CONFLICTS OF INTEREST ISSUES
FOR WATER ATTORNEYS

Water Law Section, Idaho State Bar

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Ethical Considerations for Water Professionals

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This outline sets forth some of the ethical rules applicable to representation of clients. It does not purport to be a complete survey of the field. For example, it does not address representation of corporations, common representation of multiple parties, rules concerning prospective clients, and several other areas. Rather, it focuses particularly on conflict of interest rules involving current and former clients, and sets forth hypotheticals for discussion regarding water law situations. The full text of selected rules is set out in Attachment A. I Attachment B is the 1995 Colorado Attorney General’s opinion addressing ethical considerations for water lawyers in that state. While this of course is from another jurisdiction, the rules involved are essentially the same. The Colorado opinion is a useful analysis of the unique ethical questions faced by water rights attorneys.

A. Applicable rules

Idaho lawyers are governed by the Idaho Rules of Professional Conduct promulgated by the Idaho Supreme Court. The rules governing conflicts of interest and other key provisions were substantially amended, effective July 1, 2004. Unless otherwise stated, all references in this outline to rules and official comments are to the 2004 version of the Idaho Rules, and are referred to simply as “Rule.”


The conflict of interest rules vary by category of client. Generally speaking, the lawyer owes a broader duty to current clients than to former clients. Special rules (adopted in 2004) are applicable to prospective clients.

Note that under Rule 1.10 and Rule 1.18(c) conflicts of one lawyer are generally imputed to the entire firm (unless the conflict is based on personal interests of the lawyer). Thus, in this outline, statements about “a lawyer” should be understood to apply to any lawyers within the law firm.

Conflicts of interest may be consented to by the affected clients if certain conditions are met. Some conflicts, however, are not consentable, either because they fall into a prohibited category or because they are inherently unreasonable.

B. Conflicts of interest involving two or more current clients (“concurrent conflicts”) (Rule 1.7)

Rule 1.7 governs the duty owed by the lawyer to avoid conflicts of interest among the lawyer’s current clients (referred to as “concurrent conflicts”). The rule broadly prohibits the lawyer from putting himself or herself in a position (1) that qualifies as “direct adversity” or (2) that will “materially limit” the lawyer’s ability to serve. Either constitutes a conflict of interest.

Rule 1.7(a) provides (emphasis added):

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1 Sections A and B of this outline are excerpted from Christopher M. Meyer, Ethics Handbook, Ethical Considerations for the Client and Lawyer in Idaho, published by Givens Pursley LLP.
RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

A conflict of interest exists if the clients are “directly adverse” or if there is a “significant risk” that the lawyer’s representation of either will be “materially limited” by the responsibilities to the other. These two concepts (“directly adverse” and “materially limited”) are considered below. The question of “consent” or “waiver” under subsection (b) is addressed after that.

(1) “Materially limited” (Rule 1.7(a)(2))

We will take up the “materially limited” test first, because it is more straightforward and because its understanding is necessary to the discussion of the more complex “directly adverse” rule.

Even where there is no direct adversity of interest between two clients, Rule 1.7(a)(2) prohibits any representation of a client (in the absence of consent) that poses a significant risk that the representation will be “materially limited” by the lawyer’s responsibility to any other person (not just a client), including family and domestic relationships.

Comment 8 to this rule notes that, even if “there is no direct adverseness,” a conflict of interest exists if there is a “significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”

For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the
likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

This comment suggests that determining whether a lawyer would fail the “materially limited” test is essentially a common sense analysis based on practical considerations.

(2) Directly adverse (Rule 1.7(a)(1))

Most conflict issues arise under the first category, that is those occurring due to direct adversity between current clients. The rule is simply stated: “[A] lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client.” Rule 1.7(a)(1). The challenge comes in figuring out what “directly adverse” means.

There are three categories of circumstances in which a concurrent conflict question can arise.

