

OG ENERGY EDUCATION SERIES



OLIVA
GIBBS LLP

STEERING CLEAR OF LEGAL LANDMINES

LESSONS FOR LANDMEN

WEDNESDAY, MAY 17, 2023

12:00 PM TO 1:00 PM CT

Information, insights, and advice to help land teams proactively understand and mitigate litigation risk.



Andrew Good
Partner | Columbus



Joseph Manning
Senior Attorney | Houston

WWW.OGLAWYERS.COM



Speakers

Andrew Good

Partner, Columbus Office



LOCATION

Based in Columbus, Ohio



BAR ADMISSIONS

New York, Ohio



EDUCATION

J.D., Capital University Law School

B.S., The Ohio State University

Joseph Manning

Senior Attorney, Houston Office



LOCATION

Based in Houston, Texas



BAR ADMISSIONS

Texas

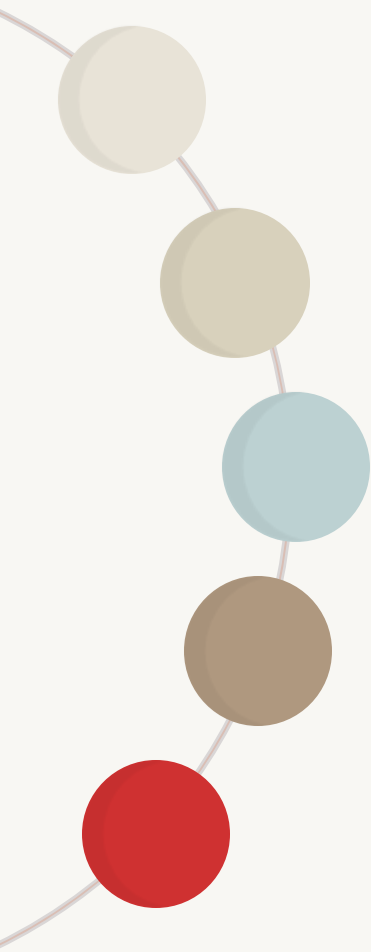


EDUCATION

J.D., The University of Texas at Austin
School of Law

B.A., The University of Texas at Austin

Agenda

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- I. Importance of Landmen
 - II. Code of Ethics, Standards, and Regulations
 - III. Legal and Ethical Landmines
 - IV. Legal and Ethical Ramifications
 - V. Case Studies/Hypotheticals
 - VI. Summary of Key Points and Tips

Importance of Landmen



Importance of Landmen

Per the AAPL

- ❖ “A landman is the public facing side of an oil, gas, mineral or other energy sources exploration and production team who interacts and negotiates directly with landowners to acquire leases for the exploration and development of minerals or other energy sources.”
- ❖ Many landmen are also licensed lawyers.
- ❖ Pressures to perform are motivators and drive behavior. These inevitably impact your decision-making. Thus, following ethical rules and obligations are key to success for you and the company.

Some duties include:

- ❖ Mineral rights acquisition or divestiture negotiations;
- ❖ Exploring and/or developing minerals through business agreements;
- ❖ Researching public and private records to determine mineral ownership; and
- ❖ Title review, rectification, and other means of reducing title risk associated with ownership in minerals; management of rights and obligations are gotten from interests in minerals ownership and pooling or unitizing interests in minerals.

Ethics, Standards, and Regulations



Ethics & Professional Organizations

- ❖ Landmen are not per se regulated by any state or federal agency.
- ❖ There is no governing body that issues licenses or certifications.
- ❖ Many landmen choose (i.e., voluntarily) to become members of professional organizations, which include:
 - **AAPL** - The American Association of Professional Landmen, which is the largest trade association of landmen in the United States.
 - **NADOA** - The National Association of Division Order Analysts
 - **NALTA** - The National Association of Lease and Title Analysts
- ❖ These organizations, along with personal and legal ethics, help maintain and promote integrity, develop trust, and avoid ethical/legal risks.

What About Ethics?

- ❖ These are the basis of conduct, business principles, and ideals for landmen to adhere to in the professional world.
 - **Professional Ethics** – these are ethical principles or standards implemented by professional organizations or by your companies
 - **Personal Ethics** – these are ethical principles or standards that a person uses to judge behavior as right or wrong in personal and professional settings
 - **Legal Ethics** – these are codes of professional responsibility that set forth the generally accepted standards of conduct.

What About Ethics? (Cont.)

❖ Why are these important?

