



THE Energy Dispatch

A PUBLICATION OF THE
IEL YOUNG ENERGY
PROFESSIONALS' COMMITTEE

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Interested in writing for *The Energy Dispatch*? Young energy professionals may submit articles or ideas for our next issue to IEL's Associate Director, Vickie Adams (vadams@cailaw.org).

Upcoming IEL Events

[3rd National Young Energy Professionals' Law Conference](#)

April 10-12, San Antonio, TX

[6th Appalachia Young Energy Professionals' General Counsel Forum](#) – April 24, Canonsburg, PA

[6th Mergers & Acquisitions in Energy Conference](#)

May 21 in Houston, TX

[Offshore Energy Law Conference](#) – May 22, Houston, TX

Visit our [website](#) for our full calendar and a list of our online offerings!

A Letter from the New Chair

Hello readers,

As the incoming Chair of the Young Energy Professionals Committee, I wanted to take a few moments (or words) to introduce myself and provide a roadmap for what I, and my fellow YEPs, hope to accomplish this year.

I have been involved with IEL and the YEPs for just shy of a decade. I was first introduced to the YEPs upon joining my firm, Steptoe & Johnson PLLC, straight out of law school and was immediately hooked. While my participation has always been from a distance – beginning in Charleston, WV and now in Denver, CO – I have never felt separated from my YEP colleagues and friends. In my years attending IEL events, I have seen the YEP Committee grow in numbers and enthusiasm and have witnessed first-hand the impact of IEL's continued support for its younger members. We have, in my opinion, the most active and passionate group of young

energy attorneys in the country, and I am very excited to see all the things we will achieve.

During my term as Chair, I plan to build upon past successes and implement a new thing or two along the way. The historical signature YEP event has been the General Counsel Forum Dinner, which we will continue to host in Texas, Pennsylvania and Colorado throughout the year. A newer signature event has become the National Young Energy Professionals' Law Conference – the only one of its kind! It will be held in San Antonio, Texas from April 10 – 12, 2019. Another recent YEP initiative is the *Energy Dispatch* newsletter (as you are reading now) which is always well written and an excellent way to become more involved.

This will be our second year accepting applications for a YEP Leadership Class. Our inaugural program received stellar reviews, and we are looking to make it even better the second time around. It will also be our second year working with a Leadership Council, which not only generates more ideas but provides opportunity for high-level involvement within the committee.

As for new items on this year's agenda: a personal goal of mine is to create and host a short Energy Transactions 101 program, similar to last year's Energy Litigation 101 program. We have some good ideas in the works but certainly welcome any and all suggestions for topics and speakers. We are further looking into the possibility of establishing a mentorship program, which is also the subject of the class project for the first Leadership Class.

So, as you can tell, we have a lot going on! No matter your practice area or geographical location, there is a place and way for you to become involved in the YEPs. Whether attending the National YEP Law Conference, writing for the *Energy Dispatch*, or getting new programming off the ground, we'd love to see you around!

I am proud to serve as this year's YEP Chair and look forward to meeting and working with many of you during the coming months. See you (hopefully) in San Antonio!

Diana S. Prulhiere, IEL YEP Committee Chair

Your Real Legal Education Starts After You Graduate

Tod J. Everage, Kean Miller LLP

After recently re-watching *Back to the Future II* and dwelling on the fast-approaching 10-year anniversary of my law school graduation, I started thinking about what I would tell my newly-barred self if I could go back to 2009. Back then I was ready to take on the world with

no idea how to do it. I was outwardly confident, but also self-conscious about my weaknesses; I was ambitious, but also clueless about how to succeed as a young lawyer. The future World Series Champions notwithstanding, there are many things I would like to go back and tell myself about how to handle my first few years of practice (not that I would have listened). Here are just a few:

**TAKE ON THE
UNPOPULAR JOB AND
HANDLE IT WITH
grace
AND
without
complaint.**

**ACCEPT THAT YOU DO NOT
KNOW ANYTHING AT A HIGH
LEVEL, AND NO ONE EXPECTS
YOU TO.**

It doesn't matter what law school you went to. If your desire is to work in a firm or in-house – especially in the energy sector – that school did not adequately prepare you to be a well-rounded, successful attorney. Sorry to break it to

you, but that “Certificate in Energy Law” you were given in law school for taking a few classes does not make you as an expert in oil and gas matters. You may have picked up a few tools, learned a few buzz words, or began setting your foundation, but you most likely did not learn anything about some of the important parts of law practice. I'm talking about the business of law, professional development and building your reputation, landing a client, getting an in-house job (if that's your goal), or managing staff. It also didn't adequately prepare you to competently represent actual, real-world clients, with actual, real-world problems they are relying upon you to fix.

Most new lawyers are hired to work in a particular practice area. When you are just starting out, there is so much you have and need to experience for yourself to truly learn and understand. You can't get it all from Westlaw or LexisNexis. And, until you have experienced enough to find your footing, you will be faced with many uncomfortable situations. I recall many client (or potential client) meetings where I was the greenest lawyer in the room. The conversations between the older lawyers completely flew over my head as they talked about legal concepts and industry-related terminology or companies I had never heard of. I felt like I had nothing of value to contribute, so I said nothing. Then, I worried that the client perceived my silence as incompetence, rather than just awkwardness about my lack of experience. But time passed, as it always does, and I grew out of those awkward career toddler years. If you are there now, you'll grow out of yours too. Until then, accept that there will be growing pains and you will likely stumble as you find your footing, but there is no

shame in admitting your lack of experience. No one will judge you for it. Everyone was there, if they admit it or not.

BE THE PERSON WHO SAYS “YES” TO OPPORTUNITY.

When opportunity knocks, answer the door; you never know what's on the other side. Sure it's cliché, but if you become the person who steps up to take on new assignments or roles outside of your comfort zone, who agrees to help someone else out during crunch time, or who handles the undesirable tasks, you will be appreciated and valued. I am not just talking about the straightforward work assignment opportunities. Look for the task no one else wants. There are seemingly thankless jobs that need to be done, or non-billable requests that may not produce an immediate return. Take on the unpopular job and handle it with grace and without complaint. With each task completed, another potentially more exciting or career-progressing opportunity will arise. You really, truly, never know what will happen next. At a minimum, you'll have learned something or worked with someone new, and that's always progress.

