Lawyers and Landmen:
Mandatory Licensing Meets Historically Defined[1]

I. Introduction

Landmen have long played a vital role in the oil and gas industry. As professionals, landmen voluntarily submit to professional standards by joining organizations such as the American Association of Professional Landmen, and in some instances being certified through these organizations. The legal profession similarly has a long history with the oil and gas industry in this country. Lawyers must be licensed and are subject to mandatory regulation and professional standards by their respective state bars. In order to protect the public from non-lawyers dabbling in the legal profession, every state prohibits the unauthorized practice of law ("UPL"). However, in most oil and gas producing states, the work historically performed by landmen is exempted from the unauthorized practice of law. Determining where work historically performed by landmen stops and practicing law begins presents an inherent tension between the highly regulated legal profession and the voluntarily regulated landwork profession.

This paper will explore the professional duties of lawyers in Louisiana, the legal basis of these duties, the basis of the prohibition on the unauthorized practice of law, the contours of "work historically performed by landmen" in Louisiana, and the interplay between the historical work of landmen and the practice of law

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II. Duties Owed to Clients by Attorneys

The attorney-client relationship is not an arm's length business transaction. The Louisiana Supreme Court, like many others, has recognized that an attorney has a fiduciary duty to his clients. In *Plaquemines Parish Commission Counsel v. Delta Development Company, Inc*., 502 So.2d 1034 (La. 1987), the court discussed the nature of this fiduciary duty:

The relation of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client only on the basis of the strictest fidelity and honor.
In advising his client and conducting the latter's affairs, an attorney is bound to exercise that reasonable care and diligence which is usually exercised by lawyers and must possess and employ the ordinary legal knowledge and skill which is common to the members of his profession . . . This, however, is not the full extent of a lawyer's duties or obligations to his client; he is, in addition, bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence, so that, in all his relations with his client, it is his duty to exercise and maintain the utmost good faith, honesty, integrity, fairness and fidelity.

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Id. at 1040 (*citing Searcy v. Novo*, 188 So. 2d 490 (La.App. 2d Cir.1939)).

An attorney's paramount duty is, and must be, to his client. *Penalber v. Blount*, 550 So.2d 577, 581 (La. 1989). In fact, Louisiana adheres to the principle that in no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his client. *Plaquemines Parish Commission Council*, 502 So.2d at 1040. Other Louisiana cases which describe the attorney-client relationship include *Lupo v. Lupo*, 415 So.2d 402 (in no other agency relation is a greater duty of trust imposed than in that involving an attorney's duty to his client or former client); *Feldheim v. Plaquemines Oil & Development Co*., 282 So.2d 469 (La. 1973) ("there must be perfect fairness, adequacy and equity on the part of the attorney"); *La. State Bar Association v. Van Buskirk*, 191 So.2d 497 (La. 1966). *See also Federal Savings & Loan Insurance Corp. v. Mmahat*, 97 Bankr. 293, 296 (E.D. La. 1988) (attorney-client relationship gives rise to a fiduciary relationship; judgment rendered against the debtor for malpractice is non-dischargeable under § 523(a)(4)).

As noted by the Court of Appeals in *Searcy v. Novo*, 188 So. 490 (La.App. 2d Cir. 1939):

> The law leaves no uncertainty in defining the character of duty which an attorney owes to his client. The relation of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client only on the basis of the strictest fidelity and honor.

Searcy, 188 So. at 498. "In no relationship is the maxim that 'no man can serve two masters' more rigidly enforced than in the attorney-client relationship." *Plaquemines Parish Commission Council*, 502 So.2d at 1040.

This principle of undivided loyalty is firmly embedded in the Rules of Professional Conduct (“RPC”), adopted by the Louisiana Supreme Court pursuant to its exclusive and plenary power to regulate the practice of law. LSA-La.Const. art. II, §§ 1, 2. *See also, Chittenden v. State Farm Mutual Automobile Insurance Company*, 788 So.2d 1140, 1148 (La. 2001). Recognizing loyalty as an essential element of the lawyer's relationship to a client, Rule 1.7 of the RPC generally prohibits a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. This duty of loyalty continues even after the termination of the attorney-client relationship. Rule 2.1 of the RPC imposes an affirmative obligation upon a lawyer to exercise independent professional judgment and to render candid advice to his or her client, thereby underscoring the importance of avoiding any divided loyalties that might cloud that independent judgment.