- Sets a standard of behavior/actions
- Develops integrity, creates credibility, and instills trust and support
- Improves decision-making capabilities and guides you to make the right decision
- Protects yourself and your company
- Provides defenses and/or advantages in business

Professional Ethics



AAPL

Personal Ethics

- ❖ These refers to a person's beliefs about what's right and wrong.
 - These are guidelines for the decisions made in and out of the workplace, including how you handle certain situations.
 - These play a part in how you grow and develop your career.
- ❖ Examples
 - Honesty
 - Loyalty
 - Integrity
 - Respect
 - Responsibility
 - Selflessness

Personal Ethics (Cont.)

❖ Why are these important?

- Allows you to be more effective
- Follows your reputation and instills trust and support for you from others
- Establishes a foundation for you to make the appropriate decision/action in necessary situations
- Improves decision-making process and capabilities
- Sets your standard of behavior for your professional and personal career/goals.

Legal Ethics

- ❖ A code of professional responsibility. Many landmen are also licensed lawyers, so a balanced approach must be applied when a lawyer is working as a landmen.
- ❖ Look to the American Bar Association's Model Rules of Professional Conduct and each state's corresponding rules of professional conduct.

<i>Texas Disciplinary Rules of Professional Conduct</i>	<u>TX Rules of Professional Conduct</u>
<i>Pennsylvania Rules of Professional Conduct</i>	<u>PA Rules of Professional Conduct</u>
<i>Ohio Rules of Professional Conduct</i>	<u>Ohio Rules of Professional Conduct</u>
<i>West Virginia Rules of Professional Conduct</i>	<u>WV Rules of Professional Conduct</u>
<i>Pennsylvania Rules of Professional Conduct</i>	<u>OK Rules of Professional Conduct</u>
<i>Louisiana Rules of Professional Conduct</i>	<u>LO Rules of Professional Conduct</u>
<i>Oklahoma Rules of Professional Conduct</i>	<u>OK Rules of Professional Conduct</u>

Legislation

- ❖ Many states have attempted to pass legislation that would require licensing requirements for landmen. Historically, there has been no need to maintain a license. However, some states require registration at this time.

Legislation (Cont.)

❖ Ohio under O.R.C. 4735.01 (SB 263)

- Exempts landmen from the real-estate licensing requirement. An “oil and gas land professional” is defined as a person who “regularly engaged in the preparation and negotiation of agreements for the purpose of exploring for, transporting, producing, or developing oil and gas mineral interests, including, but not limited to, oil and gas leases and pipeline easements.”
- Employee landmen appear to be fully exempt under this law. Independent landmen are prohibited from engaging in fee transactions, and they must comply with certain additional conditions to receive exemption and subsequently remain exempt. To be exempt, an independent landman must:
 1. Register annually with the superintendent of real estate and pay an annual fee not to exceed \$100;
 2. Maintain membership in an established professional organization that develops a set of performance and ethical standards for landmen; and
 3. Provide certain disclosures to landowners on forms approved by the superintendent

Legislation (Cont.)

❖ North Carolina under N.C. Gen. Stat. § 113-425

- Requires landmen to be registered.
- “A person may not act, offer to act, or hold oneself out as a landman in this State unless the person is registered with the Department in accordance with this section.”
- N.C. Gen. Stat. § 113-425(b). The NC Department of Environmental Quality has the right to revoke a registration or impose civil penalties if someone, among other things, falsely represents himself as a registered landman or engages in any other fraud, deception, misrepresentation, or knowing omission of material facts related to oil and gas interests. 113-425(c).

❖ Maryland under Md. Code, Bus. Occ. & Prof. § 10.5-101

- Requires registration for individuals who negotiate with property owners for the acquisition of mineral rights in oil or gas.
- Proof of registration must be provided to property owners before acquiring mineral rights. § 10.5-104.
- Statute also contemplates potential fines and penalties, but the statute does not impose any ethical standards of conduct that could give rise to a penalty.

Difference between Personal, Legal, and Professional Ethics

<u>Personal</u>	Refers to a person's beliefs and values in both professional and personal aspects of life
	Viewed as a "moral code" or your personal conscience
	Example – return a lost wallet versus keeping it (honesty).
<u>Professional</u>	Refers to a person's values within the workplace
	Viewed as a set code of conduct that must be adhered to in the workplace or your career
	Example – return a lost wallet to co-worker versus keeping it (code says no stealing/theft).
<u>Legal</u>	Avoids legal consequences (civil or criminal)
	These are legal limits
	Example – return lost wallet versus keeping it (i.e. theft)

Ethical and Legal Landmines



AAPL Code of Ethics and Standards of Conduct

- ❖ “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 the individual's membership status shall be subject to review for possible disciplinary action as prescribed in Article XVI of these Bylaws..”
- ❖ “The Bylaws of the AAPL provide that a Code of Ethics has been established “to inspire and maintain a high standard of professional conduct” for the members of the Association. The Code of Ethics is the basis of conduct, business principles and ideals for AAPL members.”

