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THE HONORABLE LEONARD P. PLANK, COLORADO COURT OF APPEALS

LYNNE MOORE SIEGEL*

PERSONAL BACKGROUND

Judge Leonard P. Plank of the Colorado Court of Appeals was born on the Fourth of July—a fitting birthday for this highly spirited man. At the time of his birth in 1932, Plank's family lived in Gunnison, Colorado, on the Western Slope. Several years later, they moved to Denver, where Plank has lived most of his life.

Plank's father was an eminent Denver surgeon, while his mother worked in their home raising five children and devoting extensive time to community and church activities. Plank and his four siblings were a lively bunch, but their feisty mother kept everything running smoothly. The Judge's upbringing was typical of a traditional Irish-Catholic family of the time. Church, hard work and a joy of life influenced the young boy.

After attending Regis High School, Plank continued his education at Regis College. Involved in politics on campus, he was student body president during his senior year. In 1954, the Judge obtained his degree in history. After college, Plank was drafted into the army.

While in the military service, Judge Plank married his high school sweetheart, Patricia Ann Fallon. He and Pat have six children, Mary Pat, Leonard, Marty, Kathleen, Paula and Nancy. The Judge is a devoted family man whose six children were already born when he began his judicial career. Once when Plank was asked "What is it like to have six children?" he responded with a laugh. "The only people in the world that would understand it are those that have five teenagers at once. Nothing more needs to be said."

EARLY LEGAL YEARS

During his time in the army, the Judge seriously contemplated the career he wished to pursue. He decided on law, in part owing to his interest in history. Judge Plank thought the concept of precedent in the law gave society the opportunity to govern itself today based on the lessons of yesterday.

Plank attended night classes at the University of Denver College of Law and worked during the day in the clerk's office in Denver District Court to support his young family. In time, he became the substitute division clerk and worked with each of the judges then sitting in Denver Dis-

* Colorado College (B.A., 1979); University of Denver (J.D., 1983); private practice (1983-89). The author was a clerk to Judge Plank in Denver District Court and the Colorado Court of Appeals.

trict Court. This experience later influenced Plank's decision to become a judge as well as how he would conduct himself in court.

Plank graduated from law school in December of 1960. He took the bar exam the following February and as soon as the bar results were released, he became a Denver deputy district attorney. During his four years with the District Attorney's office, Plank prosecuted criminal cases that ran the gamut from murder to larceny. A judge that Plank appeared before praised him as a well-prepared gentleman in court.

After only eighteen months at the District Attorney's office, Plank experienced his first major encounter with the press while prosecuting a test case involving a new antipornography law. In preparation for trial, Plank checked out the allegedly lewd movie from the police evidence room. When the movie could not be produced at the time of the trial, the case was dismissed. Fingers pointed at the young deputy district attorney with the insinuation that he "lost" the evidence. After much ado in the newspapers, a humiliated police chief issued a public apology to Plank when a red-faced police custodian admitted he misfiled the film in the evidence room. From this embarrassing experience, Plank learned an important lesson that would serve him well in the years to come. He recognized that one must be unfazed and unswayed by public clamor, a fear of criticism and partisan interests.¹

From August 1965 until June 1970, Plank practiced in the private sector, first as an associate at the firm now known as Zarlengo, Mott, Zarlengo & Winbourn and later as a staff attorney for CF&I Steel Corporation. One of Plank's superiors wrote that Plank possessed the legal ability, integrity and judicial temperament required of an excellent judge.

THE JUDICIARY

In the Spring of 1970, Plank was selected by then Mayor William McNichols and sworn in as a Denver County Court judge. This appointment was the first step in a successful judicial career that now exceeds twenty-two years. Throughout his time on the bench, Plank has enjoyed immense popularity with attorneys, jurists, witnesses, litigants and jurors and is known for his knowledge of case law, excellent judicial demeanor, compassion and humor.

Plank heard an enormous variety of cases during his tenure in Denver County Court. Among those were cases involving a motorcycle-riding dog and seven parents who pled no contest to false imprisonment and conspiracy charges as the result of two young women being forced to meet with a cult deprogrammer.

In 1974, then Governor Vanderhoof, noting that the Judge possessed a distinguished judicial record, appointed Plank to the Denver District Court bench to fill a vacancy created by the resignation of Judge Merle Knous, a candidate for attorney general. Plank flourished in the fourteen

1. MODEL CODE OF JUDICIAL CONDUCT Canon 3.B(2) (1990).

years he spent in Denver District Court, becoming well known for his eminently fair handling of cases, including several highly sensitive trials. At the district court level, Plank heard cases in all divisions: criminal, domestic and civil. Over the course of several rotations through the divisions, he acted as the chief presiding judge of the criminal division. In this role, Plank answered many questions related to sentencing patterns and crime in Denver. Known for both giving an alleged criminal "his day in court" and giving tough sentences, Plank encouraged and supported the Denver Anti-Crime Council's review of criminal sentences, believing that a council of judges, public defenders, private lawyers, citizens and elected officials could most effectively study the complex issues involved in crime and punishment.

