

**10<sup>th</sup> Annual Energy Litigation Conference**  
**November 3, 2011**  
**Hilton Post Oak Hotel, Houston, Texas**

It is very gratifying to be among so many friends and colleagues. When David Winn called me in July to announce this quite unexpected honor, I expressed my surprise on two separate but related bases. The first was that I had never considered myself as an oil and gas lawyer per se and secondly, to the extent I have been, it was never on the level or with the deep, acknowledged expertise of prior honorees like Frank Douglas, John McCollum, Shannon Ratliff, Gene LaFitte, Greg Copeland or last year's honoree, Jack Balagia – with all of whom I have had the pleasure of professional relationships. In the instance of Frank Douglass, I so admired his expertise regarding the history and methodology of the Texas Railroad Commission that I requested his aid as an expert witness in the *Spectrum Stores v. Citgo* case for the proposition that the rules for the OPEC Cartel were modeled – by a Venezuelan graduate of Texas A&M – on the rules of the Railroad Commission. The prior honorees had that depth of knowledge and expertise that I have never approached. Rather, I have always viewed myself as a general commercial litigator representing banks, airlines, box makers, rice growers, accounting firms, underwriters and the like – but as would probably be true for any general litigator over the past decades in Houston or Louisiana or across the Southwest, as I survey what I will call my “body of work”, the energy cases do stand out. I will review three of the most notable in a moment. The first in natural gas, the second in coal, the last in crude.

When I joined Fulbright in 1970 or as it was then known as Fulbright, Crooker, Freeman, Bates & Jaworski, all new litigators were handed an insurance docket made up of cast off cases from more seasoned associates. I did not thrive with that docket of open intersection and slip and fall cases, but I quickly realized that there were more interesting and challenging cases to work on if you actively sought the assignment. In those early days of my practice, our Firm was quite likely to be involved in any significant case in Houston so I would survey the news of new filings and then seek out the partner taking on a defendant and volunteer to work on the matter. As a result of those efforts, I participated in a trial arising from the first implantation of an artificial heart – *Karp v. St. Lukes Hospital, Dr. Denton Cooley, et al.* and a lengthy trial in Judge Singleton's court arising from the explosion of the Chambers and Kennedy platform off Galveston during the

installation anti-pollution overflow valves. The focus of that trial, tragically, was the manner and point of death of the crew and contractors since it mattered whether the victim was on the vessel, the rig, or in the water under the prevailing laws. I spent weeks with Grand Jury witnesses in San Antonio representing what was then known as Texas International Airlines in an investigation concerning the opening of Love Field, a fact which I suppose dates me as to most of you. I spent the better part of the 1980's defending Texas Bank Holding Companies in securities class action cases. Invariably rig and production loans were central to those cases. I spent another couple of years defending what may have been the first major Foreign Corrupt Practices investigation undertaken by the Department of Justice. It involved the sale of gas compression equipment to Pemex. It was truly fascinating with an abundance of war stories unsuitable for today.

Nevertheless to return to the theme of general commercial litigation – I recruited for our Firm for many years until I was deemed too impatient or crotchety, I suppose. I always told the law students that I loved the variety that general litigation presented – the need to learn with each new case how different industries worked – airlines, box manufacturers, banks, pipelines, even chicken feed, but I also explained the downside known to you all – in exchange for those exciting, challenging cases came business travel – a LOT of it – my ever supportive family is here today so I apologize for never being home for any emergency. I owe my wife Bettie and younger son Alex a special apology because I left Houston for New Mexico and a ten week trial in Las Cruces when Alex was less than one month old. That case was the New Mexico Natural Gas Litigation which basically amounted to trying the price of natural gas charged to utility customers to a jury of consumers.

The San Juan Basin producers were simultaneously being sued by a class of consumers for inflating the price and by the royalty owners for selling gas too cheaply, but the trial in Las Cruces addressed only the consumers and the New Mexico Gas Utility Company.

There is a reason utility prices and juries don't mix. The situation was made more difficult by the fact that Harry Reasoner and a crew from Vinson & Elkins had been in the same Court the week before us in a well-publicized case trying to secure New Mexico water for El Paso which had the locals really riled up – when we explained that we were only trying to defend high gas prices they calmed down. After that we were simply treated with the ordinary disdain the New Mexicans show toward Texans.

