

Ethics for Landmen and Lawyers

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Overview

- I. Purpose Behind Ethical Rules**
- II. Ramifications of Ethical Violations by Landmen and Lawyers**
- III. Specific Legal and Ethical Concerns for Landmen**
- IV. Ethical Issues for Lawyers Working with Landmen**



**“The meek shall inherit the
Earth, but not its mineral rights”**
-J. Paul Getty



“A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act . . . with zeal in advocacy upon the client's behalf.”

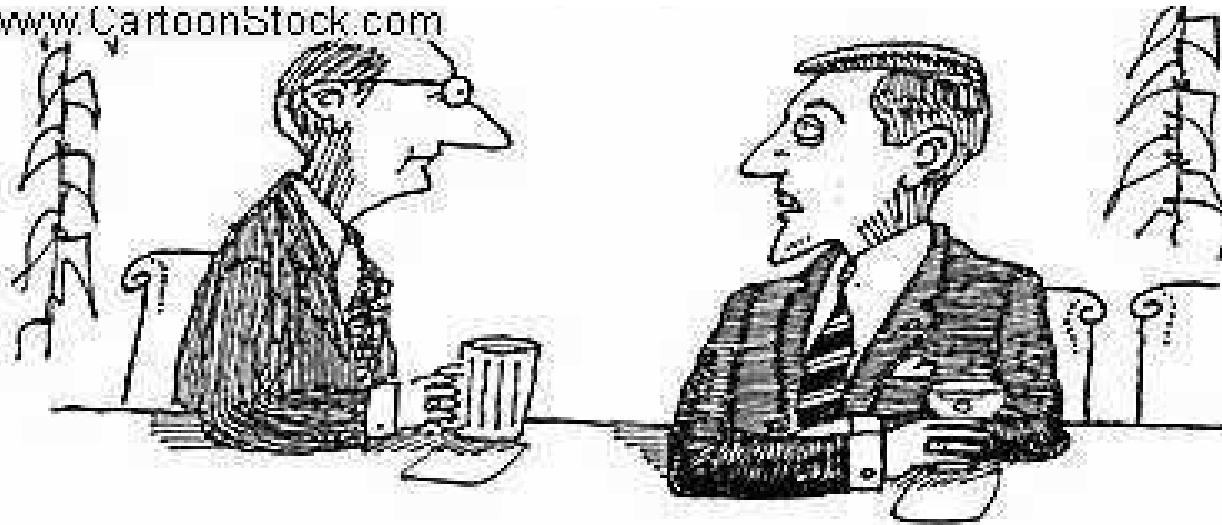
-Comment [1], Rule 1.3, ABA Model Rules of Professional Conduct





