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## Regulate or Be Regulated: Why Professional Landmen Should Be Proactive in Protecting the Integrity of Their Occupation

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**REGULATE OR BE REGULATED: WHY PROFESSIONAL  
LANDMEN SHOULD BE PROACTIVE IN  
PROTECTING THE INTEGRITY  
OF THEIR OCCUPATION**

*Brian J. Steinocher<sup>†</sup>*

I.	INTRODUCTION.....	384
II.	LANDMAN.....	384
	A. <i>History of the Landman</i> .....	384
	B. <i>The Duties and Job Functions of a Landman</i> .....	387
III.	REASONS FOR MISTRUSTED LANDMEN.....	388
	A. <i>The Negotiation between Landman and         Landowner</i> .....	389
	1. Lease Tactics Used by Landmen.....	390
	2. The Knowledge Gap Between Landmen and Landowners.....	391
	B. <i>Opportunistic Landmen and the Agency         Relationship</i> .....	392
IV.	COMPARABLE PROFESSIONS TO THE PROFESSIONAL LANDMAN.....	394
	A. <i>Landmen and the Unlicensed Practice of Law</i> .....	394
	B. <i>Comparison with Real Estate Professionals</i> .....	396
V.	LACK OF REGULATION ANOMALY.....	397
	A. <i>Regulatory Background on Comparable Occupations         and Licensing Theories</i> .....	398
	1. Entry Regulations of Lawyers .....	398
	2. Entry Regulations of Real Estate Professionals.....	399
	3. The Argument Against Excessive Entry Regulations .....	399
	B. <i>Texas’s Most Recent Attempt to Regulate         Landmen</i> .....	400
	C. <i>The Influence Behind the Decision in Texas</i> .....	401
VI.	REGULATORY OPTIONS AVAILABLE .....	402
	A. <i>States That Took Action to Reign in Leasing         Practices</i> .....	402
	B. <i>Scholarly Suggested Approaches to Regulation</i> .....	403
	C. <i>A Possible Approach Through the AAPL</i> .....	404
VII.	CONCLUSION .....	405

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## I. INTRODUCTION

In most states, the landman profession is unregulated and free to define itself. Work performed by landmen often flirts with the practice of law, but under Texas law much of the work that landmen perform is excepted from the unlicensed practice of law. Historically, the American Association of Professional Landmen (“AAPL”) has been influential in guaranteeing that this exception stays available to landmen all over the United States and that landmen are not subject to licensing requirements in the states they work in. In light of the recent, unsuccessful attempt by the Texas legislature to regulate landmen, this Article will analyze whether or not regulation would be beneficial for landmen, the energy industry, and the general public.

This Article will first discuss the historical roots and qualities of landmen. It will then address the duties and job functions of landmen. Section III will analyze why both the general public and the energy industry itself may distrust landmen and the job functions they perform. Section IV provides a contrast between landmen and the practice of law, in addition to identifying how the landman profession is relatable to the real estate profession. These comparisons help highlight the anomaly of the lack of regulation of landmen, even though there are similarities among these professions. Section V addresses the lack of regulation over landmen, including licensing theories, the regulation of comparable professions, and the licensure requirements proposed in Texas in 2009. Finally, Section VI presents examples of what other states have done to promote regulation, summarizes other regulatory recommendations, and ends by proposing regulations that Texas could enact to regulate landmen.

## II. LANDMAN

### A. *History of the Landman*

“The landman may know the law, but the law does not seem to know very much about the landman.”<sup>1</sup> In fact, it seems that very little is known about landmen and where the occupation began.<sup>2</sup> Some trace the occupational roots to buying timber rights in the 1800s or securing coal rights in Appalachia.<sup>3</sup> The role of the modern landman has taken a somewhat similar, yet different, course since that time.<sup>4</sup> When Texas struck “big time” oil with the Spindletop geyser in 1901, endless opportunities for mineral wealth through development of oil

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1. Gordon L. Allott, Jr., *Unanticipated Liability of the Landman*, 31 RMMLF-INST 21, § 21.01 (1985).

2. See Ann M. Eisenburg, *Land Shark at the Door? Why and How States Should Regulate Landmen*, 27 FORDHAM ENVTL. L. REV. 157, 165 (2016).

3. *Id.* at 165–67.

4. *Id.* at 165.

fields in Texas seemed apparent.<sup>5</sup> To bridge the gap between the mineral owner and the ambitious mineral developer, the industry needed someone with kindness, loyalty, and the ability to create lasting trust between the parties while, at the same time, securing the most favorable lease possible for mineral developers.<sup>6</sup> Success at this particular endeavor was quite lucrative.<sup>7</sup> As such, today's landmen are more commonly associated with oil and gas companies, but their clientele can be broadly defined as anyone interested in divesting or acquiring mineral interests.<sup>8</sup>

Undoubtedly, the goal for buying or leasing timber lands in the 1800s was similar to the goal of leasing oil and gas rights today: get the best deal for the client and leave a favorable impression for future opportunities.<sup>9</sup> Such a task could only be accomplished through "kindness, loyalty, and trust."<sup>10</sup> In fact, a landman's charisma can come across as so endearing and sincere that a landowner feels guilty attempting to negotiate a better deal.<sup>11</sup>

Up until 2007, landmen were a dying breed.<sup>12</sup> Their job determining mineral ownership and leasing mineral rights occurs in the early stages in oil and gas exploration, so demand for landmen closely mirrors the crude oil market.<sup>13</sup> When the market regresses or crashes, landmen are often left out of work.<sup>14</sup> Domestic crude oil production declined nearly every year from 1985 to 2007.<sup>15</sup> U.S. oil production was understandably past its peak with no foreseeable rebound in production.<sup>16</sup> "Landmen were not needed."<sup>17</sup>

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5. See Paul Cones, *The Evolution of the American Landman*, LANDMAN BLOG, <http://www.landmanblog.com/evolution-american-landman/> [<https://perma.cc/7NPF-9Q7X>] (last visited Feb. 5, 2017).

6. See John McFarland, *Dealing with Landmen*, OIL & GAS LAWYER BLOG (Dec. 11, 2011), <http://oilandgaslawyerblog.com/2011/12/dealing-with-landmen.html> [<https://perma.cc/D4H2-UT2B>].

7. Cones, *supra* note 5. The Texas Fuel Company was founded in 1902, and later became known as Texaco. *Id.*

8. See *Frequently Asked Questions*, AAPL AMERICA'S LANDMEN, <http://www.americaslandman.com/faq> [<https://perma.cc/24N5-3RKM>] (last visited Jan. 17, 2017).

9. See Eisenburg, *supra* note 2, at 166.

10. Douglas Clark, *Kindness, Loyalty and Trust; Enemies of the Landowner, but Friends of the Landman*, THE CLARK LAW FIRM, <http://pagasleaseattorney.com/kindness-loyalty-trust-enemies-landowner-friends-landman> [<https://perma.cc/3GGP-X27P>] (last visited Sept. 30, 2016).

