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The Energy Dispatch, the IEL's Young Energy Professional newsletter, contains substantive articles on trending legal issues in the energy industry, interviews, and professional development.

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Young Energy Professional Highlight: Jared Nelson

Interview by Ryan Frome-Pezzulli, Institute for Energy Law

RF: What was your path to becoming a lawyer?

JN: While I was working with the Louisiana Department of Public Safety and Corrections, Division of Probation and Parole, I was in court a lot. I got to interact with Assistant District Attorneys, public defenders and judges. Numerous individuals told me, "you know, you should go to law school" and "I think you should go to law school." So finally, after about five years, I decided, it's time to go to law school. Not to mention, my wife told me that I should go to law school as well.

RF: Sounds like you had a lot of outside influences telling you to go to law school.

JN: Yes, a lot of outside influences that eventually turned into one of the best decisions in my life.

RF: What led you to the energy sector?

JN: Oddly, I didn't imagine myself being in the energy sector. I always wanted to be a criminal prosecutor, because of my law enforcement background. However, whenever I got out of law school, I got hired on at the Louisiana Department of Justice, as an Assistant Attorney General working in their litigation division. In that position, I handled general liability and torts matters for the State of Louisiana and when I relocated to Lafayette, I handled civil rights as well. I did a lot of civil work.

When the opportunity presented itself to join Liskow & Lewis, this was my introduction to the energy field. I had no knowledge and no experience in this field, however, they took me on, taught me, and I am continuing to learn to this day. So that was my introduction to the energy sector, it's different, but it's fun.

RF: Your path to becoming an energy lawyer was not very straight forward, was it?

JN: I thought I had a path that I was set on and I had people in my corner supporting me on that path. But then another door opened for me, that happened to be the one that takes me further. I just have to keep my eyes and my mind open to new opportunities.

RF: How would you describe your practice?

JN: I am an associate in the Energy & Natural Resources and Environmental Group, at our Lafayette office. As a result, I focus on all types of litigation primarily in the areas of energy and environmental law.

RF: Have you had any mentors in your career that helped you reach where you are today?

JN: Yes, absolutely! As I said before, during my time at probation and parole, I met a lot of Assistant District Attorneys, public defenders, other lawyers and judges. Those individuals saw me progress through law school. To this day, one of the closest mentors that I have is Judge Royale Colbert, Jr., who just became a district court judge here in the 15th Judicial District Court, which includes Lafayette, Vermilion, and Acadia parishes. He's one of my close mentors that I keep in contact with.

Another mentor is the Chancellor of the Southern University Law Center, John Pierre. He's more like a family friend, but he's the one that pushed me to be great. He knew me prior to law school and he knew that eventually I would go to law school. He was the one that gave me the extra push to do well so that I could have a successful career as a lawyer. Those are my mentors outside the firm.

Within the firm, my current mentor is Brian Capell, the person that hired me. He's the one that I work closely with, he's always made himself available to me, and he's given me guidance on how to navigate the legal landscape and the energy sector. This has made my transition into the sector much more pleasant than it could have been if I had to do it on my own.

RF: Do you have any tips or advice for other young lawyers seeking a career in the energy space?

JN: Well, if you are interested in joining the energy space, I would recommend joining a firm that deals with this type of litigation. That would be the most direct way of working with energy clients. Furthermore, working at a firm that

does this type of work, can eventually expose the young lawyer to in-house counsels of various energy companies, which could potentially lead to working as in-house counsel for these companies in the future.

Additionally, I feel that young lawyers should attend, if they are able, energy related conferences and seminars, as there is a great deal of energy lawyers, law firms, and energy companies present. You will be able to learn the terms and the laws with regards to the energy space and this is a great networking opportunity. And of course, you have to become a member of the Institute for Energy Law!

RF: What is an interesting fact about yourself?

JN: An interesting fact about myself, is that I was originally born and raised in New York City before relocating to Louisiana. Everyone asks how in the world did I get to Louisiana? The answer is always the same. I married the love of my life, Joelle, who was born and raised in the Lafayette area. So as a result, now I have dual citizenship between Louisiana and New York.

