

**THE ETHICAL OBLIGATIONS OF LAWYERS AND  
LANDMEN: ARE THEY DIFFERENT?**

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# THE ETHICAL OBLIGATIONS OF LAWYERS AND LANDMEN: ARE THEY DIFFERENT?

## I. INTRODUCTION.

Legal literature addressing the relationship and the ethical differences between oil and gas lawyers and landmen is sparse. The only legal source the author has been able to locate which even touches on the subject is the October, 2005 Texas Bar Journal article by John C. Heymann entitled “*Ten Things Landmen do to Irritate their Lawyers.*”<sup>1</sup> When the author read Heymann’s article he was working as a Land Manager for a major oil company. His first reaction, as might be expected, was “What about lawyers who irritate landmen?” The passage of time and the author’s own experiences with a small minority of landmen after having re-entered private law practice has tempered his reaction. But rather than rebutting or otherwise engaging in a polemic over which profession does the better job of irritating the other, it would seem more productive to focus on ways in which the two professions can work together to better to serve their common client—the oil and gas producer and explorer.

A major step in such an undertaking is to better understand the differences and similarities in both the duties and the ethical obligations of the two professions. At the outset it should be noted that both lawyers and landmen, or at least those landmen who are members of the American Association of Professional Landmen.<sup>2</sup> are subject to professional codes of ethics. But the ethical obligations of each profession cannot be considered in a vacuum. The differences in the roles of lawyers and landmen in the oil and gas industry, and particularly the different roles of oil and gas title lawyers and landmen, must be understood if their respective ethical obligations are to be fully appreciated. The primary goal of this paper is to help better facilitate such an understanding. A secondary goal is to identify practice tips for oil and gas lawyers who wish to improve their dealings with landmen on both an ethical and a professional level.

## II. WHY SHOULD LAWYERS CARE?

The public image of landmen, like that of lawyers, is often flawed. The term “landman” is often associated with image of questionably ethical individuals chasing farmers across cow pastures in order to “hound” them into signing oil and gas leases—hence the genesis of the term “lease hound,” which as Heymann points out in his article is still used by many people today.

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<sup>1</sup> Texas Bar Journal, October 2005 (68 TXBJ 842).

<sup>2</sup> The American Association of Professional Landmen or “AAPL” is the premier professional association for landmen in the United States and Canada.

But the term “lease hound” is an oversimplification when applied to the modern landman. The term “landman” is actually a generic term used to describe a multitude of different job specialties for people coming from a variety of different educational backgrounds, as well as different genders.<sup>3</sup> The ranks of landmen include at least one former President of the United States as well as past and present CEOs of some of the largest energy companies in the United States.<sup>4</sup> Educational backgrounds for landmen are not uniform. Most modern landmen, however, are college graduates and many have advanced degrees in law, business, accounting, and even geology or engineering.<sup>5</sup> But there are no educational requirements per se to be a landman. A high school dropout can quit selling shoes for Wal-Mart and become a landman simply by printing a business card holding him or herself out as one. This is because the land profession is largely unregulated, with the ongoing debate for and against regulation of landmen within the American Association of Professional Landmen<sup>6</sup> and allied local landmen’s associations for many years mirroring the national debate over whether more or less government regulation of the private sector is a good or bad thing.<sup>7</sup>

Regulated or not, it is fair to say that the land profession in the United States for the past several years has been enjoying perhaps its biggest resurgence in decades. This is

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<sup>3</sup> The genesis of the word “landman” is unknown to the author, but it must date to the early years of the American oil industry, probably in the boom years of land speculation following the First World War. *See* Daniel Yergin, *The Prize* 218-220, (Simon and Shuster, 1991). In its modern usage, the term applies to both men and women (*see* Article II, Section 4, “Gender”, Bylaws of the American Association of Professional Landmen, (Last Amended July 1, 2005), and despite occasional attempts through the years at various companies to substitute more gender neutral terms such as “land representative” or “commercial negotiator,” most women landmen apparently do not care and the term has continued in widespread usage to apply to both women and men. References in this article to landmen are intended to apply to both sexes and likewise use of the term “he” rather than “he or she” is for convenience and is intended to be gender neutral.

<sup>4</sup> President George W. Bush, 43rd President of the United States, worked as a landman in his home town of Midland, Texas during the 1980s. Aubrey McClendon, former President and CEO of Chesapeake Energy Corporation, along with co-founder Tom Ward (now Chairman of Sandridge Energy) both started as landmen. Likewise Vaughn Venneberg II, former President of XTO Energy, is a landman by profession.

<sup>5</sup> The first Land Department Manager (“Chief Landman”) the author encountered at his former major oil company employer was a lawyer plus held master’s degrees in both business and geophysics.

<sup>6</sup> The American Association of Professional Landmen (or A.A.P.L.) is the land profession’s leading professional association and is a strong proponent of voluntary certifications for landmen including the “Registered Professional Landman” and the “Certified Professional Landman” designations. Both designations require a set number of years of land experience, a college degree from an approved university, continuing education requirements, and in the case of the CPL certification, an examination. The AAPL’s mission is to “promote the highest standards of performance for all Land Professionals, to advance their stature, and to encourage sound stewardship of energy and mineral resources.” *See* Article IV, Bylaws of the American Association of Professional Landmen (Last Amended July 1, 2005). Sometimes the author (as well as others) refers to the organization simply as the AAPL.

<sup>7</sup> *See* <http://www.hapl.org/en/rel/129/>

a dramatic turnaround because a dozen years ago the land profession was in danger of dying out. Oil prices were under \$10 a barrel, U.S. natural gas was still in a bubble, the major oil companies had by and large abandoned US exploration to fish for better prospects overseas, and the U.S. rig count had plummeted. The land profession itself was middle- aged and greying, with recruiting so flat that most universities, including the University of Texas, had abandoned their petroleum land management programs.