11. *Id.*

12. Lauren Etter, *Texas Landmen Left out of Work as Oil Patch Boom Turns Bust*, BLOOMBERG (Mar. 23, 2015, 9:41 AM), <https://www.bloomberg.com/news/articles/2015-03-23/texas-landmen-left-out-of-work-as-oil-patch-boom-times-go-bust> [<https://perma.cc/VVG2-AGYG>].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

But horizontal drilling and advances in fracking technology<sup>18</sup> created an energy boom that resurrected the landman profession.<sup>19</sup> Horizontal drilling coupled with regulatory spacing requirements meant that a single lease was often not enough to meet the minimum acreage requirement to drill a well.<sup>20</sup> Urban areas, in particular, could require hundreds of leases for a single oil or gas well.<sup>21</sup> Exploration companies needed the landman to determine the proper owner of the minerals under each lot and to negotiate an oil and gas lease with each individual owner. The result was, in a single five-year period coinciding with the shale boom, an increase in AAPL membership from 8,000 to more than 20,000 members.<sup>22</sup> By 2010, the average annual wage for a landman was over \$125,000.<sup>23</sup> Shortly thereafter, CNN Money recognized the landman profession as one of the top 100 jobs in America.<sup>24</sup>

The accolades were quickly met with equally unimpressed critics.<sup>25</sup> During the shale boom, the increased interaction between landowners and landmen increased scrutiny directed at landmen.<sup>26</sup> Several articles lambasting landmen for unethical and unscrupulous leasing practices forced some states to consider regulating or licensing landmen,<sup>27</sup>

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18. Cones, *supra* note 5.

19. Etter, *supra* note 12.

20. Cones, *supra* note 5.

21. *See id.*

22. *Id.* The AAPL currently has over 13,500 registered members and forty-four local affiliated associations within the United States and Canada. *Why Join?*, AAPL AMERICA'S LANDMEN, <http://www.landman.org/aapl-membership/why-join> (last visited Nov. 11, 2016). In addition to standard membership, the AAPL offers three levels of certifications that landmen can obtain through a combination of work experience and education. *Id.* The certifications improve credibility and have been proven to increase the earning potential for landmen. *Id.* Throughout the oil and gas industry, the certifications are recognized as indications of "competency, proficiency and professionalism." *Id.* To set itself apart from other industry organizations, the AAPL offers a multitude of education and networking opportunities to its members to help keep them competitive and knowledgeable of changes in industry practices. *Id.* The education materials vary in form, from continuing education courses focusing on contracts, negotiations, and updates in oil and gas law, to publications like textbooks and research articles. *Id.*

23. Cones, *supra* note 5.

24. *Id.* CNN Money bases the top 100 careers on "big growth, great pay and satisfying work." *100 Best Jobs in America*, CNN: MONEY, <http://money.cnn.com/pf/best-jobs/> [<https://perma.cc/HC8H-U3P8>] (last visited Oct. 1, 2017).

25. *See, e.g.*, Eisenburg, *supra* note 2.

26. *Id.* at 161.

27. *E.g., id.* (stating that landmen have a reputation as ethically dubious and unscrupulous); *see also* Ian Urbina & Jo Craven McGinty, *Learning Too Late of the Perils in Gas Well Leases*, N.Y. TIMES (Dec. 1, 2011), <http://www.nytimes.com/2011/12/02/us/drilling-down-fighting-over-oil-and-gas-well-leases.html> [<https://perma.cc/L7P2-V8WY>] (claiming that landmen will tell people they will miss out if they do not sign right away).

likely in hopes of protecting landowners from being taken advantage of by dishonest landmen.<sup>28</sup>

### B. *The Duties and Job Functions of a Landman*

The landman, whether an independent landman or company landman, is the business side of oil and gas exploration.<sup>29</sup> While company landmen work directly, or in-house, for oil and gas companies, independent landmen usually work on a contract basis for oil and gas companies by performing research in the courthouse or acquiring leases from mineral owners.<sup>30</sup>

Independent landmen generally establish the foundation for mineral ownership through courthouse research and serve as the industry's contact with the public.<sup>31</sup> When an exploration company wants to lease a tract of land, an independent landman performs research in the county courthouse by searching the indirect index records and tracing title back to a predetermined date, sometimes the date of the land patent.<sup>32</sup> After tracing the title back to the predetermined date, the landman will run title forward by searching the direct index records to check for mineral or other conveyances and active oil and gas leases.<sup>33</sup> If the title chain appears complete or acceptable, the landman will calculate the present ownership interest of the tract of land and prepare what is known as a mineral ownership report.<sup>34</sup> The mineral ownership report is then used by the landman, or a different landman, to contact the appropriate mineral owners and attempt to lease their undivided mineral interest through lease negotiations.<sup>35</sup>

After adequate leases are acquired to form a drillable unit, and the exploration company decides it would like to drill a well, the independent landman's job is to return to the courthouse and complete a full-title run sheet.<sup>36</sup> The run sheet includes all documents that could affect title to a particular tract of land.<sup>37</sup> When the run sheet is complete, it is submitted to an attorney for review.<sup>38</sup> The attorney then issues a title opinion that includes the ownership interests of all interested parties and possible curative issues that may need to be ad-

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28. See Tex. H.B. 1405, 81st Leg., R.S. (2009) for an example of legislation that could be enacted to regulate landmen.

29. *What is a Land Professional*, AAPL, <http://www.americaslandman.com/about-landmen> [<https://perma.cc/P8J8-VMFQ>] (last visited Oct. 1, 2017).

30. Rob Davis, *A Landman's Work is the Foundation for Accurately Determining Mineral Ownership Under Rights-of-Way: So, How Should a Landman Search for Roadway Title?*, 18 TEX. WESLEYAN L. REV. 39, 42–44 (2011).

31. *What is a Professional Landman*, *supra* note 29, at 42.

32. Davis, *supra* note 30, at 42–43, 50–51.

33. *Id.* at 50–51.

34. *Id.* at 41–42.

35. *Id.* at 40–44.

36. *Id.* at 43.

37. *Id.*

38. *Id.* at 42.

dressed to correct title defects.<sup>39</sup> Throughout this process, the company landman acts as the supervisor of the independent landmen and attorneys involved<sup>40</sup> and relies on the title foundation set by the independent landmen.<sup>41</sup> The company landman requests run sheets from the independent landman and title opinions from attorneys, decides what title risks the drilling company is willing to take, and determines what curative instruments are absolutely necessary to clear title.<sup>42</sup>

However, the duties of a landman are not limited to these functions.<sup>43</sup> Landmen can perform multiple other functions, including, but not limited to, negotiating business agreements for mineral exploration and managing mineral rights or obligations derived from ownership of mineral interests.<sup>44</sup> In sum, a landman is “primarily responsible for the acquisition and management of interests in oil, gas, and all other mineral estates in land.”<sup>45</sup>

### III. REASONS FOR MISTRUSTED LANDMEN

Motivated by fear of missing out on lease bonus money and monthly royalty checks, early signers of oil and gas leases are often not concerned with whether they got a good deal.<sup>46</sup> The difference between a good lease and a bad lease can be a substantial amount of money.<sup>47</sup> Early in the Barnett Shale boom, leases in Tarrant County, Texas, offered \$300 to \$400 per residential lot, and a royalty between 12.5% and 18.5%.<sup>48</sup> Not long thereafter, Tarrant County residents were receiving offers as high as \$18,250 per acre with a 27.5% royalty.<sup>49</sup> Landowners, when envious of their neighbor’s better deal, often blame landmen, claiming they were misled during the negotiation process.<sup>50</sup> But the better deals were likely due to landowners gaining knowledge about the lease negotiation process and neutraliz-

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39. *Id.* at 41–45. Curative is the process used to fix any defects in the title chain for a certain tract of land. *Title Curative*, MINERAL WISE, <http://www.mineralweb.com/library/oil-and-gas-terms/title-curative-definition/> [https://perma.cc/5CV9-KM7H] (last visited Oct. 1, 2017).

40. Davis, *supra* note 30, at 45–46.

41. *Id.* at 46.

42. *Id.* at 45–46.

