The Twenty-Ninth Annual
Chester Bedell Memorial Lecture

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

Presented to The Florida Bar
By
The Chester Bedell Memorial Foundation
in cooperation with
The Trial Lawyers and Criminal Law Sections

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HONORABLE JOSEPH W. HATCHETT

Tallahassee, Florida

JOSEPH W. HATCHETT

Joseph W. Hatchett was born in Clearwater, Florida in 1932. His mother worked as a maid and his father as a cotton picker. From these beginnings he became the first black to be elected to the Florida Supreme Court since Reconstruction.

Upon receiving his law degree from Howard University Law School in Washington, D.C. in 1959, he went to work for the NAACP Legal and Defense Fund.

In 1975 Justice Hatchett was appointed to the Florida Supreme Court and was re-elected to the Court in 1976.

In 1979 Justice Hatchett became the first black judge to serve on a federal court of appeals in the South, serving on Fifth Circuit and then in 1981 on the 11th Circuit where he became Chief Judge.

In 1999 he returned to private practice and became a leader in reapportionment and redistricting in Florida and Georgia.

In 2005 the National Bar Association recognized him for more than 40 years of dedication to the cause of justice and equality before the courts of the United States on behalf of the African-American community.

INTRODUCTION

MS. WOLBOLT: Good afternoon. September 17, 1932 was the first day in the life of an African American man whose life story, much like Mr. Morgan, is just one of first.

He was born in segregation in Clearwater, Florida. His dad was a cotton picker, his mom was a maid. He aspired to become a lawyer in large part because of a high school teacher who preached the importance of the law to the lives of the people in the community.

After going to segregated schools in Clearwater, he had to go following military service to a black law school -- Howard University -- because Florida's law school was still at that time segregated.

He obtained his degree from Howard with honors, came back to Florida to take his bar exam only to find that the hotel at which the bar exam was administered would not accommodate African Americans, and so he would have to go some distance away to a black hotel for the two and a half days of the exam, which he nonetheless took and passed.

In September 1975 he became the first African American to serve on the Florida Supreme Court. And there's a very warm letter in your Florida Bar magazine that's being distributed here about Judge Hatchett going on the Florida Supreme Court.

It ends: "He on the court strictly on merit because, 'He was tougher, smarter and worked harder than his fellow lawyers.'"

He was elected the following year after a very racially charged opposition and thus became the first African American elected to statewide office in the South since Reconstruction.

In 1979 he became the first African American to serve on a federal appeals court in the South when he was appointed to the 5th Circuit, and a few years later he went to the 11th Circuit where he served as Chief Judge from 1996 to 1999.

It is truly impossible, and we do not have enough time today for me to outline all of the awards that he has had and all the contributions that he has made to the cause of justice and equality and the promotion of racial and ethnic diversity within the legal profession.

So I asked him if he could tell me what decision he had authored that he considered the most important. I thought it would be something that we in this room would know. And he told me that he didn't like to take credit for multi-judge opinions, but he said, "I like to talk about my grandkids." Well, once again, time doesn't permit me to tell you everything I know about his grandkids. He's got five grandsons, one granddaughter and one great-grandson. And it's especially fitting that one of his grandsons has just passed the Florida Bar.

So please welcome Judge Hatchett who is well qualified to give this annual address in memory of Chester Bedell.

A CHALLENGE FOR INDEPENDENT LAWYERS: ACCESS TO THE COURTS

-Members of the Judiciary
-Trial Lawyers
-Friends

Thank you for inviting me to meet with you today. It is a privilege for me to be invited to deliver the annual Chester Bedell Memorial lecture. Trial lawyers and bar leaders tell wonderful stories about Chester Bedell's superb advocacy and leadership. I, too, knew Chester Bedell and on several occasions litigated against him. What great fortune to have the opportunity, early in my legal career, to stand in the same courtroom with one of the giants of the legal profession. Chester Bedell was an exceptional person whose life and qualities have left their mark upon the legal community of this state and region.

Prior speakers have focused on subjects as wide ranging and varied as the Innocence Commission, the importance of the writ of habeas corpus, and significant events in American history. I especially noted that Stephen Bright focused his remarks on the importance of defending the poor - highlighting the fact that the American lawyer at his or her noblest and best protects the rights of everyone. So along with independence, I will discuss access to the courts.

This lecture is dedicated to "The Independence of the American lawyer." Perhaps, because I was once a judge, I agree with one of your prior speakers, the Honorable Gerald Tjoflat, who in giving this lecture a couple of years ago stated: "The independence of lawyers and the independence of judges are inter-dependent, tied inextricably together. Without an independent bench, an independent bar is but an illusion."

