

# **COMMON<sup>1</sup> ETHICS<sup>2</sup> PITFALLS<sup>3</sup> FACED BY THE PROFESSIONAL LANDMAN<sup>4</sup>**

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This paper intends to review the ethical requirements imposed upon members of the American Association of Professional Landmen (AAPL) and draw out some common themes that

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<sup>1</sup> This paper will not present a statistical analysis of which ethics pitfalls occur most frequently; it will, instead, examine certain recurring themes present in the Code of Ethics and the Standards of Practice. As far as the author knows, data regarding the number and kind of ethics complaints is not generally available; however, the AAPL does maintain a Member Expulsion List on its website which identifies those nineteen (19) individuals who “have been expelled from membership in the AAPL due to violation(s) of AAPL’s Code of Ethics and Standards of Practice.” Of course, expulsion from AAPL membership is not the only remedy available to the Ethics Committee to discipline members who have violated the Code of Ethics and the Standards of Practice. See generally Article XVII of the AAPL By-Laws (providing that the Ethics Committee may take a variety of actions regarding an ethics complaint, including (1) dismissal, (2) censure, (3) temporary suspension, (4) permitted resignation, (5) expulsion, or (6) revocation or suspension of certification).

<sup>2</sup> This paper will examine the topic of ethics within the context of the AAPL Code of Ethics and its Standards of Practice, as identified and more fully described herein. Considerations of other ethical standards, such as the topic of business ethics as more generally understood, are beyond the scope of this paper.

<sup>3</sup> The Merriam-Webster Dictionary defines “pitfall” as “1: TRAP, SNARE specifically: a pit flimsily covered or camouflaged and used to capture and hold animals or men[.] 2: a hidden or not easily recognized danger or difficulty[.]” This paper hopes to demonstrate that the most common pitfalls involve failures related to certain common themes like honesty, fairness, and fiduciary duty.

<sup>4</sup> Section 3 of the AAPL By-Laws defines “Landman” as “a Land Professional who is primarily engaged in Landwork.” Section 2 of the AAPL By-Laws defines “Land Professional” as “a person who derives a significant portion of his or her income as a result of performing Landwork.” Section 1 of the AAPL By-Laws defines “Landwork” as the actual performance or supervision of any one or more of the following functions: A. Negotiating for the acquisition or divestiture of minerals or real property associated with or connected to energy sources. B. Negotiating business agreements that provide for the exploration for and/or development of minerals or real property associated with or connected to energy sources. C. Determining ownership in minerals or real property associated with or connected to energy sources through the research of public and private records. D. Reviewing the status of title, curing title defects, providing title due diligence and otherwise reducing title risk associated with ownership in mineral or energy sources or the acquisition and divestiture of minerals or real property associated with or connected to energy sources, but shall not include division order or lease analyst functions. E. Managing right and/or obligations derived from ownership of interests in minerals or real property associated with or connected to energy sources. F. Unitizing or pooling of interests in minerals or real property associated with or connected to energy sources. ‘Minerals’ shall include without limitation oil, gas, related hydrocarbons, coal and lignite.” For purposes of this paper and the accompanying presentation, the author has assumed that the Code of Ethics and the Standards of Practice apply to anyone who is a member of the AAPL.

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run throughout the Code of Ethics and the Standards of Practice in an attempt to illustrate how the ethical obligations Landmen are expected to follow reinforce each other.

Let us begin with the text that we will be considering in this paper, namely the AAPL ethical requirements. We find them set forth in the AAPL By-Laws.<sup>6</sup> The ethical requirements are described under three headings: (1) the Code of Ethics<sup>7</sup>; (2) the Standards of Practice; and (3) the Preamble. An AAPL member may be subject to discipline, as set forth in Article XVII of the By-Laws, if the member engages in conduct that is inconsistent with these ethical requirements.

The structure of the ethical requirements is interesting in that each heading is presented with increasing detail. In the following review of the Code of Ethics and the Standards of Practice, I have highlighted certain words and phrases to which we shall return in our consideration of the recurring themes throughout the ethics obligations. The Code of Ethics itself has only two sections. Section 1 provides:

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 within the industry and the public and among industry parties.

The Land Professional, in his<sup>8</sup> dealings with landowners, industry parties, and others outside the industry, shall conduct himself in a manner consistent with *fairness and honesty*, such as to maintain the respect of the public.

Section 2 of the Code of Ethics provides:

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.

