When Does a Client Become a Client?

A commentary by Gregory L. Jessup, CPL

Editor's Note: The article "When Does a Client Become a Client" represents the view of the author and provides a thought-provoking commentary for independent landmen who provide services to their clients. The opinion and perspective of the author is not necessarily the opinion of AAPL. Readers are advised that legally binding contracts may be created orally and may not always be in writing. Generally, each state has legislation, a Statute of Frauds, governing the types of contracts that are legally required to be written. If unsure, readers should seek appropriate legal advice.

Sometimes the most deep and thought-provoking oil and gas questions come about when a group of landmen has lunch together. Generally the number of landmen attending the meal will equal the number of answers to each question. At a recent lunch I brought the question of the day for the dining room: "For a landman, when does a client become a client?"

Immediately, a colleague offered up a rhetorical question as the answer: "When does a buyer become a buyer, a grantee a grantee, an assignee an assignee?" It was his opinion that the answer to the "client" question was that a signed agreement was required as good business practice dictates that for all of the aforementioned titles.

But, he was asked, do you really need an agreement and/or service contract to establish a contractor/client relationship? And if you agreed with that, what about the entity for which you performed services and were compensated without an agreement in place? Do you then have a "service provider/customer" relationship only? I was suspecting that it might be a long lunch, but you know what? It wasn't.

Every landman at the table was in accord that it was not only standard business practice in our industry but good business practice to have an agreement in place to establish the contractor/client relationship. The agreement should outline the terms, conditions, responsibilities, obligations, consideration, etc. — e.g., AAPL Master Land Services Contract. So all agreed that the formal relationship dictated that a signed agreement was encouraged, but what about the less formal agreement? Where is the line of demarcation, if any, between a "customer" and "client?" Do they both necessitate agreements, written or otherwise?

Contractor/Client Relationships

It just so happened that at one time in my life I had the privilege to be an expert witness in a lawsuit that dealt with similar questions. Between bites of my prime rib with horseradish sauce, I was more than happy to share my vast experience and knowledge with my fellow landmen:

Though there was more than one layer to the referenced lawsuit, my marching orders were to concentrate on the relationship between the landman and those with whom he

had business dealings through the lenses — or perhaps more accurately described as the prism — of my 30-plus years of landman work as it relates to standard industry practices. The following is similar to the case background I was given at the time with the appropriate name changes:

> A landman, Tommy Pinto, had been working a shale play; we will use the Barnett for this scenario. Mr. Pinto had not yet taken any leases in the Barnett but had made some good contacts, initiated discussions with prospective lessors and obtained a few lease options. His plan was to develop some leasing opportunities and market those opportunities for profit. He drew some large "halos" on his maps to show general "areas of interest" as he didn't want to give away too much information. While at a NAPE Expo, he visited the booths of a couple of parties he knew to be interested in the Barnett Shale play — Sure Thing Oil Co. and Looks Good Energy Inc. Both companies did indeed show interest in working with him in the Barnett Shale. After NAPE, Mr. Pinto had follow-up meetings with both companies and showed them his maps while never divulging exact tract and lease data. Both companies continued to express interest and even shared some of their own in-house information with Mr. Pinto. It is important to note at this point that no one had entered into any confidentiality and nondisclosure agreement (CA) or any master land services contract (MLSC). At some point Sure Thing Oil went from being a "prospective client" to a "client/customer/buyer" by asking the landman to begin taking leases on its behalf in the areas of interest, which of course Mr. Pinto was happy to do. They still didn't have an executed agreement, but there appeared to be an "understanding" as to his compensation and as a consequence, compensation was paid. Eventually successful wells were drilled by Sure Thing Oil on these leases. Well, the folks at Looks Good Energy found out about Sure Thing Oil's success, had a problem with that and filed a lawsuit stating that they "stole" their landman,

Tommy Pinto, and their ideas and robbed them of their opportunity to get those leases and develop the minerals.

