



MEETING RECAPITULATION

THE PAULINE NEWMAN IP AMERICAN INN OF COURT

THURSDAY,
NOVEMBER 17, 2016

The third Inn meeting of the 2016-2017 year was a joint meeting with the Giles S. Rich American Inn of Court at the U.S. Court of Appeals for the Federal Circuit, on Thursday, November 17, 2016.

The program began at about 6:00 p.m. with a welcome and announcements from Janet Gongola and Judge Essex. The title of the program was “Beyond the Bench: Retired Judges Reflect on their Careers, Accomplishments, and Changes in the American Judicial System. Beginning at about 6:15 p.m., there was a discussion with Judge Paul R. Michel, Judge Rod McKelvie and Judge John C. Lifland.

Judges Michel and McKelvie said that they did not miss being federal judges. Judge Lifland said that he could not wait to get to work every morning when he was a judge.

Being a federal judge is the best job that a lawyer can have. It was more isolating than I expected it to be. My friends who were in the law business did not show up as often. As a judge, I did not get to stand up and ask witnesses questions. It took a while to get used to the lack of stress that a judge has compared to the stress that I had as a lawyer.

I think that it is much harder to be a federal judge now than when I was on the bench. The workload has gone up. The judiciary has become more subject to political interference. The press is looking for dramatic stories, which usually put the judiciary in a negative light.

I did not do much criminal work before becoming a judge, and I sometimes had a hard





time understanding the arguments that the lawyers were making in criminal cases. Sometimes they did not seem to care whether they won or lost.

I found my experience working as a Senate staffer dealing with lobbyists representing conflicting interests to be a good preparation for being a judge.

As a lawyer for twenty-seven years before I became a judge, my adversaries were people I could argue with all day, and then shake hands. As a result, I found it easy to treat lawyers with respect after I became a judge.

I now appreciate the value of serious efforts to settle cases before they cannot be settled, than I did when I was on the bench.

I decided when I left the bench not to take clients and not to take cases in the United States,

but I was persuaded to have a different policy in foreign jurisdictions, where I have testified as an expert witness. I found cross-examination by the English barristers to be a harsh experience.

Being an expert witness is tough, even if you have some expertise. Especially if you don't. I think being a former judge is an advantage as an expert witness. You have practice in assessing arguments, and knowing which ones to use.

As an appellate judge, it was not part of my job to help settle cases. I thought that I would enjoy mediation after I left the bench, but I found it was often very frustrating.

When I was a judge, nobody talked to me about the expense of litigation, but in mediation, everyone talks about it.

It is shocking to me how unavailable federal litigation is to most parties, except for extremely well funded parties. It used to be said that horseracing was the sport of kings, because only they could afford. Now patent litigation is the sport of kings.

I think that litigation is a great way to spend your life, but it is not working that well.





When we see a long docket sheet, it seems like a Dickens novel.

As a district judge, I was in awe of the hard work done by the appellate judges.

I found the opportunity to question judges in oral argument very useful, especially in complex cases, such as patent cases. You can read a brief, but you cannot question it. We should allow more time for oral argument, as in the British courts.

An appellate judge apologized to a trial judge that he met, for reversing him three times. The trial judge said that he reversed the appellate judge every day. [Laughter.]

I attended many bar events as a judge to help lawyers see it as we see it.

As a mediator, I have sympathy for lawyers who have to continue to be adversarial to

satisfy their clients' expectations. I have less sympathy for lawyers who expect to accomplish anything by convincing me that they are right, because as a mediator I have given up the job of deciding who is right and who is wrong, that I had as a judge.

I regret having said that any supposed issue of fact in claim construction is wholly subsumed by the issue of law.

I found it very educational sitting by designation on other appellate courts. I wish I had also sat by designation on trial courts.

On three judge panels, one judge would go through the entire trial record.

Supreme Court decisions on patent cases have too many vague terms that are undefined. It is difficult for lawyers to advise clients about validity.

As a judge, you have to slow down from being a lawyer, and learn to wait to listen



to both sides.

Writing is the preeminent skill that lawyers need, but young lawyers should take opportunities to litigate small matters. Pilots are rated by how many hours they have flown certain aircraft, and there is a rough analogy for litigators. NITA courses and the like are fine, but there is no substitute for actually litigating, the more the better.



The America Invents Act was badly drafted in several respects, and should be rewritten.

I do not like the word reform. There are some proposed patent reforms on Capitol Hill that are great and others that are awful. I would like to see greater clarity and simplicity in the law. We do not have speedy and inexpensive resolution of disputes, as promised at the beginning of the Federal Rules of Civil Procedure. One problem with reform is that the tendency is always to make things more complicated. This drives expenses up and uncertainty up. We need to make things simpler, not more complicated.

There were closing remarks by Janet Gongola at about 7:30 p.m. Following the program, there was a reception in the Dolley Madison House, with hors d'oeuvres and drinks, until about 8:30 p.m.

Respectfully submitted,

Stephen Christopher Swift
Secretary