ETHICS

A Discussion of Ethics, Rules, and Causes of Action Relevant to Lawyers and Commercial Negotiators Involved in Natural Resources Transactions©

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Field result goes here DOCUMENT RETENTIONGeneral Considerations.

Document retention policy is not only relevant to commercial negotiators and landmen, but is an important consideration for all attorneys. Janet Douvas Chafin offers the following seven elements

ETHICS

A Discussion of Ethics, Rules, and Causes of Action Relevant to Lawyers and Commercial Negotiators Involved in Natural Resources Transactions©

I. SCOPE OF ARTICLE

Initial normative considerations in every representation that should be of principal concern to a practicing attorney, and, in particular, an attorney rendering or utilizing written reports or opinions, such as title opinions, consist of professional ethical obligations to which we are bound by oath and the duties owed to clients, and, possibly, to others, that establish the standard of care under which liability may accrue if any representation is not conducted with the requisite degree of learning, skill, judgment, and diligence. See, e.g., Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App.--San Antonio 1966, no writ). Opinions rendered by attorneys, including title opinions, are increasingly becoming standard requirements in energy industry transactions, whether exploration and production, acquisition, or financing is the context. Regardless of the type of transaction, ethical obligations of an attorney rendering a title opinion, and duties of the title attorney to clients, and, possibly to others will be discussed in this paper. Discussion of title opinions in this paper is limited to opinions covering mineral rights with emphasis on opinions covering oil and gas properties.

Sources of ethical obligations are described in one section of this paper. Next, some of the practical aspects of title examination and preparation of opinions are treated in the section on ethics, title opinions,

and risk management. The standard of care applicable to the work of a title attorney is discussed in Section V of this paper. Additionally, possible causes of action by a client against an attorney who improperly renders a title opinion and other justifications for observing ethical conduct and properly performing duties to which title examiners are bound are discussed in the same section. Following the section on liability to clients is a section in which the question of whether an attorney owes a duty to non-clients is discussed. First, the duty to non-clients is generally discussed. In the same section, a reported decision concerning an instance in which an examining attorney was aware that non-clients were likely to rely on his opinion is discussed. Finally, a section is dedicated to the use of opinions, including opinions of others followed by a discussion of ethical considerations to be observed in marketing of legal services.

In advance of developing the sources of ethical obligations, a working definition of an opinion and a definition of a title opinion are provided in Section II of this paper.

Prior to adoption of the Texas Disciplinary Rules of Professional Conduct (the "*Texas Rules*"), members of the State Bar were subject to the Texas Code of Professional Responsibility (the "*Code*"); however, on May 19, 1989, the State Bar membership voted on the replacement for the Code. The vote taken on the proposed Texas Rules resulted in their adoption, which ultimately became effective on January 1, 1990. In many instances in this paper, comparisons are made to the standards established under the Code, now superseded, with the presently effective standards in effect since the adoption of the Texas Rules. In addition, Louisiana's Code of Professional Responsibility was replaced by the Louisiana Rules of Professional Responsibility, effective January 1, 1987 (the "*Louisiana*

Rules"). Since both are based upon the ABA Model Rules, the Louisiana Rules and the Texas Rules (collectively, the "*Rules*") are similar; however, in this paper, a significant portion of the analysis is devoted to identifying the differences between the Louisiana Rules and the Texas Rules.

II. ANALYSIS OF OPINIONS

A. General Features

Increasingly in the practice of law today, attorneys are being called upon to advise clients or others of their opinion as to what the law is concerning a particular factual situation, or, in short, to render an opinion; that is, the attorney is asked to interpret and explain the law with regard to a particular set of facts. See M. Sterba, Drafting Legal Opinion Letters 3 (2d ed. 1992).

In connection with securities, corporate, commercial, energy industry, and other transactions, lawyers are called upon either to perform tasks or produce written material, such as memoranda and other work product for delivery to a client, in order to assist the client in accomplishing its business transactions, or to provide the client or non-client with advice. Legal advice may be given orally, in meetings or conversations, or in written memoranda, reports, and correspondence delivered by an attorney to her or his client; however, frequently a client will find it appropriate for the attorney to formally state an opinion in writing. Clients request written opinions for a variety of reasons, for example: (i) determining the precise state of affairs of the client or others; (ii) assuring the client that its conduct will be lawful or that legal relationships exist; (iii) resolving legal uncertainties, satisfying contractual or disclosure requirements or

representations made by the client in disclosures; (iv) serving as the legal basis for statements such as representations as to title or for warranties concerning extent of ownership; or (v) providing notice of legal risks. Id.; see also Practicing Law Institute, Opinion Letters of Counsel 13, 14 (1987).

Although formal, written opinions typically are organized in the form of a letter containing ordinary features, such as addressee, date, description of subject matter, and signature, certain operative elements of an "opinion" letter may be unique to a formal written opinion that takes the form of a letter. Sterba, supra, at 4. For example, opinions within an opinion letter may be set forth in enumerated paragraphs, and such a letter frequently contains other features, such as the reason for the opinion, limitations as to particular laws, assumptions (often in the form of comments), the basis for the opinion, and any requirements to be fulfilled before limitations on the opinions stated in the letter may be removed. Id. at 19-30.

The form of written opinion most frequently utilized by title examiners is that of a letter. A letter title opinion contains many of the features of other opinion letters. Additionally, title opinions contain features that are generally only found in title opinions, such as accreditation of interest sections and sections devoted to analysis of documents examined.

Your attention is directed to Attachment I, a form of letter title opinion that is discussed in Section II, Parts C and D of this paper, and particularly to the disclaimer that appears in italics in Comment and Requirement 18, p. II-13. The importance of such a disclaimer may extend beyond a particular opinion. Occasionally, in both file due diligence and in title examination, as well as in other steps taken by buyers and

sellers in acquisitions and divestitures of producing properties, negotiations and drafting that lead to terms in purchase agreements which seek to allocate both known and unknown liabilities may lead to misunderstandings, contract disputes, material delays in meeting transaction deadlines, and costly litigation, problems which can be avoided through careful planning of the due diligence processes, precise drafting of relevant contracts such as purchase agreements, and in meticulous preparation of title opinions covering properties that are the subject of the particular acquisition or divestiture. For an excellent treatment of how to avoid such problems, see Zachos, Environmental Defects: How to Draft and Negotiate Purchase and Sale Agreements that Minimize Confusion and Avoid Disputes, Paper presented to the Advanced Oil, Gas and Mineral Law Course, co-sponsored by the Oil, Gas and Mineral Law Section of the State Bar of Texas, Dallas, Texas (September 23 & 24, 1999).

B. Definition of Title Opinion

An opinion by an examining attorney covering specifically designated interests in property that characterizes the quality and quantity of ownership in such property of a particular owner or of all owners may be referred to as a title opinion. A working definition of a title opinion is:

> a statement of opinion by an attorney, often in the form of a letter, as to the state of the title to land, mineral, royalty or working interests. The opinion will often recommend that curative instruments be obtained before the property interest is purchased, drilled on, or otherwise dealt with. In the course of leasing and development of a tract of land, there may be occasions for several title opinions.

H. Williams & C. Meyers, Oil and Gas Terms 1112 (10th ed. 1997).

C. Types of Title Opinions

In the course of representing energy industry clients in exploration and production transactions, financing transactions, transactions involving the purchase and sale of oil and gas properties, and other transactions in which the state of title to mineral interests or mineral rights is an important element of the overall transaction, title examiners are called upon to examine documents and materials provided by the client or abstracts or runsheets and documents obtained by landmen pursuant to instruction by the examining attorney, or to perform stand-up examinations of the public records and render various types of title opinions. Title opinions may assume many varied forms with their scope, content, and analysis dependent more upon the nature of the transaction than any other variable except the skill, expertise, and diligence of the examining attorney. Standard types of title opinions encountered in practice are the original title opinion, the limited title opinion, the division order title opinion and the supplemental title opinion.

D. Standard Provisions

The discussion that follows provides an analysis of several standard features of title opinions. In each of the forms of title opinions attached to this paper, comments providing advice to or requirements for the addressee of the opinion to satisfy cover a variety of subjects that are commonly brought to the attention of the addressee of the opinion. Portions of the

forms of title opinions attached are essentially standard in format to all types of title opinions.

1. Property Description

Essential to circumscribing the coverage of a title opinion is the portion of the title opinion that identifies the property examined, describes the lands, leases, and/or units that comprise the property intended to be covered by the title opinion (the "*Captioned Property*"). See Attachment I, infra, Page I-1. In connection with describing the Captioned Property and circumscribing the coverage of the opinion, a carefully drafted comment that excludes from the coverage of the opinion any matter of conflict or discrepancy with respect to survey, area, boundary, or title to beds of any water bodies is recommended. Within the State of Louisiana, the parish, property name (if a commonly known name exists), the section, township, range, and a complete immovable property description should be provided in the property description section of the title opinion. Within the State of Texas, the county, property name (if a commonly known name exists), survey, and a complete real property description should be provided in the property description section of the title opinion. For convenience of the reader of the title opinion, as a caption, the property description is typically located on the first page of the title opinion; however, it may be contained within the body of the title opinion or, if the description is lengthy, it is often attached as an exhibit or appendix to the title opinion. Obviously, precision is important from a legal standpoint in describing the property that is the subject of the title opinion. The obligations of the attorney to: (i) abide by the client's decisions concerning the objectives of the representation; and (ii) only limit the general methods of the representation if the client consents after consultation dictate that the extent and scope of the property under examination, and described in the opinion, must not be diminished or enlarged without consulting with the client. See Texas Rule 1.02 (a)(1) and (b).

2. Opinion Based on Examined Material

With the application of technology to the practice of law increasingly providing practitioners with opportunities to achieve new efficiencies in delivering services and producing work product, the trend toward creation and utilization of forms in practice is a development that continues to permeate all areas of practice, including preparation of title opinions. Form opinions typically contain sections that state that certain documents and materials and certain records were examined in preparation of the title opinion. Absolute accuracy in such a statement is important. Crawford v. Gray & Assocs., 493 So. 2d 734 (La. Ct. App. 2d Cir.), writ denied, 497 So. 2d 1012 (La. 1986). If the title opinion is solely based upon an examination of documents and records listed in the opinion, the client should be advised that no abstracts were examined. Communication with the client to explain the approach taken in preparing the opinion must be conducted to the extent reasonably necessary to permit the client to make informed decisions concerning the methods employed in preparing the opinion. Texas Rule 1.03 (b). After consultation with the client concerning the basis upon which the opinion is to be prepared, it is common for an examiner in an advisory comment to state within the opinion that the client has requested the examiner to base the title opinion solely upon an examination of documents and records listed in the opinion without the benefit of abstracts and to advise the client of the reason provided by the client for instructing the examiner to proceed in such a manner. Typically, the reasons that a client directs an examiner to proceed without abstracts involve time prescribed by the drilling, acquisition closing, or other schedule or cost limitations. Often, an advisory comment of this type will state that, as a result of proceeding without abstracts, the title opinion is subject to the currentness, accuracy, and completeness of the documents and records listed in the opinion as the examined materials; moreover, this type

of comment normally advises the client that this kind of examination is more prone to inaccuracy than an examination based upon abstracts that are compiled by persons who, through personal knowledge and experience, are thoroughly familiar with the area in which the Captioned Property is situated and located and any irregularities in the records which may affect title to the Captioned Property.

Caution is recommended in preparing this type of comment. An examining attorney should be careful not to give the appearance of attempting in advance to limit his or her liability to the client for malpractice. See Texas Rule 1.08(g). See also Louisiana Rules 1.7(b) and 1.8(h), which provide that:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless;
>
> > (1) The lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
>
> [...]

> (h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

See Soderquist v. Kramer, 595 So. 2d 825 (La. Ct. App. 2d Cir. 1992), which held invalid a settlement agreement in which the clients released all claims against adverse parties and against their attorney. In this case, a malpractice claim was appealed to test the validity of a summary judgment in favor of attorney based exclusively on a settlement agreement to which attorney was not a party in the litigation, which he advised his clients to sign, and which released him from any claims arising from the specific representation, an act viewed by the court as an attempt to exonerate the attorney from a claim by his client for malpractice. Texas Rule 1.08(g); Louisiana Rules 1.7 (b) and 1.8(h).

Soderquist was represented by Kramer in a suit between Soderquist and WSB that involved a company owned by Soderquist. The settlement agreement reached included the following language:

> It is agreed that as additional consideration between WSB and Soderquist that they do hereby release any and all claims and rights which they may have against each other and all parties involved in these transactions including but not limited to . . . Franklin Parish Broadcasting, Michael E. Kramer . . . .

Soderquist sued Kramer for malpractice connected with Kramer's representation and the Louisiana second circuit court of appeal invalidated the agreement since, from the nature of release, it was evident that the interests of the attorney and client were adverse.

3. Opinion Based on Opinion of Another

In instances in which a title opinion is based in part upon the opinion of other counsel, an examiner frequently states that the title opinion is subject to the accuracy and completeness of the opinion of the other counsel. Should the examining attorney have any reason to doubt the qualifications, experience, or competence of the attorney who prepared the underlying opinion, or to question the conclusions set forth in the underlying opinion, the examining attorney should not expect to be able to interpose this type of advisory comment with impunity. Texas Rule 1.03 (b). Frequently, clients will request an affirmative statement by the examining attorney that, based upon the general reputation and experience in title matters possessed by the firm or more specifically by the attorney who prepared the underlying opinion, the examining attorney believes the addressee is justified in relying on the underlying opinion or that the underlying opinion is in form and substance or form and scope satisfactory to the examining attorney. If the client requests it, the examining attorney should carefully craft an affirmative statement concerning reliance upon the opinion of other counsel, avoiding statements which suggest concurrence in the opinion of other counsel, and avoiding statements which require independent investigation or verification. Some commentators suggest that as a form of negative assurance, the examining attorney may state that the opinion of other counsel is satisfactory in form and scope, thereby avoid addressing the substantive law on which the other opinion is

based. See Babb, Barnes, Golden & Kjellenberg, Legal Opinions to Third Parties in Corporate Transactions, 32 Bus. Law. 553, 555 (January 1977); cf. Wolfson, Opinions of Counsel to the Underwriters in Public Offerings of Securities, in Practicing Law Institute, Opinion Letters of Counsel 97, 146-48 (1987) (suggesting statements that the opinion of other counsel is acceptable as to form and substance or as to form and scope are equally common and treated as equivalent). However, examining attorneys may be well advised, however, in preparing title opinions to avoid assurances concerning the substance of opinions of others.

4. Opinion Based on Examiner's Opinion

An update of an existing opinion may be based in part upon an opinion previously issued by the examining attorney or firm. Similar to the format of the Limited Title Opinion that updates an existing opinion, the Supplemental Opinion is an example of this type of title opinion. The advisory comment that sets forth the basis on which such opinion is prepared usually states that the title opinion is subject to the comments and requirements contained in the earlier opinion. If the examining attorney has not been furnished and has not been requested to examine curative materials, this type of advisory comment typically states that no curative materials have been furnished and that the scope of the engagement of the examining attorney has not included examination of curative materials. A carefully conceived and precisely drafted engagement letter that, in reasonable detail, sets forth the terms of representation, and delineates the scope of the representation in sufficient detail, can assist the examining attorney in avoiding any misunderstanding that may arise from this type of advisory comment. See Texas Rule 1.02 (a) (1) and (b). An

example of an engagement letter setting forth the terms of representation is attached as Attachment III.

5. Accreditation of Interests

The section of the title opinion in which ownership interests in the surface and the oil and gas mineral estate are set forth in fractional or decimal form is perhaps the most critical section of the title opinion. If the client cannot compute the interests stated in the accreditation portion of the opinion, at a minimum, the opinion may have diminished utility to the client. If terms, such as working interest and net revenue interest, are utilized with disregard to their distinctly understood meanings in the industry, the examining attorney may be failing to completely carry out the obligations that the lawyer owes to the client. See generally Texas Rule 1.01 (b) (2).

6. Limitation on Use

a. Liability to Third Parties

Another standard comment is one that is intended to restrict the benefit of an opinion to the addressee of the opinion, provide some evidence that third parties are not intended to benefit from the opinion, and expressly deny permission to anyone other than the addressee and its counsel, if applicable, to rely on, quote, or otherwise refer to the opinion in any report or document without consent of the examiner or the law firm of the examiner. The value of including such a qualification in an opinion is highlighted by the case McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999) (hereafter "*Appling*"), in which the Texas Supreme Court held that an attorney may owe to a third person a duty to not negligently misrepresent a material fact, regardless of privity, especially if the attorney making the representation invites reliance on the part of the third person. For an excellent discussion of the limits of the tort of negligent misrepresentation, see Steele, Professionalism, Ethics, and Business Development, South Texas College of Law's 1999 Program: The Energy Law Institute for Attorneys and Landmen. For Louisiana title opinions, see the Evans v. Waguespack case, 638 So. 2d 1153 (La. Ct. App. 1st Cir. 1994) (holding that law firm who prepared a title opinion for the plaintiff's mortgagee in connection with the purchase of immovable property owed no duty to plaintiff-mortgagor for defects in title because the title opinion was issued to the mortgagee and not the plaintiff-mortgagor and clearly stated that the "opinion is neither assignable nor heritable"); but see Capital Bank &Trust Co. v. Core, 343 So. 2d 284 (La. Ct. App. 1st Cir.), writ denied, 345 So. 2d 504 (La. 1977) (recognizing the right of a lender, as a third party beneficiary, to bring a

direct legal malpractice action against an attorney it neither retained nor paid for the issuance of a title opinion upon which the lender would rely in lending funds, where the title opinion was issued to such lender); cf. Citizens Nat'l Bank v. Gilsbar, Inc., 581 So. 2d 719 (La. Ct. App. 1st Cir. 1991) (the reasoning of the court in Capital Bank & Trust Co. regarding prematurity of the Bank's action in that case is stated to be invalid by the Louisiana Supreme Court's reasoning in Rayne State Bank & Trust v. National U. Fire Ins., 483 So. 2d 987 (La. 1986)).

Following is an example of a form of comment intended to disclaim any intention to benefit third parties as well as to restrict the opinion from unauthorized use:

> This opinion is given as of the date hereof, and we undertake no, and hereby disclaim any, obligation to advise you of any change in any matter set forth herein. Furthermore, this opinion is rendered solely and exclusively for the benefit of [the addressee] [and its general counsel in connection with any opinion issued by such general counsel to the addressee] and may not be relied upon by any other person or entity or quoted in whole or in part or otherwise referred to in any report or document furnished to any person or entity without our prior written consent.

b. Duty of Confidentiality to Client

Another aspect of the subject of sheltering an opinion from unauthorized use by non-clients concerns the obligation of the examining

attorney to preserve client confidences, secrets, and confidential information, as such terms are defined in the Texas Rules. Formerly, under the Code of Professional Responsibility, an examining attorney was required to preserve confidences and secrets of a client. The Code defined: (i) confidence as information protected by the attorney-client privilege under applicable law; and (ii) secret as other information gained in the professional relationship that the client has requested the attorney to hold inviolate or the disclosure of which would be embarrassing or which would be likely to be detrimental to the client. Under limited circumstances, Code DR 4-101(C) permitted an attorney to reveal client confidences and secrets. For example, with the consent of the client, but only after full disclosure to the client, confidences and secrets may be revealed by the attorney. See Code DR 4-101(C)(1). The Texas Rules are more restrictive in prohibiting the release of confidential information. Texas Rule 1.05 provides:

> (a) "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence of United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (h), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm;

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation;

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known; or

(4) Use privileged information of a client for the advantage of the lawyer of a third person, unless the client consents after consultation.

The essence of the rules enunciated by Code DR 4-101 and Texas Rule 1.05 is that, without consultation with the client involving full disclosure, client confidences, secrets, and confidential information must be protected by the examining attorney unless the client consents to disclosure or disclosure is permitted under the narrow exceptions to blanket prohibitions against disclosure contained in the Code and the Texas Rules. See Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.); cf. Rayne State Bank & Trust Co. v. National Union Fire Ins. Co., 483 So. 2d 987 (La. 1986) (construing Louisiana's version of DR 4-101 and Rule 1.6 of the Louisiana Rules, the analog to Texas Rule 1.05).

Comments designed to disclaim any benefit to third parties and to shelter the opinion from unauthorized use of non-clients serve important functions, including, without limitation, management of risk to the examining attorney; however, Texas Rule 1.05 requires the examining attorney to initiate steps to preserve the attorney-client privilege that may require changes in the examining attorney's practice and procedures connected with issuing title opinions. Texas Rule 1.05 requires the examining attorney to safeguard the integrity of information provided by a client that is protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence, or by the principles of the attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence of United States Courts and Magistrates.

To comply with Texas Rule 1.05, title examiners will be well advised to anticipate the susceptibility to discovery of their work and,

once issued, the title opinion. Where appropriate, examining attorneys should broaden the scope of their title examination practice and procedures and implement internal office document and information management practices designed to preserve the attorney-client privilege, and preserve the work product doctrine.

In instances in which the client or the examining attorney prefers to shelter the title opinion from discovery, regardless of whether litigation is contemplated, the examining attorney should deliver or transmit the title opinion with a cover letter in which the addressee is advised against utilizing the opinion in a manner that could create a waiver of the attorney-client privilege. To prevent waiver of the attorney-client privilege, examining attorneys should counsel their clients in the cover letter, and elsewhere, on what measures the client should take and on which uses of opinions they should avoid.

Measures should be implemented to ensure that, during examination, all title notes, run sheets, drafts of opinions, correspondence, and other attorney work product are adequately treated to preserve the work product doctrine in instances in which opinions are rendered and litigation is either anticipated or pending. Clients should be counseled to avoid actions that would cause the protections against discovery afforded by this doctrine to be lost. For further discussion of this subject, see Richard K. Casner, Discoverability of Title Opinions in Texas State Litigation, 18 Oil, Gas and Mineral Law Section Report 3 (State Bar of Texas 1993).

An information management practice this author recommends is to implement a filing system that allows one to designate that the

documents and materials on which the title opinion is based are being subject to the attorney-client privilege or work product doctrine. The need may exist to shelter the opinion or the information on which it is based from discovery; however, for the purpose of supporting the opinion, if any portion of the title opinion is questioned after it is issued, a separate file should be maintained which contains the documents and materials examined and all information that is relevant to the advice given or conclusions made in the opinion. should be maintained.

III. SOURCES OF ETHICAL OBLIGATIONS

A. Ethical Standards

Over the years, ethical standards, as principles governing the conduct of the members of the State Bar, have been developed from a variety of sources, including philosophic, religious, family, and personal beliefs, and have provided the basis for the Canons of Professional Ethics adopted by the American Bar Association (the "ABA") in 1908. Texas developed its Canons of Ethics in 1909. In 1969, the ABA promulgated the Model Code of Professional Responsibility. Louisiana soon followed and developed its Code, which it later replaced with the Louisiana Rules, set forth in Louisiana Revised Statutes Title 37, Chapter 4-Appendix, Article XVI. Texas developed its Code, discussed in Section III, Part B of this paper, in 1971 consisting of the Canons and Disciplinary Rules from the model code of the ABA, and, in 1972 the State Bar adopted the Ethical Considerations of the model code of the ABA. The ABA adopted the Model Rules of Professional Conduct in 1983. In 1984, the State Bar of Texas established a review committee

to determine whether the model rules of the ABA should be adopted. See generally the Second Edition of State Bar of Texas Committee on Legal Education, Texas Lawyers' Professional Ethics (1986). The model rules of the ABA were amended and recommended for adoption by Texas lawyers in a rules referendum held during May 19 - June 19, 1989, as the Texas Rules, as defined in Section III, Part C. The Texas became effective immediately for lawyers admitted after June 1, 1989, and became effective for all other lawyers on January 1, 1990. See generally Newton, The Proposed Texas Disciplinary Rules of Professional Conduct Should be Adopted, 52 Tex. B.J. 557 (1989); see also Lori Gallagher and Andrew S. Hanen, Attorney-Client Conflicts of Interest and Disqualification of Counsel in Texas Litigation, 24 Tex. Tech L. Rev. 1039 (1993), containing a discussion of state and federal standards in Texas relevant to ethical guidelines (at 1041-58), duties owed to a potential client (1096-1102), trends in conflicts of interest (1108-21), and methods of curing conflicts (1121-33). Another ethical standard to consider arises out of the oath administered to every person admitted to practice law in the State of Texas.

B. Codes of Professional Responsibility

Prior to the adoption of the Texas Rules, the professional conduct of the members of the State Bar of Texas was measured against the standards established in the Code, standards which continue to be important even though they have been replaced by the Texas Rules. The Code combined disciplinary rules, adherence to which was mandatory, canons of ethics, to which all members of the State Bar of Texas were obliged to aspire, and ethical considerations, which were designed to offer guidance. While for years the disciplinary rules, canons, and

ethical considerations of the Code were important to all practitioners, emphasis in this paper is placed on particular sections of the Code that were especially pertinent to an attorney whose practice includes rendering or utilizing title opinions.

