

Water Law and Ethics: Sinking and Swimming with Litigation, Water Districts, and Agencies

Presented by

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ATTORNEYS AT LAW

Hypothetical A

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 the University of Idaho College of Law. 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 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. Circumstances have progressed to the point that 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 engage on Mega's behalf 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 introduce local competitors 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?

Situation 1

You ask Paula to analyze certain historical information you have collected for her and to communicate directly with the diverter's attorney regarding Mega's rights. Your plan is to have Paula negotiate an out-of-court settlement alone; minimizing your involvement in order to manage the fees charged to your client. Paula performs all her research and analysis in Idaho but travels to California and holds several meetings with the client and opposing counsel here. Is this permissible?

- ▶ **Authorities:** *California Business & Professions Code ("CB&PC") § 6125; Birbrower, Montalbano, Condon & Frank P.C. et al., v. Superior Court of Santa Clara County (Esq. Business Services, Inc. RPI) (1998) 17 Cal. 4th 119.* [holding the New York-based firm violated Bus. & Prof. Code § 6125 by engaging in extensive unauthorized practice of law in California]; *California Rule of Court 9.48.*

Situation #2

Same situation as #1 but Paula never comes to California. She performs her research in Idaho and communicates with California client and opposing counsel by phone and email exclusively.

- ▶ **Authorities:** *CB&PC § 6125; Birbrower, Montalbano, Condon & Frank P.C. et al., v. Superior Court of Santa Clara County (Esq. Business Services, Inc.) (1998) 17 Cal. 4th 119.*

Situation #3

You ask Paula to analyze certain historical information you have collected for her and to prepare analyses and legal memoranda that you will use to negotiate with the diverter's attorney. You conduct the negotiations relying upon Paula's research and advice. Is this permissible?

- ▶ **Authorities:** *Los Angeles County Bar Ass'n Formal Opinion 518 (2006).*)
[An attorney may outsource legal work so long the attorney competently reviews the work, remains ultimately responsible for the final work product, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and the contracting entity].

Situation #4

The diverter agrees to arbitrate the dispute. You ask Paula to prepare and conduct the arbitration in California. Is this permissible?

▶ **Authorities:** *California Code of Civil Procedure ("CCP") § 1282.4; California Rule of Court 9.43.*

Situation #5

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. Is this permissible?

▶ **Authorities:** *California Rule of Court 9.40.*

Situation #6

The neighbor is a natural person who lives in Nevada. You decide to sue in federal court. You ask Paula to take the lead. Is this permissible?

▶ **Authorities:** *In re Mendez* (9th Cir. BAP) 231 B.R. 86; FRCP 83; Local Rules for the U.S. District Court, Eastern District California (Effective March 1, 2022), Rule 180.

Hypothetical B

Business Transactions with Clients

You grew up on a family farm in the Central Valley of California. You and your siblings inherited the farm which is located near the town where you now practice law. Your firm represents numerous irrigation districts as general counsel including one, Hometown Irrigation District ("HID"), in which your family's farm is located.

Situation #1

HID wants to condemn a small portion of your ranch for a canal right-of-way. Your brothers negotiate with HID's land agent concerning the terms of sale. You do not participate in the negotiations on behalf of your family other than to tell your brothers what you are willing to accept. Your law partner who represents HID does not participate on behalf of HID. HID makes an offer, your brothers counter, HID accepts. You are asked to sign the contract of sale. Is this permissible?

- ▶ **Authorities:** *California Rules of Professional Conduct ("CRPC") 1.8.1.*

Situation #2

HID's board has adopted a budget for the canal project. Your family has lived within HID's boundaries for over seventy years. You do not own any land located along the proposed right of way but know many of the people who do. You believe you can through negotiation acquire the entire right of way for less than the total amount HID has committed to land acquisition. You offer to negotiate the acquisition of the right of way on a contingency; you will be paid thirty percent of the difference between HID's budget and actual cost. The district's board thinks it might be helpful for you to become involved and wants to take you up on your offer. Is this permissible?

- ▶ **Authorities:** *CB&PC § 6147; CRPC 1.5 (b); Arnall v. Superior Court (Liker) (2010) 190 CA4th 360, 368.* [Section 6147 applies to contingent fee arrangements outside of the litigation context]. *County of Santa Clara v. Superior Court (Atlantic Richfield) (2010) 50 Cal.4th 35 [cert denied 131 S.Ct. 920, sub nom. Atlantic Richfield Company v. Santa Clara County, California, et al.]* [Public entities were not categorically barred from engaging private counsel under contingent fee arrangements].

