November Field Landman Question of the Month

DAPL Member Justin Cage asked:

I’ve recently read that if a state regulatory office considers a person’s work to be the “unauthorized practice of law,” that person could be subject to criminal liability, court sanctions, and/or disciplinary action. What is considered the “unauthorized practice of law” in Colorado and Wyoming? Where does work historically performed by landmen stop and “practicing law” begin?

**American Association of Petroleum Landmen Code of Ethics and Best Practices**

Unlike the legal profession, the landman profession is not subject to governmental ethical regulations. However, organizations like the American Association of Professional Landmen (“AAPL”) and affiliated local landmen associations impose their own voluntary regulation on the ethical duties of practicing landmen. AAPL Code of Ethics, Section 2 states that a Landman shall represent himself or herself to others “only in his areas of expertise and shall not represent himself to be skilled in professional areas in which he is not qualified.” A land professional “shall exercise the utmost good faith and loyalty to his employer (or client) and shall not act adversely or engage in any enterprise in conflict with (their) interest.” Furthermore, the AAPL’s Best Practices for Landmen, Standard #6 states that land professionals “shall provide a level of competent service in keeping with the standards of practice in… which he or she customarily engages” and “shall not represent himself to be skilled in nor engage in professional areas in which he or she is not qualified.”

**Defining the “Unauthorized Practice of Law” in Colorado and Wyoming.**

Colorado law prohibits the unauthorized practice of law, or the practice of law by a person who is not a licensed attorney. The Colorado Supreme Court has defined the “practice of law” as “act[ing] in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting [another] in connection with these rights and duties.” *People v. Shell*, 148 P.3d 162, 167 (Colo. 2006).

Thus, a non-lawyer or unlicensed person may not:

1. provide legal advice to another person;
2. interpret the law;
3. select or draft legal documents on behalf of another person without a licensed attorney present; or
4. hold oneself out as the attorney of another in a legal action.

In order to determine whether a landman engages in the “unauthorized practice of law” in Colorado, a nuanced analysis is involved. A landman must ensure that she does not falsely represent to her clients that she is skilled or licensed to practice law.

To the contrary, Wyoming has explicitly *exempted* landmen from the state’s regulation of the “unauthorized practice of law.” In Wyoming, only a certain group of individuals are authorized to practice law, and includes licensed individuals who: (1) provide any legal advice or service where there is a client relationship of trust or reliance; (2) appear as an advocate in a representative capacity; (3) draft pleadings or other documents; or (4) perform any act in a representative capacity in connection with a prospective or pending proceeding before any tribunal.

Notably, the State of Wyoming specifically exempts landmen from the regulation of the unauthorized practice of law. Wyoming law clarifies that “acts historically performed by landmen relating to the lease, purchase, sale, or transfer of an oil, gas, mineral, or mining interest or other interested incident to an oil, gas, mineral or mining interest in real property” are not subject to the regulation if the landman: (1) does not hold himself or herself out as an attorney licensed to practice law in Wyoming or another jurisdiction; (2) the acts are in conformance with regional best industry practice; and (3) the landman is not a member of the Wyoming State Bar. Therefore, in Wyoming, the work historically performed by landmen in assisting companies and individuals with the acquisition of land and mineral assets, obtaining leases, performing due diligence on those leases, and performing other lease-related assignments is *excluded* from the definition of the practice of law.

**Response to Field Landman Question of the Month**

In order to determine whether a landman engages in the “unauthorized practice of law,” we must determine what specific act a landman engages in on behalf of his or her client. The job description “landman” includes a multitude of different roles. Among other duties, a landman negotiates for ownership of mineral rights, negotiates for
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agreements to explore mineral rights, determines ownership in minerals through public and private records, reviews the status of real estate title, and manages the rights and obligations derived from mineral ownership.

Many of the foregoing tasks sound very much like tasks that people might assume would be performed by oil and gas lawyers. The line separating the work of a lawyer and that of a landman grows even thinner when the landman negotiates, drafts, and finalizes complex oil and gas agreements, and in some circumstances, even works closely with legal departments of oil and gas companies to do so.

Unlike Wyoming, the work of landmen in Colorado is neither exempted nor excepted from the Colorado definition of the practice of law. Therefore, whether or not one’s work constitutes the unauthorized practice of law necessitates a more nuanced analysis. Generally, providing blanket legal advice or putting oneself out as the attorney representing a client in a litigation matter would constitute the unauthorized practice of law. Sending letters to a client directing him or her to follow certain legal advice would constitute the unauthorized practice of law. Preparing of deeds, deeds of trust, promissory notes, mortgages, releases of encumbrances, leases, and wills coupled with the explanation of advice as to the legal effect thereof also constitutes the unauthorized practice of law. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass’n, 135 Colo. 398, 410 (1957).

Because there is “no wholly satisfactory” or “all-inclusive” definition as to what constitutes the “unauthorized practice of law,” Colorado reviews as series of factors, such as:

1. whether the landman provided a legal explanation or advice as the documents it prepared;
2. whether the legal instruments the landman prepared were necessary and essential to the landman’s business;
3. whether the landman charged a fee for preparing the legal instruments;
4. whether the public interest would be served by enjoining the allegedly unauthorized practice; and
5. whether the landman prepared instruments to which it was a party, and, if so, whether the landman was acting for its own use and benefit in doing so rather than for or on behalf of others.

Similarly, although it appears that landmen might be exempt from the “unauthorized practice of law” under Wyoming law, landmen must still actively protect themselves in order to avoid the unauthorized practice of law and disciplinary action from Wyoming courts.

The foregoing provides a broad overview of what can constitute the “unauthorized practice of law;” however, each case depends on the specific actions performed by the landman. In general, it is a good idea to always stay within your area of expertise and avoid situations where you may be enticed to give advice on the specialties of other disciplines such as law, accounting, taxes, engineering, oil & gas or mining operations, or geology. Always avoid purporting to act as a lawyer and never hold yourself out as representing your clients in a legal capacity provide legal advice.

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Do you have a land issue you would like discussed? Do you need supporting documentation to win a gentleman’s bet with a colleague? Is there a question you are too embarrassed to ask your boss? If so, the DAPL would like to hear from you. Please submit your question to Joe.Martin@highwestresources.com. Each month, we will publish a question chosen from those submitted, along with a Fox Rothschild LLP attorney’s discussion of the issue. The foregoing article discusses general legal principles and laws applied to a generic fact situation, is not intended to constitute legal advice or create any attorney-client relationship, and no representation or warranty of accuracy or applicability regarding the same is made by the author or Fox Rothschild LLP. The content of and views expressed in the foregoing article are those of the author, and are not the views of the Denver Association of Petroleum Landmen or of any republisher of the foregoing article, and neither shall have any liability associated with the same.