

## CHAPTER 1

### Deans of Oil & Gas Practice Lecture

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#### **§1.01 Introduction**

Thank you TL for your very kind introduction. I am honored to receive this wonderful opportunity to share some of my reflections from my time in this great industry! I want to begin by emphasizing the importance of teamwork—none of us could accomplish what we have and what we will accomplish in the future without teamwork! I want to thank all of my colleagues and mentors over my 40 plus year career at Exxon and later ExxonMobil as well as those outside counsel and co-industry in-house counsel I had the incredible privilege to partner with on so many matters both here in the U. S. and around the world. A very Big and Special Thank You to the Institute for Energy Law for this very humbling recognition—IEL and The Center for American and International Law more broadly have always played an important role in my development as both an attorney and a leader. I am confident that when CAIL and IEL celebrate their 150th anniversary 75 years from now, their monumental impact on the legal profession and our society more broadly will be even more important than today!

#### **§1.02 Beginning in the Industry**

As I reflect back on my journey which led me to what continues to be the most important industry to the world including its immeasurable benefits to our society, our quality of life and the local and global economies, I remember my first direct contact with the industry being when I was 10 years old. I grew up in Tenafly, New Jersey—a small suburb of New York City. The halftime tradition at the high school football games which I would always attend with my dad was that local businesses would throw out little rubber footballs advertising their businesses. It just so happens that I caught one of those footballs—it was from the local ESSO station and had the tiger logo and the “PUT A TIGER IN YOUR TANK” trademark. That football sat on my bookcase in my bedroom next to my Mickey Mantle poster for many years thereafter. Little could I have imagined that I would be standing here today, some 56 years later, having experienced the dream of a lifetime as an attorney for our great industry! Truth be known, I never took an oil and gas course while attending Tulane Law School—my goal was to become a maritime attorney which is what led me to Tulane from Bowdoin, my undergraduate college.

I spent my two summers in law school back in Manhattan working in the law firm that represented Onasis’ U.S. maritime interests and planned to work there as an associate upon graduation. For fun, on the recommendation of a friend, I signed up for the campus interview with Exxon. Next thing you know, I am on my first Southwest Airlines flight to Houston for a full round of interviews with the Exxon Company, USA Law Department. Two weeks later, on my 24th birthday, I received a telegram with an offer to join the law department. I accepted the offer thinking I would spend a few years with Exxon and then migrate back to the NY maritime practice I had aspired to pursue. Of course, that never happened. I actually started

my career with Exxon as a law clerk during my last semester at Tulane - I was paid \$3 per hour—some last semester ‘beer money’ as my boss characterized it. Upon graduation I began my full-time career with the department for what was then a robust starting salary of \$25,500.

What a great decision I made to now be able to serve as counsel in an industry with not only some of the brightest but also some of the most consequential people who have dedicated their lives to help improve the world. As a 10-year-old, I could never have imagined spending four days on the North Slope of Alaska in the dead of winter, being transported via a personnel basket from an offshore platform to a crew boat in the Gulf of Mexico and then providing pro bono legal advice to the crew who was being transported back to shore from their “two weeks on”, touring cutting edge LNG facilities and an LNG tanker in Qatar, visiting numerous refineries and chemical facilities, and representing Exxon and ExxonMobil in courtrooms from Cameron Parish, Louisiana to Anchorage, Los Angeles, and New York City amongst others or living temporarily in Washington, D.C. as a member of the legal team pursuing FTC and EU clearance of the then proposed Exxon-Mobil merger, working on international legal issues and traveling to countries all over the world or having a boss become Secretary of State.

Of paramount importance, of all the lessons learned during my career from all of these experiences, the most common and important attributes of our industry which I learned early on are integrity and resilience. In spite of all the value we have added and continue to provide to make the world a better place, we are an industry which has been under challenge from its very inception over 150 years ago. As a consequence, Lawyers have played a critical role to the industry’s evolution and resilience during that entire period. I could not be any prouder of all of you and all the generations of energy industry attorneys who preceded us and am confident of the generations and generations of energy industry attorneys who will succeed us. All of our clients have always relied on our wise counsel to vigorously defend them when unjustly challenged, to support them in the maintenance of compliance of the ever-evolving complex, global legal and regulatory landscape, and to help them build for and transition to the future through legal support for transactional opportunities and technology advancements. In this regard, our duty as attorneys to promote and aggressively defend the Rule of Law everyday could not be more relevant and critical.

