

**Transcription of the Oral History Interview with
Max Kempner
November 19, 2008**

0:01:00

May: Good morning, we're here in South Royalton, Vermont, at Vermont Law School, on November 19, 2008, interviewing Maximilian Kempner, former dean of Vermont Law School, 1991-1996, former member of the CLEPR Board - that is the Council on Legal Education for Professional Responsibility. Max has also served as Lecturer in Law at Columbia Law School, Chair of the ABA section on Legal Education and Admissions to the Bar- member of the ABA Task Force on Law Schools and the Profession-narrowing the Gap. He has participated in many other notable activities in the history of legal education – so numerous that they defy description and I will say at this point that one of Max's most notable achievements is to have compressed his remarkable resume into one page, which is a marvel for all of us to see and something that law students should see as well – as a model of succinct statement.

0:02:00

My name is Jim May. I am Director of the South Royalton Legal Clinic at Vermont Law School. Our photographer is Bill Bond from the law school IT department and our technical assistant is Jesse Chargin, former Vermont Law School, Southworld Legal Clinic clinician and current work-study student. And so, we move to our conversation with Max. Good morning, Max.

Kempner: Greetings.

May: Greetings. Max, you've had a long and distinguished career in promoting the goals and ideals of American Legal Education. I'm wondering if you could talk a little bit about your involvement with the Counsel on Legal Education for Professional Responsibility, that is CLEPR. Describe a little bit about how you came to be a member of that board and what your involvement has been with that organization.

0:03:00

Kempner: In the 1960s I was practicing law in New York City and my firm represented the Ford Foundation – the grantor of the funds that came to CLEPR. In that connection I met Bill Pincus while he was a program officer at the Ford

0:04:00

Foundation and we talked about the work of the Ford Foundation in legal education generally, and clinical education, more specifically. Bill was very much engaged in, was really responsible for seeing that the grant was made to CLEPR and when CLEPR was formed, as you know, he, of course, became president of the organization. And, I remember an early meeting involving Bill Pincus and Orison Mardeu, the future Chairman of the Board of CLEPR, Whitney North Seymour, Florence Kelly and a few others, to talk about the concept and the idea of forming a new organization to do the work of introducing clinical education to American and Canadian law schools. It was decided at that meeting to set up a new organization called CLEPR. I was asked to serve as counsel to the organization to prepare the papers for a corporation in New York and to join the Board of Trustees of the organization- which I did with pleasure. And, I

thoroughly enjoyed being there from the very first day to the very last day of the organization's history.

0:05:00

May: And, for CLEPR that was how long in duration? It was about ten; almost ten years?

Kempner: I think so. I think so. Yes. Yes.

May: And, you were counsel and you also held the post of Secretary for some of that time?

Kempner: I think; yes, yes. I did. And, I worked closely with Bill Pincus and the other members of the board in not only handling the legal problems of the organization, which were minor. It was a non-profit organization incorporated in New York and exempt under the Internal Revenue Code. But I also participated in the work of the organization – attended not only board meetings but the various conferences that CLEPR put on, and I followed with great interest the slow evolution of clinical education in the American law schools.

0:06:00

May: What were the goals of CLEPR at the time when you formed the organization as a new one and began to distribute the monies made available by the Ford Foundation? What were you trying to do?

0:07:00 Kempner: As the name indicates, profession responsibility of lawyers was the primary objective of the organization. Now we tend to think not only of that but of skills training. Skills training was really not the primary purpose in the early days. In the early days there was a feeling that lawyers, in general, were not sufficiently educated in ethics and professional responsibility; were behaving in ways which were not worthy of the profession. And there was need for law schools to discover new ways of reaching students and the idea was through the clinic and through clinical education. That would be a more effective method of educating students rather than only in the classroom.

May: So, was the focus, initially, on actually taking clients into courts and representing them in the courtroom or were there preliminary stages that

0:08:00 Kempner: Yes. The idea of Bill Pincus was to have students represent clients – live clients – under the supervision of practicing lawyers who were also members of the faculty of the law school, to bring that experience back into the classroom for discussion and to do all of that for academic credit in the law school. Those were the ingredients that Bill Pincus proposed and to which he stuck fairly strictly, with some variations here and there. And, that was the format and the model that was used when law schools began to apply for funding to CLEPR, they were told this model was to be followed. And, those were the projects that were initially funded by CLEPR.

