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The Honorable Karen S. Metzger, Coloardo Court of Appeals

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THE HONORABLE KAREN S. METZGER, COLORADO COURT OF APPEALS

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If asked to describe her finest accomplishment, Karen Metzger will not name any of the hundreds of opinions she authored while serving on the Colorado Court of Appeals. She will not call attention to her service as one of Colorado's first deputy state public defenders or to her varied teaching career. Instead, Karen points to her long marriage to her husband, Roger, and the accomplishments of her three children. Karen's response is typical of Karen's view of the importance of children and family and the independence of thought that characterizes Karen as a person, a lawyer, and a judge.

Karen was born to John and Betty Metzger in Denver, Colorado in 1945. John Metzger, who later became Attorney General of the State of Colorado, never encouraged Karen to become a lawyer. Instead, he encouraged her to understand what the practice of law was all about. When Karen did not have school, she went to her father's office or to court with him. He encouraged her to develop those skills necessary for a lawyer: reading comprehension, speech and debate. By engaging in "debates" at the dinner table, which were frequently not resolved until the encyclopedia came out, he also encouraged her to think for herself and look for holes in any argument. Karen's mother, Betty, a teacher and career woman in her own right, taught Karen to stick to a task until it was completed, even if that meant staying up all night to finish the project. Betty also encouraged Karen to search for creative solutions rather than following the trails blazed by others. Betty was also Karen's toughest critic, so much so that pleasing Betty often meant guaranteed success of any given project, be it a speech, a paper or other task.

After receiving her bachelor's degree from Colorado College in 1967, Karen went to law school at the University of Denver (DU) College of Law. When Karen went to law school, however, it was for her own reasons, rather than those of her parents or anyone else. Karen went because she thought that the practice of law was "the most wonderful thing in the world." Karen had seen her father resolve both small and large problems through his practice. She saw her father become friends with his clients and saw his friends become clients. She observed how the resolution of problems allowed her neighborhood and acquaintances to settle back down into their daily lives. The opportunity to be a problem solver—a lawyer—brought Karen into this profession.

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After graduation with her Juris Doctor in 1970, Karen's first job was as a Denver public defender, working for Ed Sherman. Shortly thereafter, in 1971, Colorado first established its statewide public defender system. Karen then became a deputy state public defender, working for Rollie Rogers. As a public defender, Karen advocated most strongly for the rights of children. Karen's uncompromising defense of childrens' rights once led to her arrest. One Friday morning, when Karen was the only public defender in the office, Juvenile Hall (the Hall) called and asked for a public defender to come and supervise a lineup identification for a juvenile accused of rape. When Karen arrived, she discovered the police officer conducting the lineup was using other children from the Hall for fill-ins in the lineup. These children had not been convicted of any offense: rather, some were pre-trial detainees, held for psychiatric evaluations as to competence and psychological condition, while others were clients of the public defender's office charged with but not convicted of non-bondable offenses. In spite of the risk to the rights of these children stemming from their participation in the lineup, which Karen pointed out to the police officer, he would not obtain a court order allowing it to go forward. Consequently, Karen instructed the children selected for the lineup not to follow the police officer's instructions during the lineup; instead, they were to follow only Karen's instructions. As Karen was the only woman in the room, it was not difficult for the children to know who was speaking. When the lineup took place and the children did not cooperate, the police officer in charge began berating one child to try to force compliance with the instructions. Karen informed the officer of her instructions to the children, which resulted in the cancellation of the lineup, and she went home to wait for events to shake themselves out. On Monday morning, Karen was served a summons to appear for an ordinance violation for interference with the police. (She later learned that on the previous Friday, the police intended to arrest her for felony obstruction of justice.) An immediate hearing was scheduled. When Karen explained the events to district judge Burnett, including her instructions to the children, the charge was dismissed on the theory that Karen had properly selected the lesser of two evils.

Shortly thereafter, Karen left the public defender's office and Colorado and went to Harvard University, obtaining her Master of Laws in 1973. Karen attended Harvard as a student and as a teaching fellow in the law school for the first-year research and writing program. She was not, however, content with that limited role, particularly after her experiences as a public defender. Therefore, in the Spring of 1971, Karen started a clinical program for second and third-year law students in criminal law, in conjunction with Gary Bellow, a litigator who represented Caesar Chavez and other "Bellows Fellows." With the aid of the Massachusetts' Public Defenders Office and under Karen's supervision, Harvard students were permitted for the first time to appear in the criminal division of the Dorchester District Court—the equivalent of Denver County Court—to defend individuals charged with various felonies.