43. See Memorandum from Dr. Virkram Rao, Chairman of the N.C. Mining & Energy Comm’n to the Env’tl. Review Comm’n at 2 (Apr. 1, 2015) (on file with the N.C. Dep’t of Env’t & Nat. Res.).

44. *Id.*

45. Rodney D. Knutson, *Legal and Ethical Obligations a Landman Owes His Employer*, 31 RMMLF-INST 19, § 19.01 (1985).

46. J. Zach Burt, *Playing the “Wild Card” in the High-Stakes Game of Urban Drilling: Unconscionability in the Early Barnett Shale Gas Leases*, 15 TEX. WESLEYAN L. REV. 1, 4 (2008).

47. *Id.* at 3–4.

48. *Id.* at 3.

49. *Id.* at 4.

50. Urbina & McGinty, *supra* note 27.

ing hard lease tactics by organizing their neighborhoods and waiting until the competition for their minerals heated up.<sup>51</sup>

A. *The Negotiation between Landman and Landowner*

Landmen that become members of the AAPL agree to abide by a certain Code of Ethics.<sup>52</sup> That code provides: “the Land Professional, in his dealings with landowners . . . shall conduct himself in a manner consistent with fairness and honesty, such as to maintain the respect of the public.”<sup>53</sup> A landman involved in lease acquisitions must also “be sensitive to his obligations to disclose certain information to those with whom he bargains.”<sup>54</sup> A landman who keeps silent as to material facts could be liable for fraud if:

- (1) the ignorant party makes inquiry as to the existence of such facts;
- (2) the knowledgeable party makes a partial disclosure which is misleading unless full disclosure is made;
- (3) a previously made innocent representation will be misleading unless subsequently acquired information is disclosed;
- (4) the parties occupy a fiduciary or other confidential relationship; or
- (5) the contract is inequitable, and the facts would not have been accessible to the ignorant party upon reasonable investigation.<sup>55</sup>

However, circumstances surrounding negotiations for oil and gas leases are, perhaps, the greatest area of criticism placed on professional landmen.<sup>56</sup> In recent years, “Americans have signed millions of leases” with energy companies allowing for the exploration of oil or gas on their property.<sup>57</sup> Many of these landowners, excited by the lease bonus money, fail to inquire or further understand what the language and long-term effects of the lease entail.<sup>58</sup> Oil and gas are regarded as a fee interest estate in land.<sup>59</sup> A conveyance, reservation, or oil and gas lease can sever that interest from the surface estate.<sup>60</sup> An oil and gas lease operates as a “conveyance that transfers a fee simple determinable interest in the mineral estate that is subject to the terms

51. Burt, *supra* note 46, at 3–4.

52. See *Code of Ethics*, AAPL, <http://www.landman.org/about-aapl/bylaws> [<https://perma.cc/43TP-7L2>] (last visited Feb. 11, 2017) [hereinafter *Code of Ethics*].

53. *Id.*

54. Knutson, *supra* note 45, at § 19.03(6).

55. *Id.*

56. E.g., Urbina & McGinty, *supra* note 27; Colby Hamilton, *The Landmen Cometh*, EMPIRE (Aug. 15, 2011), <http://www.wnyc.org/story/194971-the-landmen-cometh/> [<https://perma.cc/8CEJ-KUXJ>].

57. Urbina & McGinty, *supra* note 27.

58. *Id.*

59. Orca Assets, G.P. v. JPMorgan Chase Bank, N.A., No. 05-13-01700-CV, 2015 WL 4736786, at \*5 (Tex. App.—Fort Worth 2015, pet. filed).

60. *Id.*

of the lease.”<sup>61</sup> The lease, if a producing well is drilled, could be the beginning of a relationship that affects the quality of living for landowners for several decades.<sup>62</sup>

The U.S. shale boom increased landman interactions with the general public and exposed the rest of the U.S. to some of the unscrupulous leasing practices that had existed for several decades in the landman profession.<sup>63</sup> The problem, however, is likely two-fold: the landman does whatever it takes to get a lease, and the landowner fails to understand the lease and the realities implicated by oil and gas exploration.<sup>64</sup>

### 1. Lease Tactics Used by Landmen

Aggressive lease tactics used by landmen may compel some people to compare landmen to used car salesmen.<sup>65</sup> A comparison of the two invokes allegations that landmen serve up “half-truths, misrepresentations, or outright lies.”<sup>66</sup> The allegations may be well-founded, however, in light of Ohio’s recent investigation into a possible document that taught landmen how to lie to homeowners to secure valuable oil and gas leases.<sup>67</sup> But landmen commonly dismiss these complaints, claiming they are not intentionally deceitful in lease negotiations, and instead, proposing that complaints usually come from landowners that “are envious about the amount of money they believe their neighbors are earning in bonuses and royalty.”<sup>68</sup>

But the complaints are difficult to dismiss, especially when legal scholars discuss them in detail<sup>69</sup> and news agencies publish articles alleging the same practices.<sup>70</sup> After all, if landowners have not seen a good lease or negotiated with a landman before, how are they supposed to know what to ask for?<sup>71</sup> Allegations concerning landmen often claim use of “coercion, threats, and forceful behavior” to obtain leases.<sup>72</sup> Some landmen carry maps with every tract of land colored in except for one, claiming that an individual owner was holding up the

61. *Id.*

62. Urbina & McGinty, *supra* note 27 (stating that a gas well could produce for decades).

63. See Eisenburg, *supra* note 2, at 171–77.

64. McFarland, *supra* note 6; see also Burt, *supra* note 46.

65. Colby Hamilton, *The Landmen Cometh*, EMPIRE (Aug. 15, 2011), <http://www.wnyc.org/story/194971-the-landmen-cometh/> [<https://perma.cc/8CEJ-KUXJ>].

66. *Id.*

67. *Id.*

68. Urbina & McGinty, *supra* note 27.

69. See, e.g., Eisenburg, *supra* note 2.

70. E.g., Urbina & McGinty, *supra* note 27.

71. *Id.*

72. Allison Sickle, *Congressman Denies Knowing His Wife Lobbied For Landman Group*, NAT. GAS FORUM FOR LANDOWNERS (Apr. 7, 2010), <http://www.naturalgasforums.com/smf/index.php?topic=6442.0> [<https://perma.cc/V4MR-M6SX>].

process for everyone.<sup>73</sup> Then they repeat the process with the neighbor using a different map.<sup>74</sup> Hard-sales tactics are used, such as “We’re only in town until tomorrow,” or “We have already signed up all your neighbors.”<sup>75</sup> Some landmen assert that landowners who do not lease right away will miss out on easy money, and the oil and gas company will take their minerals without paying for them.<sup>76</sup>

## 2. The Knowledge Gap Between Landmen and Landowners

Perhaps the underlying issue in lease negotiations is the knowledge disparity between landmen and landowners.<sup>77</sup> The knowledge of landmen is not in and of itself the problem. Instead, the lack of knowledge possessed by landowners is often what contributes to feelings of unfairness and unconscionability.<sup>78</sup> After all, “[t]here has to be ignorance to prey on.”<sup>79</sup>

Landowners commonly misunderstand language in a lease, such as what constitutes drilling operations.<sup>80</sup> Even attorneys not well-versed in oil and gas lack an understanding of the terms included in an oil and gas lease.<sup>81</sup> A lack of understanding subsequently leaves landowners unable to negotiate a better deal and often leaves them unaware of the long-term effects of an oil and gas lease.<sup>82</sup> Landowners’ inability to properly negotiate leases overwhelmingly favors energy companies.<sup>83</sup>

In 2011, the New York Times reviewed over 111,000 oil and gas leases (mostly from Texas) and realized that most leases allowed for broad development rights, tree removal, chemical storage, and other surface changes to the property leased.<sup>84</sup> Not surprisingly, the leases rarely mentioned any environmental problems that could arise from drilling operations.<sup>85</sup> Adding insult to injury, few consumer protection laws apply to oil and gas leases to protect landowners after signing a lease.<sup>86</sup> The consequences of a bad lease vary widely, including the possibility of spending hundreds of dollars to purchase drinking water when the water well relied upon for drinking water becomes contaminated as a result of nearby drilling operations.<sup>87</sup> The truth is, a “gaping

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73. *Id.*

74. *Id.*

75. Urbina & McGinty, *supra* note 27.

76. *Id.*

77. Burt, *supra* note 46, at 4.

78. *Id.*

79. Hamilton, *supra* note 65.

80. Urbina & McGinty, *supra* note 27.

81. Burt, *supra* note 46, at 3.

82. *Id.* at 3–4.

