

University of Arkansas, Fayetteville
ScholarWorks@UARK

Annual of the Arkansas Natural Resources Law
Institute

School of Law

2-2010

Landmen and the Unauthorized Practice of Law

Robert M. Honea

Follow this and additional works at: <http://scholarworks.uark.edu/anrlaw>

Recommended Citation

Honea, Robert M., "Landmen and the Unauthorized Practice of Law" (2010). *Annual of the Arkansas Natural Resources Law Institute*. Paper 69.

<http://scholarworks.uark.edu/anrlaw/69>

This Article is brought to you for free and open access by the School of Law at ScholarWorks@UARK. It has been accepted for inclusion in Annual of the Arkansas Natural Resources Law Institute by an authorized administrator of ScholarWorks@UARK. For more information, please contact scholar@uark.edu.

LANDMEN AND THE UNAUTHORIZED PRACTICE OF LAW

Robert M. Honea
Hardin, Jesson & Terry, PLC
Fort Smith, Arkansas

Introduction

This topic has a flavor of both herding cats and the proverbial 800 pound gorilla in the living room that no one wants to talk about. On the one hand, there is not a single case anywhere in the country involving a claim that a landman is practicing law without a license. To make matters worse, the majority of states do not have a definition of what constitutes the practice of law. Instead, the issue is decided on a case-by-case basis. The end result is that we have no firm guidelines we can rely on to determine with certainty where the lines are to be drawn. On the other hand, there is a growing recognition that should the sleeping dog ever be woken up, the courts will in all likelihood conclude that much of what a landman does is in fact practicing law, as illustrated by recent events in Texas, Wyoming, and West Virginia.

The conclusions I have reached (which will hopefully be justified by the discussion that follows) are these: (1) A landman cannot do his job without practicing law; (2) the courts have been surprisingly willing to recognize that public policy requires that lay persons be allowed to practice law without a license, under well defined parameters (for example, realtors), and a similar exception for landmen is reasonable; and, (3) landmen would be well advised to take a proactive approach to this issue, and specifically should seek legislation or court rules which expressly authorize landmen to engage in the practice of law to the limited extent necessary for landmen to do what landmen have always done.

I. What constitutes practicing law?

Unfortunately, there is no single definition of what constitutes practicing law. The majority of states have elected to address the issue on a case-by-case basis. A few states have

adopted a definition of practicing law, but none of those definitions are identical. A few years ago, the American Bar Association attempted to come up with a uniform definition of what constitutes the practice of law, but was ultimately unsuccessful (Wyoming and Texas being interesting exceptions – more on that later). Also, as I mentioned in the introduction of this paper, I have been unable to find a single case involving a situation where a landman was accused of practicing law without a license. The end result is that I cannot tell you where the line is drawn between what does (and what does not) constitute practicing law.

Notwithstanding the foregoing, it is nevertheless possible to come up with a feel for where the lines are drawn by looking at unauthorized practice of law cases in other contexts, primarily realtors and abstractors. Since we are in Arkansas, I will use Arkansas law as a platform for discussing the topic.

A. Arkansas Law

The logical starting point for discussing the unauthorized practice of law in the State of Arkansas is the case of *Arkansas Bar Association v. Block*, 230 Ark. 430, 323 S.W. 2d. 912 (1959). That case involved a suit by the Arkansas bar Association against real estate brokers, asking the Court to enjoin real estate brokers from practicing law without a license. The specific conduct cited by the Bar Association as examples of practicing law are listed in the opinion, as follows:

“The real estate brokers, in transactions in which they act as broker, use standardized and approved prepared forms of instruments hereinafter listed, and complete them by filling in the blank spaces to show the real estate transaction. The said instruments are:

1. Warranty Deeds;
2. Disclaimer Deeds;
3. Quitclaim Deeds;
4. Joint Tenancy Deeds;
5. Options;

6. Easements;
7. Loan Applications;
8. Promissory Notes;
9. Real Estate Mortgages;
10. Deeds of Trust;
11. Assignments of leases or rentals;
12. Contracts of Sale of Real Estate;
13. Releases and Satisfactions of Real Estate Mortgages;
14. Offers and Acceptances;
15. Agreements for the sale of real estate;
16. Bills of Sale;
17. Contracts of Sale;
18. Mortgages;
19. Pledges of personal property;
20. Notices and Declarations of Forfeiture;
21. Notices requiring strict compliance;
22. Releases and Discharges of mechanic's and materialmen's Liens;
23. Printed forms approved by attorneys, including the various forms furnished by title insurance companies to defendants for use by defendants as agents of title insurance companies; and
24. Acting as closing agent for mortgage loans and completing by filling in the blanks therein with factual data such instruments are furnished to them and are necessary and incidental and ancillary to the closing of the transaction between the mortgagee for whom they act as agent and the mortgagor.
25. Leases.