What a difference a dozen years can make. Today, the expansion of oil and gas drilling in shale plays across the United States has created a large demand for landmen just at the time the baby boomers are retiring from the profession in droves. At the time this paper is being updated in the Spring of 2013, irrespective of a decline in natural gas prices and of the fact that the United States has been in a severe recession with unemployment rates at post World War II highs, it is fair to say that the growth of the land profession in the United States in recent years has been nothing less than astronomical. The trend is likely to continue. Landmen are now getting jobs in places like Pennsylvania, Ohio, West Virginia, North Dakota, Colorado and elsewhere that were considered “dead” to the oil patch just a few years ago. The demand for landmen in more historically active states such as Oklahoma, Texas and Louisiana remains robust due to shale plays, high crude prices, secondary recovery, and the export of land services from the Southwest to the Rockies, Appalachia, and other areas.<sup>8</sup> Landmen have become one of the “hottest” occupations in the United States. If you are an energy lawyer and you have never worked with a landman, the odds are better than ever that you will do so sooner rather than later.<sup>9</sup>

### **III. SEEK FIRST TO UNDERSTAND<sup>10</sup>**

The first course of business for a lawyer working with a landmen is to seek to better understand what it is that a landman does. As noted above, the popular stereotype of a landman as a “lease hound” is superficial and often misleading. Wikipedia<sup>11</sup> defines

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<sup>8</sup> The old adage that “if you can work titles in Texas or Louisiana you can work them anywhere” still rings true, the point being that land titles in those two states are often very complex in comparison to many other (though not all) parts of the US oil patch. This is due to the prevalence of metes and bounds descriptions, a long history of oil and gas development, aging fields, fractionation of ownership, stacked reservoirs, Texas’ voluminous body of oil and gas case law, Louisiana’s very distinctive Mineral Code, and many other factors. The author’s colleagues in other states, however, may not universally agree and the author concedes that that are many equally as complex areas in other states.

<sup>9</sup> Landmen work in other energy industries besides oil and gas exploration and production. Natural gas transmission, wind power, coal, uranium, and precious metals to name a few.

<sup>10</sup> STEPHEN COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE; POWERFUL LESSONS IN PERSONAL CHANGE, Habit No. 5, “Seek First to Understand, then to be Understood” pg. 235 (Simon and Shuster, 1989).

<sup>11</sup> [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page)

a “landman” as an individual working in the United States or Canada who performs various services for oil and gas exploration companies, which services include:

- A. Negotiating for the acquisition or divestiture of mineral rights;
- B. Negotiating business agreements that provide for the exploration for and/or development of minerals;
- C. Determining ownership in minerals through the research of public and private records;
- D. Reviewing the status of title, curing title defects, and otherwise reducing title risk associated with ownership in minerals;
- E. Managing rights and/or obligations derived from ownership in minerals;
- F. Unitizing or pooling interests in minerals.<sup>12</sup>

Put more succinctly, a “landman” is a professional who is “primarily engaged in negotiating for the acquisition or divestiture of mineral rights and/or negotiating business agreements that provide for the exploration for and/or development of minerals.”<sup>13</sup>

One might stop here to note that of the above job tasks, only the first one, negotiating the acquisition of mineral rights (or leases), would fall in the “lease hound” category. The rest of the landman’s job tasks sound very much like tasks that many people might assume would be performed by oil and gas lawyers. This is not a coincidence. In fact, the DNA, so to speak, of landmen and lawyers is so similar that the Texas Legislature felt compelled just a few years ago to pass a statute excepting land work from the definition of the practice of law.<sup>14</sup>

The distinction between landmen and oil and gas lawyers can indeed be blurred. Within the land profession itself, lawyers should understand the different roles of company landmen and field landmen. Company landmen, in very general terms, take the lead in land negotiations with other oil and gas companies, supervise independent land contractors, administer and ensure land contract compliance, and otherwise manage

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<sup>12</sup> Wikipedia’s definition is taken almost verbatim from Article II, Definitions, Bylaws of the American Association of Professional Landmen, (Last Amended, July 1, 2005)

<sup>13</sup> Article II, Definitions, Bylaws of the American Association of Professional Landmen, (Last Amended, July 1, 2005).

<sup>14</sup> V.T.C.A. Occupations Code, §954.001 (2005).

their company's land asset base.<sup>15</sup> Field landmen are typically independent contractors who specialize in title due diligence and lease acquisitions.<sup>16</sup>

Company landmen, in particular, often cross the line into what some might say is the practice of law. It is not a coincidence that the primary oil and gas operating form used in the US oil and gas industry – the AAPL Model 610 Joint Operating Agreement—was written and developed by landmen. In large oil and gas companies company landmen may negotiate, draft and finalize complex oil and gas agreements with varying degrees, and sometimes even minimal, involvement of company legal departments. Likewise, field landmen may render “stand-up” title examinations based upon review of courthouse records that oil and gas companies may rely upon to purchase expensive oil and gas leases, or in a pinch, to drill oil and gas wells. So what is the distinction between a lawyer and a landman and what is the status of landmen in states which, unlike Texas, do not exempt landmen by statute from the unauthorized practice of law?

The author's answer and reasoning in responding to that question goes to the heart of “seeking to understand” what it is that landmen do and how their roles differ from oil and gas lawyers. The best description of the role of the landmen in the author's view is what is posted by the AAPL on its website,<sup>17</sup> “Landmen constitute the *business side* of

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<sup>15</sup> In large oil and gas companies the contract compliance function is typically handled by a separate department, often called “lease administration” or “landowner relations” or something similar. Perhaps the most important task of the lease administration function is to prevent loss of leases through non-payment of rentals or non-compliance with other lease obligations. Lease administration is usually considered a sub-specialty within the overall land function. Division order analysts specialize in title issues which pertain to payment of production proceeds and are close cousins (so to speak) to landmen and lease analysts. In smaller companies, which sometimes have one man (or lady) land departments, the distinction between the three specialty areas is often blurred.

