Judges Profile

Hon. Donald P. Lay

By
William J. Egan

"I believe that the practice of law is the greatest and most satisfying profession in the world. I have great difficulty in perceiving how lawyers can become frustrated and disillusioned if they dedicate themselves to the reason the legal profession exists: to serve other people."

— Hon. Donald P. Lay
Law: A Human Process

There are few judges in the state or federal judiciary who have had more distinguished careers than Senior Judge Donald P. Lay. Judge Lay has served our federal judiciary for a third of a century as judge, chief judge, and now senior judge for the Eighth Circuit Court of Appeals. His tireless and prolific work during that time, both on and off the court, serves as an example with what is right with the legal profession and with the judiciary.

Judge Lay resigned from active status in 1992, after 25 years on the bench, 12 as chief judge. Since that time, he has continued to serve the country as a senior judge and still maintains a remarkable pace and workload. He sits several weeks per year on the Eighth Circuit and frequently sits as a visiting judge on other circuits. In addition to his caseload, Judge Lay has also continued serving academia as a professor of law, a long-held practice that he established while an active judge. From 1992 through 1996, he served as a professor of criminal procedure at the University of Minnesota Law School, and now sits as a distinguished professor of law teaching both civil and criminal procedure at William Mitchell College of Law in St. Paul.

In 1996, Judge Lay wrote and published a book with the assistance of one of his former law clerks, Dan Oberdorfer, titled: *Law: A Human Process*. Written as a practical guide for law students and newer lawyers on the real work of a trial lawyer, the book is filled with interesting anecdotes from Judge Lay's experiences, primarily from his years as a trial lawyer. The book covers a variety of issues, including the attributes of a good trial lawyer, properly preparing a case for trial, working with juries, handling appeals and dealing with difficult lawyers, judges, and clients. Although the book was written for the neophytes of the profession, it also serves as an excellent reminder to more experienced lawyers about what it means to be a lawyer, and how rewarding the profession of law can be, especially for trial lawyers who are serious about their work and their responsibilities.

How Judge Lay came into the profession of law is an interesting story. He was born in Princeton, Ill., and his family later moved to Iowa City. As a child, he had early aspirations of becoming a lawyer. He abandoned that idea when his seventh grade basketball coach, for whom he had great respect, asked what he wanted to be when he grew up. When the federal judge-to-be replied that he had designs on becoming a lawyer, the coach replied, "That's foolish! Lawyers are a dime a dozen."

After graduating from high school and serving a short stint in the Navy, Judge Lay was selected to attend the U.S. Naval Academy, but a football injury at the academy led him to enroll at the University of Iowa where he obtained a bachelor of arts degree in 1949. Upon graduation from college, Judge Lay tried his hand at sportscasting, teaching, and eventually secured an offer to serve as an executive in the Boy Scouts of America organization. But he needed a car, and did not have the money to pay for one. He wrote to an uncle who was a successful lawyer in Chicago asking if he could borrow $500 to purchase a Kaiser Frasier automobile to carry out the duties of his new position. The uncle wrote back with this advice, "Scouting is a great vocation, but I don't think it is a very good vocation. You have always liked debate and politics, have you ever thought about becoming a lawyer?" This inquiry rekindled the childhood dream and Judge Lay immediately enrolled in the University of Iowa's law school.

After graduating from law school in 1951, Judge Lay went into private practice for 15 years, the first six of those years at the Omaha law firm of Kennedy, Holland, Delacy and Svoboda and the Milwaukee firm of Quarles, Spence & Quarles. In 1957, Judge Lay returned to Omaha where he started a firm with his lifelong friend, Leo Eisenstatt. His experiences as a trial lawyer, handling virtually every kind of civil matter available, both on the plaintiff's side and the defense, shaped his judicial philosophy.

On Aug. 26, 1966, President Lyndon Johnson appointed Donald Lay, at age 39, to the U.S. Court of Appeals for the Eighth Circuit. At the time of the appointment, Judge Lay was the second youngest appointee ever to the Court of Appeals. In 1980, Judge Lay became chief judge, a position he would hold for the next 12 years until Jan. 7, 1992, when he took senior status.

