Ethical Considerations – Trilogy of Working Together as Lawyers and Landmen for the Good of the Client

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BIOGRAPHICAL INFORMATION

EDUCATION:

- Tyler Junior College and graduated with an Associate in Arts (A.A.) in 1987, summa cum laude.
- University of Texas at Tyler, completing that phase of her education with highest honors.
- Attended law school at Baylor University and graduated in 1990 with a Juris Doctor (J.D.) degree.

BOARD CERTIFICATION:

- Board Certified: Oil and Gas Law, Texas Board of Legal Specialization
- Board Certified: Residential Real Estate Law, Texas Board of Legal Specialization
- Board Certified: Civil Trial Law, Texas Board of Legal Specialization

PROFESSIONAL ACTIVITIES:

- Ms. Flowers owns twelve title companies, which are licensed in thirteen counties in East Texas
- 2010-2013 - Oil and Gas Council of the Oil, Gas and Energy Resources Law Section of the State Bar of Texas
- Fellow of the College of the State Bar of Texas, member of the Texas Board of Legal Specialization, Smith County Bar Association, Rusk County Bar Association, Gregg County Bar Association, Van Zandt County Bar Association, International Right of Way Association, State Bar of Texas, ETAPL and AAPL.
- 2011-2013 - President of Independent Title Agents of Texas (ITAT)
- 2011-present - Texas Title Examination Standards Board
- In 2011, Ms. Flowers was honored by the East Texas Association of Petroleum Landmen with their President's Award and in 2012, with the Pioneer Award. In 2011, she was also recognized with the esteemed Title Person of the Year Award by the Texas Land Title Association for her significant and longtime contributions to the title industry and the association.
- American Land Title Association (ALTA) RESPA Implementation Task Force
- Board of Directors of the Texas Land Title Association - 2004-2009 and served as TLTA's President for 2008-2009.

PUBLICATIONS and HONORS:

- 60th AAPL ANNUAL MEETING AND EDUCATION SESSIONS – "We Have to Drill This Well Somewhere-A Survey of Surface Issues Across the Nation", June 2014, Montreal, Canada, Celia C. Flowers and Melanie S. Reyes
- 2013 TEXAS LAND TITLE INSTITUTE - "Minerals--Practice Tips for Leases and Surface Use Agreements", December 2013, San Antonio, Texas, Celia C. Flowers
- 2013 ADVANCED REAL ESTATE DRAFTING COURSE, Houston Texas, March 2013, "Avoiding the Unintended Consequence When Drafting Mineral Reservations", Celia C. Flowers and Melanie S. Reyes
- 2012 TEXAS LAND TITLE INSTITUTE - "CFPB - The New Disclosure Form and Its Requirements", December 2012, San Antonio, Texas, Celia C. Flowers
- 2012 SECTION REPORT OF THE 30TH ANNUAL ADVANCED OIL, GAS, AND ENERGY RESOURCES LAW COURSE, October 2012 "The Before and After - An Update of the Eminent Domain Changes", Celia C. Flowers
- 2011 SECTION REPORT OF THE OIL, GAS & ENERGY RESOURCES LAW SECTION OF THE STATE BAR OF TEXAS, June 2011, "The Proof is in the Public Record…or is it? Navigating Evidentiary Issues Related to Texas Railroad Commission Documents", Celia C. Flowers and Melanie Reyes.
- Ms. Flowers is certified by the Texas Real Estate Commission to teach their ethics and legal courses
- 2009 TEXAS LAND AND TITLE INSTITUTE, November 2009, "Surface Use by Mineral Owners: The Title Insurance Solution," Celia Flowers, Melanie Reyes-Bruce, and Eric Schmalbach.
- 2009 EAST TEXAS ASSOCIATION OF PETROLEUM LANDMEN SEMINAR, February 2009, "Pitfalls in Title Examination: The Intricate Relationship Between Real Property Rights and Ownership," Celia C. Flowers and Melanie S. Reyes Bruce.
- 2007 REVIEW OF OIL AND GAS LAW XXII, Energy Law Section Dallas Bar Association, August 17, 2007, "Exercising the Power of Eminent Domain," Celia C. Flowers and Melanie S. Reyes.
- 2007 TEXAS LAND AND TITLE INSTITUTE, November 2007, "Minerals: Examination and Coverage Issues," Celia C. Flowers, Melanie S. Reyes, and Meredith N. Todd.
- 2006 OIL, GAS & MINERAL LAW INSTITUTE, "Protecting and Defending Your Mineral Title", Celia C. Flowers.
- 2004 STATE BAR OF TEXAS CONTINUING EDUCATION SEMINAR: SUING AND DEFENDING GOVERNMENTAL ENTITIES, November 2004, "Exercising the Power of Eminent Domain", Celia C. Flowers

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The Preamble to the Bylaws governing the American Association of Professional Landmen says it best: "Under all is the land." All partners involved in oil and gas transactions should keep this quote in mind to facilitate and maintain a harmonious goal-oriented relationship. In particular, lawyers and land professionals ("landmen") are often employed by the same client to work together to create a product for the client. The client is the company engaged in drilling, production or other oil and gas related operations. This relationship produces interesting challenges for the three professionals.