The forms used by the defendants have been previously approved by attorneys and have been previously prepared, save for the blank spaces remaining thereon, which the Defendants complete as above set out.”

In considering whether the preparation of the foregoing forms constituted the practice of law, the court began by noting that there is no comprehensive definition of what constitutes the practice of law: “We believe it is impossible to frame any comprehensive definition of what constitutes the practice of law. Each case must be decided upon its own particular facts. The

practice of law is difficult to define. Perhaps it does not admit of exact definition.” The court then held that with the exception of item 14, Offers and Acceptances, the preparation of any of the instruments listed and the taking of any of the actions described in items 1 through 25 constituted the practice of law. Obviously, it is not difficult to draw an analogy between the items listed above and the work a landman does, and come to the conclusion that if the question is ever presented, the courts will almost certainly conclude that much of what a landman does is in fact practicing law.

Contemporaneously with the *Block* case the Arkansas Supreme Court decided the case of *Beach Abstract & Guaranty Company v. The Bar Association of Arkansas*, 230 Ark. 494, 362 S.W. 2d. 900 (1959). That case involved abstract companies, and once again involved a specific list of actions which the Bar Association alleged constituted practicing law. The opinion described the actions as follows:

“The defendant companies...have been and are regularly and continuously drafting some or all of the instruments and performing some or all of the functions...hereinafter enumerated, to-wit:

- (a) Drafting and preparation of warranty deeds, disclaimer deeds and quitclaim deeds.
- (b) Drafting and preparation of promissory notes, real estate mortgages, real estate purchase contracts and related instruments.
- (c) Drafting and preparation of forms of agreement for the sale of real estate, chattels, and choses in action.
- (d) Drafting and preparation of mortgages and pledges of personal property.
- (e) Drafting and preparation of forms of conveyances naming husband and wife as grantees.
- (f) Drafting and preparation of bills of assurance, dedication instruments, and tract and sub-division restrictions.

- (g) Drafting and preparation of escrow instructions, setting forth agreements between buyers and sellers, and the rights and liabilities of buyers and sellers.
- (h) Drafting and preparation of affidavits of completion of improvements, affidavits of marital status and heirship, and various and sundry additional forms of affidavits and other instruments to remove clouds and perfect titles.”

In this case, the court began its discussion by expressly noting that under the constitution the Arkansas Supreme Court was the sole authority on what constitutes the practice of law. “It is universally held that the power to regulate and define the practice of law is a prerogative of the judicial department as one of three divisions of government. This is especially true in this state by virtue of amendment number 28 to our Constitution which reads: ‘The Supreme Court shall make rules regulating the practice of law and the professional conduct of authorities’.” The court then held that the enumerated activities constituted the practice of law, and granted the bar associations request for an injunction. The court did, however, make one statement which is relevant to the work landmen perform:

“Therefore, we conclude that title examination and curative work, when done for another, constitutes the practice of law in its strictest sense and has long been considered as such.”

The reason I call your attention to the foregoing statement is the fact that the Supreme Court recognizes the proposition that as long as you are doing the work for yourself, the work may be practicing law, but it is not unauthorized. Although this makes a lot of sense when the person involved is an individual who is doing his own work, on his own behalf, on his own nickel, the situation gets more complicated when the work is being done by a landman acting as an independent contractor for a broker who is in turn acting as an independent contractor for a company, or when a company landman is acting on behalf of the company. For the moment, I mention this only to illustrate what I have decided to call the “pro se” exception to the unauthorized practice of law.

Once again, the analogies to be drawn between the foregoing list of activities and the work a landman typically performs are obvious. Again, it appears to me that should the question ever be presented, there is no doubt that the Arkansas Supreme Court would conclude that much of what a landman does constitutes the practice of law.

The next Arkansas case is *Creekmore v. Izard*, 236 Ark. 558, 367 S.W. 2d. 419 (1963). In that case, the real estate brokers made another run at the Arkansas Supreme Court, asking the court to relax the rules as stated in *Block* so as to permit brokers to prepare legal documents under limited and well defined parameters. The court granted the real estate brokers the relief they requested, although the opinion is less than clear as to exactly how the lines were to be drawn. The holding of the court is quoted below in its entirety:

“Therefore we are ruling that the decision in *Arkansas Bar Association v. Block*, 230 Ark. 430, 323 S.W. 2d. 912, should be modified to provide that a real estate broker, when the person for whom he is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized the real estate broker to do so, may be permitted to fill in the blanks in simple printed standardized real estate forms, which forms must be approved by a lawyer; it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the brokers business and that such forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker and then without charge for the simple service of filing in the blanks.”