### **§1.03 The Rule of Law**

The Rule of Law has been and remains the most fundamental of foundations to protecting not only the integrity of our great profession but more specifically, the interests of each of our energy industry related clients. The historical underpinnings of the Rule of Law, parallels in many ways the evolution of Energy Law. In fact, many of the broader legal precepts which govern our society today and which help maintain the Rule of Law have their roots in energy law. A prime and early example is the Sherman Antitrust Act of 1890. The legislative history of the Act specifically identifies the Standard Oil Trust as the driver for the legislation. As you all know, the Act served as the vehicle which ultimately led to the U.S. Supreme Court’s 1911 decision breaking up Standard Oil to 34 independent companies, many of whom you all represent. However, perhaps the most enduring and important legacy of the 1911 decision is the Court’s establishment of the “Rule of Reason” under the Act which of course continues to have broad relevance across all industries, including ours, with respect to antitrust compliance and enforcement. For over 100 years, the appropriate application of the “Rule of Reason” has helped to maintain transparent, fact-based legal enforcement of competition law matters which helps to sustain a key component of the Rule of Law by restraining an “arbitrary” approach to the regulation of free markets.

An interesting side note regarding the Standard Oil Trust is that it was drafted by an attorney named Samuel Dodd. Dodd was an outside counsel for John D. Rockefeller who Rockefeller subsequently hired as Standard Oil's first General Counsel. I believe that all of us who serve as in-house counsel, even beyond the energy world, can thank Rockefeller for having the vision 140 years ago that a strong in-house legal team was important to the enterprise's success. From the beginning, Rockefeller established a culture in which the in-house lawyers should always have "a seat at the table" and not be viewed as secondary or roadblocks but rather enablers to the company's success. Dodd was also a man of high integrity and ethical standards—this is best exhibited by his refusal to take equity compensation on the premise that he believed it would put his ability to provide independent legal advice in jeopardy.

To me, putting aside that most would question the wisdom of taking no equity, what is enduring is Dodd's establishment of the key principle that counsel, both in-house and outside, should always have the license to provide independent legal advice and promote and protect the Rule of Law. One more enduring Rule of Law impact of the 1911 Standard Oil decision is that Delaware's long history as the hub of corporate law might never have happened. In 1911, the then Governor of New Jersey, Woodrow Wilson was preparing for his presidential run the next year. He was a progressive who believed big business was bad. Historically, many corporations, including Standard Oil, were incorporated in New Jersey. Following the Standard Oil decision, Wilson, to strengthen his progressive presidential candidacy, promulgated policies resulting in corporate standards more costly and more stringent than Delaware's. Consequently, Delaware became a much more attractive jurisdiction for incorporation and the establishment and implementation of corporate governance standards and related matters.

The uniquely positioned Chancery System in Delaware thereby became the guardian for the equitable application of the Rule of Law on the corporate landscape which continues to this very day! Another example of where the Rule of Law intersects with the evolution of energy law and our associated role as energy industry lawyers is the importance for each of us to promote a strong, independent and qualified judiciary not only here in the United States but throughout the world. As our clients have continuously invested for decades in countries with emerging economies, a transparent, fair and well-defined legal system is a threshold consideration for those investments. Absent such a viable and legitimate Rule of Law regime, as many of you have probably experienced, given the magnitude and long-term nature of the investments made by our industry, it becomes that much more difficult for our clients to make their Final Investment Decisions. From the time of the earliest oil and gas developments, the rule of law and thereby lawyers have been an essential element to the successful formation and execution of those developments. This includes the energy lawyer's lead role in helping to define firm property rights, assisting in the negotiation of enforceable commercial agreements both domestically and internationally, advising on risk mitigation, analyzing and providing practical advice with respect to the navigation of and compliance with complex and dynamic regulatory regimes, supporting the development and protection of intellectual property, and protecting our clients' interests in litigation in what must be fair, objective and transparent courtroom and arbitration forums.

What underlies our ability to successfully assist our clients regarding each of these challenges is the Rule of Law. Without, among other things, procedural and legal transparency, legal certainty, separation of powers, and equal treatment and fairness in the application of the law, I have learned throughout the years our role in identifying and applying risk mitigation to support our clients is that much more difficult, particularly given the types of jurisdictions and regimes our industry has navigated throughout its history. I have learned that it is important for us, as attorneys, to build an enduring trust and credibility with those who are the architects, policy makers and implementers of the particular legal regimes with whom our clients engage. What is most critical is that we never compromise or sacrifice our

or our clients' integrity, ethical standards, and legal compliance to obtain an outcome which is not consistent with the foundational principles underlying the Rule of Law! Specifically, each of us is accountable to ensure we always promote the proper application of the Rule of Law in all jurisdictions no matter how severe the challenge.