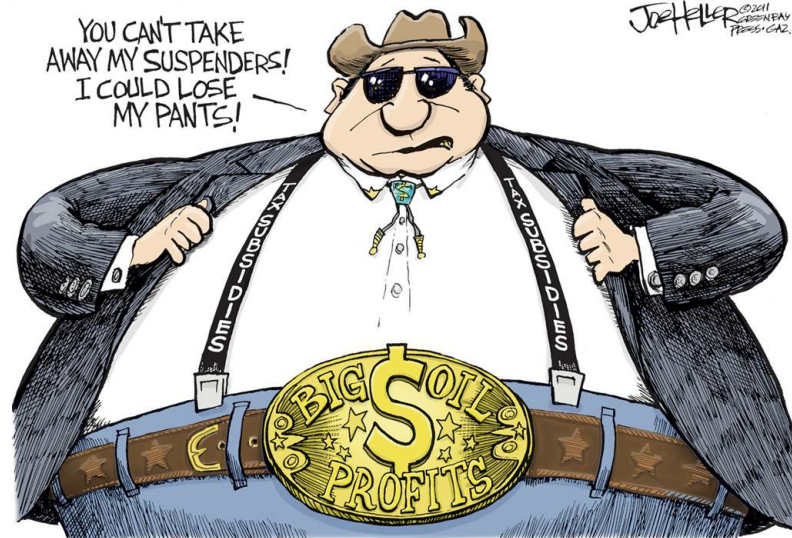


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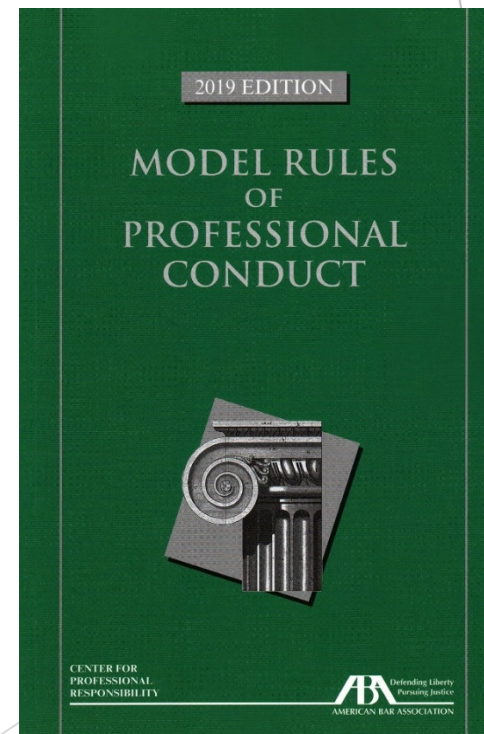
"NINETY-NINE PERCENT OF LAWYERS
GIVE THE REST OF US A BAD NAME."





- ▶ **AAPL Code of Ethics and Standards of Practice**
 - ▶ **AAPL membership is voluntary**

- ▶ **ABA Model Rules of Professional Conduct**
 - ▶ **LA – Adopted January 1, 1987**
 - ▶ **TX – Adopted June 20, 1989**
 - ▶ **Bar membership is mandatory**





Ramifications of Ethical Violations

- ▶ **Landmen:**
 - ▶ **Expulsion or suspension from AAPL**
 - ▶ **Censure by AAPL**
- ▶ **Lawyers:**
 - ▶ **Reprimand**
 - ▶ **Financial Restitution and/or Fee Disgorgement**
 - ▶ **Disbarment/suspension from the practice of law**
- ▶ **Both:**
 - ▶ **Loss of credibility and diminishment of professional reputation**
 - ▶ **In some cases, exposure to civil or criminal liability (depending on nature of underlying conduct at issue)**





Legislative Efforts to Regulate Landmen

► Texas:

- On February 18th, 2009, Texas State Representative Charlie Geren of Fort Worth filed HB 1405 which would have licensed all landmen under the Texas Real Estate Commission.
- “To protect the public, the Texas Real Estate Commission, by rule, shall:
 - Establish the eligibility requirements for a landman license holder, including education, experience, and examination requirements as appropriate;
 - Establish the moral character requirements, including honesty, trustworthiness, and integrity, an applicant or license holder must satisfy to hold a landman license;
 - Establish the form and procedures for applying for a landman license; . . .
 - Determine the scope of practice by a landman license holder; and
 - Require a landman license holder to comply with the standards of conduct and ethics established by the commission for a person licensed under this chapter.”
- Not passed into law
- Similar legislative efforts have failed in West Virginia, Colorado, Ohio, and New Mexico



Legislative Efforts to Regulate Landmen

► Maryland:

- **Md. Code, Bus. Occ. & Prof. § 10.5-101, et seq. – effective June 1, 2013**
- **Provides that a person “may not operate as a land professional” unless issued a registration certificate under the statute. § 10.5-107**
- **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 actually give rise to a penalty.**



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Find Who is Registered - Maryland Oil and Gas Land Professionals

Last update - May 2016

Name	Registration Number	Registration Date	Expiration Date
Harold Beard	1	5/11/16	5/11/18
Paul Royer	2	5/11/16	5/11/18

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Legislative Efforts to Regulate Landmen

- ▶ **North Carolina:**
 - ▶ **N.C. Gen. Stat. § 113-425**
 - ▶ **Requires that landmen 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)**
 - ▶ **Gives N.C. Dept. of Environmental Quality the right to revoke a registration or impose civil penalties if someone, among other things:**
 - ▶ **“[f]alsely represents [him]self as a registered landman” or**
 - ▶ **“[e]ngages in any other fraud, deception, misrepresentation, or knowing omission of material facts related to oil or gas interests.” N.C. Gen. Stat. § 113-425(c)**



Specific Legal and Ethical Concerns for Landmen



Fairness and Honesty



Confidentiality / Duty of Loyalty



Unauthorized Practice of Law



Fairness and Honesty

AAPL Rules

► AAPL Code of Ethics 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.



