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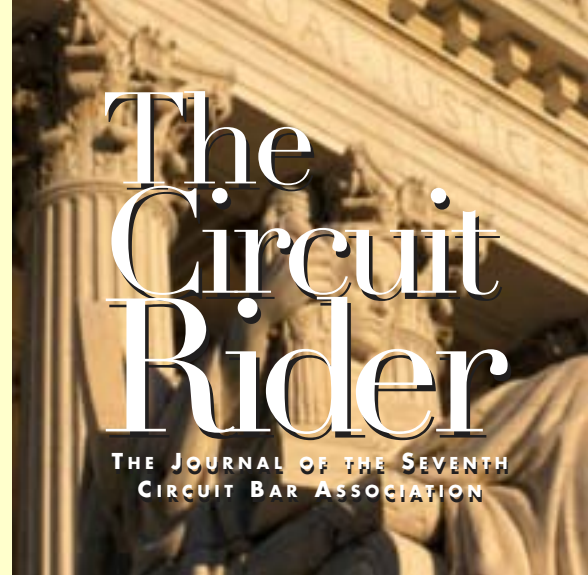
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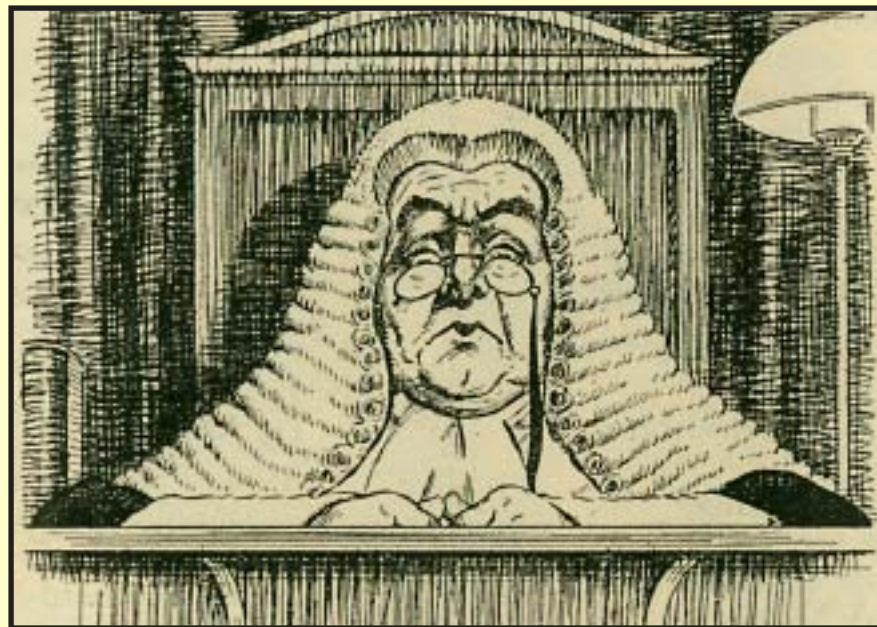
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Interview with **Judge Diane P. Wood**

*By Steven F. Molo**

Judge Diane P. Wood succeeds Judge Frank Easterbrook as Chief Judge of the United States Court of Appeals for the Seventh Circuit in October of 2013. This summer, Steven Molo, partner in MoloLamken LLP and a past president of the Seventh Circuit Bar Association, sat down with Judge Wood in her chambers and had the following conversation.

The Interview

Molo: Thank you for taking the time to share a bit about your background and your experiences on the Court of Appeals.

Judge Wood: My pleasure.

Molo: Where did you grow up; what did your parents do?

Judge Wood: Until I was fifteen years old, I lived in Westfield, New Jersey. My father was an accountant for Exxon, working in New York, and my mother was a secretary with the Girl Scouts. We moved to Houston just before my sixteenth birthday, because my father was transferred. At that point my mother began a long and happy career at the University of St. Thomas's business school as an administrator.

Molo: You were sworn in as a member of the Seventh Circuit in 1995. What was your career in the law before you went on the bench?

Judge Wood: Well, immediately before going on the bench, I taught at the University of Chicago Law School. My academic focus was antitrust – both domestic and international – and international trade and business. I also taught civil procedure. At the outset of my career, following my clerkship on the Supreme Court, I spent six months as a legal advisor to the State Department on antitrust,

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**Steven M. Molo is a Partner at MoloLamken LLP, and the past president of the Seventh Circuit Bar Association.*

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international investment, and technology transfer issues. I then practiced at Covington & Burling for two and a half years before going to teach at Georgetown for a year. In 1981, I came to the University of Chicago. I took a leave in 1993 to serve as Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice, with responsibility for the Division's international, appellate, and legal policy matters.

Molo: How was it that President Clinton came to nominate you to serve on the Seventh Circuit?