May: So, over time this service goal grew in importance, I take it, as the educational goals were attained?

0:09:00

Kempner: Service was always in the background and it was certainly of interest to the Ford Foundation in setting up the 12 million dollar fund for CLEPR. But it was not the primary purpose of the early days. And, of course there's always a little of both. And it is not real life unless there is also service to clients and that was the idea behind this way of teaching.

May: I've had the opportunity to review some of the publications made by CLEPR leadership, reporting the bi-annual reports and that sort of thing and it recounts a really remarkable evolution in the numbers of clinics supported by the Ford Foundation through CLEPR. In 1969 there were 33 supported clinics; by 1970, 59; by 1972, 90. So this was remarkably successful in a relatively short period of time. Do you have a recollection of what the response was of the law schools as you made this money available to them on the condition that they create these live client clinics?

0:10:00

Kempner: The reaction of the law schools was, of course, favorable. They always like to bring in money. But this money came with very clear conditions and there was some resistance understandably, to those conditions. Bill Pincus was a

0:11:00

funds without achieving what the organizations sought to achieve and without a

0:12:00

quid pro quo, so that there was some resistance on the part of law schools who said, give us the money and let us use it as we see fit. There was pretty strict accounting – not only financial accounting, but program accounting – over what was to be done in the clinics and how they were to be managed and run. And there was also, in the early days, as there still is to some extent today, some resistance by the traditional academic faculty, to this new method of teaching; this new method of the clinic; of experiential training. There was the criticism that that was really not worthy of the dignity of legal education and this was turning law schools into trade schools. You know the argument. And that was something that was there at the very beginning and was gradually lessened as it became clear that these clinics were successful in the sense – not only that the students liked them and wanted to participate – but also we heard it from judges that the students who were involved in law clinics were prepared; that they appeared in court and did a good job and the judges liked these programs because they moved the docket forward.

May: You were a member of the firm of Webster and Sheffield in New York City for many years during this entire time.

Kempner: Yes.

May: In fact, from 1957 until you became Dean of Vermont Law School in 1991.

Kempner: That is correct. That was my first and only job.

May: Not according to your resume, however. You've done many things but that was your day job.

Kempner: Yes.

May: As a lawyer. Is that right?

Kempner: Yes.

May: Were there reactions within a firm such as Webster and Sheffield to these developments in clinical education? Did you start to see clinicians come through and people; clinicians in the law schools come into your firm and were they well prepared?

Kempner: I did a lot of interviewing of applicants for jobs at the firm. I visited law schools in that capacity and I, for one, always asked the students that I was interviewing whether or not they had taken clinical courses and how they liked them and what they learned, so that I attempted to encourage clinical education in that way, to show that a firm, such as mine, looked favorably upon students who had been, who had had some clinical courses and who were trained in that way.

0:13:00

May: And at the time you were promoting the development of the law school legal clinics, I take it you were also working with the judiciary on student-practice rules?

Kempner: Yes.

May: Tell me how that worked?

Kempner: CLEPR did a fair amount of that. CLEPR was really a broad-range organization.

0:14:00

It was, it did not limit itself to introducing clinical programs at law schools. It also worked on student-practice rules and it did a lot of publications so that the entire legal community would know what was happening; compare programs from one school to another to give deans and faculties of law schools an idea of

0:15:00

what was happening and to encourage the state legislatures to adopt student-practice rules by publishing that material and letting it be known what was happening. CLEPR also ran conferences, both local and national, on legal education and clinical legal education so that the word was spread widely as to what was happening and the developments and what schools could do to advance the cause of clinical education. And there was also the assessment of programs to see whether or not they worked or whether they worked effectively. Different programs were analyzed and described and all of that was written up and distributed to the interested public of law schools. So, CLEPR did a broad scale job of testing and seeing what happened and how students would perform, not

only on bar examinations, but in practice after they had graduated from law school, having had some clinical courses.