**BE A TEAM PLAYER, DO GREAT WORK, AND BE
RELIABLE...YOU'LL BE INDISPENSABLE.**

Look. There are a lot of young lawyers just like you with an impeccable (or even better) resume who would love to have your job. We all know firms that have the reputation of having high attrition rates with associates. And if you find yourself at one of those places and unhappy, by all means, look for something else. But, if you are in a job that you love, you need to take care of your business. By that I mean: things that are within your control. If you do that well, it would be very hard for anyone to replace you.

You may not be able to pick your work hours. You may not be able to pick your work assignments. But, there are things that you have absolute control over as a young lawyer. One is your attitude. Another is your work product. If you commit yourself to having a good attitude and you consistently pump out great work, your supervisors and clients will notice. You will be seen as an indispensable and valuable member of the team.

**HOWEVER, REALIZE THE IMPORTANCE OR EVEN THE
NECESSITY OF SAYING “NO”.**

For the same reasons mentioned above, many young lawyers feel like they have to say “yes” to every assignment and request lest they disappoint their supervisor, appear to be unwilling to contribute, risk missing out on future work, or worried someone else will step up and over them. But, there are (at least) two important lessons here. First, if you overload yourself, your work will suffer and you risk

falling short of expectations and possibly even missing deadlines. In other words, you end up doing a lot of good work and very little great work. And, your clients deserve great work. You also become less indispensable. Second, you have to maintain some measure of work-life balance. I've seen associates who underestimate their work load, accept every assignment, then complain later that they are miserably swamped with work – which leads to resentment, unhappiness, and burnout. And that isn't good for anyone – at work or at home.

That being said, you must make sure that you learn the right way to say “no” and to manage expectations. No partner or supervisor should hold it against you if you explain why you can't take on another time-sensitive project, when there are several others sitting on your desk still needing attention. Don't simply say “sorry, can't do it.” Find out the time commitment and deadlines for the new project. If you can't be sure you can meet the deadline or you will have enough time to do a great job, explain that; maybe the partner can help alleviate the load or re-prioritize your other projects. But, also realize that the partner likely has access to your timekeeper accounting, so if you turn down work because you claim to be busy, but your hours aren't great, you will lose a lot of credibility.

This goes back to what I mentioned above. If you have built a reputation as a reliable team member, you've likely built up trust with your supervisor such that they will not question you when you need to turn down an assignment. You have established that saying “no” is truly an exception rather than a rule.

FIND MENTORS WHO WILL HELP GUIDE YOU TOWARDS YOUR GOALS.

I have been very lucky in my career to have worked with incredible mentors who have spent countless hours developing me professionally and personally. I'm not sure how anybody can be successful in the practice of law without good mentors. As a young lawyer, there are many things that can be attractive about a job: money, benefits, prestige, etc. But, do not overlook the importance of a good boss and mentor (and these do not have to be the same person); it is crucial for your future development and happiness. Working for and with great colleagues and mentors can accelerate your career, just like a bad work environment and lack of role models can stagnate or derail it. Look for the people who are supportive of your success and treat you like a team member, not just a supporting cast member in their career successes. Then, make the ask – will you be my mentor?

REALIZE THE VALUE OF INTERNAL MARKETING.

I'll end with this often overlooked piece of advice for young attorneys; something that many hard working young lawyers do without specific intent. If you work in a big firm with client-origination requirements, the first steps toward success on that path can seem daunting. Remember it's a long game, and you have to start early establishing your network. For many, this means attending industry events, writing for industry publication, etc. The seeds you sow early on may take years to fully blossom, but one thing is certain - they will not bloom if there was no seed planted. In the meantime though, realize the benefit of marketing internally in your firm. I don't mean walking up and down the halls touting your greatness. What you want is for others to do it for you. The legal business is very often a referral business. Rarely do clients hire a lawyer or group they've never heard of before. So the trick is to make yourself “referable.”

TO THE YOUNGER ME

There will be many times you will be unsure of yourself and your abilities. You will find yourself in uncomfortable situations. You may think that the path to success is daunting, that your goals are too far away, or that there are simply too few hours in a day to reach them. Accept that this is just part of journey; and you will get past it. If you do nothing else, be reliable, be professional, have a great attitude, and produce stellar work product – people will want to work with you. Take advantage of those opportunities to work with new people, as they will expose you to new work, new clients, and new avenues for growth. If you keep doing great work, your reputation will grow and you will be referable to other partners and clients. This is not just a job; it is your career. No matter how badly you want to, you cannot sprint toward your goals. Rather, focus on building up many small successes over time; they will eventually turn into big and rewarding ones. Before you know it, you'll be out there spotting the younger lawyers who used to be you, looking uncomfortable, and making those same mistakes you made not so long ago. Then when you're ready, be a mentor to someone else. That is how we all ensure the future of this profession continues to grow and progress into something we can all be proud of.



The Introvert's Guide to Networking

Joe Castelli, White & Case LLP

For many lawyers, the word “networking” conjures up horrid, nightmarish visions: sweaty palms, stiff introductions, awkward lulls in conversation. Lawyers, while perhaps considering themselves wordsmiths, can especially feel the anxiety of networking, as the majority of us are introverts, unaccustomed – or unable – to fall amiably into cordial chitchat with strangers.

The bad news is that networking is essential to professional development. Networking expands your circle of contacts, enhances your reputation in your industry and presents you with potential clients and colleagues. The good news is networking is a skill that can be learned. Even for introverts.

Unfortunately, networking is not sitting at a table with people you already know. It isn't speaking only to the people you went to the conference with or RSVP'ing to an event that you have no intention of attending. It's hard work. Networking is an active effort to engage, to make connections where there would otherwise be none.

But if you made it through law school, you can network. Approach networking like any other skill to learn, just like learning to draft an indemnity clause or ensuring that your client's representations and warranties protect them. Networking isn't an inborn trait that some people are simply born with and some aren't. Yes, some people are better at it than others. But that doesn't mean you can't learn how to do it effectively. You don't have to be the master communicator of the entire legal profession, but you can achieve your networking goals. Anyone can become a skillful networker, introverted lawyers included.

