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A Transcript of the March 10, 2001 Luncheon Speech

Patrick E. Higginbotham

A SYMPOSIUM: Ethical Issues in Settlement Negotiations

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presented by Patrick E. Higginbotham

PROFESSOR LONGAN: Judge Higginbotham comes to us from Dallas. He has had a very distinguished career. He was a United States District Judge in Dallas for seven years and then was appointed to the United States Court of Appeals for the Fifth Circuit. In addition to his judicial duties, he has served in a number of capacities throughout his career. Most recently he served a four-year term as president of the American Inns of Court Foundation. He has served as the Chairman of the Advisory Committee on Civil Rules. He has done a number of very extraordinary things.

Judge Higginbotham has also done things that in some ways are more ordinary. We have lots of ways as lawyers to learn how to be lawyers, to learn how to be professionals. We learn, in part, by extraordinary efforts of people like Judge Higginbotham, but we also learn every day in quieter ways. In our law offices there are senior lawyers training

younger lawyers. They don't get a lot of credit, they don't get a lot of publicity, but that's where professionalism for the most part is really taught.

Judge Higginbotham did that, too. I'm not sure he knew this until we discussed his talk here today, but in his capacity before he began all these extraordinary things, as a practicing lawyer, he was the lawyer who trained the lawyer who trained me. And, so, Judge Higginbotham, for the extraordinary things that you did, we salute you. For the ordinary things you did as a practicing lawyer that indirectly came to my benefit, I thank you. And on behalf of the Walter F. George School of Law of Mercer University, welcome.

JUDGE HIGGINBOTHAM: I appreciate the opportunity to be with you. I'm glad to escape the Texas rain—it hasn't quit in six weeks. And it's good to be back in this part of the country. Indeed, I am bilingual, growing up in rural Alabama. So I really appreciate being here.

Elizabeth O'Neal, my wife, is an Atlanta girl. For her it's kind of a homecoming. She's got family in Atlanta, and her dad's family is from here in Macon. In fact, to show the serendipity play of events in this world, this house belonged to one of her relatives. Ben O'Neal bought this house in 1907 and renamed it Overlook. We didn't know we were to have lunch here. It was a pleasant surprise and we certainly have enjoyed it.

I'm glad to see a lot of my old friends and colleagues. Chief Anderson, I was teasing him earlier about the first time I ever heard the name Sidney Lanier Anderson. It was at a judicial conference in Atlanta and the judges were talking about the appointments that President Carter was making, and someone said that one of the Circuit seats was going to Sidney Lanier Anderson. I said, "I don't know who he is, but he's damn sure a Southerner." Then when I met him, after he said three words, which took four minutes, I said, "He's going to be all right."

I am also very pleased to be at Mercer. General Bell, Judge Bell to me, was on the Fifth Circuit Court of Appeals when I was a District Judge. The traces of his management style are still there. Our summary calendar itself was a creation of General Bell. He is a remarkable individual. When I think about language, and a Southern drawl, Judge Bell's explanation of merit selection comes to mind.

During the early part of the Carter Administration, if you remember those years, President Carter decided on a merit selection, which meant that politics were going to change. And, so he created these committees around the country. My impression was that Judge Bell was not too keen about that idea of changing the way he understood the way the world worked. He was then, of course, Attorney General. But he

negotiated the right to select the chairs of the committee. In any event, as he came out of a meeting the press descended upon him. And they said, "General Bell, General Bell, we understand that you are opposed to merit selection." And he said, "I'm not opposed to merit selection. I'm a product myself of merit selection." Then he said, "Now, it's true that at the time I was appointed to the Court of Appeals of the Fifth Circuit that I had been the campaign manager of both United States Senators from Georgia, that I had been the campaign manager of the Governor, and I also managed President Kennedy's campaign in Georgia. So when a vacancy came open on the Court of Appeals of the Fifth Circuit, they saw that my nomination had merit." That ended the questioning.

