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WHY LAWYERS SHOULD LEAD

*Professor Harvey Gelb**

April 24, 2007

On April 4, 2007 Harvey Gelb, The Kepler Chair in Law and Leadership and Professor of Law, delivered the 2007 Kepler Lecture on Law and Leadership.¹

The Kepler Chair honors three University of Wyoming Law School alumni, Charles Kepler (J.D. 1948), his daughter Loretta (J.D. 1981) and his late nephew Courtney (J.D. 1992), all honor students. Professor Gelb recalled his students Loretta and Courtney as highly intelligent and honorable people.

An anonymous donor, Charles and Ursula Kepler, and the Paul Stock Foundation jointly funded the Kepler Chair in Law and Leadership.

Charles Kepler, a very popular guest lecturer in Professor Gelb's Business Planning Class, shares wisdom and expertise gleaned from his practice of law in Cody, Wyoming. Taking time for students is just another item in the long list of services Charles Kepler has provided to his community, this University, and the legal profession. Examples include such diverse roles as Trustee, Buffalo Bill Historical Center in Cody, Wyoming; Member, UW College of Law Dean's Advisory Board; Member, Board of Directors: The Salk Institute; and Life Member, National Conference on Uniform State Laws.

Those the Kepler Chair honors serve as inspiration for Professor Gelb's lecture, *Why Lawyers Should Lead*.

INTRODUCTION

I have come to praise lawyers, not to bury them. In fact, society cannot bury us; we are needed too much. I have been a lawyer for almost 46 years, 18 in practice and 28 as a law professor. My first-hand experience makes me proud of my profession. We are not always perfect, but who is without flaws? In any occupational group, some will act shamefully and give ammunition to those who wish to be critics. I say to you that when we are victims of bad publicity, consider the sources and their motives. I adhere to my faith that lawyers generally are a strong force for the good in society, and I would like to talk with you about why lawyers should lead.

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¹ In preparing the talk for publication, footnotes were added and some slight revisions were made.

WHY SHOULD WE LOOK TO LEADERSHIP FROM LAWYERS, A GROUP THAT
SUFFERS A BAD REPUTATION?

Let's First Consider Why Lawyers Are Maligned.

A) In performing our work, we are often part of an adversarial system. We negotiate for one side against another; we represent those charged by the government with heinous or other crimes; we counsel businesses accused of harming the interests of the public, and we represent those who do battle with such businesses. Our rules of conduct require us to be loyal to our clients. Those who oppose us and even neutrals may see us as mercenary troublemakers or hired guns and not as seekers of justice. Even to us, achieving fairness or justice in a particular situation may be a somewhat foreign notion. Rather, our goal is the best result for our client.

This system of adversarial conflict may be justified on the basis that it somehow or generally leads to “just” results or the “best results” in most situations. For example, it may be argued that out of the clash of advocates in the courtroom, with each side presenting law and facts to the court, justice will ensue. Or at a negotiating table with each side offering proposals and arguing over the content of documents, a reasonable and beneficial transaction will result. Counter arguments may question results achieved under the adversarial system at least in some contexts, such as where an attorney on one side is much better than her opponent. But my point here is not to raise such issues, but simply to show how the adversarial system may damage public perceptions of how we lawyers conduct our profession.

B) Sometimes lawyers are attacked because they antagonize powerful special interests. These special interests, who themselves use lawyers to promote their goals, nonetheless may benefit from discrediting lawyers generally. This approach may help them to counter efforts of lawyers such as those who work as government officials to regulate special interests, or who represent class action private plaintiffs who sue for employment discrimination, or who file derivative corporate suits for breach of fiduciary duty by corporate officials. Lawyers represent those who battle against corporate environmental abuse or other antisocial behavior. Businesses and their lobbyists may benefit with courts, juries and legislatures by smearing the legal profession that calls them to account.

In a February 2007, ABA Journal article, one trial lawyer stated: “We tip our hat to the insurance companies and others in Corporate America who spent millions of dollars over a lot of years to poison the well for the name of trial lawyer. . . .”² This article lists some of the buzzwords: “Greedy Trial Lawyers.

² Terry Carter, *New Name, New Strategies: ATLA Changes Its Moniker and Hones Its Tactics to Battle Tort Reformers*, ABA JOURNAL, Feb. 2007, at 39.

