

IN MEMORIAM

RECOLLECTIONS OF JUDGE GILES S. RICH

By Paul R. Michel[†]

It is fashionable to talk about the legacy left by a departed person, particularly someone well-known, such as our late colleague—Judge Rich. In many contexts, the term “legacy” is a little pretentious and inflated. In reference to Judge Giles S. Rich, however, it is a most apt expression, and the legacy he left was as invaluable as it was long.

The most obvious and concrete example of Judge Rich’s contributions to the evolution and improvement of patent law, putting aside his large contributions to the drafting of the 1952 Patent Act, is found in upwards of one thousand volumes of the Federal Reporter containing his opinions, issued between February 1957 and the summer of 1999. Even in the final months of his forty-two year tenure as the oldest judge in full-time active service—not only as of the time of his death but *ever* in the history of the Republic—he never stopped contributing. In his last two years, landmark opinions authored by Judge Rich included *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*¹

In my own view, however, an even greater legacy, though one harder to trace, can be found in the approach of innumerable judges and legal practitioners who were affected by his preaching clear thinking, clear expression and clear logic. Dozens of former Judge Rich law clerks went on to become leading intellectual property lawyers. Innumerable judicial colleagues learned the intricacies of patent law through his patient teaching. From reading his opinions, untold numbers of district judges have a clearer sense of the thrust and logic, embedded like the famous DNA code, in the patent law. Certainly, his teachings in the form of speeches, for example to the international judges’ conferences in the 1990’s and at the Giles S. Rich American Inn of Court, also embodied his approach to the law and influenced many more practitioners. Indeed, the passing on of his wisdom from one practitioner to another means that it continues to multiply.

What many in the intellectual property community do not know is how generous Judge Rich was with his time and thought. It was routine for him to write detailed memoranda commenting on opinions by other Federal Circuit judges. These memos would cover every kind of matter—from the

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1. 149 F.3d 1368 (Fed. Cir. 1998).

most sublime, usually unarticulated, notions of jurisprudence and legal logic all the way down to the proper placement of commas and everything in between.

When I first came on the court, Judge Rich typed these memoranda himself on an old electric typewriter. More recently, he was producing much fancier-looking text on the computer with the assistance of high-speed laser printers. But whatever the appearance and source of his memoranda, they represented his love of the law and willingness to try to assist and teach colleagues all that he knew and had learned over more than forty years as a federal appellate judge.

Appointed to the Court of Customs and Patent Appeals in 1956 by President Eisenhower, Judge Rich witnessed many waves of development in American innovative technology, including the development of telecommunications, computers, and biotechnology. In all that time, he never lost his enthusiasm for understanding even the simplest mechanical devices whose technological genesis went back centuries. In fact, he took extraordinary delight in understanding how things work, how anything that one might use actually performs, as well as how it could be repaired when necessary.

His chambers contained innumerable working models of patented devices of many different kinds. In appeals in which apparatus was at the center of the dispute and copies of the devices were provided to the court, he invariably examined them not only in the courtroom but more carefully later in chambers. He would tinker with such devices until he understood exactly how they worked, and then he would eagerly explain what he had learned to not only his own law clerks but also to other law clerks and, indeed, to other members of the panel.

He was a person of uncommon curiosity who took delight in discovering what things were, how they were made, and how they worked. He was famous for his ability to fix friends' clocks, as well as to repair electrical devices, plumbing, and other household items in his long-time residence on Linnean Avenue in Northwest Washington and in his country home in Connecticut. In fact, according to the lore, the country home was largely constructed by Judge Rich, whose skills at carpentry, painting, and glazing were as extensive and confidently applied as his skills with the electrical and plumbing arts.

Perhaps, then, it is of little surprise that he also was extraordinarily expert in the construction and operation of all manner of photographic equipment. He had cameras going back to pre-World War II days. He was not only fascinated by the details of the photographic arts—as befitted the son of George Eastman's patent lawyer—but he was also an extraordinar-

ily gifted photographer himself. His photographs, both of friends and scenes of natural beauty, are well-known to all of his large circle of friends and colleagues. In fact, every year he insisted on taking photographs of each and every arriving law clerk. He also was fond of giving framed copies of some of his nature photography to particularly esteemed friends.

Studying some of his nature photography demonstrates not only his skill at composition, contrast, focus and juxtaposition, but also his fascination with the details of nature itself. One particular photograph—which, once having been viewed, does not leave the mind—captures a scene of snow-covered Lafayette Park in pristine wintry conditions marked only by the footsteps of a single passerby in the newly fallen snow. In this photograph, in addition to the eerie statue of a famous general partly encrusted in snow, one sees every tree trunk, branch and twig of the minor forest viewable from our chambers high in the Howard T. Markey National Courts Building at the eastern end of Lafayette Park.

To study even this one photograph is to begin to understand how intensely focused Giles Rich was on whatever he was contemplating, whether with his eye or his mind. Indeed, the connection between eye and mind was more direct and vital in him than in anyone I have ever known.

Another expression of his wisdom and teachings came at our monthly administrative conferences, held the Thursday afternoon of each argument week, normally the first full week of each month. At such occasions, he insisted on reminding us of the way things had evolved and why they had turned out as they had. Whether it was a court practice, a fundamental feature of the Patent Act, or anything else, he would explain how the particular object of his concern arose, its function, and how it related to everything else. For him, an idea was no different from a clock. It was something to be understood in terms of how it was put together and how it operated. It was to be understood in relation to other related objects and functions. And it was something to be preserved, repaired, and, indeed improved. These mini-lectures were, at times, greeted with wry amusement by some colleagues with less patience than he. Yet of all the things said at all those meetings I have attended now for more than a decade, his statements remain vivid in my memory, whereas the words of the rest of us have long since been forgotten by one and all.