<sup>16</sup> Field landmen are also very often referred to by company landmen as “brokers” in throwback to the days when landmen would frequently broker deals between landowners and oil companies, often in exchange for an override or other piece of the action. Nowadays field landmen tend to work for a set daily rate and it is much less common for an oil company to agree to give them an override as part of the consideration for their services. But use of the job title “broker” in reference to field landmen has become part of the nomenclature of the oil patch irrespective that the job function that the field landman provides may have little to do with brokering oil and gas leases. For example, a major part of the job of a field landman, or broker, is title due diligence, that is, running title at the county court house to determine ownership. The primary reason for this evolution in job titles is that company landmen needed a short hand way of referring to field landmen as something other than landman (i.e. “brokers”) so as not to confuse their geology and engineering managers (or their lawyers).

Another job function for field landmen, or “brokers,” is to assemble de facto abstracts of title (i.e. “runsheets” with accompanying documents) which oil and gas attorneys then rely upon for oil and gas title examination. In fact, in Texas, over the past ten years or so the land profession has all but supplanted the abstracting industry insofar as assembly of oil and gas title abstracts are concerned.

<sup>17</sup> [www.landman.org](http://www.landman.org)

the oil and gas exploration team” (italics and bolding added for emphasis). Therefore, almost by definition, landmen do not practice law—they are the ***businessmen of the oil patch***. As simple a concept as that sounds, within the author’s experience it is a concept that is not intuitively recognized by the general public, by lawyers, and even by oil and gas industry executives and professionals.

To illustrate the author recalls an encounter he had not too many years ago with a work colleague in Aberdeen, Scotland when the author was working for a major oil company on a special project while employed as a landman. After exchanging business cards, the colleague went on to explain his job in great detail, which his card described as a “Business Development Coordinator.” Essentially, he attended North Sea lease sales (aka “license rounds”) to purchase offshore oil and gas leases (aka “licenses”) which he was then responsible for administering. He was also responsible for negotiating joint operating agreements, farmout agreements, and other oil and gas exploration and production agreements pertaining to offshore oil and gas operations in the UK North Sea. Last he proudly pointed to the fact that he was a graduate of a leading British university where he had studied philosophy, history and a smattering of economics and accounting. He then asked the author, “what then, does a “landman” do in the United States?” The author’s reply, much to his colleague’s shock, was that a landman in the United States does exactly the same thing that he did. After an abrupt silence in which his face expressed the look of a person who had just been called a chimpanzee, his response was that the author, as an American, was obviously incapable of understanding the complexity and importance of a Business Development Coordinator in the UK where oil and gas operations are so completely different from the US that the analogy to a US “landman” simply could not fit. At that point the conversation had gotten uncomfortable so the subject was changed.

With due respect to the author’s former UK work colleague, the analogy did fit. His job responsibilities were practically identical to an offshore landman in New Orleans or Houston working the US Gulf of Mexico. In fact, contrary to the popular assumption that landmen are only found in the United States and Canada, the author observed after traveling around the world on assignments for his former major oil company employer that landmen are found practically everywhere in the international oil patch—they just do not always have that title. Sometimes they are called business development coordinators, sometimes they are called commercial advisors, very often their role is filled by lawyers, but whatever their title when their job tasks are analyzed, the essence of their job function is the same—they address the ***business side*** of oil and gas exploration.

Very often during the author’s years working for a major oil company as a land supervisor or manager, and particularly in the years after the mid-1980s oil price collapse with attendant widespread corporate downsizing, senior managers and others would question him what it is exactly that landmen do for the company and whether or not it would be possible to get by with fewer or perhaps eliminate the job function altogether?

The author's answer was that though it was certainly possible to fire all the landmen, that would not eliminate the necessity of dealing with land issues unless the company was prepared to surrender all of its US and Canadian oil and gas leases. The fact that questions like that were even raised is a testament to how superficial the understanding of what landmen do was on the part of so many otherwise intelligent and highly educated oil industry executives. The author has observed that the bigger the company, and the more removed senior executives are from day to day oil and gas exploration operations, the wider the gulf in understanding.

The author does not believe that this type of superficial understanding is limited to executives working for the largest oil companies. There is, to put it bluntly, a widespread lack of understanding among many engineers, geologists and even lawyers who work in the oil and gas industry over what it is that a landmen does. Whether it is lack of information, limited exposure, bad experiences, or whether in more than a few cases it is pride and arrogance that causes some people to trivialize landmen as "lease hounds"<sup>18</sup> the fact remains that the land profession is largely misunderstood not only by the general public,<sup>19</sup> but by large sectors of the industry which it serves so well, including the oil and gas bar.

Why is this? The author has observed over the course of several decades that there appears to be an almost institutionalized professional bias against landmen in more than a few oil and gas companies, particularly within the majors. Perhaps the primary reason is that the major oil companies are so large and their operations so diversified and so international in scope that landmen and their job functions are simply foreign to many senior managers. Perhaps the lack of any regulatory oversight of the profession or any governmentally imposed licensing requirements is a part of the problem because it can create the impression that no particular knowledge or training is required for an individual to be a landman. Perhaps part of the problem is that many oil and gas industry professionals have engineering, science and accounting backgrounds and, particularly if they have never worked directly with landmen, cannot fathom how a group of professionals lacking in the so called "technical training" that they themselves went through can be trusted to give business advice or exercise business judgment.