Lawsuit lottery. Jackpot justice. Lawsuit abuse. Junk lawsuits. McDonald's coffee case. Runaway juries. Tort tax. Judicial hellholes."³ Recently the Association of Trial Lawyers of America voted to change their group's name to the American Association for Justice, a reasonable move in the public relations battle that has been raging.⁴

C) Sometimes lawyers do misbehave and bring discredit to themselves and the legal profession. For example, some lawyers bring frivolous lawsuits, and some district attorneys are unjust in their behavior to persons accused of crime and therefore give ammunition to those who seek to undermine the legal profession in the eyes of the public. Our profession, and we as individual professionals, must respond meaningfully to attorney misbehavior. But no human or group of humans is perfect, and our profession should not be condemned irrationally or unfairly. And remember, it's the misbehavior, real or fictional, that makes a more interesting TV or movie script or the sensational press release, so that's what the public often hears.

LET'S TURN NOW TO CONSIDER THE MORE TRUE-TO-LIFE PICTURE OF THE PRACTICING LAWYER, THE NEGATIVE AND THE POSITIVE.

Unquestionably, Some Lawyers Experience Tough Going. Why?

A) Tension: For some of us a big and frequent dose of adversarial conflict generates significant tension. Moreover, our work generally requires much care and precision, and errors can be devastating. Furthermore, we may live with deadlines and time pressures within or outside of our control. To some, the tensions are no big problem and can be turned to productive purposes. To others, tensions may cause sleep problems, indigestion, and other physical or mental problems and may actually diminish the quantity and quality of their production. Tensions may even contribute to burnout and withdrawal from the profession once enthusiastically and completely embraced.

B) The Idealism Gap: If the practice of law seems to some of us to be insufficiently linked to working for justice, fair play, and good social goals—and overly linked to controversy on behalf of causes with which we do not agree or have grave doubts—idealistic considerations which would fuel our efforts and lead to psychological satisfactions may be largely absent in our careers. The evident lack of a career purpose acceptable to a lawyer may undermine and end the pursuit of that career. Moreover, the relentless and unfair public relations campaigns which ridicule or condemn our profession may erode the appropriate

³ *Id.*

⁴ *Id.*

pride and satisfaction we should possess in being part of a noble, venerable and essential profession. To my brother and sister lawyers, I say that the appropriate reaction to such campaigns is embodied in the Latin phrase, "*Illegitimi non carborundum.*"

C) Money: All of this is not to ignore the financial side of the practice of law. To many of us as in any occupation, earning money to support our families is essential. Some of us may do extremely well or moderately well. But not all lawyers are able to make a sufficient living from practice, and the anxiety caused by inadequate or uncertain financial compensation that may leave family needs unmet may drive people from the practice of law, a form of economic burnout.

The Other Side of the Matter: The Good That Lawyers Do

What about lawyer satisfaction from practice? There are bright sides—very bright sides—to the legal profession that for many outweigh the pressures and lead to great satisfaction. I asked a practitioner of 20 years who worked on difficult cases why he was positive about his profession. His response was a simple one—because he helped people. We lawyers work to protect society from crime and to protect individual rights against improper government intrusion. We prepare the documents that provide for educational, recreational, business, and residential facilities to be created. For example, when I was city solicitor I did work to enable our city to renovate and build swimming pools, parking facilities, and sewage facilities, and when I saw the city's progress I felt good about it. We help people to buy businesses when they are eager to embark on ventures and to sell them when they want to retire. I have represented clients who worked hard to develop good businesses and wanted to sell them for a fair price that would actually get paid—even in installments—so that they would have security in their retirement. It is a special feeling when we use our skills as lawyers to help clients achieve such security. We represent people with personal injuries and property damage as well as those from whom they seek damages. We help people plan their estates and provide for their families. We deal with environmental issues and natural resources matters. We counsel clients to prevent their violating laws—and this is an important role—in fact I would say that practitioners know—but the public does not realize—the extent to which lawyers prevent violations of the law. Although we participate in conflict and adversarial situations, we often work for the resolution of conflict and settlement of disputes and earn the honor of being called peacemaker. In other words, there are many ways in which we achieve satisfaction in helping people and society.

The main thrust of my comments today is concerned with lawyers, not as they are engaged in the technical practice of our profession, but rather as leaders in our society.

III. I OFFER THREE REASONS WHY LAWYERS SHOULD LEAD

First, law is so important to all of us. It establishes rules of conduct backed by the power of government. These rules affect our lives in many ways. They are protective but they can also be threatening. The government that makes rules and enforces public and private ones has a huge responsibility to be reasonable, clear, fair and just. Lawyers are well suited to roles in government. It is no accident that 25 of 42 American presidents were lawyers,⁵ as are many of our Senators and Representatives, and as we know our Supreme Court plays a vital role in our governmental system. Among those presidents who were lawyers and leaders were John Adams, who defended British soldiers when it was unpopular to do so in a case involving the Boston Massacre, and Abraham Lincoln, who drafted the Emancipation Proclamation, one of the most important documents in our history and an outstanding example of legal drafting skills. And there was Thomas Jefferson who directed that his tombstone should refer to his authorship of the Declaration of Independence, founding of the University of Virginia, and responsibility for the Virginia Statute for Religious Freedom, (though he did not refer to his presidency, which was not without significant accomplishment e.g. the Louisiana Purchase). Americans realize the enormous importance of law in our society and lawyers are after all “learned in the law.” By education and experience, we lawyers understand the separation of powers, checks and balances, and the protection of rights and respect for legal obligations.