First, find your purpose in networking. This purpose gives you something to work towards, and remembering its importance will help motivate you to get out there. Perhaps you're a solo practitioner looking for clients. Maybe you're a junior associate hoping to develop a name for yourself. Or maybe you're a senior associate, hoping to transition into partnership

and looking to develop client relationships. Whatever your goal, keep it in mind to stay motivated to push through the analysis paralysis of networking.

Next, make measurable goals for your networking experience. Management-speak is to make “SMART” goals: specific, measurable, achievable, relevant and time-bound. It's not necessary to go through all the factors of a SMART goal for networking, but it's helpful to focus on what you can quantify.

Measurable goals help you accomplish your networking purpose because “networking” can feel so ambiguous. It's some sort of touchy-feely thing with which lawyers (as unfeeling analytical machines) are uncomfortable. But break networking down into quantifiable goals, and it'll be much easier to achieve them.

The exact goals will vary depending on your circumstances. For example, a solo practitioner might make it a goal to attend four conferences a year or give two presentations a year to enhance their exposure. A junior associate might make it a goal to introduce themselves to five junior associates at other firms to provide a solid foundation for expanding their professional network as their career progresses. A senior associate might make it a goal to get lunch with five potential clients.

You might not have a big-picture goal for networking, especially early in your career. That's fine. No matter where you stand on your career path, you can set quantifiable goals, even if you're not sure where those steps will take you. Set a goal of having five conversations with strangers at a conference, handing out five business cards, or connecting with five people on LinkedIn after the conference. You don't know where it might lead.

For introverts, it's a valuable strategy to come to networking prepared with these goals. That way, you can approach networking as a job (and really, it is part of your job), and once you hit those goals, feel accomplished enough to relax. It can be helpful to break down interactions even further. For example, aim for five questions you can ask to make small talk. “What did you find most interesting about the panel?” or “How did you find yourself working in energy law?” are questions you can ask anyone, regardless of the specific situation.

One advantage that introverts have is that we can be great listeners. We might attribute that to being uncomfortable speaking about ourselves or not knowing what to say, but asking questions doesn't come off that way. People will be impressed that you're interested in them – and they'll remember it. Most people are just waiting for their turn to talk, instead of actively listening. Express interest and ask follow-

up questions to keep the conversation flowing and your counterpart speaking about themselves.

Finally, you'll likely feel drained after networking. Don't forget to recharge. As introverts, we need time to ourselves, and there's no reason to feel guilty for it. Retiring to your hotel room and watching junk television isn't the worst way to relax, and once you hit your networking goals, you'll have earned it..

How Justice Scalia's One-stroke Commonality Analysis Impacts Royalty Underpayment Class Litigation in Oklahoma State Courts*

Micah Adkison, Crowe & Dunlevy

*Adapted from a November 2018 presentation Mr. Adkison delivered to the Oklahoma City Mineral Lawyers' Society

The recently published case -- *Whisenant v. Strat Land Exploration Co.*, 429 P. 3d 703 (Okla. Civ. App. 2018) -- may signal that class actions related to the propriety of deductions from gas royalties are becoming increasingly difficult to sustain in Oklahoma state courts.

BACKGROUND

Prior to the statutory amendments of 2009, class certification orders from trial courts in Oklahoma were reviewed under the abuse of discretion standard of review. In other words, class certification orders were not disturbed on appeal unless they were based on erroneous conclusions of law, or there was no rational basis for the ruling. During this period, appellate courts took a *certify now, worry later* approach towards class certification. See *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337, 342 (Okla. 1998) ("The pragmatically correct action, in the face of a close question as to certification . . . [is] to sustain certification because if it develops later during the course of the trial that the order is ill-advised, the order is always (prior to judgment on the merits,) subject to modification.").

But in 2009, the Oklahoma legislature changed the standard of review for class certification orders to de novo. See 12 O.S. § 2023(C)(2). Now appellate courts are not required to give deference to a lower court's findings, conclusions, or holdings. Coupled with further developments in showing *commonality* among the class, this has had a significant effect on royalty class litigation.

In 2011, the United States Supreme Court, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), weighed in on what is required to establish *common questions of law or fact* amongst a class, a *sine qua non* to class certification under both state and federal law.

Wal-Mart was a case about employment discrimination

across many geographically distributed stores where it was alleged that Wal-Mart operated under a "general policy" of employment discrimination against women by giving local supervisors discretion over employment matters. *Wal-Mart*, 564 U.S. at 353. The plaintiff class relied on (1) statistical evidence of pay and promotion disparities between men and women at the company; (2) anecdotal reports of discrimination from female employees; and (3) testimony from an expert that indicated the company's culture made it vulnerable to gender discrimination. *Id.* at 356.

The Court stated it would "be impossible to say that an examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*" *Id.* at 352. The Court indicated that the analysis doesn't look merely to common questions, per se, as any clever lawyer could come up with questions everyone in the class might ask; rather, the analysis centers on whether such questions have "common *answers* apt to drive the resolution of the litigation." *Id.* at 350. This "means that determination of [the common contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims *in one stroke.*" *Id.* (Emphasis added).

The evidence showed that Wal-Mart's official corporate policy was to give local supervisors discretion over employment matters; not to require the local supervisors to discriminate against women. If, on the other hand, the plaintiffs had established that the widely-dispersed employment managers were acting in accordance with a common corporate policy of discrimination, or that a single supervisor was the source of the alleged discrimination, then perhaps a common answer would have existed and the class claims might have been susceptible to being resolved in one stroke—but this was not the case.

Oklahoma Courts have relied upon *Wal-Mart* when analyzing royalty-underpayment class certification orders.

DISCUSSION

Whisenant involved a class certified by the state district court pursuant to 12 O.S. § 2023(B)(3), involving around 88 wells in 4 Oklahoma counties alleging improper gas-royalty deductions. (For a similar published case involving certification under 12 O.S. § 2023(B)(1)-(2), see *Strack v. Continental Resources, Inc.*, 405 P.3d 131 (Okla. Civ. App. 2017).)

