CASE NO. 17-4062

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA Ex. Rel.
MARK CHRISTOPHER TRACY, *Appellant*,

v.

EMIGRATION IMPROVEMENT DISTRICT, et al., *Appellees*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
Case No.: 2:14-CV-00701 JP
The Honorable Jill N. Parrish

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

Jeremy R. Cook
William G. Garbina
COHNE KINGHORN, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
Attorneys for Emigration Improvement District, Fred A. Smolka, Michael Hughes, Mark Stevens, David Bradford, Lynn Hales, and Eric Hawkes

Adam T. Mow
JONES WALDO HOLBROOK & MCDONOUGH
170 S. Main, Ste. 1500
Salt Lake City, UT 84101
Attorneys for Carollo Engineers, Inc.

Robert L. Janicki
Michael L. Ford
STRONG & HANNI
9350 South 150 East, Ste. 820
Sandy, UT 84070
Attorneys for R. Steve Creamer

Barry N. Johnson
James C. Dunkelberger
BENNETT TUELLER JOHNSON & DEERE
3165 E. Millrock Dr., Ste. 500
Salt Lake City, UT 84120
Attorneys for Aqua Engineering and Aqua Environmental Services, Inc.

APPELLEES'
RULE 26.1(a) CORPORATE DISCLOSURE STATEMENTS

In accordance with Federal Rules of Appellate Procedure 26.1(a), Defendant Carollo Engineers, Inc. hereby declares that it does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

JONES WALDO HOLBROOK & McDONOUGH

By: /s/ Adam T. Mow
Adam T. Mow
Attorneys for Carollo Engineers, Inc.

In accordance with Federal Rules of Appellate Procedure 26.1(a), Defendants Aqua Engineering and Aqua Environmental Services, Inc. hereby declare that they do not have any parent corporation and no publicly held corporation owns 10% or more of their stock.

BENNETT TUELLER JOHNSON & DEERE, LLC

By: /s/ James C. Dunkelberger
James C. Dunkelberger
Attorneys for Aqua Engineering and Aqua Environmental Services, Inc.

FED. R. APP. P. 28(a)(2) TABLE OF CONTENTS

FED. R. APP. P. 28(a)(3) TABLE OF AUTHORITIES

Cited Cases

Statutory Authorities

Rules

10TH CIR. R. 28.2(C)(1) STATEMENT OF RELATED CASES

There are no related cases.

FED. R. APP. P. 28(a)(5) STATEMENT OF THE ISSUES

I. Whether the District Court erred by not holding an evidentiary hearing prior to the disqualification of counsel.

II. Whether the District Court erred by failing to reinstate Christensen & Jensen after they represented in their Response and Request for Reconsideration that they intended to pay the damages arising from the wrongful lien.

FED. R. APP. P. 28(a)(6) STATEMENT OF THE CASE

Utah law makes a "person who records or causes to be recorded" a wrongful lien liable to the property owner for damages. Utah Code Ann. § 38-9-203(3). On August 20, 2015, after advising *qui tam* relator Mark Christopher Tracy ("Mr. Tracy") that recording a *lis pendens* could result in damages, Mr. Tracy's counsel, Phillip Lowry, signed and recorded a *lis pendens* against a water right held by Emigration Improvement District ("EID"). The underlying lawsuit did not in any way challenge EID's ownership of, or seek to change interests in, the subject water right.

On March 4, 2016, EID filed a Motion to Release *Lis Pendens* and for Attorneys' Fees. (Aplt. App. at 93). EID argued that Mr. Tracy, his attorney,

Phillip Lowry, and Mr. Lowry's law firm, Christensen & Jensen, P.C. ("Christensen and Jensen"), recorded a wrongful *lis pendens* regarding this lawsuit. EID requested an order from the District Court releasing the *lis pendens* and awarding them $10,000 in statutory damages, as well as attorneys' fees, "to be paid by Mark Christopher Tracy and his counsel." After the motion was fully briefed, the District Court heard oral argument and announced its decision from the bench. The District Court ruled that the *lis pendens* was wrongful and that statutory damages and an award of attorneys' fees were appropriate. (Aplt. App. at 185-86). Mr. Tracy has not appealed the District Court's finding that the *lis pendens* was wrongful or that damages were appropriate.

On June 9, 2016, EID filed a proposed judgment holding the named plaintiff, Mark Tracy, his attorney, Phillip Lowry, and Mr. Lowry's law firm, Christensen & Jensen, jointly and severally liable for the wrongful lien and the attorneys' fees. (Aplt. App. at 191). On June 16, 2016, Mr. Lowry filed a document entitled "Objection to Proposed Judgment" (the "Objection"), purportedly on behalf of Mr. Tracy and Christensen & Jensen. (Aplt. App. at 200). But the Objection failed to raise any arguments on Mr. Tracy's behalf. Instead, the Objection asserted only that Mr. Lowry and Christensen & Jensen should not be held liable for the

wrongful lien. In short, while the Objection advanced the interests of Mr. Lowry and Christensen & Jensen, it did so at the expense of their client's interests.

The District Court was concerned that the position taken by Mr. Lowry and Christensen & Jensen was directly adverse to their client, Mr. Tracy. Because the client's interests appeared to be directly adverse to those of counsel, the Court issued an Order to Show Cause, which detailed the basis for the Court's concern and instructed Mr. Lowry and Christensen & Jensen to show why they should not be disqualified for the apparent conflict of interest. (Aplt. App. at 204-205).

On June 24, 2016, Mr. Tracy's counsel filed a Response to Order to Show Cause (Aplt. App. at 211). In the response, they argued that Mr. Tracy consented to being represented by a lawyer with a conflict of interest. In support of this argument, Mr. Tracy's counsel asserted the following facts: (1) that Mr. Tracy is an attorney; (2) that "he confirmed in writing that he consents to C&J's [Mr. Tracy's counsel's] objecting to joint and several liability;" and (3) that "[t]hough Mr. Tracy's interests concerning the proposed judgment perhaps diverge from C&J's interests, C&J and Mr. Tracy are not actively asserting adverse claims against each other." (Aplt. App. at 212).