Depending on law school courses and work experience, lawyers may have been introduced to or are familiar with certain phases of the oil and gas industry. Likewise, landmen have varied backgrounds and experience – some perhaps more practically "hands on" than the attorneys – and therefore more familiar with certain aspects of the industry. Finally, client companies employ persons to manage their interests, who have different areas of expertise than either the lawyers or the landmen. On any given project, the client could be managed within the company by in-house attorneys, geologists, engineers, accountants, and/or landmen. This diversity of backgrounds can give rise to unnecessary tensions unless priorities, timelines, and an understanding of each party's responsibilities are clearly established at the beginning of any given project. The structuring of the group dynamic, and the communication of expectations and responsibilities of this trilogy of professionals (client, lawyer, and landmen) at the outset will help focus the project on the end goal – obtaining the rights necessary to explore and develop the resource. Ultimately, "Under all is the land."

I. Ethical standards

All of the professions represented in the trilogy have their own ethical standards drafted by their own professional associations. The lawyers and the landmen are governed by similar codes of conduct. Texas attorneys must abide by the Texas Disciplinary Rules of Professional Conduct (TDRPC). Landmen are governed by The American Association of Professional Landmen (AAPL)'s Standards of Practice (The AAPL Standards) and Code of Ethics (The AAPL Code).

The TDRPC for attorneys outline minimum standards of conduct which must be met in order to avoid disciplinary action. Within the framework of these rules, many difficult issues may arise requiring the lawyer to exercise professional discretion. The rules and their comments constitute a body of principles, exemplifying sensitive professional and moral judgment, upon which the lawyer can rely for guidance in resolving such issues TEX. DISCIPLINARY RULES PROF'L CONDUCT ET AL.

The AAPL Code similarly establishes the basis of conduct, business principles, and ideals for the members of the AAPL. Thus, it sets the standard for the profession as a whole. The AAPL Code and Standards, in particular, set out the landman's duties and mandates (freely using the word "shall" throughout) the conduct of land professionals. 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.

Both professional codes and standards speak to competence. A lawyer may not accept a case or continue representation in a case that he is not competent to handle. "In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent." TEX. DISCIPLINARY RULES PROF'L CONDUCT PREAMBLE. Similarly, the landman's code provides that a land professional shall keep informed regarding laws, proposed legislation, governmental regulations, public policies, and current market conditions in his area of represented expertise, in order to be in a position to advise his employer or client properly. *See* (AAPL Standards, Sec. 1)

The professional codes and standards provide strict governance of advertising. The TDRPC has strenuous rules directing how attorneys may advertise and what representations can and cannot be made both in ads and website advertising. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.01 ET SEQ. And, the AAPL Code provides that land professionals shall at all times present an accurate representation in advertising and disclosures to the public. *See* The AAPL Standards, Sec. 13.

Obviously, both professions prohibit membership behavior that is criminal. The TDRPC states a lawyer shall not commit a serious crime or criminal act; engage in fraudulent behavior; or obstruct justice. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04. The AAPL Standards prohibit any member from participating in conduct amounting to a felony, any offense involving fraud as an essential

element, or any other serious crime. *See* The AAPL Standards, Sec. 15.

Discrimination is also prohibited by the professional codes and standards. A lawyer shall not willfully, in connection with an adjudicatory proceeding, manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.08. The land professional shall not deny equal professional services, or be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex or country of national origin. *See* The AAPL Standards, Sec. 5.

Both professions provide rules for the safekeeping of client's property. A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.14. Such funds shall be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. *See Id*. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer, and shall be preserved for a period of five years after termination of the representation. *See id.* The land professional shall assure that monies coming into her possession in trust for other persons, such as escrows, advances for expenses, fee advances, and other like items, are properly accounted for and administered in a manner approved by her employer or client. *See* The AAPL Standards, Sec. 11.

Rules of professional conduct do not define standards of civil liability. *See Joe v. Two Thirty Nine J.V.,* 145 S.W.3d 150, 158 n. 2 (Tex. 2004). Nevertheless, lawyers are subject to the disciplinary authority of the Texas State Bar. Grievances for alleged violations of the rules can be filed with the State Bar Grievance Committee. An affirmative finding of a rule violation may result in disciplinary action or the loss of the attorney's license to practice law. *See, generally*, TEX. RULES DISCIPLINARY P.

Similarly, questions of landman misconduct are referred to the Ethics Committee as prescribed in Article XVII of the Bylaws, American Association of Professional Landmen. The Ethics Committee is responsible for upholding the ethical standards of the AAPL by making recommendations to the Board of Directors and Executive Committee for appropriate action. This Committee is also responsible for

decisions on disciplinary action based on unethical actions by a member following the investigation and other due process measures outlined in the bylaws.

II. Education, Experience and Expertise

Most law schools today require a person entering law school to have a four-year bachelor's degree from an accredited university and to have taken the Law School Admissions Test (LSAT). No particular type of undergraduate four-year degree is required, and each law school sets its own threshold LSAT score required for admission. Upon entering law school, students receive an education amounting to an introduction to each general area of the law. Advanced degrees are available for some specialties such as tax law, international business law, and constitutional law.