RF: Thank you for taking the time to speak with me today!

Conference Highlight - Young Energy Professionals Workshop: The Midstream Sessions Co-Chairs Emil Barth and Jennifer L. Johnson

Interview by Vickie Adams, The Center for American and International Law

Emil Barth and Jennifer L. Johnson are co-chairs of IEL's Young Energy Professionals Workshop: The Midstream Sessions, which will take place online on January 11-12, 2023. Emil is a partner in the Washington, D.C. office of Baker Botts, L.L.P. and Jennifer L. Johnson is the General Counsel and Corporate Secretary at Salt Creek Midstream in Houston, TX.

VA: Emil and Jennifer, can you tell me a little bit about your practice?

EB: I've practiced energy law since 2006. My practice covers a diverse range of matters, from Federal Energy Regulatory Commission (FERC) regulation of natural gas and oil pipelines, cross-border issues before the U.S. Department of Energy, and infrastructure permitting. I also represent clients in renewable energy and electric matters before FERC and other agencies.

JJ: As General Counsel of a small legal department, my work varies greatly on a day-to-day basis. From governance and HR matters to strategic initiatives and commercial issues, I get involved in a wide range of matters. No two days or weeks are the same. Aside from the variety of work, the fun thing about my role is that I frequently get to wear a business hat in approaching issues. I try to determine how different outcomes could impact the business as a whole, rather than just viewing it through a legal lens. While my work is varied, I would say that our legal department spends about 50% of our time on commercial matters.

VA: So, how did each of you end up in the midstream sector?

JJ: My first role after leaving private practice was at Noble Energy, and I was able to get involved with Noble's midstream business. I found the work to be fast-paced and enjoyable. I was fortunate when members of the Noble Midstream team took a new opportunity at Salt Creek Midstream and needed a General Counsel. I think working with a team that you know and like is important to overall job satisfaction, and I am lucky to have found that at Salt Creek.

EB: When I joined Baker Botts in 2005, I immediately began working on midstream infrastructure permitting and rate case work, from initial filings through appellate work in the U.S. Courts of Appeals. The issues were fascinating, diverse, and complex and that's continued throughout by career.

VA: You've worked together for the last few months to put together a two-day online conference in January, the Young Energy Professionals Workshop: The Midstream Sessions. Who should attend this conference?

JJ: The Midstream Workshop should be informative and interesting to a wide audience. We intentionally designed the program to include topics that will be useful for individuals who do not have a lot of experience in midstream and for those who work in the sector. The midstream sector is complex, so I think people who work in the sector will benefit from learning about latest industry trends. Likewise, people who aren't as familiar with the sector will be able to hear more about topics that are important drivers in the midstream space.

EB: Anyone whose practice touches the midstream sector should attend the Midstream Workshop. We tried to put together a conference that covers the full range of topics for the lawyer that may only work in one area of midstream, but wants to better understand the full picture. We also structured the panels to offer something to lawyers with basic or more advanced knowledge of the midstream

sector.

VA: What do you want people to know about the conference?

EB: The key thing I want people to know is that we have really smart, dedicated panelists who are bringing real world experience and are committed to sharing their knowledge.

JJ: I am also excited about the slate of speakers that have agreed to participate in the workshop. We have a great mix of experts who will share a lot of valuable information. I think workshop participants will get a lot from the sessions and find the program enjoyable.

VA: Do you have any tips for law students or lawyers seeking a career in the energy space?

JJ: I think people new in their careers should keep an open mind about where their career will lead. I could not have predicted my career trajectory 15 years ago when I was in law school. I also suggest being open to new opportunities and always staying professional and courteous to opposing counsel. You never know when opposing counsel will turn out to be a co-worker or even your boss someday.

EB: Try to talk to as many people in the space and read as much as you can to get a sense of the emerging issues. There is so much going on in energy.

VA: What's your favorite part of your job?

EB: My favorite part of the job is helping clients work through whatever legal or regulatory issue they are facing to realize the business or commercial goal that they have.

