IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, and STATE OF NEW MEXICO, *ex rel*. STATE ENGINEER, Plaintiffs, and ZUNI INDIAN TRIBE, NAVAJO NATION, Plaintiffs in Intervention, v. A&R PRODUCTIONS, et al. Defendants.	)	No. 01cv00072 BB ZUNI RIVER BASIN ADJUDICATION

OPPOSITION TO MOTION TO WITHDRAW AND FOR LEAVE TO ENTER LIMITED APPEARANCES

The United States of America ("United States"), by its undersigned counsel, hereby responds in opposition to the *Motion to Withdraw General Entries of Appearance for Members of the Western New Mexico Water Preservation Association and for Leave to Enter Limited Appearances on Behalf of Association Members When Global Issues Arise* filed May 8, 2008 (Doc. No. 1763) by Law & Resource Planning Associates, P.C. ("LRPA Motion"). The LRPA Motion fails to meet the essential requirements for either a withdrawal of representation or a limited entry of appearance. Because it seeks leave, first, for an entirely vague withdrawal without notice to the

affected clients and, second, for speculative and ill-defined future appearances, the motion must be denied.

Introduction

Assuming ethical consequences can be satisfactorily resolved,[1] the United States does not, in concept, oppose a limited appearance by which an attorney may seek to represent parties in a water adjudication only with respect to a specified common issue or proceeding, but not with regard to the parties' individual subfiles. Such a limited appearance can provide economical legal counsel to the represented parties without prejudice to other parties to the case, so long as due care is taken to ensure adequate notice to other parties, and that the record accurately indicates (1) the identities of the parties so represented, (2) the precise scope of such representation, and (3) that the parties so-represented have given informed consent. Indeed, the United States asserts that, if attorneys comply with this Court's orders, the two Subproceedings created herein for the adjudication of the water rights of the Zuni Tribe and the Navajo Nation accomplish precisely such a limitation of representation by allowing counsel to enter appearances to represent individuals with respect to their opposition to the Indian water rights claims without having to also provide representation with respect to the main case adjudication of those individuals' own subfiles.

The LRPA Motion fails to constitute a cognizable withdrawal of the previous general appearances entered by the attorneys, and further fails to propose a

[1] Two sources cited by the LRPA Motion, *Handbook on Limited Scope Legal Assistance – A Report of the Modest Means Task Force* 143 (Washington, DC: ABA Section of Litigation, 2003), and Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 Geo. J. Legal Ethics 563, 576 (2007), emphasize that rules of professional conduct, particularly those governing communications between persons receiving limited representation and opposing counsel, should be clarified. The New Mexico Rules of Professional Conduct, specifically Rule 16-402, do not appear to have been amended as recommended by these sources.

reasonably defined limited appearance.[2] The motion's fundamental problem is that it confuses the plausible benefits of a limited entry of appearance with a wholesale abdication of a lawyer's responsibility to know, and keep the Court and parties to a lawsuit informed about, the identity of the party or parties the lawyer is representing.

This error is starkly presented by Paragraph 18 of the motion, which asserts: "[s]uch limited entries of appearance will alleviate the need to continually evaluate membership lists and withdraw as counsel for defendants who are no longer members and enter appearances for newly joined members." The LRPA Motion cites rules and studies that deal, in one way or another, with the concept of a limited appearance. However, none of those sources contemplate an attorney being able to make a limited appearance in a case without having to specify both the clients who are represented and the scope of such representation, and, if there are changes to either the clientele or the scope, to promptly advise the court and other parties of such.

Part of the problem may be that, for whatever reason, the membership of the Western New Mexico Water Preservation Association ("Association"), or their counsel, at one time apparently believed it was pertinent to inform the Court and other parties to this action who the members were and that they had banded together. In truth, neither of those pieces of information are germane to any issue in this lawsuit. Assuming the attorneys representing Association members can file proper motions to withdraw their existing appearances, the solution to their problem with the Association's ever-changing membership would appear to be entry of an appearance on behalf of a single Association

[2] The LRPA Motion also gives little heed to, and proposes no solution for, the more than 90 motions to withdraw previously filed on the record in March of this year. Those motions will remain pending until they are granted, denied, stricken, or, themselves, withdrawn.

member who has standing and has agreed to advance the Association's interests in this litigation.

Argument

The LRPA Motion Fails to Meet Minimal Requirements for a Motion to Withdraw.