Judge Plank believes all cases demand equal attention, but it would be a loss not to mention a few of the cases Plank heard during his tenure in one of the busiest courts in the state. In 1976, Plank presided over the first death penalty hearing after the death penalty was reinstated in Colorado in 1974.² Toby Lee Romero was accused of the mutilation slaying of a young mother of three children. An important evidentiary ruling made by Plank was the admission of expert testimony by a serologist concerning the statistical frequency of the victim's blood characteristics. In *People v. Romero*,³ the Colorado Court of Appeals upheld Plank's ruling admitting the expert's testimony, because as an evidentiary foundation, it is sufficient to establish the fact that the expert witness based her testimony on tables regularly relied on by professionals in her field and created by experts too numerous to call as witnesses. Plank sentenced Romero to life imprisonment because the jury was not unanimous in deciding that death was appropriate.⁴

In 1977, Chief Justice Edward Pringle of the Colorado Supreme Court appointed Plank to hear the bombing-plot trial of Crusade for Justice activist John Haro. This highly publicized trial occurred when Denver suffered from the dubious distinction of being the nation's bombing capital of the 1970s.⁵ The tense three-week *Haro* trial encompassed three threats of mistrial, swarms of reporters and spectators and intense security. There were bomb-sniffing police dogs, spectator and witness searches, shotgun-carrying guards and 24-hour police protection for Plank's family.⁶ Plank conducted the trial in a conscientious and imperturbable manner. Ultimately, the jury acquitted Haro of all charges.

Four years later, Plank heard another highly emotional and publicized case. James Lowe was accused of brutally murdering an eleven-year-old girl. Plank heard the case after the original judge, Joseph Quinn, was appointed to the Colorado Supreme Court. Because of Quinn's ruling

2. COLO. REV. STAT. § 16-11-103 (1986).

3. 593 P.2d 365 (Colo. Ct. App. 1978).

4. COLO. REV. STAT. § 16-11-103(2)(d) (1986).

5. DALE TOOLEY, I'D RATHER BE IN DENVER 149 (1985) [hereinafter *Tooley*].

6. *Year in Review*, DENVER POST, December 28, 1977 at 4.

suppressing certain physical evidence and statements made by Lowe,⁷ the case was already controversial. The furor continued under Plank because he prohibited the introduction of a picture of the deceased, taken about one week before her death. Plank ruled that there was no probative value in pictures of the girl before her death, but ruled admissible pictures and a video movie of the deceased girl at the murder site. In another evidentiary ruling in *Lowe*, Plank admitted a letter written by the defendant containing an admission that Lowe killed the victim. The Colorado Supreme Court upheld this ruling in *People v. Lowe*,⁸ a lengthy analysis of Colorado Rule of Evidence 401⁹ regarding a trial judge's discretion in determining the relevant and prejudicial effects of tendered evidence. Ultimately, the court affirmed Lowe's conviction.

In Dale Tooley's autobiography, *I'd Rather Be in Denver*, Tooley took the opportunity to commend people he considered to be "unsung heros" who "contributed much to Denver and made it a decent place to live."¹⁰ Plank was among those lauded. Tooley said of Plank and other good judges in general, "Watching a good judge in action is like seeing a fine symphony conductor perform. The best judges are relatively passive in court and are able to move proceedings along with ease . . . Judge Leonard Plank has a knack of handing down a stiff sentence in so nice a way that the defendant is appreciative."¹¹ The case of Lauren Watson bore out Tooley's assertions.¹² The ex-Black Panther member was convicted of shooting an off-duty fire fighter, but acquiesced because he was satisfied that Plank had been as fair as he could be under the circumstances.

Stating that Plank was a strong and respected leader of the bench, Governor Roy Romer appointed Plank to serve on the Colorado Court of Appeals in 1987 as one of three appointments at that time, increasing the appellate court from ten to thirteen judges. By the time this profile is published, Judge Plank will have been responsible for nearly 500 Colorado Court of Appeals opinions. A brief article cannot completely analyze either the philosophy or scope of Plank's Court of Appeals effort. It is accurate to say, however, that the subject matter of the Judge's cases reflect many of the difficult issues of this time: drug testing, child abuse, the relative rights of a defendant and victim.

Plank's opinion in *People v. Walters*¹³ concerned such a balancing of defendant's and victim's rights. This case involved a rape conviction where the alleged victim was not present at the trial. The trial court allowed the admission of hearsay testimony giving the alleged victim's version of the events without establishing her unavailability. Applying *Ohio v.*

7. Judge Quinn's rulings were later affirmed by the Colorado Supreme Court in *People v. Lowe*, 616 P.2d 118 (Colo. 1980).

8. 660 P.2d 1261 (Colo. 1983).

9. COLO. R. EVID. 401.

10. Howard Pankratz, *Dale Tooley's Memoirs*, DENVER POST, Jan. 5, 1986 at 17.

11. *Tooley*, 111-12 (1985).

