

REMARKS OF DAN MCCLURE

LIFETIME ACHIEVEMENT IN ENERGY LITIGATION AWARD

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I. INTRODUCTION

Thanks, Willie Wood, for those generous remarks.

The one thing that Willie said that was true is that I did teach sign language to chimpanzees when I was in college. We got college credit for that kind of thing at the University of Oklahoma. But it was a wonderful preparation for the practice of law. It taught me everything I needed to know about how to communicate with judges and jurors. All trial lawyers know that you have to keep things simple and have a theme. Well, you *really, really, really* have to keep things simple when you're teaching sign language to monkeys!

When Larry Simon first called me to tell me I would be getting a *lifetime* achievement award, my first question to him was whether I was really old enough to receive such an award. Because I had always thought of myself as a *young* man. But Larry said there was no minimum age requirement. But later I went back and looked up the written criteria for this award in the IEL bylaws and saw that one of the criteria is as follows: "A person who, due to age, retirement, and/or withdrawal from the practice of law is one who should receive the Award sooner rather than later for a variety of reasons that result from that status."

And so I began to think twice about receiving this award. After the Institute sent out a mass email about this conference, I began to get telephone calls and emails. The typical call went something like this: "Dan, do you have some medical issue that we are unaware of?" "Dan, are you calling it quits?" One of my partners, who is a particularly sensitive to people's

feelings, sent me this email after learning about this lifetime award: "Dan, are you dying or retiring?"

Well, let me say first that I do deeply appreciate the Institute giving me this award in recognition of my advanced age. But let me start off by setting the record straight. My health is good, I am not yet retiring, I have no plans to die anytime soon, and I do not plan to sign up for Medicare until the last possible day allowed under federal law.

II. THOUGHTS ON ENERGY LITIGATION—THE VALUE OF WHAT WE DO

Well if I can be serious for a few minutes, I would like to be a little bit philosophical today. I'd like to explore with you a question that all of us who are in energy litigation must ask ourselves from time to time. And that is: What is the value or purpose of what we do as energy litigators? What are we really accomplishing in our work as lawyers and specifically as trial lawyers in the energy industry.

First, it is certainly true that what we get to do day to day is very interesting, very challenging and often a lot of fun. There's nothing more fun in the practice of law than being a trial lawyer and going to trial or arbitration. And litigation is as interesting and entertaining as any chess game or video game or sporting event. And the substantive context in which we are practicing, oil and gas law, is complex and ever changing, and every case has different facts that make it interesting and fun to do what we do. But is that all we are accomplishing? To entertain and amuse ourselves every day? No.

Second, we are all able to earn a nice livelihood for ourselves and our families as a result of working as energy litigators. No one in this room has missed any meals recently. But many people in America think that lawyers and especially trial lawyers, just exist to make money at the expense of everybody else. And many of our clients, managers and executives at oil and gas companies, may view what we do as energy litigators as merely a cost center, a cost that

generates no revenue, and simply a tax imposed on their businesses, a tax that is being paid to overpaid lawyers. It is true that we do make too much relative to the engineers, managers, and roughnecks who work for our clients. But I would guess that no one in this room went into the practice of law just for the money. Every one of us chose law and litigation because we thought that we could do interesting work, make a difference, and accomplish justice in the work that we do.

What we certainly do in our practices is to help resolve disputes between parties in a way that is reasonably fair and reasonably just. There are real disputes in the energy industry - between buyers and sellers, between joint interest owners, between oil companies and royalty owners and landowners, and between energy companies and regulators. We can't resolve those disputes in our country by calling in drone strikes to wipe out the other side. Somebody in this society must resolve disputes, and in our society under the rule of law, those disputes are resolved by courts, juries and arbitrators. And our task as energy litigators in an adversary system is to advocate zealously for our respective clients, and then when both sides to the dispute advocate ethically and zealously for their clients, the end result is justice.

Now all of us have been in cases that we lost that we felt we should have won. And all of us have had the experience of having our clients settle cases that we felt we would have won if litigated to a final judgment. And all of us have had the other experience of winning cases perhaps because we were lucky or clever that maybe the other side should have won or should have gotten something and didn't. And all of us have had the experience of being before judges or juries that we thought got it wrong. But I would submit to you that over the course of each of our respective careers that on average in most cases the results were ultimately fair and just, and that even the settlements were also a reasonable approximation of justice. And I would also

submit to you that if you took the experience of everyone in this room on average across the board the results that were obtained on average were fair and reasonably just. And that's justification enough for what we do as energy litigators. Is the cost of litigation too high? Yes. Is the time it takes to get resolution too long? Yes. But are the results on the whole fair and just? Yes. And that is something we can all take pride in. It's justification enough for what we do.

