

1-1-2017

Ethical and Professional Standards for Lawyers and Engineering Experts in Water Court Litigation and Dispute Resolution

Reggie Norris

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Reggie Norris, Conference Report, Ethical and Professional Standards for Lawyers and Engineering Experts in Water Court Litigation and Dispute Resolution, 20 U. Denv. Water L. Rev. 432 (2017).

This Conference Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Ethical and Professional Standards for Lawyers and Engineering Experts in Water Court Litigation and Dispute Resolution

panel into question and answer. He asked the panelists how their regimes could benefit from a change or borrow from the other regimes to improve or address the challenges posed by social, political, and environmental issues. Gordon said that, while Californians never want to admit they can learn from others, their system is convoluted and would be better off with a more coordinated system that could better address groundwater. Barfield said that Kansas has already borrowed extensively from other states to create their system. He said, contrary to Hobbs' worries about an administrative regime, that chief engineers can certainly do it all. He does not foresee further changes to Kansas' system. Hobbs noted that the downstream states keep Colorado honest. Through compacts, Colorado has been forced to consider other states, and better administer its own waters. Similarly, Hobbs explained that other interests, including reserved water rights, and public lands continue to impact considerations of water rights within Colorado. The panelists then fielded questions from the audience until they ran out of time.

Each panelist discussed how the unique history of their state molded the regime it now uses. It is the unique challenges faced by each state that has created differing water systems that, mostly, work to create efficient use and administration of water.

Rioux Jordan

**UNIVERSITY OF DENVER WATER LAW REVIEW ANNUAL
SYMPOSIUM 2017: AT THE CONFLUENCE: THE PAST, PRESENT,
AND FUTURE OF WATER LAW**

Denver, Colorado

April 7, 2017

**ETHICAL AND PROFESSIONAL STANDARD FOR LAWYERS & ENGINEERING
EXPERTS IN WATER COURT LITIGATION AND DISPUTE RESOLUTION**

The final panel at the 2017 *University of Denver Water Law Review Annual Symposium* consisted of Stephen Leonhardt, a Partner at Burns, Figa & Will, PC, Kevin Rein, Deputy State Engineer of the Colorado Division of Water Resources, Ema Schultz, Assistant Attorney General with the Colorado Department of Law, and Janet Williams, Chairman at Leonard Rice Engineers, Inc.

Stephen Leonhardt opened the panel by giving a roadmap of the many rules governing lawyers in water court proceedings that include the Colorado Rules of Professional Conduct, Colorado Rules of Civil Procedure, Water Court Rules, Federal Rules of Evidence, and Colorado Rules of Evidence. Mr. Leonhardt noted the role lawyers play as zealous advocates, but said that lawyers must also follow the rules of professional conduct, act with candor, adhere to confidentiality requirements, and satisfy certain disclosure responsibilities. Mr. Leonhardt mentioned that the rules pertaining to disclosure have changed, and that the Federal Rules of Civil Procedure were amended in 2010 to narrow the disclosure requirements; the current rule requires disclosure of the facts or data considered by the witness in forming the expert's opinion. Mr. Leonhardt then explained that the Colorado Rules of Civil Procedure were amended similarly. Under the current rules, draft expert reports are generally protected from disclosure or discovery, except for those identifying facts, data, or assumptions that

the expert considered in forming their opinion. Mr. Leonhardt further stated that under Water Court Rules the duty of the expert witness is to the court and to assist the trier of fact and not to the attorney.

Next, Janet Williams addressed the ethical obligations and principles for engineers serving as experts. Ms. Williams noted that engineers owe a duty of honesty and impartiality to the public, their employers, and clients. Further, Ms. Williams stated that an engineer's role as an expert witness is to provide objective, unbiased, independent judgment to help the water judge determine the facts in dispute. Ms. Williams discussed several factors that help an engineer maintain objectivity. These factors included the importance credibility plays in the industry, the objection process in which opposing counsel reviews the expert report for bias, and the peer review that occurs in expert meetings.

Ema Schultz then spoke and addressed the duty of the Attorney General in water court litigation from her perspective. As the exclusive legal representative of the State, Ms. Schultz noted that the Attorney General has the duty to set consistent legal policy and to consider the larger interests of the State and its citizens when determining the course of litigation. As Assistant Attorney General, Ms. Schultz stated that her role is to advocate for her clients, coordinate the litigation process, and provide legal advice for water administrators.

Kevin Rein, the Deputy State Engineer of the Colorado Division of Water Resources ("DWR"), concluded the panel by discussing the role the DWR plays in the court. Mr. Rein discussed the DWR's role as the administrator of water rights, and their statutory responsibility to oversee water compacts and to use their technical and legal expertise to assist the court to ensure that the court's decrees comply with those compacts. Mr. Rein stated that the DWR prioritizes being objective, comprehensive, and transparent when it consults with the water court.

At the end of the panel an audience member asked the question of whether the DWR or the Attorney General had any ethical obligations to fully inform the water court whether the position they take in a particular case is consistent with their past administrative actions. Kevin Rein discussed his hope that the actions of DWR in the field and the DWR's positions taken in the court would be consistent, especially as it applies to similar structures or similar water rights. Mr. Rein could not think of a situation where this had occurred, but stated that in a situation where this were true, the DWR would want to disclose this to the water court. Ema Schultz added that this was largely because the goal of the engineers in the case is to be able to administer the decree on the ground. Stephen Leonhardt expanded on this topic by noting that he had seen a few times over the years where administration had recently changed. Mr. Leonhardt asked the other panelists their thoughts on the disclosure of past administrative practices up until the recent change. Mr. Rein explained that as the DWR's understanding of what is happening evolves and is refined over time, and when DWR looks at facts and issues surrounding administration through that finer lens, there might be the need to do something different from what a past administration have done.

Reggie Norris