Law school also provides education to the students on where to find the law and how to apply it. Law schools do not, however, provide much practical experience. And, "hands on" experience within any particular industry (such as the oil and gas industry) is virtually non-existent. While lawyers have a multitude of different specialties, their specializations through the State Bar come about only after years of practice, recommendations by their peers, and testing. It is during the years of working in the industry that the attorney acquires the knowledge necessary to contribute to his work in the trilogy.

Lawyers entering the oil and gas industry discover quickly that much of the work of the lawyer and the landman overlaps. For example, both attorneys and landmen examine title, draft documents, perform curative, and conduct negotiations. Thus, the work of the landman sometimes resembles "the practice of law." In fact, the most used oil and gas operating form in the oil and gas industry, the AAPL Joint Operating Agreement, was written by landmen and attorneys working together.

The Bylaws of AAPL recognize that landmen have a multitude of different specialties as well as a variety of educational backgrounds. The word "landman" is as gender neutral as the words lawyer and attorney. The profession does not require a landman to have a college degree. However, in the last years, there has been resurgence among various universities to offer petroleum land management degrees. And, the AAPL has created a voluntary certification program which requires substantial education, work experience and testing in various areas, and offers various certification levels. Therefore, varied knowledge levels exist among landmen.

The Bylaws of AAPL define land work as the performance of various services including:

negotiating for the acquisition or divestiture of mineral rights; negotiating business agreements that provide for the exploration for and/or development of minerals; determining ownership in minerals through the research of public and private records; reviewing the status of title, curing title defects and otherwise reducing the risk associated with ownership in minerals; managing rights and/or obligations derived from ownership in minerals; and unitizing or pooling interest in minerals. See AAPL Bylaws, Art. II, Definitions, Sec. 1.

Much of a landman's work requires knowledge of courthouse records, how to "chain a title", and how to interpret documents. Most of that knowledge comes from the "on the ground" experience itself. Inside the industry, landmen are often classified as "company landmen" or "field landmen". The landman who works in the "field" reviews the courthouse records and performs examinations of title. Often field landmen are independent contractors. These landmen are called upon to do title due diligence, lease negotiations, prepare leases and provide curative documentation. Further, the field landman might be called upon to draft ratifications of leases and units. The company relies on the documentation and examinations of these landmen when purchasing oil and gas leases involving large sums of money.

Company landmen negotiate with other oil and gas companies and supervise the independent landmen working for the company as well as the "field" landmen who are also independent contractors. These company landmen manage the land assets for the company and monitor contract compliance. In fact, many times, company landmen draft agreements for large and complex oil and gas transactions instead of the companies' legal departments. Thus, landmen prepare documents, negotiate assignments, farm outs, prepare unit declarations pooling leases, and examine title – tasks sounding much like the practice of law.

Many landmen are experienced and may know as much about oil and gas law as oil and gas lawyers, especially a lawyer just entering the profession or the area of law. Many landmen working in large companies in the land department have law degrees. It is a wise for both the landman and the lawyer, who are working together for the benefit of a client/company, to assume the other one is knowledgeable and equipped with proper expertise.

The work of the land professional so resembles the practice of law that the 2005 Texas Legislature enacted a statue exempting land work from the unauthorized practice law. TEX. OCCUPATIONS CODE §954.001. Despite this exemption, landmen should exercise caution to avoid crossing the line into practicing law without a license.

Similarly, a lawyer's primary role is the giving of legal advice and opinions as opposed to giving business direction. Although, attorneys may find it difficult to accept the business decisions of their clients and may attempt to insert themselves into advising on those decisions, many lawyers lack the business savvy and expertise required to run the operations side of complicated oil and gas businesses. Even though it may be difficult for a lawyer to understand why a landman running a project for a company, may make a particular business decision that seemingly conflicts with the lawyer's legal assessments, the TDRPC Rule 1.02, nonetheless, requires the attorney to abide by a client's decisions concerning the objectives and general methods of representation. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02.

III. Duties to All Parties in the Transaction

Sometimes the trilogy morphs from a triangle into a square, with the landowner/mineral owner providing the fourth side. Typically, the landman deals directly with the landowner on behalf of the company to acquire a lease or surface right, and the lawyer later evaluates the validity and legality of the interest acquired by the landman from the landowner on behalf of the company.

It is the duty of the land professional to protect the members of the public with whom he deals against fraud, misrepresentation, and unethical practices. *See* The AAPL Code and The AAPL Standards. The landman "shall" eliminate any practices which could be damaging to the public or bring discredit to the petroleum, mining or environmental industries. *See* The AAPL Standards, Sec. 2. It is the duty of the land professional to treat all parties to any transaction fairly and act in an ethical manner. *See* The AAPL Code and The AAPL Standards. 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. *See* The AAPL Code.

The Texas Rules of Professional Conduct direct that, in the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.01. Although in most cases a lawyer's responsibility to the interest of his client is paramount to the interest of other persons, a lawyer should avoid the infliction of

needless harm. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.04 (comment).