AAPL Reference	Summary
Article XVI, Section 1	Fair and honest dealing with landowners, industry associates and the general public to preserve the integrity of the profession
Article XVI, Section 2	Adherence to a high standard of conduct in fulfilling his fiduciary duties to a principal
Article XVI, Section 2	Avoiding business activity which may conflict with the interest of his employer or client or result in the unauthorized disclosure or misuse of confidential information
Article XVI, Section 2	Performance of professional services in a competent manner
Article V, Section 9	Adherence to any provisions of the Bylaws, Code of Ethics, or any rule, regulation, or order adopted pursuant thereto
Article V, Section 9	Avoiding the aiding or abetting of any unauthorized use of the title “Certified Professional Landman,” “Registered Professional Landman,” “P.Land” or “CPL/ESA”
Article V, Section 9	Avoiding any act or conduct which causes disrespect for or lack of confidence in the member to act professionally

Honesty and Fairness

❖ At all times, a land professional has a duty to:

- Promote and, in a fair and honest manner, represent the industry to the public with the view of establishing goodwill;
- Conduct yourself in a manner consistent with fairness and honesty to maintain the respect of the public; and
- Protect those you deal with against fraud, misrepresentation, and unethical practices.

❖ In doing so, you should:

- Eliminate actions or practices that are damaging to the public or discredit the industry; and
- Conduct business in a professional manner that is fair, honest, and respectful to the industry and public.

Fiduciary Responsibilities

❖ Trust

- A landman shall assure that monies coming into his/her possession in trust for other persons (i.e., escrows, advances, etc.) are properly accounted for and administered in a manner approved by his/her employer or client.

❖ Protect

- A landman shall protect members of the public with whom he/she deals against fraud, misrepresentation, and unethical practices.

❖ Eliminate Practices

- A landman shall eliminate practices that could be or are damaging to the public or bring discredit to the industry.

❖ Fairness

- A landman shall treat all parties to any transaction fairly and act in an ethical manner.

❖ Competition

- 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.

❖ Compensation

- A 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.

Good Faith, Loyalty, and Confidentiality

❖ A landman shall:

1. Act in good faith in dealing with industry associates (good faith means a sincere intention to be honest, fair, and lawful, without any malice or the desire to defraud or take unfair advantage of others).
2. Avoid business activity which may result in the unauthorized disclosure or misuse of confidential information.
3. Not betray his partner's, employers', or client's trust by directly turning confidential information to personal gain.
4. Not aid or abet the unauthorized use of a CPL/RPL certification.

Conflicts of Interest

❖ A landman shall:

1. Avoid business activities that may conflict with the interests of his employer or client
2. Disclose his interest in an area that might be in conflict with his principal, employer or client.
3. Not act adversely or engage in any enterprise in conflict with the interest of his employer (or client).
4. Reveal the facts of his ownership in property or interest to the potential buyer.
5. Not acquire for himself, or others, an interest in property which he is called upon to purchase for his principal, employer or client.
6. 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.
7. Not accept compensation from more than one principal for providing same service nor accept compensation from one party to transaction without employer/client's knowledge and consent

Communications

- ❖ Effective communication with your team, client, and company is a key factor in the success of a project.
- ❖ A landman shall:
 - Not knowingly misrepresent any material fact.
 - Not fraudulently induce another to enter into a contract
 - Avoid falsehoods (i.e., puffing, sales talk, estimates, opinions).
 - Make affirmative disclosures based on the relationship.
 - Correct prior statements that were false, deceptive, or misleading
 - the land professional shall at all times present an accurate representation in advertising and disclosures to the public
- ❖ A landowner may sue to have the lease set aside and sue the landman and client for negligent misrepresentation or fraud. The company can be liable for the misrepresentations of a landman and also be bound by their actions.

Competence/Expertise

❖ A landman shall:

- Keep informed regarding laws, legislation, regulations, public policies, and market conditions in his/her area of represented expertise in order to be to advise his/her employer or client properly.
- Represent others in his/her area of expertise and shall not represent himself/herself to be skilled in professional areas in which he/she is not competent or professionally qualified.
 - When facing a question or problem that is beyond your level of comfort or competency, speak up!
 - The lawyer's/landman's failure to admit when an issue is outside their competency directly violates the professional codes and can lead to devastating consequences for the client.