Judge Wood: I have no simple answer to this question. I was at the Department of Justice at the time and was fortunate enough to be supported by many people.

Molo: Who are the people who have had the greatest influence upon your legal career?

Judge Wood: Well, first of all there was Professor Charles Alan Wright, who taught at the University of Texas while I was in law school there. He was a giant in the field of federal courts, and I was fortunate to take both Federal Courts and a seminar with him.

He had a wonderfully sharp mind and was quite helpful to me when I applied for clerkships.

While he was engaging, he had a formal, almost military, bearing. He always wore three-piece suits and had the rather odd policy of never calling on anyone in class. He would introduce a topic and then ask if there were any questions. It seems he considered it ungentlemanly to call on women, and yet he could not call on only men. So, his solution was to call on no one.

There were not a lot of women at Texas while I was there. But one was Edith Jones, who was in the class ahead of me, and who has gone on to serve as the Chief Judge of the United States

Court of Appeals for the Fifth Circuit.

Molo: Who else?

Judge Wood: I'd have to say the other major influences were the judges for whom I was fortunate to clerk – Judge Goldberg on the Fifth Circuit, and Justice Blackmun.

Judge Goldberg was the fastest study I could imagine. He remembered everything and he'd engage his clerks in endless conversations about legal lore. During World War II he worked in the Office of Price Administration in Washington, DC, and he carpooled with Lyndon Johnson and Sam Rayburn. You can imagine the stories that came out of that experience.

Judge Goldberg cared deeply about the outcome of cases. I think this was part of the great tradition of the Fifth Circuit at the time. He felt you had to really dig into the facts, see what was going on in the system, and understand the realities of the case. [Editor's note: One example cited by Judge Wood was *Tasby v. Estes*, 342 F. Supp. 945 (N.D. Tex. 1971), *rev'd in part*, 517 F.2d 92 (5th Cir. 1975), where the Fifth Circuit rejected an attempt by Texas to avoid desegregation of its elementary schools by a scheme to have interracial contact between its children via closed-circuit TV.]

Molo: And clerking for Justice Blackmun was, no doubt, a special experience.

Judge Wood: He changed my life. He really did. Both the opportunity to learn from the Justice during the year I worked for him and his unstinting support thereafter opened countless doors for me.

He was much more reserved than Judge Goldberg, and more formal in his approach to cases. Although, on a personal level, he was great with his clerks and a wonderful person to work with.

In chambers, we committed everything to writing. I believe this and his generally formal approach reflected his math background.





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He graduated summa cum laude as a math major from Harvard College.

Following a scientific method, his analysis focused first on data, the specifics of the case. He always began with understanding the realities of the parties. And then from the specifics, the analysis would move to the generalities and eventually to the conclusions.

Molo: Who else clerked for Justice Blackmun that year?

Judge Wood: There was Bill Block, the son of Jenner & Block name partner Sam Block. Bill went on to become a prominent lawyer in Seattle. Richard Meserve, who has a Ph.D. in physics from Stanford along with a Harvard law degree, went on to a successful career in law and science – he was a partner at Covington & Burling, became the Chairman of the Nuclear Regulatory Commission, and is now the president of the Carnegie Institution for Science and a senior counsel at Covington. Richard Willard was the fourth. He clerked for Anthony Kennedy while Justice Kennedy was on the Ninth Circuit before clerking for Justice Blackmun. Richard served as the Assistant Attorney General for the Civil Division in the Reagan Administration and was the general counsel of Bristol-Myers Squibb and Gillette. He's now with Steptoe & Johnson.

Molo: A distinguished group, with you as the only woman. Were there other women clerks at the Supreme Court that year?

Judge Wood: Well, even as recently as the mid-1970s it was known that there were certain chambers to which women did not apply because there was simply no chance of being hired. But there were two other women during my term. Susan Bloch, who is now a distinguished professor at Georgetown, clerked for Justice Marshall. Judy Miller clerked for Justice Stewart. She served as the general counsel of Bechtel, and before that was a partner in Williams & Connolly and the general counsel of the Department of Defense. [Editor's Note: Some of the other notables who clerked on the Court that Term are Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit, Gerard Lynch, Judge of the United States Court of Appeals for the Second Circuit, William Fletcher,

Judge of the United States Court of Appeals for the Ninth Circuit, Frank Blake, CEO of Home Depot, Robert Shanks, general counsel of Raytheon, Thomas A. Jackson, former president of the University of Rochester, and Don Ayer, a partner with Jones Day who held several senior positions in the Department of Justice.]

Molo: What do you look for in your own clerks?

Judge Wood: Well, first of all, I am looking for people with whom I feel I would like to spend a year. Academic excellence and some type of writing experience are basic requirements, but I look for a certain 'quickness' you hope comes across when interviewing. I find it helpful to have a balance among backgrounds – for example, someone with some type of quantitative or scientific background, someone with business experience, and so forth.