The Response to Order to Show Cause did not include a request for an evidentiary hearing or include any argument that the Court was required to hold an

evidentiary hearing. Likewise, nothing in the Response to Order to Show Cause indicated that Mr. Tracy's counsel had additional facts relevant to the issue which had not been presented, that Mr. Tracy and his counsel were withholding evidence based on concerns over the attorney-client privilege, or that Mr. Tracy and his counsel had not fully presented all facts and arguments they had pertaining to the issue. The District Court thus had no reason to know an evidentiary hearing would be necessary or even helpful.

On August 4, 2016, the District Court issued its Memorandum Decision and Order Disqualifying Christensen & Jensen. (Aplt. App. at 217-228). The District Court considered all the factual assertions and arguments submitted by Mr. Tracy and his counsel. The District Court concluded that Utah Rule of Professional Conduct 1.7(b) had been violated and, based on the required multi-factor analysis, determined that disqualification was warranted.

However, the District Court did not at that time decide who was liable for the wrongful lien. Instead, it struck the Objection to the proposed judgment and ordered Mr. Tracy to obtain new counsel so the case could proceed. (Aplt. App. at 227). Additionally, the District Court required Mr. Tracy's new counsel to respond on Mr. Tracy's behalf to the proposed judgment for damages stemming from the wrongful lien. (Aplt. App. at 227).

Though the Order required otherwise, Mr. Tracy's new counsel entered their appearance for the limited purpose of "responding to the [Proposed] Order Granting Motion to Release Lis Pendens, for Attorneys' Fees and Costs and for Damages Pursuant to Utah Code Ann. § 38-9-203 Filed on Behalf of Defendant Emigration Improvement District [Docket No. 102-2] as ordered in the Memorandum Decision and Order Disqualifying Christensen & Jensen P.C. entered on August 4, 2016 [Docket No. 159], and for proving legal advice to Mr. Tracy regarding the same." (Aplt. App. at 229-30).

Mr. Tracy, through his new counsel, requested reinstatement of Christensen & Jensen and asserted that he had previously waived the conflict of interest with Christensen & Jensen. (Aplt. App. at 235-37). In his Motion for Reconsideration, Mr. Tracy stated he consented to the objection to joint and several liability filed by Christensen & Jensen, and requested that the Court reinstate Christensen & Jensen as his counsel. Simultaneously, Christensen & Jensen responded to the Memorandum Decision and Order Disqualifying Christensen & Jensen, P.C. (Aplt. App. at 245). Contrary to their agreement that Mr. Tracy would assume liability for the damages stemming from the wrongful lien, Christensen & Jensen advised the Court in its Motion for Reconsideration that it intended to pay those damages. (Aplt. App. at 248).

Emigration Improvement District and another defendant moved for a dismissal pursuant to Fed. R. Civ. P. 41, on the basis that Mr. Tracy had failed to comply with the Court's order to obtain new counsel to represent him in the entirety of the case. (Aplt. App. at 264-65).

On March 3, 2017, the District Court entered its Order Denying Plaintiff and Former Counsel's Request for Reconsideration, Defendants' Motions to Dismiss, and Plaintiff's Motion to Stay. (Aplt. App. at 258). The District Court determined that Mr. Tracy and Christensen & Jensen had not met the criteria that would permit it to entertain a motion for reconsideration, and that nothing in Mr. Tracy's motion warranted alteration of the Court's previous determination. (Aplt. App. at 263). In addition, the District Court found that while Christensen & Jensen's "contrite withdrawal of its original objection to the proposed judgment and agreement to be held jointly and severally liable is appreciated, it is plainly insufficient to undo the taint on the underlying lawsuit." (Aplt. App. at 263). The District Court also denied the Motions to Dismiss based on Mr. Tracy's failure to obtain counsel and gave Mr. Tracy another opportunity and an additional 21 days to obtain counsel to represent him on the entirety of the case. (Aplt. App. at 263).

After the passage of 21 days Mr. Tracy filed a "status report" with the District Court advising that he had failed to retain new counsel, purportedly due to

conflict issues. After more than 236 days passed without Mr. Tracy having counsel to represent him in the entirety of the case, the District Court dismissed the case, without prejudice. (Aplt. App. at 279). This appeal followed.

FED. R. APP. P. 28(a)(7) SUMMARY OF THE ARGUMENT

Mr. Tracy's first issue on appeal is the claim that the District Court was required to hold an evidentiary hearing prior to disqualifying Mr. Tracy's counsel, Christensen and Jensen. It is well established that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Mr. Tracy never requested an evidentiary hearing or argued that the District Court was required to hold an evidentiary hearing, so this issue is not properly before this Court on appeal.

In addition, even if this Court were to find that the issue was preserved for appeal, Mr. Tracy's claim that an evidentiary hearing should have preceded disqualification is specious. There were no facts in dispute, and Mr. Tracy was not prevented from presenting any and all evidence he deemed necessary. He asserted several facts in his response to the Order to Show Cause, and asserted additional facts in his subsequent request for reconsideration – all of which was considered, but which also was insufficient. Tellingly, Mr. Tracy did not proffer and has not

stated what evidence he would have presented at a hearing or how that evidence would be different in kind or quality from that which he presented.

Mr. Tracy next argues that the District Court abused its discretion by disqualifying Christensen & Jensen instead of imposing some other type of remedy. However, under the facts as presented, disqualification was well within the District Court's discretion. The argument advanced – that the conflict had been waived because Christensen & Jensen had agreed with Mr. Tracy that Mr. Tracy alone would assume all liability – does nothing to assuage concerns over whether the client has received the benefit of independent counsel. Rather, it heightens those concerns.