C. Texas and Louisiana Disciplinary Rules

As discussed above, the Code has been replaced in Texas by the Texas Rules. Louisiana has likewise replaced its Code with the Louisiana Rules. Practitioners should be aware that certain of the Rules are especially important to attorneys whose practice includes the rendition or utilization of title opinions.

Federal courts sitting in Louisiana and Texas will not apply Louisiana or Texas rules as their sole sources of guidance in making decisions in cases where the rules of ethics apply, even in instances in which the federal district courts have adopted state rules. In re Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992); In re American Airlines, Inc., 972 F.2d 605 (5th Cir. 1992). Dresser held that the trial court should apply standards developed under federal law or national standards. Id. at 543 (noting that the trial court "erred in holding that its local rules, and thus the Texas rules, which it adopted, are the 'sole' authority governing a motion to disqualify" as such motions "are substantive motions, determined by applying standards developed under federal law"); see also In re American Airlines, Inc., 972 F.2d at 610 (noting that interpretations of the Texas Rules, when those rules are not materially different from corresponding ABA Rules, are equally applicable; further opining that although federal courts may adopt state or ABA rules as their ethical standards, "whether and how these rules

are to be applied are questions of federal law''). The governing standards are ''the ethical rules announced by the national profession in the light of the public interest and the litigants' rights.'' Included in this array as ''useful guides'' are the ABA Model Rules of Professional Conduct, the ABA Model Code of Professional Responsibility, and the American Law Institute's drafts of the Restatement of the Law Governing Lawyers.

D. Sources of Ethical Obligations for Commercial Negotiators

Several associations of landmen have adopted codes of ethics that address the ethical obligations of landmen in natural resources transactions. See Knutson, Legal and Ethical Obligations a Landman Owes His Employer, 31 Rocky Mtn. Min. L. Inst. § 19.01, § 19.03, at 19-7 (1985); see also Dzienkowski, Professional Responsibility Trends for Lawyers and Landmen in Natural Resources Transactions, Paper prepared for International Petroleum Transactions Institute § 2.03[4] (November 20, 1992).

For example, to apply for membership to the American Association of Petroleum Landmen (''AAPL''), or to apply for the AAPL's ''Certified Professional Landman'' designation, the applicant must agree to uphold the AAPL's Code of Ethics. In lawsuits based on contract, the ethical principles embodied in the code may affect the court's interpretation of the landman's obligations under the contract. Although ''[t]he enforcement of voluntary codes and standards is a still-developing area of the law,'' Knutson, supra, § 19.03[1][a] at 19-9, the modern trend of court decisions is to allow such codes into evidence. Id., § 19.03[2] at 19-11. Therefore, if the parties reasonably expect the landman to be

bound by the AAPL's ethics code, breach of the ethical duties established by the code may be evidence of breach of duties under the contract.

For discussion of ethics codes and principles of the Canadian Association of Petroleum Landmen, the Rocky Mountain Association of Mineral Landmen, and the Denver Association of Petroleum Landmen, see Knutson, supra, § 19.03[1][b]-[d]. Other applications of the guidance given to landmen by such codes are discussed in Section V, infra.

IV. TITLE OPINIONS AND RISK MANAGEMENT

A. Practical Considerations

Many of the ethical standards discussed in Section III of this paper provide direction to guide lawyers to: (i) conduct their affairs in representing clients honestly, without fraud, deceit, or misrepresentation, Code DR 1-102(A)(4); (ii) seek the lawful objectives of the client through reasonably available means within the bounds of law, Code DR 7-101(A)(1); (iii) not use a confidence or secret of the client for the advantage of the lawyer or for the advantage of a third person, Code DR 4-101(B)(3); and (iv) never knowingly engage in conduct contrary to a disciplinary rule of the Code, Code DR 7-102(A)(8). Two conflicts that often arise upon accepting an engagement to render any opinion, including a title opinion, is the theoretical conflict between the duty of the opining attorney to fulfill her or his ethical obligations owed to the client, and serve the business needs of the client accordingly, and the conflict which may arise from any

attempt by the same lawyer to limit her or his liability to the client and, possibly, to third parties who may rely on the opinion. See Fuld, Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Chaos, 28 Bus. Law. 915, 918 (1973).

The risk of liability to a client may be reduced the less the opining attorney commits herself or himself; however, a reduction in exposure to the lawyer may be accompanied by a corresponding reduction in protection for the client. Id. The practical resolution of this theoretical conflict will rest on the good judgment of the client and the professional self-discipline of and the risk management practices employed by the attorney rendering the opinion. See generally Freeman, Opinion Letters and Professionalism, Duke L.J. 371, 433-39 (1973).

Efforts required of diligent lawyers with professional ability, attitude, and experience who are mindful of and attentive to the ethical standards of the profession must be coupled with development of risk management programs designed to organize the process of rendering opinions and to provide safeguards against unacceptable risks of liability that can be incurred by the failure of an examining attorney to comply with ethical obligations owed to clients, in the first instance, and, in the final analysis, disregard for realistic principles of practice management.

B. Practice of Law

Section 212 of Title 37 of the Louisiana Revised Statutes sets forth the broad definition of the term "practice of law," and includes in that definition the "advising or counseling of another as to secular law, . . . [as well as] . . . the drawing or procuring, or the assisting in the drawing or

procuring of a paper, document, or instrument affecting or relating to secular rights. . . .'' La. R.S. 37:212(A)(1)(d) provides that "[c]ertifying or giving opinions as to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property'' constitutes the practice of law.

In Section 19 of the State Bar Act, the Texas Legislature broadly defines the practice of law to include "the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.'' State Bar of Texas Committee on Continuing Legal Education, Texas Lawyer's Professional Ethics, 1-10 (1979). The State Bar Act further declares that the definition of the practice of law in Section 19 is not exclusive, and that power and authority rests with the judicial branch of government to determine whether other services and acts not enumerated under the State Bar of Texas Act may constitute the practice of law. Id. Interpreting and explaining the law, such as providing an opinion as to the state of title constitutes the practice of law within the ambit of the State Bar Act. Cf. La. Rev. Stat. 37:212(A) (providing that the practice of law includes certifying or giving opinions as to title to immovable property or any interest therein).

C. Client Objectives

The examining attorney is directed by Code DR 6-101 to adequately prepare for the tasks and requirements of a proffered representation and only accept matters concerning which attorney is competent. Texas Rule 1.01 requires competent and diligent representation. Principles in such ethical standards form part of the underpinnings of Louisiana Rule 1.2 and Texas Rule 1.02 that require the attorney to abide by a client's decisions concerning the objectives and general methods of representation, and provide that an attorney may limit the scope, objectives, and general methods of the representation if the client consents after consultation. To determine the objectives of the client, consultation is indispensable. Client objectives may be determined from the context in which a title opinion is requested, such as opinions required by a purchase and sale agreement or a loan agreement. In some jurisdictions, the actual knowledge of the examining attorney of the objectives of the representation is not controlling, and the examining attorney may be deemed to know the client's objectives, and therefore the examining attorney is held to a standard of care based upon imputed knowledge. For example, if the examining attorney should have known that the client's lender would rely on title opinions addressed to the client only, in some jurisdictions, the examining attorney may be held liable to the reliant lender. As discussed in Section VI, infra, Texas courts have generally not held examining attorneys, or other attorneys, liable to third-parties in the absence of fraud or malice.

Risk management practices that will assist the examining attorney to comply with Code DR 6-101 (adequate preparation) and Texas Rule 1.02 (abide by client's objectives) are to: (i) utilize an engagement letter to state the scope and terms of the representation (see Attachment VII);

(ii) furnish copies of letters to landmen or abstracters to the client, after consultation with the client concerning the scope of work to be accomplished by landmen or abstracters; (iii) confirm changes in assigned projects by letter; and (iv) in the requested opinion, (a) state the specific objectives of the opinion, as requested by the client, (b) identify the substance of the matter on which the opinion has been requested, (c) state any limitations in the attorney's role, (d) identify the capacity in which the examining attorney serves, (e) otherwise provide appropriate details of the client's request, and (f) identify the parties that are authorized to rely upon the opinion and disclaim any benefit to or authorized reliance by third parties on the opinion, if this is one of the client's objectives. The examining attorney should be certain that the opinion is prepared by attorneys who are competent in each substantive area covered by the opinion, reviewed and approved by a partner or a committee on which members who are competent in title opinion examination and opinion preparation serve and who are not otherwise involved in preparing the opinion under review.

D. Factual Underpinnings

Code DR 1-102 requires examining attorneys to absolutely avoid misstatements of fact and ensure that the title opinion is accurate in its description of the factual basis on which opinions contained therein are based. In the case of Crawford v. Gray & Assocs., 493 So. 2d 734 (La. Ct. App. 2d Cir.), writ denied, 497 So. 2d 1012 (La. 1986), the title examiner stated that his opinion was based on an examination of the public records. In fact, the examiner did not examine the public records, and only based on his opinion on documents maintained by an abstract company. Documents and records critical to the examiner's

opinion were not routinely maintained by the abstract company. If the examining attorney were to have examined the public records, in ordinary course, he would have found a document that defeated his client's rights to property on which the client constructed a building that ultimately had to be moved. The court held that the failure of the examining attorney to inform his client of the correct source of information utilized in examining title constituted a breach of duty to the client and subjected the attorney to liability for damages incurred by the client.

Generally, all information, written and oral, on which the examining attorney relies in rendering the title opinion should be identified in detail in the opinion. See Attachment I, Abstracts and Materials or Documents and Records Examined, infra. The examining attorney should be specific and reasonably detailed in describing the information relied upon. If possible, general statements to the effect that, in addition to reviewing the specified documents, the examining attorney has made such other further legal and factual inquiries as deemed necessary for purposes of rendering the title opinion should be avoided. In addition, all assumptions should be stated in the opinion.

Facts known by the examining attorney and excluded from the information upon which the title opinion is based should be clearly identified; alternatively, the examiner should disclose to the addressee of the title opinion that the opinion is based solely on the information described in the title opinion. The position of trust and confidence held by the examining attorney with respect to the client is coupled with a legally imposed duty to disclose facts material to her or his representation. See McClung v. Johnson, 620 S.W.2d 644, 647 (Tex.

Civ. App.--Dallas 1981, writ ref'd n.r.e.). If the opinion is based on the opinions of others, see discussion, infra, Section II, Part D.3 (the examiner should state that the examiner has based her or his opinion on the opinion of others and the accuracy of the opinions of others are assumed).

E. Unauthorized Reliance

As discussed in Section II, Part D.6 of this paper, the examining attorney should state that the opinion is rendered solely and exclusively for the benefit of the client, or others as the engagement requires, and may not be relied upon by any other person. Unless the client consents to disclosure of client confidences, secrets, or confidential information, or disclosure is permitted under the exceptions in the Code and the Texas Rules, information subject to Code DR 4-101 and Texas Rule 1.05 must be safeguarded by the examining attorney.

V. DEVIATION FROM STANDARD OF CARE & BREACHES OF DUTY

A. Applicable Standard

1. Louisiana: In Louisiana, legal malpractice may be based on an action in contract or an action in negligence. As the court explained in the Allen v. Carollo case, 674 So. 2d 283, 286-87 (La. Ct. App. 1st Cir. 1996), quoting Cherokee Restaurant, Inc. v. Pierson, 428 So. 2d 995 (La. Ct. App. 1st Cir., en banc), writ denied, 431 So. 2d 773 (La.

1983), "'when an attorney expressly warrants a particular result, i.e., guarantees winning a lawsuit, guarantees title to property, guarantees or warrants the ultimate legal effect of his work product, or agrees to perform certain work and does nothing whatsoever, then clearly there would be an action in contract . . . [but since] such instances would be rare, . . . most legal malpractice claims would continue to be [characterized as] . . . delictual actions."'

In the Burris v. Vinet case, 664 So. 2d 1225, 1229 (La. Ct. App. 1st Cir. 1995), the court stated that "an attorney has a duty to exercise that degree of care, skill, and diligence exercised by prudent attorneys practicing in his community or locality." See also Herring v. Wainwright, No. 32-360, 1999 WL 735973 (La. Ct. App. 2nd Cir. Sept. 22, 1999). Although an attorney in Louisiana "is not required to exercise perfect judgment in every instance, . . . his license to practice and his contract for employment hold out to a client that he possesses certain minimal skills, knowledge, and abilities." Id. To establish a claim for legal malpractice, a party must prove that there was an attorney-client relationship, that the attorney was negligent or engaged in professional impropriety in his or her relationship with the client, and that the conduct of the attorney resulted in some loss to the client. Id. Thus, in a legal malpractice action, a client is entitled only to such damages that result from the attorney's error, negligence, or dereliction. Howard v. Wicker, 653 So. 2d 845, 848 (La. Ct. App. 1st Cir. 1995), writ denied, 679 So. 2d 1381 (La. 1996).

Louisiana law also dictates that an attorney has an obligation, as a result of his fiduciary relationship to his client, to "render a full and fair disclosure [to that client] of all facts which materially affect [the client's]

rights and interests." Schlesinger v. Herzog, 672 So. 2d 701, 712 (La. Ct. App. 4th Cir.), writ denied, 679 So. 2d 1381 (La. 1996).

2. Texas: In an opinion delivered June 28, 1989, the Supreme Court of Texas reiterated the long-standing rule of law that an attorney malpractice action in Texas is based on negligence. Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989), citing Firemen's Fund Amer. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67 (Tex. Civ. App.--Tyler 1975, writ ref'd n.r.e.); Patterson & Wallace v. Frazier, 79 S.W. 1077 (Tex. Civ. App. 1904, no writ), appeal after remand, 93 S.W. 146 (Tex. Civ. App.), rev'd on other grounds, 100 Tex. 103, 94 S.W. 324 (1906). An attorney in Texas is held to a standard of care that would be exercised by a reasonably prudent attorney. Id. at 503. An attorney-client relationship is essential. Except for those exceptions identified in this article, absent privity of contract, an attorney may not be liable for breach of duty; however, an attorney may be liable for fraudulent or malicious conduct. Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.--Houston [1st Dist.] 1985, no writ), citing Poole v. Houston & T.C. Ry, 58 Tex. 134, 137 (1882) for the pronouncement of the Supreme Court of Texas over 100 years ago that, where a lawyer acting for his client participates in fraudulent activities, his action in doing so "is foreign to the duties of an attorney." See also Gamboa v. Shaw, 956 S.W.2d 662 (Tex. App.--San Antonio 1997) (holding that there is no exception to the privity requirement in a malpractice case and thus, a lawyer's negligence in fulfilling his obligations to his corporate client do not extend to the shareholders and creditors of that corporation). If an attorney in Texas violates his professional responsibilities by concealing facts when a duty exists to reveal them, the existence of a remedy under the State Bar Act by

means of disciplinary procedures does not preclude the attorney from being liable for actionable fraud. See Hennigan v. Harris County, 593 S.W.2d 380, 383 (Tex. Civ. App.--Waco 1979, writ ref'd n.r.e.).

However, in Appling, supra, the court held that, as a distinguishable tort, an attorney may be subject to a negligent misrepresentation cause of action in a case in which he is not subject to a legal malpractice claim, the latter cause of action being based on negligence under the standards of care discussed in this article. More importantly, the court held that the attorney may owe a third person a duty to not negligently misrepresent a material fact, regardless of privity, if the attorney making the representation invites reliance on the part of the third person. Id.; see also Steele, supra. At least with regard to causes of action involving negligent misrepresentation, the opinion in this case appears to give additional weight to the continuing effort in this era of litigation against lawyers to undermine the privity rule.

B. Potential Causes of Action

Malpractice liability to a client for issuing an inaccurate, incorrect, or erroneous title opinion, or other legal opinion, in Texas is governed by tort principles. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988). Causes of action based on negligence may result from an attorney giving an erroneous legal opinion or advice, failing to give any advice or opinion when legally obligated to do so, in disobeying the lawful instruction of a client, in delaying or failing to discharge duties entrusted to the attorney's care by a client, or in the failure of the attorney to exercise ordinary care in preparing, managing, and conducting affairs that affect

the rights of a client. See generally Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.--Austin 1985, no writ) (citing numerous cases in fn. 1). Practitioners must keep abreast of recent changes in the law in order to render proper legal advice. For example, recent changes to the Texas Probate Code are of significance to an attorney determining ownership of property. Section 45 of the Texas Probate Code now provides that, where a deceased spouse left no will (i.e., was intestate), the community property estate of the deceased spouse passes entirely to the surviving spouse if all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse. The practical effect of this change in the law is that, with respect to persons who die on or after September 1, 1993, the effective date of the new law, it is no longer necessary to have a guardian appointed for the children of the marriage to obtain a lease over certain community property mineral interests, since a lease covering the interests that such children would have owned prior to enactment of this amendment may now be taken from the surviving spouse.

In Texas, the statute of limitations for legal malpractice is two years and does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986). See Willis v. Maverick, 760 S.W.2d at 644-645 for discussion of the application of the "discovery rule" to toll limitations; see also Sullivan v. Bickel & Brewer, 943 S.W.2d 477 (Tex. App.--Dallas 1995) (distinguishing between a cause of action for legal malpractice, and a cause of action for fraud allegedly committed by an attorney relating to establishing and charging fees for

professional legal services, and holding that a cause of action for fraud is subject to a four-year statute of limitations).

In Louisiana, an action for damages for legal malpractice must be filed within one year of the alleged act, omission, or neglect or within one year from the date such act, omission, or neglect is, or should have been, discovered; however, in all events, such actions must be filed within three years from the date of the alleged act, omission, or neglect. La. Rev. Stat. 9:5605. See Dowell v. Hollingsworth, 649 So. 2d 65 (La. Ct. App. 1st Cir. 1994) (holding that the time limits in La. Rev. Stat. 9:5605 are not subject to the doctrine of contra non valentum), writ denied, 653 So. 2d 572 (La. 1995). This same prescriptive period applies to any action for damages against an attorney licensed in Louisiana, whether such action is based upon tort or breach of contract. For an example of a case involving a claim of breach of contract where an attorney expressly warrants a specific result and fails to obtain that result or when the attorney agrees to perform certain work and fails to perform, see Phillip v. Home Ins. Co., 671 So. 2d 943, 946 (La. Ct. App. 5th Cir.), writ denied, 675 So. 2d 1124 (La. 1996)). La. R.S. 9:5605. In the Reeder v. North case, No. 97-C-0239 (La. 10/21/97), the court held that a cause of action for legal malpractice is extinguished three years after the act, omission, or neglect regardless of when the negligence is discovered and regardless of whether the cause of action could be brought within that period: "The Legislature was aware of the pitfalls in this statute but decided, within its prerogative, to put a three-year absolute limit on a person's right to sue for legal malpractice, just as it would be within its prerogative to not allow legal malpractice actions at all." Further, the court opined that the "continuous representation rule" cannot be applied to peremptive periods. Id.

A potential cause of action against attorneys inescapably includes fraud. See Hennigan v. Harris County, supra. For a discussion of additional causes of action that may apply to title examiners, see Baron, The Expansion of Legal Malpractice Liability In Texas, 29 S. Tex. L. Rev. 355 (1987) (in addition to traditional malpractice causes of action, the cause of action under the Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. & Com. Code Ann. §17-.41-.63 (Vernon Supp. 1987) (the "DTPA") is discussed at 366-368).

Another potential cause of action that, although it has been asserted unsuccessfully against attorneys, may be noteworthy to follow in the courts is based upon the implied warranty of good and workmanlike performance. In Archibald v. Act III Arabians, 755 S.W.2d 84, 85 (Tex. 1988), the court held that, while the implied warranty of good and workmanlike performance applies to professional services, it does so only when the service involves the repair or modification of existing tangible goods or property. Although an examining attorney provides professional services in rendering a title opinion, the rendition of such services by the examining attorney does not occur in connection with repairing or modifying a tangible product.

C. Application of Standards -Texas and Louisiana

Texas. In reported cases arising out of malpractice claims against attorneys, Texas courts have described certain standards that are applied to measure the conduct of attorneys which, in addition to guidelines provided by ethical standards, may be instructive to title examiners. The approach taken, by comparison, in applying standards of care by

Louisiana courts to conduct by attorneys rendering opinions may be reviewed by examining the cases listed infra, Appendix C, "Subject Matter Comparison of Texas and Louisiana Cases." An examining attorney is not bound to possess and exercise the highest attainable degree of skill nor is an examining attorney an insurer of the results of her or his work; however, the examining attorney is required to possess legal knowledge and to exercise skill and diligence that members of the legal profession commonly employ. See Great American Indem. Co. v. Dabney, 128 S.W.2d 496, 501 (Tex. Civ. App.--Amarillo 1939, writ dism'd judg't. cor.); see also Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App.--San Antonio 1966, no writ) (applying reasonable and ordinary care and diligence test). The Supreme Court of Texas has rejected the subjective good faith excuse for negligence of an attorney. See Cosgrove v. Grimes, 774 S.W.2d at 503. The standard of conduct by which negligence of attorneys is tested is an objective one that tests the exercise of professional judgment in choosing one course of action over another; the subjective belief of the attorney that her or his acts are in good faith is not pertinent. Id. A finding that an attorney was negligent is not the end of the inquiry. To prevail in an action for negligence against an attorney, a plaintiff must establish that: (i) the attorney owed a duty to the plaintiff; (ii) the duty was breached; (iii) the breach is the proximate cause of the damages complained of; and (iv) damages occurred. See, e.g., Firemen's Fund Amer. Ins. Co. v. Patterson & Lamberty, Inc., supra; Cosgrove v. Grimes, supra, at 503.

In In re American Airlines, Inc., 972 F.2d 605 (5th Cir. 1992), the federal Fifth Circuit Court of Appeals stated that "we have squarely rejected this hands-off approach in which ethical rules 'guide' whether counsel's presence will 'taint' a proceeding, holding instead that a District

Court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it." In re American Airlines, 972 F.2d at 611. The court indicated that it will "vigorously apply" ethical standards.

Louisiana. The Preamble to ABA Model Rules of Professional Conduct provides that:

> [b] Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

However, it should be noted that Louisiana did not adopt the Preamble to the Model Rules or the comments to the ABA Model Rules. This is an indication that a breach of the Louisiana Rules may be a basis for civil liability based on malpractice. Indeed, in Succession of Cloud, 530 So. 2d 1146 (La. 1988), the Louisiana Supreme Court stated that the standards in the Louisiana Rules "which govern the conduct of attorneys have the force and effect of substantive law. . . . When an attorney enters into a contract with his client in direct and flagrant violation of a disciplinary rule and a subsequent civil action raises the issue of enforcement (or annulment) of the contract, this court, in order to preserve the integrity of its inherent judicial power, should prohibit the enforcement of the contract..." See also Schlesinger v. Herzog, 672 So. 2d 701, 707 (La. Ct. App. 4th Cir.) (agreeing that "the Louisiana State Bar Association's Rules of Professional Conduct 'have the force and

effect of substantive law,"' and opining that "the ethical issue [raised by defendants' conduct] was transformed into a legal duty"), writ denied, 674 So. 2d 1381 (La. 1996).

D. Attorneys as Witnesses

In some situations there is a prohibition against an attorney acting as a witness for his client in litigation in which the attorney is also representing the client. Texas Rule 3.08 states that:

> (a) A lawyer shall not accept or continue employment in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:
>
> [. . .]
>
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

Under this rule and similar rules, such as Louisiana Rule 3.7 and similar requirements adopted by federal courts, attorneys must be careful to avoid disqualifying themselves from representing their client by inadvertently and unnecessarily becoming a witness. In particular, an attorney who provides an affidavit signed by the attorney to be used in litigation may be in danger of being disqualified in the case.

E. Supervisory and Agency Liability

As discussed in Section III, Part C, above, the Louisiana Rules and the Texas Rules may affect the ethical obligations of both supervising and supervised attorneys.

1. Supervising Attorney

Supervising lawyers in corporate law departments may be subject to discipline for encouraging or even permitting violations of the rules by junior lawyers. Rule 5.01 provides, in pertinent part:

> A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:
>
> (a) The lawyer is a ... supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
>
> (b) The lawyer ... has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take

> reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

Louisiana Rule 5.1 is similar. See also Dzienkowski, supra, § 2.02[7]. For responsibilities regarding nonlawyer assistants, see Texas Rule 5.03 and Louisiana Rule 5.3.

2. Supervised Attorney

The responsibilities of a supervised attorney are set out in Rule 5.02, which provides:

> A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except that a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct.

Note, however, that comment 6 provides that:

> [t]he protection afforded by Rule 5.02 to a supervised lawyer relates only to professional disciplinary proceedings. Whether a similar defense may exist in actions in tort or for breach of contract is a question beyond the scope of the Texas Rules of Professional Conduct.

See also Louisiana Rule 5.2.