83. *See id.*

84. Urbina & McGinty, *supra* note 27.

85. *Id.*

86. *Id.*

87. *Id.*

inequality” exists between the knowledge and negotiation skills of the average landman and the average landowner contemplating signing an oil and gas lease.<sup>88</sup>

Past landowners that have already been victimized by poor leases warn future lessors to get educated before the landman comes knocking.<sup>89</sup> A knowledgeable landowner can likely circumvent hard sales tactics used by landmen that fall outside the accepted general professional standards.<sup>90</sup> Questions including what company the landman works for, why the company is leasing in the area, what kind of wells will be drilled, and how much acreage the company has acquired in the area are all a good start.<sup>91</sup> But answers to those questions are of little value if the landowner does not take it a step further and perform the proper due diligence by understanding the lease, investigating state and local laws, and researching oil and gas production in the area.<sup>92</sup> Perhaps, most important is “don’t get in a hurry,” because instilling a fear that the opportunity will pass and the landowner will be the only one left out is one of the landman’s strongest tactics.<sup>93</sup> But as ignorance among landowners disappears, unethical landmen will find themselves in a tougher position.<sup>94</sup>

### B. *Opportunistic Landmen and the Agency Relationship*

“The landman is an agent of his employer.”<sup>95</sup> Thus, the law of agency likely applies to landmen.<sup>96</sup> As an agent, the landman has “a duty not to take advantage of confidential information acquired in his position of agency that would detrimentally affect the principal in the relationship.”<sup>97</sup> He is “bound to exercise the utmost good faith, loyalty, and honesty toward his employer” and “must use care, skill, and diligence in performing his duties.”<sup>98</sup> After all, landmen often possess proprietary information on “unleased prospects, prospects that are currently in the leasing process, and unleased minerals in existing wells.”<sup>99</sup> The volatility of the energy industry often leads landmen to

88. *Id.*

89. *Id.*

90. McFarland, *supra* note 6.

91. *Id.*

92. *Id.*

93. *Id.*

94. Hamilton, *supra* note 65.

95. Knutson, *supra* note 45, at § 19.02(1).

96. S. Thomas Throne & Jacob T. Haseman, *The Duty of Landmen and Legal Counsel to Former Employers in the Petroleum Industry: Ethical and Legal Obligations*, 55 RMMLF-INST 7-1, § 7.02 (2009). The principal-agent relationship depends on three elements: “the manifestation by the principal that the agent shall act for him, the agent’s acceptance of the undertaking; and the understanding of the parties that the principal is to be in control of the undertaking.” *Id.* at § 7.02(1).

97. *Id.*

98. Knutson, *supra* note 45, at § 19.02(1).

99. Thorne & Haseman, *supra* note 96, at § 7.01.

pursue other opportunities that can sometimes offer a higher salary.<sup>100</sup> Therefore, they often end up working for “direct competitors of their former employers.”<sup>101</sup>

The AAPL’s voluntary code of ethics specifically addresses the duty that a land professional owes to employers.<sup>102</sup> “A Land Professional shall not betray a partner’s, employee’s, or client’s trust by directly turning confidential information to personal gain.”<sup>103</sup> As a remedy, “any profit gained from improper use of confidential information . . . in violation of his fiduciary duty before or after termination of the agency relationship must be returned to the principal.”<sup>104</sup>

Examples in case law can help people understand the importance of this code of ethics.<sup>105</sup> In *Tenneco Oil Co. v. Joiner*, an oil company sued its former landman, Joiner, to recover for damages for fraudulently mishandling information when Joiner obtained leases for his own use and benefit.<sup>106</sup> Tenneco hired Joiner to secure leases within a certain area outline on Tenneco’s buy map.<sup>107</sup> Joiner worked for Tenneco for four months, securing leases within the outlined area before his contract with Tenneco was terminated.<sup>108</sup> Nevertheless, Joiner obtained thirty leases for himself, resulting in substantial damages to Tenneco.<sup>109</sup> The court held that Joiner misused confidential information that he had acquired from Tenneco for personal gain.<sup>110</sup> *Tenneco* is not the lone example of a landman misusing confidential information. In *Barnsdall Oil Co. v. Willis*, the court held that Willis, a landman, misused confidential information when he obtained leases in the target area under the name of his brother-in-law at a substantial profit to himself.<sup>111</sup>

The agency relationship can also cause substantial liability concerns for an oil company that employs a problematic landman. In *Petrohawk Properties, L.P. v. Chesapeake Louisiana, L.P.*, Petrohawk found itself on the unfavorable end of the court’s decision due to fraud and misrepresentations by one of the landmen representing it.<sup>112</sup> Petrohawk’s landman, Lisa Broomfield, approached a property owner after Chesapeake had already secured a lease extension with the same

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100. *Id.*

101. *Id.*

102. *See Code of Ethics, supra* note 52.

103. *Id.*

104. Thorne & Haseman, *supra* note 96, at § 7.02(2).

105. *See Tenneco Oil Co. v. Joiner*, 696 F.2d 768 (10th Cir. 1982).

106. *Id.* at 769.

107. *Id.* at 770.

108. *Id.*

109. *Id.*

110. *Id.* at 776.

111. *See Barnsdall Oil Co. v. Willis*, 152 F.2d 824 (5th Cir. 1946).

112. *See Petrohawk Props., L.P. v. Chesapeake La., L.P.*, 689 F.3d 380 (5th Cir. 2012).

property owner.<sup>113</sup> Broomfield informed the property owners that Louisiana was a race statute state, which could potentially invalidate the Chesapeake lease if Petrohawk filed the lease before Chesapeake filed a lease extension.<sup>114</sup> The court held that Broomfield's statements were material misrepresentations of fact that constituted fraud, and thereby rescinded the initial lease between Petrohawk and the landowners.<sup>115</sup>

A simple analysis of this agency relationship clearly establishes that a typical landman has no interest in helping a landowner obtain a lease with favorable landowner provisions.<sup>116</sup> When leasing for an oil and gas company, a landman's loyalty lies solely with the oil and gas company, not with the landowner considering the proposed oil and gas lease.<sup>117</sup> In fact, when landmen misrepresent facts or the law, or fraudulently induce landowners into leasing, it is often the oil and gas company that suffers the most because of this agency relationship.<sup>118</sup>

#### IV. COMPARABLE PROFESSIONS TO THE PROFESSIONAL LANDMAN

##### A. *Landmen and the Unlicensed Practice of Law*

A landman's job necessarily includes the interpretation and preparation of legal documents relating to real property.<sup>119</sup> It requires a vast understanding of mineral law and contract law.<sup>120</sup> Additionally, negotiations for mineral rights expose landmen to the possibility of misleading legal representations.<sup>121</sup> Mix in the realization that a single transaction or lease could be worth millions of dollars, and it is easy to see why the landman profession is at the receiving end of much scrutiny.<sup>122</sup>

In Texas, the preparation of instruments affecting title to real property constitutes the practice of law.<sup>123</sup> The practice of law also includes legal advice given to a client as to the interpretation of certain facts.<sup>124</sup> Even though negotiating a lease may not raise many problems, land-

113. *Id.* at 384.