A. Misrepresentations and Fraudulent Inducement

An abundance of case law exists regarding misrepresentations in all types of transactions. Oil and gas transactions are no exception. While dealing with a landowner, the landman must not knowingly misrepresent any material fact. As mentioned in the previous paragraph, the lawyer shall not knowingly make a false statement of material fact to any third person or fail to disclose a material fact. In the case where the landowner claims that the landman or lawyer misrepresented a material fact, the landowner is typically claiming he/she was fraudulently induced to enter the contract and seeking to set the contract aside. Specifically, if a landman takes an oil and gas lease from a landowner on behalf of a client, and the landowner later discovers the lease was obtained improperly based upon negligent misrepresentations by the landman, the landowner may sue the client to have the lease set aside and sue the landman and client for negligent misrepresentation.

The following is illustrative of the above scenario: Landman takes an oil and gas lease from Property Owner on behalf of Company. Property Owner owned half of the mineral estate, and the other half was owned by another individual. In negotiating to acquire the lease, Landman represents to Property Owner that he has already acquired a lease on the other half mineral interest. Landman further represents that there is enough acreage under the lease to drill a well on Property Owner's land. Finally, Landman represents that Company will drill a test well on the land within a given amount of time. Based upon such representations, Property Owner grants a lease to Landman for Company. Property Owner agrees to the lease because he believes his mineral estate is being diluted by oil production from an adjacent property. Company never drills the test well and may not be able to ever drill due to spacing provisions. Property Owner sues Landman and Company for misrepresentation stating that, absent such misrepresentation, Property Owner would never have granted the mineral lease to Company. *See, generally*, *Samson Lone Star, Ltd. Partnership v. Hooks*, 389 S.W.3d 409 (Tex. App. ---Houston [1st Dist.] 2012) *aff'd in part; rev'd in part, and remanded* at 457 S.W.3d 52 (Tex. 2015).

Also consider the case where Landman for Company A met with Company B representative seeking a release of a 1962 lease. Landman for Company A told Company B representative that its interest in the 1962 lease had lapsed for non-production and that the release was only necessary for title "cleanup." Following Company B's release,

Company A drilled a producing well on the property covered by the 1962 lease. Company B sued to recover the revenues it would have been due under the 1962 lease in addition to exemplary damages for the alleged fraud. *See In re Small*, 346 S.W.3d 657 (Tex. App. ---El Paso 2009, orig. proceeding).

B. Various Types of Exposure

1. Agency Relationships

The misrepresentation made by the landman or attorney while working on behalf of a company will also be imputed to the company. *See, generally, Williams v. Jennings*, 755 S.W.2d 874 (Tex. App---Houston [14th Dist.] 1988, writ denied). It is not only a matter of the company being liable for the misrepresentations of the attorney or landman. The company/client may also be bound by their actions.

Specifically, when the landman or the lawyer is negotiating with the mineral owner, a question arises as to whether the landman'/lawyer's offers and negotiations are binding on the company/client. "Apparent authority" arises when the company either knowingly permits the landman/lawyer to hold himself out as having authority or acts with such lack of ordinary care as to clothe the landman/lawyer with indicia of authority. *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007). Only the company's conduct is relevant in determining whether apparent authority exists, and it is gauged by the standard "of a reasonably prudent person, using diligence and discretion to ascertain the agent's authority." *Id.* at 182-183; see also *Funderburg v. Sw. Drig Corp*., 210 S.W.2d 607, 610 (Tex.Civ.App.-Fort Worth 1948, no writ) ("When an agent acts within the apparent scope of his authority, a duty rests upon his principal to give notice of any limitations which affect the rights of parties dealing with the agent.")

For instance, if the company provides the landman with a company email address, phone line, and physical office, enabling him to negotiate leases on its behalf, the company gives the landman the appearance of an agent/employee of the company, having the authority which he purported to exercise in negotiations with the landowner. This was the rationale of the El Paso Court of Appeals' holding in *PanAmerican Operating v. Maud Smith Estate*. 409 S.W.3d 168 (Tex. App. ---El Paso 2013, pet. denied). In *PanAmerican Operating*, a landman, identifying himself as a representative of the company, negotiated a lease with the landowner. *See id*. at 172. When the company failed to pay the lease bonus, the landowner sued. *See id.* The company answered that the landman was an independent contractor and did not have authority to lease on its behalf. *See id*. The trial court found in favor of the landowner. *See id.*

In reviewing the facts, the court of appeals noted that the company had failed to require the landman to disclose to the landowner that he was not an agent/employee of the company or that he was acting as an independent contractor. *Id.*at 173. In the court's view, the company knowingly permitted the landman to negotiate with the landowner without requiring the landman to communicate his lack of binding authority or notifying the mineral owner that the landman lacked such authority. *See id*. at 173-74. Thus, the company clothed the landman with the indicia of authority. *See id.* at 176. After upholding the trial court's finding of an agency relationship, the El Paso Court of Appeals held that the company was bound to perform its contractual obligation under the lease. *See id.*at 180. Specifically, the court held that the company, by failing to take any action to dispute its validity after receiving the lease with full knowledge of the circumstances surrounding its acquisition, effectively ratified the landowner's lease. *See id.*

A formal business relationship existed. The company knew the landman it contracted with would be contacting third parties on its behalf for the express purpose of carrying out its business objectives – leasing minerals. The company further outfitted the landman with the tools necessary to accomplish his task. In such a situation, an agency relationship will be found.

