

CIVIL LITIGATION AND THE GEOTHERMAL INDUSTRY

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ABSTRACT

This paper offers some reflections on the interactions between the legal profession and the realm of the geothermal scientist and engineer. The author, now a litigation attorney, became an attorney after about fifteen years as an engineer and physicist. Over the past several years the author was involved in litigation related to geothermal contracts.

THE CIVIL LITIGATION PROCESS

Our system of justice, deriving from the English legal system, has always made provision for civil enterprise to approach a court with a request for a determination of the rights of the parties regarding a disagreement. The parties can then obtain from the court a judgment, ultimately enforceable by the force of a police agency involved, determining the rights of the parties before the court. This the civil justice system runs in parallel with, and competes for resources with, the criminal justice system—a system in which the "state" prosecutes actions on behalf of the citizens of the state.

There is a civil justice system at both the federal and state court levels. However, for the purposes of this brief discussion, both federal and state courts will be considered the same, unless otherwise indicated.

It should be noted that the right of a jury trial in a civil case is somewhat a matter of grace, although the practical effect is that if one of the parties to a case makes the request, a jury trial will be granted.

Further, it should be noted that there are a number of alternative methods of dispute resolution (non court methods such as arbitration in its various forms, rental of commercial judges, etc.). Many of these alternatives to the conventional civil justice system are encouraged, if not actively supported, by an overloaded civil justice system.

Those who follow the news have probably heard of the impact on the civil justice system caused by the "flood" of criminal cases (primarily drug related cases) that have saturated the court systems at all levels. To those in the legal profession, however, a disturbing, and to some extent related problem, has been the failure of the court systems to follow general legal salary trends. Failure of judicial salaries to keep pace with the legal community salaries, coupled with some of the increased workload requirements has created what some think is a situation that is pointing toward a terrible future problem for the civil justice system in this country. In addition to the disincentive to become a judge initially, the low salaries, combined with a demand for private judging created by court overloading, has created a situation that has resulted in a recent exodus of many of what have been considered the better civil justice minds from the state trial bench. The impact of these trends will be discussed later.

A LEGAL PERSPECTIVE OF THE GEOTHERMAL COMMUNITY

From a legal viewpoint the geothermal community (an admittedly imprecise term) has some distinctly unique

aspects. In the general legal framework, the basis of laws relating to geothermal energy and exploration comes from the field of oil and gas law. Interactions with regulatory bodies (i.e. California Energy Commission, CPUC, FERC, etc.) are similar to other power supply entities. However, as a practical matter the legal problems of the geothermal community are somewhat unique. First, the geothermal operation itself is almost anti-competitive by its nature. The fuel supply can't be transported over significant distances. Therefore, supplier and user are either the same or are locked into a longterm relationship from which there is no recourse but to deal with the other party. Some of the normal leverage in negotiations (i.e. I'll go somewhere else for my business) is not a part of the geothermal scene.

Second, the industry is, to a great extent, in its infancy and the supplier and user to some extent must "share the risk" regarding significant capital investments in some situations. This results in a situation (when two or more parties are involved) where contract development and ongoing contract monitoring and renegotiation are of greater importance than in other areas. There is generally no ability for one party to mitigate the damages caused by a breach of contract by the other party.

Third, the size of the geothermal community is small and there are very few "experts" outside the staff of the companies participating in the community or who do not have some significant allegiances to the major companies participating in the community. From a litigation point of view this sometimes makes it hard to get an "unbiased" opinion. Here "unbiased" refers to the appearance of bias rather than to actual bias.

Finally, the geothermal community enjoys a unique position in the energy domain. Like solar, wind, and other alternative energy sources, it enjoys a "favored" status in government and regulatory circles. Associated with this is a visionary aura that attaches to the geothermal community.

WHEN WORLDS COLLIDE, LEGAL VIEWPOINT vs. SCIENTIFIC VIEWPOINT

When litigation touches any scientific community (the geothermal community not being unique in this aspect) the philosophical difference between the world of the attorney and that of the scientist regarding the meaning of truth becomes apparent. The difference in the perception and practical significance of the difference is something that the scientist, engineer, and business manager of a scientific company should be aware of and consider carefully.