The author believes there is another possible reason for this professional bias against landmen that has its roots in one of the oldest human failings—envy. Most

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<sup>18</sup> "Lease Hound" is not the only such epitaph for landmen. One of the author's former engineering managers in the 1990s (affectionately (?)) enjoyed calling the author and his department the "Land Sharks" as a play on the famous Saturday Night Live skit. In fairness landmen (and others) often refer to geologists as "rock heads" and engineers as "gears" though most landmen are wise enough not to do this to their faces.

<sup>19</sup> The author has not yet seen the new movie "Promised Land" with Matt Damon but based on reviews he has read it perpetuates negative stereotypes of landmen and the oil industry in general in a grossly exaggerated manner. But then that is to be expected of Hollywood.

landmen have fun, interesting jobs. Oil and gas deals are often made on golf courses or over a drink at the bar. Beyond that, land work in the past decade or so at least has offered steady, interesting, high paying employment. The author has known many landmen who have gotten rich in their livelihoods, as opposed to, for example, oil and gas lawyers like himself who have successfully avoided making a large fortune writing oil and gas title opinions or otherwise providing oil and gas legal services. No wonder, then, that so many oil and gas professionals outside of the ranks of landmen, including lawyers, want to get in on the action by defining the work as commercial negotiations, oil and gas law practice, or (like the author's UK colleague), business development.

But at the end of the day, from Texas to Norway, from Calgary to Cairo, both domestically and internationally, it is all about slicing the oil and gas pie to determine how much and who gets what. Landmen are indeed the business side of the oil and gas exploration team. To the author's professional colleagues, past and present, who are in denial of the fact that it is all land work or whose egos demand that it be called by another name, his advice is, "get over it."

#### **IV. TEN TIPS <sup>20</sup> FOR LAWYERS WORKING WITH LANDMEN**

By now it is probably evident that the author has sympathy for landmen and the critical role that they play in oil and gas exploration and production. Land issues are an integral part of the fabric of oil and gas exploration and production and dismissing or ignoring the role of landmen in working and resolving these issues is not likely to lead towards greater success or efficiency among companies seeking to be competitive in the United States oil patch. Today, as much as at any time in the history of the United States oil industry, landmen are key players and lawyers and others working with them should accord them the respect and deference due to a group of professionals that literally can make or break the success of the enterprise. So the first tip for lawyers working with landmen is the one we have been discussing so far—seek first to understand.

#### **Tip #1: APPRECIATE THE DIFFERENT ROLES PLAYED BY LANDMEN AND LAWYERS (SEEK FIRST TO UNDERSTAND)**

We have been discussing so far what it is that a landman does but have said less about the role of an oil and gas lawyer or general counsel interfacing with landmen. First of all, landmen, whether they have law degrees or not, and irrespective of what the Texas Legislature said in 2005,<sup>21</sup> are not paid to practice law and generally speaking, do not want to. The landman's chief concern is to "make the deal"; the lawyer's chief concern should be "to make the deal stick."

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<sup>20</sup> Meaning best practices.

<sup>21</sup> *Ibid*, note 14.

Now, that is hardly a profound statement to a lawyer and could be said about practically any commercial negotiation. But it is especially true with landmen because more often than not, once the deal is closed, the landman moves on to the next. The landman is not necessarily held accountable should the deal “head south” and litigation ensue. That accountability would more likely be assigned to the lawyer. Similarly, if the landman purchases a lease which is subsequently drilled, and assuming that he or she had cured all the requirements in the title opinion, the blame for the subsequent title failure would fall on the lawyer, or his malpractice carrier, not the landman.<sup>22</sup>

The AAPL recognizes the distinction between lawyers and landmen which is why they write into their code of ethics: “The Land Professional shall represent others only in his areas of expertise and shall not represent himself to be skilled in professional areas in which he is not professionally qualified.”<sup>23</sup>

A grey area arises in the situation where a licensed lawyer is working as a landman. The legal and ethical obligations of the lawyer are not suspended when employed as a landman. Nevertheless there is an important distinction between a lawyer holding himself out to the public as an oil and gas attorney and a lawyer working as a landman for an oil company or independent land services firm. The distinction is that the oil and gas lawyer is potentially liable for committing malpractice while the lawyer working as a landman is arguably not.

So just as lawyers need to respect the role of a landman, landmen with law degrees working as landmen should be cautious in rendering legal advice because chances are that they do maintain malpractice insurance or are otherwise covered by their company’s self insurance policies when it comes to legal malpractice. So the landman may be exposing him or herself to personal liability for malpractice when erroneous legal advice is given. Landmen with law degrees who like to practice law without sanction from their employers should be wary of the old adage—“be careful what you ask for...”

**Tip #2: DO NOT UNDERESTIMATE THE PROFESSIONAL SKILL OR KNOWLEDGE OF A LANDMAN.**

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<sup>22</sup> For further discussion see the author’s article, “*To Waive or Not to Waive? Analyzing Oil and Gas Title Opinion Requirements*,” 27th Annual Advanced Oil, Gas and Energy Resources Law Course, October 8-9, 2009, Houston, Texas.

<sup>23</sup> See Appendix, Code of Ethics, American Association of Professional Landmen.

As discussed above the land profession is unregulated and landmen are not subject to specific educational requirements. This does not mean that landmen are not apt to hold advanced degrees. More significantly, an experienced landman with or without a law degree has likely encountered over the course of the years a large number of the legal issues that an experienced oil and gas lawyer might be expected to have encountered. Landmen are, so to speak, “street smart” when it comes to oil and gas legal issues and if the landman is experienced, chances are he may know as much or more about oil and gas legalities than many oil and gas lawyers, particularly a new oil and gas lawyer just entering the profession.