JJ: I love working with a great group of people in an environment where we have a lot of mutual respect. I also enjoy the intellectual challenges that come with the job. Transporting and processing oil and gas is complex and sometimes requires a lot of thought to effectively solve problems.

VA: We spent most of our time talking about work and the conference, but what do you like to do when you're not working?

JJ: I have four young kids and a spouse that works full-time, so my family keeps me very busy. The juggle isn't always easy but can be very rewarding.

Aside from spending time with my family and friends, I love with Peloton workouts. I recently surpassed 1,000 workouts. I try to take time for myself daily and find this helps me to stay balanced.

EB: Riding mountain bikes, going running, or wandering through the mountains with my 6 and 8 year olds and my wife.

VA: Jennifer and Emil, thank you for your time! I'm looking forward to The Midstream Sessions!

Ohio Supreme Court Decision Provides Further Clarity on the Common Law Distinction Between a Reservation and an Exception

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On February 15, 2022, the Supreme Court of Ohio issued its decision in *Peppertree Farms, L.L.C., et al. v. Thonen, et al.*, 2022-Ohio-395 (2022), providing further clarity on the common law distinction between a "reservation" of a property interest and an "exception" to a conveyance. The Court concluded that the deeds creating the severed oil and gas rights contained an exception of said rights from the transfer of the property, instead of a reservation of said rights that would have required words of inheritance prior to March 25, 1925.

On March 25, 1925, the General Assembly abrogated the common law distinction between a reservation and an exception whereby words of inheritance, such as "the grantors and their heirs, successors and assigns," were no longer required to retain, or pass on, a fee simple interest in land. However, prior to March 25, 1925, words of inheritance were required to create a fee simple interest in a reservation or conveyance of an estate. Otherwise, the interest reserved or conveyed was limited to that of a life estate and the interest expired upon the death of the interest holder. If the interest created was an exception, rather than a reservation, then no words of inheritance were required to create a fee simple estate.

In Peppertree, the severance language at issue was contained in two deeds made prior to 1925 and, as such, the courts were called to determine whether the interest created was a reservation or an exception, resulting in either a life estate or a fee simple interest, respectively. In 1916, W. T. and Katherine Fleahman conveyed two tracts of land in Monroe County, Ohio, to W. A. Gillespie, using the following severance language: "Grantor W. T. Fleahman excepts and reserves from this deed the one half of the royalty of the oil and gas under the above described real estate" (the "W. T. Fleahman Interest"). Mary Fleahman then acquired W. A. Gillespie's interest and executed a deed in 1920, stating, "the 3/4 of oil Royalty and one half of the gas is hereby reserved and is not made a part of this transfer" (the "Mary Fleahman Interest"). Mary Fleahman then conveyed her rights to the oil and gas royalty to W. T. Fleahman. The Stark County Court of Common Pleas held that the language contained in both deeds constituted reservations rather than exceptions, and therefore words of inheritances were required to create a fee

simple interest.

On appeal to the Fifth District Court of Appeals, the appellants argued that the severance language contained in the above-described deeds were that of exceptions rather than reservations and, therefore, words of inheritance were not required in order to create a fee simple interest. In its decision, the appellate court cited to *Chesapeake Exploration L.L.C. v Buell*, 2015-Ohio-4551 (2015), finding that the interest reserved in the aforementioned deeds could most properly be characterized as reservations, as "when minerals are severed from the surface estate, two and new separate estates are created[.]" As the language in the instruments reserved new interests unto the grantors, rather than merely excepting them from the grant, the appellate court overruled the first assignment of error. As such, the Fifth District Court of Appeals affirmed the prior decision, stating that "[b]oth reservations explicitly indicate the grantors were reserving interests unto themselves, not merely excepting them from the grant. The Mary Fleahman Interest and the W. T. Fleahman Interest created new, severed oil and gas interests."