In his nearly 33 years of service as a federal appellate judge, Judge Lay has decided over 2,000 appeals. He has authored 1,000 majority opinions covering virtually every aspect of the law. He has also written hundreds of dissenting and concurring opinions. Those who know Judge Lay agree that he has great compassion for people, especially those in greatest need of good lawyers and the protections of the courts. That compassion is reflected in his work. When asked what were his most important decisions, Judge Lay hesitated and asked, "In what area?" Not surprisingly, he cites as his most significant decisions several cases involving individual rights and liberties.

It is also interesting that nearly half of the decisions he

notes as his most important are those on which he wrote dissenting opinions. For example, he lists *Chambers v. Omaha Girls Club Inc.*, 840 F.2d 583 (8th Cir. 1988) (Lay, C.J., dissenting), where the majority upheld the right of the Omaha Girls Club to terminate a pregnant employee, who was single, on the grounds that she did not meet the club's "role model" requirement. Another is *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983) (Lay, C.J. dissenting) *rev'd sub nom.*, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), where Judge Lay dissented from majority holding that the Jaycees' right of association outweighed the state interest in prohibiting female membership. In *Morrissey v. Brewer*, 443 F.2d 942 (8th Cir. 1971) (*en banc*) (Lay, J. dissenting), *rev'd*, 408 U.S. 471 (1972), the Supreme Court adopted Judge Lay's dissenting viewpoint that prisoners have a right to due process in parole revocation proceedings.

Judge Lay also passionately believes in the rule of law and maintains the supremacy of the rule of law in even the most difficult cases. An example of this passion is reflected *in United States v. Spotted War Bonnet*, 882 F.2d 1360 (8th Cir. 1989) (Lay, C.J. dissenting), *vacated*, 100 S.Ct. 3267 (1990), a dispute over procedural and evidentiary issues leading to the conviction of a child sex abuser. After conducting a painstaking review of the record, Judge Lay wrote in dissent:

> The defendant has been sentenced to prison for 15 years on the most unreliable, suggestive, and manipulated evidence contained in any record that I have ever reviewed. At the outset, I wish to acknowledge that minor children are in grave need of protection against sexual abuse. At the same time, this case makes manifest that in child sexual abuse cases we need to bring to a complete halt cursory appellate review, performed under the guise of deference to "the trial court's discretion," of the admissibility of hearsay and suggestive testimony. Innocent citizens must not be deprived of their liberty without a fair trial, competent evidence, and due process of law simply because they have been accused of child abuse. Our zeal to protect young children from sexual abuse should not allow courts to ignore or to diminish the constitutional rights of any person, even those who stand accused of heinous crimes.

882 F.2d at 1364.

Of great interest to Judge Lay throughout his career has been in the area of judicial responsibility and the proper administration of justice. As chief judge, he played a pivotal role in the Judicial Conference of the United States, and throughout his long career, served on a variety of Judicial Advisory Committees. He is passionate about the proper, prompt and effective administration of justice. An example of this passion can be found in his recent opinion in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997), a seemingly endless class action sexual harassment case. Writing for the majority in ordering a remand, Judge Lay noted the court's distress over the length of time, 10 years, that the matter had been pending in the courts. Citing the political wrangling in the executive and legislative branches over the two judicial vacancies in the District of Minnesota, as well as the lawyers in the case "who delayed its resolution by exercising senseless and irrelevant discovery, and by making endless objections at trial," Judge Lay urged all parties to bring the matter to a prompt conclusion. Judge Lay wrote:

> This case has been pending for almost 10 years. The final chapter is yet to be written. No one can expect that justice will be rendered to any of the parties when a final opinion is issued more than 10 years after this litigation commenced. ... If our goal is to persuade the American people to utilize our courts as little as possible, we have furthered that objective in this case. If justice be our quest, citizens must receive better treatment.

130 F.3d at 1304.

When Judge Lay wrote in his book, "I believe that the practice of law is the greatest and most satisfying profession in the world," it is clear that he sincerely meant it. That belief is reflected in the his work over the past half century as a practicing lawyer and appellate judge. In a day when so many are lamenting the current state and status of the legal profession, Judge Lay's work serves as an ongoing example of what is right with the profession of law and with the judiciary. ■

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