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<sup>6</sup> You can find the Code of Ethics and the Standards of Practice, along with information regarding disciplinary actions and the Member Expulsion List, on the AAPL website: [landman.org/about/governance/code-of-ethics-and-standards-of-practice](http://landman.org/about/governance/code-of-ethics-and-standards-of-practice) (last accessed on April 26, 2021). You can also find the Code of Ethics and the Standards of Practice by downloading the By-Laws from the AAPL website: [landman.org/about/governance/policies-and-by-laws](http://landman.org/about/governance/policies-and-by-laws) (last accessed on April 26, 2021). The author notes that there is a small discrepancy between the two sites regarding the Standards of Practice set forth in the Preamble: the second version omits what the author has identified as Standard of Practice [11]. The author expects that the omission was inadvertent.

<sup>7</sup> The Code of Ethics is also set forth in Article XVI of the By-Laws; however, since the Code of Ethics is also set forth at the end of the By-Laws with the other ethical requirements, this paper will refer to the Code of Ethics as it appears at this later instance, although the version of the Code of Ethics set forth in Article XVI and the version set forth at the end of the By-Laws are identical.

<sup>8</sup> Article I, Section 4 of the By-Laws provides: The masculine gender shall refer to both men and women. The Standards of Practice also provide: “The masculine gender used herein shall refer to both men and women landmen.”

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

The Land Professional shall exercise the **utmost good faith** and **loyalty** to his employer (or client) and **shall not act adversely** or engage in any enterprise in **conflict with the interest** of his employer (or client). Further, he shall act in **good faith** in his dealings with the industry associates. The Land Professional shall represent others in his areas of **expertise** and shall not represent himself to be skilled in professional areas in which he is not **professionally qualified**.

After the Code of Ethics, under the heading "Standards of Practice" appears the following, which is described therein as a summary of the "standard of professional conduct and these guiding principles and ideals mandated by the Code of Ethics within the AAPL Bylaws":

A. **Fair and honest** dealings with landowners, industry associates and the general public so as to preserve the integrity of the profession (Article XVI, Section 1)<sup>9</sup>;

B. Adherence to a **high standard** of conduct in fulfilling his **fiduciary duties** to a principal (Article XVI, Section 2);

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** (Article XVI, Section 2);

D. Performance of **professional** services in a **competent** manner (Article XVI, Section 2);

E. Adherence to any provisions of the Bylaws, Code of Ethics, or any rule, regulation, or order adopted thereto (Article V, Section 9<sup>10</sup>);

F. **Avoiding the aiding or abetting of any unauthorized use of the title "Certified Professional Landman," "Registered Professional**

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<sup>9</sup> Article XVI specifically sets forth the Code of Ethics within the AAPL By-Laws.

<sup>10</sup> Article V, Section 9 provides: "Any questions of misconduct of a member which may result in disciplinary action against the member should be referred to the Ethics Committee as prescribed in Article XVII. Such violations shall include but not be limited to: A. Violation of any provision of the Bylaws, Code of Ethics, Standards of Practice, or any rule, regulation, or order adopted pursuant thereto; B. Aiding or abetting any unauthorized use of the title "Certified Professional Landman," or CPL; "Registered Professional Landman," or RPL; "P. Land"; "Registered Landman" or RL; or "CPL/ESA"; C. Any act or conduct which causes disrespect for or lack of confidence in the member to act professionally as a Landman or Land Professional; [or] D. Conviction of the member of a criminal offense classified as a felony."

**Landman,” “P. Land,” “Registered Landman,” or “CPL/ESA”**  
(Article V, Section 9); and

G. Avoiding any act or conduct which causes disrespect for or lack of confidence in the member to act professionally as a land professional (Article V, Section 9).

Finally, in the Preamble, a further series of Standards of Practice is set forth:

In order to inform the members of the specific conduct, business principles and ideals mandated by the Code of Ethics, the Association has adopted the following Standards of Practice, and every member shall conduct his business in accordance therewith:

[1] In justice to those who place their interests in his care, a land professional shall be ***informed*** regarding the 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 (D, E<sup>11</sup>);

[2] 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***. He shall eliminate any practices which could be damaging to the public or bring discredit to the petroleum[,], mining or environmental industries.

[3] In accepting employment, the land professional pledges himself to protect and promote the interests of his employer or client. This obligation of ***absolute fidelity to the employer’s or client’s interest*** is primary<sup>12</sup> but it does not relieve the land professional of his obligation to ***treat fairly*** all parties to any transaction, or act in an ethical manner (A, B).

[4] The land professional shall not accept compensation from more than one principal for providing the same service, nor accept compensation from [more than] one party to a transaction, without the ***full knowledge*** of all principals or parties to the transaction (B, C).