F. Trade Practices and Consumer Protection Acts

1. Texas

In First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 418 (Tex.App.-Dallas 1983) (hereinafter "*First Municipal*"), the attorneys were "not liable to First Municipal under the [Texas DTPA] because First Municipal is not a consumer who has been adversely affected by the actions of the attorneys." The relevant section's wording has not been materially changed by the 1979 and 1983 amendments, and still defines "consumer" as "an individual, partnership ... who seeks or acquires by purchase or lease, any goods or services ...." Tex. Bus. & Com. Code Ann. § 17.45(4). Thus, application of the DTPA to hold attorneys liable to nonclients seems unlikely. See also Baron, supra, at 366-368; Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. 51:1401 *et seq.*

However, the federal court in Marshall v. Quinn-L Equities, 704 F.Supp. 1384 (N.D.Tex. 1988), held that "Services related to the sale of a security (which does not constitute a 'good') may still be services covered by the DTPA when such services are also objectives of the transaction .... Thus, contrary to Jones Walker's assertions, Plaintiffs need not demonstrate that legal services were specifically rendered by Jones Walker to Plaintiffs or that Jones Walker and Plaintiffs were in privity, for Jones Walker to be liable to Plaintiffs under the DTPA." Id. at 1393.

Usually, any legal "services" to be performed by corporate counsel at the request of the employer would not seem to be the objective of the

transaction, although this may be the case where the employer, on behalf of a customer or prospective purchaser of property, directs its counsel to prepare opinions for the benefit of the third party. Although the Marshall decision interpreting the DTPA is an important federal court decision construing the DTPA, it nevertheless does not represent the final word from the Texas Supreme Court. Furthermore, in First Municipal, the court stated that "it is undisputed that First Municipal neither purchased nor leased the Attorneys' legal services and that these Attorneys received no consideration from First Municipal for such services." Although the Supreme Court of Texas has held that a client of an attorney is a consumer within the meaning of the Act, that holding was based on the fact that the client purchased legal services from an attorney. Debakey v. Staggs, 612 S.W.2d 924 (Tex. 1981); First Municipal, 648 S.W.2d at 417.

2. Louisiana

Section 1405 of the Louisiana Unfair Trade Practices and Consumer Protection Law (the "*Unfair Trade Practices Act*"), La. Rev. Stat. 51:1401 *et seq.*, declares unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." See La. Rev. Stat. 51:1405. The terms "trade" or "commerce" are defined as meaning "the advertising, offering for sale, sale, or distribution *of any services* and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity, or thing of value wherever situated, and includ[ing] any trade or commerce directly or indirectly affecting the people of the state." Id. §51:1402(9) (emphasis added). The Unfair Trade Practices Act extends its protection to any "person who suffers any ascertainable loss of money

or movable property, . . . as a result of the use or employment by another person of an unfair or deceptive method, act, or practice. . . .'' La. R.S. 51:1409. In the Gardes Directional Drilling v. U.S. Turnkey Exploration Co. case, 98 F.3d 860, 868 (5th Cir. 1996), the Fifth Circuit acknowledged that while the Unfair Trade Practices Act defines "'person' broadly as a 'natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity,' . . . some courts in Louisiana have read it narrowly, limiting the private cause of action to consumers and business competitors.'' The Gardes Directional Drilling court adopted the narrower construction. Compare Morris v. Rental Tools, 435 So. 2d 528, 533 (La. Ct. App. 5th Cir. 1983) (adopting limited definition) with Jarrell v. Carter, 577 So. 2d 120, 123 (La. Ct. App. 1st Cir.) (using broad definition), writ denied, 582 So. 2d 1311 (La. 1991). The Supreme Court of Louisiana has not yet definitely addressed this split. See Gardes Directional Drilling, 98 F.3d at 868.

Conduct is deemed "unlawful [under the Unfair Trade Practices Act] if it involves 'fraud, misrepresentation, deception, breach of fiduciary duty, or other unethical conduct."' See A & W Sheet Metal Inc. v. Berg Mech., Inc., 653 So. 2d 158, 164 (La. Ct. App. 2d Cir. 1995); see also Camp, Dresser & McKee, Inc. v. Steimle and Assoc., Inc., 652 So. 2d 44, 48 (La. Ct. App. 5th Cir.) (defining a trade practice as "unfair'' when it "offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers''), writ denied, 663 So. 2d 742 (La. 1995). Yet, the language of the Unfair Trade Practices Act is broad and does not specify particular violations. Accordingly, the courts have evaluated claims of unfair trade practices on a case-by-case basis. See Jarrell v. Carter,

577 So. 2d 120, 123 (La. Ct. App. 1st Cir. 1991), writ denied, 582 So. 2d 1311 (La. 1991), appeal after remand, 632 So. 2d 321 (La. Ct. App. 1st Cir. 1993), writ denied, 637 So. 2d 467 (La. 1994).

The Unfair Trade Practices Act provides for a private cause of action based on injury from the use of unlawful, unfair, or deceptive methods, acts, or practices. See La. Rev. Stat. 51:1409(A). Section 1409(A) provides, in pertinent part, as follows:

> Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover damages. If the court finds the unfair or deceptive method, act or practice was knowingly used [meaning "the act or practice used was such that a reasonably prudent businessman knew or should have known that the act or practice was a violation of the Unfair Trade Practices Act], after being put on notice by the director or attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney's fees and costs. (footnote added).

This cause of action is subject to a one-year statute of limitations, running from the time of the transaction or act which gave rise to the right of action. La. Rev. Stat. 51:1409(E). In addition to such a

private cause of action, a person who violates the Unfair Trade Practices Act may be subject to an action by the attorney general or the director (that is, the executive assistant to the governor in charge of consumer affairs, see La. Rev. Stat. 51:1402(4)), for injunctive relief in the name of the state. Id. §51:1407. Any permanent injunction or other order or judgment of the court made under Louisiana Revised Statute 51:1407, or 51:1408, which authorizes the court to issue additional orders or render judgments to compensate an aggrieved person, is prima facie evidence in an action brought under Louisiana Revised Statute 51:1409 that a violation of the Unfair Trade Practices Act has occurred. Id. §51:1409(C). Because Louisiana Revised Statute 51:1409 has been interpreted as penal in nature, it is subject to strict construction. See Cason v. Texaco, Inc., 621 F. Supp. 1518, 1523 (D.C. La. 1985); Coffey v. Peoples Mortgage & Loan of Shreveport, Inc., 408 So. 2d 1153, 1156 (La. Ct. App. 2d Cir. 1981).

The issue of whether the Unfair Trade Practices Act is applicable to the advertisement and to the provision of legal services has not yet been resolved by the Louisiana Supreme Court. Some support exists, however, for the conclusion that the Unfair Trade Practices Act may regulate legal advertisements. In Reed v. Allison & Perrone, 376 So. 2d 1067, 1068 (La. Ct. App. 4th Cir. 1979), the plaintiff sought to enjoin several attorneys who operated a legal clinic and who advertised their services in local newspapers from making what were alleged to be misleading, confusing, and deceptive advertisements. Although injunctive relief was denied because the plaintiff failed to demonstrate any harm or that damages would not serve to compensate any loss suffered, the court concluded that attorney advertising is subject to the provisions of the Unfair Trade Practices Act. Id. at 1068-69. The

court reasoned that, although an attorney's advertising "is subject to regulation by the state bar association, . . . [it may] also be subject to other state legislation[, including the Unfair Trade Practices Act]"; the advertising of legal services is "clearly a 'trade' or 'commerce' as defined by R.S. 51:1402(10)." Id., citing Bates v. State Bar of Arizona, 433 U.S. 350 (1977) ("while truthful advertising of routine legal services may not be prevented by the state, advertising that is false, deceptive, or misleading is subject to restraint" and suggesting that state bar association regulations and disciplinary actions are not the sole restraining mechanism) (footnote omitted). Left unresolved is whether a violation of the provisions of the Louisiana Rules which govern advertising would constitute an unlawful trade practice and subject an attorney to a private cause of action under the Unfair Trade Practices Act. If an advertisement were fraudulent, misleading, or deceptive, Reed suggests a cause of action could be brought under the Unfair Trade Practices Act for damages or injunctive relief. Because the courts have defined an unfair trade practice as one that involves "unethical" conduct, one could argue that violations of the state's professional ethics code, which shares a common purpose with the Unfair Trade Practices Act of protecting consumers, should give rise to a private cause of action under the Unfair Trade Practices Act.

It is less clear whether the courts would extend the reasoning of Reed to find that the Unfair Trade Practices Act applied to other aspects of professional legal services. In Thibaut, Thibaut, Garrett and Bacot v. Smith and Loveless, Inc., 576 So. 2d 532, 537 (La. Ct. App. 1st Cir. 1990), writ denied, 580 So. 2d 676 (La. 1991), the court refused to apply the Unfair Trade Practices Act to a client's claim that his attorney charged him excessive fees. The court opined that "[t]he legislature

cannot enact laws defining or regulating the practice of law in any respect; the Louisiana Supreme Court has the exclusive and plenary power to define and regulate all facets of the practice of law, including the conduct of attorneys and the attorney-client relationship." Id.; see also Singer Hutner Levine Seeman & Stuart, 378 So. 2d 423, 426 (La. 1979) (holding that the Louisiana Supreme Court has "exclusive original jurisdiction [granted by Louisiana Constitution Article 5, §5(B)] over disciplinary proceedings against a member of the bar" and as a result, will "uphold legislative acts passed in aid of its inherent power, but will strike down statutes which tend to impede or frustrate its authority"). The court did not express an opinion on the Fourth Circuit's opinion in the Reed case. It is important to note, however, that a writ of certiorari was denied in the Thibaut case. Also of interest is the fact that Reed has never been reversed, or otherwise criticized, by the Louisiana Supreme Court.

In the absence of any jurisprudence to the contrary, it appears that if the Unfair Trade Practices Act regulates professional legal services at all, such regulation is limited to the advertisement of such services, and arguably includes violations of the advertising provisions of the Louisiana Rules. It is difficult, in the absence of any further guidance from the courts on this issue, to further define the scope and application of the Unfair Trade Practices Act as to other aspects of attorney conduct. See Julie E. Schwartz, Louisiana's Unfair Trade Law: An Elusive Remedy and Uncertain Threat, 41 La. B.J. 522 (April 1994), for an overview of the Unfair Trade Practices Act.

G. Employer Prohibitions on Mineral Ownership

1. Lawyers

"Natural resources lawyers have commonly received interests in their client's venture in the natural resources industries as an investment or as payment for the legal fee." Dzienkowski, supra, § 2.03[1]. The ethical considerations applicable to such situations are provided by Texas Rule 1.08 which reads, in pertinent part:

> (a) A lawyer shall not enter into a business transaction with a client unless:
>
> > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
> >
> > (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> >
> > (3) the client consents in writing thereto.

See also Louisiana Rule 1.8 and Succession of Crowe v. Henry, 602 So. 2d 243 (La. Ct. App. 2d Cir. 1992). In Henry, the attorney for the succession representative bought property from the decedent's estate. The succession later sued to annul the sale to the attorney on the theory

of simulation or lesion. The trial court granted summary judgment in favor of the attorney, as he had provided consideration and the court had approved the sale. The court of appeals held that summary judgment was not appropriate, because the trial court did not consider the attorney-client relationship. The court stated that "[a] transaction between an attorney and a client is closely scrutinized and may be annulled even though the same transaction with a non-client without overreaching may be found unobjectionable." The court remanded for inquiry into whether there was a breach of fiduciary duty.

In Louisiana, Rule 1.8(j) provides that:

> (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> > (1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and
> >
> > (2) Contract with a client for a reasonable contingent fee in a civil case.

In Succession of Cloud, supra, the client had a dispute over title to certain acreage with her siblings. The client was the record owner and was entitled to all the mineral royalties being paid. The client employed the attorney to represent her in the dispute and executed a deed which transferred a 1/4 mineral interest in the tract to the attorney "for the consideration of $10,000 in legal services," since the client did not have the money to pay for services for which attorney had been hired. The

Louisiana Supreme Court addressed the question of "whether the client and her co-owners can assert the violation of the Code (Rules) as a basis for nullifying the transfers and recovering the mineral interests from the attorney." The court held that the client could recover as long as mineral interest was still in the name or under the control of the attorney. As discussed infra, Section V.C, this ruling was based upon the holding that "[t]he standards in the Code (Rules) which govern the conduct of attorneys have the force and effect of substantive law. . . . When an attorney enters into a contract with his client in direct violation of the Rules and a subsequent civil action raises the issue of enforcement or nullification the court, in order to preserve the integrity of its inherent judicial power shall prohibit the enforcement of the Contract." These prohibitions should be carefully observed not only due to the need to adhere to applicable disciplinary rules, but also in recognition of the increasing propensity of dissatisfied clients to look to the lawyer for recovery. Dzienkowski, supra, § 2.03[3].

2. Commercial Negotiators

A commercial negotiator may be restricted in his ability to acquire an interest in a transaction as an investment or fee. Knutson, supra, § 19.06, at 19-30; see also Dzienkowski, supra, § 2.03[4]. Any land services contracts the commercial negotiator has signed with his employer must be examined for restrictions. See Section V, Part J, infra.

An agency relationship between the agent-commercial negotiator and the principal-employer may include fiduciary duties which restrict the commercial negotiator's ability to own an interest in the same

matter covered under the scope of employment. For example, there is a fiduciary duty to not use confidential information for the agent's own purposes. However, custom in the oil and gas industry may permit such investments, notwithstanding agency rules to the contrary. See generally Dzienkowski, supra, § 2.03[4].

Additionally, the ethical codes discussed in Section III, Part D, supra, may address the propriety of such investments, such that consent and disclosure may be required before such an investment is permissible.

H. Duty of Disclosure in Negotiations

1. Lawyers

"As negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirement of honest dealing with others." Preamble, Texas Disciplinary Rules of Professional Conduct. This raises the question of whether the lawyer owes a duty of disclosure to the opposing party in a negotiation. Dzienkowski, supra, § 2.06[3]. Texas Rule 4.01 provides that:

> [i]n 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 to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Although false statements are prohibited, the comments to this Texas Rule condone puffing in a negotiation context. Thus, attorneys should be careful in making statements that may be relied upon by the opposing party. See Barnhill & Ebner, Disclosure, Ethics and the Natural Resources Attorney, 16 Rocky Mtn. Min. L. Inst. 1 (1980). Louisiana Rule 4.1 is similar to Texas Rule 4.01. See also Albert D. Hoppe, Ethics of Negotiations for Lawyers and Landmen, Paper

presented to Oil, Gas and Mineral Law Section of the Houston Bar Ass'n (Nov. 25, 1997).

2. Commercial Negotiators

In a lease acquisition program, a commercial negotiator may have an obligation to disclose certain information to those with whom he bargains. Knutson, supra, § 19.03[6], at 19-17. A company employee, who typically has more company information available to him than an independent contractor, may find it more difficult to honestly say "I don't know" when asked a question by a landowner. Id.

The duty to disclose information during contract negotiations has been summarized as follows:

> [A] party to a contract who keeps silent as to material facts may be liable for fraud if:
>
> The ignorant party makes inquiry as to the existence of such facts;
>
> The knowledgeable party makes a partial disclosure which is misleading unless full disclosure is made;
>
> A previously made innocent representation will be misleading unless subsequently acquired information is disclosed;

> The parties occupy a fiduciary or other confidential relationship; or
>
> The contract is inequitable, and the facts would not have been accessible to the ignorant party upon reasonable investigation.

Id., citing Barnhill & Enns, Choosing Between and Honest Bargain and No Bargain: Information Disclosure to Potential Lessors, Mining Agreements II, Paper 1 at 1-9 (Rocky Mtn. Min. L. Found. 1981); see also Hoppe, supra.

I. Duty of Confidentiality

1. Lawyers

The obligation of attorneys to preserve client confidences by sheltering title opinions from unauthorized use by non-clients is discussed in Section II, Part D.6.a, supra. Besides the obligation to not reveal confidential client information, an attorney also may not use confidential information to the disadvantage of the client for the attorney's own purposes. Dzienkowski, supra, § 2.05[1]. The circumstances under which a lawyer may, or must, reveal unprivileged confidential information are covered by Texas Rule 1.05 (and Louisiana Rule 1.6), which is provided in Section II, Part D.6.b, supra. Generally, there is a duty to obtain informed consent from the client before using or revealing confidential information, although there are some exceptions.

Texas Rule 3.03 (Louisiana Rule 3.3), concerning the attorney's duty of candor toward a tribunal, is one such exception to the duty of confidentiality to the client. The Rule provides that

> (a) A Lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
>
> (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
>
> (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Thus, as Comment 1 to this Texas Rule states, "The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal."

For a discussion of the duty of honesty in negotiations as a limit on the duty of confidentiality, see Section V, Part G.1, supra. See also Moses, Unauthorized Use of Confidential Oil Information, 1 Rocky Mtn. Min. L. Inst. 267 (1955); Erisman & McCarthy, Obligation Not to Use Confidential Information Disclosed During Negotiations to Acquire Interests in Mineral Properties, 33 Rocky Mtn. Min. L. Inst. Ch. 23 (1988); Hoppe, supra.

2. Commercial Negotiators

An independent commercial negotiator representing multiple clients may occasionally face difficult problems involving confidentiality and conflicts of interest. "When the [commercial negotiator] discovers

information that is relevant to both employers, as well as the scope of the [commercial negotiator]'s employment, the issue arises of whether a duty to disclose arises even though the information will be used by one employer against the [commercial negotiator]'s efforts on behalf of the other employer.... [N]o answer exists to the problem.'' Dzienkowski, supra, § 2.05[6]; see also Knutson, supra, § 19.04[4]. Fortunately, when a commercial negotiator has only one employer, many of these potentially difficult situations may be avoided.

J. Land Service Contracts--Landmen

Companies in the natural resources industry often hire independent landmen utilizing employment agreements that govern the landman's obligations to his employer, and that may contain provisions governing liability insurance required to be carried by the landman and that often obligate him or her to protect confidential data. Knutson, supra, § 19.05[1] at 19-25 to 19-26.

A landman's contract typically precludes acquiring any interest in the area where he performs curative work, often for a period of six months or one year. But any use of information given to him in the course of his employment to the disadvantage of his former employer, even after the six-month or one-year period, may be precluded. If, even after three years, the landman were to acquire for his own account any interest (such as a lease from a long-lost mineral owner), the acquisition would be forbidden. Such an acquisition would give the appearance of impropriety, and it almost certainly would be an interest that the landman would not have acquired but for his unauthorized use of information previously given to him in confidence. Id., at 19-27.

K. Landman Liability for Preparation of Abstracts

"[W]hen an attorney is employed by a purchaser or lender to investigate the title of the owner, there is an implied contract between the attorney and that employer. That implied contract requires the lawyer to exercise reasonable care and skill in undertaking his duties, and if he is negligent or fails to exercise reasonable care, he may be liable for the loss occasioned thereby." See Savings Bank v. Ward, 100 U.S. 195 (1880). It can reasonably be assumed that the court will impose the same implied contract on a landman who undertakes to fulfill that role.

There is no doubt that this implied contract is the area of greatest risk to the landman. If the landman agrees to take on such a job, he must use reasonable care and skill to accomplish it, and failure to do so could bring liability. If the landman agrees to create an abstract, then his greatest risk comes from his contractual relationship with his employer. The courts, in all probability, will hold the landman to a reasonable care and skill standard. Allot, Unanticipated Liability of the Landman, 31 Rocky Mtn. Min. L. Inst. § 21.02[3] at 21-5 to 21-6 (1985).

L. Other Potential Sources of Liability

1. Lawyers

State and Federal Securities Laws. Other potential sources of liability for lawyers in natural resources transactions may include Blue Sky Laws and Federal Securities laws. Under the Texas Blue Sky Law,

"[a] person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable...jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer." Tex. Rev. Civ. Stat. Ann. art. 581-33F(2) (Vernon 1964 and Supp. 1992). Under the Louisiana Securities Law, La. R.S. 51:701 *et seq.*, it is "unlawful for any person in connection with the offer, sale, or purchase of any security, directly or indirectly, . . . 1) [t]o employ any device, scheme, or artifice to defraud [or] 2) [t]o engage in any transaction, act, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or seller." La. R.S. 51:712(D). Included in the definition of "security" set forth in Section 702(15)(a) of the Louisiana Security Law is a "fractional undivided interest in oil, gas, or other mineral rights. . . ." See also Caldwell v. Trans-Gulf Petroleum Corp., 322 So. 2d 171 (La. 1975).

For more information concerning these types of liability, see John J. Michalik, Annotation, Attorney's Preparation of Legal Document Incident to Sale of Securities as Rendering Him Liable under State Securities Regulation Statutes, 62 A.L.R.3d 252 (1975); Marc I. Steinberg, Attorney Liability under the Securities Laws, 45 S.W.L.J. 711 (1991); 66 Tex.Jur.3d Securities Regulation § 36 *et passim* (1989); Securities Lawyers' Responsibility and Accountants' Liability: Disclosure of Contingent Liabilities, 53 Tex. L. Rev. 1483 (1975); and Sterba, supra, Ch. 10.

Conflicts of Interest. In Smith v. Cross Marine, Inc., 576 So. 2d 997 (La. 1991), an attorney and his law firm had represented a limited partnership for several years in general legal matters. The limited

partners of the partnership brought suit on behalf of the partnership against the general partner, and the law firm sought to continue to represent the limited partnership in general legal matters and also to represent the general partner in its dispute with the limited partners. In Smith, the Louisiana Supreme Court reversed the Court of Appeals with no opinion. In a concurring opinion (the only written opinion in this case), Justice Calogero concluded that a conflict of interest existed and that under Rule 1.7 of the Louisiana Rules, the attorney's disqualification was clearly mandated unless both the general partner and the limited partner consented to the representation. A recent court of appeals case cautions, however, that "disclosure of a conflict is not . . . a license to intentionally advance the interests of one party to the known detriment of another . . . A waiver by the client of objection to a conflict is not a waiver of that client's right to complain about the intentional infliction of harm by the attorney or the 'obvious negligence' of the attorney to prevent such harm." See Schlesinger v. The Home Ins. Co., 672 So. 2d 701 (La. Ct. App. 4th Cir.) (Barry, J. concurring), writ denied, 679 So. 2d 1381 (La. 1996).

Another area in which a conflict of interest may arise is in the corporate family context; that is, when an attorney is asked to represent a party opposing an affiliate while concurrently representing the corporate parent. Although the Texas Rules suggest that there are instances in which such representation would not violate the general conflict of interest rule, Rule 1.06, a minimum of jurisprudential guidance may be found addressing this issue. See Tex. Disciplinary R. Prof. Conduct 1.06 cmt. 11 (suggesting that "a lawyer representing an enterprise with diverse operations may accept employment against the enterprise in a matter unrelated to any matter being handled for the

enterprise if the representation of one client is not directly adverse to the representation of the other client"); see also Gould, Inc. v. Mitsui Mining and Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990) and Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980). A recent ABA opinion provides additional guidance. Formal Opinion No. 95-390, "Conflicts of Interest in the Corporate Family Context," states that "[a] lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter." After providing these general guidelines, the opinion sets forth specific circumstances in which a lawyer is ethically required to obtain the consent of the corporate client prior to accepting such representation but cautions that, even when such consent is not ethically required, "as a matter of prudence and good practice a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation." Id. For an excellent discussion of such issues, see Hoppe, "Legal Ethics for Inhouse Counsel," Paper Presented to the Corporate Counsel Section of the Houston Bar Ass'n (May 9, 1996). For useful discussions of: (i) potential conflicts of interest resulting from representing several parties which potentially may be liable under federal environmental laws; (ii) the potential for attorney liability from supervising non-attorney consultants; and (iii) the implications for attorneys working in non-attorney roles, see Chaumette, Multiple Representation and Disclosure: Ethics in an Environmental Practice, 1999 La. Min. L. Inst.: Environmental Law for the Oil and Gas Lawyer and Landman.

Cone of Silence or "Chinese Wall". In Petrovich v. Petrovich, 556 So. 2d 281 (La. Ct. App. 4th Cir. 1990), writ denied, 559 So. 2d 1377 (La. 1990) and 559 So. 2d 1379 (La. 1990), a divorce case, the wife moved to disqualify the husband's law firm since an associate in that firm had represented the wife when the associate was with another law firm. The associate had rendered a second opinion on the entirety of wife's marital dispute. The Fourth Circuit upheld the trial court's refusal to disqualify, and held that, as the second firm had built a "cone of silence" around the associate, any actual or appearance of impropriety had been avoided. See Gallagher & Hanen, supra, at 1125, for a discussion of Texas rules applicable to Chinese Walls.

Advertising. Louisiana Rule 7.3(a) prohibits direct personal solicitation of prospective clients with whom the attorney has no prior relationship. The rule provides:

> (a) A lawyer may not solicit professional employment, in person, by person to person verbal telephone contact or through others acting at his request, from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

The ABA Model Rules, Louisiana Rule 7.3(a), and Texas Rule 7.02, refer to "prospective clients," not to laypersons, so it is arguable whether direct solicitation of "sophisticated clients" such as other lawyers is permissible.