114. *Id.*

115. *Id.* at 389–92.

116. See Knutson, *supra* note 45; see also *Code of Ethics*, *supra* note 52.

117. See Knutson, *supra* note 45.

118. *E.g.*, *Petrohawk Props., L.P. v. Chesapeake La., L.P.*, 689 F.3d 380 (5th Cir. 2012).

119. Brian R. Bjella, *Are Landmen Practicing the Law? The Legal and Ethical Issues*, 9 RMMLF-INST 25, § 25.01 (2003).

120. *Id.*

121. John S. Dzienkowski, *Unauthorized Practice of Law: Potential Traps for Lawyers and Landmen*, 40C RMMLF-INST 13, III.A. (1996).

122. See *Orca Assets, G.P. v. JPMorgan Chase Bank, N.A.*, No. 05-13-01700-CV, 2015 WL 4736786 at \*3 (Tex. App.—Fort Worth 2015, pet. filed).

123. J. Alton Alsup, *Preparation of Documentation Affecting Title to Texas Real Property as the Unauthorized Practice of Law*, 61 CONSUMER FIN. L.Q. REP. 475, 478 (2007).

124. Dzienkowski, *supra* note 121, at II.B.

men in that position may find themselves drafting lease clauses or filling in lease provisions, which could be considered the unlicensed practice of law.<sup>125</sup> Because securing a lease often demands a trust relationship with the landowner, landmen in lease negotiations may instill a belief in the landowner that the landman is a disinterested party.<sup>126</sup> Answering questions or giving legal interpretations of lease provisions to the landowner may even lead landowners to believe that the landman is their personal counsel.<sup>127</sup>

Landmen in the courthouse performing title work straddle a similar line.<sup>128</sup> Courthouse research of title is not the practice of law; in fact, nearly anyone can do it.<sup>129</sup> However, a written report, such as a mineral ownership report, that includes an analysis and conclusions of ownership interest could be considered the practice of law.<sup>130</sup> It is true that a title attorney reviews many of these documents prior to drilling, but the title attorney rarely steps foot in the courthouse, especially during a “sit down” title examination.<sup>131</sup> It is the landman that searches the records—hopefully thoroughly, determines whether the document affects the subject lands, and includes those documents in the run sheet for an attorney to review.<sup>132</sup>

But, in Texas, landmen fulfilling their usual job functions do not have to worry much about the unlicensed practice of law.<sup>133</sup> Many of a landman’s job functions are specifically excluded by statute from the unauthorized practice of law.<sup>134</sup> The statute excludes “a person performing acts relating to a transaction for the lease, sale, or transfer of any mineral or mining interest in real property” from the unlicensed practice of law.<sup>135</sup>

Even with this exception, many landmen still pursue a legal education and ultimately become licensed attorneys.<sup>136</sup> Legal education “is recognized by many as excellent training for a landman.”<sup>137</sup> Coincidentally, a landman with a law degree could receive additional compensation because of the advanced degree.<sup>138</sup>

125. *Id.* at III.A.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Davis, *supra* note 30, at 44.

132. *Id.* at 43.

133. TEX. GOV’T CODE § 83.001(b) (2013).

134. *Id.*

135. *Id.*

136. Knutson, *supra* note 45, at § 19.03[5][a].

137. *Id.*; see, e.g., *Landnews*, AAPL, <http://aaplconnect.landman.org/communities/community-home/digestviewer/viewthread?GroupId=25&MID=1597&tab=digestviewer&CommunityKey=782d4397-8f47-4fd1-9440-47b81437922a&ssopc=1> [https://perma.cc/R3A3-2RV5] (last visited Oct. 2, 2017) (showing that many job postings for landmen prefer applicants with a J.D.).

138. Knutson, *supra* note 45, at § 19.03[5][a].

A landman that becomes an attorney must consider “special restrictions on whether or not he holds himself as a lawyer.”<sup>139</sup> Although becoming a lawyer has many benefits, it also subjects a landman to disciplinary rules. Rule 8.4(c) of the American Bar Association (“ABA”) Model Rules of Professional Conduct states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>140</sup> Regardless of whether the landman chooses to hold himself out as a lawyer, the ABA has made it clear that a lawyer is bound by the applicable disciplinary rules, regardless of whether he is acting in his professional capacity as a lawyer.<sup>141</sup> Therefore, a landman wishing to identify as a lawyer may do so to achieve recognition, but should do so with extreme caution.<sup>142</sup>

### B. *Comparison with Real Estate Professionals*

The landman’s role, though somewhat of a reversal, can be compared to that of a real estate agent representing a party in a real estate transaction.<sup>143</sup> While the real estate agent persuades someone to purchase real estate, the landman attempts to purchase an oil and gas lease from someone that owns the minerals under real estate.<sup>144</sup> Both the landman and the real estate agent are charged with filling out the paperwork to make the transaction official, and both play the role of the negotiator. And, like landmen, real estate professionals are also excepted from the unauthorized practice of law by Texas statute.<sup>145</sup>

However, unlike landmen, real estate professionals in every state must take a basic real estate course that requires several classroom hours to be able to practice.<sup>146</sup> Surprisingly, Texas has some of the most stringent requirements, including 210 education hours to become a real estate agent and 630 additional education hours to become a real estate broker.<sup>147</sup> Additional requirements include a licensing exam and the payment of all necessary fees.<sup>148</sup> These requirements serve a double purpose: proof that the agent is competent about the real estate process and issuance of a license that the state can revoke if the agent is dishonest.<sup>149</sup>

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139. *Id.*

140. MODEL RULES OF PROF’L CONDUCT r. 8.4(c) (2016).

141. Knutson, *supra* note 45, at § 19.03[5][a].

142. *See id.*

143. Eisenburg, *supra* note 2, at 190.

144. *Id.*

145. TEX. GOV’T CODE § 83.001(b) (2013).

146. Eisenburg, *supra* note 2, at 188–89.

147. Evgeny S. Vorotnikov, *License to Profit: An Analysis of Entry Regulations in the Legal and Real Estate Professions*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 52, 60 (2011).

148. *Id.*

149. Eisenburg, *supra* note 2, at 189.

Originally, real estate agents represented the seller in a real estate transaction under an agreement in which the agent received a commission for a successful sale.<sup>150</sup> But real estate agents blurred this relationship with the seller as the industry expanded.<sup>151</sup> Eventually, the agent took on a central role in the real estate transaction, appearing to represent both the buyer and the seller.<sup>152</sup> The appearance of this central role exposed the seller to possible vicarious liability for the agent's actions and sometimes misled buyers into believing that the agent actually represented them.<sup>153</sup> This confusion was the result of "very little standardization in licensing and agency rules regulating realtors."<sup>154</sup>

The lack of agency rules and licensing standards for realtors parallel mistrust of landmen today. With very few exceptions, landmen are left unlicensed, unregulated, and undefined in the role they play interacting with the public to acquire leases.<sup>155</sup> A landman that cozies up with a mineral owner to get a lease appears to play the same central role in a negotiation that caused a conflict of interest for realtors.<sup>156</sup> The only difference is that the late twentieth century brought licensing statutes requiring education, training, and various types of disclosure aimed at "heightening realtor accountability to parties with whom they transact."<sup>157</sup> Despite cries from the public and legal scholars,<sup>158</sup> no such action has been taken to heighten the accountability of landmen in Texas.