Karen left Harvard and briefly returned to Colorado in 1973, but left again to become an Associate Professor at the University of Utah College of Law. Karen agreed to teach wills, estates and trusts as her assigned curricula. Once again, Karen asked for and received permission to expand her teaching duties well beyond the assigned areas. Karen created and taught a course in juvenile law and also was instrumental in developing and teaching a course on post-conviction remedies for prisoners. In the context of criminal law and criminal procedure development, both were new and innovative courses, as the United States Supreme Court had only recently recognized constitutional rights both of children in a criminal setting and of convicted individuals.

Finally, in 1974, Karen returned to Denver, Colorado to develop her law practice and to start her family with her husband, Roger. She was not long in private practice. In 1977, Mayor William McNichols, Jr. appointed Karen to serve on the Denver County Court bench. She served there until 1979, when Governor Richard D. Lamm appointed her to serve as a Denver District Court Judge, succeeding then Judge, now Justice, Luis Rovira. In 1983, Governor Lamm appointed Karen to serve on the Colorado Court of Appeals. Karen is now the most senior woman on the state appellate court bench and one of its more senior judges.

Her return to practice and appointment to the bench did not stop Karen's teaching career. Since 1977, Karen has taught courses in law and ethics as an adjunct Professor at the University of Colorado School of Nursing. She has also been an active lecturer for continuing legal education courses. Her courses have dealt with issues ranging from ethics, family and juvenile law to appellate practice.

During her years as a practicing lawyer and judge, Karen has also been active in the Catholic Lawyers Guild, the Colorado and American Bar Associations and served on the Governor's Commission on Children and Families. She also served on the Supreme Court's Committees on Public Education and Criminal Jury Instructions. She is a member of the Board of Directors of the Colorado Judicial Institute.

I came to know Karen Metzger in the Spring of 1987, when I became her law clerk. During my tenure, I learned some of the lessons that brought success to Judge Metzger as a lawyer and a jurist. Judge Metzger worked as hard and diligently as her law clerk (and I worked hard). In addition, I also learned the importance of critical editing and reevaluation of ideas and analysis. It was not unusual for an opinion to go through many successive drafts. I came to regard some opinions as curses because it took so much time and redrafting to reach a final outcome that satisfied her both intellectually and technically. It was not unusual to change the disposition of a case when the logic of the written opinion developed and the correct outcome could finally be discerned.

As her law clerk, I also came to understand how Judge Metzger views her role as a judge on the court of appeals. Her judicial philosophy requires adherence to the limited role of the court of appeals in the scheme of this state's appellate system: she also strongly believes, however, that the

court's function can only be served by the most stringent intellectual performance and integrity. The three fundamental tenets she follows in carrying out that function can be summarized as follows: (1) always read all of the relevant portions of the record, beginning with volume one, (2) the court of appeals is to review the decisions of trial courts and other tribunals to determine whether errors of law affecting substantial rights had been made, not simply to reach out and make law, regardless of the temptation to do so, and (3) if the court has to make law, then the analysis must be thoroughly reasoned and explained. An examination of a few of her more recent opinions demonstrates Judge Metzger's consistent adherence to this philosophy and these tenets.

Judge Metzger's insistence on complete review of the record is exemplified in the decision in *People v. Fell*.[1] There, the defendant was convicted of first and third-degree sexual assault and two counts of incest. On appeal, the defendant argued that the trial court erred in not responding to the jury's request for clarification of an instruction regarding the term "sexual penetration." The majority opinion agreed the court had improperly responded to the jury's inquiry in that the court should have provided additional information, but the error was harmless. In her concurrence, Judge Metzger pointed out the trial court did not err because the record compiled at trial contained *no* evidence concerning the issue that formed the basis for the jury's inquiry. Therefore, the trial court was not obligated to answer a jury's inquiry by giving additional instructions when the request pertained to matters not in evidence.