The basis for the court’s decision was not the proposition that the foregoing actions did not constitute the practice of law. Rather, the court held that while the foregoing actions constituted the practice of law, public policy considerations dictated the conclusion that brokers should be allowed to practice law in the limited circumstances described in the opinion. It is worthy of note that the court specifically referenced the fact that brokers are regulated by statute, that brokers must be licensed, that brokers must post a bond, and that the consequences for a broker’s misconduct is the loss of his license (and therefore his livelihood).

The *Creekmore* case is a two-edged sword for landmen. On the one hand, the public policy justification for granting real estate brokers an exemption obviously applies with equal force to the work landmen perform. On the other hand, landmen are not licensed, they are not regulated, they do not have to post a bond, and they do not risk loss of their license (i.e., their livelihood) if they act improperly. In my opinion, it would be difficult to argue for a public policy exemption unless landmen are able to provide proof that landmen are subject to regulation in the same manner that real estate brokers and lawyers are subject to regulation. After all, the goal sought by prohibiting the unauthorized practice of law is the protection of the public from incompetent and unethical persons. Granting landmen an exemption without also providing a means of regulating landmen would not achieve this objective.

The last case in this line of decisions is *Pope County Bar Association v. Suggs*, 274 Ark. 250, 624 S.W. 2d. 828 (1991). The *Suggs* case was the inevitable result of the vagueness of the holding in *Creekmore*. The holding in *Creekmore* used the word “simple” twice, but did not provide any guidance as to what did (and what did not) constitute a “simple” transaction. In *Suggs*, the trial court was asked to specifically address this question, and to provide some guidance as to what “simple” meant. The judge in the case ended up defining a “simple real estate transaction” as follows:

“Those which involve a direct, present conveyance of a fee simple absolute between parties, which becomes effective immediately upon delivery of the title document. Such transactions do not include conveyances involving reservations or provisions creating life estates, limited or conditional estates, contingent or vested remainders, fee tails, easements or right of way grants, or any other conveyance of future, contingent, or limited interest.”

The trial judge then went on to approve the broker’s use of standard warranty deeds, quitclaim deeds, release deeds, bills of sale, lease agreements, and mortgages with power of sale, subject to six specific restrictions:

- (1) That the person for whom the broker is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized the broker to do so; and
- (2) That the forms are approved by a lawyer either before or after the blanks are filled in but prior to deliver to the person form whom the broker is acting; and
- (3) That the forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business; and
- (4) That the forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker; and
- (5) That the broker shall make no charge for filling in the blanks; and
- (6) That the broker shall not give advice or opinions as to the legal rights of the parties, as to the legal effects of instruments to accomplish specific purposes or as to the validity of title to real estate.

The Arkansas Supreme Court affirmed the decision. The court also emphasized and explained in greater detail the public policy justification for the exemption.

“We are reluctant to say that the preparation of these instruments should not be classified as the practice of law. Standing alone, they fall readily within the meaning of that term...but we can also say...that it is in the public interest to permit the limited, outside use of standard, printed forms in the manner stipulated by the chancellor and we so hold.”

The conclusions I draw from this line of cases are as follows: (1) If and when the question is presented, the Arkansas Supreme Court will conclude that many of the tasks routinely performed by landmen are in fact practicing law; (2) the Arkansas Supreme Court has shown a willingness to recognize public policy exemptions, provided the exemptions are narrow and well defined and there is a mechanism for regulating the conduct of the persons who benefit from the exemptions; and (3) there is a high probability that the Arkansas Supreme Court would recognize an exemption for the work performed by landmen.

B. What are the consequences for a landman who engages in the unauthorized practice of law?

Having concluded that in all likelihood the courts will conclude (should the question ever be presented) that landmen are practicing law, the obvious question is “so what”? What are the consequences? The answer to this question, discussed below, illustrates why this issue is in fact very much an 800 pound gorilla.

The obvious (and perhaps worst) consequence for a landman is a restraining order prohibiting him from engaging in conduct which constitutes the practice of law. As a practical matter, this injunction would terminate the landman’s ability to make a living. Needless to say, losing a job is a serious consequence. And on a larger scale, the consequences to the industry would be severe – it is simply not realistic to assume lawyers can (or will) do what landmen do.

There are also a couple of less obvious consequences which are potentially just as severe. The first is illustrated by the case of *St. Paul Fire & Marine Insurance v. Nicholson*, 263 Ark. 694, 567 S.W. 2d. 107 (1978). In that case, an employee of an abstract company prepared a deed, but screwed it up. When the injured party sued for damages, the employee tendered the matter to the abstract company’s errors and omissions carrier, St. Paul. The insurance company denied that it had any obligation to provide coverage for the incident, on the ground that the preparation of the deed constituted the practice of law, and the policy did not provide coverage for practicing law without a license. The Supreme Court agreed and the employee ended up having to pay the damages out of her own pocket. The point here is that if a landman is doing something that constitutes the practice of law, and the landman screws it up, the landman probably won’t be covered by any kind of insurance and will end up being personally responsible for any resulting damages.