2. Aiding and Abetting

In *Robertson v. ADJ Partnership, Ltd.*, a lawyer (and family member by marriage) acted as the family's general attorney by handling its business, real estate, and probate matters. 204 S.W.3d 484, 487-88 (Tex. App. ---Beaumont 2006, pet. denied). After the death of the lawyer's father-in-law, a dispute arose between the lawyer and his sister-in-law, involving attorney's fees and certain real property transactions (the real property at issue was co-owned by the lawyer and other family members). *See id.* In connection with such, one transaction in which the lawyer and his landman associate induced family members to convey mineral properties to the landman's shell entity, the sister-in-law accused the lawyer of breaching his fiduciary duty by self-dealing and accused the landman of aiding and abetting said breach. *See id.* The lawyer argued that no fiduciary relationship existed as to the transactions at issue, and therefore, no breach could have occurred. *See id.* Nevertheless, at trial, the jury found a relationship of trust existed and that a breach had occurred. *See id.*

The appellate court noted that an informal fiduciary relationship existed between the lawyer and the sister-in-law. *See id.* at 491-93. The lawyer's prior

legal services--including the probate work, the handling of the family business, and real estate and mineral transactions—established a "substantial enough connection" to constitute a relationship of trust. *Id.*at 492-93. Thus, although the lawyer did not act as the sister-in-law's attorney in the transactions at issue, a fiduciary relationship nonetheless existed due to previous representations. *See id*. As such, the jury's finding of a breach was upheld on appeal, and the landman was held to have aided and abetted said breach as well as committing fraud against the family. *See id*. at 492-495.

C. Lawyer as Landman

It's important, too, to understand that a licensed lawyer working as a landman is still bound by legal and ethical duties. As Paul G. Yale pointed out in his 2011 paper:

> 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. Landmen with law degrees working as landmen should be cautious in rendering legal advice because chances are that their company does not maintain malpractice coverage for them. So the landman may be exposing him or herself to personal liability for malpractice when erroneous legal advice is given.

Yale, Paul G., <u>*Best Practices for Lawyers Working with Landmen*</u>, 29th Advanced Oil, Gas and Energy Resource Law Course, Oct. 2011.

D. Fiduciary Duty to Client

The ultimate legal goal of the trilogy is to acquire the needed rights for the company and confirm the validity of those rights. As noted herein, the landman and the attorney are both under fiduciary duties to the company to put the company's interests before their own interests. Both professions speak to this duty in their respective ethical standards and codes.

The landman, by accepting employment, pledges to protect and promote his client's interests. *See* The AAPL Standards, Sec. 3. This obligation of absolute fidelity to the client's interest is primary. *See id*. Moreover, the landman shall not accept compensation from more than one client for providing the same service, nor accept compensation from one party to a transaction, without the full knowledge of all parties to the transaction. *See* The AAPL Standards, Sec. 4, 7, and 8. Likewise, the TDRPC notes throughout that a fiduciary relationship exists between the lawyer and his client. In fact, it is well-settled that, in connection with the relationship between an attorney and a client, a fiduciary duty arises as a matter of law. *Meyer v. Cathey*, 167 S.W.3d. 327, 330-31 (Tex. 2005).

Aside from the legal duties, the landman and the lawyer endeavor to make the client look good in order to keep the client's business. This is best accomplished when the lawyer and landman work together for the good of the client. When each does his job in unison with the other, the client gains confidence in both professionals. That confidence leads to possible future projects with the client.

IV. Confidentiality

The TDRPC notes that both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation of confidential information. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance. The lawyer is generally required to maintain confidentiality of the client's information that was acquired by the lawyer during the course, or by reason, of the representation of the client. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (comment). Likewise, landmen shall avoid business activity which may conflict with the client's interest or result in the unauthorized disclosure or misuse of confidential information. A landman shall not betray his partner's, employers', or client's trust by directly turning confidential information to personal gain. *See* The AAPL Standards, Sec. 12.

V. Miscommunications and Other Frequent Issues

A. Communication

Communication between the members of the trilogy is a major contributor to the success of the project. Priorities and deadlines must be clearly communicated among the group. The nature of the beast necessarily leads to schedule changes and those shifts in priority should be immediately discussed by the parties.

Communication is a two-way street. It requires the information to be communicated in an organized manner, but it also requires the one receiving the communication to listen. Listening is a key component to communication. The attorney and landman must listen to the client's explanation and delineation of its needs for the project in order to understand and adapt their processes to reach the client's goals. Acceptance and utilization of new processes may be difficult for a seasoned attorney or landman. Therefore, during the project, communication is essential and must be constant. The

TDRPC provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03. The client will be faced with decisions throughout the project, and should be fully informed by both the lawyer and the landman in order to make the best, most informed, decisions.

B. Setting of Priorities

As discussed, communication is the key in the constantly changing world of the oil and gas industry. A definition of the work assignment in the beginning is essential. An engagement letter can effectively define the scope and terms of the representation, but the actual manner in which the assignment will be executed is not typically included in the engagement letter. At the beginning of the project, the client's priorities should be clearly communicated to the team (including the lawyer and the landman), as well as timing issues, i.e. 1) the timing of the information to be delivered from the landman to the lawyer; and 2) the timing of the lawyer's examination of the information and the rendering of an opinion. The team should further communicate on the curative process. A confirmation of who will work on the curative of requirements and when that work will be undertaken should be discussed at the beginning of the project and revisited again when curative actually begins. After consulting with the client concerning the manner in which the work will be carried out, the parties should confirm the processes by letter.