But we need not be officeholders to help preserve our great American legal system. We can educate each other and our fellow Americans about our government and the importance of active citizenship in our nation. We can encourage participation in elections and help insure that votes are properly counted. Where necessary we can participate in litigation and let our voices be heard in letters and public forums, at our barber shops and hair salons, and on a one-to-one basis. Our education and professional license have given us certain expertise and practical power, and with such power comes our responsibility to be good citizens. Indeed lawyers in government and lawyers outside of government have a great responsibility to protect people from government abuses.

Let me offer an example of lawyers speaking out in public against a fellow lawyer. Not long ago, the Deputy Assistant Secretary of Defense for Detainee Affairs Charles “Cully” Stimson, a lawyer, found it shocking that major law firms in the United States were representing Guantanamo Bay detainees and opined that corporate CEOs would make the law firms choose between representing terrorists or representing reputable firms.⁶

⁵ James Podgers, *Mr. President, Esq.: For Better or Worse, Most U.S. Chief Executives Have Been Lawyers*, *Says New Book*, ABA JOURNAL, Nov. 2004, at 66.

⁶ Interview by Jane Norris and Mike Causey with Charles Stimson, on Fed. News Radio (Jan. 11, 2007).

I am pleased to report that ABA President Karen J. Mathis responded as follows: “Lawyers represent people in criminal cases to fulfill a core American value: the treatment of people equally before the law. To impugn those who are doing this critical work—and doing it on a volunteer basis—is deeply offensive to members of the legal profession, and we hope to all Americans.”⁷

I take pride in the fact that more than 130 leaders of law schools, including our own Dean Parkinson, signed a letter reading in part as follows:

Our American legal tradition has honored lawyers who, despite their personal beliefs, have zealously represented mass murderers, suspected terrorists, and Nazi marchers. At this moment in time, when our courts have endorsed the right of the Guantanamo detainees to be heard in courts of law, it is critical that qualified lawyers provide effective representation to these individuals. By doing so, these lawyers protect not only the rights of the detainees, but also our shared constitutional principles.⁸

A second reason for lawyers to lead is lawyers have skills to contribute. Not very long ago I spoke to an outstanding Rabbi—a person with a brilliant intellect—who had been chair of an important Board responsible for humanitarian service to people with needs: the elderly. He perceived the considerable value of lawyers on his Board as the ability to raise significant points that probably would not have been made otherwise. Recently a senior college development director conducted a quick survey of Arts and Sciences Boards of Visitors that yielded positive responses about lawyers on Boards. One administrator stated their value as follows: “clear thinkers, process oriented, provide good feedback, value their liberal arts education, keep others on track and help summarize materials well.”⁹

During my practice years, many philanthropic organizations asked me to serve on their Boards or in other ways, and I often did, not to give professional representation to these organizations, but to serve their purposes in other ways such as chairing a community relations committee, promoting education, and soliciting contributions for causes dear to me.

⁷ Press Release, American Bar Association, Statement by ABA President Karen J. Mathis on Remarks of Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in January 11, 2007 Federal News Radio Interview (Jan. 12, 2007) <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=64>.

⁸ Yale Law School News & Events, Law Deans Release Statement on Remarks of Cully Stimson Regarding Lawyers for Detainees (Jan. 16, 2007) <http://www.law.yale.edu/news/4055.htm>.

⁹ Survey by Dale Walker of Arts and Sciences Boards of Visitors (on file with author).

Despite all the unfair lawyer jokes, and our bad public relations, community organizations want our services. And by the way, I hate unfair lawyer jokes. They are part of the demeaning of our profession. The people who tell them may not always realize their negative impact, but we should let them know.

I submit that organizations are wise to seek lawyers as board members or in other capacities, and lawyers will benefit from accepting a reasonable number of community positions. But note well the word, “reasonable number.” We must learn to accept only what time and inclination permit. We must learn to say “no” even when we feel flattered by offers. We must also be mindful that certain positions may carry with them the threat of personal liability and assess our risk before accepting them.