Some states have amended rules similar to Louisiana Rule 7.3 to expressly exempt contact with lawyers from the ban on personal

solicitations. See the discussion of the Texas Rules in Part VIII, infra. "The Louisiana State Bar Association's Committee on Lawyer Advertising is currently revising Rule 7.3. . . . The Committee's current draft would allow written solicitation of other attorneys, as well as of former and existing clients, relatives and close personal friends, or others with whom the attorney or firm has a prior business relationship, without the need to mark such written communications as advertising." Marcel Garsaud, Jr., Legal Ethics-Malpractice/ Disqualification, in 40th L.S.U. Min. L. Inst. (March 25-26, 1993).

2. Commercial Negotiators

For other potential sources of liability for commercial negotiators, see Allot, supra, passim, which discusses potential liabilities of being treated as a real estate broker, liabilities involving the unauthorized practice of law, and liabilities involving securities. See also Robert R. Ries, The Unauthorized Practice of Law in Texas, 60 Tex. B.J. 37 (Jan. 1997).

For a discussion of the potential for attorney liability from supervising non-attorney consultants, and the implications for attorneys working in non-attorney roles, see Chaumette, supra.

M. Corporate Counsel

Additional ethical and practical problems arise when corporate counsel serves in dual roles as both attorney and officer or director or other executive of the corporation. Broadly characterized, these problems involve: (i) retaining the attorney-client privilege as to

confidential communications when (a) corporate counsel provides both business and legal advice and (b) as an officer of the corporation, he possesses the power to waive that privilege; (ii) protecting the work product privilege for documents prepared in anticipation of litigation; (iii) disqualification of corporate counsel because he is either named as a co-defendant in corporate litigation or because he will be called upon to testify; (iv) conflicts of interest in balancing duties as an attorney and officer of the court with the obligation as an officer or other executive to satisfy the corporation's business needs; (v) increased risk of liability for both corporate counsel and the corporation, including that of corporate counsel because of his dual capacity, as well as that arising from the application of a heightened standard of care to a corporate officer with a special knowledge of the law, imputing knowledge held by corporate counsel to the corporation, and broader disclosure in response to an auditor's lost contingency requests; (vi) insurance coverage disputes, including difficulties in obtaining malpractice insurance and in resolving coverage conflicts between the Directors' and Officers' insurer and counsel's malpractice insurer; and (vii) environmental matters.

N. Contract Attorneys

For a discussion of the rules of ethics in situations in which contract attorneys are utilized, see Deborah L. Aaron and Deborah Guyol, Ethical Considerations Raised by the Use of Contract Attorneys, Law Prac. Mgmt. 28 (Jan./Feb. 1997).

VI. ABSENCE OF PRIVITY

A. Liability to Non-Clients

1. Texas: For years, the law in Texas has been that, absent fraudulent or malicious conduct, an attorney owes no duty to non-clients. Burnap v. Linnartz, 914 S.W.2d 142 (Tex. App.--San Antonio 1995, no writ); cf. Appling, supra (an attorney may owe a third person a duty to not negligently misrepresent a material fact, regardless of privity, especially if the attorney making the representation invites reliance on the part of the third person). Creative litigants are attempting to chip away at the barrier to malpractice actions provided by the doctrine of privity. For an extensive treatment of the subject of liability to non-clients, see Steele, supra; Comment, Lawyers' Negligence Liability to Non-Clients: A Texas Viewpoint, 14 St. Mary's L.J. 405, 405 (1983); Joan Teshima, Annotation, What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client, 61 A.L.R. 4th 464 (1988); Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties, 61 A.L.R. 4th 615 (1988); Ward, Developments in Legal Malpractice Liability, 31 S. Tex. L. Rev. 121, 142 (1990); Baron, The Expansion of Legal Malpractice Liability in Texas, supra. For a thorough discussion of one commentator's views regarding the question of whether privity serves as or should serve as a bar to malpractice actions brought by third parties against attorneys, see Hazard, The Privity Requirement Reconsidered, 1999 Ethics Seminar, South Texas College of Law (February 16, 1996).

Moreover, Texas courts deem invalid "an assignment of a legal malpractice action arising from litigation. . . ." See Zuniga v. Grace, Looke & Hebdon, 878 S.W.2d 813, 818 (Tex. App.--San Antonio 1994, writ refused); see also Britton v. Seale, 81 F.3d 602 (5th Cir.

1996) (holding that under Texas law, assignment of legal malpractice claims from mother to daughter was invalid), reh'g denied, May 29, 1996; City of Garland v. Booth, 895 S.W.2d 766, 769 (Tex. App.--Dallas 1995, writ denied) (adopting holding of Zuniga); Delp v. Douglas, 948 S.W.2d 483 (Tex. App.-- Ft. Worth 1997, reh'g overruled), citing Garland and Zuniga in finding that, although malpractice claim passed to bankruptcy estate, interest was non-assignable and the Bankruptcy Code does not authorize trustee to sell non-assignable interest to another party, and finding that grantee had no standing to dismiss claims thereunder); McLaughlin v. Martin, 940 S.W.2d 261 (Tex. App.--Houston [14th Dist.] 1997) (holding that legal malpractice claims are not assignable even if they do not arise from litigation); Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App.--Houston [14th Dist.] 1997) (holding that the same public policy reasons for prohibiting assignment of legal malpractice claims also barred assignment of cause of actions against attorneys for conspiracy, violation of the DTPA, or other intentional torts). Thus, persons outside the attorney-client relationship, including the opposing party, have no cause of action for injuries they may sustain as a result of the failure of an attorney to perform a duty owed to a client; however, an attorney may be liable to third parties for fraudulent or malicious conduct. See Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d at 472. See also Benoit v. Fleet Finance, 602 So. 2d 182 (La. Ct. App. 3d Cir. 1992).

However, it should be noted that there is a trend in the country toward eroding this privity requirement, especially in third-party-beneficiary situations, such as where an attorney mistakenly leaves an intended heir out of a will, and in cases involving negligent misrepresentation in which it may be shown that the attorney invites a

third person to rely on a misrepresented material fact. Notwithstanding the attempts to abrogate the barrier to attorney liability for malpractice provided by the doctrine of privity of contract, in Texas the privity requirement continues to serve as a bar against liability of a lawyer to third persons, absent special circumstances. Dickey v. Jansen, 731 S.W.2d 581 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.); Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716 (Tex. App.--San Antonio 1986), writ dism'd by agr., 729 S.W.2d 690 (Tex. 1987). Compare Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996) (holding that "an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust," but declaring in a footnote that the court "express[es] no opinion as to whether the beneficiary of a trust has standing to sue an attorney representing the trustee for malpractice") with Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996) (holding that attorney-client privilege applies to protect confidential communications between attorney and trustee from disclosure to beneficiaries; "notwithstanding the trustee's fiduciary duty to the beneficiary, only the trustee, not the trust beneficiary, is the client of the trustee's attorney"). Some commentators believe that it is only a matter of time before Texas's privity test is rejected for attorneys as it has been for other professionals, see Ward, supra, and Baron, supra. See also Taco Bell Corp. v. Cracken, 939 F. Supp. 528 (N.D. Tex. 1996) (finding that, under Texas law, a party to the lawsuit could not recover from the attorneys representing the adversary for conduct they engaged in as part of their duties in representing their client); but see Hideca Petroleum Corp. v. Tampimex Oil Int'l, Ltd., 740 S.W.2d 838, 847 (Tex. App.--Houston [1st Dist.] 1987, no writ) (although noting that "some Texas courts have declined to recognize a cause of action for negligent

misrepresentation to third parties in cases involving attorneys, citing First Municipal, 648 S.W.2d at 417-418, opining that "the law in Texas concerning negligent representation to third parties does not yet appear to be fully settled," and concluding that "a party to a contract to perform services generally owes a common law duty to perform with ordinary care and skill, and negligent omission or commission relating to the performance of the contract is a tort as well as a breach of contract"). If the privity requirement were absent, the Restatement (Second) of Torts § 552 (1977) ("Information Negligently Supplied for the Guidance of Others") test would likely apply, according to First Municipal, 648 S.W.2d at 413). However, even under this test, there is only liability for loss caused by justifiable reliance upon information. Id.; see also Appling, 991 S.W.2d at 794. With specific disclaimers in the opinion directed at any nonclient third parties or nonclient addressees who may view the opinion, an attorney may be able to prevent "justifiable reliance" upon the opinion by third persons.

Years of unvarying decisions by Texas courts appear to support this view. In the 1988 federal case which followed First Municipal, Marshall v. Quinn-L Equities, discussed infra, the court held that the duties of an attorney extend only to clients with whom there is privity. The court reasoned that there was not an attorney-client relationship, nor the kind of dealings over time between the attorneys and plaintiffs which would justify the type of trust or reliance necessary to establish the existence of a fiduciary relationship. "That it may have been Plaintiffs' belief that Jones Walker was the law firm for the partnership...does not make it so. Potential investors were informed in the private [placement] memorand[a] that they should not construe the contents of the memorandums [sic] as legal advice and should, in fact, consult

independent counsel's advice." Marshall v. Quinn-L Equities, 704 F.Supp. 1384 at 1396 (emphasis added); see also Barnett v. Sethi, 608 So. 2d 1011 (La. Ct. App. 4th Cir. 1992) (holding that "the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists" . . . [and] finding that because the plaintiff "clearly viewed [the defendant] as its attorney, not merely as a sort of real estate agent," an attorney-client relationship existed).

Similar to the disclaimer in Marshall that dissuaded the court from finding the requisite trust or reliance necessary to establish the existence of a fiduciary relationship, disclaimers addressed to third parties in legal opinions should likewise serve to prevent the establishment of justifiable reliance upon the opinion in cases where the privity defense is not applicable. In Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns, 710 S.W.2d 604, 607 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.), certain disclaimers were not given effect because some lease terms were held to be unconscionable.

Thus, since the privity requirement appears to be continually under scrutiny by the courts which may seem to extend attorney liability to non-clients based upon tort principles, in open disregard of fundamental principles of contract law, drafters of opinions that may be obtained by third parties should attempt to prevent any "justifiable reliance" upon their opinions by non-client third parties by including an appropriate disclaimer in the opinions, such as that recommended, infra, Section II, Part D.6.

2. Louisiana: In Montalvo v. Sondes, 637 So. 2d 127, 130 (La. 1994), the Louisiana Supreme Court declared that "Louisiana subscribes

to the traditional, majority view that an attorney does not owe a legal duty to his client's adversary when acting in his client's behalf." Accordingly, "[a] non-client . . . cannot hold his adversary's attorney personally liable for either malpractice or negligent breach of a professional obligation." Id. The court explained that the rationale behind this rule was not to diminish a lawyer's responsibility for his work, but rather "to prevent a chilling effect on the adversarial practice of law and to prevent a division of loyalty owed to a client." Id. In Joyner v. Wear, 665 So. 2d 634 (La. Ct. App. 2d Cir. 1995), writ denied, 668 So. 2d 370 (La. 1996), a physician brought an action against two attorneys who represented adverse parties in prior litigation to which the physician was not a party, claiming that they had defamed him, suborned perjury in another case, and caused an investigation of the physician by the FBI and the state Board of Medical Examiners. The court of appeals affirmed a summary judgment in favor of the attorneys, concluding that because the physician was a non-client, a non-adversary and could not assert third-party beneficiary status, he could not bring an action against those attorneys for allegedly advising a witness to withhold a certain incriminating document. Id. at 639.

In the Penalber v. Blount case, 550 So. 2d 577 (La. 1989), the court held that an attorney can be held liable to a non-client for his intentionally tortious acts, but in a footnote, stated that its opinion did not address situations in which the non-client is not an adversary but rather a third party beneficiary. In at least one situation, the court appears willing to impose liability to third-parties for damages arising through the negligence of an attorney: namely, when an attorney is engaged to "confect a will to institute third party's legatees." Such a situation, the court explained, involves a stipulation pour autrui, and "an

attorney's clear error in confecting a will, which the exercise of a reasonable competence would have avoided, constitutes a breach of the contractual stipulation for the benefit of the intended legatee." See also Shaw v. Everett, 582 So. 2d 195, 197-98 (La. Ct. App. 4th Cir. 1988) (addressing "whether non-client can assert a claim for damages against an attorney for the negligent breach of a professional obligation he owes the court, his professional and the public and finding such a cause of action can exist"). In Anderson v. Collins case, 648 So. 2d 1371, 1378-79 (La. Ct. App. 2d Cir.), writ denied, 653 So. 2d 576 (La. 1995), the court of appeals held that a lawyer representing a succession representative and engaged to provide legal assistance to the succession representative in his fiduciary capacity as administrator of the succession owes a duty not only to the succession representative but to the succession on whose behalf his client is acting in a fiduciary capacity.

One Louisiana case is of special concern to those preparing title opinions. In Capital Bank & Trust Co. v. Core, after examining cases from other jurisdictions in which the court has recognized the liability of an abstracter to a third party who relies upon an abstract of title, accepted the plaintiff's argument that "a lender, who advances funds on the strength of a title opinion rendered to it by an attorney whom the lender did not directly retain, has the right to a direct action against the attorney." The court deemed sound the reasoning of the Supreme Court of Michigan in deciding to extend liability in the abstractor cases based "on the third party beneficiary concept, the foreseeability of use rule, and cases involving fraud or collusion" and concluded that "the principles involved bring about just results," and thereafter adopted them as its own. Id. at 288. The court equated the situation presented by the plaintiff's claim to the Civil Code provision for a

stipulation pour autrui, by which one may bind himself for the benefit of a third party. Id. Cf. Citizens Nat'l Bank v. Gilsbar, Inc., 581 So.2d 719 (La. Ct. App. 1st Cir. 1991) (the reasoning of the court in Capital Bank & Trust Co. regarding prematurity of the Bank's action in that case is stated to be invalid by the Louisiana Supreme Court's reasoning in Rayne State Bank & Trust v. National U. Fire Ins., 483 So.2d 987 (La. 1986)).

B. Intended Beneficiaries

To avoid any question concerning the extent of the attorney-client relationship and the identity of intended beneficiaries of opinions rendered by the examining attorney, the disclaimer discussed in Section II, Part D.7, supra, of this paper should be included in the examiner's opinion. See discussion of potential liability to non-client, intended beneficiaries in Comment, Lawyers' Negligence Liability to Non-Clients: A Texas Viewpoint, at 418-20. The attorney preparing a title opinion should expressly negate any intention of the examiner to benefit anyone other than the addressee of the opinion (provided that the client's objectives are consistent with such a disclaimer). Code DR 6-101; Texas Rule 1.02. In the Evans v. Waguespack case, 638 So. 2d 1153 (La. Ct. App. 1st Cir. 1994), the court rejected plaintiff's claim against a law firm who prepared a title opinion for the plaintiff's mortgagee in connection with the purchase of immovable property on grounds that the title opinion, which allegedly failed to disclose defects in the title to such property, was issued to the mortgagee and not the plaintiff-mortgagor and contained a limitations clause stating that the "'opinion is neither assignable nor heritable. . . .'"

In Louisiana, it appears that under certain circumstances in which the non-client is a third-party beneficiary of the attorney's representation (at least where that representation involves succession matters), the court may permit a non-client to proceed against that attorney for legal malpractice. See, e.g., Succession of Killingsworth v. Schlater, 292 So. 2d 536, 542 (La. 1973) (finding attorneys liable to intended beneficiaries of negligently prepared wills by applying an analysis leading to the conclusion that the non-clients were third party beneficiaries of the attorney-client relationship). Because the decision of the court in Appling, supra, abrogating the privity barrier in Texas that, for years, shielded attorneys from liability for malpractice while allowing actions in tort, apart from ordinary negligence, with respect to claims against someone else's lawyer in favor of third persons, examining attorneys should exercise prudence and follow appropriate risk management practices to prevent their opinions from becoming the subject matter of a test case to attack the privity requirement.

VII. UTILIZATION OF OPINIONS

A. Opinions of Others

In Section II, Part D.3 of this paper, instances in which an examining attorney bases her or his opinion in part upon the opinion of another attorney are discussed in the context of Code DR 1-102(A) and 6-102(A) and Texas Rule 1.03(b) which require the examining attorney to avoid dishonesty, deceit, or misrepresentation, not attempt in advance to limit her or his liability to the client for malpractice, and explain all matters to the extent reasonably necessary to permit the

client to make informed decisions regarding the representation. If, in the preparation of an updated title opinion, the examining attorney relies upon opinions of other counsel, the attorney should disclose to the client that (i) the opinion of the examiner relies upon the opinion of other counsel and identify the opinion relied upon, and (ii) the accuracy of the opinion of other counsel is assumed and has not been independently verified. If possible, to establish privity between the other counsel and the client, the examining attorney may consider requesting the other counsel to address her or his original opinion to the client or re-issue an existing opinion with the client as an addressee. As part of the obligation of Code DR 6-101 to provide competent representation and Texas Rule 1.01(a), the examining attorney who relies on an opinion of other counsel (i) should not opine as to matters covered by the other counsel's opinion and (ii) is obligated to advise the client in writing of any doubts concerning the accuracy or reliability of the opinion of other counsel.

B. Use By Third Parties

Clients may request examining attorneys to prepare opinions on matters that affect the client for the use of someone other than the client. See Texas Rule 2.02; Louisiana Rule 2.3. Under the Texas Rule, the examining attorney must reasonably believe that providing the opinion to the third party is compatible with other aspects of the examining attorney's relationship with the client. Texas Rule 4.01 requires the examining attorney to not knowingly make a false statement of material fact or law to a third person. Only after consultation with the client involving full disclosure, and the consent of the client is obtained, should an examining attorney opine to a third

party in a matter that could disadvantage or adversely affect a client. Code DR 4-101; Texas Rule 1.05. The examining attorney who is requested by her or his client to prepare an opinion for the use of someone other than the client should be careful not to communicate with the third party for whom the opinion is prepared if the examining attorney knows that the third party is represented in the matter unless the examining attorney has the prior consent of the attorney representing the third party. Code DR 7-104.

VIII. DOCUMENT RETENTION

General Considerations. Document retention policy is not only relevant to commercial negotiators and landmen, but is an important consideration for all attorneys. Janet Douvas Chafin offers the following seven elements of a well-considered document retention policy:

(1) All records are retained for at least the minimum period stated in any applicable statute or regulation;

(2) All records effecting obligations of the company are retained for a period of time assuring their availability when needed;

(3) Records are made and maintained substantiating compliance with relevant laws;

(4) Document destruction occurs pursuant to a standard policy developed for business reasons so that the company cannot be

accused of deliberately destroying records in anticipation of a specific problem;

(5) Destruction procedures include a mechanism which permits management to halt the destruction of records (a) upon receipt of service of legal process requiring production of documents, (b) upon learning of a relevant government inquiry, or (c) during the course of voluntary cooperation with governmental authorities;

(6) Vital records are identified and safeguarded; and

(7) The privacy and security of records are appropriately assured.

Chafin, Janet Douvas, Corporate Document Retention Policies and Related Ethical Considerations, Presentation to the Houston Chapter of the American Corporate Counsel Association, (June 11, 1996), quoting Fedders & Guttenplan, Document Retention & Destruction: Practical, Legal and Ethical Considerations, 56 Notre Dame L.Rev. 5 (1980).

Chafin strongly recommends not only devising and following a formal policy governing document retention by the firm or other organization, but to follow that policy strictly and consistently. Id. If an organization does not do so, the organization is subject to sanctions or the "adverse inference rule." Id.

Sanctions may be imposed whenever a litigant "is on notice that documents and information in its possession are relevant to litigation, or

potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroy such documents and information." Id. at 2, quoting Wm. T. Thompson Co. v. General Nutrition Corp., Inc., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (emphasis in original). Put another way, "no duty to preserve arises unless the party possessing the evidence has notice of its relevance." Id., quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991).

In addition to imposition of sanctions, if the organization is at some point required to produce, pursuant to a discovery request, documents destroyed by the company in a way different from how it typically handles such documents, then the firm, and the client of that firm, are subject to the "adverse inference rule." Id. at 3. Under this rule, documents destroyed in a way that does not strictly conform to the document retention policy of the organization may lead the judge at trial to instruct the jury that such destruction gives rise to an inference, or presumption, that production of the document would have been unfavorable to the party responsible for the destruction of the document. Id., citing Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 133 (S.D. Fla. 1987); see also Coates v. Johnson & Johnson, 756 F.2d 524, 551 (7th Cir. 1985). Chafin notes that some courts require a showing of intent or proof of fault or bad faith destruction of documents before imposing the adverse inference rule. Id. (citations omitted).

Chafin cites one case in which the Court of Appeals for the Eighth Circuit enumerated three factors which courts should consider in deciding whether to impose the adverse inference rule:

(1) a determination of whether the document retention policy is reasonable considering the facts and circumstances surrounding the relevant documents;

(2) whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints; and

(3) whether the document retention policy was instituted in bad faith.

Id., citing Lewy v. Remington Arms Co., Inc., 836 F.2d 1104 (8th Cir. 1987). Chafin goes on to suggest that, where the destruction of documents was pursuant to a reasonable document retention policy, the litigant responsible for destroying documents in conformance with that policy is generally not subject to imposition of the adverse inference rule. Id., citing Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 486 (S.D.Fla. 1984); Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

Texas and the Fifth Circuit. Chafin notes that Texas state courts and the Fifth Circuit follow the general guidelines outlined above: that the intentional destruction of documents relevant to actual or potential litigation raises a presumption that the evidence would have been unfavorable to the party responsible for destroying the evidence. Id., citing H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.-- Waco 1975, writ dism'd) (citing McCormick and Ray, Texas Evidence) (2nd Ed.), Vol. 1, s.103, pp. 141-42); Fuller v. Preston State Bank, 667 S.W.2d 214, 220 (Tex. App.-- Dallas 1983, writ ref'd n.r.e.).

Chafin notes that the Fifth Circuit requires "evidence of bad faith before the adverse inference may be drawn." Id., citing Vick, 514 F.2d at 737; Pressey v. Patterson, 898 F.2d 1018, 1022 (5th Cir. 1990). As noted, infra, the rule in the 5th Circuit is that the presumption does not apply when the evidence is destroyed under routine procedures, unrelated to the litigation.

Courts have not specifically rejected particular retention periods selected in good faith by companies who have properly formulated a specific document retention program. Courts focus on practical factors such as legally-mandated retention periods, customer expectations, industry practice, the nature of the records, and the likelihood that the records might be needed in pending or future litigation.

Chafin notes that one should be very mindful of any statutory document retention periods which may be applicable, for the destruction of documents prior to the expiration of such a statutory period "evokes a strong suspicion, if not presumption, that the records were destroyed in bad faith." Id. at 4. However, Chafin goes on to reiterate that, "when an organization destroys records after the legally-mandated period and pursuant to a formal document retention program courts are likely to consider the documents to have been destroyed in a reasonable manner and in good faith." Id.

Recommendations. Chafin recommends that, in order to minimize the likelihood that an adversary will be able to obtain sanctions or a jury instruction pursuant to the adverse inference rule, an organization should implement the following:

(1) A formal written document retention policy designating appropriate, reasonable retention periods for various categories of documents;

(2) Incorporate into the documentation retention program, through appropriate legal research, compliance with minimum legally-mandated retention periods;

(3) Regularly document the existence and consistent implementation of the specific requirements of the document retention policy; and

(4) Establish appropriate procedures to intercept the usual document destruction schedule in the event a legal duty arises to preserve certain documents beyond the normal retention policy, such as threatened or commenced litigation, government investigation, audit, etc.

As Chafin makes clear, in order to minimize the risk of liability, a document retention policy must be strictly and consistently followed. The organization implementing the policy must be able to demonstrate that the policy existed and has been consistently followed prior to the litigation. If these principles are not followed, either sanctions or a negative jury instruction may result if it is determined that discoverable documents have been improperly destroyed. Organizations that create and follow a proper document retention program may be able to avoid costly litigation, and also maximize the probability that any litigation will end favorably for the organization and for the client.

IX. ADVERTISEMENTS AND OTHER SOLICITATIONS

A. Texas.

The Advertising Review Committee of the Texas State Bar Association recently adopted 16 Internal Interpretive Comments (the "Comments") to be used by its staff members in determining whether advertisements and writings comply with Part Seven of the Texas Rules, which Part is captioned "Information about Legal Services." These Comments provide objective standards by which to assess attorney advertising and may be found in 58 Tex. B.J. 1046 (1995). The Comments address the following seven issues, each of which is discussed in turn below: 1) attorney portrayals and client testimonials.; 2) unjustified expectations; 3) contingent fees and advances; 4) disclaimers and statements; 5) specialization; 6) brokering cases; and 7) written solicitations.

1) Attorney portrayals and client testimonials

Rule 7.04(g) prohibits a visual portrayal of an attorney by anyone other than the attorney whose services are being advertised. The Comments expand on this rule and require that any radio or television advertisement that presents persons purporting to be clients of the advertising attorney to be actual clients thereof, and that when actors are used instead of actual clients, that fact must be disclosed by a predominant display or announcement that the advertisement is a dramatization. When an attorney whose services or whose firm's services are being marketed is to be visually portrayed in an

advertisement, no actors may be used even with a disclaimer; rather, one or more of the attorneys whose services are being advertised must fulfill that role.