In any event, it was a hard slog in Las Cruces or LasCruciating as we came to call it, but it had its rewards. We were representing Conoco which could not have been a more thoughtful client. Mid-trial they flew Bettie and Alex out for a visit and otherwise supported our effort in every way. My colleagues Gerry Pecht and Dan McClure who are here today became lifelong friends as did Michael Campbell of Santa Fe who represented a particularly challenging co-defendant. The case posed many interesting legal issues under the Noerr Pennington doctrine, direct purchaser issues, damage limitation issues and the like—but a very vivid memory is that the jury which was hardworking and attentive, having been chosen based almost exclusively on the Courts questionnaire and the Courts voir dire resulted in the seating of some jurors who could read and write English for the questionnaire but try as they might could not really understand the Court's voir dire questioning nor the subsequent testimony. In consequence, they had never raised a hand to respond to any general question which may have led to further inquiry. This was a clear instance in which a highly respected judge put speed of jury selection over care. The ultimate result was a reversal based at least in part on the presence of unqualified jurors.

Within a few months, in August 1983 – I was again in trial in El Paso representing a Mexican bank when Hurricane Alicia hit Houston – hard. My client looked at the headlines and said “Rick, you are lucky to miss the storm.” I told them the storm would come and go, but that not being there would last me a lifetime. So sorry again family –

This past summer I drove for several hours from Denver to Saratoga, Wyoming with Harry Reasoner and David Hedges. We observed that we had probably had the good fortune to practice through the absolute heyday of the big Houston firms. Our Firms worked together often but we were also frequently opposed. Nevertheless, we always competed on a level and in an atmosphere that seems to have lost some currency. We litigated with fervor but without rancor. No case stands out more clearly for me in this regard than the ETSI litigation in which my friend John Murchison of Vinson & Elkins represented the plaintiff and we represented the Union Pacific Railroad along with Covington & Burling whose partner Gregg Levy ranks as one of the finest colleagues among many over the last 40 years. The case involved the proposed construction of a coal slurry pipeline from Wyoming to Texas and the ad damnum was staggering. The liability theory was that the Western railroads had conspired to deny right of way to the coal pipeline. The case went on for years with discovery from coast to coast with

all the attendant scheduling issues, and frustrations, but I do not recall a cross word or refusal to accommodate a personal request over the duration of the litigation. In fact, during a month-long round of depositions in San Francisco, John and I would periodically declare team-wide moratoriums for a joint Chinese banquet or to watch the Rockets play the Lakers in the NBA finals at a Sports Bar miles out Geary Ave. I saw Gene Gallegos in the audience this morning. I haven't seen Gene in years. He was our adversary in New Mexico. I should note that he too, knew how to compete diligently but with courtesy. We used to play tennis in the evenings after sparring all day in court.

Over the last decade, I have often missed that quality of professionalism and absence of swagger. I don't believe lawyers or our profession have changed so much, but we simply don't know one another as well as we once did. So it requires more effort and patience and experience to litigate with some humility and regard for your opponent's obligations and difficulties.

This room is filled with lawyers who were part of the Lease Oil Litigation. It was hard, but it was exhilarating. There are so many friends here today who were participants in that saga. That matter involved the pricing of crude oil at the well. One allegation was that the so-called posted price had been fixed too low. I learned there were high posters, low posters who paid bonuses, and others who really did not want nor need to buy the production of other companies.

I owe a real debt to Mike Graham who was my close colleague and confidant throughout the case but also to Dan McClure, again, Larry Simon, Russ Howell, Ed Pickle, Steve Johnson from Phillips, David Zott, Greg Copeland and many others who worked hard, well and supportively to find a resolution to a complete morass with cases in state courts from Alabama, to New Mexico to Utah overlaid by the Federal action in which it was ultimately resolved. That was, of course, before the Class Action Fairness Act was enacted so at that time the mixture of State and Federal cases all seeking a national class presented a particularly thorny problem, which required cooperation and creativity and trust on both or perhaps I should say all sides. Lee Godfrey and his colleagues, of course, represented the largest class.

I have had repeated major cases over the years with Lee and with Steve Susman. They are each more than worthy adversaries but through it

all, the corrugated cases with Steve and the Lease Oil cases or cases with Lee, they always did what they had committed to do and defended their commitments against attacks from competing plaintiffs and groups. This is an opportunity for me to publicly acknowledge their ability and professionalism.

I have always been too emotional with an unmanly habit of tearing up. I do it for example every time I see Lou Gehrig proclaim himself to be the luckiest man on earth. I may not have been the luckiest but I have had more than my fair share – a wonderful family, lots of friends, good colleagues including Layne Kruse and Jane Dowell who has assisted me tremendously in every case for the past 20 years, a stimulating and rewarding professional life, lots of continuing curiosity, and a decent golf game, how could anyone fairly ask for more? I am very appreciative to be this year's designated Honoree – deserving or not – my good luck has not run out.