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Water Law and Ethics

John McKee

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encouraging. With further implementation of the SECURE Act, encompassed in the WaterSMART program, positive steps in this area are likely.

Matt Brodahl

WATER LAW AND ETHICS

Amy Beatie, Director of the Colorado Water Trust, presented on current ethical issues concerning water law practitioners' appellate practice. Specifically, Beatie discussed ethical issues arising when practitioners decide whether to appeal, issues when prosecuting an appeal, and issues regarding conflicts of interest.

First, Beatie addressed the ethical issues in a practitioner's decision to appeal. Initially, she explained that because attorneys draft their fee agreements, clients enjoy judicial deference for unclear or ambiguous fee language. Accordingly, attorneys should ensure fee agreements include clear language authorizing them to appeal on behalf of the client and describe any fee adjustments for appeals. Colorado Rules of Professional Conduct ("CRPC") 1.2(a) and 1.4(a)(2) instruct attorneys to consult with the client about potential legal strategies, including the decision to appeal.

Next, Beatie discussed the requirement that sufficient grounds for an appeal must exist. An attorney's signature certifies that a pleading has legal and factual merit. Colorado Rule of Professional Conduct 3.1 precludes filing an appeal that has no merit or asserting a frivolous claim. Filing an appeal merely because an insistent client desires one does not excuse CRPC 3.1 if no legal or factual basis supports the appeal. All Colorado lawyers or lawyers practicing in Colorado are subject to the jurisdiction of the CRPC. Consequences of filing a frivolous appeal include court sanctions or even civil prosecution for unauthorized practice of law.

Additionally, when a practitioner decides to appeal, he or she must be competent. Colorado Rule of Professional Conduct 1.1 requires Colorado attorneys to demonstrate competent skill, thoroughness, and preparation. If an attorney has no appellate experience but still chooses to appeal, the rule requires the attorney to commit to competent on-the-job training, turn the case over to a competent appellate attorney, or associate with a more experienced attorney. To ensure competent representation, Beatie advised attorneys maintain keen interest in an appeal even after adding an experienced associate to the appellate team.

If an attorney decides not to appeal, CRPC 1.16 requires notice to clients to allow time to seek new representation for an appeal. Beatie stressed that an untimely notice of appeal is an egregious mistake. Attorneys should file notice of appeal on behalf of their client then withdraw from representation. This way, the attorney communicates the withdrawal to the court while preserving the client's right to appeal

with another attorney. Finally, attorneys who are planning to withdraw should not express any legal opinions about a potential appeal.

Second, Beatie addressed the ethical issues in a practitioner's prosecution of an appeal. She implored attorneys to designate the entire case record on appeal. An attorney who selectively picks favorable sections of the record can potentially invoke candor violations. Candor violations include an attorney concealing or omitting material facts or legal authority, and using out-of-context quotations of case authority. Beatie warned that quotations riddled with ellipses are a red flag for out-of-context candor violations. Water attorneys must disclose all applicable administrative and municipal legal authority to the tribunal, even directly adverse authorities. The standard of review for failure to disclose relevant law is a "knowing" one. For example, an attorney who includes a directly adverse law in a previous case brief "knows" of the adverse law and cannot omit disclosing that law to the tribunal in future case briefs if the adverse law applies. Attorneys who fail to disclose adverse authority at the first opportunity violate the candor rule. Beatie beseeched attorneys to comply with candor rules to help build a reputation of honesty and trust with judges and their clerks.

Further, Beatie advised caution when criticizing water courts' or lower courts' decisions in appellant briefs. In addition to prohibiting lawyers from including statements known to be false, CRPC 8.2 also prevents reckless disregard as to truth or falsity concerning the integrity of a judge, adjudicatory officer or public legal officer. Lawyers should carefully craft appellant briefs critical of lower court decisions to avoid offending water referees and water judges. Such an approach follows the respect to legal officers CRPC 8.2 requires. Beatie noted that following this rule may also pay dividends on remand should the case return to the same lower court.

Finally, Beatie concluded by examining the potential conflicts of interest in appellate proceedings. Positional conflicts occur when common clients vie against concurrent conflicts of interest and can be a common problem in water law. Beatie noted the example of a Colorado Water Conservation Board appeal that ended with common clients fighting over rights in a resulting substitute water plan. In that case, although the clients were collectively successful, ethical conflicts arose when representation of one client became directly adverse to all other clients claiming common portions of the same substitute water distribution plan. Comments to CRPC 1.7 guide the issue of positional conflict, providing four factors attorneys should follow when weighing client loyalties against potential conflicts of interest: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, and (4) if so, consult with the clients. Attorney-client loyalties can complicate these conflicts, pushing clients to retain their attorney even when conflicts exist. The factors of CRPC 1.7

acknowledge the complexity of attorney-client relationships by including the client's reasonable expectations as a consideration, but positional conflicts may require an attorney to seek informed consent of the conflicting clients, or even to withdraw if unable to balance competing conflicts among common clients.

John McKee

QUALITY OF LIFE DECISION MAKING; PLANNING UNCERTAINTIES AND LEGAL OBSTACLES PERSPECTIVE FROM DENVER WATER

Casey Funk, in-house counsel for the Denver Board of Water Commissioners (the "Board"), and Marc Waage, Manager of Water Resource Planning at the Denver Water Department ("Denver Water"), discussed the Anti-Speculation Doctrine as a legal obstacle to planning for future water uncertainties, including those uncertainties associated with climate change.

The Board, composed of five members, is the primary decision maker at Denver Water. The mayor appoints the members of the non-political Board. It makes all policy decisions, including to whom to serve water and how to serve that water. In 2006, the Board adopted a new policy to plan for uncertainties, in part because of the worst drought in recorded history in 2002.

Denver Water emphasizes efficiency, including conservation and water reuse. Denver Water utilizes many conservation methods: (1) education and outreach; (2) diagnostics, including audits and monitoring habits; (3) rebates and incentives; (4) rules; (5) research, monitoring, and evaluation; and (6) tiered rates, for example if one uses more water, that user pays more per unit. One important policy issue the Board must decide is what uncertainties to plan for and how to plan for those uncertainties. Some examples include variations from pine beetle kill, potential wild fires, and climate change.

Mr. Waage noted the planning method of the Traditional Future method; future water use is extrapolated from past trends, without anticipating any major changes. Denver Water, however, plots a cone of uncertainty to plan for a range of solutions in different situations. This cone allows Denver Water to prepare for a wide range of uncertainty, and best suites planning for climate change. Scientists predict that climate change will cause more frequent and severe droughts. However, since Denver Water does not know what is going to happen, it prefers a range of solutions, instead of waiting for scientists to figure out the exact future.

As discussed above, Denver Water takes significant steps to increase efficiency, but efficiencies alone will not solve all the possible problems associated with climate change. Casey Funk proposes that laws should permit Denver Water to save water to provide options for the future. However, saving water violates the Anti-Speculation Doctrine because a water user needs a vested interest and a specific plan. The can and will