The Supreme Court of Ohio accepted the appeal from the Fifth District Court of Appeals in order to determine, most importantly, whether as a matter of law, an oil and gas severance prior to 1925 using the words "excepts and reserves" or "reserved and is not made part of this transfer" in an instrument conveying real property is the retention of an existing interest or the creation of a new property interest.

The Supreme Court disagreed with the lower courts and held that the language contained in both deeds constituted an exception rather than a reservation. The Court stated that because the oil and gas was already in existence at the time of the conveyance, a fee simple property interest existed in the unaccrued oil and gas royalties that the grantors could except from the transfer of the real estate. The conveyances did not create the oil and gas royalty interest, but rather excluded or withheld said interest from the operation of the conveyance, thereby constituting an exception. The grantors owned a fee simple interest that was inheritable and, therefore, words of inheritance were not required to retain more than a life estate in the excepted interest in the oil and gas royalties. Furthermore, in response to Peppertree's assertion that W. T. Fleahman and Mary Fleahman retained an interest only in oil and gas royalties which are personal property interests and therefore the reservation of the same created new property rights, the Court again disagreed and held that, at the times that W. T. Fleahman and Mary Fleahman each conveyed the property, they owned an existing real-property interest in unaccrued royalties from the production of oil and gas. This interest could properly be severed from both the surface and the mineral estate and, therefore, their property rights in the partial interest to the oil and gas were absolute.

Strict API RP 1173 Adherence Presents Work-Product Protection Concerns

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API RP 1173, Pipeline Safety Management Systems, is the American Petroleum Institute's recommended practice for establishing a pipeline safety management systems framework for organizations that operate hazardous liquids and gas pipelines. Pipeline Safety Management Systems, ANSI/API Recommended Practice 1173 (1st ed. 2015). In place since 2015, the API developed the recommended practice with input from the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and the National Transportation Safety Board ("NTSB"), among others, to reach the industry-wide goal of zero pipeline safety incidents. It did so after the NTSB recommended that pipeline operators implement safety management systems in its Accident Report following a pipeline rupture in Marshall, Michigan. *See* National Transportation Safety Board, Pipeline Accident Report No. NTSB/PAR-12/01, PB2012-916501, 124 (July 10, 2012) (recommending, among other things, that the API "[f]acilitate the development of a safety management system standard specific to the pipeline industry that is similar in scope to . . . [its] Recommended Practice 750, *Management of Process Hazards*"). The Marshall, Michigan, accident released an estimated 843,444 gallons of crude oil into the surrounding wetlands, creeks, and rivers. *Id.* at xii. While no fatalities were reported, 320 people reported symptoms consistent with crude oil exposure, and cleanup costs exceeded $767 million. *Id.* At the time, PHMSA did not require pipeline operators to implement safety management systems. *Id.* at 55. But the incident prompted the NTSB to communicate to pipeline operators and other interested parties that "[p]ipeline safety would be enhanced if pipeline companies implement safety management systems." *Id.* at 120.

RP 1173 applies several principles at the core of the safety management system recommended practice. One of these principles notes that "[t]he creation of a learning environment for continuous improvement is achieved by investigating accidents thoroughly, fostering non-punitive reporting systems, and communicating lessons learned." *See* Pipeline Safety Management Systems, ANSI/API Recommended Practice 1173, at viii. Another principle suggests that pipeline operators conduct "[p]eriodic evaluation of risk management effectiveness and pipeline safety performance improvement, including audits," which are "essential to assure effective PSMS performance." *Id.*

In an effort to expand on these principles, RP 1173 dedicates an entire section to describing how pipeline operators should investigate and document accidents and "near-misses," as well as associated evaluations and lessons learned. *Id.* at 14-15. For example, RP 1173 suggests that pipeline operators

should create "investigation findings and lessons learned" as part of their "procedure for investigating accidents and near-misses that led, or could have led, to an incident with serious consequences." *Id.* at 14. It goes on to encourage pipeline operators to "share lessons learned externally through peer-to-peer interactions," in addition to maintaining records of the investigation and resulting preventative actions. *Id.* at 15. But while these "outputs" promote a collaborative learning environment, they also increase the probability of work-product waiver barring vigilant oversight by counsel.