Another example of the historical intersection between the Rule of Law and energy law focuses on the administrative law process, particularly with respect to regulatory agency deference and the separation of powers. Simply stated, as all of you know, one of the key principles of administrative law over the past 35 plus years, here in the United States, is not "GM Deference" or "AT&T Deference" but rather "*Chevron* Deference". Yes, it is our industry, through the 1984 US Supreme Court decision, that helped to establish the concept of judicial deference to administrative agencies. The *Chevron* case focused on what standard of review should be applied by a court to the Environmental Protection Agency's own interpretation of a provision in the Clean Air Act. The Supreme Court upheld the EPA's interpretation by applying a "two step" test: Step One is for a court to determine whether Congress has unambiguously spoken to the specific statutory interpretation in question. If it has, the analysis ends there.

If Congress has not spoken, then Step Two is for a court to determine whether the administrative agency's interpretation is reasonable. Of course, this decision has provided the administrative agency landscape, along with its cousin—*Auer* Deference—lots of license over the regulation of our industry and most others. Recently, courts, including the U.S. Supreme Court have been revisiting the scope of administrative agency deference on several grounds including Due Process and other Constitutional considerations such as Separation of Powers—particularly with respect to *Auer* Deference, which generally provides that courts should defer to an administrative agency's interpretation of its own ambiguous regulation.

Stated another way, is it appropriate for an administrative agency to have the power to write a regulation, interpret the regulation, enforce and penalize and then adjudicate an alleged violation of that regulation without fair notice? In 2019, the U.S. Supreme Court in the *Kisor v. Wilkie* decision did not specifically overrule *Auer* deference but significantly narrowed its application. Under *Kisor*, a court reviewing an agency's interpretation of its own promulgated regulation must determine: 1) whether the regulation is genuinely ambiguous through traditional tools of statutory construction, 2) whether the agency's interpretation is reasonable, and 3) whether the agency's interpretation is within its expertise and not an interpretation to retroactively support a given policy objective and does not result in "unfair surprise". Many are anticipating that the *Kisor* decision is the first step to the Court's ultimate overruling of both *Auer* and *Chevron* Deference. In fact, in the current term, the Supreme Court is reviewing a Medicare related case involving agency deference under *Chevron*. Clearly, a few of the foundational principles of the Rule of Law—including the Separation of Powers, Due Process, Legal Certainty and Transparency are at play and will impact every one of your clients and your legal advice and associated strategies. Stay Tuned!

When I think about the Rule of Law and its association with environmental law, many are surprised to learn that the father of the Environmental Protection Agency is Richard Nixon. The EPA was created by President Nixon in 1970 in part to address environmental matters related to the oil and gas industry. My first interface with environmental issues was actually in 1970 as a high school debater. The various issues resulting in the establishment and regulatory reach of the EPA were the national debate topics that year. Again, little could I have foreseen in 1970 as a sophomore in high school the relevance that year's debate topic would have on my law career years later! Of course, the importance of the EPA and the various environmental laws it has and continues to administer on our clients along with the administration of environmental laws by other regulators around the world is a major part of most of our

practices, probably as much today as anytime in history. As you all know, the “E” in “ESG” relates to Environmental, along with “S” – Social or Sustainability, and “G” - Governance are currently front and center with all of our clients and all of us. So here we are again, the oil and gas industry right in the middle of another legal evolution which clearly has many Rule of Law related questions which will need to be addressed as ESG’s application evolves around the world. All of us will play a critical role in helping to ensure those applications do not violate the fundamentals of the rule of law including equal, non-discriminatory treatment, due process, and legal certainty and transparency.

Many underlying U.S. Constitutional related Rule of Law precedents are derived from our industry including the limits on the calculation of punitive damages in maritime cases following the Exxon Valdez incident, several precedential tax related due process and commerce clause decisions issued by the U.S. Supreme Court, the scope of eminent domain rights, and patent and trademark related decisions. Undoubtedly, there will be many more Rule of Law energy related decisions coming out of the Supreme Court in the years to come- This highlights the key role every one of us must continue to play! Beside the U.S. federal and state law systems being so critical to the proper application of the Rule of Law in the oil and gas space, international attorneys. We also must be able to explain and demonstrate not only the underpinnings but the necessity of such compliance to counter parties around the world in order to promote and protect the rule of law.

During my career, I learned the importance of identifying the proper legal forums in given circumstances as a key consideration in protecting the Rule of Law. This includes the use of arbitration forums for both commercial and government related disputes. We have all seen the rapid growth of ICSID, UNCITRAL, the LCIA, the ICC, and the ongoing role of the AAA, amongst others, on this landscape. A broad range of energy industry related issues have found their way into the arbitral arena from expropriation disputes to contract reopening disputes related to the price of natural gas.