Fairness and Honesty

AAPL Rules

► AAPL Standards of Practice:

A. Fair and honest dealing with landowners, industry associates and the general public so as to preserve the integrity of the profession

...

G. Avoiding any act or conduct which causes disrespect for or lack of confidence in the member to act professionally as a land professional



Fairness and Honesty

Misrepresentation and Fraud

► Fraud:

1. **A false representation of fact**
2. **Knowledge or belief that the representation was false (often called scienter).**
 - **In some jurisdictions, fraud can also arise from a misrepresentation “made recklessly knowing he had insufficient knowledge upon which to base such representation”**
3. **An intention to induce someone else to act or to refrain from acting**
4. **Justifiable reliance on the representation by that person**
5. **Damage suffered as a result**



Fairness and Honesty

Misrepresentation and Fraud

- ▶ ***Petrohawk Properties v. Chesapeake*, 689 F.3d 380 (5th Cir. 2012)**
 - ▶ **Chesapeake had secured a lease extension on the property but had not yet recorded it in the public records. Meanwhile, a landman working for Petrohawk approached the landowner and obtained a competing lease on the property.**
 - ▶ **In securing the competing lease, the Petrohawk landman told the landowner that the Chesapeake extension was not “legal or valid” because Chesapeake had not yet recorded it. The landman also explained that Louisiana was a race state (true) and that if Petrohawk recorded its lease first, the Chesapeake Extension would be “invalid” (false).**
 - ▶ **The landman did not inform the landowner that the public records doctrine only applies as to the lease’s effect on *third parties* and that the Chesapeake extension would remain valid as to the landowner regardless of when or whether it was ever recorded.**
 - ▶ **As a result of this misrepresentation, the court found that the Petrohawk lease was obtained by fraud and rescinded the lease.**



Fairness and Honesty

Misrepresentation and Fraud

- ▶ ***Kropa v. Cabot Oil & Gas Corp.*, 609 F.Supp. 2d 372 (M.D. Pa. 2009)**
 - ▶ **Lawsuit alleged that a landman secured a lease based on the misrepresentation that the landowner “would never be offered more than \$25.00 per acre to lease the property” when, in fact, the landowner’s neighbors had been paid more than that**
 - ▶ **Court found that the lawsuit’s allegations supported a cause of action for fraudulent inducement**



Fairness and Honesty

Misrepresentation and Fraud

► Other examples:

- ***Roeser v. Coffey*, 98 S.W.2d 275 (Tex. Civ. App. 1935)**
 - Mineral deed rescinded after sellers had been induced to sell based on false statement that the land had been condemned for mineral purposes because of a nearby dry hole
- ***Patterson v. Shell Petroleum Corp.*, 143 S.W.2d 208 (Tex. Civ. App. 1940)**
 - Quitclaim deed rescinded after buyer had falsely informed owners that lands had no mineral value and there was no mineral activity in the area



Fairness and Honesty

► **Duty to Disclose**

- **Courts have also recognized that there may be an affirmative duty to disclose information in some circumstances.**
- **For example:**
 - **If you are asked a question, you cannot give a misleading answer**
 - **You cannot confirm as true another's false impression**
 - **If you make a partial disclosure that conveys a false impression, you must make a full disclosure to correct the misimpression**



Fairness and Honesty

Duty to Disclose

- ▶ ***Barry v. Stevens*, 31 P.2d 950 (Okla. 1934)**
 - ▶ Action for rescission and cancellation of a deed.
 - ▶ In discussing potential sale of a mineral interest, buyer and seller had engaged in a discussion about the area, specifically including discussions about production.
 - ▶ Buyer failed to disclose that a deep formation had been tested and that – just days before – a well came in at an initial rate of 1,000 bpd
 - ▶ Result?
 - ▶ Court ruled in favor of the seller, recognizing that:

“A duty to speak may arise from partial disclosure, the speaker being under a duty to say nothing or to tell the whole truth. One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes, since such concealment is in effect a false representation that what is disclosed is the whole truth.”



