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A Tribute to Judge Donald P. Lay

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For more than twenty-five years, Judge Lay has served the people of the Eighth Circuit, first as a circuit judge, then chief judge, and now as a circuit judge with senior status. He has also given of himself to the legal community in other ways: as lawyer, law school professor, author, and mentor. I was privileged to have been his student in his seminar, Recent U.S. Supreme Court Decisions, at William Mitchell College of Law. My first glimpses of the Judge disclosed to me that he was a man who knew the law well, attended to it carefully, and most importantly, believed in it passionately.

Throughout the year in which I was privileged to serve Judge Lay as a law clerk, I was allowed to see the judge’s human side. The judge always treated his staff as family. He and his wonderful wife, Miriam, carved time from already too-busy schedules to entertain us on an ongoing basis. He took a real interest in us and was genuinely concerned about our personal lives. He tried hard to allow us to meet the demands of our outside lives. One day, I received a call from my day care provider to tell me that my five-year-old son had become sick. Judge Lay asked me how fast I could get there, and there was no question about where I should be.

This is not to say that the judge did not demand hard work and an excellent product. The judge demanded of us what he demanded of himself: determination to complete the project, a willingness to do whatever it took, and intellectual honesty.

Of all the judge's fine qualities, in my mind, there is one which really sets him apart and which demonstrates the finest judicial ideals. This quality is his absolute passion about the law. The judge believes, and the word “believes” is so inadequate to describe how this affects him, that the law really means something—that it means freedom, justice, order, and the foundation for civilization. Most important, Judge Lay believes that, in America, the law is for every person. I hope to

illustrate through the use of three cases heard during my clerkship how the judge's philosophy manifested itself.

_Burger v. McGilley Memorial Chapels, Inc._,¹ was the first case I worked on during my clerkship. Burger was a fifty-seven-year-old embalmer who had worked for many years for the McGilley brothers. When the two brothers sold the business to the "next generation," the new owners decided, for some still-unexplained reason, to force Burger out. Soon after the changeover, the new management told Burger to resign or get fired and probably never work again in that city. He refused to resign and was fired. Thereafter, the young McGilleys told one of Burger's prospective employers that they fired Burger because he was working for other mortuaries while on duty at McGilleys.

Burger sued, claiming that he was illegally fired because of his age and that the McGilleys had slandered him. A jury found against him on the age-related claim but found he had been slandered and awarded him $85,000 in punitive damages. The trial judge affirmed the jury verdicts of the discharge and slander but set aside the punitive damages award.

Judge Lay read the entire record, as he does with every case he decides, and was very troubled. There was considerable evidence supporting Burger's claim of malicious slander. Judge Lay carefully raked through the facts in the record and traced the law on actual malice. He concluded that Burger had met the standards entitling him to punitive damages, so he reinstated the jury's $85,000 punitive award. Judge Lay was very concerned that the law had not "done right" by Gerald Burger.

The second case, _Estis v. Bowen_,² was a Supplemental Security Income case. Estis was a forty-two-year-old woman with a tenth grade education. She suffered from severe asthma and, due to the numerous medications she took, had many side effects, including obesity. She claimed that she was disabled due in part to the asthma and in part to the side effects of the medications. Her claim was denied.

Under the law, Estis was entitled to appear before an administrative law judge to present evidence to contest the denial of her benefits. A reading of the record revealed that the ALJ had

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¹ 856 F.2d 1046 (8th Cir. 1988).
² No. 88-539 (8th Cir. 1989).
been flippant, insensitive, offensive, and rude to Ms. Estis. Judge Lay wrote, "This court finds that the ALJ's insensitive demeanor and flippant comments at the hearing of this matter were inappropriate and give the appearance of impropriety and bias. Estis was not given a fair and impartial hearing as required by due process." Ms. Estis' case was reversed and remanded for a new hearing before an impartial judge.

Judge Lay could have stopped there. But, disturbed that the ALJ's inappropriate behavior had harmed the fairness of the hearing, the appearance of justice and, ultimately, the integrity of the process, he wrote to Louis Sullivan, Secretary of Health and Human Services, saying:

When an administrative law judge is demeaning and flippant and fails to offer courtesy to claimants who are ignorant of the law and its procedures, it seems to me that the integrity of the entire judicial process is challenged.

I hope you will continue to encourage administrative law judges, who have greater contact with the public than most judges throughout America, to treat claimants with the utmost courtesy and with the greatest degree of fairness. 4

Secretary Sullivan responded that, as a result of Judge Lay's letter, the particular ALJ had been counseled by his superiors. 5 Also as a result, judicial demeanor was added as a topic for the continuing education programs attended by ALJs. The whole legal process was strengthened because Judge Lay cared and because he acted.

The final case is United States v. Spotted War Bonnet. 6 In that case, the defendant, Roy Spotted War Bonnet, had been charged with sexually abusing his two young daughters. Relying heavily on the testimony of the two girls, who had been repeatedly questioned using anatomically-correct dolls, Spotted War Bonnet was convicted.

A panel of the Eighth Circuit affirmed the conviction, but Judge Lay posted a strong dissent. Although the charges of sexual abuse of children were disgusting, and everyone shared

3. Id., slip op. at 3.
6. 882 F.2d 1360 (8th Cir. 1989), vacated, 110 S. Ct. 3267 (1990), on remand, 933 F.2d 1471 (8th Cir. 1991).
a desire to protect the victimized children, Judge Lay scrutinized the record closely to ensure that Spotted War Bonnet had received a fair trial. He was alarmed at what he found. In the social worker’s and psychologist’s zeal to protect the children, they had unknowingly manipulated the children into coached admissions. Judge Lay wrote:

The protection of young children from sexual abuse is certainly a worthy goal. The age of the child often makes these cases difficult to prosecute. However, while the protection of the child is of course an important societal interest, due process of law and the presumption of innocence cannot be waived for those who are accused in sexual abuse cases. The Government’s proof must be trustworthy and reliable. The trial court must ensure that the evidence is competent and not subject to suggestion and manipulation. Suggestive pretrial interviews, repeated over and over by experts trained in psychology, cannot rule the day simply because the defendant has been accused of sexual abuse. Every defendant no matter how disgusting or heinous the allegations, deserves a fair trial. The law demands it. 7

Once again, Judge Lay’s deep conviction that the process, the fairness, and the integrity of the law is to be cherished and protected gave him the insight revealed above.

The Supreme Court granted certiorari 8 and remanded Spotted War Bonnet to the Eighth Circuit to be reconsidered in light of Idaho v. Wright. 9 On remand, the Eighth Circuit reaffirmed Spotted War Bonnet’s conviction. 10 Again Judge Lay dissented. 11 Although certiorari has now been denied, 12 Judge Lay’s dissent still stands as an admonition to those who would join in “witch hunts” of those accused of heinous crimes. Testimony of children must be carefully elicited to prevent the “unnecessarily suggestive” quality apparent to Judge Lay in Spotted War Bonnet. 13 Some might think that Judge Lay had a lot of courage to articulate what might be perceived as an unpopular position. But I really do not think courage had much to do with it. The judge believes, in the fabric of his soul, that the

7. Id. at 1375 (Lay, C.J., dissenting).
11. Id. at 1475 (Lay, C.J., dissenting).
13. Spotted War Bonnet, 933 F.2d at 1478 (Lay, C.J., dissenting).
process, fairness, and availability of the law to every person is its strength, its truth, and its essence.

Through these three cases, I have attempted to show the quality of Judge Lay which impressed me the most: his burning love for the law. It has been my great honor and privilege to serve this man who has served the law so well for so long.