

# 58

## WATER RIGHTS, REPRESENTATION OF MULTIPLE CLIENTS \*

Adopted March 21, 1981.

Revision adopted October 14, 1995.

### *Syllabus*

The fact that an attorney or firm may accept employment for two or more persons involved in litigation concerning water rights from the same river system does not, in and of itself, constitute an ethical impropriety. As used in this Opinion, the term “river system” means “water of the natural streams” as that term is used in Colorado law, including surface flows and alluvial and tributary ground water, which are tributary to the same river. An ethical impropriety arises when, in the course of such litigation, the water right or the water supply of one client is in fact impaired, or there is a likelihood of such impairment occurring, as a result of the representation of the other party.

### *Opinion*

This Opinion addresses the issue of whether an attorney’s or firm’s representation of a client owning or claiming water rights in a river system in and of itself bars that attorney or firm from accepting additional employment involving other water rights within that river system.<sup>1</sup> This Opinion considers the application of the relevant provisions of the Colorado Rules of Professional Conduct to the issues of conflict of interest (as addressed in Rule 1.7 and related provisions). Initially, it should be noted that the Rules apply equally to all attorneys and that there is no different standard applicable to water lawyers. However, due to the unique nature of water law practice, this Opinion is issued to guide water lawyers in situations where they represent more than one client in a river system.

Rule 1.7 specifically states:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:
  - (1) the lawyer reasonably believes the representation will not be adversely affected; and
  - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantage and risks involved.
- (c) For the purposes of this Rule, a client’s consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.

Further, the provisions of Rules 1.6, 1.8(b) and 1.9 apply insofar as previous client contacts may give rise to the presence of information protected as confidential. Rule 1.10 extends the restriction of Rules 1.7 and 1.9 to the lawyer’s entire firm. Rule 1.11 imposes additional duties on lawyers representing government entities and agencies. Moreover, the water attorney should be aware that disclosure and consent would not allow him or her to represent one client in negotiations or appearances before a public body he or she also represents. *See* Opinions 57, 45, 48, and 97 and Rule 1.11. Rule 2.2 governs a lawyer’s conduct when acting as “intermediary” between or among multiple clients.

Water rights adjudications in Colorado and most other litigations involving water rights are *in rem* proceedings binding all persons within a particular river system and water division. Because of the *in rem*

nature of such actions and the vast geographical extent of the area potentially affected by any water proceeding, it might appear that all water rights owners are in competition with one another for the same limited resource, whether they be owners of previously adjudicated rights, rights for junior priorities in the process of adjudication, or rights for which a change of water right or plan for augmentation is in the process of adjudication. An examination of the water right decrees issued in such proceedings, however, reveals that the degree of actual competition involved between water rights owners varies substantially from case to case, and in many cases, there is not a real competition at all.

A decree adjudicating a water right in Colorado confirms the existence of an appropriative right in water and defines certain of its parameters. The decree confirms the fact that an appropriation has been made, establishes an appropriation date for the water right, specifies the quantity or rate of flow allowable for such appropriation, specifies the source and location from which the appropriation is exercised, and specifies certain uses which are allowable. A decree confirming an appropriation in Colorado does not assure that water will always be available to satisfy the appropriation being confirmed. Each water right owner is at his or her own peril as to whether the water right actually will yield any water under the physical supply and priority restrictions that will prevail from time to time.

Thus, a water right decree will define and set out the parameters and conditions upon which an appropriator may divert water from a scarce and variable supply of water under the priority system. The decree will establish the relative priority of one user *vis-à-vis* others. The variable conditions of physical supply and users' fluctuating demands will determine who gets water under each of the relative priorities set out by the decrees. The decree proceeding, however, will not in and of itself determine whether water will actually be delivered under priority administration to one party or another on the river system.

Furthermore, each decree becomes a final judicial act upon its completion and entry, though many water decrees are subject to the court's retained jurisdiction for a period of time. The validity of the parameters assigned to appropriations previously decreed generally is not at issue in a subsequent proceeding to adjudicate another water right. This is manifested in the longstanding water law rule (subject to few exceptions) that no priority given in a subsequent adjudication can be senior to the latest priority given in a prior adjudication proceeding. Similarly, under the current statute, water rights decreed upon applications filed in any calendar year generally are junior to rights decreed on applications filed in previous years. C.R.S. § 37-92-306. Allowable diversion rates, volumes and uses of water are likewise insulated by the principles of *res judicata* from attack in a later adjudication proceeding for different water rights. Thus, it is evident that the outcome of an adjudication proceeding to determine a water right for a present client does not automatically pose a threat to parties who have previously obtained adjudicated rights. However, a new appropriator may have a basis to challenge certain existing decreed rights based on abandonment, lack of diligence (for conditional water rights) or similar grounds. Moreover, some types of newly decreed appropriations (such as federal reserved water rights and existing exchanges) may take priority over some previously decreed rights.

