

Michael D. McLachlan (State Bar No. 181705)
LAW OFFICES OF MICHAEL D. McLACHLAN, APC
523 West Sixth Street, Suite 215
Los Angeles, California 90014
Telephone: (213) 630-2884
Facsimile: (213) 630-2886
mike@mclachlanlaw.com

Daniel M. O'Leary (State Bar No. 175128)
LAW OFFICE OF DANIEL M. O'LEARY
523 West Sixth Street, Suite 215
Los Angeles, California 90014
Telephone: (213) 630-2880
Facsimile: (213) 630-2886
dan@danolearylaw.com

Attorneys for Plaintiff

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 1550(b))

Judicial Council Coordination
Proceeding No. 4408

ANTELOPE VALLEY WATER CASES

(Santa Clara Case No. 1-05-CV-049053,
Honorable Jack Komar)

RICHARD A. WOOD, an individual, on
behalf of himself and all others similarly
situated,

Case No.: BC391869

Plaintiff,

**REPLY TO OPPOSITION TO
MOTION FOR ORDER
DISQUALIFYING THE LAW FIRM
OF LEMIEUX & O'NEIL;
DECLARATION OF DANIEL
O'LEARY; EXHIBITS**

v.

LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40; et al.

Defendants.

**Date: July 10, 2009
Time: 11:00 a.m.
Dept.: 17C**

I. LEMIEUX MUST BE DISQUALIFIED.

The pleadings in this proceeding have become so confused that one law firm simultaneously represents cross-complainants and cross-defendants and nobody noticed. To make matters worse, that law firm, Lemieux & O'Neill ("Lemieux"), when faced with evidence of its utter dereliction of basic professional responsibilities, created a revisionist and pre-textual story designed to remove its conflict, after the fact. And, again, nobody seems able to demonstrate basic familiarity with the history of the proceeding sufficient to put a stop to an untenable situation. Lemieux cannot represent parties on both sides of the Public Water Purveyors' first amended cross-complaint, but that is exactly what it has done for well over two years.

Lemieux now claims that its four clients who filed answers to the first amended cross-complaint did so in error: they were actually served with and answered a complaint filed by Los Angeles County Waterworks District No. 40 in Kern County in 2004 (or perhaps the complaint District 40 filed in Los Angeles County. This claim is purely revisionary. Not only were these parties served with the first amended cross-complaint, the Kern County complaint and the Los Angeles complaint were superseded by the original cross-complaint in 2006, before the answers were filed. Thus, as indicated in the motion, Lemieux filed answers to the first amended cross-complaint on behalf of four of its clients while it represented two of the cross-complainants. For the reasons set forth in the motion, this simultaneous representation requires the firm's disqualification.

The litigation of this matter for these past years with the fundamental defect of one set of jointly represented clients endeavoring to prescribe against another set of parties represented by the same counsel renders this entire proceeding subject to undoing, if left un-remedied. Regrettably, the law affords only one remedy, but while harsh, this situation is was knowingly created by Lemieux to the peril of not only his clients, but all the other parties who have invested so much.

II. LEMIEUX’S CLIENTS WERE SERVED WITH THE CROSS-COMPLAINT.

Despite the defiant tone of the opposition, Lemieux does not contend that it can simultaneously represent cross-complainants and cross-defendant. But a review of the full record shows that the firm is doing exactly that.

Los Angeles County Waterworks District No. 40 is the proponent of three complaints in the coordinated proceeding (the third in the table, bearing the JCCP case number, is the Public Water Purveyors’ cross-complaint):

	Case style	Case no. (County of Origin)	Date
1.	Los Angeles County Waterworks District No. 40 v. Diamond Farming Company, et al.	BC325201 (Los Angeles County)	11/29/04
2.	Los Angeles County Waterworks District No. 40 v. Diamond Farming Company, et al.	S-1500-CV 254348 (Kern County)	12/01/04
3.	Los Angeles County Waterworks District No. 40, et al., v. Diamond Farming Company, et al. (Cross-complaint)	JCCP 4408 ¹ (no county of original filing)	01/18/06

In the two cases filed in 2004, District 40 is the only plaintiff. In the cross-complaint, District 40 is joined by a number of other purveyors as cross-complainants,

¹ Wood can find no evidence that a summons ever issued on the cross-complaint which, parenthetically, would seem to render any defaults eventually entered on the cross-complaint suspect. The summons used to serve the parties added to the purveyors’ cross-complaint seems to be an amended summons issued under the case number assigned to District 40’s 2004 Los Angeles County complaint and the Santa Clara County case number (1-05-CV-049053) assigned to the coordinated proceeding.