Cold-Drafting

- ❖ Do not cut corners!
- ❖ Cold-drafting is when a landman quickly extends offers without the proper due diligence in order to get a lease signed quickly based on what he/she thinks will get it done.
- ❖ As for the company (if disregarding these actions), it is simply buying time to verify ownership and figure out exactly which leases it wants to move forward with. Once that is done, it defunds or closes the lease purchase accounts or refuses payments on the drafts.
- ❖ The landman is left to clean up the mess and looks bad!

Cooperation, Criminal Activity, and Harassment

- ❖ The AAPL requires that anyone charged with unethical conduct or asked to give evidence in an investigation or disciplinary proceeding must place all pertinent facts before the appropriate authority of the AAPL
- ❖ A landman shall:
 - Avoid “any act or conduct which causes disrespect for or lack of confidence in the member to act professionally as a land professional.” This includes harassment, bias, and discrimination.
 - Not participate in conduct which causes him to be convicted, adjudged or otherwise recorded as guilty by any court of competent jurisdiction of any felony, any offense involving fraud as an essential element, or any other serious crime.
 - The Equal Employment Opportunity Commission (“EEOC”) defines harassment as unwelcome or inappropriate conduct based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
 - The EEOC defines sexual harassment as the unwelcome or inappropriate verbal or sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. It also can include offensive remarks about a person’s sex, such as making disparaging or insulting comments about women in general.
 - Not deny equal professional services to any person for reasons of race, creed, sex or country of national origin.
 - Not be party to any plan or agreement to discriminate against person or persons on basis of race, creed, sex or country of national origin
- ❖ Such actions are damaging to the victim and can subject the landman and/or his employer to severe civil and criminal penalties.

Unauthorized Practice of Law

- ❖ While usual job functions are generally excluded from the unauthorized practice of law, individuals with law degrees/licenses that work as landmen should be cautious in rendering legal advice!
 - No malpractice insurance = exposing yourself to personal liability for malpractice.
- ❖ A landman that is also an attorney must consider “special restrictions on whether or not he holds himself as a lawyer” as he is subject to applicable disciplinary rules for lawyers.
 - Rule 8.4(c) of the ABA Model Rules of Professional Conduct states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”
- ❖ A landman’s job:
 - includes the interpretation and preparation of legal documents and reports.
 - requires a vast understanding of mineral law and contract law.
 - involves negotiations for mineral rights to expose landmen.
- ❖ Each of the above actions could constitute the unlicensed practice of law.

Legal and Ethical Ramifications



Ramifications for Violations

- ❖ Landman that are lawyers are subject to the disciplinary authority of the states they are licensed to practice in.
- ❖ Landman misconduct is referred to the AAPL Ethics Committee, which is responsible for upholding the ethical standards of the AAPL and makes recommendations for appropriate action.
- ❖ Violations can result in:
 1. Expulsion or suspension from AAPL
 2. Censure by AAPL
 3. Loss of credibility and harm to reputation
 4. Reprimand/punishment/disbarment from the practice of law (if lawyer)
 5. Exposure to civil or criminal liability

Case Studies and Hypotheticals



Harding Co. v. Sendero Res., Inc., 365 S.W.3d 732 (Tex. App. 2012)

- ❖ 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.
- ❖ The leases were acquired in the landman broker's name and were to be assigned to the client upon meeting a target client's attention that one of the landman broker's associated entities was assisting a competitor in acquiring leases in the targeted area.
- ❖ The client sued the landman broker for breach of the non-compete clause and various torts. The landman broker brought various summary judgment motions, alleging, among other things, that the associated entities were not bound by the non-compete clause.
- ❖ The trial court granted the landman broker's motions for summary judgment on all issues. The Appellate Court held the landman broker's associated entity was not personally liable under the contract because it was not a party to the same.
- ❖ 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 the same.