[5] The land professional ***shall not deny equal professional services*** to any person for reasons of race, creed, sex or country of origin.

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<sup>11</sup> The capital letters in the parentheticals refer to the “summary of the standards of professional conduct and guiding principles and ideals mandated by the Code of Ethics and AAPL Bylaws.”

<sup>12</sup> The Preamble separately provides: “No inducement of profit and no instruction from clients can ever justify departure from these ideals.”

The land professional shall not 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.

[6] A land professional 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 (D).

[7] The land professional 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 (C).

[8] 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 himself or in which he has any interest, a land professional shall **reveal** the facts of his ownership or interest to the potential buyer (C).

[9] If a land professional is charged with unethical practice or is asked to present evidence in any disciplinary proceeding or investigation, or has direct knowledge of apparent unethical misconduct of another member, he shall place all pertinent facts before the proper authority of the American Association of Professional Landmen (E).

[10] 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** (B).

[11] The land professional shall assure that monies coming into his 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 the employer or client** (B).

[12] The land professional shall avoid business activity which may **conflict with the interest** of his employer or client or result in the **unauthorized disclosure or misuse of confidential information**.

[13] The land professional shall at all times present an **accurate representation** in his advertising and disclosures to the public (A).

[14] **The land professional shall not aid or abet the unauthorized use of the title “Certified Professional Landman,” “Registered Professional Landman,” “P. Land” and/or “CPL/ESA.”**

[15] The land professional shall 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.

Now, the highlighted language should draw your attention to a number of themes that recur throughout the Code of Ethics and the Standards of Practice: (1) the Landman is honest; (2) the Landman is fair; (3) the Landman is a fiduciary; (4) the Landman is a skilled professional; and (5) disclosure and consent can resolve some, but not all, ethical issues. Let us consider each of these themes in turn.

1. The Landman is honest.

Honesty is defined as “the character or quality of being truthful and trustworthy; esp., a disposition to behave in accordance with justice and honorable dealing, esp. as regards candor and truth-telling.”<sup>13</sup> From this definition, we can see the direct connection between the ethical obligation of honesty with the obligation to eliminate fraud and misrepresentation. After all, fraud and misrepresentation are, by their own definitions, dishonest.<sup>14</sup> While any number of criminal activities may carry ethical sanction, a Landman who engages in criminal conduct that includes fraud as an element (i.e., dishonesty) is subject to sanction regardless of the severity of criminal punishment. Along these same lines, Standards of Practice F and [14] provide that a Landman cannot lay claim to a certification he has not earned nor can he aid or abet anyone else in such dishonest act.

Both the Code of Ethics and the Standards of Practice provide ample justification for requiring honesty on the part of the Landman, from establishing and maintain goodwill with the public and among industry participants<sup>15</sup>, maintaining the public’s respect<sup>16</sup> and the integrity of

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<sup>13</sup> All of the definitions discussed in this part of the paper are taken from Black’s Law Dictionary (11<sup>th</sup> ed. 2019).

<sup>14</sup> Fraud is defined as “a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment” or “a reckless misrepresentation made without justified belief in its truth to induce another person to act” or “unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties’ relative positions and resulting in an unconscionable bargain,” while misrepresentation is defined as “the act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive” or the assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.”

<sup>15</sup> See Code of Ethics Section 1.

<sup>16</sup> Id.

the profession<sup>17</sup> to preventing disrespect for or lack of confidence in a Landman<sup>18</sup> and preventing damage to the public or discredit to the industry.<sup>19</sup>

2. The Landman is fair.

Fairness is defined as “the quality of treating people equally or in a reasonable way” or “the qualities of impartiality and honesty.” It appears that the fairness requirement is inextricably intertwined with the honesty requirement, but it also goes beyond honesty when we consider that Standard of Practice [5] prohibits Landmen from denying (or being party to an agreement to deny) “equal professional services to any person for reasons of race, creed, sex or country of origin. In fact, the ethical obligation of fair treatment is so strong that Standard of Practice [3] specifically provides that it outweighs the obligation of “absolute fidelity to the employer’s or client’s interest.”