In certifying the class, the district court relied on another United States Supreme Court case -- *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016) -- for the proposition that "a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." The

district court concluded that “individual issues, at least any issues where individual royalty owners will need to testify to establish liability, are non-existent” and Strat Land’s liability (and damages) could be determined, class wide, on the basis of expert testimony and generalized evidence.

Tyson Foods was a Fair Labor Standards Act case wherein certain employees brought a class action against their employer for not paying statutorily mandated overtime pay for time spent donning and doffing protective equipment. The Supreme Court affirmed the permissibility of inferences gleaned from statistical sampling as to the amount of time each class member spent on these activities, holding the representative sample was “the only practicable means to collect and present [the] relevant data.” *Tyson Foods*, 135 S.Ct. at 1046.

The *Whisenant* court rejected the district court’s zero-sum notion that either the plaintiff’s expert was right or the defendant’s expert was right, class wide. Relying on the seminal case *Mittelstaedt v. Sante Fe Minerals, Inc.*, 954 P.2d 1203 (Okla. 1998), the appeals court noted at least two issues that require individualized evidence: (1) the point at which gas becomes a marketable product; and (2) whether the costs deducted from an individual’s royalty are within the class of costs permitted to be deducted under *Mittelstaedt*. *Whisenant*, 429 P.3d at 707-08.

In *Mittelstaedt*, the Oklahoma Supreme Court set forth the rule for when a post-production cost can be deducted from royalty without violating the implied covenant to market. The rule permits proportionate royalty deductions when the lessee can show that (1) the costs enhanced the value of an already marketable product; (2) the costs are reasonable; and (3) the actual royalty revenues increased in proportion with the costs assessed against the royalty interest. *Mittelstaedt*, 954 P.2d at 1205. The court did not (and has not) defined the meaning of “marketable product” and the *Whisenant* court concluded that *Mittelstaedt* left it to be determined on a “case-by-case basis.” *Whisenant*, 429 P.3d at 708.

The *Whisenant* court distinguished *Tyson Foods* by pointing out that a representative sampling of gas quality across the class, unlike the average of overtime worked, would be too unreliable to sustain a reasonable jury finding in an individual action. *Id.* at 711 (citing *Tyson Foods*, 136 S.Ct. at 1047).

The court instead analogized *Whisenant* to *Wal-Mart*, noting “the [Wal-Mart] employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers.” *Whisenant*, 429 P.3d at 711.

Relying on generalized proof—whether it be based on the conditions of the named plaintiff’s well or upon an average

sampling of gas quality, proximity to pipelines and processing plants, market realities, and so forth—could result in Strat Land paying amounts which were not owed, and not paying amounts which were owed. *Id.* The court stated, “[a] reliance upon facts derived from other wells would be as impermissible as it would have been to determine liability in Wal-Mart based upon generalized evidence derived from other store managers.” *Id.* at 712.

Thus, determinations of marketability of gas and propriety of cost deductions were not susceptible to generalized proof.

CONCLUSION

Mittelstaedt places certain burdens on lessees with respect to cost deductions and gas marketability, but plaintiffs bear the burden of establishing that a class is certifiable. *Whisenant* holds the factors bearing on the *Mittelstaedt* analysis are not susceptible to generalized proof, and differences in gas quality and lease language can be used to defeat class certification. The statutory change in the standard of review for class certification orders, and *Wal-Mart*, seem to mark a trend towards not certifying royalty-underpayment classes in Oklahoma state courts. Such classes certified prior to *Wal-Mart* were affirmed; those that followed were reversed. In light of the change in standard of review and the increased burden on plaintiffs to show that the answer to a common question will resolve a central issue in the case, royalty-underpayment classes are becoming increasingly difficult to sustain in Oklahoma state courts.

Majority Rule: Natural Gas Companies May Seek Immediate Access to Begin Construction

Amy Kerlin, Reed Smith LLP

Federal courts recognize that a natural gas company may seek injunctive relief for immediate access to and possession of private property located on an approved pipeline route condemned for pipeline construction. In 2018, the Sixth and Eleventh Circuits joined the Third, Fourth, Eighth, and Ninth Circuits in upholding grants under the federal Natural Gas Act (“NGA”) of immediate access to condemned properties to begin construction activities. In each case, the appellate courts held that the natural gas companies established their authority to condemn and demonstrated the requirements for a preliminary injunction.

The NGA authorizes natural gas companies to condemn private property that is necessary to “construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas” where the gas company holds a certificate of public convenience and necessity and has otherwise been unsuccessful at acquiring the property by contract. 15 U.S.C.

§ 717f(h). The majority of federal courts to consider the issue have expressly held that a natural gas company may seek a preliminary injunction for access to the property to begin construction activities where it can establish its authority to condemn under the NGA and the four prerequisites of a preliminary injunction.

Generally, in support of immediate access to easements condemned, a natural gas company must demonstrate: (1) a likelihood of success on the merits, which is typically already met if the gas company established its authority to condemn under the NGA; (2) a likelihood the gas company will suffer irreparable harm if immediate access is denied, such as due to a condensed construction schedule; (3) immediate access is not outweighed by any burden alleged by the landowners; and (4) immediate access to begin construction is in the public interest. See *MVP, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, No. 18-1159, 2019 WL 439002, at *3 (4th Cir. Feb. 5, 2019) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).

On December 6, 2018, the Eleventh Circuit decided to “join those circuits in holding that a district court may, in appropriate circumstances, issue a preliminary injunction granting a pipeline company immediate access to property that it has an established right to condemn under the Natural Gas Act.” *Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1152 (11th Cir. 2018). The Sixth Circuit followed suit the next day and affirmed the lower court’s grant of the gas company’s preliminary injunction to access the property and begin construction. *Nexus Gas Transmission, LLC v. City of Green, Ohio*, No 18-3325, 2018 WL 6437431, at *1 (6th Cir. Dec. 7, 2018).