Fairness and Honesty

Duty to Disclose

- ▶ ***Peterson v. Koch Industries, Inc.*, 684 F.2d 667 (10th Cir. 1982)**
 - ▶ **Peterson agreed to lease her property to Koch Industries for oil and gas development. Within a few months, the lease was unitized and, shortly thereafter, production commenced on the neighboring properties in the unit.**
 - ▶ **After production began, the landman for Koch requested that Peterson ratify the lease.**
 - ▶ **The landman did not advise Peterson that production had already started within the unit on the neighboring properties.**
 - ▶ **But Peterson, for her part, “did not inquire as to the progress of the drilling, exploration, or of any production on the property prior to ratifying the lease.”**



Fairness and Honesty

Duty to Disclose

- ▶ ***Peterson v. Koch Industries, Inc.*, 684 F.2d 667 (10th Cir. 1982)**
 - ▶ When Peterson started receiving small royalty checks, she apparently wasn't happy and filed a lawsuit to void the lease due to the landman's "misrepresentation by silence regarding material facts."
 - ▶ Result?
 - ▶ Court held that there was no affirmative duty to disclose that production had been achieved, "particularly when . . . Peterson did not inquire" and may have had actual knowledge of production from other property within the unit.



Fairness and Honesty

- ▶ **Comparable rules for lawyers:**

- ▶ **Model Rule 8.4:**

- ▶ **“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation”**

- ▶ **Model Rule 4.1:**

- ▶ **“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 assisting a criminal or fraudulent act by a client”**

- ▶ **Comments to Rule 4.1:**

- ▶ **A lawyer “generally has no affirmative duty to inform an opposing party of relevant facts.”**

- ▶ **But “partially true but misleading statements or omissions . . . are the equivalent of affirmative false statements.”**



Specific Legal and Ethical Concerns for Landmen



Fairness and Honesty



Confidentiality / Duty of Loyalty



Unauthorized Practice of Law



Confidentiality / Duty of Loyalty

► AAPL Code of Ethics Section 2:

- . . . 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).



Confidentiality / Duty of Loyalty

► AAPL Standards of Practice:

C. 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



Confidentiality / Duty of Loyalty

- ▶ ***Tenneco Oil Co. v. Joiner*, 696 F.2d 768 (10th Cir. 1982)**
 - ▶ Landman hired to secure leases for Tenneco within certain area outline on Tenneco's buy map. Landman terminated after four months.
 - ▶ After termination, landman allegedly obtained thirty leases for himself "using knowledge and information . . . that he had acquired from Tenneco."
- ▶ ***Barnsdall Oil Co. v. Willis*, 152 F.2d 824 (5th Cir. 1946)**
 - ▶ Landman used client's confidential information (maps, geophysical data, and drilling plans) to obtain leases in the target area in the name of his brother-in-law



▶ **Comparable rules for lawyers:**

▶ **Model Rule 1.6:**

- ▶ **“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [these rules].”**

▶ **Model Rule 1.8:**

- ▶ **A lawyer may not use confidential information “to the disadvantage of the client.”**

▶ **Restatement (Third) of the Law Governing Lawyers § 60(2) (2000):**

- ▶ **“A lawyer who uses confidential information of a client for the lawyer’s pecuniary gain other than in the practice of law must account to the client for any profits made.”**



Specific Legal and Ethical Concerns for Landmen



Fairness and Honesty



Confidentiality / Duty of Loyalty



Unauthorized Practice of Law



Unauthorized Practice of Law

▶ AAPL Code of Ethics Section 2:

