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LUNCH ADDRESS

ASSISTING LAW STUDENTS WITH
DISABILITIES IN THE 21ST CENTURY:
BRASS TACKS

LUNCH ADDRESS
Washington, D.C.
Thursday, March 8, 2007

SPEAKER:
The HONORABLE DAVID TATEL
United States Court of Appeals for the District of Columbia

PROCEEDINGS:

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MARK NILES: Good afternoon, everyone. Hope you are enjoying your lunch. My name is Mark Niles. I am the Associate Dean for Academic Affairs here at the law school and I am here on behalf of the dean, who unfortunately could not be here today, and the law school to officially welcome you all to WCL for this conference. Also, to welcome Judge Tatel who has been kind enough to come by to share some conversation and remarks on this wonderful occasion.

Before I introduce Judge Tatel, who in the classic parlance needs no introduction, I just wanted to say a little bit about the conference from my perspective and the law school's perspective. This law school from its founding has been committed to public interest in the most central sense of the term, expanding legal education to a broader community of people from the outset of the law school, and also in the long term trying to instill among our students a commitment to, and an interest in public interest, serving the needs of people in our community, who really need lawyers and really need the kind of services that lawyers provide.

But equally as important within our law school community is making sure that we serve all the needs of all of our students from diverse backgrounds and with diverse needs, requirements, objectives, and barriers to their success. This kind of conference, addressing how schools can deal with these sorts of particular challenges presented and opportunities to be presented under these sorts of circumstances, is something that we are very proud to host. Also, I did want to say that my colleague and very dear friend, David Jaffe, does a wonderful job in addressing these issues tirelessly on a daily basis and his staff in the Office of Academic Affairs, the Office of Student—that is my office—the Office of Student Affairs and we are very proud of the work he does. I cannot imagine there is anyone in the country, in the law school or other higher education setting who thinks more and works more diligently on these issues, so we are very lucky to have him host a conference where these issues are addressed in this way by so many wonderful people from across the country. So, David, thank you very much and to your staff, thank you all very much.

Now I would like to again welcome and introduce Judge Tatel. Judge Tatel is a judge in the United States District Court for the DC Circuit. He graduated from the University of Michigan and the University of Chicago Law Schools, and at this point I am not sure if dates are really necessary for

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these sorts of things. I will leave that to him to tell you about, if he wants to. As we look here, he began in the late 1960's arguing civil rights cases for the Chicago firm of Sidley & Austin.

He then became the first director of the Chicago Lawyers Committee for Civil Rights and then later the director of the National Lawyers Committee in 1972. Two years later he joined the Washington DC law firm of Hogan & Hartson where, I am not sure if Judge Tatel remembers, but I also worked in the beginning of my career and we worked there somewhat together. In fact, Judge Tatel was the head of the law firm's education department and, while I was not lucky enough to work for him in the education department, just about all of the cool and interesting associates in the firm did work for him. So, I spent all my time when I was not working in their offices talking about all the cool work that they were doing, before I left for the Department of Justice.

Taking a break from the firm he went to the Office of Civil Rights in the United States Department of Health, Education, and Welfare to run that office from 1977 to 1979. Then he came to Hogan and ran its education group again. He was nominated by President Bill Clinton in 1994 to the seat vacated by Associate Justice of the Supreme Court, Ruth Bader Ginsberg, and has served wonderfully and to national acclaim and wonderful accolades from throughout the legal community both in Washington and elsewhere. It is an absolute honor to have Judge Tatel here at the law school to speak to you today and I give you Judge Tatel.

JUDGE TATEL: Well thank you for that lovely introduction and let me start by congratulating the law school, both for its focus on seeing law school as a way of educating people and to serve the public, which is a critical mission for law schools and for sponsoring the conference. It is a very important issue and I am personally delighted to see it receiving a lot of attention here at the law school. Thinking about educating students with disabilities is very important and I am glad to see it being done.

Let me begin with two caveats that may make you wonder why you asked me to speak. One of them is that I went through law school sighted, so in terms of the primary focus of your conference, namely making the law school work for students with disabilities, I did not have that experience. And second, if I had to describe what my true disability is, it is that I cannot type. I say that because from the perspective of blind lawyers virtually everything they need now is digital and for students who can type at a computer most of what they need is easily available online.

My problem is that, when I was in junior high school, it was the girls who were taught typing. I went to shop, learning to make a really, really good ash tray but I never learned to type. And I have thought about trying

to, but I have never gotten around to it. My wife is totally convinced that I would be extremely frustrated because even people who can see the keys end up typing on the wrong level. So, I have never learned to type.