2) Unjustified expectations

Rule 7.02 states that an attorney shall not make a false or misleading communication about his qualifications or those of his firm. To this end, the Comments require that advertisements or writings that contain statements about results obtained on behalf of clients include (i) a prominent disclaimer that such results may not be achieved in each case, and thus, are not indicative of future performance, and (ii) information regarding the nature of the case, the nature of the damages, and the actual amount recovered, if less than the judgment. Moreover, advertisements may not contain representations that the attorney will loan or advance specific sums of money (e.g. "We will loan up to $2,000 to clients") but may include a statement that actual litigation expenses, court costs, and other financial assistance may be advanced.

3) Contingent fees and advances

The Comments also state that advertisements which indicate a willingness on the part of an attorney to provide services on a contingent fee basis must (i) comply with Rule 7.04(h), which requires, if a specific percentage fee is disclosed in such advertisements, that such advertisements also indicate whether the percentage is computed before or after expenses are deducted from the recovery, and (ii) disclose whether the client will be responsible for any or all court costs and other expenses.

4) Disclaimers and statements

More generally, the Comments reiterate the requirement under Rule 7.04(c) that mandatory disclaimers or statements concerning specialization are to be separate and apart from the balance of the advertisement, and be conspicuous. The Comments then define "separate and apart" to mean that the disclaimer or statement must be separated by at least one blank line from other statements, if written, or placed separate from other printed text on the screen, if on television. "Conspicuous" is defined as meaning that the text of the disclaimer or statement is "of sufficient height and location to be easily read by the average consumer." An announcement stating new or changed associations, offices, or other such matters, and advertisement by an attorney in a legal directory or legal newspaper, however, is exempt from the disclaimer or statement requirements of the Rules.

5) Specialization

Expanding on the prohibitions concerning advertisement of attorney certification or specialization found in Rule 7.04, the Comments state that an attorney is prohibited from advertising that he has been certified by an organization which implies that its members possess special competence; no such organization has been so accredited by the Texas Board of Legal Specialization as required by the Rules. If an advertisement identifies areas of practice which require an attorney to make more than one disclaimer concerning board certification, such statements may be contained in one paragraph. The paragraph shall

not, however, include statements regarding other matters such as licensing.

6) Brokering Cases

The Comments also require an advertising attorney, who, either by past experience or practice, knows or should know that certain types of cases solicited are likely to be referred to another attorney if those cases should proceed to litigation, to disclose such fact in accordance with Rule 7.04(l), which requires that such disclosure be conspicuous.

7) Written Solicitations

The Comments also set forth guidelines by which to evaluate written solicitations under Rule 7.05, "Prohibited Written Solicitations." These guidelines include suggestions as to marking such solicitations as advertisements and establish size, typeface, location, and color requirements for such marking. The Comments also point out that if an advertisement or writing refers to other information which may be available to a person (e.g., taped messages or brochures concerning legal matters), such information is deemed part of the advertisement or writing, and if not sent to a prospective client with an individualized letter, must be reviewed by the Advertising Review Committee, as required by Rule 7.07 of all other written solicitations, with few exceptions. In the February 1997 edition of the Texas Bar Journal, the Advertising Review Committee issued Interpretative Comment 21 addressing advertisements in telephone directories or similar publications that are initially disseminated on August 1, 1997 or thereafter. This interpretative comment sets forth guidelines with respect to technical

violations and non-technical violations of these advertising rules; additional concerns arise because advertisements in such directories or publications cannot be corrected nor can their dissemination be halted because of the nature of the directory or publication.

B. Louisiana. In Louisiana, the rules governing attorney advertising are similar but simpler. The Louisiana Rules set forth the standards of attorney disciplinary enforcement. Rules 7.1 through 7.4 thereof, entitled "Information about Legal Services," establish the guidelines by which attorney advertising is evaluated in Louisiana.

First, the Louisiana rule regarding communication of fields of practice is simple: any claimed certification, specialization, or expertise must be recognized or approved in accordance with the requirements of the Louisiana Board of Legal Specialization as a prerequisite to any such claims. Louisiana Rules of Professional Conduct 7.4. Second, written communications to prospective clients must clearly state the name of at least one attorney in good standing who is responsible for its contents. Id. Rule 7.2(b)(ii). Of note is the fact that the Louisiana Rules are silent as to the brokering of cases, provision of disclaimers and statements, and advances and loans, but Rule 7.1(a)(vii) permits the portrayal of an attorney by a non-attorney if such depiction is labeled a dramatization.

X. APPLICATION OF STATE ETHICS RULES TO FEDERAL ATTORNEYS

One important issue that gained notoriety beginning in 1989 is whether state ethics rules apply to federal attorneys, specifically those

investigating suspected criminal activity who wish to directly contact individuals known by those federal attorneys to be represented by counsel. A series of actions, listed in chronological order, that were taken with regard to this issue, follows:

1. In 1989, United States Attorney General Richard Thornburgh issued to all United States Attorneys a memorandum now known as the "Thornburgh Memorandum" ("Communication with Persons Represented By Counsel," Office of the Attorney General, June 8, 1989) which expressed the view of the Attorney General that federal attorneys are not bound by the ethics rules of any state which govern attorney conduct.

According to Attorney General Thornburgh, action was needed to protect the ability of federal investigators to investigate crime because of an increasing tendency to interpret state rules governing attorney conduct, particularly those arising from ABA Model Rules of Professional Conduct Rule 4.2 or its predecessor, Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility, as prohibiting the right of federal investigators to communicate with persons represented by counsel, even though the Constitutional right to counsel had not yet attached. Along this line of reasoning, a person, who himself or herself may or may not be the target of an investigation, need only retain counsel to prevent federal prosecutors from contacting him in their effort to investigate a particular crime involving that person as a target or even as a witness. State ethical guidelines, while not entirely consistent, often followed this rule, and it appears the Attorney General felt that it was too great a burden

on federal prosecutors to familiarize themselves with the ethical rules of all states prior to attempting to investigate a crime in a particular state.

The action outlined by Attorney General Thornburgh was a change in policy which in effect placed federal interests above those of individual states, as represented by the ethics rules governing attorney conduct in that state, when federal attorneys were investigating individuals suspected of violating federal law. Evidently, this new policy was intended to make federal prosecutors immune from prosecution by state disciplinary boards for violating the prohibition on contacting persons represented by counsel. The following excerpt from the Memorandum summarizes the position taken by Attorney General Thornburgh:

> The Department [of Justice] has taken the position that, although the states have the authority to regulate the ethical conduct of attorneys admitted to practice before their courts... that authority permits regulation of federal attorneys only if the regulation does not conflict with the federal law or with the attorneys' federal responsibilities. [Citations omitted.]

"Communication with Persons Represented By Counsel," Office of the Attorney General, June 8, 1989, as provided in In the Matter of John Doe, 801 F.Supp. 478 app. (D.N.M. 1992). The Attorney General feared that expansion of such state disciplinary rules could be undertaken in order to "interfere with the duties of federal officials, including the President of the United States, the Secretary

of State, and the Attorney General of the United States, all of whom may be lawyers." Id., citing Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (5th Cir. 1989).

As demonstrated above, this shift in Department of Justice policy was made administratively, without involving Congress. Not surprisingly, this change initiated a great deal of controversy, including several cases brought in federal courts which all held that the Department did not have statutory authority to preempt state ethical rules. Allen Samuelson and Robert Maxwell, "State Ethics Rules Now Apply to Federal Prosecutors," (site visited Sept. 3, 1999) <http://www.rjoq.com/publish22.html>. See United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8th Cir. 1998); United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993).

2. In 1994, Attorney General Janet Reno issued a federal regulation which purported to exempt federal attorneys from state ethics rules uniformly prohibiting unauthorized contact with represented persons. 28 C.F.R. Part 77 (1994).

The purpose of this regulation was stated to be, in part, to eliminate "the uncertainty and confusion arising from the variety of interpretations given to [Rule 4.2 of the Model Rules of Professional Conduct] and analogous rules by state and federal courts and by bar association organizations and committees." Id. at Part 77.1(a). The portion of the regulation which purportedly exempted federal attorneys from state ethics rules with regard to investigations of organizations is provided as follows:

> A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

Id. at Part 77.10(a).

3. Federal Appeals Court Strikes Down Federal Regulation Published by Attorney General Reno.

In United States ex rel O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8th Cir. 1998), the Court of Appeals for the Eighth Circuit invalidated the regulation which sought to exempt federal attorneys from state ethics rules. In O'Keefe, the state ethics rule at issue was Missouri Supreme Court Rule 4.4.2, modeled on Model Rule 4.2, which forbade communications with represented parties except under very limited circumstances:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law* to do so.

Id. at 1253 (emphasis added). Attorneys representing the position of the United States Department of Justice argued in O'Keefe that the law, specifically 28 C.F.R. §77.10(a), authorized such ex parte contacts and in effect exempted its attorneys from complying with the Missouri rule. Id. at 1254. More specifically, the United States argued that its regulation supersedes the state ethics rule, and, in the alternative, the ex parte contacts were authorized by law and thus fell under an exception to the Missouri rule which provided that such contacts were permissible when authorized by law. Id. The District Court held, and the Court of Appeals affirmed, that the Attorney General lacked the authority to issue a rule preempting state ethics rules. Id. at 1257. The O'Keefe court grounded its holding on the precept that no agency can issue substantive regulations without the express authority of Congress. Id. at 1255; see also Chrysler Corp. v. Brown, 441 U.S. 281, 310, 99 S.Ct. 1705, 1721 (1979).

4. In February of 1999, Congress passed The Ethical Standards for Prosecutors Act, P.L. 105- 277, Sec. 801, codified as 28 U.S.C. §530B, which expressly provided that federal attorneys are subject to state ethics rules as are any other attorneys.

Evidently, pursuant to the Ethical Standards for Prosecutors Act, Congress expressed its intent to reign in federal agencies which it viewed as disposed to trample on the authority of states authority to govern conduct of attorneys within their respective borders.

Since states historically possessed such authority, this Act was not seen as a departure from the law. Philip S. Anderson, American Bar Association, "Letters to the 106th Congress," February 22, 1999, (site visited Oct. 5, 1999) <http://www.abanet.org/legadv/congletters/106th/et22299.html>. However, Congress included a provision in the Ethical Standards for Prosecutors Act which directed the Attorney General to issue rules and regulations to comply with the Act. Id. at §530B(b). This proved to be one more opportunity for the current Attorney General to interpret the Act narrowly so as to favor attorneys representing the Department of Justice.

5. The day after the Ethical Standards for Prosecutors Act became effective, Attorney General Janet Reno published a regulation as required under the Act. 64 F.R. 19273, amending 28 C.F.R. Part 77 (1999).

The Ethical Standards for Prosecutors Act provided the Attorney General with an opportunity to construe the Act narrowly so as to maximize the freedom under which federal attorneys may operate. The language employed in the 1999 regulation issued by the Attorney General does not appear to conflict with the Act. However, the regulation does construe the Act as not limiting federal "*investigative agents* (even if they are attorneys), although, under the regulations, agents operating under the direction of a covered attorney will be required to conform their conduct if so required by the ethical rules that apply to the attorney." 64 F.R. 19273 (1999) (emphasis added). Following in the tradition of the Thornburgh Memorandum, this particular

interpretation appears to give the United States sufficient latitude that would nullify the apparent intention of Congress in enacting the Ethical Standards for Prosecutors Act and enable them to continue to maneuver within the constraints imposed by state and federal court ethical guidelines in conducting investigations of violations of federal law.

XI. RECENT DEVELOPMENTS

A. Example of a Self-Audit Privilege: the Environmental, Health, and Safety Audit Privilege Act.

The Environmental, Health, and Safety Audit Privilege Act, Tex. Rev. Civ. Stat. Ann. art. 4447cc (Vernon 1999) (within this subsection, the "Act") applies to landmen and the oil and gas industry. The privilege regarding environmental audit reporting is thus a creature of statute in Texas. Texas Rules of Evidence, Rule 501; see also the Act. There is no uniform recognition of such a privilege among other states. Spencer Savings Bank, SLA v. Excell Mortgage Corp., 960 F.Supp. 835, 840 (D.N.J. 1997). However, like Texas, several states have created this privilege for environmental audit reporting. Id. Other states have carved out similar privileges pertaining to other industries, such as the health care industry. Id.

The policy goal behind the Act appears to be to encourage regulated enterprises and those engaging in regulated activities to closely

evaluate their activities, and correct any problems, without penalizing those enterprises by making the resulting evaluative reports subject to discovery in future litigation. The self-audit report need not necessarily be produced in anticipation of litigation, and the self-audit report need not necessarily be prepared by counsel. However, the self-audit report, in Texas, must still be maintained as confidential as provided in the Act.

B. Technology Issues.

A very interesting discussion of several issues relating to ethics in the oil and gas industry can be found in Steele, supra. Two of the subjects Professor Steele discusses in his paper are addressed below.

1. Communicating with clients via email. Email communications with clients relate primarily to the attorney's duty of confidentiality. The American Bar Association has said that communicating with clients via email is an ethically permissible practice, since the medium affords both the client and the attorney with a reasonable expectation of privacy. Steele, supra, at Q-11, citing American Bar Association Formal Ethics Opinion 99-413. However, Professor Steele strongly suggests that the practitioner should follow the wishes of the client with regard to employing encryption in email communications or when, if ever, to limit use of email. Id.

In addition to his discussion of email, Professor Steele addresses use of what he refers to as "extranets", or bridgings of two or more separate networks together, such as those of a client and a law firm or those of a landman and a client. Professor Steele warns that there are problems inherent to using such arrangements. For example, one must take care

to change passwords frequently in order to ensure against continued access by those individuals from either end of the extranet who are no longer employed by their respective companies. Id. at Q-12 through Q-13.

Professor Steele sounds a somewhat ominous alarm when he states that acts of unauthorized access to and publication of attorney-client privileged material appear to be increasing. Id. Use of computers to communicate with clients, particularly through an extranet arrangement, should be carefully undertaken so that, should the need arise, the attorney may demonstrate that an adequate measure of care was taken to ensure against inadvertent disclosure of the information.

2. Inviting Case Descriptions & Other Commentary From Visitors to the Firm's Web Site. Professor Steele appears to caution against providing a mechanism in one's web site for a potential client to submit remarks which describe elements of the client's dispute or legal issue. One danger, according to Professor Steele, is when the potential client submits his remarks shortly before a statute of limitations has run which would otherwise bar his or her claim if not acted upon. Id. at Q-15. In such a scenario, the potential client may (i) sue the firm for malpractice for not acting upon his claim in time, believing however wrongfully that an attorney-client relationship had been formed upon the submission of his remarks, or (ii) sue the firm for malpractice for not acting upon his claim in time when he or she knew of the time constraint and saw an opportunity to obtain remuneration via the firm's web site, suspecting that such remarks are not checked regularly enough to save his or her claim. The central question here is, When can the firm be charged with a duty to such a potential client? Professor Steele

wisely suggests that no direct link be built into such web sites, and that no such comments need be solicited in such a fashion. Id. Following such advice will probably prevent many headaches in this age of rapidly changing computer and communications technology and uncertain legal and ethical standards relating to such technology.

3. Electronic Document Retention. As part of her discussion on document retention, Chafin, supra, Article VIII, raises the important issue of drafting document retention policies which address, among other items, employee computer files, and documents backed up on magnetic storage media. The following discussion elaborates on the discussion provided by Chafin.

The vast data storage capabilities of most corporate computer systems make it increasingly easy for those companies to store a large number of documents inexpensively. Of particular concern, due to its implications for fully responding to document production requests, are magnetic storage systems which allow a company to retain documents for exceedingly long periods of time. An important consideration in developing a document retention policy is the difficulty inherent in efficiently and reliably retrieving documents stored using such a system, especially if the documents were not created and saved using document management software which automatically indexes and categorizes documents upon their creation. Central to this is how quickly a storage subsystem can become obsolete, and how to protect against obsolescence. For example, files archived onto storage media in the late 1980s may be irretrievable using recently designed computer systems. Such files may be lost unless not only the magnetic storage subsystem itself is preserved and maintained in an operational condition, but also the

computer system to which the magnetic storage subsystem is attached, including its operating system, no matter how dated it may be. Moreover, files preserved on any older system should be transferrable to a newer system. If neither the original computer system, the magnetic storage subsystem, nor file transferability can be maintained, the files stored on the older medium should be transferred to a newer medium as soon as practicable. Companies exist who dedicate their businesses to performing such data transfers.

In addition, a document retention policy should provide for categorization of documents, define a retention period for documents in each category, outline document destruction and control procedures, and require strict employee adherence to the policy. Categorization indicates how much value documents belonging to a particular category represent to the company. A company should strive to retain for long periods of time only those documents that add value to the company, protect the company from litigation, and are not likely to adversely effect the company. If the value of information of documents for a particular category is less than the cost of storing it, the document should not be voluntarily retained beyond legally mandated retention periods, or other reasonable periods appropriate for the industry and the particular category of documents.

In addition to hardware considerations and document categorization, it is important to remember that document retention requirements apply only to a company's formal records. Informal records such as drafts, handwritten notes, calendars, planners, telephone logs, and historical files maintained by employees for their own use

should be destroyed as soon as possible once there is no longer a reasonable need for the company to retain such information.

To properly implement a document retention policy, company employees must be educated about the details of the policy. Employees need to understand the potentially adverse consequences which can result if a carelessly prepared e-mail or voice mail becomes public, and how easily such electronic messages can become public. E-mail messages are often recoverable from magnetic storage systems long after their intended use has expired. Compounding the potential for problems is the fact that many employees send carelessly composed messages, messages containing inappropriate jokes, sarcasm, or derogatory language about an individual or group which may seem harmless and funny at the time to the author and the recipients, but in the context of particular types of litigation may have horribly damaging consequences. To avoid such problems, an organization should seek to avoid a direct or implied expectation of privacy from developing in its employees by requiring all new employees to sign a consent letter which clearly explains that e-mail and all computer files are subject to review by the company, that the employee consents to such company review, and that acknowledges the right of the company to make such reviews.

Courts are increasingly recognizing electronic document storage systems to be equivalent to paper documents, and companies utilizing such systems are being required to produce information all materials which can be retrieved from any portion of a computer document storage retrieval system. The cost of locating, retrieving, and printing a hard copy has been assessed against the producing party, although the requesting party must pay to have a separate copy made from the hard

copy. This locating and retrieval process from a magnetic storage system could be extremely time consuming and expensive, not to mention the potentially damaging effect ancient documents may have in the litigation.

XII. CONCLUSION

Adherence to ethical standards and sensible practice and risk management policies in the preparation and use of title opinions by attorneys and in the discharge of employment obligations by commercial negotiators, such as landmen, will not only further the aims of state bar associations and landman associations to provide a segment of the public, clients, and other consumers of legal and professional services relating to the energy industry with access to the independent professional services of attorneys and other professionals who possess integrity and competence. Such adherence should also significantly reduce the risks to the examining attorney, commercial negotiator, or practicing landman of claims by clients or others in actions for malpractice based on negligence, or for breach of contract, fraud, or under other statutory causes of action. Beyond the ambit of ethical obligations that arise under the ethical standards established by the Louisiana Rules, the Texas Rules, and other standards discussed in this paper, decisions and choices by lawyers and landmen are made everyday in determining their conduct in title examination, rendering and utilizing opinions, and otherwise. Among other motives, economic self-interest should guide attorneys to make rational decisions that govern their conduct in preparing and utilizing opinions, and should similarly shape the actions of commercial negotiators and landmen in performing their services,

discharging their duties to clients, avoiding unacceptable risks, and maintaining the high standards of their professions.

APPENDIX A

Texas Cases

1. Almanzar v. State, 682 S.W.2d 393 (Tex. App.--El Paso 1984), aff'd 702 S.W.2d 653 (Tex. 1985): an attorney may not serve two masters with adverse interests.

2. Arkla Energy Resources v. Jones, 762 S.W.2d 694 (Tex. App.--Texarkana 1988, no writ): a former client who shows that an attorney is appearing in a proceeding "substantially related" to a prior suit is entitled to the conclusive presumption that confidences and secrets were imparted to the attorney which disqualify him from appearing in the present proceeding.

3. Baptist Memorial Hosp. System v. Bashara, 685 S.W.2d 352 (Tex. App.--San Antonio 1984), aff'd 685 S.W.2d 307 (Tex. 1985): a lawyer is precluded from accepting or continuing employment when asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

4. Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716 (Tex. App.--San Antonio 1986), writ granted, 729 S.W.2d 690 (Tex. 1987): relying on National Savings Bank v. Ward, 100 U.S. 195 (1879) where the court held that an attorney who negligently prepared a title opinion would not be liable to a non-client who suffered a financial loss when it relied on the title opinion. Thus, an attorney will not have to answer for his negligence to a party not in privity of contract with him in the absence of fraud or collusion.

5. Burrow v. Arce, 1999 WL 450770 (Tex., Jul 01, 1999)(NO. 98-0184): an attorney who breaches his fiduciary duty to his client may be required to forfeit all or part of his fee, at the discretion of the court, regardless whether the breach caused the client actual damages.

6. Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App.--San Antonio 1966, no writ): in describing an attorney's duty, the court explained that: "[the attorney] impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession in which other similarly situated ordinarily possess; (2) he will exert his best judgment in a prosecution of litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause."

7. Dillard v. Berryman, 683 S.W.2d 13 (Tex. App.--Fort Worth 1984, no writ): it is the relationship of attorney to the parties and to each other that controls whether there is a conflict of interest precluding an attorney from representing a party, not whether the attorney has actually engaged in conduct which would create a conflict.

8. In re Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992); In re American Airlines, Inc., 972 F.2d 605 (5th Cir. 1992). Federal courts sitting in Louisiana and Texas will not apply Louisiana or Texas ethics rules as their sole sources for decisions based on rules of ethics, even in instances in which the federal district courts have adopted state rules.

9. Firemen's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67 (Tex. Civ. App.--Tyler 1975, writ ref'd n.r.e.). This case may be cited for the following propositions:

(a) An attorney malpractice action in Texas is based on negligence; and

(b) The ordinary rule that is usually applied in actions against attorneys for malpractice is that negligence is actionable only where it is the proximate cause of the damage complained of (emphasis added, see p. 69 [2-3]).

10. Frank Cosgrove v. Walter Grimes, 32 Tx. Sup. Ct. J. 501 (April 19, 1989): there is no subjective good faith excuse for attorney negligence; a lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney.

11. Great Am. Indem. Co. v. Dabney, 128 S.W.2d 496 (Tex. Civ. App.--Amarillo 1939, writ dism'd judgmt. cor.): an attorney is not bound to possess and exercise the highest degree of skill, nor is he an insurer of the results of his work, but is required to possess such legal knowledge and to exercise such skill and diligence as men of the legal profession commonly employ.

12. In the Interest of H.W.E., a Child, 613 S.W.2d 71 (Tex. Civ. App.--Fort Worth 1981, no writ): an attorney is not precluded from representing multiple parties in a suit unless the clients' interests are actually "adverse and hostile": a mere potential conflict of interest is

insufficient to prohibit multiple representation as long as there is no real and substantial conflict.

13. Hennigan v. Harris County, 593 S.W.2d 380 (Tex. Civ. App.--Waco 1979, writ ref'd n.r.e.): if an attorney violates his professional responsibility by concealing facts where there is a duty to reveal them, existence of public remedy by way of professional disciplinary procedures as under State Bar Act does not preclude attorney from being held liable for actionable fraud.

14. Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468 (Tex. App.--Houston [1st Dist.] 1985, no writ): an attorney has no general duty to the opposing party, but he is liable for injuries to third parties when his conduct is fraudulent or malicious.

15 Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.): an attorney may not represent conflicting interests and may not divulge a client's secrets or confidences, or accept employment from others in matters adversely affecting an interest of the client with respect to which confidence has been reposed.

16. Marshall v. Quinn-L Equities, 704 F.Supp. 1384 (N.D.Tex. 1988) (applying Texas law): "Services related to the sale of a security (which does not constitute a 'good') may still be services covered by the DTPA when such services are also objectives of the transaction.... Thus, contrary to Jones Walker's assertions, Plaintiffs need not demonstrate that legal services were specifically rendered by Jones

Walker to Plaintiffs or that Jones Walker and Plaintiffs were in privity, for Jones Walker to be liable to Plaintiffs under the DTPA."

17. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999): an attorney may owe a third person a duty to not negligently misrepresent a material fact, regardless of privity, especially if the attorney making the representation invites reliance on the part of the third person.

18. McClung v. Johnson, 620 S.W.2d 644 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.): In addition to attorney's position of trust and confidence in regard to the client, he also has a legally imposed duty to disclose facts material to his representation.

19. NCNB Texas Nat'l Bank v. Coker, 765 S.W.2d 398 (Tex. 1989): a former client who shows that an attorney is appearing in a proceeding "substantially related" to a prior suit is entitled to the conclusive presumption that confidences and secrets were imparted to the attorney which disqualify him from appearing in the present proceeding.