To fully appreciate the heightened concern of the District Court, it is necessary to understand the larger context of the issue. At the hearing on the motion to have the *lis pendens* declared a wrongful lien, the District Court pressed Mr. Tracy's counsel for some legal authority to support the argument that the *lis pendens* was appropriate. The statutory provision Mr. Tracy relied on clearly did not say what Mr. Tracy claimed it did. The District Court then asked Mr. Tracy's counsel to identify "a single case decided by any court in the United States" establishing that equitable relief is authorized by the False Claims Act, such that recording the *lis pendens* was proper. Counsel could not. (Aplt. App. at 158-159).

What had been identified to Mr. Tracy as a risk, that the *lis pendens* could be deemed a wrongful lien, was more a certainty, thus amplifying the concern that solely Mr. Tracy would be responsible for ensuing damages.

In the Order to Show Cause, the District Court advised Mr. Tracy of the issue, outlined the facts which raised the conflict of interest issue, explained its concerns, and warned of the potential for disqualification. Quite simply, Mr. Tracy was unable to adduce any evidence that the conflict was of the waivable variety, rather than unwaivable. Even if the conflict was waivable, Mr. Tracy failed to show that it was waived in full compliance with the Rules of Professional Conduct. The assumption this Court is being asked to make – that Mr. Tracy could have presented more or better evidence through live testimony than through the unopposed Declaration he submitted – is unwarranted.

The District Court applied the correct rule of law and analyzed the required factors to determine whether disqualification of Mr. Tracy's counsel was warranted. Applying its discretion, the District Court determined the filing of a pleading directly adverse to its own client was an egregious violation of the Rules of Professional Conduct, which triggered a huge delay in the case to the detriment of all parties. Given that the case was procedurally in its infancy with Motions to Dismiss premised on Rule 12(b)(6) pending, and considering the issue in the

context of how the conflict of interest was created and handled, the District Court determined continued representation would carry its taint throughout the proceeding and through trial.

Finally, the Court did not err in determining that the conflict was not rendered moot by Mr. Tracy and Christensen and Jensen's Motions to Reconsider, and therefore not reversing its decision to disqualify Christensen and Jensen.

FED. R. APP. P. 28(a)(8) ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN NOT HOLDING AN EVIDENTIARY HEARING.

A. Standard of Review

Whether an evidentiary hearing is required prior to disqualification of counsel is dependent upon various factors. *Weeks v. Indep. Sch. Dist. No. I-89 of Okla. City*, 230 F. 3d 1201, 1212 (10th Cir. 2000). The trial court's determination regarding those factors is a matter of judicial discretion. *Weeks v. Indep. Sch. Dist. No. I-89 of Okla. City*, 230 F. 3d 1201, 1208 (10th Cir. 2000). Factual findings regarding attorney conduct will not be disturbed on appeal unless there is no reasonable basis to support those conclusions. *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994).

B. The issue of whether an evidentiary hearing should have been held prior to disqualification of counsel is not properly before this Court because it was not raised below.

Mr. Tracy claims the District Court committed a reversible error by failing to hold an evidentiary hearing prior to entering the Memorandum Decision and Order Disqualifying Christensen & Jensen. However, Mr. Tracy never requested an evidentiary hearing. It is well established that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). The Court explained the rationale for the rule:

> [T]his is "essential in order that parties may have the opportunity to offer all the evidence that they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, [the opposing party] would, or could, offer ..., but this is only because [it] has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, [the opposing party] should have the opportunity to present whatever legal arguments he may have....

Id. (quoting *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941)). Thus, one of the primary purposes of the rule is to serve judicial efficiency. A case should not be appealed and remanded on an issue that neither the lower court nor the other litigants were given a chance to consider.

As required by the Order to Show Cause, Mr. Tracy's counsel filed a response in which certain facts were asserted and arguments were advanced. The response did not include a request for an evidentiary hearing or include any argument that the Court was required to conduct an evidentiary hearing. At no time prior to the Court's ruling did Mr. Tracy or his counsel ever advise the Court that they wanted a hearing or believed an evidentiary hearing was mandated by the law. Consequently, the issue is not properly before this Court.

Mr. Tracy will likely assert the issue was preserved for appeal because a footnote in a Request for Reconsideration filed on behalf of Mr. Tracy's counsel states: "To the extent the Court remains concerned about the degree to which Mr. Tracy was informed about the possibility that the lis pendens would be found wrongful or the strategy adopted in the Objection, C&J respectfully requests an *in camera* hearing…." (Aplt. App. at 247). However, the request was conditional and did not argue that an evidentiary hearing was required. Moreover, a suggestion in a footnote that the Court hold an *in camera* hearing is not sufficient to preserve on appeal the argument that the Court was required to hold an evidentiary hearing. *See Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141 (10th Cir. 2007) (a "'vague and ambiguous' presentation of a theory before the trial court" does not "preserve that theory as an appellate issue"). Similarly, federal appellate

courts generally do "not consider an issue raised but not argued in the district court." *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 575 (10th Cir. 2000). Where an appellant fails to develop any argument on a point while before the district court, appellate courts refuse to address the issue. *Harrell v. United States*, 443 F.3d 1231, 1233 (10th Cir. 2006).

Moreover, "an untimely motion, by itself, is not sufficient to preserve an issue for appellate review." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993) (citing *Melton v. Oklahoma City*, 879 F.2d 706, 718 n. 15 (10th Cir. 1989) (issue raised for the first time on a motion for judgment N.O.V. not properly preserved), *vacated on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc)); *See also Burnette v. Dresser Indus.*, 849 F.2d 1277, 1285 (10th Cir. 1988) (arguments raised on motion for reconsideration were not considered by the trial court and would not be addressed on appeal). Even if the request for an *in camera* hearing were construed as a request for an all-encompassing evidentiary hearing on the issue of disqualification, the request was untimely. It was made after the order disqualifying Mr. Tracy's counsel. A fair review of the record indicates the issue of an evidentiary hearing was neither raised before nor ruled upon by the District Court.