My own personal experiences are, like I said, very different than the students who you have in law school today. But with that maybe it would be helpful if I just told you a little bit about my own experience and I have a few comments about the employment opportunities of students with disabilities, and then I would prefer to just answer any questions that you have, that might be the most helpful thing.

I lost my eyesight in my early thirties. I was the Director of the National Lawyers' Committee at the time. I have what is called retinitis pigmentosa, which is a fairly common cause of blindness and I knew I had it since I was a child but the normal course of the disease is that it progresses slowly and usually robs people of their eyesight in their thirties, which is exactly what happened to me.

When I began to realize that the disease was progressing rapidly, I did two things. First, I started using my secretary as a reader, which instantly made life a lot easier for me because I was able to read a lot faster, I was reading a lot slower as my eyesight deteriorated. So with a reader I was able to get back up to speed.

Second, I learned Braille. I should say I learned a bit of Braille, I went to a tutor every Thursday afternoon, but I never learned Braille sufficiently well to be able to read it. I can read numbers and letters but I really cannot read it. But fortunately for me what I did learn was to type Braille, and for many years even that was not particularly helpful to me. I had these old clunky Braille typewriters called Perkins Brailers, and I really only used it to keep a stack of cards with phone numbers on them.

The reason it eventually became very helpful to me is that I was able to learn to use a Braille n' Speak when it first came out. I first started using it in the early nineties, and the Braille n' Speak has become the most important tool I have. I never go more than two feet away from it, it is right here. It has everything in it that I need, and it is a wonderful note taker. My children refer to it as dad's brain.

Just in the past year, I have been using a more sophisticated Braille computer called a VoiceNote that has much more capability. I now use them both, it is like being bilingual and I am feeling pretty good about that because I was never able to learn another language so now I can use two different computers and feel bilingual.

But I hope to phase out the Braille n' Speak eventually; I now use the VoiceNote for writing and very rudimentary e-mail. But it has much more capability. So, I use the Braille n' Speak now primarily for note taking when I am preparing for oral arguments. I take my notes with it and I use it

on the bench.

In fact, when I first came to the D.C. Circuit, I was the only one with a computer on the bench, now they all have computers and are all very jealous of mine because I only have seven keys. The other judges all wish they had something like that. And of course they have screens, which I do not have to deal with, so I consider myself much more advanced than the rest of them. So the Braille n' Speak is a very important tool for me.

I also have a reader, in fact I have two readers, one who is a full-time reader and the other a law student who comes in on evenings and on weekends, so I have someone whenever I need them. And of course I have four law clerks. I use my law clerks just like any other judge uses them, except that we read aloud, which I have said this on other occasions, just to show you that every cloud has a silver lining, one of the things I have discovered while I have been on the bench is how valuable out loud reading is to quality writing. I do not know if there are any professors here who teach legal writing, but have your students experiment with reading what they have written out loud and you will be surprised with the extent to which you will discover not just technical problems but thinking problems in what you do.

In fact, my wife has been telling me that for years. She used to be an English teacher and she taught English writing here at AU, and she was one of the first to run a program where all the writing was done on laptops. The theory, of course, is that the laptop makes it much easier to correct and she would always have her students read out loud what they wrote. So, reading out loud is really an important part of quality writing and I actually think most of my law clerks leave the job doing that as part of their regular work.

Now being on the DC Circuit is not exactly a typical job. In fact it is a pretty good job for me. I mean, I did practice for twenty years without sight. The advantage to this job over the other jobs is I do not have to travel; I do not have to deal with clients; I do not have to keep track of my time. These have nothing to do with not being sighted. But in many ways for me and my disability, the DC Circuit is a pretty good place to work because it is confined and I do have so much support. I have to keep reminding myself that my experience is far from typical.

Maybe I will spend a few minutes about my experience practicing law, which is a little more relevant to what your graduates are going to face, even though they have some technical skills that I do not have. While I was in the process of losing my sight, I moved from the Lawyers' Committee to Hogan & Hartson. I had worked with the firm on some civil rights cases, so the lawyers in the firm knew me, and asked me to consider coming over there when I was done at the Lawyers' Committee. Of course, one of the interesting questions was, "well okay, so how are you going to

function?” At that point I had one of these TV screens, I think it was called an Apollo, and it enlarged print onto a screen with reverse contrast. At that point I could use that fairly well.

