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**Communication with
Opposing Counsel and Landowners**

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Many lawyers and landmen communicate with landowners or a landowner's counsel in negotiating leases, surface use agreements, pipeline rights-of-way, and other contracts, or in the course of representing a client who is exercising rights and performing duties under existing agreements. Such communications can involve a variety of ethical traps that may lay hidden, ready to snag an unwary lawyer or landman during such communications.

I. Ethical Traps for Lawyers and Landmen Communicating with Landowners or Landowners' Counsel

This paper discusses three of the ethical traps that lawyers and landmen can encounter during such communications with landowners or landowners' counsel.

Trap No. 1 – Ethics of Negotiations. This first trap is ethics in negotiations. Here, the principal ethical duties are to avoid dishonesty in the form of false statements or either statements or omissions that are so misleading as to be the virtual equivalent of a falsehood. **Rules 4.01 and 8.04 of the Texas Disciplinary Rules of Professional Conduct** (see also Rules 4.1 and 8.4 of the American Bar Association's Model Rules of Professional Conduct) prohibit a lawyer from making false statements. Certain codes of ethical conduct that apply to landmen also prohibit dishonesty. Further, in addition to sanctions that might apply because of a lawyer's or landman's breach of professional ethics rules, false or misleading conduct could subject the lawyer or his client to liability for fraud, intentional misrepresentation, or negligent misrepresentation.¹

Trap No. 2 – The No-Contact Rule. The no-contact rule can be an ethical trap. This rule provides that a lawyer who is representing a client in a matter may not communicate about the matter with another person who is represented by counsel in the matter, without first obtaining that counsel's consent. **Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct** (see also Rule 4.2 of the ABA Model Rules) are examples of no-contact rules.

Trap No. 3 – Unauthorized Practice of Law. The third ethical trap that this paper will address relates to the possibility that a landman's (or even a lawyer's activities) might be characterized as the unauthorized practice of law. This raises issues under **Rule 5.05 of the Texas Disciplinary Rules of Professional Conduct** (based on ABA Model Rule of Professional Conduct 5.5), as well as statutes, such as **§ 81.101 of the Texas Government Code**, that prohibit any person from practicing law in a jurisdiction without being licensed to do so.

¹ This paper will focus on professional ethics rules, but in some cases the consequences of liability for fraud, intentional misrepresentation, or negligent misrepresentation may be severe.

II. The Ethical Traps

This paper discusses three types of ethical traps: ethics in negotiations; rules governing a lawyer's communications with a party represented by counsel; and rules against the unauthorized practice of law.

A. Ethical Trap No. 1—The Ethics of Negotiations and the Duty of Honesty

Lawyers and landman who are negotiating with a landowner or landowner's counsel face various ethical issues or "traps." One of these is the ethics of negotiations. Much of the ethics of negotiations relates to duties of honesty. Four general principles are: (1) the lawyer or landman negotiator can engage in "puffing" and "sales talk"; (2) such a negotiator must avoid falsehoods; (3) a negotiator generally does not have an affirmative duty to disclose information; and (4) in certain unusual circumstances, a negotiator has an affirmative duty to disclose information.

1. The Ethics of Negotiations, Principle No. 1—A negotiator can engage in puffing, sales talk, estimates of value, and statements of opinion without committing fraud or violating the rules requiring honesty

The rules of professional conduct governing lawyers and the codes of ethics applicable to landmen prohibit lawyers and landmen from making false statements. Further, in some circumstances, false statements might support a civil claim for fraud. But that does not mean that every statement that a lawyer or landman makes must be a verifiable, objective fact. The law recognizes that several types of statements are not dishonest, false, fraudulent, or unethical, even though the statements might not constitute verifiable facts.

Examples of such statements include puffing or trade talk by salesmen, such as a salesman's statement that "this is a fine car, the best deal on the lot." A lawyer or landman might make somewhat similar statements when negotiating a lease, surface use agreement, or right-of-way. For example, a lawyer or landman might say "this is a great deal," or "you'll be glad you entered this lease," or "this is a good way to provide for your family's security," or "ABC Oil is the best company around." Such statements are sometimes called puffing.²

A lawyer who makes such statements does not violate the rules of professional conduct that require honesty. There are various reasons that such statements are not considered dishonest. First, some of these statements are statements of opinion, rather than statements of objective, verifiable fact. Comment 1 to Texas Disciplinary Rule of Professional Conduct 4.01 states: "For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category." The same principle generally applies to statements that communicate a legal opinion.

Second, some of the statements are considered to be permissible exaggerations or expressions that that any reasonable person would understand should not to be taken literally.

² *Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992); *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66, 79 (RM. 1993).

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