III. Unauthorized Practice of Law

Public policy prohibits non-attorneys from practicing law in every state in the country, including Louisiana. Attorneys are placed in a special position of trust, and thus there are regulations governing attorneys' conduct. *Dunn v. Land & Marine Properties, Inc*., 609 So.2d 284 (La.App. 3d Cir. 1992). The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. *Louisiana State Bar Asso. v. Edwins*, 540 So.2d 294, 299 (La. 1989) (*citing* ABA Ethical Consideration 3-1). Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment. *Id.* (citing ABA Ethical Consideration 3-2). A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. *Edwins*, 540 So.2d at 299.

The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. *Id*. (*citing* ABA Ethical Consideration 3-3). It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. *Edwins*, 540 So.2d at 299. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. *Id.* The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. *Id.* (*citing* ABA Ethical Consideration 3-5).

The purpose of lawyer disciplinary proceedings is not primarily to punish the lawyer, but rather to maintain appropriate standards of professional conduct to safeguard the public, to preserve the integrity of the legal profession, and to deter other lawyers from engaging in violations of the standards of the profession. *Louisiana State Bar Ass'n v. Guidry*, 571 So.2d 161 (La. 1990). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington*, 459 So.2d 520 (La. 1984).

IV. Unauthorized Practice of Law in Louisiana

Louisiana, like all states, prohibits a non-licensed layperson from practicing law or from rendering legal services. La.R.S. 37:213. The "practice of law' is defined in La.R.S. 37:212 to include:

> (1) In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act

in connection with pending or prospective proceedings before any court of record in this state; or

(2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;

(a) The advising or counseling of another as to secular law;

(b) In behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document, or instrument affecting or relating to secular rights;

(c) The doing of any act, in behalf of another, tending to obtain or secure for the other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(d) Certifying or giving opinions as 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.

Several cases have considered the unauthorized practice of law for compensation. In *Duncan v. Gordon*, 476 So.2d 896 (La. App. 2 Cir. 1985), the defendant was to take all steps necessary to obtain redress for the plaintiff's personal injuries suffered in a car accident. The court refused to honor the 50% contingency fee arrangement because the defendant had to provide legal advice to the plaintiff. In reaching this conclusion, the *Duncan* Court noted,

> The practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.
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> [Gordon] was not qualified to give this advice because she did not possess the legal training required by the Supreme Court of this state. By contracting to represent plaintiff in negotiating a settlement with the insurance company, defendant attempted to function as and perform the duties of a duly licensed attorney.
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> The defendant rendered services which she was not competent to give, one of the evils the statute was designed to prevent.

Duncan, 476 So.2d at 898-99.

In *Crocker v. Levy*, 615 So.2d 918 (La. App. 1 Cir. 1993), a CPA entered into a contingency fee contract with a client. Under the terms of the contract, the CPA agreed to procure a lawyer for the client, and the client agreed to pay the CPA a percentage of certain amounts recovered in a suit contesting her father's will. In declaring the contingency fee contract an absolute nullity, the *Crocker* Court wrote,

> When the words of a contract are clear, unambiguous, and lead to no absurd consequences, the contract is interpreted by the court as a matter of law. When a contract is to be interpreted by the court as a matter of law, a motion for summary judgment is a proper procedural vehicle to present the question to the court.
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> This court finds that the written contract or any other agreements made as a result of the written contract are absolute nullities. The words of the contract are clear and unambiguous. Crocker promised to render "business, financial and other assistance, including securing for [Ms. Levy] reputable legal counsel" in exchange for a large contingency fee based on the legality of a will. This is contrary to La.R.S. 37:213 which forbids, with few exceptions, any person, partnership or corporation that is not duly licensed to practice law in this state from furnishing legal representation for another.