(i) It is not a conflict to represent two clients adverse to each other where the representation of neither client relates to the clients’ adversity and there is no material limitation issue.

Rule 1.7(a)(1) states that only direct adversity involving representation by the lawyer of at least one of the clients on the matter that makes them adverse gives rise to a “directly adverse” conflict. For instance, two clients might be fierce business competitors or they might simply despise each other. Likewise, they might be battling each other in a lawsuit unrelated to the lawyer’s representation of either of them. In these cases, the lawyer may ethically represent both of the clients in other lawsuits, business transactions, or matters having nothing to do with the clients’ antagonism for each other. Doing so does not constitute a conflict under Rule 1.7(a)(1) and requires no consent by the clients (unless the lawyer is materially limited in his representation under Rule 1.7(a)(2)). This follows from the rule’s language that there is no direct adversity unless “the representation” of one client will be directly adverse to another client.” The rule does not say that it is a conflict to have two clients who are “directly adverse” to each other. It says that it is a conflict to represent a client on a matter that is directly adverse to another client. In short, in order to create a conflict of interest under the rules, the lawyer’s representation must relate to the thing that makes the clients adverse.

(ii) It is always a conflict to represent both clients on the very matter that makes them adverse

If the lawyer represents both clients on the very matter that makes them adverse, that is plainly a conflict of interest. Thus, it would be a conflict of interest for a lawyer to represent both the plaintiff and the defendant in the same lawsuit or both the buyer and the seller in a water right purchase and sale negotiation.

In theory, such dual-representation direct conflicts are waiveable in some circumstances, but the circumstances where waiver would be proper are rare. They are not waiveable where the representation would be unreasonable or where the matter is in litigation or before a “tribunal.”
(iii) Lawyer's representation of one client on a matter adverse to another client whom lawyer represents on a different matter may or may not constitute a conflict

Suppose that the lawyer represents Client A on a matter that adversely affects Client B, whom lawyer represents on a separate and unrelated matter. Rule 1.7(a)(1) applies in this context. The commentary on Rule 1.7 addresses this question:

Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

Comment 6 to Rule 1.7 (emphasis added).

The point is reiterated in another comment offering an example in a transactional context:

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Comment 7 to Rule 1.7. The conflict described in Comment 7 is “direct” because the representation of one client is aimed directly against the other. To use the words of Comment 6, the lawyer would be advocating “against a person the lawyer represents in some other matter.” Presumably, this adversity would be present even where the negotiation between the two clients is “friendly.” However, consent might be more appropriate in the context of a friendly negotiation.

Another example of a direct conflict is found in Comment 6, which provides that it is a conflict of interest for a lawyer to confront his other client on the witness stand: “[A] directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving the other client, as when the testimony will be damaging to the client who is represented in the lawsuit.” Comment 6 to Rule 1.7. In this example, the witness-client might not even have an interest in the lawsuit; she might simply be a witness to an automobile accident. Nevertheless, this comment suggests that it would be a conflict of interest for the lawyer to cross-examine her. Note that the comment simply says this is a conflict. It does not address whether consent may be obtained. Consent is not barred even in litigation, so long as the attorney is not representing both clients in the same litigation. However, the necessity to cross-examine a client raises other difficult questions (is the consent reasonable? and is the lawyer materially limited?).

These Comments make clear that where the lawyer is engaged in direct, one-on-one opposition to another client, there is “direct adversity” – even though the lawyer is not representing the other client on that matter.

On the other hand, one can imagine situations in which the representation is adverse in some sense, but is not directly adverse. Although the rules do not employ this terminology, we might call these “incidentally adverse” situations. These are situations in which the representation of one client has the incidental effect of disadvantaging another client. Comment 6 offers one example based on business competition:

In contrast, Rule 1.9 dealing with former clients is limited to representations of both clients involving the “same or substantially related matter.” In other words, it is perfectly acceptable to represent a current client against a former client where the current direct adversity is unrelated to the former representation of the other client.
On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

Comment 6 to Rule 1.7 (emphasis added).