20. Tijerina v. Wennermark, 700 S.W.2d 342 (Tex. App.--San Antonio 1985, no writ): an attorney should exercise reasonable and ordinary care and diligence in use of his skill in an application of his knowledge to his client's cause.

21. Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988). This case may be cited for the following propositions:

(a) Cause of action for legal malpractice is in the nature of tort;

(b) The statute of limitations for legal malpractice is two years; and

(c) The statute of limitations for legal malpractice actions does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action.

23. Zidell v. Bird, 692 S.W.2d 550 (Tex. App.--Austin 1985, no writ). This case may be cited for the following propositions:

(a) An attorney, like any other individual, is answerable in tort for any negligent performance of his employment obligations; and

(b) An attorney's negligence in performance of his employment obligations may consist in giving of erroneous legal opinion or advice, in failing to give any advice or opinion when legally obliged to do so, in disobeying client's lawful instruction, in taking action when not instructed by client to do so, or in delaying or failing to handle matter entrusted to attorney's care by client.

APPENDIX B

Louisiana Cases

1. American Title Ins. Co. v. Seago, 486 So. 2d 938 (La. Ct. App. 1st Cir. 1986) This case may be cited for the following propositions:

(a) When an attorney expressly warrants a given result which does not occur, the malpractice action is properly characterized as a breach of contract action; and

(b) Where court determined that the one year prescriptive period on a legal malpractice action began to run on the date plaintiff determined the existence of defects in title which were not indicated in defendant lawyer's title opinion.

2. Barnett v. Sethi, 608 So. 2d 1011 (La. Ct. App. 4th Cir. 1992): "the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists."

3. Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 3d Cir.), writ denied, 216 So. 2d 307 (La. 1968): doubt in borderline cases of conflict of interest should be resolved in favor of disqualification.

4. Capital Bank & Trust Co. v. Core, 343 So. 2d 284 (La. Ct. App. 1st Cir.), writ denied, 345 So. 2d 61 (La. 1977): discussing that a duty to a non-client may arise when a third party relies on the opinion and the attorney knew that the non-client would rely on the opinion.

5. Cherokee Restaurant, Inc. v. Pierson, 428 So. 2d 995 (La. Ct. App. 1st Cir.), writ denied, 431 So. 2d 773 (La. 1983): attorney's statement in a title opinion that "according to my examination ... has a valid and merchantable title" does not constitute a warranty or guaranty of title.

6. Citizens Nat'l Bank v. Gilsbar, Inc. 581 So.2d 719 (La. Ct. App. 1st Cir. 1972): the reasoning of the court in Capital Bank & Trust Co. regarding prematurity of the Bank's action in that case is stated to be invalid by the Louisiana Supreme Court's reasoning in Rayne State Bank & Trust v. National U. Fire Ins., 483 So.2d 987 (La. 1986).

7. Clause v. Manuel, 442 So. 2d 905 (La. Ct. App. 3d Cir. 1983), writ denied, 448 So. 2d 106 (La. 1984): attorney representing purchaser and acting as notary on act of sale held not liable to seller for failure to advise seller of title defect.

8. Cousins v. State Farm Mut. Auto. Ins. Co., 258 So. 2d 629 (La. Ct. App. 1st Cir. 1972): when an attorney represents more than one client, he must disclose to either client all opinions, conclusions, and theories regarding the client's rights and position, even in communications to other parties whom the attorney also represented in the same matter.

9. Crawford v. Gray & Assocs., 493 So. 2d 734 (La. Ct. App. 2d Cir.), writ denied, 497 So. 2d 1012 (La. 1986). This case may be cited for the following propositions:

(a) An attorney's failure to inform his client of the correct source of information used in performing the title examination

constitutes a breach of duty to the client and subjects an attorney to liability for damages incurred by the client;

(b) attorney's statement in a title opinion that: "[certain parties] are vested with good and valid title to the above-described property" does not constitute a warranty or guaranty of title; and

10. Cummings v. Skeahan Corp., 405 So. 2d 1146 (La. Ct. App. 1st Cir. 1981): where an exception of prescription based on the one year tort prescriptive period was overruled in an action against an attorney who issued a title opinion failing to report an encumbrance. Before remanding the case for a final determination on the merits, the court stated that "a malpractice action against an attorney partakes of elements both ex contractu and ex delicto."

11. Dupre v. Marquis, 467 So. 2d 65 (La. Ct. App. 3d Cir.), writ denied, 472 So. 2d 38 (La. 1985): actions by the attorney which exceed the limits of the engagement, which acts become the acts of the attorney not the client, may give rise to a duty to a non-client.

12. Elzy v. ABC Ins. Co., 472 So. 2d 205 (La. Ct. App. 4th Cir.), writ denied, 475 So. 2d 361 (La. 1985): unless an attorney expressly warrants a specific result or fails to perform work specifically agreed to, the legal malpractice action is governed by tort principles rather than breach of contract principles.

13. Evans v. Detweiler, 466 So. 2d 800 (La. Ct. App. 4th Cir. 1985): attorney must exercise at least the degree of care, skill, and diligence which is exercised by prudent practitioners in the locality.

14. Evans v. Waguespack case, 638 So. 2d 1153 (La. Ct. App. 1st Cir. 1994): holding that law firm who prepared a title opinion for the plaintiff's mortgagee in connection with the purchase of immovable property owed no duty to plaintiff-mortgagor for defects in title because the title opinion was issued to the mortgagee and not the plaintiff-mortgagor and clearly stated that the "opinion is neither assignable nor heritable."

15. Gifford v. New England Reins. Corp., 488 So. 2d 736 (La. Ct. App. 2d Cir. 1986). This case may be cited for the following propositions:

(a) Unless an attorney expressly warrants a specific result or fails to perform work specifically agreed to, the legal malpractice action is governed by tort principles rather than breach of contract principles; and

(b) An attorney must exercise at least the degree of care, skill, and diligence which is exercised by prudent practitioners in the locality.

16. Gill v. DiFatta, 364 So. 2d 1352 (La. Ct. App. 4th Cir. 1978): attorneys are not required to exercise perfect judgment in every instance, but holding a license to practice and acceptance of client engagement constitute representations that attorney possesses certain

minimal skills, knowledge, and abilities necessary to handle the matter for which the attorney was employed.

17. Grand Isle Campsites, Inc. v. Cheek, 249 So. 2d 268 (La. Ct. App. 1st Cir. 1971), aff'd, 262 La. 5, 262 So. 2d 350 (1972): agreement by attorney to perform work on a particular matter or transaction does not create an attorney-client relationship as regards other business or affairs of the client.

18. Herring v. Wainwright, No. 32-360, 1999 WL 735973 (La.App. 2 Cir. Sep. 22, 1999): a court must consider that an attorney has a duty to exercise at least that degree of care, skill, and diligence exercised by prudent attorneys practicing in that attorney's community or locality.

19. Knighten v. Knighten, 447 So. 2d 534 (La. Ct. App. 2d Cir.), writ denied, 448 So. 2d 1303 (La. 1984): unless an attorney expressly warrants a specific result or fails to perform work specifically agreed to, the legal malpractice action is governed by tort principles rather than breach of contract principles.

20. Meyers v. Imperial Cas. Indem. Co., 451 So. 2d 649 (La. Ct. App. 3d Cir. 1984): attorney must exercise at least the degree of care, skill, and diligence which is exercised by prudent practitioners in the locality.

21. Muse v. St. Paul Fire & Marine Ins. Co., 328 So. 2d 698 (La. Ct. App. 1st Cir. 1976). This case may be cited for the following propositions:

(a) Attorneys are not required to exercise perfect judgment in every instance, but holding a license to practice and acceptance of client engagement constitute representations that attorney possesses certain minimal skills, knowledge, and abilities necessary to handle the matter for which the attorney was employed;

(b) Attorney may not be held liable for malpractice so long as his determination of a question, unresolved by legislation or jurisprudence, whether ultimately proved right or wrong, is based upon reasonable consideration of applicable legal rules and principles; and

(c) Attorneys are obligated to scrutinize any contract which they advise clients to execute and are required to disclose the full import of the instrument and the possible consequences that may arise from its execution.

22. Petrovich v. Petrovich, 556 So. 2d 281 (La. Ct. App. 4th Cir. 1990): In a divorce case, the wife moved to disqualify the husband's law firm since an associate in that firm had represented the wife when with another law firm. The associate had rendered a second opinion on the entirety of wife's marital dispute. The Fourth Circuit upheld trial court's refusal to disqualify, and held that, as the second firm had built a "cone of silence" around the associate, any actual or appearance of impropriety had been avoided.

23. Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972). This case may be cited for the following propositions:

(a) An attorney must exercise at least the degree of care, skill, and diligence which is exercised by prudent practitioners in the locality;

(b) Attorneys are not required to exercise perfect judgment in every instance, but holding a license to practice and acceptance of client engagement constitute representations that attorney possesses certain minimal skills, knowledge, and abilities necessary to handle the matter for which the attorney was employed; and

(c) Attorneys are obligated to scrutinize any contract which they advise clients to execute and are required to disclose the full import of the instrument and the possible consequences that may arise from its execution.

24. Rayne State Bank & Trust Co. v. National Union Fire Ins. Co., 483 So. 2d 987 (La. 1986). This case may be cited for the following propositions:

(a) An attorney has a duty to maintain client confidences; and

(b) An attorney's statement in a title opinion that "which mortgage affects Tracts 1 and 2 described above, together with

certain chattels included therein'' held not to constitute a warranty of the validity of the mortgage as to chattels.

25. St. Amant v. Talley, 454 So. 2d 153 (La. Ct. App. 1st Cir. 1984): attorneys owe their clients the duty of diligent investigation and research.

26. Schlesinger v. Herzog, 672 So. 2d 701, 707 (La. Ct. App. 4th Cir.): agreeing that "the Louisiana State Bar Association's Rules of Professional Conduct 'have the force and effect of substantive law,"' and opining that "the ethical issue [raised by defendants' conduct] was transformed into a legal duty.

27. Smith v. Cross Marine, Inc., 576 So. 2d 997 (La. 1991): An attorney and his law firm had represented a limited partnership for several years in general legal matters. The limited partners of the partnership brought suit on behalf of the partnership against the general partner, and the law firm sought to continue to represent the limited partnership in general legal matters and also to represent the general partner in its dispute with the limited partners. A conflict of interest existed and under Louisiana Rule 1.7, the attorney's disqualification was clearly mandated unless both the general partner and the limited partner consented to the representation.

28. Smith v. St. Paul Fire & Marine Ins. Co., 366 F.Supp. 1283 (M.D. La. 1973), aff'd, 500 F.2d 1131 (5th Cir. 1974). This case may be cited for the following propositions:

(a) Attorney's advice is not judged based on review with benefit of hindsight, but rather whether the advice given was the result of proper exercise of skill and professional judgment under conditions existing at the time the advice was given; and

(b) Attorney must advise client if he believes or should have reason to believe that there could be some adverse consequences from taking the course advised.

29. Soderquist v. Kramer, 595 So. 2d 825 (La. Ct. App. 2d Cir. 1992): Held invalid a settlement agreement that provided that the clients released all claims against adverse parties as well as all claims against their attorney.

30. Succession of Cloud, 530 So. 2d 1146 (La. 1988): the standards in the Rules "which govern the conduct of attorneys have the force and effect of substantive law. . . . When an attorney enters into a contract with his client in direct violation of the Rules and a subsequent civil action raises the issue of enforcement or nullification the court, in order to preserve the integrity of its inherent judicial power shall prohibit the enforcement of the Contract."

31. Succession of Crowe v. Henry, 602 So. 2d 243 (La. Ct. App. 2d Cir. 1992): "A transaction between an attorney and a client is closely scrutinized and may be annulled even though the same transaction with a non-client without overreaching may be found unobjectionable."

32. Succession of Killingsworth v. Schlater, 292 So. 2d 536 (La. 1973): Attorney liable to non-client under third party beneficiary analysis as intended beneficiary of will prepared for client.

APPENDIX C

Subject Matter Comparison of Texas and Louisiana Cases

I. CONFLICTS OF INTEREST

A. Louisiana

1. Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 3d Cir.), writ denied, 216 So. 2d 307 (La. 1968).

2. Cousins v. State Farm Mut. Auto Ins. Co., 258 So. 2d 629 (La. Ct. App. 1st Cir. 1972).

B. Texas

1. Almanzar v. State, 682 S.W.2d 393 (Tex. App.--El Paso 1984), aff'd, 702 S.W.2d 653 (Tex. 1985).

2. Arkla Energy Resources v. Jones, 762 S.W.2d 694 (Tex. App.--Texarkana 1988, n.w.h.).

3. Baptist Memorial Hosp. System v. Bashara, 685 S.W.2d 352 (Tex. App.--San Antonio 1984), aff'd, 685 S.W.2d 307 (Tex. 1985).

4. Dillard v. Berryman, 683 S.W.2d 13 (Tex. App.--Fort Worth 1984, no writ).

5. In the Interest of H.W.E., a Child, 613 S.W.2d 71 (Tex. Civ. App.--Fort Worth 1981, no writ).

6. Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.).

7. NCNB Texas Nat'l Bank v. Coker, 765 S.W.2d 398 (Tex. 1989).

II. UNDERSTANDING OBJECTIVES

A. Louisiana

1. Crawford v. Gray & Assocs., 493 So. 2d 734 (La. Ct. App. 2d Cir.), writ denied, 497 So. 2d 1012 (La. 1986).

B. Texas

1. Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988).
2. McClung v. Johnson, 620 S.W.2d 644 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.).

III. LIMIT UNAUTHORIZED ACCESS

A. Louisiana

1. Rayne State Bank & Trust Co. v. National Union Fire Ins. Co., 483 So. 2d 987 (La. 1986).

B. Texas

1. Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.).

IV. NON-CLIENTS

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1. Capital Bank & Trust Co. v. Core, 343 So. 2d 284 (La. Ct. App. 1st Cir.), writ denied, 345 So. 2d 61 (La. 1977).

2. Citizens Nat'l Bank v. Gilsbar, Inc., 581 So.2d 719 (La. Ct. App. 1st Cir. 1991).

3. Clause v. Manuel, 442 So. 2d 905 (La. Ct. App. 3d Cir. 1983), writ denied, 448 So. 2d 106 (La. 1984).

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B. Texas

1. Hennigan v. Harris County, 593 S.W.2d 380 (Tex. Civ. App.--Waco 1979, writ ref'd n.r.e.).

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4. First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410 (Tex. App.--Dallas 1983, writ ref'd n.r.e.).

5. Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468 (Tex. App.--Houston [1st Dist.] 1985, no writ).

6. Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716 (Tex. App.--San Antonio 1986), writ granted, 729 S.W.2d 690 (Tex. 1987).

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9. Hideca Petroleum Corp. v. Tampimex Oil Int'l Ltd., 740 S.W.2d 838 (Tex. App.--Houston [1st Dist.] 1987, no writ).

V. DEVIATION FROM STANDARD OF CARE

A. Louisiana

1. Cummings v. Skeahan Corp., 405 So. 2d 1146 (La. Ct. App. 1st Cir. 1981).

2. Cherokee Restaurant, Inc. v. Pierson, 428 So. 2d 995 (La. Ct. App. 1st Cir.), writ denied, 431 So. 2d 773 (La. 1983).

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4. Elzy v. ABC Ins. Co., 472 So. 2d 205 (La. Ct. App. 4th Cir.), writ denied, 475 So. 2d 361 (La. 1985).

5. Gifford v. New England Reins. Corp., 448 So. 2d 736 (La. Ct. App. 2d Cir. 1986).

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7. Crawford v. Gray & Assocs., 493 So. 2d 734 (La. Ct. App. 2d Cir.), writ denied, 497 So. 2d 1012 (La. 1986).

8. Rayne State Bank & Trust Co. v. National Union Fire Ins. Co., 483 So. 2d 987 (La. 1986).

B. Texas

1. Burrow v. Arce, 1999 WL 450770 (Tex., Jul 01, 1999)(NO. 98-0184).

2. Firemen's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67 (Tex. Civ. App.--Tyler 1975, writ ref'd n.r.e.).

3. Zidell v. Bird, 692 S.W.2d 550 (Tex. App.--Austin 1985, no writ).

4. Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988).

VI. APPLICATION OF STANDARDS

A. Louisiana

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B. Texas

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APPENDIX D

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3. Presented a portion of the ethics portion of the program at the Advanced Oil & Gas Short Course sponsored by the University of Houston Law Center (February, 1995; February, 1996; January, 1997 in both Houston and in Dallas).

4. *Ethics for the Oil & Gas Practitioner*, at the South Texas College of Law Advanced Oil & Gas Inst. (August, 1996).

5. In June of 1996, delivered a paper entitled *Ethics for Oil and Gas Practitioners*, to the Oil, Gas and Mineral Section of the State Bar of Texas.

6. In September of 1996, presented a paper entitled *Ethical Considerations and Malpractice Prevention: A Discussion of Ethics, Rules and Causes of Action Relevant to Lawyers and Landmen in Natural Resources Transactions*, at the 1996 National Association of Lease and Title Analysts Conference in Dallas, Texas.

7. In February, 1997, presented a paper entitled *Ethical Considerations in Rendering Opinions*, to the 1997 Mineral Title Examination Institute in Baton Rouge, Louisiana.

8. In March, 1997, presented a paper entitled *Ethics for Oil & Gas Lawyers*, to the 44th Mineral Law Institute, in Baton Rouge, Louisiana.

9. In March, 1997, a paper entitled *Ethical Considerations in Rendering Opinions* was published by the Oil, Gas and Mineral Section of the State Bar of Texas, State Bar Section Report - Oil, Gas and Mineral Law, Vol. 21, No. 1 (March, 1997).

10. Presented the ethics portion of the program at the Advanced Oil & Gas Course sponsored by the University of Houston on January 30, 1998, in Dallas, Texas and on February 6, 1998, in Houston, Texas.

11. In February, 1998, presented a paper entitled *Ruminations on Professionalism* to the Houston Bar Association Corporate Counsel's Section, 2nd Annual Seminar on Ethics and Professionalism.

ATTACHMENT I

FORM OF ORIGINAL TITLE OPINION (TEXAS)

DATE

State of Texas: County of _____

Property Name: _____

Survey: _____

Description: **[Note: Description may be referenced to an Appendix if length prohibits its placement in this caption.]**

ORIGINAL TITLE OPINION

Client Address _____

Attention: _____

Gentlemen:

Subject to the Comments and Requirements hereinafter set forth and based solely upon examination of the [Abstracts and Materials if the opinion is based in part upon examination of Abstracts, or if it is not, then Documents and Records] specified herein, we find title to the captioned property vested as of _____, at _____ [a.m. or p.m.], as follows:

[THE ACCREDITATION OF INTERESTS HEREINBELOW IS ON A NONAPPORTIONMENT BASIS]

FEE SIMPLE TITLE

(1) Surface:

name of person or entity interest

(2) Oil and Gas Mineral Estate:

(a) Leasing Rights, Bonus and Delay Rentals:

[Note: When necessary, ownership of these rights should be credited separately.]

name of person or entity
(Basic Lease X)
interest

(b) Royalty:

[Note: Nonparticipating Royalty included hereunder as N.P.R.I.]

name of person or entity
(Basic Lease X)
fraction interest R.I.

(c) Overriding Royalty:

name of person or entity
(Basic Lease X)
fraction interest O.R.I.

(d) Leasehold Estate:

name of person or entity
(Basic Lease X)
fraction interest N.R.I.
[fraction interest L.I.]

ENCUMBRANCES

Lien[s]: [Note: In the description of liens, include the amount and the due date of the indebtedness secured and a statement that the

security instrument includes a future advance clause, if such be the case.]

(1)

(2) . . .

Easement[s]:

(1)

(2) . . .

Taxes:

[No or An incomplete] showing has been made with respect to the payment of taxes on the captioned property. [State, county and school taxes have been paid through 19__.]

Unreleased, Time-Expired Oil, Gas and Mineral Lease[s]: [Note: Should include present record owners]

(1)

(2) . . .

[Other]

[Note: If other types of encumbrances burden the captioned property, such as coal and lignite leases, list same under appropriate subheadings.]

ANALYSIS OF THE BASIC LEASE[S]

1.

Lessor:	_____
Lessee:	_____
Dated:	_____
Filed:	_____
Recorded:	Volume __, Page , _____ Records, _____ County, Texas
Interest Covered:	[All of Lessor's undivided interest in the oil, gas and other minerals in and under the captioned property, being an undivided _____ interest.]
Primary Term:	_____ years
Rental:	$_____ annually

Rental Date:	On or before _____, annually
Rental Next Due:	_____
Rental Payee:	_____
Shut-In Royalty:	On shut-in [gas] wells, _____ payable at the times and under the circumstances described in the Basic Lease
Depository:	For rentals and shut-in royalty,___ _____
Royalty:	On oil,_____ On gas,_____ On other minerals, except sulphur, On sulphur,_____
Pooling:	_____
Description:	[Note: You may reference all of the captioned property or a portion thereof.]
Proportionate Reduction Clause:	[Yes or None]
Pugh Clause:	[Yes or None]
Separate Tracts Clause:	[Yes or None]
	[Note: You may wish to cite here other significant clauses such as an

Entirety Clause or Free Fuel Clause]

Well Obligations: _____

Unusual Provisions: See Comment _____

[Note: You should reference the applicable unusual provision comment.]

2...

ASSIGNMENT[S] OF THE BASIC LEASE[S]

1.

Assignor: _____

Assignee: _____

_____

Dated: _____

_____

Filed: _____

_____

Recorded: Volume _____, Page _____, _____

__ Records, _____ County
, Texas

Interest Assigned: _____

_____

[Interest Reserved: Supply this information if not indicated in the section on Documents Creating Overriding Royalty Interests.]

Proportionate Reduction
Clause: [Yes or None]

2...

DOCUMENT[S] CREATING OVERRIDING ROYALTY INTEREST[S]

(This section does not include subsequent assignments, either in whole or in part, of overriding royalties once created. Should you desire a tabulation of such subsequent assignments of overriding royalties, please advise and we will furnish same by supplemental opinion.)

1.

Type of Instrument: _____

Grantor:(Assignor:) _____

Grantee:(Assignee:) _____

Dated: _____

Filed: _____

Recorded: Volume _____, Page _____, _____ Records, _____ County, Texas

Interest Assigned: _____

[Interest Reserved: _____]

Pooling: _____

Proportionate Reduction Clause: [Yes or None]

[Present Owner(s): _____]

2...

[ABSTRACTS AND MATERIALS OR DOCUMENTS AND RECORDS] EXAMINED

[Note: Herein you should include a comprehensive list of each and every facet of your title search.]

If you have based your opinion upon abstracts, use the following form:

(1) Abstract Number XXXX, in X Volumes, prepared by [Abstract Company Name] of [City], Texas, covering the captioned property [and other lands], certified from [date and time] through [date and time] and containing X pages.

(2) Supplemental [Complemental] Abstract...

(3) List other instruments, maps or plats if relied upon in assessing title...

If you have based your opinion upon a runsheet developed by a land person and read the title in the county, use the following form:

(1) Uncertified runsheet dated _____ prepared by X, covering title to the captioned property from [date and time] through [date and time], based upon the indices of [Abstract Company Name] of [City], Texas.

(2) Deed Records, Oil and Gas Lease Records, Deed of Trust Records, Lis Pendens Records, Federal Tax Lien Records, State Tax Lien Records, Probate Minutes, Mechanic's and Materialman's Lien Records and District Court Records [list any and all other records reviewed;

remember that each county is different] in the offices of the County Clerk and District Clerk of _____ County, Texas, as to only those documents referred to in the runsheet described as item (1) above.

(3) Indices and records maintained in the Office of the County Clerk of _____ County, Texas, as such affect and apply to title to the captioned property, limited to the record owners of said property as of the close of the runsheet referenced hereinabove, their successors and assigns, from [the closing date of such runsheet] through [the closing date of this Opinion].

(4) List other instruments, maps or plats if relied upon in assessing title...

If you have developed the entire opinion including the runsheet, use the following form:

(1) Indices of [Abstract Company Name], [City], Texas, affecting the captioned property, covering the period of time from [date and time] through [date and time] for Deed Records, Deed of Trust Records, etc. [list all records to which indices pertain].

(2) Deed Records, Deed of Trust Records, etc. [list all records reviewed] in the Office of the County Clerk of _____ County, Texas, as to only those documents shown by the indices referenced in (1) above.

(3) ... as in (3) for alternative above regarding use of runsheet, but referring to [closing date of Abstracter's records] rather than [closing date of such runsheet]...

(4) List other instruments, maps or plats if relied upon in assessing title...

Note: In each instance, if your opinion is based partially upon a prior title opinion, such should be listed herein. Additionally, when listing records examined with regard to updating a runsheet or abstracts, be sure to include the language set forth below:

"[List records] as such affect and apply to title to the captioned property, limited to the record owners of said property as of the close of the runsheet [or abstracts] referenced hereinabove, their successors and assigns, from ..."