As with the court systems, in order to maintain the Rule of Law in these settings, it is incumbent on us that we aggressively seek to protect the independence of the arbitral process, the proper application of the rules including arbitral award enforceability as well as ensuring appropriately qualified arbitrators are appointed.

#### **§ 1.04 Lawyer Contributions in the Industry**

I am now going to spend a few minutes discussing how, over the course of our industry’s history, lawyers have made major contributions to the industry’s development and resiliency. At its inception, the primary commercial focus of the petroleum industry was the manufacture and sale of kerosene. Here, in the U.S., a New York attorney, George Bissell, along with others purchased land in Titusville, Pennsylvania and retained Edwin Drake to drill in 1859 the well that led to the first modern oil discovery in the U.S. To many, Bissell, again let me emphasize—an attorney, is considered the “father of the American oil industry”. Effectively, with the purchase of the land which led to the drilling of Drake’s well, Bissell can also be characterized as the “father of the petroleum landman”. From that earliest well until today, what has driven the evolution, resiliency, and the endurance of the industry to meet market and societal demand and dynamics is being able to successfully respond through technological innovation. From supplying kerosene for lamps in the early days, to developing efficient manufacturing technology for refineries and chemical plants to support the industrial revolution and national defense, to developing and implementing 3-D Seismic, to developing Deep Water drilling, to developing hydraulic fracturing, the expertise and innovative spirit of those in our industry is without peer. Undoubtedly, as we sit here, with all the current and future challenges and thereby opportunities knocking on our door, the same technological and associated legal creativity will continue to come to the forefront.

All of us, all of those who preceded us, and those who will succeed us, can thank George Bissell and Samuel Dodd and others for setting the table for the opportunities and material role our profession has played to the success and resiliency of our industry. Just take a minute to think about the negotiation which led to Bissell's land purchase and thereby Drake's well and discovery of oil here, in the U.S., Dodd's drafting the Standard Oil Trust which ultimately resulted in the incorporation of 34 independent companies after the 1911 Supreme Court decision as well as the establishment of the "Rule of Reason" and being a factor in Delaware becoming the hub of corporate law. The key role lawyers have had in seeking and then protecting all the thousands of patents and trademarks, that have been so critical to the technological and commercial success of our industry throughout its history. The negotiation of the vertical suite of domestic and international commercial, transportation, logistical, manufacturing and marketing agreements from the upstream, through the midstream to the downstream and the marketplace. Litigating or arbitrating both here and abroad the never-ending series of complex issues our industry has faced throughout its history which have established innumerable legal precedents far beyond the oil and gas industry. In helping our industry re-establish and re-define itself through its various cycles and downturns - especially during the past 40 years.

When I reflect back to my earliest days as an attorney, I vividly recall the very first time I stood up in a courtroom as a newly minted Exxon attorney. It was in Shreveport, Louisiana. The case was a bailment case involving a customer's car which had been stolen from a company owned service station. The two key takeaways from that day which I continue to carry today are:

1. The euphoria, passion, and pride I had when I made my very first appearance before a court: "Randall Ebner, Exxon Corporation" and
2. How I did not like to lose- which I did!

It should be a daily part of each our missions to focus on passing on that pride, dedication, creativity, and passion to others who we are recruiting and mentoring for the future.

This includes continuing to recruit, train and mentor diverse generations of attorneys both here in the U.S. and throughout the world. I believe that we must start to incentivize a diverse population of students as early as middle school on the pursuit of a legal career, including in the energy space. Since my retirement, one of my key objectives is to support this mission through participation on the legal education landscape, both at law schools and through first class organizations like IEL and CAIL more broadly. I want to particularly give a shout out to IEL for its increasing focus on the importance of diversity in its programs and the many other suite of activities it undertakes!

What I have also learned and came to appreciate early on is that what our profession brings to our industry is perfectly complemented by what we all bring as lawyers to our local communities and society more broadly. Philanthropy and community service including pro bono service have been a longstanding cornerstone of both our industry and those of us who provide it legal support. This serves as further evidence of the foundational values and principles that are so common to both the industry and the legal profession. I am as proud of the thousands of hours of free legal advice we have all provided to those in need in our communities as I am as with respect to all the legal support we have successfully provided to our industry's clients throughout the years. I hope that this dual hat we all wear will be continued for generations to come.

## **§1.05 Conclusion**

Let me conclude with again thanking all of you for all you do every day to support the Rule of Law and to maintain the integrity of our profession and of our industry! As we navigate the current global challenges we are all helping our clients to address, each of your roles could not be more critical to this end. I am as optimistic as ever, that 75 years from now, there will continue to be a vibrant energy industry supported by a superb generation of attorneys!

Thank you

