UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2022 Fundamentals of Oil, Gas and Mineral Law

April 21 and 22, 2022

Houston, Texas

Conflict of Interest Considerations in an Oil and Gas Practice

George Shires

Shareholder

Cotton, Bledsoe, Tighe & Dawson, P.C.

Midland, Texas

Conflict of interest issues are unavoidable for lawyers and landmen in the oil patch. This paper will examine the types of conflict issues that may arise and how courts have analyzed such issues.

There are many different types of conflicts that can exist. For example, you may have two different clients that are antagonistic against each other based upon personal reasons that have nothing to do with business, which creates a personal conflict. You may also have two different clients who compete against each other in the marketplace, creating an economic conflict. Still further, you may have one client who could be a material witness in lawsuit involving another client, which creates a litigation conflict. Not every conflict rises to the level of being a "prohibited" conflict, which invokes the ethics rules discussed in this paper. For example, an Oil Company employs Landman Brokerage A to run title for planned projects in Wilson County and Landman Brokerage B to run title for planned projects in Dimmit County. Has Oil Company created the type of interest subject to the conflict of interest rules with either Landman Brokerage A or Landman Brokerage B? Absent any other facts to the contrary, it would seem that Oil Company has only created vendor relationships with the landmen brokerages – while Landman Brokerage A may be an economic competitor with Landman Brokerage B, Oil Company likely has not breached any ethical duties by employing the two brokerages to run title in different counties. However, both Landman Brokerage A and Landman Brokerage B have established a relationship with Oil Company necessitating confidentiality and loyalty, as discussed below, and thus both the brokerages have created an interest with Oil Company that may be subject to a future conflict of interest analysis with later parties.

I. The Law of Agency

The Texas Disciplinary Rules of Professional Conduct (the "TDRPC") states that said Rules "*…do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached*."[1] For landmen that are members of the American Association of Professional Landmen (the "AAPL"), a violation of the AAPL Code of Professional Ethics may entail penalties within the organization, but likely would also not create any private causes of action. Therefore, to establish civil liability in a conflict of interest matter, we look to the law of agency and the duties imposed in a principal-agent relationship.

In Texas, an agency relationship does not require a written agreement – such a relationship can be established by an oral agreement between the parties or by the conduct of the parties.[2] The two essential elements required to establish an agency relationship are (1) authorization to act and (2) the principal's right to control the action of the agent.[3] Once an agency relationship is established, a corresponding fiduciary relationship is also established as a matter of law. Thus, when a lawyer enters into an engagement agreement with a client, the lawyer is the agent, and the client is the principal. A fiduciary owes its principal a duty of loyalty and a strict duty of good

[1] Tex. Disc. R. Prof. Cond. (Eff. Jan. 31, 2022) Preamble No. 15.
[2] *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671, 697 (Tex. 2017).
[3] *Reliant Energy Services, Inc. v. Cotton Valley Compression, LLC*, 336 S.W.3d 764 (Tex. App. Houston [1st Dist.] 2011, no pet.).

faith, fair dealing, honest performance, and strict accountability[4]. Loyalty requires faithfulness to commitments or obligations, and for the agent to advance the principal's interests over anyone else's, including the agent's.

Under Texas law, an agent has a general duty to disclose material facts to its principal.[5] The agent has the duty to impart to its principal every material fact relating to transactions within the scope of the agency upon becoming aware of those facts.[6]

In *Barnsdall Oil Co. v. Willis*, 152 F.2d 824 (5th Cir. 1946), J. K. Wadley, contracted by Barnsdall Oil Company in 1943 to obtain oil leases on their behalf, obtained the services of landman A. L. Willis as his agent to buy certain specified oil leases in Bowie County, Texas (only from certain parties and within certain price limits). Willis was not an employee of Wadley, nor was he restricted by any express agreement from acting as a broker for whoever else he chose. (During this same time, Willis was also buying oil leases for other unrelated parties in Arkansas). From time to time until approximately Sept. 28, 1943, he bought designated leases for Wadley. Wadley told Willis that he was undertaking to block up the leases in a certain area, showed him a map of the area where Barnsdall's leases were located, and shared information on the geological tests being made in the area and their results.

In the center of the tract which Wadley was undertaking to block up was a 91-acre tract belonging to a Mr. Heilbron. Wadley mistakenly believed that the lease on this land was owned by the Texas Company and did not commission Willis to acquire it. However, the lease was actually owned by the Phillips Petroleum Company, whom Willis had performed title work for in the past. Willis knew that Wadley erroneously believed that the land was under lease to the Texas Company. On July 20, 1943, while Willis was in Phillips Petroleum Company's Shreveport office on another project, Willis made inquiry of the Heilbron lease and discovered that Phillips had recently allowed the Heilbron lease to lapse. Willis promptly contacted Heilbron and obtained an oil lease for himself, but in the name of his brother-in-law, A. T. Brown.

On August 12, 1943, an employee of Barnsdall who was looking after Wadley's matters discovered the Phillips lease on the Heilbron land was no longer in effect, and on that same day engaged Willis to obtain a lease on the Heilbron land. However, Willis did not reveal to Barnsdall or Wadley that he was now the owner of the new lease on Heilbron's land, but nevertheless agreed to undertake to get it for Wadley. For some time afterwards, Willis pretended that he could not find the owner of the lease, keeping his own lease unrecorded until September 1. After recording the lease in the name of A. T. Brown, Willis claimed to be unable to locate A. T. Brown. Later, Willis told Barnsdall that he found A. T. Brown, sold the lease to Barnsdall for a large profit and an overriding royalty interest retained in Willis's name, and received a $500 commission for buying the lease (from himself).

After being sued, Willis claimed that he obtained no confidential information from his employment by Wadley, stating that any information he had was public information readily available to anyone, and denied all allegations of breach of faith and asserted that he had the right

[4] *Armstrong v. Armstrong*, 570 S.W.3d 783 (Tex. App. El Paso 2018, no pet.).
[5] *Patton v. Archer*, 590 F.2d 1319 (5th Cir. 1979).
[6] *Ramsey v. Gordon*, 567 S.W.2d 868 (Tex. App. Waco 1978, writ ref'd n.r.e.).

Title search: Conflict of Interest Considerations in an Oil and Gas Practice

Also available as part of the eCourse
2022 Fundamentals of Oil, Gas and Mineral Law eConference

First appeared as part of the conference materials for the
2022 Fundamentals of Oil, Gas and Mineral Law session
"Conflict of Interest Considerations in an Oil and Gas Practice"