COMMENTS AND REQUIREMENTS

[Note: Any one or more of the following may not be applicable to your examination and opinion; this form is intended to be used as a checklist for various title problems; the numbers are supplied herein for reference only.]

1.

This Opinion is based upon an examination of the Documents and Records listed above. You have requested us to base this Opinion upon such examination, without the benefit of abstracts which are not obtainable [within the time prescribed by your drilling schedule], and this Opinion is subject to the currentness, accuracy, and completeness of such Documents and Records. You are aware, of course, that this kind of examination is more prone to inaccuracy than an examination based upon abstracts compiled by persons who, through personal knowledge and experience, are thoroughly familiar with the area and any irregularities in the records which may affect title to the property.

[Note: If examination and opinion are based upon an uncertified runsheet, such should be stressed.]

REQUIREMENT:

None, advisory only.

2.

This Opinion is based in part upon the opinions of other counsel and, therefore, is subject to the accuracy and completeness of such opinions. Furthermore, this Opinion is subject to the Comments and Requirements contained in such opinions of other counsel, as to which we have not been furnished and have not been requested to examine curative materials.

REQUIREMENT:

None, advisory only.

[Note: In order to make your opinion self-contained, either quote the outstanding requirements of the opinion on which you are basing your opinion as separate comments herein with appropriate references or attach the opinion as an exhibit to your opinion. Whichever approach you use, state what you have done as a closing sentence to Comment 2. If you choose to adopt the former method, the following language is suggested: All requirements in such opinion[s] of other counsel are either advisory, satisfied or brought forward below.]

3.

The Abstracter has briefed many of the instruments in the Abstract, and unless you submit abstracts containing complete instruments, we will have to rely upon the judgment of the Abstracter in deleting material.

REQUIREMENT:

None, advisory only.

4.

The [Abstracts and Materials or Documents and Records] examined do not contain a copy of the Patent covering the captioned property.

REQUIREMENT:

Obtain from the General Land Office and furnish for examination a Certificate of Facts evidencing, if such be the case, that the State of Texas has issued a Patent covering the captioned property. Additionally, the Patent, as evidenced by the Certificate of Facts, should be filed in each county in which lands covered thereby are situated.

5.

There are early record title defects, breaks in the chain of title, and other title deficiencies pertaining to the captioned property occurring prior to 19__, which the statute of limitations may have cured. We have assumed title to the captioned property has ripened in favor of X, his [her] [their] heirs and assigns, under the Texas statute of limitations.

REQUIREMENT:

Obtain from two or more knowledgeable but disinterested residents of the community, and furnish for examination, affidavits reflecting the history of use and occupancy of the captioned property for a period of more than twenty-five years from the present, and also reflecting the time and place that housing, fencing and other improvements were erected and whether and how the same have been maintained. The affidavits should provide the name of each occupant or user, the time of each occupancy or use, and the type or character of each occupancy or use. They should contain specific facts upon which, when introduced as evidence in a court proceeding, a court of law could base a finding of adverse possession in favor of X, his [her][their] heirs and assigns, if such be the case. Conclusions of the affiant should be avoided.

6.

The captioned property is subject to the unreleased, time-expired oil, gas and mineral lease[s] described above. In the absence of production from the property covered by such lease[s], [or from property pooled therewith], it [they] should have expired by its [their] own terms. [Our examination of title indicates that time-expired lease[s] X listed hereinabove was [were] pooled by that certain Designation dated _____, recorded in Volume ____, Page ____, _____ Records, _____ County, Texas.]

REQUIREMENT:

To ensure that the above described lease[s] has [have] not been maintained by production, drilling operations or otherwise, obtain from the record title holders thereof and furnish for examination releases of such lease[s]. In the alternative, obtain from two or more knowledgeable but disinterested residents of the community, and furnish for examination, affidavits reflecting the history of oil and gas drilling and production operations from the lands covered thereby [and from OTHER LANDS unitized or pooled therewith], evidencing, if such be the case, that said lease[s] has [have] expired by its [their] own terms.

7.

The captioned property is subject to the unreleased lien[s] described above. [Insert the following when appropriate: Lien[s] ___ listed hereinabove under Lien[s] additionally secure[s] future

advances made by the lender[s] to the borrower[s] therein. Under the case law of Texas, a lien created by a security instrument containing a future advance clause remains effective until released by the current lien holder even after the initial debt has been satisfied. Thus, should [any of] the lender[s] advance funds to the [relevant] borrower[s] pursuant to a future advance clause, the lien[s] securing the new debt [debts] would relate back to the initial security instrument[s].]

REQUIREMENT:

[You may wish to waive further curative work in connection with obtaining releases of the security instruments which secure indebtedness due on a date prior to 25 years from the Closing Date of the opinion, as a reasonable business risk. As to Lien[s] ____,] obtain and furnish for examination [a] release[s] of the lien[s] existing under the document[s] described under Lien[s] hereinabove or, in the alternative, [a] subordination[s] of such lien[s] to your rights under the Basic Lease[s].

8.

The Basic Lease[s] is [are] beyond the first year of its [their] primary term[s].

REQUIREMENT:

Obtain and furnish for examination copies of receipts or other matter from the Lessor[s] or its [their] Depository [Depositories] evidencing the timely and accurate payment of delay rentals for each year of the primary term[s] during which drilling operations were postponed.

9.

The Basic Lease[s] is [are] [a] nonstandard form lease[s] that contain[s] many unusual provisions not present in the more commonly used standard forms of oil, gas and mineral leases that affect <u>every</u> aspect of your operations on the captioned property pursuant thereto. Due to the number and complexity of such provisions, we have not attempted to summarize in detail your various obligations thereunder. You should give very careful and close attention to all such provisions of the Basic Lease[s] in conducting your operations on the captioned property and your relations with the Lessor[s].

[<u>Note</u>: If a Basic Lease is a standard form lease which includes riders attached thereto, substitute the following for the first sentence: The Basic Lease is a standard form lease which has been modified to include many additional provisions that affect numerous aspects of your operations on the captioned property pursuant thereto.]

<u>REQUIREMENT</u>:

None, advisory only.

10.

We have prepared this Opinion covering only a portion of the lands described in Basic Lease[s] __ pursuant to your request. Since Basic Lease[s] __ does [do] not contain a separate tracts clause, there exists a possibility under community lease concepts, depending upon the ownership of the tracts covered by Basic Lease[s] __ not examined herein, of persons claiming an interest in and to the captioned property which would alter the accreditation of the oil and gas mineral and royalty estates set forth hereinabove.

REQUIREMENT:

Advisory at this time; however, prior to the distribution of proceeds from the sale of production attributable to the record owners set forth hereinabove, obtain and furnish for examination title opinions covering the lands included in Basic Lease[s] __ and not examined herein. Should you desire our assistance in the preparation of same, please advise.

11.

The captioned property is subject to that [those] certain time-expired, term nonparticipating royalty interest[s] reserved

[granted] in that [those] certain [describe instrument[s] and supply recording data], which, in the absence of production from the property subject to such interest[s], should have expired by its [their] own terms on [date].

REQUIREMENT:

Unless you contemplate pooling the captioned property and the captioned property is also to be the drill site, this comment is advisory at this time; however, prior to the distribution of proceeds from the sale of production attributable to the owners of royalty interests set forth hereinabove, to ensure that the above described term interest[s] has [have] not been maintained by production, drilling operations or otherwise, obtain from the record title holder[s] thereof and furnish for examination a reconveyance of such term interest[s]. In the alternative, obtain and furnish for examination from two or more knowledgeable but disinterested residents of the community affidavits reflecting the history of oil and gas drilling and production operations on the property subject to such interest[s], evidencing, if such be the case, that said term interest[s] has [have] expired by its [their] own terms.

[Note: Where the document creating the NPRI references the tract and LANDS POOLED THEREWITH, then Comment 11 should include "or lands pooled therewith".]

12.

[This comment is apt to term NPRIs which are still in term. Use where no language references pooled acreage in instrument creating NPRI.]

The nonparticipating royalty interest credited hereinabove to _____ for a period of __ years from __[date]__ "and as long thereafter as oil, gas or other minerals, or either of them is produced or mined from the lands described herein, in paying or commercial quantities" [quote appropriate language from instrument], pursuant to [reference document]. Under the language of the relevant instrument, production from lands with which the captioned property has been pooled, rather than production from the captioned property itself, will not serve to maintain the relevant interest beyond its __-year term under existing Texas jurisprudence. (See Stephenson v. Vineyard, 564 S.W.2d 424 (Tex. Civ. App.--Houston [1st Dist.] 1978, writ ref'd. n.r.e.).)

REQUIREMENT:

None, advisory only.

13.

The accreditation of mineral interests in and to the captioned property herein is limited to the oil and gas mineral estate.

Specifically excluded from this Opinion is an accreditation of ownership in and to uranium, coal, lignite and other hard minerals.

REQUIREMENT:

None, advisory only.

14.

We have credited the mineral estate as shown above based upon record title as of _____ at _____ [a.m. or p.m.]. Although X is not credited with any interest in the mineral estate as of _____, Basic Lease __ was properly executed by X. On _____, the date of Basic Lease __, X owned a [an] _____ mineral interest in and to the captioned property. Our examination of title indicates that subsequent to the execution of Basic Lease __, X conveyed the _____ mineral interest to Y; therefore, our accreditation hereinabove does not show any incidents of ownership in X.

REQUIREMENT:

None, advisory only.

15.

The Documents and Records [Abstracts and Materials] examined reveal that the following persons, all of whom held record title to an undivided interest in the captioned property at the time of their deaths, died on approximately the dates set out and that either partialo information regarding payment of State Inheritance Taxes or Federal Estate Taxes is of record:

Name	Date of Death

REQUIREMENT:

Obtain and furnish for examination evidence of the payment of State Inheritance Taxes and Federal Estate Taxes on the above listed estates, or evidence that no such taxes were due, or evidence that, respectively, the Comptroller of the State of Texas and the Internal Revenue Service of the United States have waived all rights to assert liens against the decedents' interests in the captioned property for nonpayment of such taxes. As to the estates where the date of death of the decedent was prior to 25 years from the Closing Date of the opinion, you may wish to waive further curative work in connection with the proof of payment of taxes on the estates as a reasonable business risk.

16.

The tabulation of ownership with respect to the overriding royalty interest of _____ credited hereinabove to _____ is based upon the obligation of _____ under that certain [reference agreement], and the materials examined contain no evidence of an assignment of such overriding royalty interest.

REQUIREMENT:

Advisory at this time; however, prior to the disbursement of proceeds from the sale of production from or attributable to the captioned property, an assignment of the overriding royalty interest should be prepared in conformity with the terms contained in the aforesaid agreement, executed by the appropriate parties and recorded in the Office of the County Clerk of _____ County, Texas. The accreditation herein assumes that no adverse disposition of the leasehold prior to recordation of the assignment shall have occurred and has been evidenced of record. You should satisfy yourself that no such divestiture is apparent of record.

17.

[Note: Form a comment reciting the facts indicating that X (a person in your chain of title) is assumed to have died and that there

are no or incomplete probate proceedings or affidavits of heirship of record. The following requirement should then be made.]

REQUIREMENT:

Obtain and furnish for examination certified copies of the probate proceedings, if any were had, on the Estate of X, Deceased. Such probate proceedings should include at a minimum [indicate what documentation is necessary, taking into consideration the date of death of X; whether X died in a foreign jurisdiction (§95 and §96, Probate Code); whether the Will and Order are filed in search county as muniment of title (§89, Probate Code); whether your lessor is X's executor or purchased the captioned property from X's executor or from beneficiaries of X's estate]. In the event that X died intestate and no administration was had upon his [her] estate, obtain from two or more disinterested persons and furnish for examination an affidavit of heirship setting forth the following information about X, Deceased:

(1) dates of all marriages;
(2) names of all spouses;
(3) children of all marriages, including from which marriage each child came;
(4) date of death;
(5) statement that decedent left no will; and
(6) domicile at date of death.

In addition, obtain and furnish for examination evidence of payment of Federal Estate Taxes and State Inheritance Taxes, if any, occasioned by the death of X, or proof that such taxes are not due.

[Note: Request taxes in conjunction with Comment and Requirement 15. This requirement may be combined with Requirement 15 as Sections a. and b., if appropriate.]

18.

No showing has been made regarding the rights of parties in possession.

REQUIREMENT:

You are charged with notice of the rights of parties in possession; therefore, before entering upon the captioned property, you should inquire into the rights of anyone found in possession, and if there is a conflict with your right[s] of entry under the Basic Lease[s], the matter should be referred to us for further advice.

19.

Several [One] of the persons to whom we have credited ownership of the captioned property hold[s] record title in one name,

but have [has] executed a Basic Lease in a different, although similar, name.

REQUIREMENT:

Obtain and furnish for examination a Same Person Affidavit, executed by two or more disinterested persons, evidencing that the following named individuals are one and the same person:

Name in Which Record Title Held	Name in Which Basic Lease Executed

[In the alternative, obtain and furnish for examination certified copies of marriage certificates indicating the name variances.]

20.

The pooling power granted to you by the Basic Lease[s] is not binding on the nonparticipating royalty interest owner[s] set forth above.

REQUIREMENT:

Prior to pooling the captioned property with other lands, obtain from the named nonparticipating royalty interest owner[s] and furnish for examination a ratification of the proposed unit or pooling agreement or the Basic Lease[s].

21.

No [An incomplete] showing has been made regarding payment of taxes.

REQUIREMENT:

Obtain from the Tax Assessor-Collector of _____ County, Texas, and from the Tax Assessor-Collector of any other political subdivision within which the captioned property lies and which has taxing jurisdiction thereover, and furnish for examination tax receipts or other certificates evidencing that state, county, school, and other taxes levied against the captioned property have been paid for all years up to and including 19___.

22.

You must locate and respect the easements described above and conduct your operations on the captioned property accordingly.

REQUIREMENT:

None, advisory only.

23.

This Opinion does not cover any matter of conflict or discrepancy with respect to survey, area or boundary.

REQUIREMENT:

None, advisory only; however, if an opinion on these matters is desired, we should be furnished with a surveyor's plat and report for examination and further opinion.

24.

Of necessity, this Opinion is subject to any applicable bankruptcy or insolvency laws, liens for taxes not yet due, statutory and constitutional mechanic's and materialman's liens not of record, operator's liens not of record, statutory liens securing payment of proceeds of production from the captioned property, enforcement of regulations or orders by any governmental authority having jurisdiction

over the captioned property, capacity or competency of parties, fraud, delivery and alteration after delivery.

REQUIREMENT:

None, advisory only.

25.

First sales, if any, of natural gas produced from the captioned property, either in interstate or intrastate commerce, may be subject to price regulation under the Natural Gas Policy Act of 1978 ("NGPA"), as administered by the Federal Energy Regulatory Commission (the "FERC"). In addition, if natural gas produced from the captioned property already has been dedicated to interstate commerce, and no certificate of abandonment has been issued, it may be subject to other non-pricing regulation by the FERC under both the NGPA and the Natural Gas Act ("NGA"). Such non-pricing regulation in some cases would require continued commitment or dedication to interstate commerce of natural gas produced from the captioned property, although the natural gas production occurs under a different lease, granted to a different lessee.

This Opinion does not cover any matter pertaining to the FERC's jurisdiction under the NGPA and the NGA. You are advised that under the terms and provisions of the NGPA, in some cases the

seller of natural gas is required to take certain affirmative action in order to obtain the most favorable first sales price category.

REQUIREMENT:

None, advisory only.

26.

Section 91.401 *et seq.* of the Texas Natural Resources Code provides certain time periods for payment of all proceeds from the sale of production from oil or gas wells. Payment must be made within 120 days after the end of the month of first purchase. Thereafter, payment must be made within 60 days after the end of the calendar month in which subsequent oil production is sold and within 90 days for gas production. If the amount owed is $25.00 or less, then payment may be made every 12 months. If payments are not made within the specified time period, then the payor must pay interest on the amounts due.

Payments may be suspended and the interest penalties will not be incurred if there is:

(1) a dispute concerning title that would affect distribution of payments;

(2) a reasonable doubt that the payee does not have clear title to the interest in proceeds of production; or

(3) a requirement in a title opinion that places in issue the title, identity or whereabouts of the payee and that has not been satisfied by the payee after a reasonable request for curative information has been made by the payor.

REQUIREMENT:

None, advisory only.

27.

This Original Title Opinion is rendered solely and exclusively for the benefit of [Client] and is not to be quoted in whole or in part, nor is it to be relied upon by any other person without the prior written consent of this firm.

REQUIREMENT:

None, advisory only.

LANIER YEATES
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Very truly yours,

LANIER YEATES

A PROFESSIONAL CORPORATION

ATTACHMENT II

FORM OF ORIGINAL TITLE OPINION (OCS)

[DATE]

[Company]
[Street Address]
[City, State, Zip]

Attn: Mr./Ms. [Name]
[Title]

Re: Federal Offshore Lease, OCS-G [Serial Number]
Block [_____], [_____]Area, [_____ Addition]
Gulf of Mexico, Offshore Louisiana

LIMITED TITLE OPINION

Ladies and Gentlemen:

We have acted as counsel for [_____ Client's Name _____] in examining title to that certain federal oil and gas lease described in Section I of (the "Lease"), insofar only as the Lease covers the lands and

subsurface interval also described in Section I of Exhibit A (the "Land"). The Lease, insofar only as it covers the Land, is hereinafter called the "Property."

This Opinion has been prepared in connection with [describe transaction].

Based solely upon the examination of the Abstracts and Materials listed on Exhibit B annexed hereto and made a part hereof for all purposes (the "Abstracts and Materials"), and subject to the Comments and Requirements set forth below, our opinion is that, on (i) [closing date], at [_____] a.m./ p.m., as to the records of the Office of the Clerk of Court for the Parish of _____, State of Louisiana (the "_____ Parish Clerk") and (ii) [closing date], at [_____] a.m./p.m., as to the records of the Adjudications, Public, and Right of Way Records maintained by the Minerals Management Service of the United States Department of the Interior, Gulf of Mexico, OCS Region, in New Orleans, Louisiana (the "MMS"), [_____] owned undivided interests in and to the Property equal to the interests identified in Section II of Exhibit A, free and clear of all liens, mortgages, security interests, and other encumbrances except those described or referred to in Section III of Exhibit A attached hereto.

COMMENTS AND REQUIREMENTS

1.

This Opinion is based upon an examination of the Abstracts and Materials, and is, therefore, subject to the currentness, accuracy, and completeness of the Abstracts and Materials examined.

REQUIREMENT:

None, advisory only.

2.

While the Land is under the jurisdiction of the United States, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. Sec. 1333(a)(2)(A), provides that, to the extent that the laws of the adjacent state are applicable and not inconsistent with federal laws and regulations, the laws of the adjacent state are to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf ("OCS") which would fall within the state's boundaries if extended seaward. The Land is located in federal waters offshore Louisiana; therefore, the laws of the State of Louisiana are applicable to the extent they are not inconsistent with federal laws and regulations.

The rationale of at least one decision by a federal court provides the basis for an argument that Louisiana recording statutes affecting immovable property apply to federal leases covering OCS lands located offshore Louisiana. In the case of Union Texas Petroleum Corp. v. PLT Engineering, Inc., 895 F.2d 1043 (5th Cir.), cert. denied, 498 U.S. 848 (1990), the

United States Court of Appeals for the Fifth Circuit concluded, in pertinent part, that the recording requirements of the Louisiana Oil, Gas and Water Wells Lien Act, La. R.S. 9:4861 et seq. (which it held to apply to OCS lands), were complied with by the filing of the requisite notice of claim with the Clerk of Court of the parish adjacent to the relevant offshore block. The Court reasoned that the OCSLA (i) adopted the provision of Louisiana law that "[t]he gulfward boundaries of all said coastal parishes extend coextensively with the gulfward boundary of the State of Louisiana [La. R.S. 49:6], and (ii) extended the boundaries of such parishes to the outer limits of the OCS by providing that state law applies to the subsoil and seabed of the OCS and all artificial islands thereon 'which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf'...."

We believe that the Court's reasoning in the Union Texas case, if applied to Louisiana recording statutes, supports the argument that Louisiana recording statutes affecting immovable property apply to federal leases offshore Louisiana. Consequently, our conclusion is that, under relevant law applicable to federal leases covering OCS lands located offshore Louisiana, every muniment of title should be filed with the Clerk of Court in the appropriate parish adjacent to the relevant offshore block.

Although the Land is not located within the geographic boundaries of any Louisiana parish, applying the rationale of the Fifth Circuit in the Union Texas case, we suggest that the most likely adjacent parish would be [_____] Parish. Consequently, in addition to

examining title to the Property in the records of the MMS, we have also examined title to the Property in [_____] Parish, Louisiana.

Based upon our examination of title to the Property, all instruments in the chain of title have been filed in the Conveyance Records of [_____] Parish, Louisiana.

REQUIREMENT:

None, advisory only.

3.

We have assumed that all formalities required in connection with bidding for the Lease were fully complied with by the bidders, a factual matter which is outside the scope of our examination.

REQUIREMENT:

You should confirm that all parties complied with all required formalities connected with bidding for the Lease.

4.

The Lease provides that the United States of America shall be paid a royalty on production of 16-2/3% in amount or value of production

saved, removed, or sold from the Property. The royalties, when paid in value, are due and payable monthly on the last day of the month next following the month in which the production is obtained. Please note that, by virtue of 43 U.S.C. Sec. 1334, a producing federal lease is subject to cancellation for failure to comply with any of its provisions, including those relating to the payment of royalty.

REQUIREMENT:

None, advisory only. Because the failure to pay royalty in a timely manner is grounds for cancellation of the Lease, however, you may wish to verify that all accrued and accruing royalties, if any, have been paid in a timely manner as provided in the Lease.

5.

The Lease is issued on Form MMS-2005 (March 1986) and contains a number of provisions of which you should be aware, including the following special stipulation to which all co-owners of the Lease are bound in the conduct of operations on the Property:

STIPULATION NO. 1 - PROTECTION OF ARCHAEOLOGICAL RESOURCES

a. "Archaeological resource" means any prehistoric or historic district, site, building, structure, or object (including shipwrecks); such term includes

artifacts, records, and remains which are related to such a district, site, building structure, or object (Section 301(5), National Historic Preservation Act, as amended, 16 U.S.C. 470 W(5)). "Operations" means any drilling, mining, or construction or placement of any structure for exploration, development, or production on the lease.

b. If the Regional Director (RD) believes an archaeological resource may exist in the lease area, the RD will notify the lessee in writing. The lessee shall then comply with subparagraphs (1) through (3).

1. Prior to commencing any operations, the lessee shall prepare a report, as specified by the RD, to determine the potential existence of any archaeological resource that may be affected by operations. The report, prepared by an archaeologist and geophysicist, shall be based on an assessment of data from remote-sensing surveys and of other pertinent archaeological and environmental information. The lessee shall submit this report to the RD for review.

2. If the evidence suggests that an archaeological resource may be present, the lessee shall either:

i. Locate the site of any operations so as not to adversely affect the area where the archaeological resource may be; or

ii. Establish to the satisfaction of the RD that an archaeological resource does not exist or will not be adversely affected by operations. This shall be done by further archaeological investigation, conducted by an archaeologist and a geophysicist, using survey equipment and techniques deemed

necessary by the RD. A report on the investigation shall be submitted to the RD for review.

3. If the RD determines that an archaeological resource is likely to be present on the lease and may be adversely affected by operations, the RD will notify the lessee immediately. The lessee shall take no action that may adversely affect the archaeological resource until the RD has told the lessee how to protect it.

c. If the lessee discovers any archaeological resource while conducting operations on the lease area, the lessee shall report the discovery immediately to the RD. The lessee shall make every reasonable effort to preserve the archaeological resource until the RD has told the lessee how to protect it.

All provisions of the Lease should be carefully adhered to in the conduct of operations on the Property.

REQUIREMENT:

None, advisory only.

6.

The documents reviewed from the records of the MMS indicate that [_____] has been designated as operator of the Property by [_____], the record title owner.

REQUIREMENT:

None, advisory only.

7.

The provisions of 30 C.F.R. §256.62 make the assignment of all or an officially recognized portion of a federal lease subject to the approval of the Regional Director of the MMS. An undivided interest in the Lease may be assigned in whole or in part only to a qualified party as defined in 30 C.F.R. §256.35(b). All instruments of transfer must be filed in duplicate for approval within 90 days from the date of final execution. 30 C.F.R. §256.64(a)(1) and (2). An approved assignment of all or an undivided interest in a federal lease is deemed to be effective on the first day of the lease month following its filing with the MMS, unless an earlier date is specified in the request for approval. 30 C.F.R. §256.62(c). 30 C.F.R. §256.62(d) further provides that the assignor shall be liable for all lease obligations accruing prior to approval of the assignment by the MMS, and 30 C.F.R. §256.62(e) states that the assignee shall be liable for all obligations under the lease subsequent to the date that the Regional Director approves the governing assignments.