While it is undeniable RP 1173 has extraordinary intentions of eliminating incidents and has taken a calculated approach for such noble goal, companies should be aware that strict adherence to RP 1173 could present a myriad of work-product protection concerns. The recommended practice not only encourages the internal distribution of investigation results, but also external distribution with peer companies, regulators, and beyond. *Id.* Therefore, pipeline operators must carefully consider the possibility of waiving, or at least compromising, work-product protection when implementing or revising any safety management systems framework.

To start, most litigators are familiar with the precept that the work-product doctrine protects parties from divulging information used to prepare for litigation. As Federal Rule of Civil Procedure 26(b)(3) describes: "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). The Rule goes on to explain that a court may order disclosure if the requesting party can show a "substantial need" for the material, as well as an inability to procure equivalent information "without undue hardship." *Id.* Though seemingly straightforward, the Rule leaves the door open as to how concrete the prospect of litigation must be before a document is protected under the privilege.

In an attempt to provide certainty, state and federal courts have devised various tests to assess if a document was prepared in anticipation of litigation. Unfortunately, these tests can produce starkly different results depending on the jurisdiction and the facts at issue. But at least in the federal courts, most courts protect documents primarily motivated by litigation or anticipated litigation. (Some courts apply a "because of" test, whereby a document is entitled to work product protection if it "can fairly be said to have been prepared . . . *because* of the prospect of litigation." (*See United States v. Adlman*, 134 F.3d 1194, 1203-04 (2d Cir. 1998) (adopting the "because of" approach for the first time (citation omitted; emphasis in original)). A more restrictive, "primary purpose" test applies work-product protection "as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).) At the same time, the work-product doctrine generally does not protect documents primarily prepared for other reasons, such as external or internal requirements, or in the ordinary course of the company's business. (*See, e.g., Fulmore v. Howell*, 657 S.E.2d 437, 443-44 (N.C. Ct. App. 2008) (holding that the trial court did not abuse its discretion in compelling the discovery of an "internal investigation/accident report," which was created by a truck driver and by the defendant trucking company's safety director following a fatal accident).)

In the context of RP 1173, the work-product doctrine presents two critical questions for a document associated with an accident investigation: first, whether the document is protected at all; second, if work-product protection exists, whether that protection may be waived by strictly adhering to the recommended practice's investigation procedure. The fact that many documents will likely serve a so-called "dual purpose" complicates these questions even more. Dual-purpose documents are those that have both a legal and business purpose, which may not receive work-product protection. But again, the work-product doctrine typically does not extend to required or ordinary course investigations. Consequently, companies should be mindful of the content included in documents and reports necessary for such investigations. But even when work-product protection applies to a document prepared in anticipation of litigation, strictly adhering to RP 1173's core principles could result in the waiver of that protection. Waiver is possible when a public document includes mental impressions and other non-essential analyses, as well as when a pipeline operator shares "lessons learned" with third parties.

Given the work-product protection concerns created by RP 1173, pipeline operators should consider creating dual investigations for those incidents where the compromising of work product would be critical. In these instances, for example, the company can allow the normal RP 1173-induced investigation to focus entirely on the factual development(s) of the incident, while an attorney-led investigation can focus on the conclusions and litigation strategy. During the RP 1173-induced investigation, the company can learn from a factual standpoint how the accident or near-miss happened and respond to it from a business standpoint. But on the second attorney-driven, litigation-focused track, counsel can provide legal advice and protect the company's interests in actual or anticipated litigation.

By conducting such two-track investigation, pipeline operators can attempt to have their cake and eat it too: conducting the ordinary-course, non-privileged investigation, as well as a protected strategy-focused one. While more costly, this two-track strategy has proved effective in other contexts. *See, e.g., In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522 (PAM/JJK), 2015 WL 6777384, at *3-4 (D. Minn Oct. 23, 2015) (holding that the attorney-client privilege and the work-product doctrine covered Target's

internal communications and its communications with a team of Verizon employees who conducted an outside lawyer-initiated and directed investigation into a data breach, while recognizing that Target had already produced documents related to a separate internal investigation).