In this example it appears that the lawyer’s representation of neither client was related to their economic competition (presumably this is what is meant by “unrelated litigation”). Suppose, however, that the lawyer’s representation of one of the clients did relate to the adversity between the clients. For example, suppose the lawyer helped a client buy a property or obtain a water right, the existence of which would give that client a leg up vis-à-vis another client.

The rule itself offers no real guidance, other than the use of the adverb “directly” to limit the types of adversity to which the rule applies. It would appear logical that a lawyer’s representation is not directly adverse so long as it is not directed “against” the other client. In other words, adversity that is merely incidental (meaning that its primary purpose is something other than to defeat or block the desires of the other client) does not constitute “direct adversity.” (Recall that even if there is no direct adversity, the lawyer also must be cognizant of whether the representation would be materially limited by his or her representation of the other client.)

For instance, suppose a lawyer represented a real estate developer seeking to build a high rise apartment building in a residential neighborhood. Suppose that lawyer or the lawyer’s firm also represents another client on an unrelated estate planning matter. Finally, suppose that the second client lived near the proposed apartment complex and believes that if the high rise is constructed, it may reduce the value of other properties in the area including hers. Is this a conflict under the rules? Must the representation of the developer client be disclosed to the homeowner client? If the homeowner client declines to consent, must the lawyer end his representation of the developer?

To take a more extreme example, suppose the lawyer represented a water utility in a rate case before the Idaho Public Utilities Commission. Can the lawyer be conflicted out by any other client that uses water from this utility and refuses to give consent?

It would appear that the answer to both hypotheticals is “no.” Common sense suggests that being “directly adverse to another client” requires something more than incidentally disadvantaging another client—such as the homeowner in the high rise example or the electric power customer in the water utility example. In order to rise to the level of a direct ethical conflict, the lawyer’s representation of one client must be directly aimed at the other client in a manner requiring the lawyer to confront and oppose the other client in some adversarial setting (whether that be in a hearing room or in a contract negotiation).

Of course, if the homeowner or the power customer were to intervene in the proceeding or otherwise put the lawyer in the position of having to take them on as opponents, that would be a different matter. There is no bright line here. Whether the line is crossed may depend on the nature of the hearing and whether the lawyer will be called upon to thrust and parry with the other client.

In conclusion, it is not easy to say what “directly adverse” means. In the words of Comment 6, it requires that the lawyer affirmatively act “as an advocate in one matter against a person the lawyer represents.” The rule, however, offers little guidance (except at the extremes) as to when conduct crosses that line. The comments do not squarely address the issue of when representation of one client in the adverse matter constitutes a “directly adverse” conflict. On the other hand, the comments are entirely consistent with the “confront and oppose” analysis suggested here.
(3) Positional conflicts (adverse precedents)

Is it a conflict of interest for a lawyer to argue a position in one case that may create a precedent harmful to another client who is not a party to that case? The quick answer is generally no, unless the lawyer will be called upon to take the opposite position for the other client in another case. The commentary makes clear, however, that issue arises solely under the second prong of the conflict rule ("materially limited") not under the first prong ("directly adverse").

In the preceding section, this outline concluded that direct adversity occurs when the lawyer will be called upon to confront and oppose the other client in an adversarial setting. Thus, arguing for conflicting precedents in different tribunals on behalf of different clients would not constitute direct adversity. This conclusion is reinforced by Comment 24 to Rule 1.7 which deals with the special issue of adverse precedents. The comment states that ordinarily it is not a conflict of interest for a lawyer to take a position for Client A that establishes a precedent that may be harmful to Client B in another tribunal at another time. The comment states in full:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client may create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: whether the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients’ reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

Comment 24 to Rule 1.7.