Why are lawyers great candidates for community service? 1) By education—we are trained to be logical and analytical, to see issues factual and legal, and engage in problem solving. 2) We are trained to gather facts and to discern what is relevant in the various situations with which we deal. 3) We are trained to look to precedent—to past practice and also to current analogous situations to see what wisdom can be garnered from the experiences and methods of others—to ascertain its applicability to or differing characteristics from situations we are facing. 4) We know a great deal about doing research. 5) We know how to ask questions of others. 6) We know what is expected of agents and directors and trustees in the eyes of the law—the loyalty and care that they owe as fiduciaries to those they serve. For example, many of us, including my students in Business Organizations, are schooled in idealistic principles like those stated by Judge Benjamin Cardozo in the context of a case involving fiduciary duties owed by partners or joint adventurers in business together. Cardozo said:

Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.¹⁰

Is it not a good thing for organizations to have the services of lawyers schooled in such lofty principles of fiduciary responsibility? 7) We are, therefore, in a position by example and by advice to instruct other fiduciaries who serve with us as to their duties.

¹⁰ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

There were many days when I raced from my office to attend a directors or trustees meeting of a philanthropic organization. It was a great change of pace and spiritually uplifting, as the doing of a good deed can be. Let me hasten to add that I chose my community work because of feeling for the causes it served, but it did at times lead to an important side benefit, the acquisition of clients also devoted to such causes, the possibility of which I was not totally ignorant.

For the third reason for lawyers to lead, strangely enough, I now return to the subject of dissatisfaction and burnout. In my earliest weeks as an undergraduate freshman at college, an essay about Sigmund Freud with his famous id, ego, and superego terminology was required reading for my entire class. After all, one could hardly engage in social discourse or understand frequent academic references without knowing some basic Freudian terms. It was not uncommon for students to discuss each others' psychological problems face-to-face in Freudian terms. I never took a course in psychology and over the years have read little more in that field. A few years ago, I acquired a copy of Viktor E. Frankl's *Man's Search for Meaning*, a book that has sold millions of copies. Frankl's theory, called Logotherapy, states that the "striving to find a meaning in one's life is the primary motivational force in man."¹¹ This contrasts to the pleasure principle on which Freudian psychoanalysis is based and the will to power on which Adlerian psychology is focused.¹² There are many treatises written about psychology and logotherapy and my knowledge is like a drop in the sea. But I have the temerity to call to your attention some thoughts declared by Dr. Frankl because they resonate with me. He states "that man is responsible for and must actualize the potential meaning of his life" and that "the more one forgets himself—by giving himself to a cause to serve or another person to love—the more human he is and the more he actualizes himself."¹³ I believe that our profession is exceptionally well-suited to the attainment of a meaningful life through service to causes and to people.

Ah—you say—look at all of the tensions in our profession. But not all tensions are bad. Tensions may lead us to better performance, to more alertness—to better preparation. And there is Dr. Frankl's perspective on tension: "that mental health is based on a certain degree of tension, the tension between what one has already achieved and what one still ought to accomplish, or the gap between what one is and what one should become."¹⁴ This is reminiscent of a favorite Justice Brandeis quote from Mathew Arnold, "Life is not a having and a getting, but a being and a becoming."¹⁵ Admittedly the practice of law may not be everyone's best road to

¹¹ VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 121 (Washington Square Press 1985) (1946).

¹² *Id.* at 121.

¹³ *Id.* at 133.

¹⁴ *Id.* at 127.

¹⁵ ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 94 (Viking Press 1946).

follow—and some may appropriately change course to pursue their meaning in life. But for many of us, it can bring true satisfaction.

TO SUMMARIZE, THESE ARE THE THREE REASONS WHY LAWYERS SHOULD LEAD.

A) We are good at it—our training and expertise match needs of leadership.

B) It is good for us. Professional and civic work helps us to satisfy our “meaning in life” needs.

C) It’s good, even essential, to safeguard the American way of life—we can perpetuate a society of law and freedom under law.

When I was a very little boy I asked my mother what I could be when I grow up. I used to hear other kids talk about being firemen and I wondered about it. My mom said: “Well you can be a doctor or lawyer or engineer.” My mother had been a schoolteacher and my father a physician and my future was very important to them. When I couldn’t stand the sight of dissecting a frog and knew next to nothing about being an engineer, one possibility remained, the law. I read about great lawyers like Louis Brandeis and Clarence Darrow. I knew that law was a gateway to a variety of interesting careers and I opted for law. My saintly parents were very happy with that decision and they sacrificed a great deal cheerfully to provide me with a law school education. They knew, and so did I, that I was becoming a part of an honorable and important profession—a profession which to this moment I am proud to be part of. You students of the law, members of the profession, your families, friends and the American people should know that too.