1 including two of Lemieux's clients-- Littlerock Creek Irrigation District and Palm Ranch
2 Irrigation District. As the opposition points out, on April 4, 2007, four of Lemieux's
3 clients were named as Doe defendants. While District 40's lawyers badly mishandled the
4 service, it is clear from the record that these four parties were served with the JCCP 4408
5 cross-complaint (and, more specifically, with the first amended cross-complaint), as the
6 following facts demonstrate beyond any doubt.

7 First, the Doe amendments identify the plaintiff as "Los Angeles County
8 Waterworks District No. 40, et al." (Exhibit F.) The only pleading in which District 40
9 **and others** are plaintiffs is the cross-complaint. There is no "et al." on District 40's 2004
10 complaints.

11 Second, the Doe amendments identify 4408 as the case number, which references
12 the purveyors' cross-complaint, not either of District 40's 2004 complaints, as now
13 claimed by Lemieux. For that matter, the Doe amendments indicate that the law firm of
14 Best, Best & Krieger represents District 40 **and** Rosamond Community Service District.
15 Rosamond CSD was not a plaintiff in the 2004 complaints and was not represented by
16 Best, Best & Krieger except in connection with the cross-complaint. Rosamond CSD can
17 only add parties to the purveyors' cross-complaint.

18 Third, the declaration of service forms filed to establish service on Lemieux's
19 clients indicate *under penalty of perjury* that the service consisted of the purveyors' first
20 amended complaint and related documents (although apparently accompanied by the
21 wrong summons). (Exhibit G.) While Lemieux now argues its clients were actually
22 served with one of the 2004 complaints, and not the first amended cross-complaint, the
23 firm has admitted it did not keep copies of the service package. (Exhibit H.) Thus, the
24 only evidence of what was served comes from the process server in the declaration of
25
26
27
28

1 service.² (Of course the firm of Best, Best & Krieger, who handled all of the Doe and Roe
2 amendments, could also shed light on the matter, if they were so inclined.)

3 Fourth, the Court and the parties involved in this proceeding in late 2005 and early
4 2006 contemporaneously understood that the purveyors' cross-complaint would
5 supersede the two 2004 complaints filed by District 40. As fully explained below, the
6 hearing transcripts from December 2, 2005 and February 17, 2006 make this clear.

7 Fifth, as also explained in detail below, District 40 eventually added 185 Does to
8 its 2004 Los Angeles County complaint and 41 to its 2004 Kern County complaint, prior
9 to the filing of the purveyors' cross-complaint. With few exceptions, these Does were
10 then named as cross-defendants in the purveyors' cross-complaint. Under Lemieux's
11 analysis, District 40 is now pursuing the exact same claims against these parties in two or
12 three separate lawsuits, i.e., District 40's two 2004 complaints and the purveyors' first
13 amended cross-complaint. Obviously, the point of the purveyors' cross-complaint was
14 not to create splintered litigation, but to streamline the process. So Lemieux's current
15 position, that District 40 is still pursuing the 2004 complaints along with the purveyors'
16 first amended cross-complaint, is, simply, wrong.

17 Sixth, all the parties added to the proceeding in April 2007 appear to be mutual
18 water companies. According to the proofs of service, they were **all** served with the
19 purveyors' first amended cross-complaint. All of them (setting aside the recently-filed
20 notices of errata by Lemieux)³ answered the first amended cross-complaint. None of
21 them answered either of District 40's 2004 complaints.

23 ² Whether one accepts this or Lemieux's explanation that its clients conveniently failed to
24 keep copies of the 2004 complaints were served with, the Doe amendments, and the proof of
25 service forms are internally inconsistent. The summons and Doe amendments reference different
26 cases, and the proofs of service show that parties were served with a hybrid collection of
documents. And, to make matters worse, the proof of service forms bear the case number from
District 40's 2004 Los Angeles County case (BC325201).

27 ³ Whatever the outcome of this motion, Lemieux's clients filed answers to the purveyors'
28 first amended cross-complaint. A notice of errata filed years later cannot fix or change this.
District 40's complaints and the cross-complaint have different case numbers, originated in

1 Why would the purveyors add a number of mutual water companies to the first
2 amended cross-complaint, but add four of Lemieux's clients to the dormant (and
3 superseded) 2004 complaints? The obvious answer is that they did not. Lemieux's four
4 cross-defendant clients are, indeed, cross-defendants and its two cross-complainant
5 clients are cross-complainants. Thus, the firm finds itself both prosecuting and defending
6 the same lawsuit on behalf of separate clients. This is an ethical breach mandating the
7 firm's disqualification.