The second consequence is mentioned in a concurring opinion in the *Pope County Bar Association v. Suggs* case, supra. In his concurring opinion, Justice Hickman made the following comment:

“Even so, realtors should be aware that their negligence in preparing such legal documents may well be examined by applying a standard of care expected of attorneys. They sought and gained the right to “practice law.” With that convenience goes a heavy responsibility to the public.”

The possibility that a landman will be held to the same standard that applies to attorneys is significant. I specifically call your attention to Rules 4.1, 4.2, and 4.3 of the Arkansas Rules of Professional Conduct. Those rules read, in their entirety:

Rule 4.1. Truthfulness in statements to others.

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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law.

Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interest of such a person are or have a reasonable possibility of being in conflict with the interest of the client.

If you apply the foregoing rules to the typical situation where a landman is talking to farmer Brown about buying a lease, you can readily see how easy it would be to violate one or more of these rules. As an attorney, these rules are something of which I am very much aware.

Frankly, I make every effort to avoid communicating directly with a lay person who is not represented by an attorney concerning a matter in which the lay person's interests are in conflict with those of my client; it is just too easy to get in trouble, particularly when you consider how unreliable people's memories are.

In summary, although a landman is not going to go to jail, the potential consequences for the unauthorized practice of law are nevertheless significant.

C. The pro se exemption and A.C.A. §16-22-211.

Everyone has an intuitive understanding of the proposition that you always have the right to do your own legal work. The Arkansas Supreme Court has expressly recognized this proposition, in these words:

“It is generally conceded that an individual who is not a licensed attorney can appear in the courts and engage in what is commonly conceded to be practicing law provided he does so for himself and in connection with his own business. *Creekmore v. Izard*, supra.”

The foregoing exemption makes sense when you are talking about an individual. What happens when you apply this concept to a corporation? Is there a similar “pro se” exemption for corporations? In Arkansas, at least, the answer to this question is “no.” There is a statute in Arkansas which expressly prohibits corporations from practicing law, A.C.A. §16-22-211. This statute has been discussed in two cases, *Arkansas Bar Association v. Union National Bank*, 224 Ark. 448, 273 S.W. 2d. 408 (1954) and *Undem v. State Board of Law Examiners*, 266 Ark. 683, 587 S.W. 2d. 563 (1979). In both cases, the Arkansas Supreme Court cited and enforced the statute to prohibit what it perceived to be a corporation practicing law. I must confess that I find it a little odd the Arkansas Supreme Court would enforce a statute concerning the practice of law, given the statements of the court in *Beach Abstract*, supra, to the effect that under the Arkansas constitution the courts have the sole authority to decide what constitutes the practice of law. This is probably a distinction without a difference, however, as the underlying reasoning

behind the statute is discussed in the cases, and in my opinion the court would reach the same result if it addressed the question in the absence of the statute (a corporation is not a human and cannot act in and of itself, and therefore by definition cannot represent itself).

The *Union National Bank* case is particularly useful in the context of the present discussion. In that case the Union National Bank was acting as a trustee and executor, and was also providing legal services to customers in connection with a variety of estate planning issues, such as the preparation of trusts and wills. The actual work was done by employees of the bank who were licensed to practice law, or by employees of the bank who were acting under the direct supervision of such lawyers. The Arkansas Supreme Court held that the bank could not provide legal advice to its customers, and could not prepare legal documents on behalf of its customers. The Court further held that although there was nothing wrong with the bank acting as a trustee or an executor, the bank itself could not appear in court, prepare and sign pleadings, etc. The court acknowledged that there would be nothing wrong with the bank using either outside counsel or in-house counsel to represent the bank in such matters, but there nevertheless had to be an established relationship between the bank, as the client, and the attorney, as the bank's lawyer.

When you apply this case to an in-house landman, you can readily see the problems. Although an individual can prepare a lease for himself, a corporation cannot. Instead, a corporation has to hire a lawyer to do the work. As a practical matter, the only way to get around this problem is to have a staff attorney "supervise" the work of the landman. In most cases this is what undoubtedly what happens. In all likelihood, however, there is no conscious recognition of the fact that the landmen are actually acting as counsel for the corporation, working under the umbrella of the in-house attorney, and the relationship between the landman and his employer is technically that of an attorney and a client.

The conclusion I draw from the foregoing is that although there is a “pro-se” exemption to the unauthorized practice of law, it is not of any use in a corporate context.