With these recent opinions, the majority of federal appellate courts expressly recognize a district court’s authority to grant immediate access to easements condemned pursuant to the NGA where the statutory and injunctive requirements are met. See, e.g., *Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp., Lancaster Cty., Pennsylvania, Tax Parcel No. 1201606900000*, 907 F.3d 725, 729 (3d Cir. 2018); *MVP, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, No. 18-1159, 2019 WL 439002, at *6 (4th Cir. Feb. 5, 2019); *All. Pipeline L.P. v. 4.360 Acres of Land, More or Less, S/2 of Section 29, Twp. 163 N., Range 85 W., Renville Cty., N.D.*, 746 F.3d 362, 369 (8th Cir. 2014); *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop.*, 550 F.3d 770, 776-78 (9th Cir. 2008).

The Road Less Traveled: Using Nontraditional Experts in Complex Hydraulic Fracturing Cases

Jonathan Havens, Baker Botts, L.L.P.

INTRODUCTION

Over the last decade, energy companies have combined old and new technologies and techniques to fuel a revolutionary increase in oil and gas production from tight shale formations. But energy companies have not stopped with innovations such as horizontal drilling and hydraulic fracturing. Instead, energy companies have continued to develop additional cutting-edge technologies and techniques to produce oil and gas from tight shale formations even more efficiently. Naturally, litigation has arisen from the horizontal drilling and hydraulic fracturing. Just as the use of these technologies has increased the complexity in the production of oil and gas, so too has the complexity of litigating related cases also increased. Because of the increased complexity of this litigation, choosing the right expert witness is even more important.

Expert witnesses may be required to testify regarding common issues appearing in lawsuits, including the standard of care, causation, or damages. How an expert addresses these broad issues will change depending on the specific factual circumstances in a given case. Such facts are ever-evolving as companies use new technologies and techniques for more efficient production. Even if an expert has been qualified to testify regarding the standard of care in one case, the expert may not be qualified in another case with different factual circumstances.

The opportunities and challenges related to this complex and changing environment require a party to closely match a potential expert witness’s expertise to the actual facts and issues in the party’s case. I recently tried a case where we took the road less traveled. We used an expert witness with nontraditional educational credentials and no experience testifying, but one who possessed deep technical experience related to the key issues and facts. The nontraditional expert connected with the jury credibly and distilled the complexity into simple concepts the jury could understand, which helped the jury return a verdict in my client’s favor.

ROLE OF AN EXPERT IN AN OIL AND GAS CASE

Generally, expert testimony is required when an issue is beyond the experience of a lay person and an expert’s expertise will help the trier of fact understand the evidence or determine a fact in issue. In a case involving hydraulic fracturing, an expert may be required to define the relevant standard of care, identify whether there was a breach of that

standard of care, determine whether any breach caused the alleged damage, and determine whether the plaintiff was damaged. See *Eagle Oil & Gas Co. v. Travelers Prop. Cas. Co. of Am.*, No. 7:12-CV-00133-O, 2014 WL 3744976, at *4 (N.D. Tex. July 30, 2014) (permitting expert witness testimony regarding an insurance policy’s “due care and diligence clause,” causation, and damage in a dispute regarding insurance coverage for a horizontal well that had “a 7–inch piece of casing rupture[] downhole causing the top casing joints and wellhead to be ejected into the air, and allowing a flow of gas and well fluids to the surface that could not be controlled.”)

Expert testimony regarding the standard of care for oil and gas operations generally, and horizontal drilling and hydraulic fracturing operations specifically, will likely be required in negligence cases. The standard of care is the reasonable conduct of a person or company in a given situation. Many oil and gas contracts incorporate a standard of care, such as the reasonably prudent operator standard or an exculpatory clause found in a Joint Operating Agreement. Expert testimony may be needed to establish what is reasonable conduct for the applicable oil and gas operations at issue and whether there was a breach of the standard.

Causation is also an important issue that often requires expert testimony. Identifying a breach of a standard of conduct is merely the beginning. Expert witnesses may be needed to show how the breach caused damage, especially when dealing with downhole issues or situations where the damaged property is no longer available. With the complexity inherent in horizontal drilling and hydraulic fracturing, an expert witness may need to address multiple potential causes for damage.

A party may also need an expert witness to assist in proving damage. An expert witness might be required to show damage to real property—i.e. the reservoir is less valuable than it was before—or that certain personal property—such as coiled tubing or frac iron used in oil and gas operations—was damaged. The availability of the property for inspection and testing may dictate what type of expert is necessary, but in either situation, the inquiry will likely be complex.

In my recent trial, frac equipment catastrophically separated during hydraulic fracturing operations. We needed expert testimony on the standard of care and damages and sought out experts to help explain these issues to the jury.

IDENTIFYING A QUALIFIED EXPERT WITNESS

Once you have determined which issues require expert testimony, the next step is to identify qualified experts. An expert witness may be qualified by virtue of his or her knowledge, skill, education, experience, or training in the

particular area at issue. While a petroleum engineer may have education and experience in oil and gas operations, he or she may not be able to qualify as an expert if the education or experience is not sufficiently related to the particular issue requiring expert testimony. See *Pioneer Nat. Res. USA, Inc. v. W.L. Ranch, Inc.*, 127 S.W.3d 900, 907 (Tex. App.—Corpus Christi 2004, pet. denied) (holding that an expert was not qualified because he did not have experience in “drilling horizontal wells which are more complex than vertical wells” and therefore he could “not establish an applicable standard of care” in a hydraulic fracturing case).

Because many oil and gas companies are working on the cutting-edge of technology, it may not be practicable to find an expert witness with both (1) the requisite technical expertise to qualify as an expert and (2) prior experience as an expert witness in litigation. When faced with this increasingly common problem, a party has a difficult decision to make. A party may opt for an expert who is experienced in testifying and has stellar educational credentials with the hope that he or she will be able to reliably formulate opinions based on new and cutting-edge technology. On the other hand, a party may opt for an expert with deep technical experience in new and cutting-edge technology even if that expert does not have the standard educational credentials and has little to no experience testifying. Although it can be a challenge to get an expert up to speed on the somewhat arcane legal rules related to expert witnesses, the opportunity to credibly communicate the issues to the jury may be worth the trouble.

When looking for expert witnesses that have the deep technical experience, it may make sense to consider an employee of the party as an expert. After all, the employees are on the frontline of developing and applying the new technology and may know more about it than anyone else in the world. Another potential source of expert witnesses is the vendor supplying or supporting the new technology. While these experts have deep technical experience on a particular subject matter, you will need to invest time in educating them regarding the rules applicable to expert witnesses and in preparing them to testify.