During my testimony I was asked, "What is the standard industry practice for landmen in this situation? Is Mr. Pinto not only acting in the capacity of a landman but also a land and prospect broker? What are the relationships between the landman and these companies? Are the relationships formal, informal? What are the obligations and expectations of the involved parties?" Question begat question.

I decided it would be appropriate to begin at the beginning using my own experience and our American Association of Professional Landmen Standards of Practice & Code of Ethics — the beginning being when I have the initial contact with a "prospective client" (important to note I described it as "prospective"). I have an obligation to treat him as I would other industry people as stated in the AAPL Code of Ethics, Section 2, "Competition among those engaged in the mineral and energy industries shall be kept at a high level with careful adherence to *established rules of honesty and courtesy" [emphasis added]*. I may even perform a service for him and get paid for it without a service agreement in place. At that point I would consider him to be a "customer" and treat him as stated above, with honesty and courtesy.

It became important as I prepared to give testimony that I be able to draw distinctions between a "prospective client," "customer" and "client" as it relates to independent landmen. I suggested that common nomenclature, especially in the business arena, would deem that the word "client" implies a higher bar of responsibility and expectations than "prospective client" or "customer," but where was the line separating the titles from a landman's perspective? I developed the following simplified examples for myself to better help me illustrate the differences:

Example No. 1:

The independent landman is called by an individual (or company) to discuss the possibility of him making a courthouse run to get a copy of a document and deliver it back to him. In my opinion that individual has now become a "prospective client." He has not provided any services, and the parties have not agreed upon any terms, conditions or consideration.

Example No. 2

The independent landman is called by an individual (or company) to make a courthouse run to get a copy of a document and deliver it back to them. The landman is paid for his time and cost. If the parties agree that the requirements for a "contract" (Texas) were achieved as follows:

1. an offer made;
2. acceptance in strict compliance with terms of the offer;
3. a meeting of the minds with respect to both the subject matter of the agreement and all of its essential terms;
4. a communication that each party has consented to the terms of the agreement; and
5. consideration; then that individual has now become a "client" and is under the fiduciary obligations prescribed in the AAPL Code. The landman delivered a service for payment.

Example No. 3:

The same independent landman is also called by the same individual (or company) to make a courthouse run and get a copy of a document, but this time the individual has requested that the information be kept confidential and, to ensure that, they required the landman to enter into a service agreement. Fortunately the AAPL graciously provided the promulgated Master Land Services Contract, referenced above, that includes an Article IV. Confidentiality, Non-Disclosure and Conflict of Interest. Once it was executed, they then had a

contractor/client relationship as defined in the MLSC.

In my opinion, Example No. 3 makes the best business sense. I know this to be common industry practice from my experience and interaction between parties that desire to codify and memorialize the obligations and responsibilities of performance, expectation of results and confidentiality. Further, the AAPL Code of Ethics, Section 2, states the following:

> "A Land Professional shall not betray his partner's, employer's, or client's trust by directly turning confidential information to personal gain. The 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 the interest of his employer (or client)."

It's important to note that the AAPL groups "partner," "employer" and "client" together in the Standards of Practice & Code of Ethics. There is commonality between these relationships. They are also each formalized by some form of documentation, whether its partnership agreements, a contractor-client service contract or a simple W-2 form delineating out compensation requirements with the accompanying state employment codes. This formalization is a significant and expected practice in our business. Section 2 of the Code of Ethics puts forth two different and distinctive groups or classifications: 1) "Partner, Employer and Client" and 2) "Those engaged in the mineral and energy industries" or, basically, everyone else who isn't in the first group. There are different standards for each classification, each with certain expectations, both explicit and implied, and while they may have similarities, they are not the same.

We know that it is expected of landmen, as outlined, to treat others in a fair, honest and courteous manner. However, if there is not an agreement in place that covers confidentiality, there is only the codified obligation to be fair, honest and courteous, as well as the expectation to keep competition at a "high level." So caveat emptor Sure Thing Oil and Looks Good Energy, if you want to keep secrets, get a CA and/or MLSC pronto. Otherwise you are doing a disservice to your companies. Remember, in this case you have a landman who is also a prospect broker trying to make a deal. He's showing his information and maps to a lot of prospective buyers and will take the first acceptable offer to come along, and until you contractually "yoke" him, you should not reasonably expect him to not use information to aid him in the marketing of his prospects unless you protect yourself. In my opinion it is irresponsible for you not to get him under agreement as soon as possible.