The LRPA Motion asserts, at 1, that it is filed on behalf of "the membership of the Western New Mexico Water Preservation Association."[3] The motion thereafter fairly frequently equivocates between references to the membership of the Association and to the Association itself, but admits, at Paragraph 6, that the Association itself is not a party to this action and, at Paragraph 2, that some of the members of the Association are also not parties to this case: "Most of the membership has been joined as defendants in this adjudication." (Emphasis added) To the extent the motion was submitted on behalf of any individual or entity that has neither been joined as a defendant nor granted leave to intervene in this case, it was improperly filed and must be stricken or denied.

The LRPA Motion otherwise provides no information whatsoever about the identities of the parties to this case who would be affected by the withdrawal of appearance it seeks. The motion essentially concedes, in Paragraph 7, that the attorneys who filed the motion do not themselves know who "the membership of the Western New Mexico Water Preservation Association" are. It is therefore a fair inference that they do not know on whose behalf they have filed the motion. If the attorneys who filed the LRPA Motion are unable to identify the parties they represent, and seek to cease

[3] The motion thus purports to be a motion by the clients seeking to be relieved of representation by their attorneys, rather than a motion by the attorneys seeking to be relieved of the duties of representing their clients.

representing, it is certain that the Court and the other parties to this case have much less ability to do so.

The LRPA Motion asserts, at Paragraph 22, that it is opposed. However, even if it were unopposed, the motion wholly fails to meet the requirements of D.N.M.LR-Civ 83.8 for a withdrawal of appearance. Subsection (a) of that rule, governing unopposed motions to withdraw, requires that:

> The motion to withdraw and proposed order must indicate consent of the client represented by the withdrawing attorney and:
> - notice of appointment of substitute attorney; or
> - a statement of the client's intention to appear *pro se* and the client's address and telephone number.

The LRPA Motion does not even provide the name of the affected clients. In addition, D.N.M.LR-Civ 83.8 (b), concerning opposed motions to withdraw, requires that "[t]he attorney must file and serve on all parties, including the client, a motion to withdraw." (Emphasis added.) The certificate of service attached to the LRPA Motion indicates that the motion was served only on CM/ECF Participants and provides no basis for concluding that the unidentified clients affected by the motion have ever received notice of it. Indeed, given that the attorneys who filed the motion apparently do not know who the affected clients are, it seems quite likely that the clients have not been given any such notice.

In sum, the LRPA Motion was filed on behalf of unidentified persons who may or may not be parties to this case and who do not appear, on the record, to have been given notice that they are seeking to become unrepresented. The motion fails to inform the Court,[4] the affected clients, or other parties of what representation relationships it

[4] Granting the LRPA Motion would provide no guidance whatsoever to the Clerk's Office with regard to maintenance of the docket listing of parties and their counsel.

seeks to sever, and therefore wholly fails to meet even the requirement of D.N.M. LR-Civ. 7.1 that "[a] motion must . . . state with particularity . . . the relief sought." Much less does it meet the requirements of Rule 83.8 for a motion to withdraw. Accordingly, insofar as the LRPA Motion constitutes a motion to withdraw, it must be denied.

The LRPA Motion is not a Limited Appearance Motion

For reasons much like those discussed in the preceding section, the LRPA Motion wholly fails to meet the requirements for a motion pursuant to D.N.M. LR-Civ. 83.4(c) for leave to make a limited entry of appearance: (1) the motion does not identify the parties on whose behalf the limited appearance is sought, (2) does not disclose the scope of the representation, and (3) does not, itself, give any indication that the movants or affected clients have been notified or have given their informed consent.[5] Again, it fails to state with particularity the relief sought and thus does not meet D.N.M. LR-Civ. 7.1's most basic requirement for a motion. Charitably construed, the motion appears to be a request that the Court delegate to the unidentified and ever-changing[6] membership of the Assocation the authority reserved by Rule 83.4(c). On behalf of these unidentified members of an organization that is not a party to this case, and who, themselves, may or may not be parties, the motion seeks *carte blanche* "leave to enter a limited appearance if and when the membership considers it to be in its best interest." LRPA Motion, at page 6 ("wherefore" clause). It therefore appears to be an attempt by the attorneys who filed the motion to obtain the prospective right to appear in this case whenever they choose,

[5] Instead, the motion, at Paragraph 14, proposes to obtain such consent in the future, "if the Court requires."