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



Unauthorized Practice of Law

- ▶ **Both Texas and Louisiana prohibit the unauthorized practice of law by persons who are not members of the state bar. TX Gov. Code § 81.102; La. R.S. § 37:213**
- ▶ **Penalties for the unauthorized practice of law include fines and jail time.**



Unauthorized Practice of Law

- ▶ **“Practice of law” is defined to include:**
 - ▶ **“The preparation of a pleading or other document . . . on behalf of a client before a judge in court . . .” Tex. Gov. Code § 81.101(a)**
 - ▶ **“. . . [T]he giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument . . .” Tex. Gov. Code § 81.101(a)**
 - ▶ **“The preparation of legal instruments of all kinds.” *Louisiana State Bar Ass’n v. Edwards*, 540 So. 2d 294 (La. 1989)**
 - ▶ **“Certifying or giving opinions . . . as it relates to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.” La. R.S. § 37.212(2)(d)**



Unauthorized Practice of Law

Exceptions for Landmen

▶ Texas

▶ “Landman Exception”

▶ “[T]he ‘practice of law’ does not include acts relating to the lease, purchase, sale, or transfer of a mineral or mining interest in real property or an easement or other interest associated with a mineral or mining interest in real property”

▶ Tex. Occ. Code § 954.001



Unauthorized Practice of Law

Exceptions for Landmen

► Louisiana

- Less clarity – no specific statutory exception for landmen
- Case law generally recognizes that “functions historically performed by landmen” do not constitute the unauthorized practice of law
 - *Placid Oil Co. v. Taylor*, 306 So. 2d 664 (La. 1975)
 - *Crawford v. Deshotels*, 359 So. 2d 118 (La. 1978)
 - *Collins v. Godchaux*, 86 So. 3d 831 (La. App. 3 Cir. 2012)



Unauthorized Practice of Law

Exceptions for Landmen

► Louisiana

- What functions are “historically performed by landmen”?
 - “Landman” defined as “an employee of an oil company whose primary duties are the management of the company’s relation with its landowners.” *Crawford*, 359 So. 2d 118.
 - A landman’s duties include “securing of oil and gas leases, lease amendments, pooling and unitization agreements and instruments necessary for curing title defects from landowners.” *Crawford*, 359 So. 2d 118.
 - Is this list exclusive?



Unauthorized Practice of Law

Exceptions for Landmen

▶ Louisiana

▶ *Collins v. Godchaux*, 86 So. 3d 831 (La. App. 3 Cir. 2012)

- ▶ Collins was a landman contracted to manage the mineral interests of two landowners and his services included:
 - ▶ Drafting a memo that identified potential lease violations
 - ▶ Requesting photographs of property damage to nearby property to evaluate potential legal prescription issues
 - ▶ Negotiating damage claims and engaging in settlement negotiations
- ▶ After the landowners failed to pay Collins, Collins brought suit for the balance he was owed.
- ▶ The landowners filed a counterclaim asserting that they didn't have to pay because the work performed by Collins constituted the unauthorized practice of law.



Unauthorized Practice of Law

Exceptions for Landmen

▶ Louisiana

- ▶ ***Collins v. Godchaux*, 86 So. 3d 831 (La. App. 3 Cir. 2012)**
 - ▶ The district court agreed with the landowners and held that Collins had engaged in the unauthorized practice of law, but the Louisiana Third Circuit reversed.
 - ▶ The Third Circuit confirmed that functions “historically performed by landmen” do not constitute the unauthorized practice of law.
 - ▶ Court made clear that the list of historical landmen functions provided in *Crawford* was non-exhaustive, and the court cited to many examples in which landmen performed other functions.