May: Now, during the time that you were on the CLEPR board from roughly, what, '68 to approximately '78, didn't you also serve as Chair of the Section on Legal Education?

Kempner: Oh, the American Bar Association?

May: The ABA, yes.

0:16:00

Kempner: I had been active in the Section of the ABA for some years and I served as Chair. I believe it was 1970, '71. The board of CLEPR, if I remember correctly, was appointed by three organizations: the American Bar Association, the National Legal Aid and Defender Association, and the Association of American Law Schools. Each appointed members to the board and then there were some members that were appointed at large. But that's how the board was designated and appointed. And I suspect that I was appointed by the ABA as a representative to the CLEPR board and served in that capacity.

May: You were in a unique position serving in that capacity then, to, shall we say, encourage the law schools to accept the overtures of CLEPR and the Ford

0:17:00

Foundation to take the funds that were made available and do you think that you were able to encourage many more to do that during that time?

0:18:00 Kempner: The history certainly indicates that a lot of schools developed clinical programs at that time. One of the reasons that there was the growth of clinical programs and the continuation of clinical programs in law schools was the manner in which Bill Pincus at CLEPR funded these organizations. There were a variety of models but the traditional model that he developed was a three-year grant, where each year the amount given was reduced. So it was a declining three-year grant given with the understanding that the recipient law school would make up the difference, so there would be a consistent level of funding over a three-year period. The law school was committed to continue the program in its regular budget after the three-year had run. This was the way to make sure that once the program had begun with foundation funds, it would not drop by the wayside after the foundation funds ran out but the school was committed to carrying it on in its own budget. And that was a very effective way of financing and that was Bill Pincus' idea and I think it was responsible for the continuation. Many foundation programs end when the foundation funding ends. Here, there was a requirement that it continue, and it did.

May: So, it's really a maintenance of effort plus it's really an increase in effort.

Kempner: Yes.

May: That he required

Kempner: Yes.

May: That you all required

0:19:00

Kempner: Yes. And, as you know, schools then went on and developed much larger clinical programs out of their own budgets and raised money for that purpose. Your clinic at Vermont Law School is a central part of legal education of American law schools and Canadian, I might say.

May: Yes, I noted that; CLEPR did actually give grants to some Canadian schools.

Kempner: Yes.

May: Right.

Kempner: Yes.

May: Max, if you have a few more minutes I'd like to ask you for your recollections of some of the people with whom you served on the CLEPR board. You've mentioned Bill Pincus several times.

Kemper: Yes.

May: Could you tell us a little bit about him?

Kempner: Well, Joe Harbaugh, who was a fine clinician and professor in legal education, described Bill as a ruthless philanthropist. I would describe him as a little bit more benign than that, but he was demanding. He was certainly demanding and he had a vision. He was a missionary. He also was an experienced philanthropist having been with the Ford Foundation for the good time. He realized that you can't just give away money. You need to get something in return. He developed the program to see it through. And, as I mentioned, that caused some resistance but it was effective. He had a vision; he implemented it; he spoke; used to give speeches all over the country. He visited law schools everywhere and he was a vital force in introducing the clinical movement. But he was also willing to listen to new ideas. He made some large grants to train clinicians. So, it was not just the relatively small grants to institute clinical programs but also some larger grants to institute that. And, he also gave funds to individuals who understood the educational underpinnings and the jurisprudential underpinnings of clinical legal education and I'm thinking particularly of Gary Bellow who, a brilliant professor at Harvard who developed the concept there. I might say that the major law schools in the country were reluctant in the early days to adopt these programs because they were well set and thought that their brand of legal education was

effective since it had started in the Langdell a hundred years earlier. And it was effective but gradually these major schools also developed clinical programs and now have very strong clinical programs.

But the people; the greatest joy to me in being involved in this enterprise was being able to associate with people such as Orison Mardeu, an experienced New York lawyer who was a kind of person who did not really have to think about whether particular conduct of his might be ethical or not. It was natural. It was the kind of person that he was. It was built into his very nature. He would be incapable of engaging in unethical conduct. He was a gentle man. A man who accomplished great things in the national legal aid and offender world. A man who saw his responsibility to the bar and to the community equally important as that of his responsibility to clients. A man who I admired enormously.