But the firm had never had a lawyer with a disability and it had never had a young lawyer with a disability, which is an important thing to remember. Because many older partners have disabilities, law firms have always had to deal with the disabilities of older partners it is just that they had never thought about them in the same way they deal with the disabilities of new hires. With older partners, either becoming immobile, losing their sight, or losing their hearing, law firms struggled with that for a long time, but as I said they did not have to deal with it with the young ones. It should not have made any difference, but still it was an issue people thought about.

The firm’s attitude was, and remember this was also pre-ADA, this is before the Americans with Disabilities Act was passed and Hogan & Hartson certainly was not getting federal funds. The regulations were inadequate. So the point is they had no guidelines to look to and their view basically was, you know, “whatever you need, just ask us.” So, we worked out at the beginning that I would have a full-time secretary, this is at about the point that law firms were moving away from that because they were trying to cut costs. So I had a full-time secretary and I had my little TV set which I had purchased. I needed a couple of extra Dictaphones; the firm bought those and was perfectly supportive of all that.

And that worked just fine for a couple of years, really no problem. Then I went off to HEW during the Carter administration and when I came back, the economics of law firms had really changed a lot. They were becoming much more attentive to their costs because firms were becoming more competitive. At the same time, the computer was becoming much more wide-spread. At the time, I am talking about 1979, when I joined the firm, the first generation of computers were coming online, and so lawyers were beginning to share secretaries. I felt uncomfortable having a full-time secretary, the firm said, “sure if you want one, fine.” I just felt uncomfortable with that, since no one else had one, and so I shared my secretary with others but we worked out an arrangement for a few years where secretaries who were not busy would serve as readers for me, so I had a pool of them. That actually worked out pretty well, it turned out not to be hard to manage and the secretaries liked it and it worked fine for me.

I was able to do that without increasing the cost to the firm and I felt good about it. Then we began to experiment with a new model which actually ended up working much better—not only were computers coming online but so were paralegals. Law firms were discovering that paralegals were a very efficient way to do a lot of work and it was extremely

profitable, because you pay them little and charge a lot which is the secret to why law firms make a profit.

By then I was getting pretty busy with litigation, and education as mentioned was thriving. We were able to keep a bunch of paralegals busy in that group. What we ended up doing is the firm was able to hire a paralegal for me each year and I was able to give the paralegal enough billable work so that in the end they were not a loss to the firm. I used the paralegal maybe half-time for reading but because the paralegal had billable work the rest of the time, the firm was not making any money on that paralegal—however it also was not losing any money. So, again, the firm was very supportive and probably would have been happy giving me a full-time paralegal under any circumstances.

I mention all of this because the experience that I had showed me, and this is, I think, a lesson students need to learn as they begin to go to law firms, that is the process of negotiating with the firm. Both sides understand each other's needs. And it worked pretty well for me. The firm was very sensitive to my needs. In all the years I was there they never balked at something I needed. They bought the Braille n' Speak, which really was not an issue because other lawyers in the firm had computers. As I said, they bought the tape recorders that I needed but it worked because I was sensitive—tried to be sensitive—to the economics, so it worked really for me.

After I had been there a few years, another young lawyer joined the firm who was blind and he, for whatever reason, would not ask the firm for help. It became overwhelming for him and things just did not work out. It was just because he did not ask and my experience, my own personal experience has been, and I have talked to a lot of blind students that have gone to law firms, if both sides understand each other and are sensitive to each other's needs the process can work for both sides.

Let me say a couple of things about work then I will answer your questions. Obviously, one of the things I am sure your students with disabilities have on their minds is, "so I graduate from AU or whatever law school, how do I get a job?" And by the way, remember that I can really only speak to the experience of the blind. I have never used a wheelchair and I have never been deaf. I am sure those disabilities create different challenges than being blind. So, all of my comments are pretty much focused on that.

But a couple of things about what you can be telling your students. Number one is that the very best employer for students, for lawyers with disabilities, is the United States government. Government is great. I happen to think there are other very good reasons for working for the government. But the government, for a lot of reasons that you obviously

all know as well as I do, is a very good employer. The government has all kinds of resources for employees with disabilities. I have had two stints in the government: at the Office of Civil Rights in the seventies and now almost fifteen years in the courts. The government has always been very supportive for anything that I have needed. Nobody has ever asked, in fact, they have suggested that I buy things that I do not even think I need. The government also has all kinds of interesting training resources and facilities. I do not know if it still does but the justice department used to have a technology center with equipment for people to look in to use.