## V. LACK OF REGULATION ANOMALY

In at least one U.S. state, more than eight hundred occupations require licensure.<sup>159</sup> Occupational licensing has grown tremendously over the last fifty years and, by 2008, was estimated to affect 29% of the workforce through federal, state, or local governments.<sup>160</sup> One study suggests that higher educated workers are likely to work in occupations that require a license.<sup>161</sup> It is understandable then that licensed workers feel more competent performing their job duties.<sup>162</sup>

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150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 160.

156. *Id.* at 192.

157. *Id.* at 189–90. Many states require real estate agents to disclose exactly what their role is in the transaction. *Id.*

158. *See id.* at 157–206; *see also* Urbina & McGinty, *supra* note 27.

159. Mario Pagliero, *What is the object of professional licensing? Evidence from the US market for lawyers*, 29 INT'L J. INDUS. ORG. 473, 473 (2011).

160. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing* 1, 2 (Nat'l Bureau of Econ. Res., Working Paper No. 14308, 2008).

161. *Id.* at 2. Licensing is also more prevalent among minorities, union members, and government workers. *Id.*

162. *Id.*

### A. *Regulatory Background on Comparable Occupations and Licensing Theories*

Two prevalent theories of licensing exist; the public interest theory and the capture theory.<sup>163</sup> The public interest theory suggests that licensing imposes a minimum quality standard to ensure the “quality of goods or services provided to the public by eliminating dishonest practitioners and charlatans from the market.”<sup>164</sup> Many articles that attack landmen for unethical practices mirror the public interest theory.<sup>165</sup> Hence, the public interest theory presents the idea that licensing would allow the state to keep track of landmen that are accused of misrepresentation or fraud, and create a way to remove them from the industry.<sup>166</sup>

The capture theory, on the other hand, argues that the industry itself creates, designs, and operates the regulation primarily for its own benefit.<sup>167</sup> The capture theory may be what truly drove the boom of licensing since the 1950s.<sup>168</sup> Licensing can help eliminate unwanted competition in a labor market, resulting in an increase in salary of around 15%.<sup>169</sup> The licensing board basically serves as the gatekeeper, adjusting the licensing requirements to keep new competition out of the market.<sup>170</sup>

#### 1. Entry Regulations of Lawyers

Some studies indicate that the capture theory may be applicable to the education and entry requirements that regulate who may become a lawyer.<sup>171</sup> Barriers to entry for attorneys coincided with the creation of the ABA in 1878.<sup>172</sup> The ABA, throughout its history, has been “actively interested in improving the legal profession through legal education.”<sup>173</sup> By 1952, the ABA was acknowledged as the national agency for law school accreditation.<sup>174</sup>

163. Pagliero, *supra* note 159, at 473.

164. Vorotnikov, *supra* note 147, at 52.

165. *E.g.*, Eisenburg, *supra* note 2, at 198–99.

166. *Id.* at 200–02.

167. Pagliero, *supra* note 159, at 473.

168. *See* Kleiner & Krueger, *supra* note 160.

169. *Id.* at 8.

170. Vorotnikov, *supra* note 147, at 54; Robert W. Hahn, Robert E. Litan, & Jesse Gurman, *Bring More Competition to Real Estate Brokerage*, 35 REAL EST. L.J. 86, 100 (2006).

171. Vorotnikov, *supra* note 147, at 52–66.

172. *Id.* at 53.

173. *Id.* at 53–54. First, law schools required a high school diploma, then two years of college, then, in 1948, the first LSAT was administered to help law schools search for skillful candidates. *Id.* at 54.

174. *Id.* at 55. As the ABA became more influential, the number of non-accredited law schools saw a sharp decline in both number and student enrollment. *Id.* By 1982, only one percent of law students were enrolled in unapproved schools, leading to accusations that the ABA “inflated faculty salaries, reduced teaching loads, increased the cost of legal education, and prevented disadvantaged persons from obtaining legal

In 1972, an affiliate of the ABA introduced the Multistate Bar Examination for the first time.<sup>175</sup> The Multistate Professional Responsibility Examination followed in 1980.<sup>176</sup> In 1988 the Multistate Essay Examination was introduced, and in 1997 the Multistate Performance Test began.<sup>177</sup> Given these historical events and others, it appears that the legal profession has been introducing barriers to entry “that have grown and tightened” over the years.<sup>178</sup>

## 2. Entry Regulations of Real Estate Professionals

The occupation licensure of real estate professionals has a long history as well.<sup>179</sup> It began in the late 1800s when local real estate boards pushed for fees and bond requirements to receive a real estate license in hopes of eliminating “curbstoners from the market.”<sup>180</sup> The National Association of Realtors (“NAR”) was founded in 1908, and in 1913 the NAR proposed that every state adopt regulatory licensing requirements.<sup>181</sup> At the time, “some real estate professionals saw licensing as a threat to their profession, and others claimed it would be inefficient in excluding charlatans.”<sup>182</sup> Despite the controversy, every state has some form of real estate licensing today.<sup>183</sup>

## 3. The Argument Against Excessive Entry Regulations

One of the main reasons many researchers do not support occupational licensing is because licensing regulations are often lobbied for by the professionals or their affiliated lobby organizations: the ABA did it for the legal profession, and the NAR did it for the real estate professions.<sup>184</sup> The effect of the regulation is a reduction in competition instead of protection for the consumers from incompetent professionals.<sup>185</sup> The reduction in competition allows professionals to charge higher fees and leaves few incentives for improving the quality of service.<sup>186</sup>

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education.” *Id.* at 56. The US Department of Justice further alleged that the ABA had misused the accreditation process for law schools to “inflate faculty salaries and benefits.” *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 57.

178. *Id.* at 58.

179. *Id.* at 58–60.

180. *Id.* at 58.

181. *Id.* at 58–59.

182. *Id.* at 59.

183. *Id.*

184. *Id.* at 62.

185. *Id.*

186. *Id.*

However, not all occupational licensing has this unfortunate consequence, whether intended or unintended.<sup>187</sup> “The main justification for the existence of mandatory licensure . . . is that professionals can cause damages that are hard to estimate in monetary terms in order to properly compensate victims, or irreversible damages that are impossible to compensate.”<sup>188</sup> But in cases outside of these particular damage claims, the public is already protected from fraud, professional negligence, and other damages by means of existing laws and a proper court system.<sup>189</sup> However, rural areas, where most oil and gas exploration occurs, may have limited accessibility to these common law legal solutions.<sup>190</sup>

### B. *Texas’s Most Recent Attempt to Regulate Landmen*

In 2009, State Representative Charlie Geren sponsored a bill aimed at requiring landman licensing in Texas.<sup>191</sup> The purpose of the proposal was “to protect the public” from landmen, defining a landman as “a person that acquires or manages mineral interest, performs title or contract functions related to the exploration of minerals, negotiates for the acquisition or divestiture of minerals, or negotiates business agreements that provide for the exploration for or development of minerals.”<sup>192</sup> The bill further proposed that no person may perform the functions of a landman unless that person applied for and held a landman license issued by the Texas Real Estate Commission (“TREC”).<sup>193</sup>

Notably, the bill attempted to give TREC a great amount of discretion.<sup>194</sup> The bill allowed TREC to establish education, experience, and examination requirements; moral character requirements like honesty, trustworthiness, and integrity; continuing education requirements; the scope of practice by landmen; and the code of conduct and ethics.<sup>195</sup> Additionally, the bill allowed TREC to set fees, establish the term of the license, and determine disciplinary rules for violations.<sup>196</sup>

Why the bill delegated this authority to TREC is unclear,<sup>197</sup> especially when the AAPL seems like the natural choice given its estab-

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187. *See id.* at 63 (referencing a study that shows licensing increased the quality of service based on the number of complaints filed against real estate agents).