Note that the comment addresses the subject entirely under the “materially limited” concept, and suggests an approach that weighs and balances all the surrounding circumstances. Whether the lawyer’s actions constitute a conflict of interest depends on a variety of factors, such as the importance of the precedent and the clients’ reasonable expectations. It also bears emphasis that even where a conflict exists, it is waiveable based on informed consent.

The comment is written in terms of “different tribunals at different times.” Thus, it would be a conflict, presumably, to argue conflicting positions before the same tribunal at the same time. ³

³ It is unclear what “at the same time” means. Suppose a lawyer filed a motion seeking a broad interpretation of a discovery sanction rule, and the motion was denied. While that case is still pending, could the same lawyer representing another client before a different judge in the same district court defend that client in a discovery dispute by seeking a narrow application of the sanctions rule? The correct answer would seem to be, “that depends.” The blurriness of these questions and the need for more facts and context argues for analyzing these under the more flexible “materially limited” rule.

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In any event, the author would suggest that even where the lawyer is seeking differing precedents before the same tribunal, there is no *per se* conflict under the directly adverse rule. So long as the lawyer is representing the clients on different matters (e.g., different water rights applications) that do not require the lawyer to confront and oppose the other client, there would be no direct adversity, and the analysis should proceed under the more practical, common-sense-based “materially limited” prong of the conflict rule. Thus, if the lawyer can reasonably say that his or her advocacy of each water right is not materially limited by the other, then there is no conflict of interest.

A cautious approach to this issue would call for the lawyer’s engagement letter to point out that the firm is engaged in a variety of water rights and public policy matters and other actions that are likely to create precedents, and warn that the client may disagree with or be adversely affected by undertakings of the firm on behalf of other clients. There could be an issue as to the effectiveness of consenting to such a generic and prospective disclosure of conflicts. However, a thoughtful explanation that fairly puts the client on notice should be effective. Comment 22 to Rule 1.7.

C. **Duties to former clients (Rule 1.9)**

(1) **The applicable rule**

A lawyer owes a duty not only to each of his or her existing clients, but to the lawyer’s former clients. The duties owed to former clients are somewhat more limited, but remain significant constraints in perpetuity. Rule 1.9 governs conflicts arising between a current and a former client. These are sometimes referred to as “sequential conflicts.”

Rule 1.9 states (emphasis added):

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person; and

   (1) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

   (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

   (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The discussion below addresses Parts (a) and (b) of this rule.
(2) **Must be substantially related matter**

Rule 1.9 prohibits a lawyer from representing a client (in the absence of consent) whose interests are materially adverse to those of a former client whom the lawyer represented in “the same or a substantially related matter.” Whether the matters are “the same or substantially related” generally refers to whether the matter involves the same disputed issues of fact. The official commentary offers these examples:

[A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Comment 3 to Rule 1.9.

In the first example in Comment 3, both the new matter and the former matter relate to environmental issues at the project, even though one involved environmental regulatory permits and the other involved rezoning. If the new matter involved rezoning issues completely unrelated to the environmental considerations addressed in the old matter, then, depending upon the particular facts, one might contend that the matters are not substantially related. However, this would be a close call.

Suppose a lawyer helped Client A obtain a permit for a water right in a routine uncontested administrative filing, and then concluded the representation. Could lawyer later represent Client B in opposing Client A’s application to transfer the water right to a different use? This will depend on the facts. For example, does the opposition to the transfer have anything to do with how the water right was originally permitted? Assuming no such factual nexus, it would seem that the original permit application and the subsequent transfer should not be deemed “substantially related” simply because they involved the same water right.

However, assume the lawyer’s representation of Client A in the above example (to obtain the water right) relied on lawyer’s advocating, and proving, particular hydrologic facts for a ground water basin. It would seem that lawyer may not later represent Client B in an action to challenge Client A’s proposed transfer by advocating a hydrologic analysis contradicting those facts. A tougher question is presented where the lawyer seeks to appear later representing Client B who, though not challenging the hydrology, asserts well interference against Client A. Is this second action “substantially related” to the original representation?