Whitney North Seymour who took over as chair of CLEPR after Orison Mardue's death was a giant of the bar. He was not only a splendid lawyer, he was the finest after dinner speaker I ever heard. I remember asking him once if he wouldn't loan me one of his after dinner stories which he kept written in the breast pocket of his jacket. And he said under no circumstances would he lend that to me. And I offered to rent it. He said under no circumstances. A delightful man; a leader of the bar in every respect; a good friend and a mentor of mine. I asked him once how it was that he had been so successful in the Supreme Court of the United States because at that time he had argued more cases in the Supreme Court than

0:24:00

0:25:00

anybody else; partially because he had been an Assistant Solicitor General. And I expected him to say, you know, I have a large law firm. I have much help; very able assistants and so forth and so on. No, that's not what he said. What he said was that when I analyze a case I look for the moral issue; the key moral issue where my client is right. And I take that issue and I argue it and I tend to discard all the various other issues that I might use and concentrate on that one moral issue where my client is right. And I think that's why I've been successful in court said Whitney North Seymour.

Florence Kelly was another member of the board. She was the Administrative Judge of the New York Family Court under who the entire family court system was modernized. And she brought about significant change for the better in the court system in domestic matters in New York. Another great leader of the bar.

There were so many others.

May: You mentioned Sam Thurman.

Kempner: Oh, Sam Thurman. What a giant he was. He was the dean of the law school in Utah; very much involved in national legal education matters. And another man whose ethical standards were so high that you could use them as a model. A mountain of a man; just a splendid person.

May: How about John Robb?

0:26:00

Kempner: John Robb, a practitioner from Albuquerque; devoted a good half of his working life to pro bono work of all different kinds; a model for young lawyers like me, for students, the kind of person who would appear before a judge, and would be effective with his honesty. The judge would recognize that when John Robb was there, he would get the truth.

0:27:00

Bob McKay, dean of NYU Law School; another person on everybody's list of favorite people and greatest lawyers and the greatest law school administrators. So, I'm mentioning only a few of my personal friends on that board. There were many others. Jim Nabrit, a splendid lawyer for the NAACP; a wonderful person and again, you have this quality of professionalism; of responsibility to a larger cause that was obvious and clear in everything he did and said. So, it was a wonderful group of people that had been assembled, I think, largely by Orison Mardeu and then by Whitney Seymour. Whitney Seymour had been President of the American Bar Association and of the Association of the Bar of the City of New York. And all of these people were giants. They were giants of the Bar and it was a privilege to be able to work with them.

0:28:00

May: Thank you. A couple more questions, Max. You mentioned earlier you served as dean of Vermont Law School from 1991 to 1996. I'm wondering what influence

you think your experience on the CLEPR Board and also your ABA Section work, had on the policies that you pursued as dean of Vermont Law School?

0:29:00

Kempner: Well, you know, we're all made up of our experiences over the years and it's difficult to spin out any one influence or another. I do know that my association with the people on the CLEPR board had a profound influence on my attitude towards the practice of law; toward the teaching of law; toward the role of law in the community and adherence to the rule of law. I learned that, not so much in analyzing CLEPR programs, which I did a good deal of, but I think the primary influence really were people who personified what we were trying to accomplish. That had it. I don't know where they got it. They had it.

May: From our point of view you brought it to Vermont Law School and I'm thinking of a couple of things that are examples of what you just talked about; what you brought from those experiences. One of which is that during your time as dean you oversaw a creation of tenure tract status for the two core clinical faculty. That must have given you some measure of joy and justification for all of your work.

0:30:00

Kempner: Absolutely. I mean, this is one of the issues that Bill Pincus at CLEPR worked toward; to give status to clinicians because at the beginning they were second class citizens. They were not on tenure track. They were underpaid. They were overworked. The facilities in which they worked were disgraceful in many

schools. And I think the clinical movement has come a long way. It still has a ways to go but has come a long way in giving status to clinical professors. And I'm very glad that that has happened at Vermont Law School.