188. *Id.* at 62.

189. *Id.*

190. Eisenburg, *supra* note 2, at 198.

191. H.B. 1405, 81st Leg., R.S. (Tex. 2009), <http://www.lrl.state.tx.us/legis/BillSearch/actions.cfm?legSession=81-0&billtypeDetail=HB&billNumberDetail=1405&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100> [<https://perma.cc/RD4N-FFKJ>].

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See* H.B. 1405, *supra* note 191.

lished relationship with the landman profession.<sup>198</sup> It could be due to the AAPL's stance against working with the state to develop a licensing bill in Texas at the time,<sup>199</sup> or perhaps the extensive experience of TREC in regulatory matters.<sup>200</sup> Ultimately, the bill was met with little regard. After its first reading, the bill stalled in the Licensing and Administrative Procedures Committee in March 2009.<sup>201</sup>

### C. *The Influence Behind the Decision in Texas*

The AAPL took a hard-defensive position against Rep. Geren's landman licensing requirements in Texas.<sup>202</sup> The Houston Association of Professional Landmen ("HAPL"), an associate group of the AAPL, published a release stating it believed "Mr. Charles Geren's bill [was] a real threat to [the] profession."<sup>203</sup> The release indicated that HAPL visited with staff lobbyists from several large oil companies, the Texas Independent Producers & Royalty Owners, the Texas Oil & Gas Association, members of TREC, and several independent lobbyists.<sup>204</sup> HAPL's position was a reflection of its members' expressed opposition to licensing, "let alone licensing under TREC," additionally noting that it would potentially seek help from its members to oppose passage of the bill.<sup>205</sup>

Circumstances surrounding the licensing bill could be what led the industry to oppose it so strongly. The bill called for licensing to occur under TREC, an organization that previously had little relation to the landman profession.<sup>206</sup> Market conditions were also likely an influential indicator that many associations in the industry considered.<sup>207</sup> The U.S. was in the midst of the largest energy boom it had seen since the 1980s.<sup>208</sup> In 2008, both oil and gas prices were near historical highs.<sup>209</sup>

198. *Why Join?*, *supra* note 22.

199. *Motion Passed at December 2008 AAPL Board Meeting*, TAPL (Dec. 9, 2008), <http://www.tapl.org/articles/motion-passed-at-december-2008-aapl-board-meeting> [<https://perma.cc/2JZA-LLNK>] [hereinafter *Motion Passed*].

200. *About TREC*, TEX. REAL ESTATE COMM'N, <https://www.trec.texas.gov/agency-information/about-trec> [<https://perma.cc/2N37-SUQZ>] (last visited Oct. 3, 2017) (stating that TREC has served to safeguard consumers in real property transactions since 1949).

201. H.B. 1405, *supra* note 191 (showing online that the last action on the bill was a referral to the Licensing and Administrative Procedures Committee on March 2, 2009).

202. *Motion Passed*, *supra* note 199.

203. Memorandum from HAPL to HAPL Membership (Mar. 8, 2009) (on file at <http://www.hapl.org/landman-licensing-updated/>) [<https://perma.cc/FD27-NX7M>].

204. *Id.*

205. *Id.*

206. *See About TREC*, *supra* note 200, at 2 (stating that TREC offers licensing for real estate agents, brokers, inspectors, right-of-way agents, and residential service companies, but does not offer any license for a landmen).

207. *See Crude Oil*, TRADING ECON., <http://www.tradingeconomics.com/commodity/crude-oil> [<https://perma.cc/TA99-6FH4>] (click "All" below the chart) (last visited Oct. 1, 2017).

208. Etter, *supra* note 12.

Despite a dip in the market, oil prices were headed back to over \$100 per barrel.<sup>210</sup> Landmen were in extremely high demand.<sup>211</sup> This Author believes that mandating licensure at this time could have left exploration companies shorthanded and unable to lease the acreage needed to drill and increase domestic energy production. Under the capture theory, licensed landmen—in high demand and limited in supply—would have been able to demand higher prices,<sup>212</sup> a cost that would be placed directly on the oil and gas companies, and, ultimately, transferred to the end consumer.

If the reader here believes that the capture theory for licensing is prevalent and the most common reason for regulating a profession, it may come as a surprise that landmen and the AAPL opposed licensing as strongly as they did. By placing some form of entry barrier on the occupation, landman licensing may offer some form of stability to an incredibly volatile and expendable profession. Furthermore, by eliminating some of the unscrupulous landmen, the honest landman may be able to regain the trust of the public.<sup>213</sup> The potential increase in pay would probably be a welcomed side effect.<sup>214</sup>

## VI. REGULATORY OPTIONS AVAILABLE

### A. States That Took Action to Reign in Leasing Practices

Few states have successfully taken action to regulate landmen.<sup>215</sup> In 2015, none of the thirty-four states active in oil and gas production activities required formal landman registration.<sup>216</sup> However, in some states, the conduct of landmen may be included in the definition of real estate agents.<sup>217</sup> In fact, only two states have a statutory requirement for landman registration: Maryland and North Carolina.<sup>218</sup> Maryland's registration requirement is rather simple: submit an

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209. *Crude Oil*, *supra* note 207; *Natural Gas*, TRADING ECON., <http://www.tradingeconomics.com/commodity/natural-gas> [<https://perma.cc/WMD7-NKZ4>] (click "All" below the chart) (last visited Oct. 1, 2017).

210. *Crude Oil*, *supra* note 207.

211. Etter, *supra* note 12.

212. See Vorotnikov, *supra* note 147, at 62 (stating as it becomes more complicated to enter a profession, the number of professionals remains the same or decreases, allowing the remaining professionals to charge higher fees).

213. Hamilton, *supra* note 65.

214. Klein & Krueger, *supra* note 160, at 8 (stating that occupational licensing has a 15% positive impact on wages).

215. Memorandum from Dr. Virkram Rao, *supra* note 43, at 4.

216. *Id.*

217. *Id.*

218. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-102 (Supp. 2016); N.C. GEN. STAT. § 113-425(b) (2016). In Maryland, "[a] person may not operate as a land professional in the State unless the person registers . . . and is issued a registration certificate." MD. CODE ANN., BUS. OCC. & PROF. § 10.5-102. North Carolina's statute says that "a person may not act, or hold oneself out as a landman . . . unless the person is registered. N.C. GEN. STAT. § 113.425(b).

application and pay the fee.<sup>219</sup> Upon approval, the landman is registered for two years, after which time he must reapply.<sup>220</sup> North Carolina's registration, enforced by the Department of Environmental Quality, is strikingly similar.<sup>221</sup>

Unfortunately, neither state requires much more than a very simple application for registration approval.<sup>222</sup> Such a baseless standard for registration likely provides a false sense of security to landowners when dealing with registered landmen,<sup>223</sup> which is why Texas needs to consider a more comprehensive approach that stipulates additional requirements beyond a simple registration process.