In summary, Mr. Tracy failed to preserve the argument that the District Court was required to hold an evidentiary hearing prior to disqualifying counsel.

C. If the issue is deemed to have been preserved for appeal, the District Court did not abuse its discretion because an evidentiary hearing was unnecessary in this case.

After identifying a conflict of interest and explaining the factual basis for the conflict of interest, the District Court issued an Order to Show Cause indicating that the Court was concerned that the Objection presented an unwaivable conflict of interest and requiring Mr. Tracy's counsel (Mr. Lowry and his firm, Christensen & Jensen) to show cause "why they should not be disqualified from representing Mr. Tracy due to the apparent conflict of interest." (Aplt. App. at 205).

Mr. Lowry and Christensen & Jensen submitted a response to the Order. In their response, they asserted that Mr. Tracy is an attorney, who had "confirmed in writing that he consents to C&J's [Mr. Tracy's counsel's] objecting to joint and several liability," and that, "[t]hough Mr. Tracy's interests concerning the proposed judgment perhaps diverge from C&J's interests, C&J and Mr. Tracy are not actively asserting adverse claims against each other." (Aplt. App. at 212). In addition to asserting these grounds, Mr. Lowry and Christensen & Jensen argued that the conflict did not extend to the *qui tam* claims which they asserted were separate and distinct from the wrongful lien issue. Mr. Lowry and Christensen &

Jensen argued the assertion of joint and several liability was a "frivolous argument" and could not give rise to an actual conflict of interest. Finally, Mr. Lowry and Christensen & Jensen argued they could not be held liable since they were not parties to the lawsuit.

Mr. Lowry and Christensen & Jensen did not request an evidentiary hearing. They did not claim that their response to the Order to Show Cause was incomplete. They did not claim they had additional evidence which had not been offered. They did not claim that their briefing was too limited or request that a hearing be scheduled for the purposes of oral argument so they could explain their position. They did not indicate that they had concerns about potentially waiving the attorney-client privilege. They did not request that the Court allow them to file a response under seal. (Aplt. App. at 211).

Mr. Tracy, however, now asserts, "the district court abused its discretion in failing to hold an evidentiary hearing and failing to take or consider any evidence or make any findings in relation to the decision to disqualify Mr. Tracy's choice of counsel." (Brief of Apnt, at 16).

Appellees respectfully disagree.

An evidentiary hearing is not always required before counsel is disqualified, and was certainly not required here. A similar argument was made in *Weeks v.*

Indep. Sch. Dist. No. I-89 of Okla. City, 230 F.3d 1201 (10th Cir. 2000). In that case, Weeks sued the school district for alleged violations of § 1983, the Americans with Disabilities Act, Title VII, and the Fair Labor Standards Act. Weeks' lawyer engaged in *ex parte* communications with key supervisory personnel employed by the defendant school district. When the school district learned of the *ex parte* communications, it moved for a protective order to prohibit additional contact and sought to have the evidence obtained excluded from trial. The lawyer admitted having the *ex parte* communications, but asserted the communications did not violate the applicable rule of professional conduct because the employees lacked authority to bind the school district. The district court disagreed, granted the motion, and also *sua sponte* disqualified Weeks' lawyer from further participation in the case. *Weeks*, 230 F.3d at 1205.

On appeal, the lawyer asserted that disqualification without a prior evidentiary hearing was improper. This Court disagreed. As does Mr. Tracy, the lawyer in *Weeks* relied on *Fullmer v. Harper*, 517 F.2d 20 (10th Cir. 1975) to argue that an evidentiary hearing was required.

In *Weeks*, this Court concluded that an evidentiary hearing was not necessary because there were no disputed facts, there was no additional evidence the parties needed to present, and the issue was not decided based upon mere

colloquy, but was rendered after briefing. Additionally, this Court considered it significant that an adequate record had been made which allowed for meaningful review on appeal.

The same is true here. There are no disputed facts. Mr. Tracy had ample opportunity to present all the evidence he deemed relevant to the issue. Additionally, by requiring Mr. Tracy's counsel to respond to the Order to Show Cause, the Court provided Mr. Tracy and his counsel a full opportunity to brief the issue. In fact, through their Motions to Reconsider, both Mr. Tracy and Christensen & Jensen had two opportunities to present evidence and brief the issue.

Notwithstanding these opportunities, Mr. Tracy asserts he was constrained from making a complete record by concerns over waiving the attorney-client privilege and revealing work product. After they were disqualified, and it their request for reconsideration, Christensen & Jensen suggested an *in camera* hearing may be appropriate. (Aplt. App. at 247).

However, Mr. Tracy's counsel informed the district court, "C&J has obtained Mr. Tracy's permission (through his independent counsel), however, to disclose that Mr. Tracy and C&J had more than one discussion about the lis pendens and the risks associated with filing it. During those privileged discussions, Mr. Tracy was fully informed by C&J about the risks associated with

filing the lis pendents [*sic*] and agreed that he would be financially responsible if the lis pendens was removed and the court awarded damages." (Aplt. App. at 247-48). Additionally, Mr. Tracy advised the District Court of the same information through his Declaration. (Aplt. App. at 241).

Given this disclosure, it is hard to imagine that additional evidence remained undisclosed.

Appellees assert the appellate record is more than sufficient. Alternatively, if the appellate record is lacking in some respect, it can only be due to strategic decisions made by Mr. Tracy and his counsel (including his subsequent legal counsel). To the extent they deemed it necessary to waive privilege to advise the Court of the purported waiver of the conflict, they did so. The District Court was fully apprised of the agreement between Mr. Tracy and his lawyers that he would bear the risk of a wrongful lien. The District Court was fully apprised that Mr. Tracy was advised of the risk that the *lis pendens* would be deemed a wrongful lien. Notwithstanding this evidence, the District Court concluded disqualification was warranted.