While RP 1173 is not positive law required by any regulatory body, its recommended practices serve as a baseline for assessing a pipeline operating company's safety practices, and potential liability, following any pipeline accident. Therefore, pipeline operators should be mindful of their safety practices and adherence to industry standards. The existence and content of a pipelines operator's safety management system will almost certainly be a critical component of any PHMSA or NTSB investigation following a pipeline accident, as well as any associated lawsuit(s). At the same time, pipeline operators should be mindful of their outputs associated with any safety management system and strive to protect work-product. Achieving zero pipeline safety incidents is always the goal, but this can happen without compromising the protections afforded by the work-product doctrine and exposing pipeline operators to liability.

Fifth Circuit Orders Remand to Allow Landowners' Tort Claims to Proceed Against the Louisiana Department of Environmental Quality in State Court

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Can a landowner assert tort claims against the Louisiana Department of Environmental Quality ("LDEQ") for failing to warn of alleged property contamination? And does the Louisiana Environmental Quality Act's ("LEQA") public notification regulation place a non-discretionary duty on LDEQ to notify landowners of property contamination? In *D & J Investments of Cenla, L.L.C. v. Baker Hughes a G E Co., L.L.C.*, the Fifth Circuit held that these unsettled questions of Louisiana law are more properly resolved by a Louisiana state court, not a federal court sitting in diversity. No. 21-30523, 2022 WL 9862487 (5th Cir. Oct. 17, 2022). Thus, the Fifth Circuit ordered the district court to remand a case brought by 48 landowners against LDEQ and several past and present owners and operators of an industrial facility, finding that LDEQ was not improperly joined, and therefore the case could not be heard in federal court.

In *D & J Investments*, the landowner-plaintiffs filed suit in Louisiana state court claiming soil and groundwater contamination on their property from an industrial facility's alleged improper waste disposal practices. In addition to the owners and operators of the facility, plaintiffs also sued LDEQ for failing to timely and properly investigate and warn plaintiffs of the contamination. One of the defendants removed the case, alleging that the only non-diverse defendant, LDEQ, was improperly joined because plaintiffs failed to state a claim against the department. The district court denied plaintiffs' motion to remand and dismissed LDEQ, finding that LDEQ did not have a duty to inform plaintiffs of contamination on the property and that Louisiana law does not create a cause of action against LDEQ for contamination caused by private industry.

On appeal, the Fifth Circuit reversed and found that remand was required due to the uncertainty of whether discretionary immunity under Louisiana law applies to LEQA's public notification regulation. Discretionary immunity prohibits liability from being imposed on a state department, such as LDEQ, based on the failure to exercise or perform discretionary acts. LEQA's public notification regulation, however, provides a time frame for notification based upon two possible "triggering events:" (1) when LDEQ becomes aware of information and determines that a release is likely to have off-site impacts that exceed applicable federal or state health and safety standards and pose a significant risk of adverse health effects; or (2) when LDEQ confirms off-site impacts that exceed applicable federal or state health and safety standards and the department determines that the off-site impacts pose a significant risk of adverse health effects. The Fifth Circuit held that this public notice provision could be subject to reasonable alternative interpretations by a Louisiana state court. On the one hand, the public notification provision contains non-discretionary terms such as "shall" and specific triggering events and timeframes to provide mandatory notice. On the other hand, "the triggering events depend on determinations and confirmations made by LDEQ (and to that extent is discretionary)." Under improper joinder rules, the Fifth Circuit found that it was required to resolve this ambiguity in plaintiffs' favor and order the district court to remand the case to state court.

During oral argument, the Fifth Circuit panel asked whether it should certify the question of LDEQ's duty to the Louisiana Supreme Court. Although it remains to be seen whether a tort cause of action can be brought by a landowner against LDEQ, and whether the LDEQ owes a duty under LEQA's public notice provision, these questions will now be decided in Louisiana state court.

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