Judge Metzger's insistence that the court of appeals correct substantial errors of law, not simply reach out and make law, is also reflected in the opinions she writes. In *Cronk v. Intermountain Rural Electric Ass'n.*,[2] the court of appeals reviewed a trial court order dismissing the claims of three employees, who all asserted their employment was wrongfully terminated. The claims ranged from breach of an implied employment contract to tortious interference with contract to outrageous conduct. In constructing her opinion, Judge Metzger answered precisely the question posed in the context of the appeal: did the trial court err in granting the employer's motion for summary judgement, thereby dismissing the employees' claims? The opinion concluded that in many respects, the trial court erred because the judge resolved disputed issues of fact, which did not comply with the dictates of Colorado Rules of Civil Procedure 56.[3]

A relatively straightforward decision on its face, a portion of the opinion created something of a stir among lawyers practicing in the field of employment law. That part of the opinion dealt with the question of

1. 832 P.2d 1015 (Colo. Ct. App. 1991) (Metzger, J., specially concurring).
2. 765 P.2d 619 (Colo. Ct. App. 1988).
3. COLO. R. CIV. P. 56 states in relevant part:
(H) DETERMINATION OF A QUESTION OF LAW. At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.

wrongful termination, wherein the employees claimed that they were discharged for refusing to violate identified portions of the Public Utilities Code. The court of appeals' analysis did not include a standard for judging the reasonableness of the employees' belief that they were being terminated for those reasons. Some practitioners criticized the opinion on that basis. However, the issue was not addressed in the opinion because it was not addressed by the parties and was not necessary to resolve the questions presented by the appeal. Thus, in spite of the obvious gap in the analysis, the issue could not properly be decided by the court of appeals. That issue remained undecided until recently when in *Martin Marietta v. Lorenz*[4] the Supreme Court specifically adopted the result and reasoning of *Cronk*, adding the standard of "objective reasonableness" for the analysis of the wrongful termination claim.

Finally, Judge Metzger's insistence on thoroughly reasoned and documented opinions in the role of lawmaker is also evident from her opinions. Indeed, Judge Metzger applies this rule to opinions dealing with procedural as well as substantive matters, both being equal in her mind. For example, in *Moore v. Grossman*,[5] the plaintiff brought a product liability action against the manufacturer of a catheter, contending that the catheter had failed one week after surgery, thereby causing the plaintiff's injuries. The manufacturer named the attending physician, Dr. Grossman, as a non-party having fault, pursuant to Colorado Revised Statutes § 13-21-111.5.[6] Plaintiff then filed a motion to file an amended complaint, seeking to name the doctor as an additional defendant. The plaintiff also caused the motion, amended complaint and summons to be served on the doctor. Shortly thereafter, the statute of limitations passed. Because of various rulings by the trial court, the doctor ultimately succeeding in obtaining a dismissal on the theory that the plaintiff had failed to file the claims prior to the passage of the statute of limitations and should have proceeded by way of independent action rather than a motion to amend. The Court of Appeals reversed, finding that the filing of the motion to amend, combined with service on the doctor, served to toll the statute of limitations.

Because this issue was not previously decided by any Colorado state court, it was necessary for the court of appeals to "make law" regarding the procedures to be followed under Colorado Rules of Civil Procedure 15(a).[7] In the opinion written by Judge Metzger, she carefully docu-

4. 823 P.2d 100 (Colo. 1992).
5. 824 P.2d 7 (Colo. Ct. App. 1991).
6. COLO. REV. STAT. § 13-21-111.5 (1987).
7. COLO. R. CIV. P. 15(a) states in relevant part:

(A) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within twenty days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

mented the rationale for each step of the analysis. The opinion relies not simply on the words of the rule at issue but also sets forth policies the rule is designed to serve ("to secure the just, speedy and inexpensive determination of every action") as well as rulings of federal and state courts that previously passed upon similar factual and legal circumstances. Each link in the chain of logic leading to the conclusion is fully set forth. This short, three-page opinion is a model for the type of opinion writing at which Judge Metzger excels. The culmination of these judicial philosophies can be seen in opinions like *Amax, Inc. v. Water Quality Control Comm'n*[8] and its conceptual companion *Board of County Comm'nrs v. Water Quality Control Comm'n.*[9]

In her years of practice, Karen Metzger has dedicated herself to the finest traditions of the legal profession: intellectual independence and integrity as well as service to the profession as a teacher, practitioner and judge. Karen's career exemplifies what a lawyer can do if that lawyer believes the practice of law "is the most wonderful thing in the world" and takes the steps necessary to keep it that way. In these days of harsh criticism of legal practice and burn-out among lawyers, Karen Metzger's career is a powerful example of the possibilities given to those who chose to practice faithfully in this profession.

8. 790 P.2d 879 (Colo. Ct. App. 1989), *modified,* March 29, 1990 (consideration of future uses when setting water quality standards was proper and methodology used was reasonable and appropriate).

9. 809 P.2d 1107 (Colo. Ct. App. 1991) (water quality standards could be revised according to statute that did not require findings of inconsistency, court could consider commission's deliberations when conducting review and methodology used was incompatible with water quality data).