II. What is going on in other states?

Texas, Wyoming, and West Virginia are all presently dealing with this issue. What has happened in these states is useful both for the purpose of illustrating the potential problems and also the potential solutions.

A. Texas.

In 2001, a special task force of the Texas Bar Association recommended the adoption of a definition of the practice of law. I am told that the impetus for this proposal was the American Bar Association’s then current discussion of a proposed uniform definition of the practice of law. The definition proposed by the task force read as follows:

“A. The “practice of law,” as used in this chapter, includes:

1. Providing legal representation;
2. Providing legal advice;
3. Preparing or negotiating, in whole or in part, a will, trust, contract, conveyance, pleading, or other instrument to the extent such preparation or negotiation is performed or offered explicitly or implicitly to provide legal advice or legal representation; or
4. Those activities described in Section 81.102.B.

B. “Legal representation” means acting as an advocate in governmental adjudicative proceedings in a court or administrative agency to determine the specific rights or obligations of one or more persons.”

The proposal also included an exemption for landmen, which read as follows:

“A. Except as provided in subsection b, a person may not engage in the practice of law in this state unless the person is a member of the state bar.

B. The following additional persons may engage in the practice of law to the limited extents specified below:

1. Persons performing acts relating to the lease, sale, or transfer of any mineral or mining interest in real property, to the extent of the preparation of legal instruments affecting title to real property in a transaction involving such mineral or mining interest.”

The AAPL correctly recognized that the foregoing definition and “exemption” would have had a significant impact on landmen. The AAPL was ultimately successful in solving the problem by persuading the Texas legislature to adopt a statute as part of the occupations code, which reads as follows:

“CHAPTER 953. PETROLEUM AND MINERAL LAND SERVICES
Sec. 953.001. EXCEPTION TO PRACTICE OF LAW. For the purposes of the definition in Section 81.101, Government Code, the “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 if:

1. The acts are performed by a person who does not hold the person out as an attorney licensed to practice law in this state or in another jurisdiction; and
2. The person is not a licensed attorney.”

As matters now stand, the statute is “good law” and landmen in Texas are specifically authorized to practice law without a license. I have a couple of concerns about this statute, however. First, like every state in the United States of America, the Texas Constitution includes the separation of powers concept. In my opinion, the Texas Supreme Court has sole authority under the Texas Constitution to decide what does and what does not constitute practicing law. If the statute were ever challenged, in my opinion the Texas Supreme Court would not have any obligation to follow or enforce the statute, and would in fact be free to reach whatever conclusion it thought best. That having been said, as a practical matter I think such a result is unlikely, were it not for the second issue.

The second problem I see is regulation. I am told that the negotiations which resulted in the adoption of the statute quoted above included a discussion of the need for adopting some sort

of regulation of landmen, as the quid pro quo for the exemption. The theory was that the public policy behind the prohibition on the unauthorized practice of law is the protection of the public, and if persons who are not regulated are given an exemption, the public policy purpose is not achieved. Although the AAPL was successful in avoiding regulation as a condition of granting the exemption, the regulation battle is not over.

The Barnett Shale Play, for all the benefits it has provided to the industry in general and landmen in particular, has also resulted in a rather troubling development for landmen. Unfortunately, the Barnett Shale was something of a perfect storm in the sense that the volume of work resulted in many unqualified persons deciding they wanted to be “landmen,” and the geographical location of the play put those unqualified persons in direct contact with mineral owners who had no experience or knowledge whatsoever concerning mineral law. Not surprisingly, the legislature started getting a lot of complaints from their constituents concerning unethical behavior on the part of these unqualified persons. The end result was a push to adopt statutory regulation (licensing) of landmen. So far, the AAPL has been successful in persuading the Texas legislature that regulation is unnecessary. Since the Texas legislature only meets every two years, and since activity in the Barnett Shale (and therefore the complaints) has dropped off significantly, it may be that this issue has been successfully tabled for the time being. I predict, however, that we have not heard the last of this topic, and that regulation will continue to be a thorny issue for landmen everywhere.

B. Wyoming.

The Wyoming situation is an example of the law of unintended consequences. The Wyoming Supreme Court recently decided that it needed to adopt a definition of what constitutes the practice of law. They basically adopted the Arkansas Bar Association’s model definition as their definition. By the time the landmen heard about it, it was already a done deal.

Unfortunately, the way the definition is phrased, pretty much everything a landman does is defined as practicing law. The definition is lengthy, so I will not quote it here. A copy is attached as an exhibit to this paper, however.