Situation #3

The canal's prime contractor completes the project almost a year after the final construction deadline. HID was forced to pay the several easement grantors a total of approximately \$250,000.00 as consideration to extend temporary construction easements. HID is also entitled to about \$130,000.00 in construction delay payments from the contractor. HID's board is aware that litigation costs can balloon in even what seem to be straightforward cases. HID would like to retain your firm to handle litigation against the contractor on a contingency. Is this permissible?

► **Authorities:** *CB&PC § 6147; CRPC 1.5 (b); Arnall v. Super Court (Liker) (2010) 190 CA4th 360, 368. County of Santa Clara v. Superior Court (Atlantic Richfield) (2010) 50 Cal.4th 35 [cert denied 131 S.Ct. 920]*

Hypothetical C

Attorney's Duty to Protect Confidential and Privileged Information

You represent a local landowner, Agnes. Local Irrigation District's ("LID") manager has recently called Agnes to tell her that LID is interested in acquiring 320 acres of land she owns in a certain low-lying area of the district to build a recharge basin. You have represented Agnes for many years. You also represent her neighbor, Ben. Ben is getting out of farming and already has a potential buyer; although they haven't agreed on the price. He has engaged you to handle the sale of his land from negotiation through preparation of documents.

Situation #1

LID's manager told Agnes when he called her that LID might be willing to pay Agnes as much as \$19,000.00/ acre for her land. Agnes relayed that to you. May you tell Ben what Agnes told you about the price LID offered her for her land to help Ben prepare his opening offer for the sale of his property?

- ▶ **Authorities:** *CB&PC § 6068(e); CRPC 1.6; California Evidence Code ("CEv.C") § 954; CEv.C § 955; Wells Fargo Bank, N.A. v. Sup. Ct. (Boltwood) (2000) 22 Cal 4th 201, 209* [privilege applies even where litigation is not threatened]. Note impact of CRPC 1.4.

Situation #2

Agnes told LID's manager to call you about the recharge basin transaction because she wants you to represent her. LID's manager told you the district is willing to pay Agnes \$19,000.00/ acre for her land. May you tell Ben what LID's manager told you?

- ▶ **Authorities:** *CB&PC § 6068(e); CRPC 1.8.2; California State Bar Formal Opinion 2016-195*. [A lawyer may not disclose confidential information or publicly available information that the lawyer obtained during representation when the client has requested it be kept secret or where disclosure would be likely be embarrassing or detrimental to the client]; Also consider *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 (attorney owes client a "duty of undivided loyalty")].

Situation #3

You receive a call from a person whom you have never represented. That person would like you to represent him in a negotiation with LID for (guess what) the sale of 320 acres to build a re-charge basin. LID's manager told the prospective client that the district might be willing to pay as much as \$22,000.00 an acre. You immediately decline the case because you already represent Agnes in her efforts to sell her land to LID at the best price she can get. It occurs to you that Agnes might improve her position by counter-offering to sell her land to LID for \$20,500.00 an acre. Can you tell Agnes about the information you obtained from the person you declined to represent to help Agnes formulate a competitive bid?

▶ **Authorities:** *CRCP 1.4 ; CRPC 1.18(b).*

Situation #4

Same situation as 3 but you are careful not to tell Agnes how you came up with the offer number. May you use the information without disclosing it to Agnes?

- ▶ **Authorities:** *In re Soale (1916) 31 Cal. App. 144, 153.* [Attorney under duty to "preserve the secrets of [the] client."]

Situation #5

Same situation as 3 but you learn that the prospective client is no longer interested in selling land to LID. May you disclose the information to Agnes? May you use it without disclosing it to her?

- ▶ **Authorities:** *In re Soale (1916) 31 Cal. App. 144, 154.* [Accusation in disbarment proceeding does not require a showing of actual harm suffered by the client, as would be required in an action for alleged deceit].

Situation #6

The negotiations progress between Agnes and LID. Agnes is busy during the day. She would like to meet in your office after the dinner hour to go over draft sale documents. Can you tell your wife you are going to your office to meet with Agnes about legal matters? Can you tell your wife you are going to your office to review sale documents with Agnes?

- ▶ **Authorities:** *CB&PC § 6068(e); CEv.C§ 955. CRCP 1.6.*

Hypothetical D

Professional Competence

You have a general business practice. You handle purchase and sale transactions. You often perform due diligence for your clients in connection with those transactions. One of your major clients enters into a letter of intent to acquire approximately 3,500 acres of row crop land. You do not consider yourself to be an expert on water rights.