In all such close cases, obviously, the lawyer will be better off if he or she can obtain consent from the former client. The practical difficulty is that consent tends to be harder to obtain from former clients than it is from current clients. This is another reason that these matters should be addressed at the time of the initial engagement.

(3) **Consent of former client**

As with current clients, conflicts relating to former clients may be waived if the former client gives informed consent, confirmed in writing. Rule 1.9(a) and (b).
D.  “Informed Consent” (Rules 1.7, 1.8 and 1.9, among others)

Rule 1.0 defines “informed consent” as a person’s agreement “to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Of course, and as noted by Comment 14 to Rule 1.7, “some conflicts are nonconsentable.” Comment 15 to Rule 1.7 states:

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

More concretely, Comment 18 to this rule provides:

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.

The “confirmed in writing” requirement can be satisfied by “a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.” Comment 20 to Rule 1.7.

E.  The Colorado Bar Association’s Opinion

Colorado has a large number of water rights attorneys and many water controversies. In 1981, with an update in 1995, the Colorado Bar Association’s Ethics Committee issued an opinion (“Opinion”) addressing “whether an attorney’s or a 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.” The Opinion is set out on Attachment B. Some highlights:

- Generally, the Opinion concludes that the fact that a lawyer represents “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.” Rather, the Opinion concludes that such representation would be ethically improper “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.”

- The Opinion does not announce a different ethical standard for water lawyers, but recognizes the “unique nature” of the water rights practice.

- The Opinion notes 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.”

- “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. . . . The variable conditions of physical supply and users’ fluctuating demands will determine who gets water. . . .”
• “The 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’.”

• It would be improper for a lawyer to represent two water right applicants who are “in actual competition” because they are seeking the same remaining water supply on a stream

F. Hypothetical ethics scenarios involving water matters

In each of the following, consider at least the following:
• Concurrent conflict of interest under Rule 1.7?
• Conflict involving a former client?
• Lawyer materially limited?
• Can the conflict be waived by “informed consent, confirmed in writing”?
• One client’s confidential information?
• Contents of engagement letter?
• Approach taken by Colorado Atty Gen’s opinion on water matters.

1. Lawyer is asked to represent client (“Junior”) in seeking a new water right permit in a basin or stream system where Lawyer has current clients with water rights.

2. Junior in the above example asks Lawyer to prosecute Junior’s application for a water right transfer under circumstances where Lawyer, who already represents Senior, considers it likely that Senior will need to oppose the transfer application.

3. Junior files the transfer application using other counsel and is Lawyer’s former client. Could Lawyer represent Senior in opposing Junior’s application?

4. Senior decides not to oppose Junior’s transfer application. Could Lawyer represent a completely new client in opposing it?

5. Junior, a former client (and represented by someone else), seeks to invalidate Senior’s water right. Can Lawyer represent Senior in the dispute?

6. Senior asks Lawyer to initiate a delivery call against other water right holders, including that held by Junior, a former client whom Lawyer assisted in obtaining a water right.

7. In the previous scenario, suppose Junior had told Lawyer, during Lawyer’s representation of Junior, that Junior was thinking of challenging Senior’s water right at some point, but that he would not want to pursue it if it was going to cost him more than a few thousand dollars?

   a. Would this materially limit Lawyer’s ability to represent Senior?
b. Would it place Lawyer in a position where he or she would be using confidential information to the disadvantage of a former client?

8. Lawyer is general counsel (not water right counsel) to irrigation district, but then ends this representation and takes on representation of a separate entity which initiates a delivery call against the district’s water rights.
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(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.2: SCOPE OF REPRESENTATION

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of a client; or

(6) to comply with other law or a court order.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessor, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument, giving the lawyer or a person with whom the lawyer has a familial, domestic or close relationship any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

   (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

   (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

   (1) the client gives informed consent;

   (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

   (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

   (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing.
ATTACHMENT B: COLORADO'S ETHICS OPINION ON WATER RIGHTS REPRESENTATION

Ethics Opinion 58: Water Rights, Representation of Multiple Clients, 03/21/81; Revised 10/14/95

The following Formal Opinion was written by the Ethics Committee of the Colorado Bar Association

[Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions.]