So, the government is a great place whether you have a disability or not. If this were a different conference I would tell you all the non-disability reasons that working for the government is a very important thing to do. But anyway, so government is a good place and the students should not feel at all that they are not seeking the best place by seeking work with the government. I mean, the government is not perfect. We see cases in the DC Circuit all the time of discrimination against employees with disabilities, no question, and some of the practices I have seen in some agencies are pretty awful. But overall it is a positive place to go to work.

Law firms, I think, again I have not been in a law firm in fifteen years, I am a little out of it, but I do know from people I have talked to and conferences I have been to that firms are increasingly sensitive to this aspect of hiring; they know about their legal obligations—at least I think most of them do. I have been to several conferences that the ABA and others have put on that are actually focusing on law firms, helping them understand their responsibilities and how they can make hiring lawyers with disabilities work for both sides. As you all are essentially your students' representatives to the bar, then who better to remind the legal profession of its legal responsibilities than law professors? They need to know and you are in the best position to explain to them that this is an issue they need to think about carefully. Not just because it is good for them but because if they do not, if they are not careful, they themselves could get into some legal problems.

The real reason it seems to me for firms to be interested in hiring students with disabilities has nothing to do with either their legal obligations or charity or anything else. There are a lot of people graduating from law school. Law firms have no trouble finding really good smart young people to be lawyers. People who have gotten good grades, people who can learn how to do legal research—they can find those people. But in legal practice you need other kinds of people also. You need people who are tough, you need people who know how to deal with difficult situations, you need people who have good judgments, and there is no better pool of people, I think, for law firms to find than students with disabilities who have gone through law school that way. I mean, I did not. I said at the

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beginning I went through law school sighted and I have to tell you, the admiration I have for students who are going to law school without sight is enormous, and if I were hiring a person in a law firm, somebody who accomplished that, who did it and got the same grades everybody else did, is someone I would like working for me.

I think that is a message that you can pass along to the firms who are interviewing at your law schools so that they think about hiring not just in terms of their legal responsibilities or that it is the right thing to do, but it is deeply in their own professional interest as a law firm to hire people that have accomplished what students with disabilities have accomplished. So, I said I would say a few things and answer any questions you would have, so what do you want to talk about?

Nothing?

Yes, in the back.

AUDIENCE MEMBER 1: Judge Tatel, you spoke to your experience personally, could you speak more generally to what it is like for a law student to suddenly be trying to . . . about the track record.

JUDGE TATEL: Yes, in fact, I do not know anything about the track record but I do know that I got a call from somebody I know in the Second Circuit, the Third Circuit, who had a law student who is blind, had the same disability that I deal with. That was a very prestigious clerkship; in fact, he just argued a case before us two weeks ago, he is at the Department of Justice. So, the answer is I do not know what it is, but I do know over the years a number of judges have called me and said "I am interviewing a blind student, what should I think of that." So I know judges are thinking about it, I do not know what the experience of the judiciary is, I do not even know if we have any data. You might ask the administrative office that kind of interesting question. Judges are very secretive about their clerks.

AUDIENCE MEMBER 2: Judge, a question came up early on about when is a good time if and when a student with a disability can disclose that disability during an interview, what is your take on that?

JUDGE TATEL: Is that not an issue that is kind of all wrapped up in legal principles? I mean, you probably know that better than I do. I know the employer is not entitled to ask until an offer has been made, is that not right? Is that not the law? The law I know by the way is the law of the last case I heard. I have not heard one of those so I am winging it here on this. But I do know, obviously there are some disabilities that you cannot

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disclose just because of who you are. It would be hard for me to interview for a job and not disclose that I am blind, but the hidden disabilities, I think as I said the law is pretty clear, you do not have to disclose it, and the employer can not ask about it.

AUDIENCE MEMBER 3: Judge, this is actually a follow-up to that and understanding, I think, what you said about the law, I, maybe at least my question would be as a practical matter if you have an applicant who had a learning disability let us say, having worked in, particularly thinking about the law firm context, do you think it would be prudent for that applicant to talk about their disability and it might be dependent on what kind of accommodation they were seeking or does your sense of working in a law firm suggest that you would be better off trying to do the work without disclosing that and then if it came up later try to get to that?

JUDGE TATEL: I think it depends on your record. I mean if you were high in your class and you got really good grades, the law firms will hire as many people as they can get. In that kind of situation I think it would be fine to just disclose it because I think the firm probably wants to hire you anyway, but that is just a guess. I mean as an employer if I were hiring someone, I guess I would want to know that, I would not hold it against the person who had not told me but it seems to me that I would want to know. But again, I think there are legal limits on what I can ask; it is not an issue that I have much experience with. I do know that is exactly the question that someone asked me at an ABA conference of law firms—that was the very first question.

