, **or has been engaged in that employment or service, and any of the following applies:**

(i) The arrangement is, or the prior employment or discussion was, with a party to the proceeding. . . .

(C.C.P. § 170.1(a)(8)(A) (emphasis added).)

Section 170.1(a)(6)(A)(iii) is clearly implicated here as well and may be more important: “A person aware of the facts might reasonably entertain doubt that the judge would be able to be impartial.” This “objective standard clearly indicates that

the decision on disqualification not be based on the judge's personal view of his own impartiality . . .” (*Jolie v. Superior Court* (2021) 66 Cal.App.5th 1025, 281 Cal.Rptr.3d 610, 619) “[A] judge faced with a potential ground for disqualification ought to consider how his participation in a given case look to the average person on the street.” (*United Farm Workers of America v. Superior Court* (1985) 170Cal.App.3d 97, 104.) “Ethical breaches by a privately compensated temporary judge serving as a public official are far more disquieting than similar violations by private arbitrators.” (*Jolie, infra*, at 626 (finding disqualification required under 170.1(a)(6) (A)(iii) based upon the retention of the judge on other matters by counsel for one of the parties).)

Properly addressing the question of disqualification requires full disclosure of the pertinent facts. The California Code of Judicial Ethics addresses the requirement for disclosures in this context as follows:

E. Disqualification and Disclosure

(1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.

(2) In all trial court proceedings, a judge shall disclose on the record as follows:

(a) Information relevant to disqualification

A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

(California Code of Judicial Ethics, Canon 3.E.)

In sum, you are required to disclose completely the information regarding your dealings with the County and Best Best & Krieger in your work as a neutral so that the assessment of disqualification can be made on a proper record. It is preferable to complete this process sooner rather than later since orders issued by a properly disqualified judge are void. (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776.) Thank you for your prompt attention to this matter.

Very truly yours,



Michael D. McLachlan

cc: Chair, Judicial Council of California (via U.S. Mail)

Mike McLachlan

From: Jack Komar <jvkomar@sbcglobal.net>
Sent: Thursday, September 9, 2021 9:57 AM
To: Mike McLachlan
Cc: Rowena Walker
Subject: Antelope Cases

Categories: Evidence

Mr. McLachlan:

Your letter of September 8, 2021 inaccurately states that I worked for Los Angeles County and its counsel. That is inaccurate and did not occur. Either I was not clear or you misread my earlier letter or declaration.

Again, all work as a neutral was with through JAMS, including mediating an action between Los Angeles County and Inyo County. I was not employed or retained by Los Angeles City or County or by any lawyer or law firm employed by either entity, including Best Best and Krieger. The one and only time I worked for any county was in 1966-69 as a deputy district attorney for Santa Clara County.

I have not worked directly with Los Angeles or any other county as a mediator. I am never hired by any party or law firm in a mediation or arbitration (or any other) setting and do not solicit such an ongoing relationship or otherwise. All of my work is exclusive through JAMS.

Whether sitting as an assigned judge in Antelope or acting as a neutral mediator or arbitrator through JAMS I am beholden to no one other than the law and truth. As I was through 24 years as a superior court judge and 15 years plus service in the Antelope Coordinated cases.

I am by copy of this e-mail requesting that the Superior Court add this to the website so that all counsel are apprised of this communication.

Very truly yours,

Judge Jack Komar (Ret)