It has been a pleasure to serve with Larry Fox and others on the Ethics 2000 Commission for the last three years. I try to make every meeting because I keep thinking that Larry might want to say something.

It's a wonderful commission. It's well-balanced. It has a diverse background in membership. I am not nearly so well schooled in the law governing lawyers as Larry and other members of the commission. I am now nearly 26 years out of private practice so I don't have occasion to deal with the day-to-day struggles of the practicing lawyers. But it's been an enriching experience for me to listen to the discussions and offer some counsel from time to time.

You know, I grew up in rural Alabama, and like I said, my brother still practices in a small town there in the same law office, the same place, for the past 40 years. His wife runs the office, and he calls it the Mom and Pop Legal Shop. I know from him, and from my own Alabama background, that in Alabama and Georgia and maybe a little into Mississippi, too, I think the northern part, perhaps, they still practice law by parable, and it's a powerful way of communicating, indeed.

I want to share a story with you. The story is to make a point. Then I want to talk to you about what I think are extraordinary changes going on that we lawyers are involved in.

The story is a personal one. When I was a kid about 15 years old or so, I was hitchhiking to Texas. I was a tennis player and that's how I traveled. I carried my tennis rackets with me. I was trying to visit my mother who was then in Texas. So I set to hitch hike to Texas. On Christmas Eve I caught a ride to this small town just across the Mississippi. This is before the interstate highway system. And there in this little town I was stuck. The hour was coming up to midnight, and I was standing on this corner right down town in this little town. I had positioned myself where traffic had to make a turn and stop. I was under a red light so I didn't appear to be too dangerous. And the traffic would slow.

But there weren't a lot of people traveling at that late hour on Christmas Eve, and I was feeling sorry for myself. Then a car came around, and I looked at it, and it was moving very slowly. As he started pulling over, I had to jump back a little to avoid being hit.

I was suspicious this fellow might have had something to drink, and so I walked over on the driver's side, and I said, "Yes, sir." And he said, (guttural noises). And I said, "Yes, sir, I'm looking for a ride." (Guttural noises). "Well," I said, "do you want me to drive," and he said something (guttural noises). So I got in and I looked and the engine was running and the tank was full. So, he slid over and I got under the wheel. He soon fell asleep and didn't respond to my chatter as I went on down the road.

And then, as the sun came up, I came into Shreveport. And there was a little place there, a little drive-in where you could, it was the last place where the traffic turned and committed to head out of Shreveport and had not yet picked up speed. The car needed gas and I shook him awake. And he came awake and he said, "Where am I?" I said, "Shreveport." He said, "Shreveport? What am I doing in Shreveport?" I said, "Well, we really need to get some gas. You stopped and you gave me a ride."

And he said, "Shreveport?" And I said, "Yes, that's not where you wanted to go?" He said, "Hell, I was just going down to the store to pick up a loaf of bread." The last time I saw the man he sort of turned and headed back, and I was looking at him thinking to myself, now, what is he going to tell his wife when he gets back home.

Now, the lesson in that story is that when you decide to let someone else take control, be sure you're going to the same destination. And there's wisdom in that for the practicing laywer and his clients.

There's been a push recently to create a multi-disciplinary practice—Larry and I are not too keen about that, but some others were—where lawyers would partner up with accountants. We had concern over that prospect. In looking at the question and in reading about it, it became clear to me that its impetus was not a domestic phenomenon, that it's a part of change that is occurring elsewhere. And one of the things that I wanted to talk a little bit about is how that change really does have impact upon each of us.

First, putting change in context, the profession is changing rapidly in profound ways. Let me just give you a few pieces of specific data about the profession. Between 1975 and 1995 the number of lawyers in Chicago exactly doubled. In 1995 minorities were three times more likely than whites to be prosecutors, more than twice as likely to practice criminal defense, twice as likely to do family law, but less than half as

likely to do personal injury or work for insurance companies. What we're seeing here is a separation of the Bar.

In terms of family background, lawyers whose fathers had occupations of a lower socio-economic status increased from 27 to 34 percent, and the degree of income differentiation has became marked.