When we speak of the independence of American judges and lawyers we are really stating nothing more than that the rule of law cannot be sustained without giving judges and lawyers a high degree of independence of action.

From my judicial experiences, I learned that judges must be free to exercise their judicial powers without external influences that may reduce their objectivity and impartiality. Every case must be decided based on its legal merits - free from the influences of other branches of government or any other influences. Independence for judges enhances the impartial assessment of the facts of cases and the objective application of the law.

Americans must have confidence that the judiciary will apply the law equally against the powerful and even against the government. Americans must also have confidence that decisions are determined through a consideration of legal and factual merits rather than through political

interests or based on what is popular.

America is best served by having an independent legal profession. That means that members of the profession, judges and lawyers, must be free to carry out their duties without fear of reprisal and without interference.

The duty of a lawyer is a high one. Lawyers have the duty to represent their clients to the fullest, to advance the interest of their clients freely, and to always assist the court in upholding the rule of law. Consequently, when we speak of the independence of the American lawyer, we are speaking of the lawyers' right to form professional organizations, to represent clients no matter how unpopular, and to be free from disciplinary action, sanctions or prosecution for undertaking their professional duties. In other words, lawyers must not be intimidated in any way because of the work that they do for their clients or have unreasonable interference in the performance of their legitimate duties.

Why is it important that lawyers have independence? Why do you judges and lawyers insist upon this independence? What is the purpose of demanding this professional independence? Let me give you a few reasons, among many. As Americans we declare that all people are entitled to equal protection under the law. If that be true, then the people of the United States must have confidence that lawyers will represent unpopular clients without fear and advocate to the greatest extent possible on behalf of unpopular causes.

The purpose of this independence is the protection of the American people, all of them without regard to race, color, sexual orientation, agenda or other differences. The protection of the people through an independent legal profession is the foundation of a free and democratic society. As a summary, we can say that as members of the legal profession we insure the supremacy of the law not the arbitrary exercise of power.

If we remain independent, we will continue to be the guardians of human and other rights. If we remain independent, we can continue to insist that legal decisions not be based upon the wealth or power of those who enter the legal system. As independent judges and lawyers, we are the indispensable instruments for the protection of minority, individual, and unpopular rights.

So, again this year, as in years before, we reaffirm the principal that independence for the judiciary and the bar is important to the American justice system and to the American people - all of them. But our independence must continue to serve a purpose. It must serve a greater good.

I suggest three areas where our independence, our leadership positions and our code of conduct call for us to take action:

1. We must eliminate the drift of raw politics into appellate judge elections;

2. We must insure that middle class Americans have access to the courts in civil cases; and

3. We must take immediate emergency action to provide access to the civil courts for those in poverty.

I view these matters as challenges to our profession. Let's talk about one of the forms of encroachment on the independence of the legal profession. According to the Brennan Center for Justice, in the 2011 - 2012 election cycle many judicial races seemed indistinguishable from ordinary political campaigns featuring super pacs, mudslinging, attack ads, and millions of dollars. The Brennan Center reports that the boundaries that keep money and political pressure from interfering with the rule of law have become increasingly blurred. Sound familiar? It should.

Many of you remember my election of 1976 for the Florida Supreme Court. In that election, I sought to retain my seat on the Florida Supreme Court; but, it was not a retention election as we currently have in place for appellate judges. In that 1976 Supreme Court election, I had an opponent; I ran for office as though running for sheriff in all 67 counties; I went across Florida with my hands out begging for money, had political ads, name calling, and all the other activities that the voters of Florida thought they were eliminating in the general election of 1976 when they instituted merit retention for appellate judges. What a proud day for Floridians when its appellate judges were no longer subject to the effects of campaigning, making promises, and accepting money from those expecting something in return.

The next couple of elections for the Florida Supreme Court were better than my 1976 election. Florida voters had changed the appellate selection and retention systems for the better, and they were proud that they had done so. But wait a minute; look what has happened.

The Brennan Center for Justice reports that across American total spending in the 2011 and 2012 state supreme court races reached an estimated fifty-six million dollars ($56M). Where were the most expensive appellate judge elections? The most expensive elections were in Michigan, Wisconsin, North Carolina and Florida. Yes, right here in Florida.

"Americans for Prosperity" spent an estimated one hundred fifty-five thousand dollars ($155K) targeting three Florida Supreme Court Justices, who previously rejected a ballot proposal resisting mandates imposed by the Federal Affordable Care Act. "America Votes", a progressive advocacy organization, contributed three-hundred thousand collars ($300K) to the Florida "Pro-Retention Group". "Defend Justice from Politics" spent more than three million dollars ($3M) on ads supporting the retention of the three Florida justices.