May: We certainly appreciate it. And we also appreciate the fact that, in addition to seeing that the two core faculty were put on tenure track, you also supported expansion of the clinic to add a third attorney in his case with the U.S. Department of Justice grant to do domestic violence work. This also is a realization, I think, of some of the goals of CLEPR. Now we have four attorneys. Would you care to comment on the evolution of the clinic from the time you got here, which was, it was in some flux; by the time you left we had tenure track status for two and a third attorney doing domestic violence work.

0:31:00

Kempner: I'm very happy to hear that. I think the test is whether or not every student has the opportunity to participate in some clinical experience. Not that you can force students into it but you certainly can make it attractive. The tendency is for students to be enthusiastic about clinical work and that word spreads around the student body. You have people waiting in line to get involved and enrolled in these courses.

The other thing that CLEPR began to think about which needs to be thought about and which is now being thought about in legal education is sequencing.

0:32:00 Sequencing; that is to say, building the curriculum of the second year on the first

year and building the curriculum of the third year on the second year so that there is some logical progression in the education of students. For too long there was really no difference in courses given in the first, second or third year of law school. I think now there's much more of a tendency to sequence and to build on the experience of the first year and subsequent years. And that's something that CLEPR was interested in and attempted to pursue in its grant-making for clinical programs.

May: And that was certainly subject to discussion within the faculty and the curriculum committee during your time here?

Kempner: Oh.

May: The appropriate

Kempner: Every law school has been talking about that.

May: Right.

Kempner: And that's good.

May: Right. You mentioned that Bill Pincus was a visionary and missionary; someone who had an idea and moved it forward and, in the process, enticing law schools to

0:33:00 take this Ford Foundation money. With CLEPR 's rules and strictures he also developed a movement that began to expand and one of your goals was to circulate information about the clinical movement; the idea of clinics. I note that, and could hardly forget, that during your time as dean at Vermont Law School you encouraged and supported our faculty to do work in Russia under U.S. government sponsored rule of law programs. And I certainly have taken a very active part in that as have many other members of the faculty. We created the first modern day law school legal clinic in Russia; Petrozavodsk sister school. Petrozavodsk State University and that faculty there, along with us and people from ABS Sealy and other programs, have helped to spread that idea across Russia. We also provided significant library support and from these programs and others that our faculty did there's now; we've had a demonstration legal aid program and now they have their own federally supported legal aid program. A core of some of the early legal aid work and certainly a core of many of the law schools are clinics and this is for the entire Russian federation. Would you care to comment on that evolution?

0:34:00

Kempner: In a way it's easier to introduce clinics into legal education in some countries because the traditional training has been that of apprenticeship. And the clinic is closer to the apprenticeship model than it is to the Langdellian model of the United States. And, I think, there's a great benefit to students from having some comparative studies, including comparative legal studies in the clinic. So they see the approach; that the approach in their country is not the only approach. We

0:35:00

have a tendency to think that our method of legal education is the only method because that's what we know and are accustomed to. But it's very helpful to have a comparative analysis. Comparative law in general is a critical field of study that helps us to further the rule of law and improve the rule of law in the United States.

May: You were, among your many other achievements you also served on the Narrowing the Gap Study; the MacCrate Commission Report that actually was published while you were dean at Vermont Law School. Could you comment a little bit about the process that was followed and the creation of that and what you were trying to achieve and how that maybe fit into what CLEPR's goals were?

0:36:00

Kempner: Well, now that I think about it, Bob MacCrate, the chairman of the commission, had all the qualities of these other great lawyers that I mentioned. He is in a class with Orison Mardeu and Whitney Seymour and others. And he also is in a class with Bill Pincus because Bob MacCrate had a vision and a mission. And he did not allow this venture to become an interesting bit of academic research but he was interested in practical consequences. And, as a result, the MacCrate report is one which, for the first time, really describes in detail what a lawyer does and what a lawyer should be trained to do, so that there will be a connection – a nexus – between legal education and practice, which in the past had frequently been ignored or neglected. And, I think, as a result of the MacCrate report there's a better understanding by law schools of what it is that lawyers do and what law schools need to do to train for that profession. For example, the chapter in the

0:37:00

report that deals with skills and values that lawyers should have in order to be able to practice independently, is an important piece of work which has had a profound influence throughout American Legal Education as well as the practice of law.