A word of warning is in order, particularly to younger oil and gas lawyers. Lawyers should be cautious before assuming that landmen do not know what they are talking about. The author has known more than a few landmen through the years who derive special satisfaction in making young lawyers, in particular, look stupid. Landmen do not enjoy being treated like the “village fool” by a lawyer, particularly by a younger, inexperienced lawyer, and like the fools in Shakespeare’s plays, are apt to have the last laugh.<sup>24</sup>

### **Tip #3: STAND YOUR GROUND**

To quote Elihu Root, President Theodore Roosevelt’s Secretary of War and an esteemed member at the time of the New York Bar, “About half the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop.”<sup>25</sup> This seems to be particularly true of oil and gas lawyers.

The lawyer owes the respect to landmen which they are due, but nonetheless, the lawyer must often stand his ground.<sup>26</sup> Sometimes a provision in a lease simply must be reworded, sometimes a title requirement should not be waived, and sometimes more time is necessary to accomplish a legal task that was more complex than anticipated. In most cases the landman will respect the lawyer more for standing his ground than those lawyers who easily cede a point or rush a task to the subsequent prejudice of the client’s business objectives.

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<sup>24</sup> This is not to infer that most landmen do not have a sense of humor. *See supra* Part IV, Conclusion.

<sup>25</sup> THOMAS J. VESPER, *UNCLE ANTHONY’S UNABRIDGED ANALOGIES*, p. 409 (Thompson West (2008)).

<sup>26</sup> Both the American Bar Association (ABA) Model Rules of Professional Conduct 1.1 and 2.1 as well as Texas Disciplinary Rules of Professional Conduct 1.01 and 2.01 require a lawyer to provide competent representation and to exercise independent professional judgment irrespective that the client may not want to hear the lawyer’s advice. The ABA Model Rules and the Texas Disciplinary Rules of Professional Conduct are so similar that for purposes of brevity the author will hereafter cite the ABA Model Rules, only, and will refer to them in the following format: “ABA Rule \_\_\_”

In addition, landmen, like lawyers, make their share of mistakes. Likewise a small minority of landmen, like a minority of lawyers, can at times act incompetently or unethically. John Heymann, in the article identified at the outset, “*Ten Things Landmen Do to Irritate Their Lawyers*,”<sup>27</sup> did a very good job in identifying some of the most common pitfalls that an oil and gas title examiner may encounter when working with landmen. Space does not allow a detailed re-capitulation of his topics but the headings themselves are interesting:

- i. Providing too much information.
- ii. Providing too little information.
- iii. Committing forgery.
- iv. Engaging in deceit.
- v. Making unreasonable demands.
- vi. Making impossible requests.
- vii. Using taped oil and gas leases.
- viii. Using computer generated forms.
- ix. Pressuring a notary.
- x. Getting a lawyer sued.

To these the author would add the following, which are not necessarily limited to the context of title examination:

- xi. Being asked to initial agreements without affording the lawyer adequate time to review.
- xii. Not taking care to preserve the attorney client privilege in e-mail or other communications.
- xiii. Indifference to cost and risk of litigation.

The author will quickly say that simply because all of these areas are problems, by no means does he wish to infer that the majority of landmen are persistently guilty of these infractions any more that he would wish others to infer that the majority of lawyers are unethical or incompetent because of the actions of a few. Nevertheless, landmen are often and understandably harried if not harassed by their employers to complete a task, often with little patience or empathy shown for the complexity of the job at hand. But this does not excuse a lawyer from preventing a too hurried landmen to compromise a client’s business objectives.

On the other hand, oil and gas lawyers are sometimes accused of being impractical in their solutions or as being impediments to a deal being completed. Despite these type accusations more often than not the lawyer is correct in his stance and must

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<sup>27</sup> See *supra* note 1.

simply stand his ground with his land colleague. Taking “flack” is simply part of the territory for oil and gas lawyers.<sup>28</sup> The client always has the option of ignoring legal advice; but the lawyer never has the option of not giving the appropriate legal advice when circumstances warrant.<sup>29</sup>

**Tip #4: DO NOT ASSUME THAT LANDMEN ARE INDIFFERENT TO ETHICS.**

The general public, and of course many politicians pandering to them, tend to stereotype oil companies and oil men (or women) as universally corrupt and greedy. The author’s own impression of the major oil companies having worked for one for almost three decades is that overall they behave responsibly and ethically, pay more than their fair share of taxes, and are among the nation’s leading corporate citizens.

But stereotypes of the greedy oil man persist. J.R Ewing, the character from the 1980s T.V. hit show “Dallas,” might fill the bill for the general public’s portrait of an oilman, and to the extent the general public has an impression of a landman, the J.R. Ewing character might not be too far removed. There is no question that landmen, as the business side of the oil and gas exploration team, often find themselves in the cross hairs of complex ethical dilemmas and sometimes they cross the line.

Lawyers, however, should not automatically assume that landmen, since they are not a regulated profession, are either indifferent to ethics, or worse, are universally out to cheat landowners. First of all, understand that lawyers do not have a monopoly on codes of ethics. Though the land profession is not subject to governmental regulation, it imposes its own voluntary regulation through organizations such as the AAPL and its affiliated local landmen’s associations. Attached to this paper is a copy of the AAPL Code of Ethics which all members of the AAPL are bound to comply with. It is a succinct and elegantly written statement which is on par with similar codes governing most any other professional group, including lawyers, with the distinguishing characteristic that it, unlike most State Bar Codes of Ethics, is only a page long.