Special interest groups are now giving large sums of money directly or indirectly to judicial candidates. This activity furthers the impression

that justice is for sale.

During that election cycle in 2012, the New York Times reported that a political party was seeking to "remake Florida's judiciary" and "give the Legislature greater power over Supreme Court appointments and judicial rules of procedure."

To show how elections regarding appellate judges had changed in a few years, the Palm Beach Post stated: "In a typical election year, Florida Supreme Court justices put $500 in their campaign account and after the votes are counted, they withdraw the money and settle in for another six year term." Not anymore.

So, what do the trial lawyers and leaders of the Florida Bar do to insure that appellate judge elections do not destroy the independence of the judiciary? Well, some will say rightfully, it is time to amend the Florida Constitution to better address the situation we now face. Right! We can do that in 2018 during the regular Florida Constitution Revision Commission process. Sure we can - if we are willing to wait four years. Sure we can - if we believe we can get the "right" people on the revision commission.

What can we do now? The best way to guarantee independence is to help develop the public's understanding of, and respect for the courts and the ideal of judicial independence. We must become educators. Lawyers and judges must educate the public on the lawyer's role and the judge's role in a democracy. We cannot wait until election times or times of crisis. We must be community educators using a variety of methods and tools to reach the media, the public, and the legislative and executive branches of government.

Yes, we are doing some educating of the public, especially the young, through programs such as Justice Teaching and the Florida Law Related Education Association, but recent events shout at us to turn up the heat; to try harder; to work longer to preserve the independence we celebrate today.

Now to a second matter. We must insure that middle class Americans have access to the civil courts. In 2009, the American Bar Association Coalition for Justice conducted a study of judges all over the United States to determine the effects of the economic downturn. The judges were asked three questions with follow-ups. Question one was whether they had seen a change in the number of filings in their courts? If so, had filings increased or decreased, and if filings had increased what types of cases experienced the most growth. Second, the judges were asked whether they had witnessed a change in the number of people being represented by lawyers. And the third question was: what is the impact of self-representation on cases and how does it impact the parties and the courts?

As to the number of cases, a majority of the judges, fifty-three percent (53%), said that the number of cases increased in 2009. Judges who

answered that the number of cases increased were asked a follow-up question about the types of cases that had increased. The most common increase was in the area of foreclosures - sixty-one percent (61%). Second was an increase in domestic relation cases - forty-nine percent (49%). Third most common area of increase was consumer issues - forty-nine percent (49%), and the fourth was housing matters other than foreclosures - twenty-six percent (26%).

During this study the judges were asked if they had seen a change in representation in 2009 in civil matters. Sixty percent (60%) of the judges stated that lawyers represented fewer parties than usual. Then the judges were asked how the lack of representation affects the parties. Sixty-two percent (62%) of all the judges said that outcomes were worse. In other words, sixty-two percent (62%) of the judges said that not having a lawyer hurts parties. That is not new to any of use in this room. We knew that all the time. Although only sixty-two percent (62%) of judges reported a negative impact on the parties' cases when unrepresented, seventy-eight percent (78%) of the judges said that courts are negatively impacted when parties are without lawyers.

The system of justice in this country is based on an adversarial model. It has sophisticated sets of rules and procedures under which everyone must operate. For it to operate efficiently, each party should be represented by a lawyer. When parties are not represented by lawyers the study shows that the parties actually hurt their cases through self-representation. No only do the parties hurt their cases, but the justice system itself is slowed down because unrepresented litigants use more staff time.

As Americans we take our disputes down to the courthouse. We take our disputes down to the courthouse because the courthouse plays a special role in our system of democracy. It is the place where citizens present their disputes against individuals, corporate entities and even the government. Just as we take other individuals, entities, corporations and government officials to the courthouse, sometimes they take us. When that happens, we can't opt out. If a party cannot afford a lawyer and cannot opt out of the system and does not qualify as indigent, they self-representation is the only option left.

The guarantees of our American Constitution die not come with the caveat "for those who can afford them." Denial of justice to a significant segment of our society, those who are not indigent and yet cannot afford a lawyer, is a failure of our profession and of our system of democracy.

If those statements are true, who should help those that cannot afford representation. The next question is how can they be helped? The special privileges that come with being a licensed lawyer also come with a heightened ethical obligation both in our roles as lawyers and as public citizens to increase access to justice and participation in the legal process.