Both lawyers and landmen should consider doing weekly status reports to the clients and the other members of the team. Most importantly, all team members should stand ready to be flexible when priorities shift. As the project moves forward, the priorities should be reviewed by the client, and any change in those priorities should be promptly communicated to the team. When the priorities change, each partner in the trilogy should remember how difficult it is for one to switch tasks in "midstream" and then restart the task at a later date. It is virtually impossible to "pick it up where you left off". Therefore, time and money are potentially lost. If possible, the effect of any change (i.e. greater expense, longer completion time) should be communicated to the client as early as possible so that the client can make any necessary revisions to the overall plan/project going forward.

C. Understanding the of Realities of a Shared Work Product

The title product is a collaboration by the attorney and the landman. The landman goes to the courthouse and/or title companies and prepares a chain of title of all the instruments affecting the property's title. The runsheet and a copy of the documents may be delivered to the attorney for examination or the runsheet may be delivered for the attorney to go to the courthouse himself to review the documents. This shared process creates the work product – an examined title which may be relied upon to buy leases or to buy entire prospects.

In times past, attorneys were provided abstracts prepared by the title company in the county where the land was located. Under the pressure of timing of the projects and the cost of this practice, the practice moved exclusively to landmen preparing runsheets using the county clerk and/or title company records. Today, many records can be found on the internet. The landman and company/client need to do a thorough check on potential source for these electronic records. Many companies which make these records available online do not review or index these records as the title companies are required to do. Remember, if the records are not reliable, it is the trash in and trash out theory. The examination will not be accurate.

1. <u>All Work Assignments are Not Alike.</u>

The clients should give consideration to the records to be included in the landmen's runsheets. Some companies want every document ever filed related to the tract or any owner included in the runsheet. Some attorneys like to see that every individual who ever owned an interest in the property continued to be included in the search, even after the individual conveyed his/her interest. What, or what not, to include could be debated endlessly. However, the instructions from the client should govern this issue.

For example, deeds of trust that are well past their term and old oil and gas leases and the assignments of those leases might be excluded by the client. Nevertheless, because there is a chance that a document was labeled incorrectly or there was information in the instrument itself affecting the title, many companies hesitate to direct the landman to disregard these instruments and exclude them from her runsheets. The landman may include documents relating to past owners who have divested themselves of their interests. A landman who is simply chaining the title and preparing the runsheet, but not doing an examination, may not know the interest was fully divested. What is too much or too little information is subjective and will differ from client to client. Clear

communication from the outset identifying the documents to be included and excluded and the extent of the search will get all team members on the same page and avoid conflicts along the way.

In connection with excluded information, some clients may only request the landman submit runsheets that cover limited title information to the lawyer for review. These runsheets should be clearly delineated as to their coverage. Additionally, should the client determine that subsequent assignments of released oil and gas leases, or rights of way, or expired deeds of trusts and their assignments, etc., will not be included in the runsheet, this limitation should be communicated to the examining lawyer. Of course, at some point, the runsheet may have more limitations than one might think would be useful. Accordingly, the examining attorney should note in his opinion its limited nature.

Furthermore, if the client directs the landman to exclude any reference to assignments of oil and gas leases that appear to be beyond their primary term (but have not been released), and a typical requirement is made by the attorney to verify that the unreleased leases have in fact expired due to non-production, then any subsequent assignee will not be identified in the runsheet. Therefore, should the curative reveal the lease is actually held by production, the subsequent assignee, being the current owner of that lease, is not listed in the runsheet? This illustrates one of the many issues that can arise by limiting title searches. Information might have been obtained by those subsequent assignment documents which could have demonstrated to the examiner that the lease was pooled or that a tract well was drilled on the lease, and thus, the lease was held by production.

Lawyers base their opinions on the documents that are included in the runsheet prepared by the landman. Not only are some documents intentionally excluded per a client's request, some documents might be unintentionally left out or simply missed. There are many reasons these documents might be missed. Oftentimes, the lawyer jumps to the instant, and possibly erroneous, conclusion that the missing document is the "fault" of the landman. The missed document might have been indexed incorrectly by the county clerk or the title company, making it impossible to locate by the landman. Accordingly, communication between the lawyer and landman helps eliminate the blame game. If a document is missing, the lawyer should simply, and politely, ask the landman if he can obtain a copy of the document and forward to the lawyer.

2. <u>Assumptions Lead to Curative.</u>

Attorneys must make assumptions in title opinions. For instance, a person in the chain of title

died intestate. The leases were taken from the children of the deceased person. However, from the instruments in the chain of title, it is clear that the deceased person had been married. The attorney may make an assumption that the spouse predeceased the owner and the property was the separate property of the deceased spouse. The attorney makes the requirements accordingly. The type of assumption the attorney chooses may not align with the beliefs the landman has developed as he has been intensely reviewing the records for weeks (or sometimes months) and talking to the heirs prior to submitting the runsheet. Moreover, simple communication may be hindered by the pressure from the client to complete the task. In these instances, it is best to remember the fiduciary duties each has to the client and the ethical pronouncement to be fair to all parties in the transaction. It is also important to keep an open mind and remember that each party does not have the benefit of the others' information or insight. This open perception better allows lawyers and landmen to communicate and to gather information that will fill in the needed gaps without the assigning of fault.

