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Ethical Principles and Obligations for Water Lawyers

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Hobbs discussed came in 1922 with the Colorado River Compact. The deal divided the waters of the Colorado between the seven states laying claim to its waters. Specifically, the compact divided the water between the Upper Basin and the Lower Basin, allocating 75 million acre-feet to the Lower Basin over an averaged ten-year period, 1.5 million acre-feet to Mexico, and the rest for use by the Upper Basin states. Colorado and the other Upper Basin states subsequently decided how to split up their allotment in 1948 with the Upper Colorado River Compact. Colorado secured fifty-one percent of the Upper Basin allocation. Justice Hobbs noted that in 1922 the states were assuming a yearly flow of more than 16 million acre-feet. The problem, he said, was that this amount overestimated water availability, especially in drought years. In fact, as recently as 1902, there were only 9.5 million acre-feet of water in the basin, something that the Upper Colorado River Compact drafters knew. This deal, therefore paved the way for storage to be an integral part of water in the West—a trend that continues today.

Justice Hobbs concluded his presentation by answering participant questions about the failure of recent water law legislation, including Senate Bill 23 in 2014 and House Bill 1259 earlier this spring. Justice Hobbs closed by saying that he has seen a lot of changes in Colorado water law over the course of his career and that he was excited for the changes that the future generation of professionals working in water might encounter.

Josh Boissevain

COLORADO WATER CONGRESS WORKSHOP ON LEGAL ETHICS IN WATER AND ENVIRONMENTAL LAW: ETHICAL PRINCIPLES AND OBLIGATIONS FOR WATER LAWYERS

· Denver, Colorado

November 16, 2015

As one portion of its two-part workshop, the Colorado Water Congress hosted a series of presentations concerning the unique interaction between the Colorado Rules of Professional Conduct (“Rules”) and situations that often arise in the practice of water law.

Stephen H. Leonhardt, a shareholder at Burns, Figa & Will, gave the first presentation. He used James P. Owen’s book *Cowboy Ethics: What Wall Street Can Learn from the Code of the West* to guide a water lawyer through various situations that he or she could encounter in practice. Starting with the precept “when you make a promise, keep it,” Leonhardt compared the book’s discussion of ethics with Rule 1.2’s guidance on the attorney-client relationship. He also mentioned that proposed amendments to the Rules address issues surrounding modern technology and social media. In closing, Leonhardt presented the maxim “remember some things aren’t for sale” to stress that expert witnesses should be a tool for the water court, not a weapon for one side to wield.

The second speaker was David S. Lipson, an expert in hydrogeology and a professor at the Colorado School of Mines. Lipson frequently appears as an

expert witness before water courts. He outlined some of the reasons why expert witnesses are important in water law, and clarified their ethical role. He introduced the multidisciplinary nature of water issues, noting that they often require many scientific disciplines working together in order to solve large-scale problems. He cited the recent discharge of mining waste into the Animas River as an example of interdisciplinary cooperation. In dealing with such problems, multiple scientific disciplines must collaborate to diagnose the problems' causes and formulate solutions for cleanup or mitigation. Next, Lipson addressed the ethical guidelines that bind professional expert witnesses: (i) professional engineers' licensing requirements, and (ii) professional societies' voluntary codes of ethics. He went on to explain the limitations that professional societies' codes of professional conduct place on expert witnesses' obligation to advocate for their clients. Lipson closed by emphasizing that experts should advocate for the data or objective facts above all else, while also keeping the public health in mind.

The third speaker was Cynthia F. Covell, co-founder and shareholder at Alperstein & Covell. Her presentation focused on a frequent conflict of interest that arises in water law: when water law practitioners represent organizations and individuals for long periods of time and across different water districts. Covell emphasized that water law practitioners today need to advocate for conflict resolution that allows clients to maintain their longstanding relationships. Covell stressed that "material" conflicts are often hard to define in such a complex area of practice. She also discussed American Bar Association Opinion 93-337 and the "issue" conflicts that arise in water law when a lawyer advocates on two sides of an unsettled legal question. The opinion cautions concern over the lawyer's credibility and that water law appeals go directly to the Colorado Supreme Court. Covell concluded her presentation by asking audience members when they think representation of a former client clearly ends for purposes of the Rules. Multiple practitioners responded to her question by warning of broad initial engagement letters sent to clients, and noting that malpractice insurers recommend sending a closure letter to clients when appropriate.

The workshop ended with a set of hypothetical problems presented by Leonhardt and Covell. These problems addressed the evolution of the Rules surrounding issues of modern technology, including rules currently proposed for adoption, as well as the Colorado Bar Association's Opinion 127: Use of Social Media for Investigative Purposes. The first problem involved a lawyer representing an environmental non-profit organization opposing a real estate developer's plan to build a resort in a beautiful mountain area. The problem discussed the developer's Facebook page and to what extent the lawyer could use information the page contained. Per Opinion 127, a lawyer may always view the public portion of a person's social media page including posts. A lawyer may not request access to a private portion of a social media profile of a person represented by counsel in a matter without first obtaining permission. A lawyer also cannot delegate these tasks to a third party. In communicating through social media, a lawyer must adhere to the same rules that govern traditional communications. Leonhardt and Covell also went through a problem addressing the "issue" conflicts Covell discussed in her earlier presentation. In this problem, a lawyer represents client C in an unsuccessful appeal against K. The lawyer continues to represent C after the appeal. Later, K asks the attorney

to represent her in another matter she wishes to bring under the same theories the attorney had raised in the earlier appeal. While there is no clear answer to the dilemma, the discussion brought up issues of professional image and integrity, as well as appearing before the same judges on repeated occasions.

In sum, the presentations all offered valuable insight into the ethical practice of water law in light of new technologies and increasing complexity in the field.

Brian Hinkle