Crocker, 615 So.2d at 921.

In *Alco Collections, Inc. v. Poirier*, 680 So.2d 735 (La. App. 1st Cir. 1996), a creditor engaged a collection agency to collect a debt in exchange for half of the amounts it collected. The agency filed suit in its own name to secure payment against the debtor. The court of appeal concluded that the agency's actions constituted the unauthorized practice of law. As a result, the court declared the contract between the agency and the creditor to be null and without effect. In addition, because the collection agency did not own the debt, the court sustained the debtor's peremptory exception pleading the objection of no right of action.

In *Dunn v. Land and Marine Properties, Inc*., 609 So.2d 284 (La. App. 3 Cir. 1992), the heirs of the Dunn estate entered into a contract with a business corporation for it to "perform all administrative and legal work, including the pursuit of litigation if necessary" to recover property from the estate. 609 So.2d at 285. The contract called for payment in the form of a contingency fee of 50% of anything of value received and a mineral lease on any property recovered. The company assigned the contract of representation to its president, an attorney who filed a petition for possession. The trial court issued a judgment of possession that placed the heirs in possession of one half of the estate and the attorney in possession of the other half. The court of appeals concluded that the contract was null and void on its face because it specifically called on the business corporation to perform legal work that it was prohibited from doing

under state law. Furthermore, because the judgment of possession was the result of a null contract, the court concluded that the judgment was null and void also.

V. Landmen and the Unauthorized Practice of Law

The Louisiana Supreme Court, has specifically addressed the issue of the unauthorized practice of law by landmen in two cases. In *Placid Oil v. Taylor*, 306 So.2d 666 (La. 1975), the court first addressed allegations involving a landman allegedly engaging in the unauthorized practice of law. In *Placid Oil*, the landman, who was a non-lawyer, entered into a contract with the heirs of former landowners concerning title to a certain piece of property. The landman agreed "to remove all clouds from the said titles, and [agreed] to use all diligence in his efforts to do so, AT HIS SOLE EXPENSE, and the decision as to the method of procedure, and whether or not to institute litigation shall be left entirely to the discretion of [the landman]. . ." *Id.* at n.1. In return, the landman was to receive mineral rights to the property. A subsequent mineral lessee claimed that the transfer of the mineral rights to the landman was an absolute nullity because it was consideration for the unauthorized practice of law. The Louisiana Supreme Court rejected that argument, stating:

> . . . no evidence at all was introduced to show that, by reason of the contract, [the landman] had actually performed any prohibited legal services. Nor can we say, for instance, that services performed by removing clouds from titles, such as locating heirs or having adverse claimants sign quitclaims prepared by lawyers, amount by themselves to the practice of law, so as to exclude non-lawyers from the useful functions historically performed by landmen.

Id., at 666.

Subsequently, in *Crawford v. Deshotels*, 359 So.2d 118 (La. 1978), the Louisiana Supreme Court once again addressed a claim that a landman had engaged in the unauthorized practice of law. In that case, Crawford, an independent landman, contacted an heir after researching the title to a tract of land and discovering that the heir had been denied her legitime of an interest in the property. Upon contacting the heir, Crawford entered into an agreement with the heir whereby, in consideration for the necessary work and expense required for perfecting the title, the heir would convey a one-half mineral interest to Crawford. To that end, Crawford secured quitclaim deeds, which he personally prepared, conveying to the heir her interest in the property.

The heir later sued Crawford for dissolution of the contract, contending Crawford's actions constituted the unauthorized practice of law in violation of La.R.S. 37:213. In finding in favor of Crawford, the Louisiana Supreme Court quoted from the appellate court opinion, which relied on the opinion in *Placid Oil*, and read, in relevant part:

> Mr. Crawford agreed to undertake "the necessary work and expense in perfecting the title, of whatever undivided interest grantor may have legal title to, into grantor and causing the said title to grantor's interest to be properly reflected in the Conveyance Records of the Parish of Vermilion." The evidence shows that pursuant to this agreement Crawford obtained quitclaim deeds, which he personally prepared, conveying to Mrs. McDaniel an undivided one-sixth interest in the property. It was not necessary for Mr. Crawford to employ an attorney or to file any proceedings in court.