Molo: And then how do your chambers operate?

Judge Wood: They're interactive. I'm a huge believer in preparing before argument. My clerks write bench memos that explore each case beyond what we find in the briefs. I dive into the facts. The clerks do go through the record with an eye to making sure the lawyers have not missed an issue the Supreme Court is focused on. For example, the court might be looking at a Spending Clause case. It may implicate whether there is a private cause of action under a particular statute. The lawyers in the case before us may not see that and understand its implications. In these circumstances, it is not a case just about the Spending Clause, it is, at a broader level, a case about whether there is a private cause of action under a federal statute. That is the sort of thing my clerks are looking for. We like to approach the case with what I refer to as a "Solicitor General's mindset." So, the bench memos are important.

Molo: And after argument?

Judge Wood: That is the moment of greatest engagement with my colleagues. We sit in a conference room and vote tentatively following some discussion.

Molo: Do the votes change following that initial vote?

Judge Wood: Rarely.

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Molo: Do your clerks have a substantial hand in drafting your opinions?

Judge Wood: To the extent possible, the draft starts with me. Depending on the nature of the case, my clerks will have varying degrees of input. We may go through several drafts, but I feel that after a case is argued, we owe the world an answer, and so I try not to delay things too long.

Molo: What motivates you to write a dissent?

Judge Wood: In the Court of Appeals, as opposed to in the Supreme Court, I believe there are more reasons to write a dissent. First, there is the possibility of persuading one of my colleagues to vote my way. Second, it is possible that with a dissent, there may be en banc review, and I want to let other members of the court understand the issue as I see it. Third, the dissent can serve as a clarification of an issue for the judges of other circuits. And last, a dissent can signal to the Supreme Court what you think is wrong with the majority opinion. Depending on the issue, the Court will take a closer look at a case with a dissent. Nevertheless, in the end, less than four percent of cases in the Seventh Circuit wind up with dissents.

Molo: The Seventh Circuit heard four en bancs in February, an unusually high number. Is this a trend?

Judge Wood: I wouldn't say it is a trend. It happened that those four cases were cases the court deemed worthy of en banc review. The standard for granting en banc review is very close to the standard for granting certiorari. Arguing that the panel got it wrong on the facts is not enough. It has to be a situation where there is a need to clarify the law for the circuit. Whether we see a general increase in en bancs, I suppose, will depend upon the cases that come before us.

Molo: Many argue that the cost of litigation today – particularly with e-discovery – has become so prohibitive that it has created an issue of access to justice. Are the courts doing enough about this?

Judge Wood: The cost issue is definitely a problem. I serve as a member of the Judicial Conference's Standing Committee on

Rules of Practice and Procedure. We talk about writing rules that will give parties incentives to keep costs down. The question is, if you already have rules, are judges using the rules as well as they might? The Federal Judicial Center is revising the bench book now, and "best practices" will be addressed. We are also considering whether Rule 1 should impose a duty on the parties to cooperate. Some think it is just another rule, but if you consider what a court might do to enforce it, it can be quite powerful. So, it is as much about how enforcement of the rules is approached as it is about creating new rules.

Molo: What would you change about civil procedure if you could?

Judge Wood: In an article I wrote a few years ago, I said that summary judgment has become a large tail wagging a small dog. We seem to have lost sight of the fact it was designed to be a procedural tool to allow cases to move forward. Granting summary judgment often only seems to have the effect of drawing out the resolution. Some cases, by their nature, are simply fact-driven and a grant of summary judgment is not going to withstand the standard of review. Its use should be reined in.

Molo: What is your view on the changes in the sentencing laws with the relatively recent decisions of the Supreme Court?

Judge Wood: Given the length of many sentences, I do not blame lawyers for raising whatever issues they credibly can on appeal. I wrote the first decision in our circuit holding that a sentence within the guidelines range is presumptively reasonable. So, people now seem to focus on trying to find a procedural flaw in the way in which the district court handled the sentencing.

Molo: How would you assess the quality of advocacy before your court?

Judge Wood: I would say most of the lawyers who come before us focus on the right issues and give a satisfactory account of the case. However, challenges arise when the case does not fall into a recognized fact pattern. Even the best lawyers sometimes stumble when that occurs. That then requires greater work on the part of the court in terms of the identification and analysis of the issues.

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Molo: And, of course, the court itself is diverse in the approach different judges may take in looking at those issues.

Judge Wood: That’s right. Each of us has our own style in how we think about a case. Some members may place a heavier emphasis on precedent. Other members of the court are more focused on policy. Others may be looking at a case more from the perspective of how the Supreme Court might be thinking about an issue.

Molo: Given that an advocate appearing before you won’t know his or her panel until the morning of argument, how are we supposed to properly prepare to give the court what it wants and make the best pitch for our clients?