[6] "The membership list is constantly in flux . . . ." LRPA Motion at Paragraph 7.

without any obligation to identify, or even know, the parties on whose behalf they are appearing.[7] For these reasons alone, the motion must be denied.

Setting aside these obvious defects in the motion, to the extent the relief sought can be discerned, it does not constitute a limited appearance within the meaning contemplated for that term by any of the sources the motion cites. The motion, at Paragraph 10, asserts that limited entries of appearance are "specifically authorized" by Local Rule 83.4(c). To the contrary, the plain language of that rule prohibits limited appearances "except by Court order." Moreover, the Rule references only limited appearances "as provided in N.M.R. Prof'l Conduct 16-303(E)." That Rule, in turn, provides: "In all proceedings where a lawyer appears for a client in a limited manner, that lawyer shall disclose to the court the scope of representation." The LRPA motion, however, overtly leaves the scope of representation to be determined at a future date in the sole discretion of the unknown "membership" of the Association, and therefore does not satisfy the basic requirement that Rule 16-303(E), and by derivation Local Rule 83.4(c), impose on limited appearances.

Paragraph 10 of the LRPA motion also references N.M.R. Prof'l Conduct 16-102(C). That rule, however, permits a limitation of a lawyer's representation of a client only if "the client gives informed consent." The LRPA motion does not identify the clients to be represented by the requested limited appearances or even certify that they have been informed of the motion, and wholly fails to establish that they have given informed consent. Again, the motion, at Paragraph 14, makes only a prospective offer to

[7] Notably, any relationship an attorney might have with unidentified and unknown persons appears unlikely to comply with the Rules of Professional Conduct governing the client-lawyer relationship. See, e.g., N.M.R. Prof'l Conduct 16-102(A) (lawyer obliged to consult with client and abide by client's decisions); 16-104(A) (duty to keep client reasonably informed); and 16-104(B) (duty to inform client so as to permit informed decision-making).

obtain client consent for limited representation "if the Court requires," and proposes, in Paragraph 13, that counsel be allowed to withdraw from such representation "without further need to acquire consent of all members." The motion is therefore in conflict with Rule 16-102(C).

The LRPA Motion, at Paragraph 11, cites to the *Handbook on Limited Scope Legal Assistance – A Report of the Modest Means Task Force* (Washington, DC: ABA Section of Litigation, 2003) ("ABA Handbook"). That document, which deals primarily with examples from domestic law and other fields of general practice and is largely oblivious to the demands of complex multi-party litigation, discusses aspects of "limited scope legal assistance," defined as follows: "By 'limited scope legal assistance', we mean a designated service or services, rather than the full package of traditionally offered services. The client and lawyer select the service the lawyer will provide." *Id*. at 4. The LRPA motion, however, identifies neither the clients nor the designated services to be involved in the requested limited appearance.

The LRPA motion's relationship to the kind of practice detailed in the ABA Handbook is speculative at best. Immediately after the motion vaguely references, in Paragraph 17, the ABA Handbook analysis of methods for structuring limited scope representation agreements, Paragraph 18 of the motion leaps to the conclusion that "[s]uch limited entries of appearance will alleviate the need to continually evaluate membership lists and withdraw as counsel for defendants who are no longer members and enter appearances for newly joined members." The transition is a *non sequitur* of startling proportions. From a document that emphasizes the need to work out detailed retainer agreements with clients who are to be represented on a limited scope bases, ABA

Handbook at 73-74, the LRPA Motion attempts to justify a right to appear on behalf of "clients" who are not even known by the attorneys and who therefore cannot possibly have discussed or entered into retainer agreements of any sort. There is absolutely nothing in the ABA Handbook that suggests limited scope legal assistance, or a limited entry of appearance, can absolve an attorney of the obligation to know who he or she is representing, and to inform affected courts and other parties accordingly.

The LRPA Motion also cites, in Paragraph 21, Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 Geo. J. Legal Ethics 563 (2007). That article, at 567, defines limited scope representation as "an agreement in which a client hires an attorney to assist with specific elements of a legal matter or to perform discrete tasks, either for a fee or pro bono." Because the LRPA Motion specifies neither clients nor elements nor discrete tasks in this legal matter, it fails to propose anything that fits within the Farley article's definition of limited scope representation.