Of the solo practitioners in 1975, 25 years ago, more than 65 percent had attended a local law school while 7 percent of lawyers in firms of 100 or more had attended the same schools, only 7 percent. Just over 22 percent of the total lawyers attended the "elite law schools."

The rate of exit turnover for mid-size firms increased from 40 percent in 1975 to 61 percent in 1995. The exit rate jumps from 22 to 43 percent in the next largest size firm. In that 20-year interval the tenure rate of lawyers dropped from 39 to 19 years. So what you're seeing, then, is income disparity, the distribution of the practice itself changing, a large turnover in law firms, minorities, and people from local law schools moving into areas of practice that are markedly different and separated from graduates of other law schools. You also see a decline of the smaller firms.

For many years, until recently, the overwhelming percentage of the private law practice in this country was conducted by firms of fewer than three. Smaller firms of 2 to 9 lawyers declined, however, in the last 20 years by some 35 percent. And firms of 35 to 64 lawyers declined some 23 percent. As the American Bar Foundation concluded, and much of this data is drawn from their studies, firms of 65 to upwards of 1600 have enjoyed a percentage increase of over 164 percent. So what you've seen then is a gradual absorption into the large firms of the smaller firms. There are far fewer small firm practitioners as the social strata of the society began to mirror itself.

You don't have to look very hard to see other differences emerging in the Bar. A couple of years ago I spoke at the state meeting of the Colorado Bar Association. When I got there, I asked a friend, "Who will be at this program?" And he said, "Well, you're not going to see any defense lawyers. You're not going to see any plaintiff's lawyers." I said, "Why not?" He said, "Well, the plaintiffs' bar goes to the Colorado Trial Lawyers Association. And the defense bar is going to defense attorney meetings, et cetera. And they don't often come to the State Bar meetings anymore." I said, "Well, who's here?" He said, "Well, others."

Now, I found that to be somewhat unsettling. And that is of course, a vacuum that the American Inns of Court have been attempting to fill by bringing people from diverse backgrounds—the small practitioner, the prosecutor, and the big firm representatives together in a way to try to recreate a sense of community.

I've talked to private practitioners, and they say, "Pat, you know, you wouldn't like the practice of law today. I know you enjoyed it but you wouldn't like it today." And I say, "Why, what do you mean?" They say, "It's just changed." I say, "How has it changed?" They say, "Well, it's just different." I say, "How is it different?" And they say, "Well, you know, it's not fun anymore. The emphasis is making more money. We're making more money, but the price is just too high. The price is too high in what it does to ideals and my sense of commitment to the practice of law."

This lawyer spoke for many. His view was stated directly. I didn't come into the practice of law to try to get rich. I came into the practice of law because I thought I could make a difference. The satisfaction of representing a client and doing a good job, that means a lot to me. It means a lot to me because I have the sense that I am making a contribution.

I always saw the practice of law as making a contribution, ultimately, to this country itself. And in every sense that's true. And that's one large difference between lawyers and practicing accountants. The law is different from the accounting profession. The rule of law is enforced in law offices and courthouses across the country, where clients are talking to lawyers and lawyers are giving guidance and structuring transactions to conform to the law. Lawyers are instruments of government.

I was struck by a comment by a British commentator during the recent Florida election. He said, "You know, this is a strange thing. If this happened in almost any other country, if we had this problem and it continued for so long, the generals would move in. But you know, in the States it's different. The lawyers move in." It was a humorous comment, but it was true. I take a lot of satisfaction from that, because it meant a great deal to me to see Warren Christopher and Jim Baker standing up there and representing conflicting positions but standing, really, for the law. There will be different views over how it played out, but lawyers were there and lawyers were, indeed, necessary to this peaceful change in power. And I don't think that's going to change. Men are not yet angels.