Landmen, therefore, are likely to become very irritated, justifiably, with lawyers assuming a “holier than thou” attitude towards landmen. Another adage that is relevant: “People who live in glass houses should not throw bricks.” If this adage does not register, note the number of disciplinary cases and disbarments for ethical violations involving lawyers.<sup>30</sup> The author lacks data on the number of lawyers who are convicted felons

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<sup>28</sup> As legal specialists, oil and gas lawyers are generally held to a higher professional standard than general practitioners who might only occasionally encounter oil and gas legal issues.

<sup>29</sup> ABA Model Rules 1.1 and 2.1.

<sup>30</sup> Lawyers are not to counsel clients to commit crime or fraud, ABA Rule 1.2, much less commit crimes or

versus convicted landmen as a percentage of their respective professions but suffice to say both professions have their bad apples.

**Tip #5: DO NOT CONFUSE LEGAL WITH BUSINESS ADVICE.**

By this time it should be obvious that one of the premises of this paper is that landmen are engaged in the business side of oil and gas exploration. Lawyers, however, do not readily acknowledge or want to concede that their primary role is to advise on legal, as opposed to business, issues. The author recalls a staff attorney in the New Orleans office of his former major oil company employer who once told the author that in his view the highest and best use of a landman was to pull office files and gather information for lawyers so that he and his secretary could be spared the task.<sup>31</sup>

The landman's task, however, goes beyond "file swamping" for a legal department. Most landmen are proud of the fact that they are called upon by corporate management to give business advice and they will be offended by lawyers who attempt to exclude them from the process.

Beyond this, oil and gas lawyers can do a disservice to their clients when they fail to distinguish their legal advice from business advice.<sup>32</sup> Though "arm chair" lawyers are found in practically any industry, the author's experience tells him that oil company executives generally want to defer to lawyers on legal advice.<sup>33</sup> Conversely, oil company executives do not want transactions to be held up or rigs to be laid down by lawyers who usurp their prerogative to make business (as contrasted to legal) decisions.<sup>34</sup>

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fraud themselves, but it happens.

<sup>31</sup> Generally speaking the lawyer otherwise showed respect and deference to his land colleagues. Landmen, likewise, occasionally fall short in affording the respect and deference due lawyers.

<sup>32</sup> A lawyer is expected "to exercise independent professional judgment and render candid legal advice" which may include referral "to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation," ABA Model Rule 2.1. However, the comments to ABA Rule 2.1 also recognize that experienced clients may expressly or impliedly want only purely technical legal advice [ABA Model Rule 2.1 Comment 3] or that the lawyer sometimes encounters matters that go beyond strictly legal questions and that are in the domain of another profession [ABA Model Rule 2.1 Comment 4]. Many lawyers, however, struggle with the concept that landmen are members of an independent profession and that landmen should more than occasionally be accorded deference on non-legal matters which fall within the landman's bailiwick of expertise.

<sup>33</sup> The author is using "oil and gas executives" in a generic sense including landmen, engineers, accountants, geologists, etc.

<sup>34</sup> Clients of course are to be kept fully informed and given the opportunity to provide input into the strategy and even tactics used in a particular legal matter. ABA Model Rule 1.4, Comment 5.

As most oil and gas lawyers realize differentiating between legal and business decisions is not always easy. Likewise, the author does not suggest that lawyers should not “stand their ground” when circumstances warrant (*See supra* Tip #3). But a lawyer should not try to hold a landman hostage to an issue that is fundamentally a business, as distinguished from a legal, matter. Landmen, like attorneys, have stressful occupations and have a “bigger picture” to deal with that the lawyer cannot always be privy to.

As much as most lawyers enjoy giving business advice, this is one area where lawyers need to be careful not to overstep their bounds. Another element of the equation is that young oil and gas lawyers, in particular, quickly recognize that landmen get involved in very interesting issues and they like to lever the landman into educating them on the business issues involved. Sometimes this even means withholding approvals as to form on legal instruments so as not to miss the opportunity to get exhaustive and time consuming education from the landman on peripheral subjects.

When managing a major oil company land department, the author had to tell more than one young lawyer that if they really were going to insist on holding up a deal pending their receiving exhaustive briefings on peripheral or irrelevant issues perhaps a transfer to the Land Department should be arranged since they have such an affinity for a landman’s work? Usually that threat was effective in resolving the log jam of legal approvals.

**Tip #6: DO NOT IGNORE THE REALITIES OF DEALING WITH SURFACE OWNERS.**

As most lawyers realize, in Texas, and many other oil and gas producing states the mineral estate is dominant over the surface estate and the mineral owner, or his lessee, generally enjoys whatever access to the surface of the land as is needed to develop oil and gas subject only to the requirement to reasonably accommodate or to comply with specific lease provisions.<sup>35</sup> Older lease forms such as the classic “Producer’s 88” seldom have specific restrictions on surface usage so in older producing areas, in particular, the surface owner is by and large at the mercy of the oil and gas company lessee who wishes to develop minerals under his tract.

This of course presents a real problem when the minerals have been severed from the surface and the surface owner will not participate in any of the benefits of oil and gas

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<sup>35</sup> Space does not allow for a full discussion of the rights of mineral owner as against surface owners, (*See ERNEST SMITH & JACQUELINE WEAVER, TEXAS LAW OF OIL AND GAS, AND THE DISCUSSION OF THE ACCOMMODATION DOCTRINE*) Chapter 2.1B.2 (Lexis Nexis, 2011). Other states have legislatively overridden the dominance of the mineral estate over the surface estate by passing surface damages acts.

production, such as bonus checks, rental checks, royalty checks, etc.. Surface owners tend to have short memories and like to forget that their predecessors in title assigned away the mineral rights or that they may have bought their land at a discount over what it might otherwise have cost had the minerals been included.