None of the Appellees objected to the evidence, the method by which it was adduced, or the subsequent introduction of evidence in the Requests for

Reconsideration. Significantly, the evidence was unopposed. Two teams of lawyers presented evidence and briefed the issues for Mr. Tracy.

Under these circumstances, there is no reason to conclude that an evidentiary hearing would have further illuminated the issue. As the Court of Appeals decided in *Weeks*, where the evidence submitted is undisputed, where there is no need for additional evidence, where instead of colloquy the parties had the opportunity to fully brief the issue, an evidentiary hearing is not required before disqualification.

The failure to hold an evidentiary hearing was not an abuse of discretion, and the District Court's ruling should be affirmed.

II. THE DISQUALIFICATION OF MR. TRACY'S COUNSEL WAS NOT AN ABUSE OF DISCRETION.

A. Standard of Review

A district court's decision to disqualify counsel is reviewed for an abuse of discretion. *Chavez v. New Mexico*, 397 F. 3d 826, 839 (10th Cir. 2005). The trial court's factual findings regarding the conduct of attorneys will not be disturbed unless there is no reasonable basis to support those conclusions. *Weeks v. Indep. Sch. Dist. No. I-89 of Okla. City*, 230 F. 3d 1201, 1208 (10th Cir. 2000).

B. The District Court did not err in failing to pursue a supplemental factual inquiry into the conflict of interest.

Mr. Tracy contends that the District Court abused its discretion by failing to pursue a factual inquiry into the circumstances surrounding the conflict of interest. This is incorrect. The fact finding preceded the issuance of the order disqualifying counsel. In response to the Order to Show Cause, Mr. Tracy's counsel asserted several facts and presented their position. The District Court based its decision on the facts presented. It had no reason to suspect that other material and relevant facts had not been presented.

More specifically, Mr. Tracy contends that the District Court abused its discretion by failing to pursue a factual inquiry into "how an attorney could possibly 'reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client' while actively pursuing the lawyer's own best interest at the direct expense of his client." (Brief of Apnt, at 25). This contention mischaracterizes the District Court's Memorandum Decision and Order Disqualifying Christensen & Jensen P.C. The quote relied upon by Mr. Tracy to frame his argument is incomplete. The phrase omitted by Mr. Tracy

shows that the Court was identifying that Mr. Tracy's counsel offered no evidence on this point. The entire sentence states:

> While Mr. Lowry and Christensen & Jensen assert that Mr. Tracy is solely liable for the sanctions and statutory damages at issue, **they provide no explanation** for how an attorney could possibly "reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client" while actively pursuing the lawyer's own best interest at the direct expense of his client.

(Aplt. App. at 222)(emphasis supplied).

The order disqualifying Mr. Lowry and Christensen & Jensen was issued after the District Court issued an Order to Show Cause which clearly required them to present evidence and argument relative to the conflict of interest the Court described. The District Court specifically identified that it was concerned with "Utah R. Prof. Conduct 1.7." (Aplt. App. at 205).

By arguing as he has, Mr. Tracy is attempting to hold the District Court responsible for the failings of his counsel. Mr. Lowry and Christensen & Jensen were invited to show cause. However, they utterly failed to do so. A failure to "show cause" does not start a new factual inquiry. It ends the inquiry, especially when counsel with notice fails to offer evidence relative to an element at issue. The argument is specious.

Mr. Tracy cites to no authority for the proposition that when concerned parties fail to "show cause," and fail to adduce evidence on a pertinent issue, that a Court should then renew its factual inquiry based on a presumption that evidence exists but was not offered. The District Court is not to blame for the failure of counsel to present evidence. Rather, the failure to present evidence is what troubled the District Court:

> In fact, that argument typifies Mr. Lowry and Christensen & Jensen's troubling attitude towards their unethical behavior in this case. The court identified what it believed was a serious conflict of interest and issued an Order to Show Cause requiring Mr. Lowry and Christensen & Jensen to respond. Their response, which consists of only four pages, largely dismisses the court's concern. They do not take any responsibility for either the filing of the original wrongful lien or, more importantly, for the behavior that resulted in the violation of the Utah Rules of Professional Conduct. Incredibly, the final argument advanced by Mr. Lowry and Christensen & Jensen is the exact same argument that created the conflict—namely, that all the liability belongs to Mr. Tracy.

(Aplt. App. at 226-227).

The District Court did not abuse its discretion by failing to pursue a factual inquiry. It issued an Order to Show Cause giving Mr. Tracy's counsel the opportunity to present evidence and argument relative to the issue. However, the response was deficient. Evidence on a pertinent point was not offered. That is not the District Court's fault. When a party fails to

adduce evidence on a pertinent element, a Court does not hold a hearing on the lack of evidence. Rather, a Court renders a decision based on the lack of evidence and rules accordingly. That is what happened here.

There was no abuse of discretion.

C. The District Court did not err by disqualifying Mr. Tracy's counsel.

Mr. Tracy argues the District Court committed reversible error by disqualifying Christensen & Jensen over a conflict of interest related to the "discrete issue" of liability for the wrongful lien which he characterizes as "unrelated" to his *qui tam* claims. It did not. Substantial evidence supports the District Court's determination.

Mr. Tracy also argues the District Court abused its discretion by concluding that the violation of the Utah Rules of Professional Conduct warranted disqualification. Mr. Tracy does not argue that the Court applied the wrong legal standard. Rather, this argument is simply a re-casting of its prior argument that the District Court lacked a factual basis for its determination because it failed to hold an evidentiary hearing. As stated above, the Court gave Mr. Tracy's counsel the opportunity to "show cause." They failed to do so.