8
9 **III. THE CONTEMPORANEOUS HEARING TRANSCRIPTS ESTABLISH**
10 **THAT THE PURVEYORS' CROSS-COMPLAINT SUPERSEDED**
11 **DISTRICT 40's 2004 COMPLAINTS BEFORE LEMIEUX'S CLIENTS**
12 **WERE ADDED AS DOE DEFENDANTS.**

13 At the outset of the JCCP 4408 coordinating proceeding, the Court held a series of
14 status conferences at which the status of the pleadings was one of the key agenda items.
15 The Court ordered a meet-and-confer effort to streamline the pleadings and ordered
16 District 40 to file a cross-complaint. While one could argue whether any streamlining
17 occurred, the intention—based on the hearing transcripts and the following pleadings—
18 was for the cross-complaint to supersede the two 2004 complaints District 40 brought to
19 the coordination.

20 While the hearings of December 2, 2005 and February 17, 2006 were wide
21 ranging, the December hearing resulted in an order for "the parties" to file cross-
22 complaint by January 15, 2006, with the idea that District 40's 2004 complaints would be
23 re-styled as a cross-complaint to landowner actions that, pre-coordination, had been
24 pending in Riverside County:

25
26 different counties, and will result in separate judgments. And the notices of errata do not actually
27 clarify much. They do not, for example, indicate which of District 40's 2004 complaints the
28 parties intended to answer. But again, there is no legal authority allowing a litigant to go back in
time two years and retroactively change its pleadings on this fundamental level.

1 COURT: The difficulty is that there are competing plaintiffs because of the
2 way the pleadings are heard without the cross-complaint requirement [due
3 to orders in the Riverside proceedings]. So I think what I am going to do is
4 designate the—I am going to call him the L.A. Waterworks plaintiffs to
5 style their pleadings as a cross-complaint. I think that will help us to
6 differentiate various parties, if it is styled in that fashion then we know
7 what their burdens are so they are generically plaintiffs.

8 (Exhibit I, p. 45:18-26.)

9 The result was the purveyors' cross-complaint, which identified District 40 and
10 others, including two Lemieux clients, as cross-complainants, and the vast majority of the
11 defendants in District 40's 2004 complaints as cross-defendants. In response to questions
12 about the scope of the cross-complaint, the Court stated at the February 17, 2006 status
13 conference:

14 As so that order was that, essentially he [District 40] re-pled [sic], as not
15 talked about adding any additional parties, or expanding the scope of that
16 cross-complaint, however, if counsel wish to do that, they certainly could,
17 under the order authorizing the filing of the amended pleading.

18 (Exhibit J, p. 5:17-22.)

19 Thus, the intent was to style the pleading as a cross-complaint, but in substance it
20 was an **amendment** to the 2004 District 40 complaints. As an amended pleading, the
21 2006 purveyors' cross-complaint should have superseded the 2004 District 40
22 complaints.

23 Contrary to Lemieux's argument, the Doe/Roe amendments follow a consistent
24 pattern, despite an apparent blunder in designating a number of parties to the cross-
25 complaint as "Does," instead of "Roes." Specifically, after filing its 2004 complaints,
26 District 40 added one Doe defendant to the Los Angeles case prior to the establishment of
27 the coordinated proceeding (City of Los Angeles). In October 2005, District 40 added
28

two federal defendants to both the Los Angeles case (as Does 2 and 3) and the Kern County case (as Does 1 and 2). It appears that as of October 2005, District 40 had added 185 Does in the Los Angeles case and 41 in the Kern case (with some overlap). On December 15, 2005, District 40 added SCC Acquisitions as Doe 186. Then, when the purveyors' cross-complaint was filed in January 2006, essentially all the Doe defendants in the Los Angeles and Kern cases became named defendants, consistent with the notion that the cross-complaint superseded both those actions.

Next, on March 13, 2007, the purveyors filed the first amended cross-complaint. On March 20, 2007, District 40 added White Fence Farms as Doe 187, to the first amended cross-complaint (as confirmed by the proof of service). While this should have been a "Roe" amendment, the numbering is a continuation from the Los Angeles County case.

The purveyors did the same thing for "Does" 187 through 230, which included four of Lemieux's client. Beginning with fictitiously named defendant 231, and continuing through 2218, the purveyors switched back to "Roes." However, the assigned numbers remained consistent. Thus, Does 187 through 230 should have been identified as Roes, but the intent was clear to make them parties to the first amended cross-complaint. In any event, as noted above, Does 187 to 230, including Lemieux's four clients, were all served with the first-amended cross-complaint.