Accordingly, the LRPA Motion is not in fact a motion for limited entry of appearance pursuant to D.N.M. LR-Civ. 83.4(c). It would be more properly characterized as a motion to waive Rule 83.4(c) for the duration of this lawsuit, but it provides no ground such relief. To the contrary, the LRPA Motion, through its vagueness with respect to both the identities of parties to be represented and the scope of such representation, exemplifies exactly why Rule 83.4(c) is necessary and should remain in effect in this case.

The Existence of the Association is Irrelevant

The central problem complained of in the LRPA Motion is that it is difficult to keep track of the membership of the Association. This, however, only became a problem before the Court because the membership, apparently, originally asked the law firm retained by the Association to enter its appearance on behalf of all the individual members of the Association, without understanding or accepting responsibility for the consequences of that choice. If, instead, the attorneys had entered an appearance only on behalf of one member, or a few key members, who had standing to raise the issues of concern to the Association and who agreed to abide by the Association's decisions with respect to litigation of those issues, it would have been relatively easy for the attorneys to maintain contact with their clients, and the Court and other parties need never have been aware of the Association's existence, or of whatever agreement its members had with regard to funding the litigation of the issues in question. The problem was not created by the actions of other parties or by any unfairness in the rules applicable to this proceeding; it was created by a tactical mistake made by the members and the attorneys who undertook to represent them.

One course of action that could clear the record prospectively would be the following:

1. The CM/ECF Docket in this case erroneously lists the Western New Mexico Water Preservation Association as a party, despite the fact that the Association has never been joined and has never been granted leave to intervene. This erroneous listing on the Docket is a continuing source of confusion and compounded docketing error and should be ordered promptly stricken.

2. The more than 90 motions to withdraw filed in March of this year must be acted upon. Although counsel for the United States has noted some name discrepancies in the motions, and some conflicts between them and updated entries of appearance filed nearly simultaneously, the motions are, on the record, unopposed. The simplest way to secure their prompt disposition would be for the counsel who filed them to provide the Court with a single proposed form of order that references all of the motions by date, document number, and defendant name.
3. A single motion to withdraw, consistent with both D.N.M.LR-Civ. 83.8(a) and (b), should be filed for any remaining general appearances that need to be terminated. The motion should identify each affected representation by defendant name and the date and document number of the appearance(s) being withdrawn. The affected parties should be grouped as to whether they have consented to the withdrawal or the attorneys have lost contact with them. For those the attorneys have lost contact with, the last known address should be stated. For those that have consented, the motion should assert the client intends to appear *pro se* and state the client's address and telephone number. The motion should provide notice to all affected clients that objections must be served and filed within fourteen (14) calendar days from date of service of the motion, and that failure to object within this time constitutes consent to grant the motion. The certificate of service for the motion should show that it has been served on all of the affected clients at their last known addresses.
4. Any attorneys who desire to undertake limited representation of any individuals or group of individuals may enter into a written agreement with the clients which

> specifies the scope of the representation and provides for such representation to be undertaken, in Court, by means of limited appearances on behalf of designated parties to this case who specifically agree to abide by the decisions of the parties to the agreement with regard to such representation. The agreement need not, and should not, be referred to by the appearances filed with the Court. However, the appearances, which should be submitted as attachments to a motion pursuant to D.N.M.LR-Civ. 83.4(c), must identify the designated clients being represented and the scope of the representation, and show that the clients have consented to the limited representation.

There may be other workable solutions, and counsel for the United States expressly disclaims any intention to provide legal advice to the Association, its members, or their attorneys. However, the United States does assert that any solution will be satisfactory only insofar as it is based on meticulous attention to the state of the record in this case.

Conclusion

For the foregoing reasons, the United States urges the Court to deny the LRPA Motion, without prejudice to the ability of any party to submit proper motions to withdraw pursuant to D.N.M. LR-Civ. 83.8, or for limited entry of appearance pursuant to D.N.M. LR-Civ. 83.4(c).

Respectfully submitted June 9, 2008.

Electronically filed.

_____/s/_____
BRADLEY S. BRIDGEWATER
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, CO 80294
(303) 844-1359
Attorney for the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 9, 2008, I filed the foregoing *Opposition To Motion To Withdraw And For Leave To Enter Limited Appearances* electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

_____/s/_____
Bradley S. Bridgewater