Perhaps the most powerful signal of what's happening in today's world is perhaps the fact that it is growing so much smaller. The economy has jumped political boundaries in ways that are absolutely stunning. We know that, but what you may not have thought about is this phenomenon is changing legal institutions. Indeed, that's the swirl that began to push for multi-disciplinary practice.

Let me illustrate by reminding you of some recent history. In 1957, the European Court and the European Court of Justice was created.

Now, what's absolutely stunning about this, at least to me, is that this Court, in a very short period of time, through a series of interpretations of various treaties, has blended together in the European union a legal structure that over-arches the member countries. Those member countries have given up their sovereignty to the extent that the European Court of Justice decision is binding. Through its own judicial interpretation it has created this structure so that the EC, the law of the European Community is preemptive. It begins to walk and talk like a Federalist structure. It is preemptive, meaning that if there is a conflict between the law in Italy and the EC, it is the EC that controls.

The court has one member selected by each country and then the four super powers of the European nations select an additional judge, giving them a needed odd number. Those judges decided in a case out of Italy as follows: An Italian man did not want to pay his power bill that came to about $2. He maintained that the power company was conducting business contrary to the EC. That decision went to the European Court after the Italian Courts had ruled against him. The Italian Courts had reached X results, the EC reached Y results, and the Italian court ruled that the Italian Constitution controlled. The European Court of Justice said, no.

Now, the Court has also said that the law of the EC is enforceable by a citizen of the state, a member state, against the state. Remember that this was an Italian citizen that was bringing this. So, you have a right of enforcement by members against their own state. And that, to me, is taking a long step toward creating a union.

Now, correspondingly, parallel development in almost the same time span, you have the European Court at Strasburg, again springing from a treaty. You have two courts. One is dealing with economic issues, and one is dealing with human rights issues. That's a dichotomy that blurs at its edges. Nonetheless, in essence you have both.

The British supported the creation of this court, but then were reluctant to fully subscribed to it, subjecting their membership to a lot of qualifications. And, so, it rested until the Fall of last year.

What happened then is, to me, the most significant of all of these events. The British decided to adopt into the organic law of England, the United Kingdom, parts of the human rights protocol, which was essentially a bill or rights then being enforced by the Strasburg Court. There are some differences and some qualifications, but in general what the British did, effective in October of last year, was to pull this body of law into the U.K.

Think for a moment what this means. Here is a British tradition of parliamentary government in which the decision of the judiciary could not trump the Parliament. And now you incorporate what is essentially

something that walks and talks and looks like a provision for a bill of rights. And now the judges are going to enforce that. Suddenly, the judiciary is studying how to assimilate this new form of judicial review into the British tradition.

A quick glance at the convention, the list of rights will give you some idea of the task ahead for them. "Everyone has the right to the liberty and security of person. No person shall be deprived of his liberty save in the following cases and with a procedure prescribed by law." These look like due process clauses.

Although it creates a system for the first time where the judiciary can say that an act of Parliament contravenes this human rights convention, they did not fully subscribe to our principle of judicial review. Rather the British looked at their own law and other models including Canada and concluded that what ought to happen is this—and this is a quintessential British response: When the jurists, when the high court says that an act of Parliament contravenes the "constitutional" law, they do not strike it down as invalid. Rather they issue a declaration of incompatibility. And what that means is simply that the law then, in essence, is in suspense. It cannot be enforced unless and until the Parliament elects to re-enact it, essentially the Canadian model.

As to lesser law, they have the power to strike it down. So, what you have seen now in a period of about 20 years is the creation of an entire new body of law, an entire new institutional structure in Europe. We've seen the incorporation within the United Kingdom of what walks and talks and looks like a form of constitutional limit upon the legislative branch at the same time. The Republic of South Korea has created its own constitutional court, as has the Republic of Germany and others.

These constitutional courts are essentially Western conventions that have been grafted onto civil law and other systems. The battle now between the common law and civil law systems is on.