12. *People v. Watson*, 671 P.2d 973 (Colo. Ct. App. 1983).

13. 765 P.2d 616 (Colo. Ct. App. 1988), *cert denied*, 821 P.2d 887 (Colo. Ct. App. 1991).

Roberts,¹⁴ the Judge held that the defendant's constitutional right to confrontation was violated, reasoning that when the prosecutors knew the alleged victim was missing for months prior to the trial, it was unreasonable for the prosecutors not to subpoena the alleged victim once she was located. Plank concluded that the State failed to demonstrate that the witness was unavailable and therefore the hearsay testimony was inadmissible.¹⁵

In a very different but difficult case, Plank affirmed a trial court's decision that denied the priority of an attorney's lien over a prior recorded third-party bank's deed of trust in *Cottonwood Hill, Inc. v. Ansay*.¹⁶ Plank's opinion considered whether the attorney's lien priority as to third-parties is based on when the legal work began or the date of notice given. The Judge distinguished two prior decisions¹⁷ ruling that priority was determined based on the date work began and concluded that the statutory intent was that an attorney's lien priority as to third-parties fixes when notice of the lien is properly given.

Later in 1989, Plank wrote an opinion with an exhaustive analysis of federal and state securities regulations, demonstrating the love Plank has for the history of law.¹⁸ In this dispute, the seller of securities sued the buyer for breach of an express oral contract to purchase the securities with the buyer counterclaiming against the seller, alleging violations of securities law. The buyer also sued his accountant on a third-party claim for fraudulent representations. The trial court directed a verdict against the buyer on the counterclaims and third-party claim and entered judgment under a jury verdict for seller. Plank reversed and remanded on all but one of the directed verdicts, carefully laying out the purposes of the various sections of the securities regulations, guiding the reader through the logic of his holdings. The same patience that was seen in Plank as a trial judge is evident in this map through the securities law jungle.

In this same scholarly manner, Plank's opinion in *Tucker v. Ellbogen*¹⁹ expanded Colorado partnership law. Among other issues, Plank discussed the five years it took the managing partner to wind up the partnership. During this period, this partner did not give a final accounting, allowed oil and gas leases to expire and did not take any steps to resolve a partnership bank debt. Plank rejected the proffered justification for delay and concluded that the partner responsible for winding up the partnership has an affirmative duty to wind up the partnership affairs as expeditiously as possible.

One quality so greatly appreciated in Plank is his willingness to find humor in the law and his work. One day in a complicated corporate case, the Judge leaned too far back in his chair, flipping both the Judge and

14. 448 U.S. 56 (1980).

15. *Walters*, 765 P.2d at 617.

16. 709 P.2d 62 (Colo. Ct. App. 1985).

17. *Collins v. Thuringer*, 21 P.2d 709 (Colo. 1933); *Board of County Comm'rs v. Berkeley Village*, 580 P.2d 1251 (Colo. Ct. App. 1978).

18. 791 P.2d 1139 (Colo. Ct. App. 1989).

19. 793 P.2d 592 (Colo. Ct. App. 1989), *cert denied*, 1990 Colo. LEXIS 466 (Colo. 1990).

chair onto the floor. After composing himself, Plank announced, "I may have lost my dignity, but not my jurisdiction. You'll have to continue." When the Judge was introduced at a public function as "the best judge on the bench," Plank agreed, but only if the person making the introduction meant the bench at the softball field.

The irony of this outgoing and funny man is his great modesty. Although the Judge will talk about cases for hours, it is impossible to get him to talk about himself. This profile had to be pieced together from newspaper clippings, memorabilia, case law and interviews with others.

THE REST OF HIS LIFE

The Judge's obvious love of young people extends beyond his own family. He participated in Denver's Adopt-a-School and Save our Society, where he had the opportunity to interact with students. On a regular basis, he has taught law at the high school and college levels. Many lawyers graduating from the University of Denver College of Law also had one of their first legal writing assignments critiqued by Plank.

Plank remains faithful to his commitment to the extended legal community. He served as president of the Colorado District Judges Association and the State Council of Trial Judges Association and has served on the Civil Rules Committee for the past ten years. He actively participates in the Colorado and Denver Bar Associations by holding offices and sitting on a myriad of committees. He has been an active participant in the Denver Anti-Crime Commission, Community Corrections Board and Samaritan Shelter. The Denver Bar Association honored Plank with its first-ever Judicial Excellence Award and the Catholic Lawyers' Guild awarded Plank the St. Thomas More Award for outstanding contributions to profession, community and religion.

Not surprisingly, another judge once paid a painter to add the title of "Mr. Wonderful" to the door of Plank's chambers while he sat as a Denver District Court judge. He did it to tease Plank about Plank's consistently high evaluations from lawyers in the Denver Bar Association poll. Plank never saw the sign, however, because the presiding chief judge ordered it removed. Although Judge Plank never saw the painted door, now he can see the printed word—Your Honor, you truly are "Mr Wonderful." I thank you for your dedication to your family, friends, the law and your community.