In many companies these type issues are dealt with by the Right of Way Department. For those not familiar with the job function, right of way agents are close cousins (so to speak) of landmen, and in many oil and gas companies share the same title. Generally speaking, right of way is the branch of land work which focuses on surface issues attendant to oil and gas exploration, development, or transmission, as opposed to negotiating for subsurface oil, gas and mineral rights.<sup>36</sup>

Dominance of the mineral estate is a fine concept in theory, but try explaining it to the farmer pointing his shot gun at you at the gate you need to get through to access your proposed drilling location. The author never saw a member of the legal staff of his former employer actually confronting a distressed landowner in the field, and of course that was not their job. Their job was to tell the right of way agents what rights the company had, or perhaps to retain local counsel to seek temporary restraining orders.

Often, however, lawyers went a step further. Particularly annoying to most landmen and/or right of way agents are the lawyers who attempt to inject themselves in the negotiations by giving detailed instructions to the landman in the field on how to handle face to face encounters with surface owners –from the safe distance and relative comfort of their law offices. This of course is akin to the soldier being sent up the hill to take a machine gun nest by a General sitting comfortably in his bunker.

A lawyer who is over zealous in this regard may enjoy less cooperation from the landman than otherwise, which ultimately is not in his client's best interest. Generally, lawyers should both empathize with and give wide latitude to landmen dealing with surface owners, at least in the initial stages of the dialogue. Recall the admonition about restricting your advice to legal issues, not business issues (*See supra* Tip # 5).

Such latitude often involves the landman paying surface damages to the landowner, regardless of whether such payments are due under the lease. This is a time-honored tradition in most oil producing states which might be akin to "hush money." This is one area where the landman is likely to enjoy considerable support from the

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<sup>36</sup> Right of way agents, like landmen, are found internationally as pipeline access, damage claims, and other surface oriented operational or infrastructure issues are important components of oil and gas development worldwide. But like landmen, right of way agents go by different names in other countries. Within the author's experience in many African nations (e.g. Nigeria) the role of a right of way agent is often filled by individuals with law degrees.

engineers running oil and gas operations as many engineers have experience working at the field level and are not strangers to encounters with recalcitrant surface owners.

Again, this is an area where experience with people may trump knowledge of the law and lawyers in these situations might be advised to defer heavily to the landman in doing what it takes to smooth things over with the surface owner and to not get overly focused on what legal rights case law may afford. On the other hand, sometimes the best alternative to a negotiated solution is to withdraw and sue. Lawyers would then be called in to help resolve the dispute and advice and counsel in advance, along the lines of preserving rights and taking the best posture in the event of potential litigation, is always appreciated by landmen.

**Tip #7: DO NOT PROCRASTINATE.**

“Do not procrastinate” is a good rule in any area of law practice.<sup>37</sup> However, timing is particularly sensitive to oil and gas companies who do not want to incur expensive drilling rig downtime due to title issues or failures. Over-promising and under-delivering is perhaps the single biggest failing of any oil and gas lawyer, the author included.

The answer is simple. Sometimes you must say no to new business if it forces you to compromise current commitments. The alternative is to compromise the client’s best interests, which is unacceptable.<sup>38</sup>

**Tip #8: DO NOT OVERBILL.**

This again could be said for any area of law practice.<sup>39</sup> Oil and gas companies are particularly focused on the cost of legal services because unlike so many other areas of their business (commodity prices, supply and demand, political risks, blowouts, spills, etc.) the cost of legal services is something that they can directly control. Landmen, likewise, have limited control over what the going rate is for lease bonuses and royalties, for example, are in a given area. Oil and gas title examination costs, in contrast, are something that landmen have a lot of control over.

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<sup>37</sup> Reasonable diligence in legal representation is also required by ABA Model Rule 1.3.

<sup>38</sup> Author’s note: This is one of those “do as I say, not as I do” truisms as his clients might sometimes point out. Predicting how long or how little time an oil and gas legal project will take seems to be a universal failing among oil and gas lawyers.

<sup>39</sup> Unreasonable legal fees are prohibited by ABA Model Rule 1.5.

Beyond that, title examination costs are oftentimes, particularly in the major oil companies, one of the few areas where a landman is delegated any significant control authority. It is easy to understand, therefore, why landmen, wanting to prove their zeal for cost control to their respective employers, sometimes go overboard in pressuring oil and gas attorneys to lower their bills.

On the other hand, oil and gas attorneys oftentimes assume great risk when issuing title opinions and the subject matter is generally both tedious and complex. An oil and gas attorney should not have to give away, or heavily discount, his or her services. But if you are just entering this area of practice, be forewarned that you are likely to have your bills subject to close scrutiny by landmen, and that landmen often possess more than a passing and knowledge of both the process and the subject matter. Another relevant adage—“Pigs get fat, hogs get slaughtered.”

**Tip #9: DO NOT INJECT TOO MUCH COMPLEXITY.**

To paraphrase slightly a quote attributed to Albert Einstein, “Any fool can make things more complex; true genius takes the complex and makes it more simple.”<sup>40</sup> Oil and gas law, and oil and gas title examination in particular, involves complexity and tedium. Nevertheless, a good oil and gas lawyer should strive to keep it as simple as possible.<sup>41</sup>

First, understand that landmen, particularly in the major oil companies, generally report to geologists or engineers who have short attention spans when it comes to listening to explanations of tedious and complicated land related issues. Landmen, in turn, appreciate lawyers who can be concise and to the point.

One of the most common complaints the author hears from landmen about oil and gas lawyers performing title examinations is that the number of requirements in a title opinions are too great. Similarly, too lengthy title opinions and too lengthy contracts written to cover every possible worst case eventuality are generally ill-received by landmen. This is particularly true because landmen generally do not have authority to sign contracts themselves, and must present and review the agreement with higher management, oftentimes without the lawyer being present. Likewise, often they must review title requirements with a higher tier of management. Landmen do not like being put in the position of having to defend overly verbose or poorly written contracts that they themselves did not author. The same can be said about title requirements which are overly conservative and or over-kill the issue and the solution.