Landmen in Wyoming are pursuing political, legislative, and judicial solutions to the problem, but so far have not made a lot of headway. The problem they are encountering is that the Wyoming legislature is taking the position that the judiciary has sole authority over practicing law, and that the solution therefore must come from the judiciary. This is unfortunate, as it is obviously difficult to lobby judges the way one lobbies legislatures. At the moment, landmen are continuing to do what they have always done, and so far there has been no effort to seek injunctive relief to prohibit landmen from practicing law. Nevertheless, it is obviously a ticking time bomb in Wyoming. Once again, the lesson to be learned from all of this is a proactive solution is a much better option than a reactive solution.

C. West Virginia.

The West Virginia Supreme Court of Appeals has adopted a definition of the practice of law. The definition reads, in its entirety, as follows:

“In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge or skill. More specifically, but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures. W. VA. COURT RULES ANN., *W. Va. Definition of the Practice of Law* (Michie 2003).

West Virginia also has a State Bar Committee on the unauthorized practice of law. In 2003, the committee issued an advisory opinion which was directed at title insurance companies. Although not directed at landmen, the advisory opinion (just like the Arkansas case law discussed above) would appear to include much of what a landman does. A test case was subsequently filed which went through the trial courts to the Supreme Court and came back down again for the further development of the record. To date, there has been no final decision in the case. It appears likely, however, that West Virginia will ultimately end up in a situation which is basically identical to Arkansas – what title companies do is practice law, and the question is not whether title companies are practicing law, but rather whether they will be given an exemption.

As I said, the advisory opinion was not specifically directed to landmen. Landmen in West Virginia were concerned, however, and therefore arranged a meeting with the committee to discuss their concerns. The committee's response was to issue another advisory opinion that, in effect, concluded that the work performed by landmen is in fact practicing law.

The landmen in West Virginia have attempted to persuade the West Virginia Supreme Court to review the advisory opinion, but the Supreme Court has declined to consider the matter. This is unfortunate, as the West Virginia Supreme Court has also made it abundantly clear that the judiciary has sole authority to decide what constitutes the practice of law, thus negating any kind of legislative solution to the problem.

As matters now stand in West Virginia the definition of the practice of law would appear to include a lot of what a landman does, the Bar Committee on the unauthorized practice of law has issued an advisory opinion which appears to confirm this conclusion, but no one has attempted to challenge landmen, and landmen are continuing to do what they have always done. How long this status quo will continue is anyone's guess. Hopefully, the pending litigation

involving title companies will ultimately result in a finding that although title companies do in fact engage in the practice of law, public policy justifies an exemption, and that a similar approach will be taken when and if a case is brought against landmen. As matters now stand, however, there is obviously a great deal of uncertainty in West Virginia.

D. Louisiana.

I am including Louisiana in this discussion simply because there are some cases in Louisiana that should be mentioned, and this was as good a place to discuss them as any.

There are three Louisiana cases which involve claims that a landman was practicing law without a license. In all three cases, however, the issue arises indirectly. In each case, a landman prepared a document, and one of the parties to the document decided they didn't like the deal and wanted to get out of it. They therefore asserted that the document was a "nullity" because it was the result of an illegal act – a landman engaging in the unauthorized practice of law. In all three cases, the court concluded that the landman was not practicing law, without any real discussion of how or why what the landman did was not practicing law. The sum total of the discussion is as follows:

“Nor can we say, for instance, that services performed by removing clouds from title, 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.”

Placid Oil Company v. Taylor, 306 S. 2d. 664 (Louisiana 1975). See also *Crawford v. Deshotels*, 359 S. 2d. 118 (Louisiana 1978); *Dunn v. Land and Marine Properties*, 609 S. 2d. 284 (Louisiana 1992).

Based on the foregoing, one can only conclude that in Louisiana the work performed by landmen is not practicing law. I have to wonder, however, whether this would hold up if it was ever challenged directly (such as a suit brought by the Bar Association, or perhaps the Supreme Court's committee on the unauthorized practice of law).

III. What does the AAPL have to say?

Standard 6 of the AAPL Code of Ethics reads, in pertinent part:

“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.”

The AAPL also has a standing Ethics Committee, responsible for investigating ethics complaints and disciplining members who have engaged in unethical conduct. From what I have been able to determine, the AAPL Ethics Committee has never been asked to investigate a complaint of an AAPL member practicing law without a license, and the Ethics Committee has never taken any affirmative action to explore the question of whether members are practicing law without a license. Nevertheless, the AAPL Code of Ethics does contain a provision which expressly prohibits landmen from practicing law.