Unauthorized Practice of Law

- ▶ **Comparable rules for lawyers:**
 - ▶ **Unfortunately, no prohibition on the “unauthorized practice of land”**
 - ▶ **But the Rules of Professional Conduct do require that a lawyer “provide competent representation to a client,” and the comments recognize that this duty may occasionally require reliance on experts in a particular field.**
 - ▶ **Model Rule 1.1**

Intermission

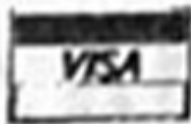
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Ethical Issues for Lawyers Working with Landmen



Conflicts of Interest



Attorney-Client Privilege

Conflicts of Interest



*"My fees are quite high, and yet you say you have little money.
I think I'm seeing a conflict of interest here."*



Conflicts of Interest

► Rule 1.7: Conflict of Interest – Current Clients

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

- (1) the representation of one client will be directly adverse to another client; or**
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**



Conflicts of Interest

► Rule 1.7: Conflict of Interest – Current Clients

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

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



Conflicts of Interest

► Rule 1.9: Conflict of Interest – Former Clients

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

...

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Conflicts of Interest

Transaction

Client A



Client B

Litigation

Client A



Client B



Ethical Issues for Lawyers Working with Landmen



Conflicts of Interest



Attorney-Client Privilege

Attorney-Client Privilege

- ▶ **The attorney-client privilege is closely tied to the lawyer's ethical duties to maintain confidentiality**
- ▶ **Model Rule 1.6(c):**
 - ▶ **"A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."**





Attorney-Client Privilege

WHAT IS THE ATTORNEY-CLIENT PRIVILEGE?

“The privilege protects disclosure of confidential communications between the client and the lawyer made for the purposes of obtaining or providing legal advice.”

Key components

- “Communication”
- “in confidence”
- “between attorney and client”
- “For purpose of obtaining or providing legal advice”





Attorney-Client Privilege

PRIVILEGE CAN BE WAIVED

➤ Intentional Disclosure to Third Parties

Possible Exceptions

- Disclosure to third parties serves interest of client or is necessary to aid attorney in rendering legal advice
- Independent contractor could be “functional equivalent” of employee
- Common Interest

Consequences

- Limited Waiver
- “Subject Matter” Waiver

➤ Careless or Inadvertent Disclosure to Third Parties

Possible Exceptions

- Reasonable precautions taken
- Number of inadvertent disclosures
- Extent of disclosure
- Delay in clawing back



PRIVILEGED



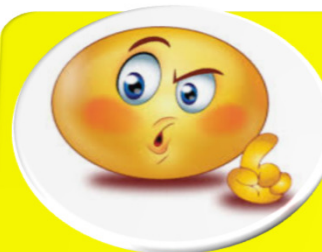
NOT PRIVILEGED



Attorney sends confidential legal opinion to Vice President of Oil Co., his client, regarding environmental liabilities the company may inherit with respect to mineral interest in Blackacre Field



Attorney sends legal opinion to Oil Co.'s independent contractor landman to review attorney's boundary and acreage description in legal opinion on Blackacre Field



VP of Oil Co. forwards attorney's legal opinion to interest owners concerned about company's prospective liabilities in Blackacre Field



VP of Oil Co. sends attorney's legal opinion to landowner to support legal position in settlement negotiations



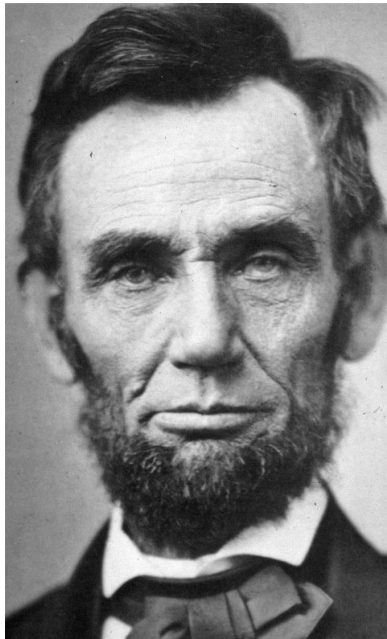
Some Parting Advice

**“It takes 20 years to build a reputation
and five minutes to ruin it.”**

► **Warren Buffett**



Some Parting Advice



“There is a vague popular belief that lawyers are necessarily dishonest . . . Let no young man choosing the law for a calling for a moment yield to the popular belief – resolve to be honest at all events; and if in your judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.”

► **Abraham Lincoln**

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