B.A. Kelly Land Co., LLC v. Aethon Energy Operating, LLC, 25 F.4th 369 (5th Cir. 2022)

- ❖ An unleased landowner in Louisiana filed suit against an operator due to the operator not providing disclosures and reports as required under Louisiana's conservation laws.
- ❖ The unleased landowner sent a letter making a request for the information, but the operator argued that the request was too vague to qualify as a request under the statute requiring the reports and disclosures.
- ❖ The operator argued that their senior landman was confused as to what was requested; however, in a declaration, under oath, the landman inferred that he knew enough about the landowner, the statute, and the information to be provided under the statute, that any confusion he purportedly had as to what information the landowner sought was not a defense.
- ❖ The 5th Circuit Court of Appeals stated that the declaration by the landman corroborated that he and the operator were reasonably competent mineral operators and must have known what information was being requested and required under the statute.
- ❖ The 5th Circuit Court of Appeals held that the letter was a sufficient request for reports under the statute and rendered judgment for the landowner.

Ethics Violation

- ❖ As an employee of Smith Land Services, Inc, Jim Landman performed landwork for Lotsa Cash Inc. As he conducted research and title work on behalf of Lotsa Cash Inc., Jim Landman gained considerable knowledge of an Ohio Unit. Jim Landman used that confidential information to try to persuade landowners in the Ohio Unit to sell their mineral rights to him – instead of leasing those rights to his client. When a landowner agreed to sell her rights, Jim Landman used his significant other's name for the official paperwork. Jim Landman left a paper trail that included his own letters as well as county deed record filings.
- ❖ The AAPL Code of Ethics Section 2 clearly states:
 - “A Land Professional shall not betray his partner's, employer's or client's trust by directly turning confidential information into personal gain.”
 - “The Land Professional shall exercise the utmost good faith and loyalty to his employee (or client) and shall not act adversely or engage in any enterprise in conflict with the interest of his employer (or client).”
- ❖ Jim Landman betrayed Smith Land Services and the client, Lotsa Cash Inc., by clearly engaging in activities that were in conflict with the interest of his employer and client. Jim Landman was found to have violated Article XVI – Code of Ethics, Section 2 of the AAPL ByLaws. He was expelled as an AAPL Member, which also included his designation as a CPL. Notice of the action was provided to the membership through publication in the Landman magazine.

Hypothetical

- ❖ A landman is both a CPL and a licensed attorney. His employer directs him to negotiate with the owner to obtain the lease. The landman knows the landowner will agree to deal very favorably with the company and that other companies are interested in the same property.
- ❖ Can the landman push for a bargain when nearby owners are getting something better?
 - Landman - Probably not. If the owner found out later that he was getting less than the “going rate,” he/she would be upset/angry. These actions could be construed as not holding the industry in the best light, which is a primary ethical duty of landmen under AAPL.
 - Lawyer – no. He/she has to duty to represent the company zealously and do what is best for it.
- ❖ Can the landman state or imply that the opportunity is the owner’s only hope as part of the negotiation?
 - Landman – No. This is a clear ethical violation and equates to dishonest conduct. The landman would have to tell the owner there may be others interested under the Code

Hypothetical

- ❖ The landman works for Company X and identifies prospective properties. He/she is then fired from Company X.
 - **Can the landman go to work for Company Z working in the same geographic area?**
 - No - The thought that the landman would not use information previously learned is so unlikely that it is ignored as a possibility.
 - Going to work for another company in the same geographic region is considered an ethical violation unless a reasonable amount of time has passed.
 - **What if the landman goes to work for himself/herself?**
 - No – this would be self-dealing.

Hypothetical

- ❖ A landman is a licensed lawyer in Ohio but is unlicensed in Texas. He holds himself out to the public as a lawyer.
 - Is this an ethical violation?
 - Yes, for landmen - this is dishonest and would violate the code.
 - Yes, for lawyers – this violates ABA Rule 8.4 and likely the state's corresponding rules.

Hypothetical

- ❖ Landman bills a client for all day, yet only worked 4 hours.
 - Ethical violation?
 - Landman - Yes. It violates section 1 of the Code and multiple standards of practice (3, 4, 6).
 - Lawyer – Yes. This violates ABA Rule 8.4 (overbilling).

Hypothetical

- ❖ While working, a landman learns of an advantageous business opportunity where the prospective buyer needs capital. The landman offers capital to the buyer.
 - Ethical violation?
 - Landman – Likely yes. A landman is prohibited from getting involved as a professional in “property or transactions” in which he/she has an actual or contemplated interest unless that is fully disclosed to all affected parties.
 - Lawyer- Yes. ABA Rule 1.8 (and corresponding state rules) prohibit lawyers from getting involved in business transactions with clients without certain conditions being met.

Hypothetical

- ❖ Landman is going through a nasty divorce. He/she decides to post defamatory statements on social media and posts a “private” video online.
 - Ethical violation?
 - Yes – AAPL requires ethical standards even in non-landman related conduct.

Key Points and Lessons



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