Again, Mr. Tracy's argument is based on a mischaracterization of the District Court's Memorandum Decision and Order Disqualifying Christensen & Jensen P.C. Mr. Tracy asserts:

> In its Memorandum Decision, the Court itself recognized that it had many questions to which it did not have answers:
>
> > The court does not know if they fully disclosed the ramifications of their adverse arguments to Mr. Tracy before he provided his consent. Similarly, the court does not know if they informed him that he may have grounds to contend that Mr. Lowry and Christensen & Jensen should be solely liable for the wrongful lien. Finally, Mr. Lowry and Christensen & Jensen have not indicated whether Mr. Tracy gave his "consent" before or after they advanced the arguments that are adverse to his interests. Thus, Mr. Lowry and Christensen & Jensen have not demonstrated that Mr. Tracy gave "informed consent, confirmed in writing" even purporting to waive the conflict (were such a conflict waivable).
>
> Without this information, the Court nevertheless held that Mr. Tracy's counsel had violated Utah Rule of Professional Conduct 1.7.

(Brief of Apnt, at 22).

A fair reading of the Memorandum Decision and Order is that the Court is explaining that its conclusion was in part based on Mr. Tracy's failure to present evidence on issues which may have affected the determination. The Order to Show Cause was the invitation to present evidence and argument. The Response,

with little in the way of evidence or argument, was filed as required. However, it was particularly deficient.

The lack of evidence is well documented by the District Court in its Memorandum Decision and Order Disqualifying Christensen & Jensen, P.C. For instance, the Court stated:

> Mr. Lowry and Christensen & Jensen advance two arguments for why they have no conflict of interest in this case. First, they argue that their "objecting to frivolous arguments that manufacture an apparent conflict of interest between Mr. Tracy and [Christensen & Jensen] does not give rise to an actual conflict of interest." Second, they contend that any conflict of interest has been waived by Mr. Tracy in accordance with the Utah Rules of Professional Conduct. Neither of these arguments, however, is supported by the law or the facts.

(Aplt. App. at 219-220).

The District Court further stated:

> As the court stated in the Order to Show Cause:
>
> > Mr. Tracy appears to be best served by a judgment rendering Mr. Lowry and Christensen & Jensen, P.C. jointly liable with him. In contrast, as is apparent from the Objection, Mr. Lowry and Christensen & Jensen, P.C. prefer to avoid joint liability.
>
> In their response, Mr. Lowry and Christensen & Jensen admit that their interests "perhaps diverge" from Mr. Tracy's, but maintain that "Mr. Tracy himself is best positioned to determine what is and is not in his best interest." They fail to explain, however, how it could possibly be in Mr. Tracy's best interest for him to be solely liable while allowing

> them to escape all liability for Mr. Lowry's filing of the wrongful lien.
>
> * * *
>
> In short, Mr. Lowry and Christensen & Jensen have provided the court with no authority, from any court in the nation, allowing a lawyer to advance an argument on his own behalf that is adverse to his client.

(Aplt. App. at 221).

Similarly, while Mr. Tracy's counsel made the conclusory assertion that the conflict had been waived, they failed to support the assertion with facts or analysis. The District Court stated:

> Mr. Lowry and Christensen & Jensen next contend that any conflict of interest has been waived by Mr. Tracy. But they have not demonstrated that the conflict of interest in this case is waivable under the Utah Rules of Professional Conduct. And even were it waivable, they have not demonstrated that Mr. Tracy waived the conflict of interest in accordance with the Utah Rules of Professional Conduct.

(Aplt. App. at 227).

Notwithstanding the paucity of evidence presented to it, the District Court conducted the proper analysis.

Mr. Tracy asserts, "the district court also abused its discretion in holding the only appropriate remedy for a violation of the ethical rules was disqualification of Mr. Tracy's counsel. The district court appears to assume that any ethical violation taints the entire proceeding and therefore requires disqualification." (Brief of Apnt at 15).

The assertion is unfounded.

In the Memorandum Decision and Order Disqualifying Christensen & Jensen P.C., the District Court properly recognized that not all violations of the Rules of Professional Conduct require disqualification of counsel. The District Court expressly stated, "Having determined that Mr. Lowry and Christensen & Jensen violated the Utah Rules of Professional Conduct, the court must now consider whether they should be disqualified from representing Mr. Tracy in this case." (Aplt. App. at 223).

The District Court then properly proceeded to analyze whether the case was tainted by counsels' ethical violation. It considered the egregiousness of the violation, the presence or absence of prejudice to the other side, and whether and to what extent there has been a diminution of effectiveness of counsel. The Court also considered the hardship that may be imposed upon Mr. Tracy and the stage of the proceedings.

With respect to egregiousness, the District Court found the following:

> First, the egregiousness of the offense weighs in favor of disqualification. As explained above, Mr. Lowry and Christensen & Jensen violated the Utah Rules of Professional Conduct by advancing arguments to serve their own interests at the direct expense of their client's interests. This was a serious breach of the rules governing conflicts of interests, as well as the duty of loyalty owed to their client. Indeed, it is difficult to conceive of a more serious violation of the rules

> than when an attorney advances arguments that are directly contrary to his client's interests. The integrity of the legal profession and this country's system of justice depend, at least in part, on counsels' loyalty to their client. When an attorney does not heed an admonition to withdraw, he injures the profession, does a disservice to the court, and runs the risk of even subverting the justice system. *See Int'l Bus. Machs. Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978). A client must be able to rely on the fact the lawyer is adequately protecting the client's interests. Accordingly, the egregiousness of the offense weighs in favor of disqualification.

(Aplt. App. at 224).

On the issue of prejudice, the District Court stated:

> Second, there is prejudice to Mr. Tracy. As fully explained above, Mr. Tracy's interests have been directly prejudiced by having his own counsel advance arguments against his interests. Thus, this factor also weighs in favor of disqualification.

(Aplt. App. at 225).