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<sup>40</sup> “Any intelligent fool can make things bigger, more complex, and more violent. It takes a touch of genius -- and a lot of courage -- to move in the opposite direction.” (“Collected Quotes From Albert Einstein,” [rescomp.stanford.edu/~cheshire/EinsteinQuotes.html](http://rescomp.stanford.edu/~cheshire/EinsteinQuotes.html))

<sup>41</sup> This is another one of those “do as I say, not as I do” truisms, as the author’s clients might point out.

Shakespeare reminds us that “Brevity is the soul of wit.”<sup>42</sup> Landmen tend to think that lawyers avoid being concise because they generally bill by the hour. As lawyers know, this is not necessarily a fair generalization because the complexity of a given legal matter is not within the lawyer’s control. Nevertheless, an oil and gas lawyer who can be brief and concise is more likely to endear himself to a landman than one who is not.

**Tip #10: DO NOT FAIL TO ADMIT ERROR, QUICKLY.**

In those (rare?) cases where the lawyer is subsequently shown to be in error by a landman, perhaps the best advice is to quickly admit the error. Generally it is better to “eat crow when it is young and tough rather than waiting until it is old and rotten.”<sup>43</sup>

**CONCLUSION.**

As a commentator on the legal profession once said, said, “There are two things wrong with almost all legal writing. One is style. The other is content.”<sup>44</sup> On that note, perhaps the content of this paper has not been particularly useful to or well received by its readers. Nevertheless, the author wishes to end with one more “best practice” for lawyers working with landmen that he hopes may be universally well received. That is, no matter what happens, keep your sense of humor intact.<sup>45</sup> The author has concluded after many years of observation that the average landmen has mastered the art of having fun and poking fun much more so than most lawyers. Perhaps that is because landmen, because the nature of their work invites constant criticism and second guessing,<sup>46</sup> have to do a better job reigning in ego and not taking themselves so seriously.

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<sup>42</sup> WILLIAM SHAKESPEARE, *HAMLET*, Act 2, Scene 2.

<sup>43</sup> JAY G. FOONBERG, “HOW TO START AND BUILD A LAW PRACTICE,” American Bar Association (5<sup>th</sup> Ed. 2004). In addition, ethical rulings for lawyers in many states dictate that mistakes be communicated to client.

<sup>44</sup> THOMAS J. VESPER, *UNCLE ANTHONY’S UNABRIDGED ANALOGIES*, p 409 (Thompson West (2008), quoting Fred Rodell, Law Professor at Yale University.

<sup>45</sup> The passage of time and more flexible humor has even mellowed the author’s reaction to being called a “Land Shark.” *See supra* note 22.

<sup>46</sup> One of the pleasant surprises to the author when he re-entered private law practice after working as a landman was that more than occasionally clients will defer to lawyers. Landmen, on the other hand, are continually second guessed by lawyers, accountants, engineers, geologists, senior managers, junior managers, and other landmen, among others.

So it is always important to keep things in perspective, and perhaps lawyers have something to learn from our occasionally cynical and sarcastic,<sup>47</sup> but nearly always hard working, intelligent, and professional, colleagues in the land profession. On that note, the author will close by expressing his hope that he has met his goal of identifying best practices for lawyers seeking to improve their ethical dealings and professional working relationships with landmen. To the extent the author has fallen short of his goal, words brought to mind are those of the Oklahoma humorist, Will Rogers, on the topic of legal prose and lawyers in general:

“Every time a lawyer writes something, he is not writing for posterity. He is writing so endless others of his craft can make a living out of trying to figure out what he said. Course perhaps he hadn’t really said anything, that’s what makes it hard to explain.”<sup>48</sup>

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<sup>47</sup> Through the years while working for a major oil company the author was admonished repeatedly by senior managers that “the landmen were all too cynical and sarcastic.” The author’s stock answer was that cynicism and sarcasm, for a landmen, is a job requirement, not a job failing.

<sup>48</sup> See *supra* note 25, p. 409.

# CODE OF ETHICS

The Code of Ethics shall be the basis of conduct, business principles and ideals for the members of the AAPL and it shall be understood that conduct of any member of the Association inconsistent with the provisions set forth in this Article shall be considered unethical and said individual's membership status shall be subject to review for possible disciplinary action as prescribed in Article XVII of the Bylaws.

In the area of human endeavor involving trading under competitive conditions, ethical standards for fair and honest dealing can be made increasingly meaningful by an association organized and dedicated not only to the definition, maintenance, and enforcement of such standards, but to the improvement and education of its members as set out in the Standards of Practice. Such is the objective of AAPL and such is its public trust.

**Section 1.** It shall be the duty of the Land Professional at all times to promote and, in a fair and honest manner, represent the industry to the public at large with the view of establishing and maintaining goodwill between the industry and the public and among industry parties.

The Land Professional, in his dealings with landowners, industry parties, and others outside the industry, shall conduct himself in a manner consistent with fairness and honesty, such as to maintain the respect of the public.

**Section 2.** Competition among those engaged in the mineral and energy industries shall be kept at a high level with careful adherence to established rules of honesty and courtesy.

A Land Professional shall not betray his partner's, employer's, or client's trust by directly turning confidential information to personal gain.

The Land Professional shall exercise the utmost good faith and loyalty to his employer (or client) and shall not act adversely or engage in any enterprise in conflict with the interest of his employer (or client). Further, he shall act in good faith in his dealings with the industry associates.

The Land Professional shall represent others only in his areas of expertise and shall not represent himself to be skilled in professional areas in which he is not professionally qualified.