### B. *Scholarly Suggested Approaches to Regulation*

The fact that the oil and gas lease is viewed as a contract between two parties leaves the mineral owner the option to claim damages under several common-law remedies including misrepresentation, fraud, and even unconscionability. But these remedies are generally only available after damages have been suffered and "may be of limited accessibility to many rural residents anyway."<sup>224</sup>

Apart from common law remedies, states hoping to achieve some oversight of the landman profession could implement other regulatory options.<sup>225</sup> Among these are landman registration and licensing, disclosure requirements, ethical standards, misdemeanor convictions and civil fines, lease revocation rights by landowners, and vicarious liability through presumed agency relationships.<sup>226</sup> Registration and licensing are probably the logical first step because they act as barriers to entry and allow for disciplinary oversight.<sup>227</sup> Essentially, "the requirement of passing an exam will . . . [weed] out the 'unscrupulous.'"<sup>228</sup>

Registration or licensing through an exam could be supplemented with an array of disclosure requirements.<sup>229</sup> Disclosures such as requiring landmen to present identification and proof of a license and

219. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-103(a).

220. § 10.5-103(c).

221. N.C. GEN. STAT. § 113-425(b).

222. See *Landman Registry Application*, N.C. DEP'T ENV'T & NAT. RES., [http://www.conservation.nc.gov/c/document\\_library/get\\_file?uuid=7738e949-98e6-4191-b78b-60cf293563&groupId=14](http://www.conservation.nc.gov/c/document_library/get_file?uuid=7738e949-98e6-4191-b78b-60cf293563&groupId=14) [<https://perma.cc/DGF8-BXJA>] (last visited Feb. 19, 2017); see also *Apply for an Original Registration – Maryland Oil and Gas Land Professionals*, MD. DEP'T OF LABOR, LICENSING & REGULATION, <http://www.dllr.state.md.us/license/oilgas/ogapply.shtml> [<https://perma.cc/W6J9-GBEH>] (following hyperlink: "Register as a Maryland Oil and Gas Land Professional") (last visited Oct. 4, 2017).

223. Memorandum from Dr. Virkram Rao, *supra* note 43.

224. Eisenburg, *supra* note 2, at 198.

225. See *id.* at 200–06.

226. *Id.*

227. *Id.* at 200.

228. *Id.* at 201.

229. *Id.* at 201–03.

acknowledge the existence of an agency relationship with the company they represent could be beneficial.<sup>230</sup> This would serve as a protective measure to notify the land or mineral owner that the landman does not represent his or her interest.<sup>231</sup> Additional disclosures include the “environmental aspects of proposed development[ ] and the financial details of any proposed deal.”<sup>232</sup> To be certain all disclosures were properly made, a disclosure checklist signed by the landowner could serve as evidence that the landman has acted in good faith and has not withheld material information.<sup>233</sup>

Along with mandatory disclosure, imposition of misdemeanor convictions for acts of fraud or intimidation could help protect landowners.<sup>234</sup> But the idea of protecting the public may be better served with a landowner right of revocation.<sup>235</sup> A right of revocation would allow a landowner who signed prematurely to collect more facts, consult with an attorney, and potentially withdraw or renegotiate the lease upon the realization that the lease terms were undesirable or misrepresented.<sup>236</sup> The regulation model applied to real estate agents is recommended as the best way to implement these suggestions.<sup>237</sup>

### C. *A Possible Approach Through the AAPL*

The real estate model may be an excellent proposition; however, great potential lies in the infrastructure and network currently maintained by the AAPL. Similar to the way the ABA established regulations for attorneys and the NAR imposed early regulations on real estate professionals,<sup>238</sup> the AAPL—the landman professionals themselves—should devise regulations that will protect the landman profession from “curbstoners.”<sup>239</sup>

Given the already established complexity of the AAPL,<sup>240</sup> and the fact that it privately regulates its voluntary members for ethical violations,<sup>241</sup> dismissing the AAPL as a means of regulating landmen almost seems illogical.<sup>242</sup> Perhaps, then, the best way to accomplish what Representative Geren set out to do—protect the public—could best be accomplished with the AAPL acting as an agent for the state instead of placing that burden on TREC. The AAPL, through hand-

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230. *Id.* at 201.

231. *Id.*

232. *Id.*

233. *Id.* at 203.

234. *Id.* at 202–03.

235. *Id.* at 203.

236. *Id.*

237. *Id.* at 199.

238. Vorotnikov, *supra* note 147, at 53–60.

239. *See id.* at 62.

240. *Why Join?*, *supra* note 22.

241. *Code of Ethics*, *supra* note 52.

242. *C.f.* Eisenburg, *supra* note 2, at 199.

outs or its website, could provide information to landowners, such as disclosures about oil and gas exploration or a code of conduct that landowners should expect from landmen. Landmen would then only need to provide an informational sheet about the AAPL to landowners. Failure to do so could result in an opportunity for the landowner to revoke or renegotiate a lease. Provided with the AAPL information sheet, failure by landowners to contact the AAPL or visit the AAPL website and educate themselves on oil and gas activities could be viewed as willful blindness.

If done correctly, the AAPL could accomplish many of the other scholarly regulatory recommendations, including mandatory licensure, disclosure requirements, and landowner revocation. Appropriate regulatory requirements would force landmen to become more educated about oil and gas and more knowledgeable about the circumstances surrounding negotiations with landowners. All parties involved, including landmen, oil and gas companies, and landowners negotiating with landmen, would benefit from using an organization with immediate presence, vast educational abilities, an established Code of Ethics, and members that have agreed to abide by that Code of Ethics.

One obstacle seems consistent in preventing this from occurring: the AAPL. In 2008, the AAPL issued a motion stating that it would “not proceed to develop a licensing bill in Texas.”<sup>243</sup> Those inside the AAPL seem to believe that the current voluntary professional certification opportunities are the most logical way to resolve the unethical behavior that occurs in the profession.<sup>244</sup> However, as new technology aids the spread of oil and gas exploration, state legislature licensing efforts are likely to multiply.<sup>245</sup> Unfortunately, the AAPL passively permits states to propose regulation instead of actively seeking regulation that could benefit its members. Despite opposition from some AAPL members, it may be necessary for other members that understand the benefits of regulatory licensing to actively engage the AAPL and its local chapters to encourage licensing statutes, especially in Texas.

## VII. CONCLUSION

By researching property records and negotiating oil and gas leases, landmen are an essential part of the oil and gas business. Surprisingly, they are not regulated, which is even more shocking when compared to similar professions. There are several reasons to regulate landmen, including protecting landowners from unscrupulous landmen using fraudulent or misleading lease tactics. Texas attempted to regulate

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243. *Motion Passed*, *supra* note 199.

244. Anya Livek, *Licensing Landmen – Inevitable?*, PITTSBURGH BUS. TIMES (Jan. 22, 2013, 4:35 PM), <http://www.bizjournals.com/pittsburgh/blog/energy/2013/01/licensing-landmen—inevitable.html> [<https://perma.cc/3E8M-YYEQ>].

245. *Id.*

landmen in 2009 but failed. Despite other states like Maryland and North Carolina requiring registration for landmen, Texas has continued to resist regulatory possibilities.

Given the recent developments in urban drilling and extraction technologies, this Article advocates for regulation of the landman profession. In fact, regulation is in the best interest of landmen, oil and gas companies, and the general public because it will help eliminate unscrupulous landmen from the market. However, this new regulation cannot be oblivious to the political economy. Even though regulation is probably inevitable, a top-down approach originating from the state legislature or groups opposed to oil and gas exploration will likely be met with fierce resistance from industry insiders. Instead, the AAPL is in the best position to offer regulatory requirements and oversight for landmen. Landmen within the AAPL that recognize the benefits of regulatory licensing should be proactive in encouraging the AAPL to lobby for meaningful regulation that eliminates the “curbstoners” and helps protect the integrity of the occupation.