I must confess that I am somewhat troubled by the foregoing state of affairs. As the foregoing discussion illustrates, it appears obvious to me that landmen cannot do their job without practicing law. With the exception of Texas, I therefore conclude that all landmen are probably violating the AAPL Code of Ethics. The AAPL, however, is not doing anything about it. In my opinion, this is not a state of affairs which will be helpful to landmen should they ever face a challenge on the unauthorized practice of law issue. I anticipate that the response to any such challenge will necessarily be the same as it was in Texas – don't argue about the proposition that landmen practice law, but instead argue for an exemption. The problem I see is that the moment landmen ask for an exemption, I am confident this question will be asked: How can we be sure that the public will be protected from unethical behavior, if we grant landmen an exemption? As matters now stand, all landmen have is a voluntary association (the AAPL) which has a provision which prohibits the practice of law that has never been enforced, and as a

practical matter the only consequence for violating the AAPL Code of Ethics is expulsion from a voluntary association. Obviously, it would be difficult to argue that the foregoing state of affairs is going to provide any real protection for the public.

When the AAPL was fighting with the Texas legislature in 2001, the AAPL recognized that some form of regulation might be the quid pro quo for an exemption. The AAPL therefore floated the idea of mandatory AAPL membership, with the idea being that the AAPL would be the regulatory body for landmen. As I understand it, this idea was quite unpopular with landmen. Indeed, it is my understanding that landmen have for the most part uniformly opposed licensing or regulation of any kind. In my opinion, this is not a wise move. I believe the better course of action would be to come up with a regulatory scheme that landmen can live with, and have it in place and functioning, so that landmen will be able to tell representatives of the various states that an exemption is justified because landmen are regulated. To my way of thinking, the idea of mandatory AAPL membership, and the idea of the AAPL being the regulator, makes a lot of sense. I do not see another realistic option that would provide one uniform, nationwide standard. The only other option I see is to go with a state-by-state regulation/licensing approach, which would obviously have some significant practical problems.

To summarize, it appears to me that the AAPL's approach to this problem has basically been that of a fireman, responding to fires when the alarm sounds. Again, as I have already said, I suggest that it is probably time for the AAPL to take a more proactive approach to this issue.

IV. So what's the solution?

- A. Do nothing, and deal with the problem on a case-by-case basis, when and if it arises. Although I suppose there is some merit to the idea of letting a sleeping dog lie, at the same time I think it would be wise to hope for the best but nevertheless prepare for the worst.

- B. Require that all landmen be lawyers. This is obviously not a viable solution, but it is at least a theoretical possibility.
- C. Don't practice law. Again, this is a theoretical, but not viable, solution. Although the AAPL was successful in Texas in persuading the legislature to adopt a definition of the practice of law which exempted landmen, I have to believe that it is unlikely this result will be duplicated in every other state. I anticipate the more likely result is that many of the tasks performed by landmen will, when challenged, be found to constitute practicing law, and telling landmen they can't do anything that constitutes practicing law is going to be the equivalent of telling a landman he can't do his job.
- D. Take advantage of the "pro se" exemption. The problem with this idea is that it simply does not fit with the way things are done in the real world. Individual landmen are typically independent contractors. Often they have a relationship with a broker who is itself an independent contractor for a company. The individual landman is typically buying a lease in the name of someone else, using someone else's money. Under these facts, the pro se exemption simply does not apply.

Another alternative would be to bring everything in-house. For example, a corporation could hire one or more staff attorneys who are licensed in whatever state is involved. The in-house landmen could then act "under the supervision" of the attorney. I am satisfied that this structure would solve the unauthorized practice of law problem, but only to the extent the landman is doing work for and on behalf of his employer. Also, as a practical matter this is a simply not consistent with how the business operates. The whole system is set up as layers

of independent contractor relationships, and this system necessarily negates any ability to take advantage of the “pro se” exemption.

- E. The paralegal option. Another solution that may make more sense in the real world is the idea of having landmen act under the supervision of licensed attorneys. Paralegals routinely engage in conduct which is clearly practicing law. It isn't a problem, however, because they are acting under the direct supervision of an attorney; in effect, the paralegal and the attorney are one and the same. I can't think of any reason this solution would not work for landmen, although as a practical matter it is probably not a viable solution for the individual landman. Rather, I think this solution would work only if the brokers hired a staff attorney as an employee, and then also treated their landmen as employees, rather than independent contractors. Nevertheless, it is a possible solution to the problem.
- F. Pursue a political/legislative/judicial solution. The best solution of all is obviously a permanent fix which expressly authorizes landmen to do what landmen do. The main problem I see with this solution is the fact that submitting to some kind of regulation is almost an inevitable quid pro quo for the exemption. This is a problem, since landmen typically work in multiple states over the course of their career, and requiring a landman to get a different license in every state he works in is a huge burden. I am not sure that a national licensing scheme is possible, but a national scheme would be the logical route to take. In any event, I predict that landmen are going to have to make some concessions on the licensing issue in order to deal with the unauthorized practice of law problem.