These stream adjudications often occur in the context of an extensive river system where there may be many previously adjudicated water rights. The Colorado River system has, for example, at least 10,000 individual water rights. Clearly, the adjudication of a junior priority has no impact under the law on most of the previously adjudicated 10,000 rights and, absent other ethical considerations, no conflict would exist from representation of an owner of one or more of the 10,000 water rights and the simultaneous representation of a junior appropriator.

A lawyer undertaking representation of a client should consider the potential for real harm to another client, based on a realistic assessment of actual and likely future administration and factual conditions on the river. While the tests to be satisfied as to initial applicability of Rule 1.7 are whether the clients' interests are "directly adverse" and whether the lawyer's representation "may be materially limited," in most water law situations the operative question will be whether the water supply available under a decreed priority to one client will be impaired as a result of the endeavor of another client. Because of the usual complexity of the factual situations involved, the question should be further expanded to include the "likelihood of impairment."

There may be situations in which two presently proceeding appropriators may be in actual conflict with one another, where the appropriations are near each other or are large in comparison to the remaining water supply in a particular area. First of all, if both were asserting an appropriation on the same stream within the basin, and both were filing within the same calendar year, there might then be an actual competition for a certain portion of the scarce resource. Present adjudication statutes provide that for any water decrees upon applications filed in the same calendar year, the relative priority is determined by the actual date of appropriation proven by each. In some of these concurrently proceeding cases where there is an actual competition for the same physical supply, the court's determination of parameters such as flow rate and appropriation date may decide the ultimate administrative question of which of the appropriators gets a full water supply under foreseeable low flow conditions. It would be improper to represent both appropriators in such circumstances. In addition, as noted above, there are some circumstances in which decreed priorities may be vulnerable in subsequent proceedings.

In other adjudication cases involving changes of previously decreed rights or plans for augmentation, where the standard is whether or not there will be any injurious effect on water rights entitled to take water, factual issues will arise as to whether the granting of the application will alter the historic regimen of the stream so as to injure the decreed water rights of others. In such circumstances, the question of whether a Rule 1.7 conflict exists will depend on whether there is an impairment in fact, or in likelihood, of the supply available for other water rights owners. This question in turn depends on certain factual characteristics of the case and of the part of the river system involved. It is not always true that each change of water right case necessarily puts in jeopardy all previously decreed water rights or even the supply of water available to such water rights. It may well be possible that change cases on certain segments of the river system can be implemental without potential impact on others in other portions of the river system. It is generally true, for example, that a change case involving a certain priority will not adversely affect the supply of water available for upstream parties having priorities senior thereto, though it may affect the amount of return flow available to downstream parties, and the extent to which upstream junior rights are curtailed.

Each of these cases involves factual variations and must be examined for actual or potential impairment of a client's water supply. Representation of one client will be less likely to affect another client adversely if the water rights involved are located in separate water districts, on separate tributaries within a river system, or at distances far removed, although the circumstances of each case will control.

In determining whether there is an actual or potential impairment, the lawyer must be mindful of confidentiality obligations to each client. Rule 1.7(b) restricts representation which "may be limited by a lawyer's responsibilities to another client. . . ." These responsibilities include the lawyer's confidentiality obligation under Rule 1.6, which extends to all "information relating to representation" of each client. Similarly Rule 1.8(b) prohibits use of such information to the client's disadvantage, unless the client consents, and Rule 1.9(c) requires consent for any adverse use or disclosure of information relating to representation of former clients. In determining whether actual or potential impairment of another client's water rights exists, the lawyer must be careful to protect the confidential information of each client, and to obtain each client's informed consent to any disclosures that may be needed to satisfy Rule 1.7.

In circumstances where a potential impairment exists, the lawyer must consider the likelihood of such impairment. If such impairment is likely, we think "a disinterested lawyer would conclude that the client should not agree to the representation," so the lawyer must decline representation under Rule 1.7(c). If the likelihood of impairment is remote, each client must consent to the representation after "consultation which involves full disclosure of the possible effect of such dual representation on the exercise of the lawyer's independent professional judgment on behalf of each client." Comment to Rule 1.7. A prerequisite to such full disclosure is, of course, obtaining each client's consent under Rule 1.6 to any disclosure of "information relating to representation of" that client.

In conclusion, the fact that each of multiple clients seeks to take water from the same river system does not in and of itself create an actual conflict which would bar multiple employment by a water rights practitioner. The practitioner must look to the likelihood that an actual impairment of water supply avail-

able to a client's water rights might result from such multiple employment, and must abide by the requirements of Rules 1.6 and 1.7 regarding confidentiality and client consent.

## NOTE

1. This Opinion does not address potential conflicts of interest which may arise in representing multiple clients claiming rights in designated ground water, Denver Basin ground water, nontributary ground water, or other water resources which are not part of a "river system" as defined in the Syllabus. While the Opinion does not discuss the factual and legal issues involved in such circumstances, the Colorado Rules of Professional Conduct do, of course, govern lawyers' and firms' conduct and should be applied in the pertinent text.

\* With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course of conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." See Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

\* On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, Conflict of Interest: Current Clients, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).