The District Court analyzed the third factor set forth in *Parkinson v. Phonex Corp.*, 857 F. Supp. 1474, 1476 (D. Utah 1994), and determined that in addition to delaying the case for all the litigants, Mr. Tracy's counsel was not effective:

> Third, there has been a significant diminution of the effectiveness of counsel in this case. This case has ground to a halt due to the conflict of interest. The court needs to make a determination as to whether Mr. Lowry, Christensen & Jensen, and Mr. Tracy are liable for the attorneys' fees and statutory damages related to the wrongful lien. But there is no way to resolve that dispute before Mr. Tracy obtains independent counsel. Defendants contend that Mr. Lowry, Christensen & Jensen, and Mr. Tracy are all jointly liable. Mr. Lowry and

> Christensen & Jensen contend that only Mr. Tracy is liable. But, to this point, no arguments have been advanced on Mr. Tracy's behalf.
>
> Even a cursory review of the relevant statute reveals that Mr. Tracy may have a defense to liability related to the wrongful lien and an argument that all liability should be borne by Mr. Lowry and Christensen & Jensen. One of the relevant statutes imposes liability on any individual "who records or causes to be recorded a wrongful lien, . . . knowing or having reason to know that [it] . . . is a wrongful lien." Utah Code § 38-9-203(3). Mr. Tracy's liability may therefore depend, at least in part, on whether he caused Mr. Lowry to record the lien and on the advice that Mr. Lowry provided to him regarding the filing of the lien. The court does not express any opinion as to whether the facts in this case would justify such a defense. Rather, the court is concerned that these arguments have not been advanced precisely because of the conflict of interest in this case. *See White*, 908 F.2d at 685 (considering that the lack of briefing on an issue "may have resulted . . . from the very conflict" of interest recognized by the court). Accordingly, the adversarial briefing in this case will not be complete until Mr. Tracy obtains outside counsel. This weighs in favor of disqualification.

(Aplt. App. at 225-26).

The District Court also properly determined that the stage of the proceeding also favored disqualification:

> Finally, the stage of the proceeding also weighs in favor of disqualification. While the case was filed some time ago, much of the elapsed time was spent waiting for the United States to determine whether it would intervene in this action. The parties have recently completed the briefing on motions to dismiss under Rule 12(b)(6), but oral argument has not occurred. The case is still in the earliest stage. This also weighs in favor of disqualification.

(Aplt. App. at 226).

The District Court properly evaluated the evidence before it (including the lack of evidence before it). As explained above, the lack of evidence was not the fault of the District Court. Mr. Tracy's counsel failed to adduce or make an offer of proof on evidence it now claims warrants a reversal. Mr. Tracy's counsel did not present evidence on whether the conflict was waivable, and if so, they did not present evidence on those elements of proof necessary to establish a proper waiver under the Rules of Professional Conduct.

III. THE FAILURE TO REINSTATE MR. TRACY'S COUNSEL AFTER HIS COUNSEL AGREED TO PAY DAMAGES ARISING FROM THE WRONGFUL LIEN WAS NOT AN ABUSE OF DISCRETION.

Mr. Tracy's final argument is that after the conflict of interest was "mooted" by Christensen & Jensen's promise to pay for those damages stemming from the wrongful lien, his choice of counsel should have been reinstated. The District Court considered the requests for reconsideration, applied the appropriate principles of law, and concluded the prior determination should stand.

> A court may grant a motion to reconsider when there is "an intervening change in the controlling law," a discovery of "new evidence previously unavailable," or a "need to correct clear error or prevent manifest injustice." *See Servants of Paraclete*, 204 F.3d at 1012 (citing *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995)). Importantly, motions for reconsideration are "not appropriate to revisit issues already addressed or advance arguments that could have been

> raised in prior briefing." *Id.* (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991)).

(Aplt. App. at 261).

In asking for reconsideration of the order disqualifying Mr. Lowry and Christensen & Jensen, Mr. Tracy reasserted that the conflict of interest had been waived. As before, Mr. Tracy failed to present evidence that the conflict of interest was waivable. Rather, Mr. Tracy and his lawyers merely asserted their subjective belief that continued representation would be unaffected by the conflict. However, as the Court detailed in a footnote, there was still a substantial lack of evidence. The Court explained:

> FN 1. For example, nothing in Mr. Tracy's motion to reconsider suggests that C&J properly advised Mr. Tracy that *Mr. Lowry and C&J* could be liable under Utah Code § 38-9-203 or that their liability could provide him with a potential defense to liability. Mr. Tracy asserts only that he and Mr. Lowry "discussed that [*Mr. Tracy*] would be responsible for such damages if they were awarded." (Docket No. 167-1, at 2) (emphasis added). As explained in this court's Disqualification Order, the wrongful lien statute provides that "[*a*] *person* is liable to the record owner of real property for $10,000 or for treble actual damages, whichever is greater, and for reasonable attorney's fees and costs, who records or causes to be recorded a wrongful lien" when that person knows or should have known that the lien is wrongful, groundless, or contains a material misstatement or falsity. § 38-9-203(3). The statute—and Utah law interpreting it—make no distinction between those who actually record the wrongful lien (*e.g.*, attorneys) and those who cause the wrongful lien to be recorded (*e.g.*, their clients) as long as either party knew or should have known the lien should not be recorded. *See Winters v. Schulman*, 977 P.2d 1218, 1224 (Utah Ct. App.

> 1999) (holding an attorney liable for filing a wrongful lien on behalf of client because, as an attorney, he should have known the lien was wrongful). Thus, if Mr. Lowry failed to properly apprise Mr. Tracy of the shaky legal basis upon which the lien was recorded, Mr. Lowry and C&J (who had reason to question the viability of the lien) would be liable under the statute—not Mr. Tracy (who reasonably relied on the advice of his attorneys that the lien was viable). *See* Utah R. Prof'l Cond. 1.7, cmt.10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, *if the probity of a lawyer's own conduct in a transaction is in serious question*, it may be difficult or impossible for the lawyer to give a client detached advice" (emphasis added)).