WATER RIGHTS, REPRESENTATION OF MULTIPLE CLIENTS

58
Adopted March 21, 1981.
Revision adopted October 14, 1995.

http://www.cobar.org/index.cfm/ID/386/subID/1779/CETH/Ethics-Opinion-58-Water-Rights-Representation-of-Multiple-Clients-03/21/81-Revised-10/14/95/

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.\(^2\) 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. Sections 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 available 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.

2. 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.
Dear ~Client:

Thank you for retaining this firm to represent ~Client/Company in connection with ~matter. I am writing to confirm the terms of that representation.

Initially my legal representation will involve ~description of matter. I will keep you informed at each stage, so that you may make key decisions on how to proceed.

Our representation is limited to the scope of work for which we have been retained. I would be happy to take on other matters for you in the future. Each new matter, however, will be subject to conflict-of-interest clearance and a specific agreement regarding the scope of such representation.

I will be the responsible attorney for this matter. From time to time I may call on other attorneys in the firm for assistance or consultation. My hourly rate for ~insert year~ is shown in the enclosed Fee and Cost Schedule (Exhibit C). Any additional personnel or adjustments in billing rates will be clearly indicated on your billing statements.

~OPTIONAL RETAINER FEE As we discussed, my retainer fee for this matter is $~Amount. As explained in Exhibit D, these funds belong to you until we earn them. Any unearned balance will be returned to you at the conclusion of our representation. I would appreciate your forwarding a check in that amount, payable ~insert firm name~, as soon as possible.

~ OR With the understanding that you will keep your account current, I have agreed not charge an initial retainer fee in this matter.

At this point it is difficult to predict overall costs. However, I will proceed one step at a time, keeping you fully informed of progress and the level of my activity.

After you have had a chance to review this letter and the attachments, please indicate your approval by signing the acceptance at the bottom of this letter. If you have any questions or if you do not agree to the terms of the representation, please let me know as soon as possible. If this engagement agreement meets with your approval, please make a copy for your files and return the signed original to me.
I thank you for entrusting your work to this firm. I will do my best to provide you with the high quality legal counsel you expect. If you ever feel that I am not meeting your expectations or you have other questions about our relationship, please do not hesitate to call me.

I look forward to working with you.

Sincerely,

Encl:    Exhibit A: Conflict Disclosure and Waiver
         Exhibit B: General Terms and Conditions
         Exhibit C: Fee and Cost Schedule
         Exhibit D: OPTIONAL Retainer Fund Agreement

ACCEPTANCE OF ENGAGEMENT AGREEMENT

I have read the preceding letter and the exhibits that follow, including the Conflict Disclosure and Waiver. I agree to the firm’s representation on those terms. I am authorized to enter into this Engagement Agreement on behalf of ~Client/Company.

Dated: _______________  

~Name
~Title
~Client/Company
EXHIBIT A

Conflict Disclosure and Waiver

In this discussion, "you" refers to ~Client/Company. It also encompasses any corporate parents, subsidiaries, or other related entities. "I," "me," "we," "us," and the "firm" all refer to [insert firm name].

Our representation of you is governed by Rule 1.7 of the Idaho Rules of Professional Conduct.1 This rule prohibits the firm from representing two clients where our representation of one client would be directly adverse to another client unless four conditions are met: (1) despite the conflict, we reasonably believe that we can provide competent and diligent representation to each client, (2) the representation is lawful, (3) we do not represent competing clients on the same matter in the same litigation or other formal proceeding, and (4) both clients waive the conflict after being fairly advised of the circumstances. The purpose of this letter is to advise you of actual and potential conflicts and seek your informed consent before we undertake your representation. In making your decision, we encourage you to consult with your own independent counsel.