Scientists are trained to seek the truth through experimentation and the rigorous testing of a hypothesis. To an attorney, truth is what a court will allow into evidence and therefore what the attorney can convince a jury or judge to believe. The attorney's view is not necessarily as cynical as it sounds. There is an inherent belief underlying our judicial system that the adversarial system is best suited for determination of the "truth" and therefore the outcome of a question brought to a court.

As a result of the structure of our legal system and the exclusive use of the adversarial system, there is serious doubt as to whether the legal system can function adequately in the context of complex litigation with complex technical issues.

Whenever the technical person or manager has to give thought to the issue of litigation, either to address a wrong (e.g. the delivery of purchased equipment not meeting specification, the failure of a contractor to perform, etc.), or as an alternative in negotiation, the fundamental difficulty of the legal system in dealing with such issues should be considered -- long before litigation is entered into.

THE IMPACT OF LITIGATION

Litigation, as viewed by the attorneys involved, is a war. The other participants are, by and large, the casualties whether or not their "side" ultimately prevails or loses. Because 95% of civil cases never reach the trial stage, prevailing in the sense of winning is generally a self-imposed criteria.

There are, fortunately, some fundamental understandings and preemptive policies that the scientific manager and individual engineer or scientist can do to minimize the impact of involvement in litigation. Unfortunately, these are lessons and policies that must be invoked prior to the onset of litigation in order to be of benefit. A few items will certainly be available from corporate or retained counsel, although sometimes the scientific side must ask.

Contrary to the impressions left by popular examples of courtroom drama, litigation is not done on the fly, or "trial by ambush." It is now a well established concept in civil proceedings that what will go on at trial should be known to the participants long before the trial.

This is called civil discovery and is strictly enforced by courts. As a practical matter, if a company is involved in litigation, it can be forced to "open" its files (from larger files to the contents of an individual's desk or computer) to other parties in a case. The opening may be ordered without regard to prior confidentiality agreements by which the holder has acquired the information. The cost of this opening can be enormous in the loss of manpower as well as the actual cost. In the legal community there are large companies with hundreds of employees totally devoted to the copying, microfilming, categorizing, and indexing of documents produced in discovery.

In addition, prior to trial, the taking of testimony from various individuals will be done under court mandate. Employees, former employees, etc. may be subpoenaed and spend significant periods of time testifying, or preparing to testify, before a case can go to trial.

Although these are necessary "evils" of a litigation system, the cost can be minimized and the potential harm minimized as well by the adoption of policy guidelines, and use of the guidelines regarding document retention, storage, and marking. At both a corporate and individual level adequate policies can minimize the impact of litigation.

Further, an understanding, and appropriate use of the attorney-client privilege can protect the confidentiality of information that might be damaging to the corporation if it were not adequately protected. Once again, consideration of these items with corporate counsel should come at the initiative of the scientific community.

Finally, the use by scientific manager of contracted for methods of alternative dispute resolution (e.g. binding arbitration clauses in contracts) should always be a consideration to minimize the impact of litigation on the company.

MODIFYING THE LEGAL COMMUNITY

Groups such as the geothermal community are in a unique position to lobby to modify the manner in which civil litigation is done in complex cases. The recognition of the need for such changes should come from outside the legal community as well as inside. Recent changes in the patent appeal process are examples that indicate that changes can be made, albeit slowly, but there are numerous reminders of the problems still inherent in the patent system.

Anything that can be done to strengthen the legislative process and decrease the apparent current willingness of the legislative bodies to default to the courts for decision making would be ultimately helpful. This, however, merely avoids the problem of the lack of suitability of the legal process for technical decision making.

In summary, there are no apparent solutions to these problems, but the active interest of the scientific community, and various subgroups such as the geothermal community are essential if fundamental changes are to be made.