Now transnational deals are being done daily by American business. When I talk to Charlie Matthews, the vice president and general counsel of Exxon, and he speaks about his lawyers all around the world, their transactions must conform, for example, with the anti-trust laws in Europe, with the commissions there, as well as domestic trade rules. Courts are seeing the anti-trust cases asserting multi-national conspiracies, allocations of territories, with questions such as whether foreign entities should have access to American Courts to enforce American antitrust laws. All of this in an environment of rapid, extraordinarily rapid change.

And that's the world in which lawyers are struggling to define themselves, searching to locate the ethical principles that govern their profession. That search is really for a definition, a search for the

definition of the soul of the profession itself. It's fair to ask the younger people in this next generation of lawyers what will the practice of law look like over the next 20 years and the 20 years thereafter. Many believe it will not exist in its present form at all. The training of lawyers is changing rapidly. We see the academy changing. Many members of law faculties are practicing more law than they're teaching. Call it consulting, call it what you will, but there is an interchange that's going on between the practicing lawyer and the teaching lawyer that is also different than in times past.

There are constants in this flux. One is simply the demand of order in our social relationships, and that's in a simple word, law. Law ensures the future need for lawyers despite the social change ahead. The core essentials of government, fairness, honesty, and respect for individual worth are unchanged. I put it to you that lawyers are now and they will remain both the prime architects and the carpenters of our legal system—the very engine of governments. It follows that they are going to be needed for the simple reason that as our founding fathers said, because men are not angels. They were not then and we're not going to change.

So our efforts ought to focus upon holding onto our core values that distinguish the profession. Here the one word that comes to my mind is duty. Duty to the court and duty to the client and understanding who your client is. That will take you a long way toward compliance with the ethical regime. That and listening to the deep call in your conscience that something is wrong. There is a risk in dealing with the very complexity of these rules that we will lean too heavily upon them and put aside the deep call of our conscience that this is just not right. That ultimately is the lawyer's ultimate compass.

There is a duty to teach. Not only by professors in the law school, for we are all teachers. We teach by word and example generations who follow. If we are to teach, we have to understand. We have to first understand that values are timeless; timeless in their essence. But even timeless values can be lost.

We lawyers must at this marker in time of the Millennium remind ourselves that we are obligated to plant the trees, although we will not be there to enjoy their shade. We have to remember that as members of the profession that was done for us. No efficient market or entrepreneurial indulgences will do this planting, nor can we hire servants. The duty to plant for the future falls on each one of us. And it is that duty that is unique and it falls on you as individuals that ultimately define and mark this as a profession.

I started trying cases when I was 22 years old, and for nearly 40 years I've been in court on one side of the bench or the other. I've loved every

day. I love the Bench. I love the practice. I could walk across the street tomorrow and be happy with it. But lawyers are the key. I am reminded of an image that always comes to my mind, and it comes to me from my boyhood on a dairy farm, of the three-legged stool.

The distance between Denver, Colorado and Santa Monica, California is the three-cornered stool. The three-cornered stool is this. In a trial courtroom where the real judges sit, we need a strong judge with the ability to control the courtroom; to hold like a bird, tight enough to control it but not so tight as to kill it. You must have a prosecutor or a plaintiff's lawyer who is competent, who respects the court and who will discharge his duties to his client. You must have a defense lawyer who will do the same. If any one leg of this three-legged stool is short, there is a problem. This image is a reminder that lawyers are an integral part of every trial scene. The judges can't do it alone. The lawyers can't do it alone. The lawyers and judges are a part of the same game—in pursuit of identical ultimate goals.

So my message today is in this time of flux, we hold to our core values, and we remember that we're in this game together, the practicing bar, the judiciary, that all of us are integral to the very government of this nation. And we shouldn't let cries for efficiency and cries for new economic arrangements and structures, that in the short term may look more powerful cast aside the reality that we, as lawyers, have a unique function in this country. And every time we have an election that goes down like Florida, the lawyers will come out. They will be there, or if some other social problem comes upon us it will be the lawyers who are the architects and the lawyers that are the problem solvers.

I appreciate the opportunity of being with you today.