3. The Landman is a fiduciary.

A fiduciary is “someone who is required to act for the benefit of another person on all matters within the scope of their relationship” or “one who owes to another the duties of good faith, loyalty, due care, and disclosure” or “someone who must exercise a high standard of care in managing another’s money or property.” This managing would also include confidential information, which is defined as “knowledge or facts not in the public domain but known to some, esp. to those having a fiduciary duty not to misuse the knowledge or facts for their own advantage.” So, the Landman has an ethical obligation to manage information for the benefit of others, as well as money. Standard of Practice [11] requires proper accounting and administration for monies coming into the Landman’s possession “in trust for other persons.” Ordinarily, fiduciaries are expected to conduct themselves with utmost good faith and loyalty toward those in their trust. “Good faith” is defined as “a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.” It would be the opposite of “bad faith,” which is defined as “Dishonesty of belief, purpose, or motive.” Section 205, comment d, of the Restatement (Second) of Contracts states that: “A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.”

4. The Landman is a skilled professional.

The Code of Ethics and the Standards of Practice use a variety of words to describe the manner in which a Landman is expected to execute his work: competence, expertise, informed, professional, and skilled. A “professional” is “someone who belongs to a learned profession or whose occupation requires a high level of training and proficiency.” But the remaining terms

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<sup>17</sup> See Standards of Practice A.

<sup>18</sup> See Standards of Practice G.

<sup>19</sup> See Standards of Practice [2].

present some differences of expectation. “Expertise” calls for “skill or knowledge in a particular subject; specialized experience that gives rise to a facility that comparatively few people possess,” “skill” is defined as “special ability and proficiency; esp., the practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them appropriately, with readiness and dexterity,” but “competence” means “a basic or minimal ability to do something; adequate qualification.” The author assumes that the use of “competence” may have been derived from Rule 1.1 of the American Bar Association’s Model Rules of Professional Conduct, which provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Standard of Practice [1] requires that a Landman “shall be informed regarding laws, proposed legislation, governmental regulations, public policies and current market conditions in his area of represented expertise.” Which raises the question: what is your area of represented expertise? The author suggests that this means that if a Landman intends to undertake a project in Ohio, then the Landman needs to know about the interplay between the Marketable Title Act, O.R.C. 5301.49 et seq., and the Dormant Mineral Act, O.R.C. 5301.56,<sup>20</sup> even if those who have steered clear of the Buckeye State need not worry about the issue. Every state has its own version. But there are also matters of more general interest, but the author will cut short a discussion of the importance of continuing education in light of the fact that anyone who is reading this has made it the eighth page of a paper submitted in support of a presentation and such discussion could probably be filed under the heading of “Choir, preaching to.”

#### 5. Disclosure and consent can resolve some, but not all, ethical issues.

Finally, the Code of Ethics and the Standards of Practice clearly state that some ethical issues can be resolved if the Landman discloses the matter to the principal (or client or employer) and the principal (or client or employer) consents to the Landman providing services after the disclosure. Specifically, the Standards of Practice permit the following so long as there has been disclosure and consent by the principal (or client or employer): (1) accepting compensations (commission, rebate, interest, ORRI or other profit) on transactions made for an employer or client; (2) acquiring for himself or others an interest in property which he is called upon to purchase for his principal, employer or client; (3) undertaking to provide professional services concerning a property or a transaction where he has a present or contemplated interest; and (4) accepting compensation from more than one principal for providing the same service or from more than one party to the same transaction. But consent and disclosure will not cure all ethical problems. As noted above, Standard of Practice [3] specifically provides that the Landman’s obligation for fair treatment outweighs the Landman’s “obligation of absolute fidelity to the employer’s or client’s interest.” Similarly, consent and disclosure would have no effect on the requirements imposed by Standard of Practice [9] to report ethical violations to the AAPL and present evidence in the course of an ethics investigation, Standard of Practice [13] regarding accurate representations in advertising and disclosures to the public, Standard of Practice [14] regarding the unauthorized use of AAPL certifications, Standard of Practice [15] regarding criminal activity. Nor would client

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<sup>20</sup> For those who would like to end their happy ignorance of the Scylla and Charybdis that are the Marketable Title Act and the Dormant Mineral Act, see *Corban v. Chesapeake Exploration, L.L.C.*, 76 N.E.3d 1089 (Ohio 2016), *Blackstone v. Moore*, 122 N.E.3d 132 (Ohio 2018), *Erickson v. Morrison*, \_\_ N.E.3d \_\_, 2021-Ohio-746 (Ohio Mar. 16, 2021), and *O’Kelley v. Rothenbuhler*, 2021-Ohio-1167 (Ohio App.-7<sup>th</sup> Dist. Mar. 31, 2021).



consent protect a Landman from an ethics sanctions if the client had consented to the Landman engaging in dishonest practices. An unresolved question is whether the disclosure and consent must be in writing. Neither the Code of Ethics nor the Standards of Practice requires written disclosures or consents, but it seems that from a documentary point of view, such writings would be advisable.