By agreeing to this representation, you waive any conflicts of interest described in this letter and consent to our representation of you.

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1 Rule 1.7 of the Idaho Rules of Professional Responsibility (effective July 1, 2004) provides:

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.
No direct conflict with other current clients on this subject matter.

We have run a conflict check based on the following names and information that you have provided. The firm is not aware of any direct conflict of interest with other current clients regarding the subject of our representation of you on this matter, except as discussed below. In other words, we are aware of no situation in which you and another current client are directly adverse and we are representing both you and the other client in connection with that same matter.

This firm represents many clients with interests in water rights. We are not aware of any immediate physical conflict (such as potential well interference) between your water rights and those of any other client. At some level, however, virtually all water rights are physically interconnected and therefore potentially in conflict with each other.

OR

[INSERT DISCLOSURE OF NATURE OF CONFLICT, POTENTIAL RISKS, AND SCOPE OF WAIVER/CONSENT]

Potential adversity on unrelated matters.

Our firm represents clients in a variety of commercial ventures. Accordingly, it is inevitable that some of our clients will have interests and objectives that may conflict with those of other clients from time to time. For instance, some of our clients may be business competitors of each other. Even if they are not competing head-to-head, they may run into each other in the real estate market, for example. Such business adversity among our clients is natural and does not necessarily create a conflict of interest for this firm—so long as we are not representing both clients in the same transaction or dispute.

We want you to be aware, however, that there may be times when we represent one client on some matter that another client finds undesirable. For instance, one client might ask for our assistance in acquiring a property that another client, whom we represent on an entirely unrelated matter, might be interested in. Or we might represent the developer of a project that another client, represented on a completely different matter, wished not be developed.

You should also be aware that from time to time we represent cities, counties, states, and other governmental entities. Such representations are always limited to particular matters. Naturally, we would never represent such an entity in a matter adverse to you. However, it is possible that we might represent a governmental entity on a matter at the same time that you have unrelated permitting or other matters before that entity.
Our representation of you is limited to the particular matters we undertake for you. We ask your understanding and consent that our representation of you does not allow you to prevent us from undertaking unrelated work for other clients, even if you view that unrelated work as undesirable from your perspective.

**Positional conflicts (policy issues or legal precedents).**

The firm’s lawyers are engaged in a variety of public policy, regulatory, and legislative matters with broad implications. We represent clients that may hold viewpoints or advocate public policy positions contrary to yours. For example, we represent businesses and industries of all types, banks and other financial institutions, business owners, venture capitalists, trusts, doctors and hospitals, trade organizations, real estate investors and developers, professional groups, industry associations, homeowner groups, citizen groups, user groups, policy advocacy organizations, nonprofits, and governmental entities at all levels, as well as other public and quasi-public entities. We appear before courts, agencies, regulatory and governmental bodies, and state and federal legislatures. Consequently, there could be instances in which we pursue a policy issue or legal precedent on behalf of one client that you might not consider favorable or desirable.

**Communication regarding conflicts.**

If you ever become aware of any circumstances that raise concerns about the appropriateness of our representation of you or another client, please inform us immediately. The attorneys who represent our other clients on matters potentially adverse to you may not always be familiar with all circumstances related to our representation of you. Consequently, the firm may not be in a position to detect every situation that may raise concerns about the appropriateness of the concurrent representations. Therefore, we rely on you to notify us of any concerns that come to your attention.

**Our continued representation of other clients.**

You are free to terminate our representation of you for any reason at any time. If you do so, you have agreed that we may continue to represent other clients whose conflicts with you are known today or may be reasonably anticipated based on the disclosures made in this letter. Thus, even if you no longer wish for us to represent you in the future, we may continue to represent other clients of this firm. If you have questions about this or any other concerns, please do not hesitate to ask.