

Professional Ethics for the Water Lawyer

Introduction

Benjamin Franklin said "When the well's dry, we know the worth of water." He could have added, "And once we know the worth of water, we'll all lawyer up."

We live in an age when ever increasing demand for water has combined with chronic shortage of supply to cause an exponential increase in water-related transactions and litigation over a multi-state region in the American West. Lawyers who practice water law may find themselves asked to represent clients in novel contexts or under novel conditions, the ethical implications of which are not immediately apparent to them. We intend by this presentation to alert you to situations that present ethical issues and to discuss the ways in which you might address them.

In particular, we will present you with hypothetical situations that illustrate issues related to the unauthorized practice of law, business/ financial relationships with clients and non-lawyers, privilege and the duty to protect a client's confidential information, competence/ diligence problems, and (everybody's favorite) conflicts of interest.

We hope this helps you successfully work through any issues you may encounter in your practice.¹

¹ The presenters are admitted to practice only in the State of California. The Supreme Court of the State of California adopted a complete revision of its Rules of Professional Conduct ("RPC") on , 2018. California's new RPC are modeled after the ABA's Model Rules of Professional Conduct but have several significant variations. You should consult your state's rules to properly determine your ethical obligations in any situation you may encounter.

HYPOTHETICAL SITUATION #1
Unauthorized Practice of Law

You practice in a small firm located in Central California. You attended law school in the Bay Area. Your best friend from law school, Paula, was one of the smartest students in your class; graduating Order of the Coif. Paula got married during your third year and moved to Idaho with her husband soon after graduation. She never took the California Bar examination. She took the Idaho Bar instead, passed with the highest score that year, and joined a very good firm located in Boise. Paula is only admitted to practice law in Idaho. She is a very experienced water litigator. She also teaches water law at Idaho's law school. Although she practices in Idaho, she has published a text on the water law of several states, including California. She has also published several articles on federal reclamation law.

You are a partner in a small Central California law firm. You practice general business and corporate law. You have a general understanding of California water law and can handle routine water rights issues as they come up in transactions, but you don't consider yourself to be a water law specialist and there are no water law specialists in your firm. Your biggest client is Mega Ag Resources LLC. Mega Ag is, as the name suggests, a heavy hitter in California agriculture. It obtains water for its various farms from a variety of sources including riparian rights, federal reclamation projects and contractual arrangements that are expressly governed by California law. Over the past few years Mega's president, John, has begun to ask you more and more questions about water law. It has gotten to the point where John believes Mega may have to engage in litigation to protect its rights against infringing neighbors. John likes and trusts you, but knows you and your firm don't feel fully equipped to represent him in what could become a water war to be fought on several fronts. John has told you he wants you to stay involved with Mega's water program, but has authorized you to hire the best lawyer you can find with whom to consult and, if you feel appropriate, to take the lead on various water matters. You immediately think of Paula primarily because you know she's very competent, but also because you don't want to give local competitors access to Mega.

Within a few days a problem pops up. Mega has a ranch located on Wet River. An upstream neighbor has started diverting water from the river in amounts far in excess of historical diversions. Under which of the following alternatives may Paula assist you?

Alternative #1: You ask Paula to analyze certain historical information you have collected for her and to communicate directly with the diverter regarding Mega's rights. Your goal is to negotiate a compromise outside of court. She keeps you in the loop and the two of you discuss

strategy, but you are not directly involved in the negotiations with the diverter. [Cites to applicable statutes and RPC to be provided as an appendix]

Matter #2: The diverter disagrees with Paula's position. Your firm files suit in state court with Paula named as co-counsel. You have Paula admitted *pro hac vice*. Her firm prepares all the pleadings and she conducts oral argument. [Cites to applicable statutes and RPC to be provided as an appendix]

Matter #3: The diverter agrees to arbitrate the dispute before you even file a complaint. You ask Paula to prepare and conduct the arbitration in California. [Cites to applicable statutes and RPC to be provided as an appendix]

Matter #4. The neighbor is a natural person who lives in Nevada. You decide to sue in federal court. You ask Paula to take the lead. [Cites to applicable statutes and RPC to be provided as an appendix]