V. Conclusion.

As I said in the beginning, this issue has a flavor of the 800 pound gorilla in the living room that no one wants to talk about. Although I suppose it is possible that the sleeping dog could be left alone and he will never wake up, at the same time I think landmen would be well advised to recognize that this is a potentially serious problem and that a proactive solution is a much better option than a reactive solution.

Rule 11.1. Unauthorized practice of law.

(a) Definitions.

- (1) “Adjudicative body” includes any body, board, committee or commission constituted by law and acting in an adjudicative capacity.
- (2) “Adjudicative capacity” means an adjudicative body is acting in an adjudicative capacity when a neutral official or officials, after the presentation of evidence or legal argument by a party or parties, will render a binding judgment (usually findings of fact, conclusions of law and an order) directly affecting a party’s interest in a particular matter.
- (3) “Legal provider” means an active member in good standing of the state bar, and any other person authorized by the Wyoming State Supreme Court to engage in full or limited practice of law.
- (4) “Nonlawyer” means a person to whom the Wyoming Supreme Court has granted a limited authorization to practice law but who practices law outside that authorization, and a person who is not an active member in good standing of the Wyoming state bar, including persons who are disbarred or suspended from membership.
- (5) “Person” means any individual, group of individuals, firm, unincorporated association, partnership, corporation, mutual company, joint stock company, trust, trustee, receiver, governmental entity, and any legal or business entity.
- (6) “Practice Law” or “Practice of Law” means providing any legal service for any other person, firm or corporation, with or without compensation, or providing professional legal advice or services where there is a client relationship of trust or reliance, including, but not limited to:
 - (A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents’ estates, filing articles and amendments for business entities, other instruments intended to affect or secure legal rights, and contracts, except routine agreements incidental to a regular course of business (or as allowed by statute);
 - (B) Preparing or expressing legal opinions, or the doing of any act tending to obtain or secure the prevention or the redress of a wrong or the enforcement or establishment of a right;

(C) Appearing as an advocate in a representative capacity; drafting pleadings or other documents; or performing any act in such capacity in connection with a prospective or pending proceeding before any court, court commissioner, or referee.

(D) Providing advice or counsel as to how any of the activities described in sub-paragraph (A) through (C) might be done, or whether they were done, in accordance with applicable law;

(E) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (A) through (D) above;

(F) 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;

(G) Certifying or giving opinions as to title to immovable property or any interest therein or as to the 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 property.

- (7) "Ownership interest" means the right to control the affairs of a business, or the right to share in the profits of a business, and includes a loan to the business when the interest on the loan is based upon the income of the business or the loan carries more than a commercially reasonable rate of interest.

(b) General Rule

No person may engage in the practice of law in the State of Wyoming, or in any manner hold himself or herself out as authorized or competent to practice law in the State of Wyoming, unless enrolled as an active member of the State of Wyoming Bar, except as otherwise permitted by these Rules. Further, no person may engage in the unlawful practice of law. The following constitutes the unlawful practice of law:

- (1) A nonlawyer practices law or holds himself or herself out as entitled to practice law;
- (2) A legal provider holds an investment or ownership interest in a business primarily engaged in the practice of law, knowing that a nonlawyer holds an investment or ownership interest in the business;

- (3) A nonlawyer knowingly holds an investment or ownership interest in a business primarily engaged in the practice of law;
- (4) A legal provider works for a business that is primarily engaged in the practice of law, knowing that a nonlawyer holds an investment or ownership interest in the business; or
- (5) A nonlawyer shares legal fees with a legal provider.

(c) Exceptions to definition of “practice law.”

- (1) Appearing as an advocate in a representative capacity before any body, board, committee, or commission constituted by law, if that body, board, committee or commission is functioning as an adjudicative body is not practicing law when such conduct is authorized by Wyoming Supreme Court rule, federal statute, state statute, county or city resolution or ordinance, federal administrative regulation, or state administrative regulation.
- (2) Acts performed by a paralegal or other non-lawyer assistant which would normally be construed as the practice of law, such as drafting of legal documents and pleadings, if those acts are performed under the supervision and control of an attorney who is both legally and ethically responsible for the acts of the paralegal or non-lawyer assistant and who is admitted to practice in this state.
- (3) Pursuant to Rule 101(a), Uniform Rules for District Courts of Wyoming, partnerships, as defined by Wyo. Stat. §17-21-101(a)(vi), and sole proprietorships may appear through the owners.
- (4) Pursuant to Rule 1.04, Uniform Rules for the Circuit Courts of Wyoming, in small claims actions, appearance by non-attorneys may be permitted as provided by Wyo. Stat. §1-21-202(b).

(added October 28, 2004, effective March 1, 2005)