Almost gone unnoticed, the United States Supreme Court's 2011 decision in *Turner v. Rogers* 131 Supreme Court 2507 (2011) addressed the need for state courts to provide strategies to insure that unrepresented parties receive a fair opportunity to be heard when fundamental rights may be lost. In *Turner,* a father was held in contempt for failing to comply with a child support order. The family court in South Carolina found the father in willful contempt and sentenced him to 12 months imprisonment. The Supreme Court of South Carolina affirmed. The United States Supreme Court granted certiorari, and Justice Bryer writing for the majority, held that the father's incarceration due to civil contempt violated the due process clause of the Constitution. The surprise is that the United States Supreme Court ruled in *Turner* that in a civil proceeding a state had to provide a lawyer for the condemned father. Yes, the *Turner* decision is limited, and it applies to civil contempt cases, not all civil matters involving unrepresented parties. Yes, it is a 5 to 4 decision but, times are changing; state provided lawyers are necessary to insure fairness and to meet the requirements of due process when fundamental rights are threatened.

In the absence of a lawyer, the court is best situated to insure that unrepresented civil litigants have meaningful access to justice. But the bar cannot simply stand by because it has an obligation to fulfill its mission and expand equal access to justice. The unrepresented must be helped. Who is responsible for providing that help? The answer is found within the ethical duties governing lawyers --- from not only our code of ethics but from the very oath that we took as new lawyers. And I quote: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

Now the third matter of concern. In our own state of Florida we must take emergency action to provide access to the courts for those in poverty with civil matters. There has been a decline in funding attributable to the collapse in revenue from the Interest On Trust Accounts (IOA) Program benefitting the Florida Bar Foundation. Revenue from IOTA has fallen eighty-eight percent (88%) due to a drastic decrease in interest rates. Studies show that as much as eight percent (80%) of the legal needs of the poor are going unfulfilled. In addition, the Florida Bar Foundation is projecting cuts of seventy-six percent (76%) of its legal aid grants by the 2015-16 grant year, and current estimates for the near future project one legal aid attorney for every 10,700 Floridians living in poverty.

The U.S. Census Bureau calculated that the number of people in Florida living below the poverty line increased 4.3% to more than 3.2 million from 2000 to 2012, and Florida's legal aid programs handled eighty-nine (89) thousand cases. Without the services of legal aid programs, the poor and financially troubled clog the civil court system without representa-

tion. Our Supreme Court has spoken to the responsibility of lawyers to answer the call of representing the poor and I quote "Justice is not truly justice if only the rich can afford counsel and gain access to the courts." At a later time, our Supreme Court stated "Lawyers have been granted a special boon by the State of Florida - they in effect have a monopoly on the public justice system. In return, lawyers are ethically bound to help the state's poor gain access to that system."

Think about the fact that unless something changes in our state of Florida, we will have one legal aid lawyer for every 10,700 Floridians living in poverty. We are going to have to do "something new." "Something new" means something that will require more of our time and our money.

Finally, as we close this year's luncheon tribute to Chester Bedell, a few parting thoughts.

It cannot be taken for granted that in our democracy the idea of the independent lawyer is safe and will long endure. In these difficult times, when power struggles between branches of government are frequent and everyone wants to see "reform" or change for the sake of change, the independence of the American lawyer must be viewed as a notion at risk and requiring special protection.

The American independent lawyer must continue to insist that the rule of the majority is limited by constitutional guarantees to the minority and advocate for and define those rights.

It is wonderful to be an independent American lawyer. Although it is wonderful - although it is a high calling - it is a calling of great responsibility. Our clients face challenges and losses to reputation, standing, office, property, liberty and sometimes even life itself. In those times of challenges and losses, our clients place their trust and confidence in us. And in resolving their disputes, we place our trust and confidence in our courts. Only in our courts, with independent judges and lawyers, can the rich and the poor, the educated and the uneducated, the member of the majority and minority groups speak the truth, have their evidence fairly considered and receive a just outcome.

THE BEDELL LECTURERS

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Julius LeVonne Chambers 1991
Roxanne B. Conlin 1992
Joe Stamper 1993
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Stephen B. Bright 2010
Barry Richard 2011
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Hon. Joseph W. Hatchett 2014

The Chester Bedell Memorial Lecture on "The Independence of the American Lawyer" is an annual event at the Trial Lawyers' Section luncheon meeting at the Convention of The Florida Bar. The Bedell Foundation, which receives tax-deductible contributions for support of the lecture, was created by the Jacksonville Bar Association in 1981 to help preserve the independent bar and to extend that sense of history, duty and destiny that Bedell exemplified in more than 50 years of practice in the courtrooms of Florida