In the frac equipment case, we had a nontraditional expert witness who was the only witness in the case with experience with the same type of failure. His experience was based on decades of inspecting failed frac equipment in similar situations as part of his daily job, not as an expert witness for litigation. Based on that experience, he was able to credibly communicate the failure mode while also ruling out alternative causes based on a close analysis of the facts.

DEVELOPING FACTUAL SUPPORT FOR EXPERT’S OPINIONS

Whether a party chooses a witness with a great education and experience testifying or a witness with deep technical experience, the expert's opinions will only be as good as the facts he or she can rely on. *Discovery Operating, Inc. v. BP Am. Prod. Co.*, 311 S.W.3d 140, 169 (Tex. App.—Eastland 2010, pet. denied) (holding that a petroleum engineer's testimony was unreliable and inadmissible because it was "not supported by facts in evidence"). An expert with a deep technical experience related to the subject matter will be able to identify the specific facts necessary to formulate his or her opinion and help your case. In contrast, an expert with general knowledge may not be able to provide this necessary guidance.

A complex wellsite often has multiple companies and technologies all working together to produce oil and gas. On one hand, the amount of information and data from the sensors available on a given wellsite may be overwhelming; at the same time, there may be vast gaps in information due to the nature of the oil and gas production process. These realities increase the importance of selecting an expert who has deep technical experience with the latest technology because that expert will be able to identify the key facts and make reasonable assumptions. See *XTO Energy Inc. v. Goodwin*, No. 12-16-00068-CV, 2017 WL 4675136, at *7 (Tex. App.—Tyler Oct. 18, 2017, pet. denied) (holding that an expert's testimony was unreliable because the expert unreasonably assumed that the well valuations in defendant's SEC filings were reliable). Importantly, an expert with deep technical experience will also be better able to identify irrelevant facts and unreasonable assumptions in the opposing expert's opinion. Ultimately, an expert's deep technical experience will allow him or her to communicate to a fact-finder in a more persuasive and credible way.

Our nontraditional expert was able to rely on (1) experience with similar frac equipment failures, (2) testimony of third-party fact witnesses, and (3) photographs of the damaged equipment to relay important and specific information to the jury. His analysis closely fit the facts of the case. The opposing party's traditional expert opinions were less persuasive because they were more general and failed to adequately rely on the undisputed facts.

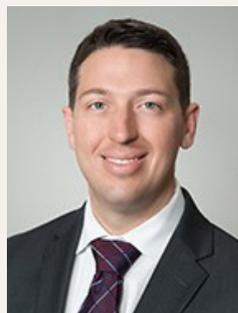
CONCLUSION

A company faced with litigation related to horizontal drilling, hydraulic fracturing, and associated technologies must be able to communicate credibly to a fact-finder regarding technical issues related to the standard of care, causation, and damages. In certain cases, an expert with deep technical experience and little to no testifying experience may be preferable over a more traditional expert with excellent educational credentials and experience testifying.

Depending on the issues in the case, the increasing complexity and cutting-edge nature of technologies and techniques may require a less traditional choice for an expert witness. But that choice can make all the difference.

Leadership Class Highlights – Part 1

In July 2018, 35 unique and motivated individuals working in the energy industry were selected by a committee to be part of IEL's Inaugural Leadership Class. Below is Part 1 of a two-part series of short highlights on the members of IEL's first Leadership Class. We hope if you meet any of these amazing individuals that you will strike up a conversation about legal movies, ice cream, or even IEL. If you or someone you know is interested in being part of IEL's next Leadership Class, applications will be available on IEL's website in mid-April.



Erich Almonte, King & Spalding LLP, Houston, TX

In what states are you licensed to practice law? Texas; Washington, DC; Florida

What is your favorite legal movie or TV show? A Man for All Seasons, followed closely by My Cousin Vinny

What do you like most about being part of the IEL YEP group? Getting the chance to interact with the other participants. Each brings a unique background and interesting perspective to the program, and they're all great people.

Do you prefer ice cream in a bowl or in a cone? Bowl

Little known fact: I served nine years as an infantry officer in the U.S. Army before practicing law.

Brian Anderson, Chevron North America Exploration & Production Co., Coraopolis, PA

In what states are you licensed to practice law? Licensed in Pennsylvania and West Virginia

What is your favorite legal movie or TV show? 12 Angry Men

What do you like most about being part of the IEL YEP group? Learning from a diverse group of young attorneys from all walks of life about the many legal issues facing the energy industry

Do you prefer ice cream in a bowl or in a cone? Cone

Little known fact: I successfully argued a pro bono veterans' benefits appeal before the U.S. Court of Appeals



for the Federal Circuit

Nadège Assalé, Bradley Murchison Kelly & Shea LLC, New Orleans, Louisiana



In what states are you licensed to practice law?

Louisiana and Texas

What is your favorite legal movie or TV show?

Antiques Roadshow

What do you like most about being part of the IEL YEP group? I am meeting

and forming relationships with a great and inspiring group of people; the program so far has provided us with clear examples of leaders that other emerging leaders can follow; I feel more committed to the IEL in general

Do you prefer ice cream in a bowl or in a cone? Either so long as it is waffle!

Little known fact: I cannot ride a bicycle.

Lisa Butler, Squire Patton Boggs (US) LLP, Houston, Texas

In what states are you licensed to practice law? Texas and New York – as well as my home, Western Australia

What is your favorite legal movie or TV show? So many, I can't choose. A Few Good Men, My Cousin Vinny, A Time to Kill, Damages - and so many more!



What do you like most about being part of the IEL YEP group? The camaraderie among the group. It has been a wonderful opportunity to meet peers, not only in Houston but from across the country.

Do you prefer ice cream in a bowl or in a cone? Definitely a bowl!

Little known fact: I had an adventurous childhood, full of travel. We spent a few years living on a farm in Australia – so I can feed cows, round-up sheep and pick grapes (if I have to!). At 8 years old, I travelled over 11,000 miles unaccompanied, from Perth, Western Australia to Phoenix, Arizona (with layovers in Singapore and LAX). I attended 7 schools before university. This has sparked a lifelong love of travel, learning, and meeting new people – and definitely made me adaptable to change.