Judge Wood: Assume the worst. Actually, it helps a great deal that we do it this way. We try very hard to function as a body of eleven people, plus our senior members. We make a real effort to work together. We have avoided the problem of some courts where some members might not speak with other members. Practically speaking, this has the effect of forcing lawyers to argue to the center of the court. On balance, that is a good thing.

Molo: What are your most memorable experiences on the court?

Judge Wood: Well, one truly stands out. I cannot recall the case name right now [Editor’s note: *Minnick v. Anderson*, 151 F. Supp. 2d 1015 (N.D. Ind. 2000), *vac’d sub nom. Minnick v. Davis*, No. 00-3460 (7th Cir. Jul. 1, 2002)], but it was a capital case, and we were sitting en banc. The appellant had two theories. The first required that the conviction be set aside altogether. The other theory challenged the death sentence only. Judge Easterbrook asked the appellant’s lawyer if his client recognized that if he prevails on the argument challenging the conviction, he could be convicted and sentenced to death again. The lawyer replied, “my client doesn’t have a clue; he’s completely nuts.” I’m not recalling

the precise words, but it was very close to that. Of course, the court just sat there in amazement. We ordered that the case be sent back to the district court for a determination of whether the appellant was competent at the time the petition was filed and, if not, that a guardian be appointed. [Editor’s Note: Minnick was later found incompetent and a guardian was appointed who rejected the strategy of Minnick’s prior lawyers. In 2004, Minnick was granted relief in a state post-conviction proceeding and has since been removed from death row.]

Molo: Your own professional background was primarily as an academic. How do you find working in an institution where your day-to-day work has a very real and practical impact most of the time?

Judge Wood: I am always mindful of the practical consequences of our decisions. Yet, I understand the broader implications, beyond the impact on the litigants, that our decisions may bring. One of the great things about our court is that we have this wonderful mixture of backgrounds. We have people who have been deep into the most basic elements of the political process, people who have been accomplished trial lawyers and trial judges, and people who have been some of the country’s finest academics. Through

that mix, I believe we are able to achieve a balance that allows us to reach the right result, as much as possible, on the important issues we confront daily.

Molo: What are the best things about your job?

Judge Wood: Of course, it is a privilege to be involved almost daily with dealing with interesting and important questions that can have such a broad impact. On a more personal level, it is great to engage with colleagues on these issues in a serious and civil way. Our court, and the courts generally, are not paralyzed like some government institutions. And we maintain an “on the record” approach – very transparent to the public.





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Molo: And the worst things about your job?

Judge Wood: Like any job, there is a certain amount of “routine.” There can actually be a sense of futility about some areas of the law. The drug cases are an example. I remember that not long ago I went to lunch with Judge Bauer and Judge Cudahy. I mentioned that I was just reading the briefs in a drug case and it felt as if it was the same drug case I had considered the year I went on the bench in 1995 – probably the same Dunkin Donuts parking lot where the deal occurred. They both laughed, and Judge Cudahy said he is considering the same drug cases he considered when he went on the bench in 1979; Judge Bauer said the same was true for him going back to 1974.

Molo: What effect do you see the political polarization having on the judiciary?

Judge Wood: The most obvious is the slowness of the confirmation process. It has been two and a half years since our late and much-missed colleague Judge Evans took senior status, and we have no replacement. We are fortunate to have hard-working senior members. Despite the general confirmations slow down, we have been able to get some good people confirmed in the district courts in the circuit recently. There are some very strong people who have just joined the court for the Northern District of Illinois. Unfortunately, people are made to wait. And the process itself is so intrusive that good people are kept out.

On the back end, the pay situation is such that some outstanding people are taking full retirement as soon as they are able to do so. We lost David Coar, Wayne Anderson, and Jeanne Scott recently.

Molo: What are your thoughts on the challenge for the administration of justice in the 21st century?

Judge Wood: I know that complexity – with advancements in technology – is an issue of concern to many people.

I’m not a big fan of specialized federal courts. The experiment of the Federal Circuit, with a focus on international trade and patent matters, has its limits. Courts operating at a general level

are able to see broader patterns. It is up to the lawyers to boil the issues down – to make them understandable to those unfamiliar with the details of the subject.

Expert testimony is still an evolving issue. The Australians have an interesting approach. They call it “hot tubbing.” They bring the two opposing experts down to the well of the court and let them battle it out. They think it gets to the point much more quickly and effectively.

Molo: Two of your own children are lawyers. What advice would you give a young person coming out of law school today who might aspire to some day serve as a judge?

Judge Wood: Work hard; become involved in your community and in the bar; don’t forget public service; and do your best to obtain experience in court.

Send Us Your E-Mail

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We are unable to provide you with these services, however, if we don’t have your e-mail address. Please send your e-mail address to changes@7thcircuitbar.org.