IV. WOOD HAS STANDING-AND, INDEED, AN OBLIGATION—TO BRING THIS MATTER TO THE COURT'S ATTENTION.

Lemieux argues that Wood has no standing to seek its disqualification. The firm bases the argument on the assumption that it has only a potential – as opposed to actual – conflict of interest. But the record shows that the conflict is actual—Lemieux's clients are on both sides of the purveyors' cross-complaint. In the face of an actual conflict of interest, especially one that calls the entire legitimacy of the proceeding into doubt, Wood

1 has an obligation to raise the problem with the Court. (*Concat LP v. Unilever, PLC*
2 (N.D.Cal. 2004) 350 F.Supp.2d 796, 818; *Coyler v. Smith* (C.D. Cal. 1999) 50 F.Supp.2d
3 966, 971.) Moreover, two of these conflicted clients are defendants in both class actions.

4 The current situation cannot continue, particularly since a civil judgment may be
5 reversed if an attorney's concurrent representation of clients precluded one client from
6 receiving a fair trial. (*Hammett v. McIntyre* (1952) 114 Cal.App.2d 148, 155-58.) Here,
7 Lemieux argues that its clients intend to pursue claims as overlying and appropriative
8 uses of groundwater. One might well ask how they intend to do that, since according to
9 the opposition, none of them are pursuing any affirmative claims. One might also ask
10 whether they intend on pursuing appropriative claims against each other, or only against
11 selected parties, and when some notice of these claims might be provided.

12 Of course, since the entire argument is an attempt to side-step the firm's ethical
13 failure, answers to these questions are probably not forthcoming. Lemieux may wish that
14 all of its clients were either cross-complainants or cross-defendants, and it may now feel
15 that its clients all should be similarly situated with respect to the rest of the public water
16 purveyors. But that is not reality. The reality is that two of its clients joined the
17 purveyors (in, among other things, seeking prescriptive rights across the entire basin) and
18 four were sued by the purveyors.

19 / / /

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court should grant the motion and enter an order
3 disqualifying the law firm of Lemieux & O'Neill from further representation in this
4 proceeding.

5
6 DATED: July 2, 2009

LAW OFFICES OF MICHAEL D. McLACHLAN
LAW OFFICE OF DANIEL M. O'LEARY

7
8
9 By: _____ //s//

Daniel M. O'Leary
Attorneys for Plaintiff

DECLARATION OF DANIEL M. O'LEARY

I, Daniel O'Leary, declare as follows:

1. I am an attorney duly licensed to practice before the courts of the State of California and am attorney of record for plaintiffs in this case. The following is based on my personal knowledge and if called as a witness, I could and would testify competently thereto.

2. Exhibit F is a true and correct copy of the Doe amendments by which several of Lemieux & O'Neil's clients were brought into this proceeding.

3. Exhibit G is a true and correct copy of the proof of service forms filed by Los Angeles County Waterworks District No. 40 evidencing that these clients of Lemieux & O'Neil were served with the purveyors' first amended cross-complaint.

4. Exhibit H is a true and correct copy of June 23, 2009 e-mail from Keith Lemieux to Michael McLachlan.

5. Exhibit I is a true and correct copy of the portions of the hearing transcript from December 2, 2005 cited in the reply brief.

6. Exhibit I is a true and correct copy of the portions of the hearing transcript from February 17, 2006 cited in the reply brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 2nd day of July 2009 at Los Angeles, California.

/s/

DANIEL O'LEARY

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

On July 2, 2009, I caused the foregoing document(s) described as **REPLY TO OPPOSITION TO MOTION FOR ORDER DISQUALIFYING THE LAW FIRM OF LEMIEUX & O'NEIL; DECLARATION OF DANIEL O'LEARY; EXHIBITS**

(X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa Clara County Superior Court website: www.scefiling.org regarding the Antelope Valley Groundwater matter.

() (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and processing of documents for mailing. Under that practice, the above-referenced document(s) were placed in sealed envelope(s) addressed to the parties as noted above, with postage thereon fully prepaid and deposited such envelope(s) with the United States Postal Service on the same date at Los Angeles, California, addressed to:

() (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other overnight delivery service, for delivery on the next business day. Each copy was enclosed in an envelope or package designed by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

() (BY FACSIMILE TRANSMISSION) I am readily familiar with the firm's practice of facsimile transmission of documents. It is transmitted to the recipient on the same day in the ordinary course of business.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

() (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

12
REPLY RE: MOTION TO DISQUALIFY