



## THE GILES S. RICH AMERICAN INN OF COURT

### SEPTEMBER 2017 MEETING RECAP

On September 19, 2017, the Giles S. Rich American Inn of Court opened the 2017-2018 term with a program about academia's influence on intellectual property litigation and how IP practitioners can better source their arguments. The program, *Crowdsourcing Arguments: Academia's Role in IP Litigation*, invited a distinguished panel of current and former law professors to discuss utilization of IP scholarship and recent trends in professorial amicus briefs and "scholar-shopping."

Honored Guest, **The Honorable Kimberly A. Moore** of the U.S. Court of Appeals for the Federal Circuit, opened the evening's program with brief remarks introducing the audience to the topic. Judge Moore reflected on the importance of IP scholars in the profession, and commented on the perceived increase in amicus briefs authored or signed by professors since her tenure as a law professor herself. Following her opening remarks, Judge Moore joined fellow panelists **Prof. Dmitry Karshedt** (The George Washington University), **Prof. Neel Sukhatme** (The Georgetown University Law Center), and **Prof. James Y. Stern** (William & Mary School of Law) for a robust discussion led by co-moderators **Daniel Kane** and **Nicholas Evoy**.



(From Left to Right) Prof. James Y. Stern, Nicholas Evoy, The Honorable Kimberly A. Moore, Prof. Neel Sukhatme, Daniel T. Kane, and Prof. Dmitry Karshedt.

When asked about the role of academia in IP litigation, Judge Moore suggested academic scholarship can often highlight parallels between different areas of law or describe the application of legally-foreign concepts to the area of intellectual property law (e.g., *Chevron* deference). Prof. Sukhatme similarly suggested empirical data concerning certain market trends or policy effects can be effectively conveyed to the Bench through academic scholarship. Prof. Sukhatme, in particular, has utilized data analytics in his scholarship to

describe the effect of the patent fee structure and help explain industry-specific patenting behaviors.

Prof. Stern, who's recent work is more theoretical in nature, responded to a quote from 2011 attributed to Chief Justice John Roberts, Jr., suggesting there is "a disconnect between the academy and the profession."<sup>1</sup> Chief Justice Roberts is quoted stating, "[i]f the academy wants to deal with the legal issues at a particularly abstract, philosophical level . . . that's great and that's their business, but they shouldn't expect that it would be of any particular help or even interest to the members of the practice of the bar or judges." Prof. Stern proffered that Chief Justice Roberts, who cited a hypothetical article on "the influence of Emmanuel Kant on evidentiary approaches in 18th Century Bulgaria," highlighted that scholarship can be vexed by hyper-focused or overly-abstract theses. However, Prof. Stern conceded examining Emmanuel Kant or evidentiary approaches in 18th Century Bulgaria may have some utility.

When asked to comment on Google's calculated funding of academic scholarship supporting certain policies and legal arguments (a.k.a., "scholar-shopping"), Prof. Sukhatme suggested the premise of the recent *Wall Street Journal* expose<sup>2</sup> on Google's "academic influence campaign" may be flawed. Alluding to discussions within academia over the article, Prof. Sukhatme recounted that some have suggested Google helped fund university centers and symposiums, rather than directly funding particular scholarship.

Prof. Karshedt, who recently submitted a self-authored amicus brief in *Oil States v. Greene Energy*, commented on the increasing prevalence of professorial amicus briefs in federal cases. According to Prof. Karshedt, some law professors have developed a reputation for appearances as "friends of the court" and, thereby, have garnered professorial signatories to their briefs. While the *National Law Journal* submits an overall increase in amicus briefs at the Supreme Court during the 2017-2018 term,<sup>3</sup> Judge Moore suggested the prevalence of amicus briefs in IP-related cases is heavily dependent on the import of the question presented to the Court.

<sup>1</sup> <https://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99take-on-academic-scholarship>.

<sup>2</sup> <https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286>.

<sup>3</sup> <http://www.mondaq.com/unitedstates/x/627760/trials+appeals+compensation/In+Quiet+Term+A+Drop+In+Amicus+Curiae+At+The+Supreme+Court>