Situation #1

The source of irrigation water for that land is a series of deep wells. You have represented clients in the purchase and sale of land irrigated by wells before. Can you competently represent the client in this transaction even though you are not a water lawyer?

- ▶ **Authorities:** *CRPC § 1.1(a) (b).*

Situation #2

Your state has passed a comprehensive statute mandating the sustainable management of underground aquifers. Can you still competently represent your client in the purchase of row crop land irrigated by a series of deep wells?

- ▶ **Authorities:** *CRPC § 1.1(a) (b). Wright v. Williams* (1975) 47 Cal.App.3d 802, 809 ["The duty [of competence] encompasses both a knowledge of law and an obligation of diligent research and informed judgment."]

Situation #3

The land in question is largely dependent upon riparian rights. Can you handle the transaction?

- ▶ **Authorities:** *CRPC § 1.1(a) (b)*. *Lewis v. State Bar* (1981) 28 Cal.3d 683 [holding that negligently and improperly conducting administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney warrants suspension for 30 days, with suspension stayed and placement on probation for one year.].

Situation #4

Can you handle the transaction if you associate a specialist to conduct water rights due diligence to prepare a written opinion regarding the availability of water to the property?

▶ **Authorities:** *CRPC 1.1(c); Cole v. Patricia A. Meyer & Assocs., APC (2012) 206 Cal. App. 4th 1095, 1115-1116.* [Trial counsel who were constantly identified as counsel of record for the plaintiffs, have a duty to ascertain merits of claim even where they do not personally work on early steps of the case.]

Hypothetical E

Conflicts of Interest

Mega Ag has engaged you to litigate a major water rights case against a company called Lost Ranch. Lost Ranch will be represented by another local firm, Jones & Jones. The action will be a declaratory relief action to determine the relative rights of the two landowners to stream flows from a deep creek that forms the border between their two ranches.

Situation #1

Your firm represents Lost Ranch in connection with the registration and renewal of its packing house trademarks. Your firm provides no other legal services to Lost Ranch and never has. Your intellectual property partner talks with Lost Ranch personnel on an infrequent, irregular basis when they call to ask for help and has not spoken with them for at least ten months. The long lapse in communication is not atypical for the relationship. There is no disengagement letter in the file. May your firm take the case?

- ▶ **Authorities:** *CRPC 1.7 (a)*. Consider CRCP 1.10 Imputation of Conflicts of Interest.

Situation #2

Same facts as Situation #1 but your partner sends Lost Ranch a disengagement letter after he learns of your firm's opportunity to represent Mega Ag against Lost Ranch. May your firm now take the case with Lost Ranch's informed written consent?

- ▶ **Authorities:** *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal. App. 4th 1050, 1059. [Reasoning the parties knew they were undertaking concurrent adverse representation and doing it without consent of the conflicting party]

Situation #3

Your firm has no current relationship with Lost Ranch but it represented Lost Ranch five years ago in the acquisition of the land that lies across the creek from Mega Ag. Your firm performed water due diligence at the time. It has not represented Lost Ranch since then. May your firm take the case?

- ▶ **Authorities:** *CRPC 1.9 (a)*.

Situation #4

Your firm represented Lost Ranch in the acquisition of the land that lies across the creek from Mega Ag, but the partner who represented Lost Ranch at the time left the firm and took his files with him. May your firm take the case for Mega Ag?

- ▶ **Authorities:** *CRPC 1.10 (b)*.

Situation #5

You take the case for Mega Ag and then hire a lawyer from Jones & Jones. Will your firm now be disqualified?

- ▶ **Authorities:** *CRPC 1.9 (b); Adams v. Aerojet-General Corp (2001) 86 Cal. App. 4th 1324, 1338-1339.* ["'Preserving confidentiality' is the touchstone of the disqualification rule"].; Consider *CRCP 1.10(a)(2) Imputation of Conflicts of Interest*; Consider *Or. State. Bar. R. Regul. and Polic. 1.9(d)*. Consider *Analytica, Inc. v. NPD Research, Inc. (7th Cir. 1983) 708 F.2d 1263, 1266* ("'substantially related,'...means: if the lawyer *could have* obtained confidential

Situation #6

You take the case and then hire a new admittee who worked on the same case at Jones & Jones as a summer clerk before she passed the bar. Will you now be disqualified?

- ▶ **Authorities:** *In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572, 596.*

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Thank you for attending “Water Law and Ethics: Sinking and Swimming with Litigation, Water Districts, and Agencies”.

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