The Abstracts and Materials indicate that all pertinent assignments in the chain of title of [_____] to the Property that are required to be approved by the MMS have, in fact, been approved by the MMS except for the following:

Instrument:	
Assignor:	
Assignee:	
Dated:	
Effective:	
Recording Data:	

[We understand that the above instrument has been filed with but not yet approved by the MMS.]

REQUIREMENT:

Obtain and furnish for examination evidence of filing with and approval by the MMS of the instrument identified above.

8.

Prior to August 20, 1997, federal laws and regulations did not require the filing with the MMS of assignments of overriding royalty interests, production payments, carried working interests, mortgages, liens, encumbrances, preferential rights, or documents of a similar nature. Filings of documents evidencing transfers of these types of instruments could be rejected at the discretion of the Regional Director of the MMS. Effective as of August 20, 1997, carried working interests, overriding royalty interests, and payments out of production are required to be filed with the MMS (although approval by the Regional Director is not required). 30 C.F.R. Sec. 256.64(a)(7).

Our examination indicates that no such interests have been created that continue to affect the Property, except as indicated in this Opinion. For your information, the following overriding royalty interests continue to affect the Property:

a.

d.

. . .

We are unable to determine conclusively, however, whether any such interests have been created by documents that have not been recorded with the MMS or filed with the Parish Clerk.

REQUIREMENT:

None, advisory only.

9.

The Abstracts and Materials examined contain reference to the following unrecorded agreements that may affect the ownership of the Property as a result of the references:

a.

b.

. . .

Under relevant Louisiana law, although unrecorded agreements are not effective against third parties, the obligations contained therein may be assumed by an express assumption or acknowledgment of such obligations with the effect that a person or entity is not afforded the protections of the Louisiana recording statute otherwise available to a third party.

REQUIREMENT:

If you should desire an opinion concerning the effect of any such documents, copies of same should be provided for our examination and further comment.

10.

Under current regulations of the MMS, prior to the issuance of an OCS lease, any bidder on an OCS lease is required to post a bond as required by Section 256.52. 30 C.F.R. Sec. 256.47(f). Section 256.52 requires a bidder or another record title owner

to post with the MMS a $50,000 lease bond conditioned upon the bidder's compliance with the terms and conditions of the lease. 30 C.F.R. Sec. 256.52(a)(1). Alternatively, the bidder or another record title owner may comply by posting a $300,000 areawide bond that guarantees compliance with all the terms and conditions of all leases in the area where the lease is located. 30 C.F.R. Sec. 256.52(a)(2).

These bonding requirements increase in the event that a lessee seeks approval of an assignment of an OCS lease subject to either an Exploration Plan ("EP") or a Development and Production Plan ("DPP"). 30 C.F.R. Sec.256.53(a) and (b). In the event of a proposed assignment of a lease subject to an approved EP, MMS will require the assignee to furnish a surety bond in the amount of $200,000 as a condition of the approval of the assignment unless the assignee already maintains or furnishes the $500,000 surety bond referred to hereinafter or maintains an area-wide surety bond that guarantees compliance with all of the terms and conditions of the OCS leases held by the assignee in the relevant OCS area. In the event of a proposed assignment of a lease subject to a DPP, MMS will require the assignee to provide a $500,000 surety bond unless the lessee already maintains a $3,00,000 area-wide bond that guarantees compliance with all of the terms and conditions of the OCS leases owned by the assignee in the relevant OCS area.

These bond requirements are applicable not only to the original lessee under OCS leases, but to all assignees of record title interests therein as well, and the MMS treats the failure of an assignee to comply with these bond requirements as grounds for disapproving such a transfer of interest in an OCS lease to such an assignee. 30 C.F.R. Sec. 256.62(a)(2).

<u>REQUIREMENT:</u>

None, advisory only.

11.

In addition to the specific bonding requirements that must be met by lessees of OCS leases under 30 C.F.R. Sec. 256.52 and Sec. 256.53 discussed in the preceding comment, the MMS may require additional security from the lessee of an OCS lease after operations or production have begun, if such additional security is deemed necessary. 30 C.F.R. Sec. 256.53(d). Pursuant to 30 C.F.R. Sec. 256.53(d), the MMS may require supplemental bonds from lessees whose cumulative potential lease abandonment liability exceeds their cumulative bond coverage, including any previously required supplemental bond, and who do not demonstrate financial ability significantly in excess of the potential abandonment liability. Under the Supplemental Bond Procedures, the MMS may review a lessee for supplemental bond requirements prior to approval by the MMS of assignments, exploration plans, development and production plans, or at any other time when the MMS determines that the lessee may not have the financial resources necessary to carry out the obligations of an OCS lease. 30 C.F.R. Sec. 256.53(f).

Once the MMS has issued a supplemental bond requirement, the failure by the lessee to comply with such demand may be grounds for an order by the Regional Director of the MMS suspending production from the lease, 30 C.F.R. Sec. 250.10, or even cancellation of the lease. 43 U.S.C. Section 1334(c) and (d). See also, 30C.F.R. Sec. 256.52(h).

According to the Letter to Lessees and Operators dated November 5, 1993, issued by the MMS, a lessee may demonstrate the financial ability necessary to receive an exemption from the obligation to post supplemental bonds only if the estimated cumulative potential lease abandonment of the lessee to the MMS is not more than 25% of the most recently available and independently audited calculation of the net worth of the individual lessee, with the assumption being made in such calculation that each co-owner of the lease is independently liable for 100% of abandonment costs, and if the lessee meets at least one of the following criteria:

i. the lessee has total employment of 500 or more as evidenced by pu

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ii. the lessee has a minimum net worth of $35 million or minimum gross annual sales of $45 million in the most recent available year as evidenced by audited financial statements; or

iii. the lessee is restricted from joint bidding on OCS leases based upon the semi-annual review conducted by the Justice Department.

In instances in which MMS leases are owned in co-ownership, a supplemental bond will not be required if one or more of the co-owners is considered sufficiently financially able to serve as a self-insurer.

REQUIREMENT:

None, advisory only.

12.

Under 30 C.F.R. Sec. 250.10, the MMS may direct a suspension of any operation or activity, including production, if the lessee fails to comply with a provision of any applicable law, regulation, or order, or provision of a lease or permit. Under the same section of 30 C.F.R., the MMS may suspend any operations or activity, including production on the Property, to facilitate proper development of the Property or in the event of a threat to life (including aquatic life), property, mineral deposits, the national security, or the marine, coastal, or human environment.

REQUIREMENT:

None, advisory only.

13.

We have not examined any evidence as to the manner in which the Lease has been maintained in force and effect since its issuance and, therefore, we express no opinion as to the present status of the Lease. The Abstracts and Materials indicate that the Lease was granted with a five-year Initial Period, or primary term, and is beyond the first year of its primary term. We have assumed that the Lease has been and is being maintained in full force and effect in accordance with its terms by the payment of delay rentals, shut-in royalties, minimum royalties, drilling operations, production, or otherwise.

REQUIREMENT:

None, advisory only

14.

The interests of [_____] in and to the Property are termed "operating rights." Although the MMS regulations, 30 C.F.R. Sec. 250, et seq., do not define the terms "operating rights" or "record title," such terms are defined in the regulations pertaining to onshore federal lands in 43 C.F.R. Sec. 3100.0-5. The term "record title" is defined as "a lessee's interest in a lease which includes the obligation to pay rent, and the rights to assign and relinquish the lease. Overriding royalties and operating rights are severable from record title interests." 43 C.F.R. Sec. 3100.0-5(c). The term "operating right" is defined in the federal onshore regulations as "the interest created out of a lease authorizing the holder of that right to enter upon the lease lands to conduct drilling and related operations, including production of oil or gas from such lands in accordance with the terms of the lease." 43 C.F.R. Sec. 3100.0-5(d).

Although the MMS Regulations do not define the foregoing terms, such terms are used therein, and we are of the opinion that the cited definitions apply with equal force

in the context of OCS leases. Thus, under the foregoing definitions, the owner of operating rights is authorized to enter upon an OCS lease to conduct drilling and related operations. The operating rights owner is subject, however, to having his interest extinguished if the record title holder fails to meet its lease obligations or chooses to relinquish the relevant lease. 43 C.F.R. Sec. 3100.0-5(c). Generally, only the record title holder is entitled to receive notices from the MMS regarding essential matters affecting the relevant lease and remains responsible for the fulfillment of all obligations of the lease, including the payment of royalties, rentals, and minimum royalties, the filing of reports, and the filing of requests for suspension of production. See 30 C.F.R. Sec. 256.68; 43 C.F.R. Sec. 3100.0-5(e).

An operating rights owner may obtain a certain amount of protection from the acts and omissions of the record title holder if the operating rights owner is designated as the operator of the subject OCS lease. Pursuant to 30 C.F.R. Sec. 250.8(a)(1), an operator's designation will be accepted by the MMS as *"authority for the operator to act on behalf of each lessee and operating rights owner and to fulfill each of their obligations under the [OCSLA], the lease, and the regulations in this part."* (emphasis added). Please note, however, that although the designation of an operating rights owner as operator of an OCS lease clearly permits the operating rights owner to step into the shoes of the lessee with respect to operations on the OCS lease governed by the provisions of Part 250 of 30 C.F.R., a literal reading of the quoted language from Section 250.8 indicates that the designated operator does not step into the shoes of the lessee or record title holder in his relationship with the MMS under the terms of the lease pertaining to matters such as the payment of royalties and minimum royalties, suspensions of operations or production, and lease termination, which matters are governed by Part 256 of 30 C.F.R. 30 C.F.R. Sec. 250.8(b). Thus, even when an operating rights owner is the designated operator of an OCS lease, such owner still must deal directly with the record title holder to protect himself from acts or omissions by the record title holder which could result in the termination of the OCS lease.

REQUIREMENT:

None, advisory only.

15.

Reference to any well name or unit name in this Opinion, in the description of the Property in Section I of Exhibit A, or in the tabulation of record title in Section II of Exhibit A, is not intended to enlarge the coverage of this Opinion to include lands, depths, hydrocarbon substances, or oil and gas leasehold interests or operating rights other than those specifically described on Exhibit A. The scope of this Opinion is expressly limited to the land, depths, hydrocarbon substances, and the interests described on Exhibit A.

REQUIREMENT:

None, advisory only.

16.

The tabulation of interests in and to the Property herein is limited to ownership of record title interests, interests in operating rights, and overriding royalty interests in the Lease. Specifically excluded from this Opinion is a tabulation of ownership of any other mineral rights, interests, or estates.

REQUIREMENT:

None, advisory only.

17.

Of necessity, this Opinion is subject to any applicable bankruptcy or insolvency laws, liens for taxes not yet due, statutory and constitutional liens and privileges under applicable state or federal law not of record, operator's liens not of record or not

otherwise disclosed pursuant to our examination of title, statutory liens securing payment of proceeds of production from the Property, enforcement of regulations or orders by any governmental authority having jurisdiction over the Property, capacity or competency of parties executing instruments in the chain of title, and defenses of fraud, lack of delivery, and alteration after delivery. When appropriate, we have made comments and requirements regarding the authority and capacities of parties executing instruments as a trustee, executor, administrator, attorney-in-fact, guardian, or in similar capacities, but we have assumed, for purposes of this Opinion, the authority of all parties executing instruments in the capacity as a duly authorized officer appropriately acting on behalf of a corporation.

REQUIREMENT:

None, advisory only.

18.

This Opinion does not cover any matters relating to compliance with or violation of any federal, state, or local environmental laws or regulations, nor to any matters relating to compliance with or violation of any orders, decrees, judgments, injunctions, notices, or demands issued, entered, promulgated, or approved under any such environmental laws or regulations *unless specifically set forth in the Abstracts and Materials.*

REQUIREMENT:

None, advisory only.

19.

This Opinion does not cover any matter that could be determined only by an investigation upon or survey of the Property. Except as specifically set forth herein,

this Opinion does not purport to cover obligations imposed by applicable federal or state laws, rules, or regulations with respect to owners of mineral rights. You are advised, however, as to the existence of a pipeline right-of-way as bearing serial number OCS-G [_____], and determined by the abstracter to traverse the Land.

REQUIREMENT:

None, advisory only. In connection with the above-mentioned pipeline right-of-way, however, you should become familiar with the terms of such encumbrance and obtain all of the requirements of such right-of-way in connection with any operations conducted on the Land.

20.

This Opinion is strictly limited to the matters addressed herein, and no other opinion is implied or should be inferred with respect to any other matters.

REQUIREMENT:

None, advisory only.

21.

This Opinion is rendered solely and exclusively for the benefit of [_____,] its affiliates, and lenders to [_____] (collectively, the "_____ Group") and is not to be quoted in whole or in part, nor is it to be relied upon by any other party, without the prior written consent of this firm. Other than the right to consent to the use of this Opinion by any person other than the [_____] Group that is reserved by this firm, any rights that may arise as a result of the preparation and issuance of this Opinion concerning matters covered by this Opinion are vested solely in [_____] unless otherwise consented to in writing by this firm, and such

rights are not assignable, heritable, or mortgageable, and shall not survive the transfer of the Property by [_____] to any person.

REQUIREMENT:

None, advisory only.

Very truly yours,

LANIER YEATES
A PROFESSIONAL CORPORATION

EXHIBIT A

I. PROPERTY DESCRIPTION

II. TITLE TO THE PROPERTY

A. MMS Records

Owner	Record Title Interest	Operating Rights Interest	Net Revenue Interest	Overriding Royalty Interest
Total	1.000000	1.000000		

B. [_____] Parish Records

Owner	Record Title Interest	Operating Rights Interest	Net Revenue Interest	Overriding Royalty Interest
Total	1.000000	1.000000		

III. ENCUMBRANCES (the "Encumbrances")

1. Liens and Mortgages:

2. Lis Pendens:

3. Judicial Mortgages:

2. Unitization Agreements:

4. Other Encumbrances:

EXHIBIT B

ABSTRACTS AND MATERIALS EXAMINED

I. Certified Run sheet prepared by [_____], based upon an examination of the Indices to the Conveyance, Mortgage & Suit Records of the Clerk of Court and Ex-Officio Records of [_____] Parish, Louisiana, covering title to the Property, from [_____] through[_____], at [_____] a.m./p.m.

II. Run sheet dated[_____], prepared by [_____] covering the Property based upon an examination of the records of the MMS and covering the period of time from [_____], to[_____], at [ ] a.m./p.m.

III. Photocopy of documents from the records of the MMS and the Cameron Parish Clerk that are reflected by Documents 1 and 2 above.

ATTACHMENT III

ENGAGEMENT LETTER

[DATE]

Client Name and Address

Attention: _____

Re: Acquisition from _____ (the "*Seller*") of interests in producing properties located in _____ (the "*Acquisition*").

Gentlemen:

Thank you for the opportunity to work with you on the referenced matter. I am pleased that we have been retained as special Texas and Louisiana oil and gas counsel to represent you in the Acquisition in connection with title matters.

I. SCOPE OF ENGAGEMENT

A. Due Diligence and Document Analysis. As we discussed by telephone today, _____ has requested and we have agreed to review any existing title opinions which (i) may be available from the files of the Seller and (ii) cover the referenced properties, if any, (the "*Original Opinions*") and advise you concerning the suitability of such opinions for your purposes.

B. Examination of Title. Upon completion of due diligence in the files of the Seller and our review of documents furnished by the Seller, with the assistance of our

attorneys and contract land services, we will commence to examine the relevant parish, Minerals Management Service or other appropriate records for all instruments affecting the interests of the Seller, and, if any Original Opinions exist, for all instruments filed subsequent to the closing dates of the Original Opinions, and prepare limited title opinions covering the nature and extent of ownership of the interests that _____ intends to acquire from the Seller.

II. FEES AND EXPENSES

A. Legal Fees. Fees for our legal services rendered in connection with the Acquisition will be based on the actual time spent on the project by the attorneys and legal assistants performing the services.

B. Billing Rates. Our billing rates for the attorneys who will be performing a substantial portion of the work on the Acquisition range from $____ to $____ per hour, and our legal assistants rates range from $____ to $____ per hour.

C. Disbursements. Out-of-pocket expenses that are incurred as required in the Acquisition will be charged to you, including long distance telephone charges, photocopying costs, document preparation charges, lodging, meals and travel expenses connected with out-of-town travel, if any, messenger services, and any secretarial overtime that may be occasioned by advanced deadlines.

D. Monthly Statements. Our invoices will be rendered monthly and directed to your attention.

III. OTHER SERVICES

A. Landmen and Abstracters. Additionally, the project will require employment of contract landmen and abstracting services to perform the record title update in the offices of the parish clerks of the State of Louisiana. Fees charged by landmen generally amount to $_____ per day. Abstracters charges are based on the number of pages compiled in an abstract.

B. Prior Approval. Before engaging the services of any third parties, including landmen and abstracters, we will request your approval.

C. Review of Third Party Invoices. Landmen, abstracters and other third parties providing services will be requested to direct all invoices to ___[Client Name]___ in care of our Firm. We will review all third party invoices and forward them to you upon our determination of their appropriateness.

IV. TERMS OF PERFORMANCE

A. Delivery Date. We understand that, if materials can be returned to us by the landmen and abstracters on the schedules that we have (i) discussed with you and (ii) requested the landmen and abstracters to follow, your preference is to receive our title opinions covering the referenced properties on or before _____ 19_.

B. Acknowledgment of Engagement. Please acknowledge our employment and authority to immediately proceed with our work on your behalf, as described in and under the terms of this letter, by executing a copy of this letter and returning it to my attention in our Houston office.

Very truly yours,

J. Lanier Yeates

AGREED TO AND ACCEPTED
this _____ day of
, 19__

CLIENT

By: _____

Printed Name: _____

Title: _____

ATTACHMENT IV

LETTER DECLINING REPRESENTATION

[DATE]

Client Address _____

Attention: _____

Re: _____

Dear [Name]:

This will confirm our discussion in which I advised you that our Firm would not be in a position to represent you in connection with the referenced matter.

If you do not have another lawyer in mind to represent you in this matter, we would suggest that you contact [name of firm from referral list] (name of the local lawyer referral service).

You should be aware that time limits [could be] [are] involved and [may] affect your rights. We have not attempted to determine the applicable time limits and have not and do not advise you of any particular time limitations; however, you should immediately contact another attorney. If you fail to do so, claims may be barred or your rights may be inalterably affected.

Very truly yours,

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. _____

ATTACHMENT V

WAIVER OF CONFLICTS LETTER

[DATE]

Name and Address

Attention: _____

RE: _____

Gentlemen:

In the past, we have represented _____ in various legal matters. In connection with the sale by _____ of its _____ properties, we have been requested to represent _____ as special Louisiana and Texas counsel in title and financing matters.

This letter is to advise you that conflicts of interest may exist or could arise in the future as a result of our representation of _____ in connection with such financing and the sale by _____ of the _____ properties and to request a waiver of such conflicts. If you agree to waive all such conflicts or potential conflicts, please sign one copy of this letter in the space provided below and return it to me.

Very truly yours,

_____

AGREED TO THIS _____ DAY
OF _____, 19__

By:_____
Printed Name:_____
Title:_____

ATTACHMENT V

FORM OF CONFIDENTIALITY AGREEMENT

[DATE]

Client Address _____

Attention: _____

Gentlemen:

You have expressed an interest in exploring the possibility of purchasing certain oil and gas producing properties (or interests therein) and other assets ("*Assets*") from _____ ("*Seller*") or Seller's subsidiaries.

This letter shall evidence the agreement between you and Seller relating to confidential information furnished to you in connection with such possible acquisitions. In consideration of Seller making available the Information (as defined herein), you agree as follows:

1. Such proposed transactions involving the acquisition of Assets shall hereinafter be referred to as the "*Proposed Transactions.*" All information relating to the Proposed Transactions, whether oral or written, furnished to you, your officers, directors, employees, representatives (including attorneys and accountants) and agents (such persons collectively referred to hereafter as "*You and Your Agents*"), together with analysis, compilations, studies or other documents prepared by You and Your Agents which contain or otherwise reflect such furnished information or your review of, or interest in, the Proposed Transactions shall be considered confidential and is hereafter referred to as the "*Information.*" Each part of the

information furnished to You and Your Agents or any subsidiary or affiliate of You and Your Agents shall be deemed furnished to you for purposes of this letter.

2. The Information that may be furnished to You and Your Agents by officers, directors, employees, agents, or representatives of Seller and its subsidiaries will be kept confidential by You and Your Agents in connection with evaluation of the Proposed Transactions. In no event shall you use the Information for any purpose other than the evaluation of the Proposed Transactions and in no event shall any such information be used to the detriment of Seller. You agree not to violate any law in connection with your use of the Information. You agree to show or grant access to the Information only to you directors, officers, employees, agents and representatives who need to have access to the Information for the exclusive purpose of evaluating the Proposed Transactions and developing the means of carrying it out, each of whom shall be informed by you of its confidential character and shall agree, as a condition precedent to the disclosure of any of the Information to such individual, to be bound by all of the terms of this letter as if such individual had been an original signatory hereto; you agree to use your best efforts to cause such persons to comply with the terms of this letter. You agree not to make the Information available to any other person or group for any other purpose whatsoever.

3. Without the prior written consent of Seller, except as permitted herein with respect to the Information, you will not disclose to any person the fact that you have received confidential information from Seller, or that discussions or negotiations are taking place concerning the Proposed Transactions or the status thereof.

4. For two years from the date hereof, without the prior written consent of Seller, you will not and you will cause each of your "affiliates" and "associates" (as those terms are defined under the federal securities laws) to not (a) acquire, offer to acquire, or agree to acquire, or cause or recommend that any other person acquire, directly or indirectly, by purchase, gift, through the acquisition of

control of another person or otherwise, any equity securities of Seller, (b) sell, directly, or indirectly, any equity securities of Seller that are not owned at the time of such sale or cause or recommend that any other person sell, directly or indirectly, any securities of Seller, (c) make or in any way participate in, directly or indirectly, any "solicitation" of "proxies" to vote or become a "participant" in an "election contest" (as such terms are used in the proxy rules of the Securities and Exchange Commission), or seek to advise of influence any person or entity with respect to the voting of any voting securities of Seller, (d) form, join or in any way participate in a "group" within the meaning of Section 13 (d) (3) of the Securities Exchange Act of 1934 with respect to any Seller equity securities, (e) deposit any voting securities of Seller into a voting trust or subject any voting securities to any arrangement or agreement with respect to the voting of such voting securities, (f) execute any written consent with respect to any of Seller's equity securities, (g) propose any business combination with Seller or make or propose a tender or exchange offer of any other offer for any of Seller's equity securities, (h) arrange, assist or participate in any financing relating to the purchase of any of Seller's equity securities by any person, or (i) otherwise act, alone or in concert with or on behalf of others, to directly or indirectly seek to control or influence the management, Board of Directors, policies or affairs of Seller.

5. If for any reason the Proposed Transactions are not pursued by you or Seller, or if for any reason the Proposed Transactions do not proceed or if you are so requested by Seller, you agree to return to Seller, within 30 days of a request therefor, all the Information, including any and all copies, except for that portion of the Information which consists of analyses, compilations, studies or other documents prepared by You and Your Agents which portion of the Information you agree to hold and keep confidential and subject to the terms of this letter, or to destroy if requested by Seller. Such destruction will be confirmed in writing. You agree that the covenants contained herein shall survive the return of destruction of the Information, in accordance with the terms of such covenants. All Information relating to the Assets not purchased by you shall be returned to Seller.

6. You acknowledge that Seller may not have an adequate remedy at law for money damages in the event that any of the covenants in the Agreement were not performed in accordance with its terms and therefore agree that Seller shall be entitled to specific enforcement of such covenants in addition to any other remedy to which it may be entitled, at law or in equity.

7. You further acknowledge that (a) neither Seller nor any of its subsidiaries is making any representation or warranty as to the accuracy or completeness of the Information and (b) neither Seller nor any of its subsidiaries is in any way obligated to pursue or complete the Proposed Transactions. Representations, warranties, and other obligations relating to the Proposed Transactions, if any, will be contained only in formal documents that reflect the consummation of the Proposed Transactions. Neither Seller nor any of its subsidiaries or agents shall have any liability to You and Your Agents arising from the use by You and Your Agents of the Information.

8. The foregoing restrictions with respect to the Information shall not apply to any information (in the general form furnished hereunder) which you demonstrate (a) is on the date hereof or thereafter becomes generally available to the public other than as a result of a disclosure, directly or indirectly by Your and Your Agents, (b) was available to you by Seller or its representatives, or (c) becomes available to you on a nonconfidential basis from a source other than Seller or its representatives, which source was not itself bound by a confidentiality agreement with Seller or its representatives, which source was itself bound by a confidentiality agreement with Seller or its representatives and did not receive such information, directly or indirectly, from a person or entity so bound.

If you are in agreement with the foregoing, please sign and return one copy of this letter, which will constitute our agreement with respect to the subject matter of this letter, and which shall be construed in accordance with and governed by the laws of the State of Texas.

Very truly yours,

_____

By: _____
Printed Name: _____
Title:_____

Agreed to and Accepted this
day of _____, 19__.

By:

By: _____
Printed Name: _____
Title: _____