3. Determine What Curative is Acceptable to the Client.

Sometimes communication breaks down over requirements made by attorneys in their title opinions. The client and attorney should discuss the form of the title opinion and determine how to address those issues that occur in most all oil and gas titles. For example, attorneys most often require affidavits of use and possession and non-production. Those affidavits are best provided from persons with knowledge of the facts surrounding the matter but have no interest in the outcome. However, because obtaining those affidavits from disinterested parties is sometimes impossible, landmen may perform the investigation of the facts and attest to those facts in affidavit form. The client may be willing to accept these affidavits from the landmen, however, the examining attorney may be reluctant to accept them. The client and the attorney should be able to discuss and arrive at a resolution so that the attorneys can draft requirements and/or comments which will meet the client's needs while maintaining their desire to accurately reflect the status of the curative.

4. Balancing the Client's Needs with Legal Duties.

The client will occasionally want an attorney writing a title opinion requirement to change the requirement. Sometimes the change is not significant – just approaching the requirement from a different assumption and still making a similar requirement. For instance, the examining attorney may have shown unleased interest in the ownership section, yet have a number of leases from various parties that may cover

all or a part of the unleased interest. The attorney has no information to verify the heirship information that would possibly "connect the dots." Therefore, the attorney reflects the interest as unleased and makes the necessary requirement to provide information clearing the matter up. The client might rather see the assumption by the attorney that the interests are leased and the requirement be made for the information to confirm the assumption. The attorney must remain objective and keep the goal of protecting his client in mind. However, if the attorney cannot agree to the modification, then he needs to maintain his position - which is sometimes not easy.

If the attorney cannot alter the requirement to suit the client, the client may decide not to satisfy the requirement and make a business decision to take the risk. If the attorney examiner knows the client has decided to waive the requirement, the attorney should be certain to clearly inform the client of the consequences of ignoring/waiving the requirement so there is no later misunderstanding. In a client's haste, the company may be willing to waive a requirement that should not be waived.

Sometimes the company/client or the landman believe that the lawyer is being impractical about her requirements. For example, attorneys may require stipulations from parties where the potential for conflict over the interpretation of an instrument exists. The landman and the client believe the parties will never stipulate, and thus, the requirement would be impossible to satisfy. Without another solution, the attorney may be seen as throwing up roadblocks to getting the deal done instead of being the finder of solutions to problems. Still, there are some instances in which no other solution exists. The lawyer and the client should implement a system for addressing these potential roadblocks at the beginning of the project to avoid misunderstandings during the "rush".

D. When Things Go Wrong – Avoiding the Blame Game

When these challenges arise, do not "throw each other under the bus". A landman does not like to be singled out by the attorney, in a requirement, as leaving things out of the runsheet. Company landmen do not like to be put to the task of explaining a long winded or poorly written requirement from the attorney to management. The landman curing the poorly written requirement of the attorney is at a further disadvantage, as he may have trouble understanding the requirement at all. Too often, the individual members of the trilogy may jump to conclusions without thoroughly investigating what facts were being utilized by the other parts of the trilogy. Sometimes, the simple exchange of factual information will help the parties to the transaction

understand the reasons behind the requirements, decisions, or actions taken.

It is finally important to remember that not every task is a "rush." Yet, there are many schedules and schedule changes the parties must balance on a project. True "rushes" should be communicated as such, and the group should avoid labeling every task as a "rush", a "rush rush" and "REALLY a rush." Such unnecessary pressures set up the parties for the "blame game." Avoid playing the "blame game". Although the work of the landman and lawyer is naturally scrutinized by the other members of the trilogy, the expectation of being second-guessed makes the job more stressful.

The client's best interest must remain the primary focus in the heat of the moment. It is a foregone conclusion that all members of the trilogy will make their share of mistakes. The pointing of fingers will not serve the client. Instead, the focus should be on getting the best job done in the most productive way. An environment must exist that allows each to admit any mistakes readily. And, all parties to the trilogy must admit their mistakes readily and move forward to remedy the issue as soon as possible. The landman and lawyer serve as two separate pairs of eyes, reviewing the same materials. This system provides a safety net so that inadvertent errors are more likely to be recognized and corrected. As such, the landman and lawyer should work together to make the product perfect as opposed to working against one another, which will inevitably undermine the project.

VI. Representations of Competency to the Client

The gathering of accurate records and the examination of those records is no simple task, and requires the expertise of the landman and the lawyer. It is essential for the client to be comfortable with the skills of each.

According to the AAPL, the landman shall provide a level of competent service in keeping with the standards of practice in those fields in which a land professional customarily engages. The land professional shall not represent himself to be skilled in nor shall he engage in professional areas in which he is not qualified, such as the practice of law, geology, engineering or other disciplines. *See* The AAPL Standards, Sec. D and Sec. 1.