Once you have established a contractor/client relationship, which we described as entering into a service agreement with confidentiality language, he shall "exercise good faith and loyalty … and not act … in conflict with the interest of his client." Note that the obligations and expectations are now much higher once the agreement is entered into and a client relationship has become established. The expectation of "loyalty" and "nonbetrayal" has elevated the responsibility of the landman that may not be as obviously present in just a "prospective client" relationship. He now has the obligation of "confidentiality" and "nondisclosure" upon him as defined in the MLSC. Remember, in the Code of Ethics, "client" is put on the same level as "partner" and "employer." You are to treat both "client" and "prospective client" with fairness, honesty and courtesy, but your higher obligation is to the client with whom you have a confidential relationship and duty as prescribed in your agreement.

The "Penalty" of No Written Agreement

Roger Beecham, partner with Shannon Gracey Ratliff & Miller LLP, Attorneys, thought it also prudent to reference the contractual concept of "course of dealing." It is defined as a "clearly recognizable pattern of previous conduct between parties to a business transaction." In other words, no contract has been executed, but over a course of time, by repeated type actions and compensation, a contract may be deemed to be in place and a contractor/client relationship. A big problem with this is that any disputed terms and/or intent will not be reconciled by referencing a signed contract between the parties but be subject to the "decision of the jury." Not recommended!

Further, Craig Duewall and Mark Stratton, also of Shannon Gracey, and attorneys involved with this case, commented afterward that it may be considered that the "prospective client" becomes a "client" when the service is rendered (usually when money paid) or the contract is executed. For example, if I'm showing you properties over the course of a year and we never do a deal (enter into a contract, written, verbal or course of dealing), but at each meeting I learn something interesting about your company, it seems to me that you are not my client and I thus don't have the additional duties discussed above. That might change on the day you decide to "pull the trigger." However, if we ink an agreement at the first meeting that defines our relationship, then we have a road map that requires me to treat you with the additional duties discussed. I think the more interesting question is how do we treat that year-long period when we didn't have an agreement and had not yet done a deal.

Conclusion

If you do not have a contract with a party wherein you create a contractor/client relationship that outlines your duties and obligations, then the recipient of the services may only be considered a prospective client. Somehow, these definitions and distinctions have become convoluted as more and more people have entered our profession. It is the lack of these distinctions that can get us into trouble as it did the entities in the referenced lawsuit. Do as I do, and keep a blank copy of a Master Land Services Contract in your briefcase; you never know when it could come in handy and protect you and your "client." At the very least, have a trail of emails between the parties presenting the terms and conditions of a service agreement. That agreement is what delineates the parties' "loyalty" obligations and expectations. As also discussed in this article, it is understood that parties may have a verbal or "course of conduct" contract in lieu of a written one, but they still must meet certain criteria to be considered a contract and are much more difficult to enforce. Sadly the days of the "handshake" agreement have passed us by.

Article Take-Away

1. Get everything in writing.
2. Treat everyone fairly, honestly and courteously.
3. Give everyone you have contact with (either in email or written meeting disclosure) a recital that "nothing you give or provide me will be treated as confidential absent an express written agreement."
4. A recommended default may be to treat prospective clients, customers and clients all as "clients" as described above but not to the detriment of your contractual clients.

Anyway, as I finished up my diatribe and lunch was just about over, I was pleased that my assessment of the question at hand — "When does a client become a client?" — was accepted by one and all, and I could feel like a real deal expert.

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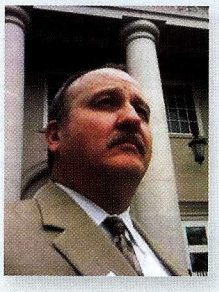
about the AUTHOR



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