Eric Camp, Decker Jones, P.C., Fort Worth, Texas



In what states are you licensed to practice law?

I'm licensed to practice law in Texas and North Dakota.

What is your favorite legal movie or TV show? My favorite legal movie is "A Time to Kill".

What do you like most about being part of the IEL YEP group? My favorite thing about being part of the IEL YEP group is getting to know and work with like-minded young energy lawyers interested in giving back and contributing to our profession. I get to surround myself with the leading energy lawyers of tomorrow and that is a lot of fun.

Do you prefer ice cream in a bowl or in a cone? I prefer ice cream in a bowl – preferably a very big bowl.

Little known fact: I was in the bottom quarter of my law school class after my 1L year. I didn't have to study much in college to do well and didn't think I would have to do so in law school either. I was wrong. My grades dramatically improved my 2L and 3L years but the bad 1L grades meant that I had to hustle to find my first job after law school and build my practice and reputation early in my career to advance. Ultimately, I am convinced that having to dig myself out of that hole made me a better lawyer and forced me to take personal ownership of my career early. And thankfully nobody ever asks or cares about my 1L grades anymore.

Aaron Friess, MidAmerican Energy Company, Des Moines, Iowa



In what states are you licensed to practice law? New Mexico and North Dakota. I am also registered as in-house counsel in Iowa.

What is your favorite legal movie or TV show? Liar, Liar.

What do you like most about being part of the IEL YEP group? Having such a wide network of talented colleagues at similar points in their careers.

Do you prefer ice cream in a bowl or in a cone? Cone.

Little known fact: I worked in a dogfood factory during a college summer break.

Amanda Hanks, Plains All American Pipeline, L.P., Houston, Texas



In what states are you licensed to practice law? Texas

What is your favorite legal movie or TV show? Boston Legal

What do you like most about being part of the IEL YEP group? Building a network of amazingly talented and incredibly interesting fellow energy attorneys

Do you prefer ice cream in a bowl or in a cone? Bowl

Little known fact: Ever since law school, I keep my Texas Law Review Manual on Usage and Style (MoUS) book in my desk drawer at the office and cannot help myself in editing.

Jackie Hickman, Liskow & Lewis, New Orleans, Louisiana

In what states are you licensed to practice law? Louisiana

What is your favorite legal movie or TV show? The Good Wife.

What do you like most about being part of the IEL YEP group? Meeting other young energy professionals at the YEP Conference.



Do you prefer ice cream in a bowl or in a cone? Neither – I prefer it straight from the carton with a spoon.

Little known fact: I just rode in my first Mardi Gras parade this year

Jeffrey Johnson, BHP Billiton Petroleum, Houston, Texas



In what states are you licensed to practice law? Texas and Arkansas

What is your favorite legal movie or TV show? A Few Good Men

What do you like most about being part of the IEL YEP group? Opportunities to hear career advice and perspectives from energy law leaders.

Do you prefer ice cream in a bowl or in a cone? Bowl – if I get it in a cone, I will end up wearing it!

Little known fact: I have discussed sports with a former President of the United States.

Jennifer Johnson, Noble Energy Inc., Houston, Texas

In what states are you licensed to practice law? Texas

What is your favorite legal movie or TV show?

To Kill a Mockingbird (really the book but will put it for the movie)



What do you like most about being part of the IEL YEP group? Meeting new people who work in different areas of energy law across the country/globe

Do you prefer ice cream in a bowl or in a cone? Bowl

Little known fact: Prior to law school, I worked as a nurse at MD Anderson Cancer Center with adult leukemia patients. The experience working with cancer patients helped shape many of my core values.

Benedict Kirchner, Steptoe & Johnson PLLC, Meadville, Pennsylvania



In what states are you licensed to practice law? I'm licensed in NY, PA, and DC

What is your favorite legal movie or TV show? The original Law and Order – it's the only way I passed the NY bar exam

What do you like most about being part of the IEL YEP group? The feeling of inclusiveness and belonging. It is such a great group of people that couldn't be friendlier. More than anything it just feels like home.

Do you prefer ice cream in a bowl or in a cone? In a cone, no mixing of flavors (that's a bad Penn State Creamery joke)

Little known fact: I wore a kilt to my high school senior prom.

Brad Knapp, Locke Lord LLP, New Orleans, Louisiana

In what states are you licensed to practice law? Texas and Louisiana

What is your favorite legal movie or TV show? I am insufferable watching legal TV shows. My wife turns them off because I start imposing reality on the script. That said, I'm a big fan of *My Cousin Vinny*.



What do you like most about being part of the IEL YEP group? I have greatly enjoyed meeting colleagues from around the world. The leadership summit and other programming has been truly educational.

Do you prefer ice cream in a bowl or in a cone? While I prefer a cone, in practice I have to defend my ice cream from little kid invasions. I find a bowl helps fend off those attacks.

Little known fact: I spend a bit of my limited free time endeavoring to write fiction, a hobby that has garnered many fine rejection emails from prestigious literary journals.



Lucas Liben, Reed Smith LLP, Pittsburgh, Pennsylvania

In what states are you licensed to practice law? Pennsylvania and West Virginia

What is your favorite legal movie or TV show? My Cousin Vinny (is there any other acceptable answer to this question??)

What do you like most about being part of the IEL YEP group? Making connections with other lawyers outside of either my region or immediate practice area, and seeing the broad array of practice areas that are related to the energy field.

Do you prefer ice cream in a bowl or in a cone? Sugar cone (again...is there another acceptable answer??)

Little known fact: I am a huge Yankees fan, and I try to get down south for Spring Training games as many years as possible

Jesse Lotay, Jackson Walker LLP, San Antonio, Texas

In what states are you licensed to practice law? Texas, Missouri, and Kansas

What is your favorite legal movie or TV show? Suits

What do you like most about being part of the IEL YEP group? Interacting with similarly situated peers in the energy industry and learning about the challenges, issues, and trends they're seeing.

Do you prefer ice cream in a bowl or in a cone? Häagen-Dazs strawberry ice cream in a cone with sprinkles.