0:38:00

May: And, as well, I might add in the evolution of the legal profession in other countries where American law school professors, lawyers, clinicians have gone beginning around the time you helped to initiate that work here around 1993, to help create new law faculties, new clinics and the like. It certainly was helpful to us when we went to the Russian Federation, newly formed, to have a book of that depth and caliber to show; to rely on, to use as basis for our comments about what American Legal Education was trying to do. I hope that it received as wide a distribution as you had hoped when you made it. It certainly seemed to me to be the only presence.

0:39:00

Kempner: It's been very widely circulated and discussed and written about. It's not a bibliography surrounding that which is interesting and which is still discussed. And it ties in with CLEPR because of the concern, not only with skills, but values. The statement is one of skills and values. And it's an interesting analysis of the value systems that the lawyers need to have in order to begin to practice independently.

May: Thanks very much, Max. Anything you'd like to add? I did note that you showed me at one point some medals that were given to you as a member of the CLEPR board commiserating the service of some of the folks with whom you served and of whom you've spoken. I think Orison Mardeu, Whitney North, Seymour, Florence Kelly are the three...

Kempner: Yes, yes.

0:40:00

May: ...persons depicted on those medals. We might have to take a shot or two of those for the posterity here.

Kempner: Yeah. Bill Pincus had the lovely idea of having these medals cast and giving one to each of the members of the board of the organization. And they now sit on my window sill at home and I think about the CLEPR days a lot because I'm able to hold these medals in my hand.

May: Wonderful, wonderful. Max, thank you very much.

Kempner: Pleasure.

May: Appreciate it.

Kempner: Would law schools have developed clinics as rapidly and as broadly as they did without CLEPR? I mean, what would have happened in legal education without CLEPR? My guess is that the time was ripe for experiential education and experiments had been going on before CLEPR, to some extent in that area. And that some law schools were developing their own programs of clinics. What CLEPR did was to accelerate the pace and to introduce clinical programs in law schools all over the country which otherwise, without the CLEPR funding would probably not have gotten off the ground, at least that early. So I think that CLEPR moved it forward and maybe as much as a generation. Otherwise, I think that the clinical programs would have developed much more slowly and without the philosophical jurisprudential underpinnings that were developed during the CLEPR period.

0:42:00

May: So much between like '91 and '94, let's say, when all of a sudden we had, I don't know which month, something happened first or second, but in the MacCrate report and then the tenure tract decision here, I guess it followed up on an ABA visit that it occurred maybe earlier under Doug Gottle's watch; whatever. But that all came tumbling down within the space of a couple of years and this place really significantly changed. But what really changed; I mean, what I see is a continuum between CLEPR and then the MacCrate report. The MacCrate report, I think really made the faculties listen in a way they had never listened before. It seemed like all the negative stuff – and there was a lot of it – really people taking shots, asides, under the breath comments, eye rolling, not listening; all that

0:43:00

stopped by about 94 with the MacCrate report. And then they knew; a lot of these faculty were around when CLEPR was being developed so they had it tucked away back here somewhere; but they had maybe; not all of them, but some of them had just sort of filed away under inactive. But I think MacCrate really renewed that whole thrust in legal education and brought it to the fore.

0:44:00

Kempner: I mean, one of the ongoing issues in legal education is cooperation among law schools, practicing bar and the judiciary. And for that matter, the bar examiners; another interesting issue. And, it's an on-going struggle. We need to continue to encourage dialogue and cooperation among those various branches of the legal profession. And, the MacCrate report helped move it in that direction. But it's not something that's ever solved. The dialogue needs to be stimulated again and again.

May: Right. Particularly as budgets shrink and new demands are made.

Kempner: Yes, yes.

May: Right. And the growth of many new areas such as international practice, changes in intellectual property law. Max, thank you so much. I really appreciate it.

Kempner: Well, it's a pleasure to.