A very similar issue was presented in *Placid Oil Company v. Taylor*, 306 So.2d 664 (La.S.Ct.1975) where a landman, a non-lawyer, agreed to furnish services to remove clouds from the titles of landowners in consideration of an interest in the property. The court found that regardless of whether the services to be performed by the landman under the contract constituted the practice of law, the evidence did not show that the services actually performed were prohibited legal services. The court stated:

> Nor can we say, for instance, that services performed by removing clouds from titles, such as locating heirs or having adverse claimants sign quitclaims prepared by lawyers, amount by themselves to the practice of law, so as to exclude non-lawyers from the useful functions historically performed by landmen.

In its decision in *Placid*, the Supreme Court cited with approval the case of *Strange v. Robinson*, 189 So. 338 (La.App 1939) which involved facts very similar to the *Crawford* case. The court in *Robinson* held that the services performed by the landman did not constitute the prohibited practice of law.

Under these authorities, the services performed by Crawford clearly did not constitute the prohibited practice of law.

359 So.2d at 121. The Louisiana Supreme Court concluded that Crawford "did nothing more than to perform the services historically rendered by landman." *Id.*

Significantly, the *Crawford* court cited with approval a definition of the term landman in its opinion. It defined a "landman" as "[a]n employee of an oil company whose primary duties are the management of the company's relations with its landowners. Such duties include the 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 at 119, n.1.

Whether a particular activity is one that is historically performed by landmen is a question of fact that requires the party alleging the landman is practicing law to put on evidence that the landman’s actions are outside the bounds of that work “historically

performed by landmen." Work historically performed by landmen has been given a broad definition in the Louisiana case law.

- In *Marin v. Exxon Mobil Corp*., 48 So.3d 234 (La. 2010), a landowner's son-in-law engaged in negotiations on behalf of his father-in-law and himself for site clean-up.

- In *Freeport-McMoran, Inc. v. Transcontinental Gas Pipe Line Corp*., 924 So.2d 207 (La.App 1st Cir. 2010), writ denied, 925 So.2d 1256 (La. 2006), a landman participated in settlement negotiations in a take-or-pay dispute.

- In *Denbury Onshore, L.L.C. v. Pucheu*, 6 So.3d 386 (La.App. 3d Cir. 2009), one landman participated in negotiating an escrow agreement and another landman participated in negotiations on a mineral lease.

- *Adams v. JPD Energy Inc*., 46 So.3d 751 (La.App. 2d Cir. 2010), writ denied, 49 So.3d 892 (La. 2010), involved an independent landman company, which was retained to obtain mineral leases.

- The case of *CreeOil Co. v. Home Ins. Co.,* 653 So.2d 620, 623 (La.App. 3d Cir 1995), writ denied, 660 So.2d 875 (La. 1995), involved a petroleum landman who "acquired and sold oil and gas leases and put exploratory drilling deals together."

- In *Win Oil Co., Inc. v. UPG, Inc*., 509 So.2d 1023 (La.App. 2d Cir. 1987), a landman engaged in performing title research and rendering opinions on the ownership of mineral rights.

- In *St. Romain v. Midas Exploration, Inc.,* 430 So.2d 1354, 1355 (La.App. 3d Cir. 1983), a landman, "[a]fter protracted preliminary negotiations, . . . agreed to a mineral lease . . . [and] prepared [the] mineral lease.

VI. Conclusion

As the foregoing demonstrates, landmen are an integral part of the oil and gas industry, and this role has long been recognized by Louisiana courts. The work historically performed by landmen in assisting companies and individuals with acquiring land and mineral leases, performing due diligence on those leases, and performing other lease-related assignments is excluded from the definition of the practice of law. While the "work historically performed by landmen" in many instances may implicate an analysis of property and mineral rights, performing legal work and providing legal representation in litigation is not "work historically performed by landmen." A landman who endeavors to undertake such work has engaged in the unauthorized practice of law and is subject to having his contract declared an absolute nullity.