Under the TDRPC, a lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. Competence is defined in the terminology section of the Code of Professional Conduct as possession of the legal knowledge, skill, and training reasonably

necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 (comment).

Lawyers and landmen cannot be equipped or competent to help an oil and gas client in all matters that might come up during a project. The lawyer and landman should not hesitate to speak up when faced with a question or problem from the client that is beyond their level of comfort or competency. The lawyer's/landman's failure to admit to the client when an issue is outside their realm of knowledge directly violates their respective professional codes and can lead to devastating consequences for the client.

VII. Conflicts of Interest

Sometimes communication breakdowns turn into true conflicts of interest. As discussed above, the landman shall avoid business activities that may conflict with the interests of his employer or client or result in the unauthorized disclosure or misuse of confidential information. The landman 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. *See* The AAPL Standards Sec. A, C, G, 1, 2, and 3, and *see* The AAPL Code, generally. The land professional shall not acquire for himself, or others, an interest in property which he is called upon to purchase for his principal, employer or client. He shall disclose his interest in the area which might be in conflict with his principal, employer or client. In leasing any property or negotiating for the sale of any block of leases, including lands owned by him or in which he has any interest, a land professional shall reveal the facts of his ownership or interest to the potential buyer. *See* The AAPL Standards Sec. 7, 8, 10, and 12, and *see* The AAPL Code, generally.

Attorneys and landmen working in a particular area or geographical location may do so repeatedly for different clients. Under such circumstances, an ethical obligation exists not to use the information to the detriment of the client or for the benefit of the lawyer or a third person in regard to an evaluation of a matter affecting a client for use by a third person. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 2.02. Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client if there were a

reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information or an improper use of such information to the disadvantage of the former client if it is the same. Additionally, representation adverse to a former client is specifically prohibited where the representation involved the same or a substantially related matter. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09.

The Texarkana Court of Appeals recently addressed a conflict of interest issue between a landman and client. *Harding Co. v. Sendero Resources, Inc*., 365 S.W.3d 732 (Tex. App. --- Texarkana 2012, pet. denied). In *Harding Co. v. Sendero Resources, Inc.*, a company contracted with a land brokerage firm to acquire oil and gas leases on its behalf in East Texas, and the agreement included a non-compete clause. *See id*. at 735-36. The leases were acquired in the landman broker's name and were to be assigned to the client upon meeting a target acreage. *See id.* at 736. Months later, it came to the client's attention that one of the landman broker's associated entities was assisting a competitor in acquiring leases in the targeted area. *See id*. at 737. The client sued the landman broker for breach of the non-compete clause and various torts. *See id.* The landman broker brought various summary judgment motions, alleging, among other things, that the associated entities were not bound by the non-compete clause. *See id.* The trial court granted the landman broker's motions for summary judgment on all issues. *Id. at* 738.

On appeal, the Texarkana Court held the landman broker's associated entity was not personally liable under the contract because it was not a party to same. *See id*. at 738-41. However, the court held that the landman broker had a duty to act solely for the benefit of the client because the landman broker had proceeded to acquire leases on behalf of the client as an agent for same. *See id*. at 744. Therefore, because the landman broker was also acquiring leases for other clients in the same area, a fact issue existed, and the appellate court remanded the case back to the trial court. *See id*. at 749-50.

The AAPL Standards states that the landman shall not accept compensation from more than one principal for providing the same service, nor shall the landman accept compensation from more than one party to a transaction, without the full knowledge of all principals or parties to the transaction. *See* The AAPL Standards, Sec. 4. Further, the landman shall not undertake to provide professional services concerning a property or a transaction where he has a present or contemplated interest, unless such interest is specifically disclosed to all affected parties. *See* The AAPL Standards, Sec. 7. Additionally, the land

professional shall not acquire for himself or others an interest in property which he is called upon to purchase for his principal, employer or client without the consent of said principal, employer or client. *See* The AAPL Standards, Sec. 8.

Furthermore, the landman shall disclose his interest in the area which might be in conflict with his principal, employer or client. *See* The AAPL Standards, Sec. 4, 7, and 8. In leasing any property or negotiating for the sale of any block of leases, including lands owned by him or in which he has any interest, a land professional shall reveal the facts of his ownership or interest to the potential buyer. *See id.* The land professional shall not accept any commission, rebate, interest, overriding royalty or other profit on transactions made for an employer or client without the employer's or client's knowledge and consent. *See* The AAPL Standards, Sec. 10.

These conflict of interest rules present numerous challenges. For instance, when companies sell to other companies and landmen, and lawyers continue to work for the new entity, the conflict of interest rules may come into play. Additionally, careful attention must be paid where landmen are working for numerous companies near the same areas and those areas begin to overlap. A thorough knowledge and understanding of the professional codes will help all parties to the trilogy avoid potential conflicts.

VIII. Conclusion

The trilogy is a team, and the members must always be cognizant that they are working together for a common goal. If this goal is achieved, the client looks good to his management, and this perception ultimately flows to the other members of the trilogy in reputation and the acquisition of future work. As noted by the AAPL – "Under all is the land." The survival and growth of free institutions and our civilization depend heavily upon the wise utilization of land and widely allocated ownership. If the trilogy can communicate and work together toward this purpose, the pressures and challenges of the industry will just be bumps in the road the success.