AUDIENCE MEMBER 3: We at least waited.

AUDIENCE MEMBER 4: Is it true that once an offer is made that if a person has a disability that might require some assistance that it is better to disclose, because if you do not, if you check off no, then the employer is not obligated to, insurance wise,

JUDGE TATEL: I do not know

AUDIENCE MEMBER 4: health insurance wise to cover those costs.

JUDGE TATEL: I am sorry, I do not know.

AUDIENCE MEMBER 4: But if the person does disclose a disability once hired and if they were to become sick then the employer's obligated to

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cover some health cost.

JUDGE TATEL: I am sorry, I just do not know the answer to that. That is an interesting question.

MARK NILES: We will have to get some verification on that from other experts. Any other questions for Judge Tatel? Yes.

AUDIENCE MEMBER 5: I took my name tag off because I do not want to implicate my school. But, we have a blind student at my school and what I have noticed in relationship to her around the school is that the professors are frequently reluctant to exercise the Socratic Method on her, in particular, what would you say to those certain professors?

JUDGE TATEL: Ooh, I would say they are making an enormous mistake. I mean, it is hard for me to imagine why they would. I guarantee you this fine lawyer that argued before us two weeks ago and the judges were not the least bit reluctant, I mean he got a real experience in the DC Circuit. I can not imagine why a professor would do that, and I think the best thing for your friend would be for you or others to bring that to their attention. I do not know whether you would be comfortable doing it, but if this is a friend of yours, I think a law professor would really want to know what he or she is doing is not helping that student, much less helping that student in terms of her relationship with her classmates, right?

AUDIENCE MEMBER 5: Right.

JUDGE TATEL: So I would go back to school tomorrow and tell that professor about it.

AUDIENCE MEMBER 5: Thank you.

MARK NILES: And have them see Judge Tatel.

JUDGE TATEL: Tell them to call me. What else? That is the kind of question I can go for.

MARK NILES: I see a lot of smiling faces out there, questions coming.

JUDGE TATEL: Alright.

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AUDIENCE MEMBER 6: I do not have a question but I just wanted to add that we had a student who was blind, who was phenomenal when called on because she had a memory that was just amazing. You know, she could memorize everything about the cases for every class because she never knew when she would be called on, so they are missing out on a great opportunity.

JUDGE TATEL: That is true, I mean people, you accommodate, you develop other skills to accommodate for a loss of skills and that is a typical example. I used to be able to remember everything until I got my Braille n' Speak and now I write notes. So even that facility has atrophied.

AUDIENCE MEMBER 7: In terms of the students' preferential accommodation, or as a lawyer in the field, how would you advise that? If a student says, I do not use computers a lot so what I really need is a reader? That is obviously way more expensive than getting documents put into Word. How do you, what do you see? I know that legally all you have to do is provide a reasonable accommodation but trying to make it more humanistic.

JUDGE TATEL: Do you have a specific case?

AUDIENCE MEMBER 7: Yes I do.

JUDGE TATEL: Oh, really? Because my answer was, I probably should not give the answer, my answer was going to be, I would be surprised that there are such people anymore because.

AUDIENCE MEMBER 7: I was too.

JUDGE TATEL: I do not know what to tell, I just do not know. I think that is an issue that you should probably, are you from a law firm?

AUDIENCE MEMBER 7: No, I am from Georgetown Law School actually.

JUDGE TATEL: Oh, so this is a student.

AUDIENCE MEMBER 7: It is a student.

JUDGE TATEL: Who wants a reader.

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AUDIENCE MEMBER 7: Who actually is working now and has a reader at work, but is

JUDGE TATEL: I do not know what to tell you. I think you should probably talk to lawyers at the school to figure out what your legal obligations are there. The concept of reasonable accommodations is certainly flexible and I do not know. I am sure there is case law on this. I do not know how you would, I am sure that reasonable accommodation for students who can use a laptop is different than reasonable accommodation for me. I do not know how it fits in the ADA. Sorry.

AUDIENCE MEMBER 8: I think what you look at is the end following the means. What the end has to be is effective communication and if the communication through the laptop is not going to be effective for that particular student, for whatever reason, then she has got a right to demand the reader instead of the computer or the digital transcription. So I think, really what we have to look at is what does she get rather than how does she get it.

MODERATOR: Well, Judge Tatel, thank you so much.

JUDGE TATEL: You are welcome.

MODERATOR: We have a small token of appreciation that you are welcome to open now.