Little known fact: I taught country western dance in



undergrad and can beat anyone in Texas Two-Step!

Jillian Marullo, Liskow & Lewis, Houston, Texas



In what states are you licensed to practice law? Texas

What is your favorite legal movie or TV show? Not sure if this counts, but the courtroom scene in Ghostbusters 2 (I don't watch any legal TV shows); second choice would be My Cousin Vinny

What do you like most about being part of the IEL YEP group? Connecting with colleagues in the energy business and learning about their varying legal practices

Do you prefer ice cream in a bowl or in a cone? Bowl

Little known fact: I was a carhop at Sonic in high school but only wore roller skates once due to an unfortunate, messy, and highly embarrassing incident involving a root beer float.

Luís Miranda, Miranda Law Firm, Houston, Texas

In what states are you licensed to practice law? I am not licensed to practice law in the US.

What is your favorite legal movie or TV show? Suits.

What do you like most about being part of the IEL YEP group? Having the opportunity to meet interesting people from different backgrounds.

Do you prefer ice cream in a bowl or in a cone? In a bowl.

Little known fact: I already lived on four different continents



Nick Morrell, Katten Muchin Rosenman LLP, Houston, Texas



In what states are you licensed to practice law? Texas

What is your favorite legal movie or TV show? Boston Legal

What do you like most about being part of the IEL YEP

group? Talking to the cool folks of IEL YEP, of course!

Do you prefer ice cream in a bowl or in a cone? Cone

Little known fact: I have a degree in Egyptology, so I can read and write in hieroglyphics and give a mean museum tour.

**Christopher L. Morrow, The Williams Companies, Inc.,
Tulsa, Oklahoma**

In what states are you licensed to practice law?

Oklahoma

What is your favorite legal movie or TV show?

How to Get Away With Murder.



What do you like most about being part of the IEL YEP group?

The best part of being part of the IEL YEP group for me is having the opportunity to develop meaningful relationships with a diverse group of motivated and inspired young professionals, who will undoubtedly achieve great things throughout their careers.

Do you prefer ice cream in a bowl or in a cone? Cone!

Little known fact: I am a complete nerd who still loves to write computer programs and utilize scripting to make myself more efficient (I may be in denial by acting like people don't know this).



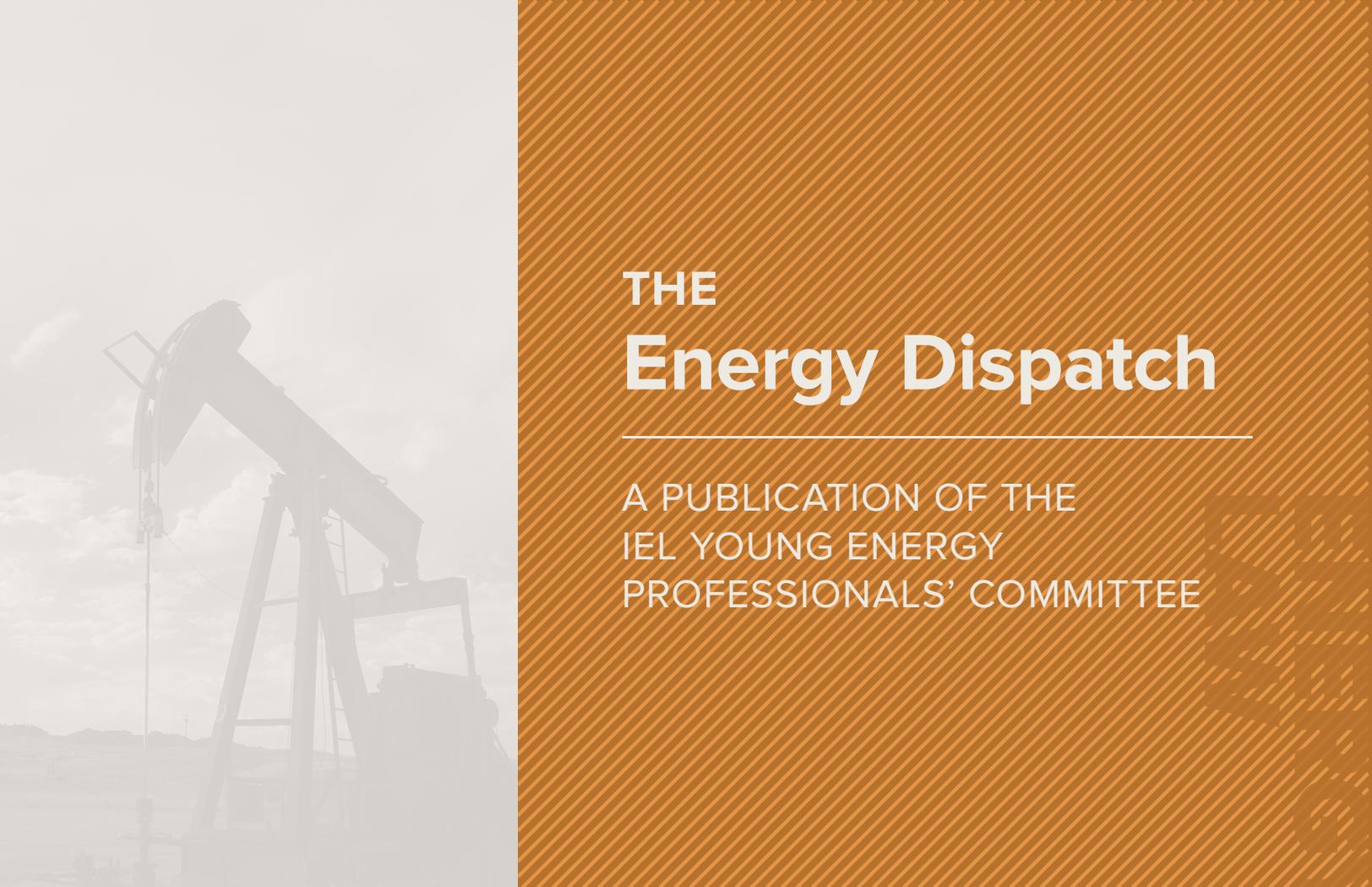
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