(Aplt. App. at 262).

Significantly, the District Court considered all of Mr. Tracy's evidence relating to whether the conflict had been waived – including that submitted by Mr. Tracy's second team of lawyers. It stated: "Moreover, because the conflict was not waivable, Mr. Tracy's additional argument and evidence suggesting that he has waived the conflict is unavailing." (Aplt. App. at 262).

Finally, even if the District Court erred in not determining that the conflict had been "mooted" by Christensen and Jensen's representation in its Motion for Reconsideration that Christensen and Jensen intended to pay for the damages, the Court was well within its discretion to not reverse its prior ruling disqualifying Christensen and Jensen. As explained by the District Court, "given the circumstances surrounding the disqualification and counsel's response to the

situation, the court believes that counsel's misconduct has 'taint[ed] the lawsuit.'" (Aplt. App. at 263).

In summary, the District Court's refusal to reinstate Christensen & Jensen, following its agreement to pay damages arising from the wrongful lien, was not an abuse of discretion because its prior conduct tainted the lawsuit.

FED. R. APP. P. 28 (a)(8) CONCLUSION

The District Court properly determined that a conflict of interest existed. It then required Mr. Tracy's counsel to show cause why they should not be disqualified from continuing to represent him. They failed to do so. Though unopposed, they submitted a paucity of evidence and little in the way of argument. They failed to present evidence to establish the conflict was waivable. Even if the conflict was waivable, they failed to present sufficient evidence to establish that the conflict had been properly waived. Rather, as the District Court noted, Mr. Tracy's counsel just persisted in stating that Mr. Tracy alone was responsible for damages stemming from the wrongful lien. They did not request an evidentiary hearing. And, there was no need for one. They presented the evidence they chose to. It was insufficient. The District Court did not abuse its discretion, and its rulings should be affirmed on appeal.

Dated: August 31, 2017

/s/ Jeremy R. Cook
Jeremy R. Cook (10325)
William G. Garbina (13960)
COHNE KINGHORN, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
jcook@cohnekinghorn.com
wgarbina@cohnekinghorn.com
Attorneys for Emigration Improvement District, Fred A. Smolka, Michael Hughes, Mark Stevens, David Bradford, Lynn Hales, and Eric Hawkes

/s/ Robert L. Janicki
Robert L. Janicki
Michael L. Ford
Strong & Hanni
9350 South 150 East, Ste. 820
Sandy, UT 84070
rjanicki@strongandhanni.com
mford@strongandhanni.com
Attorneys for R. Steve Creamer

/s/ Adam T. Mow
Adam T. Mow
Jones Waldo Holbrook & McDonough
170 S. Main, Ste. 1500
Salt Lake City, UT 84101
amow@joneswaldo.com
Attorneys for Carollo Engineers, Inc.

/s/ James C. Dunkelberger
Barry N. Johnson
James C. Dunkelberger
Bennett Tueller Johnson & Deere
3165 E. Millrock Dr., Ste. 500
Salt Lake City, UT 84120
bjohnson@btjd.com
jdunkelberger@btjd.com
Attorneys for Aqua Engineering and Aqua Environmental Services, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,781 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The undersigned also certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman style.

Dated: August 31, 2017

/s/ Jeremy R. Cook

Jeremy R. Cook (10325)
William G. Garbina (13960)
COHNE KINGHORN, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
jcook@cohnekinghorn.com
wgarbina@cohnekinghorn.com
Attorneys for Emigration Improvement District, Fred A. Smolka, Michael Hughes, Mark Stevens, David Bradford, Lynn Hales, and Eric Hawkes

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to Section II, J of the CM/ECF User's Manual, issued by the United States Court of Appeals for the Tenth Circuit, I hereby certify the following:

a. All required privacy redactions have been made per 10th Cir. R. 25.5;

b. The hard copies of the Brief of Appellees submitted to the clerk's office are *exact* copies of the version submitted by ECF; and,

c. The ECF submission of the Brief of Appellees was scanned for viruses with the most recent version of AVG CloudCare AntiVirus, version 16.151.8013, most recently updated at 6:02 a.m. on August 31, 2017, and according to the program is free of viruses.

Dated: August 31, 2017

/s/ Jeremy R. Cook

Jeremy R. Cook (10325)
William G. Garbina (13960)
COHNE KINGHORN, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
jcook@cohnekinghorn.com
wgarbina@cohnekinghorn.com
Attorneys for Emigration Improvement District, Fred A. Smolka, Michael Hughes, Mark Stevens, David Bradford, Lynn Hales, and Eric Hawkes

CERTIFICATE OF SERVICE

The undersigned certifies that on this 31st day of August, 2017, a true and complete copy of the foregoing **BRIEF OF APPELLEES** was served via the CM/ECF system upon the following:

Andrew Graham Deiss
Deiss Law
10 West 100 South, Ste. 700
Salt Lake City, UT 84101
adeiss@deisslaw.com
Attorney for Plaintiff/Appellant

Robert L. Janicki
Michael L. Ford
Strong & Hanni
9350 South 150 East, Ste. 820
Sandy, UT 84070
rjanicki@strongandhanni.com
mford@strongandhanni.com
Attorneys for R. Steve Creamer

Adam T. Mow
Jones Waldo Holbrook & McDonough
170 S. Main, Ste. 1500
Salt Lake City, UT 84101
amow@joneswaldo.com
Attorneys for Carollo Engineers, Inc.

Barry N. Johnson
James C. Dunkelberger
Bennett Tueller Johnson & Deere
3165 E. Millrock Dr., Ste. 500
Salt Lake City, UT 84120
bjohnson@btjd.com
jdunkelberger@btjd.com
Attorneys for Aqua Engineering, and Aqua Environmental Services, Inc.

/s/ Jeremy R. Cook