But I would also submit that what we are accomplishing in our profession as energy litigators goes beyond just the resolution of individual disputes one by one for our individual clients. I submit to you that we are accomplishing the enforcement of the rule of law in the civil sphere in the oil and gas industry. To have a reliable, predictable legal system in which just and fair results are usually obtainable is what it means to have a rule of law, and that rule of law undergirds everything that goes on in the oil and gas business, just as it does for all businesses in our country. What good are contracts if you can't enforce the contracts? What good are regulations if the regulations cannot be reliably applied and enforced? Our transactional lawyer colleagues write contracts, purchase and sale agreements, operating agreements, exploration agreements, oil and gas leases. Our in-house counsel give guidance and advice every day to their clients about what their companies can and cannot do under the law. But it is in litigation and in trial work where the rubber meets the road. We are the tip of the spear. What we ultimately do at the courthouse is what determines what the law really means in a practical and concrete way. We certainly make law when the case is litigated and produces a published opinion from a court, a lower court or an appellate court, that applies the law in the real world. But we are also making law in cases that don't get reported, because the industry is aware of who is getting sued and what are they getting sued for and what are the results of those suits, whether tried or settled..

And it's the litigation results that dictate to the industry how they should conduct their business and what conduct creates the greatest risks.

Finally, as the Chairman of Exxon said when he addressed our group at the Rogers Award Dinner several years ago, the rule of law is an essential prerequisite to business and investment. The willingness of oil and gas companies to invest resources in the United States in particular as opposed to some third world countries is the existence of a regime of law that is predictable and reliable and can be counted on to produce predictable, reliable, fair, and just results when disputes are litigated. You and I function as key actors in making the rule of law a reality, and that's a real accomplishment and something to be proud of.

III. THE PEOPLE WE DO OUR WORK WITH

But there is one more thing that makes our work valuable and meaningful aside from *what* we do. And that is the people we do the work with. We don't do energy litigation all by ourselves. Everything we do in our work we do with other people – our colleagues, our clients, our expert witnesses, and our opposing counsel. In many ways, the relationships that we form with others in doing our work is more important to us than the work itself.

Outside of our families, the people we spend the most time with are the people that we do our work with. My wonderful wife Judy has put up with me for forty years, but so have my colleagues, my clients, and opposing counsel. Litigation can be stressful and sometimes brings out the worst in us. In the heat of battle it can also bring out the best in us, and result in the strongest and most enduring relationships.

The people we work with most closely are those in each of our respective firms or companies. If you are in a law firm, it is the associates and partners that you work with. In oil and gas companies, it may be the people in your law department as well as the internal management employees that you work closest with.

For me, I have been with the same law firm since 1978. I joined Fulbright & Jaworski in Houston that year, and have worked in the litigation department the whole time, handling every conceivable type of case, but mainly oil and gas cases of all sorts. The joy of practicing law for me has been the relationships formed with my mentors, my contemporaries, and later with the associates who worked under me. I am sure as each of you reflect on your own careers, that you have had wonderful relationships with the people in your own organizations.

I think back to when I started at Fulbright in 1978. Leon Jaworski was back at the firm, fresh from his victory in the United States Supreme Court, in a case called *United States v. Richard M. Nixon*. The litigation department even at that time in Houston was huge. There were around 30 litigation partners, and more than 60 litigation associates. Each associate was assigned two mentors, a business litigation partner and a tort litigation partner. But each associate was also trained by assigning each associate, within a year or two, somewhere between 100 and 200 lawsuits to personally handle. The most I handled at one time was 140 cases. My hourly rate was \$45 per hour. These were small insurance defense type cases, including railroad personal injury cases and worker compensation cases that were tried to a jury. We tried cases not only in Houston, but in small towns in outlying counties like Matagorda County, Brazoria County, and Ft. Bend County. In Harris County there was one central docket of trial settings, and any case could be set at any time. And then they were called to trial in order of oldest to newest. So literally every week, I had some case set for trial, but you would only prepare for trial for the cases old enough to be reached for trial. But within two or three years, I had a jury trial about every other month for several years. And what a great experience every Monday to have 100 lawyers from the firm all going to the courthouse for motions hearings that were held every Monday morning in all cases. And people at the firm were constantly in trial at all times. The

comradery and the esprit de corps and the war stories were just incredible. The relationships that were formed were very strong. At the same time I was handling my own docket of cases, I was also working on more significant cases for senior lawyers. I learned something different from each of them.

But outside of our own firms or companies, one of the great things about practicing energy litigation is that we get to know lawyers who are doing similar kinds of work at other firms, not only in our own cities, but in other towns and in other states. Some of the most fun cases that I have been in have been joint defense cases where everybody in the industry was sued, and all of the in-house counsel and outside counsel for the different companies had to work together and got to know each other well. Energy litigation also has introduced me to wonderful trial lawyers in states outside of Texas, who also may be representing the same clients or other clients in similar cases – excellent oil and gas litigators in Louisiana, Oklahoma, Colorado, New Mexico, Wyoming, and more recently for me in Ohio and Pennsylvania.

Finally, this organization, the Institute for Energy Law, allows those of us who are doing oil and gas law to spend time together, at this litigation conference, at the annual conference in February, at the other conferences, and at the regular meetings of the committees and the Advisory Board. Both inside lawyers and outside counsel get to meet and compare notes, and learn from each other. But more importantly, this organization gives us as energy lawyers an opportunity to strengthen old relationships and form new relationships with other professionals who are doing the same work that we are doing.

At the end of the day, the satisfaction that we get from practicing energy litigation comes from the strength and the depth of the relationships that we form with our colleagues, our clients, and others who are doing the same type of work that we do. Forming relationships and

friendships with the people we do energy litigation with is ultimately what gives the most meaning and value to our work, and those relationships and friendships is what we will remember long after we have finished our work.

Thank you