To me, the center of gravity of his wisdom actually did not concern the fine points of the patent statute, the case law construing it, or the world of technological artifacts. Rather, the core of his wisdom, in my view, was his insistence on two intellectual qualities that are all the more vital despite their invisibility. First, he was a stickler for precision of language. For example, he constantly urged us to stop referring to the “specification”

as a source of claim construction, because the claims were themselves a part of the specification. He urged us instead to use the far more precise term "written description." That is, the specification consists of the written description, the title, the abstract of the invention, and the claims. Of these, aside from the claims, certainly the most important were the written description and accompanying drawings. Innumerable examples of other points of precise terminology would come to the mind of each and every judge of our court, but the details of these examples are not nearly so important as his absolute uncompromising insistence that we get the terminology right and use it consistently.

The second core tenet of the judicial persona of Judge Rich was that things should be logical. Decisions should be predictable, which requires that they be logical. Opinions should be internally consistent and, in that sense, logical. The relationship among the statute, the case law, the guidelines and manuals of the Patent and Trademark Office, and the decisional writings of officials at all levels had to relate logically, one to another. He frequently exposed in discussion with fellow judges "illogics" in our thinking or opinions, which, lying just beneath the surface, had not been seen until he spoke.

In all the above respects, Judge Rich showed curiosity, enthusiasm and intelligence in his intense desire to understand everything he encountered, both legal and physical. He would sometimes raise his voice or repeat things, much as a schoolmaster might for young students who had not been paying adequate attention to the instruction. The very vehemence of these statements, of course, prompted our attention, sometimes our amusement, and always our respect.

One of my favorite qualities in conversing with Judge Rich, or listening to him speak, was that, like a great musical composer, he used silence as well as sound to convey his message and to create emphasis. Put differently, he thought carefully before he spoke, and if that meant that there would be a long silence between when he had secured the attention of the group and when the first word emerged from his mouth, it troubled him not at all. What he then would say would be so clear and useful that even our most impatient colleague would wait happily while he gathered his thoughts and recollections.

Although one should take care not to seem to make fun of so minor a detail of daily life as eating habits, I think it instructive to describe those of my late colleague. In eating, he exhibited two qualities that permeated his life and his approach to every activity of life. First, he concentrated utterly on what he was doing at the moment. I never saw a man so immune from distractions, interruptions and diffusion of attention. So even while

eating a sandwich, he would concentrate on what he was doing and the pleasures and delights of the activity. Secondly, he would proceed with the most carefully modulated, slow, steady pace. As in all activities, he refused to be rushed or flustered. He was, therefore, able to function more effectively and efficiently as well as to draw greater joy from the fascinations of life in matters both monumental and minuscule.

The suppleness of his mind was apparently without limit. Although in his mid-nineties he was no longer quite so erect, sturdy, or steady on his feet as he had been just a year or two earlier, his mind seemed not to stiffen or harden with advancing age. Not only did he master computer technology and become one of the court's premier e-mailers, but he delighted in being able to produce music and extraordinarily clever spreadsheets and diagrams on his computer. He kept up. It seemed that no breakthrough, whether it concerned gene expression, DNA sequences, advanced inner workings of computers, or the chips at their core, was beyond his understanding. He seemed able to master new devices and new concepts as if they sprang from some old familiar language and logic that he had lived with forever. Perhaps he understood the basics of science and technology so well that what might have appeared to the rest of us as entirely novel appeared to him merely what he might have called, with a twinkle in his eye, an "obvious" variation of the earlier art.

Indeed, if assessment had to be made of his greatest single contribution to the development of patent law, I myself would be inclined to nominate his great innovation of the concept of obviousness. He is credited with having introduced this notion and term into the 1952 draft Act to replace the many prior formulations, all of which had been glaringly inadequate and had included things like "flash of genius," "synergism," and "creative invention." He abandoned the hopeless quest for clear, objective definitions of those attempts that concentrate on the claimed invention and try to discern something from within its own language and content. Instead, he related the claimed invention to the prior art—what was routinely known by the ordinary artisan—by the concept of whether the alteration in the prior art, in order to achieve the claimed invention, would or would not have been apparent, that is, "obvious," to the ordinary artisan in the field.

The contributions of individual judges are difficult to measure because each judge on a court of appeals is normally writing for a panel of three in approximately one-third of the cases he helps decide, and is providing a vote and advice on the opinion-drafting in the other two-thirds. Thus, to a greater or lesser degree, every opinion is a collaborative effort among the author and the other two judges. Moreover, on our court a great deal of commentary is provided by nonpanel judges who review, or at least have

the opportunity to review, every precedential decision before it issues publicly. These nonpanel colleagues frequently comment, sometimes in great detail, on the panel's proposed opinion; frequently, significant changes are made as a result. Thus, the final opinion often represents considerable input not only from the three panelists but from several other colleagues on the court. Indeed, further changes still are sometimes made at the behest of our Central Legal Office staff, a core of technically-trained, long-term "super law clerks" who help us try to stay wholly consistent with all prior opinions expressing views on a particular issue. Therefore, in addition to the imprint of constitutional, statutory, regulatory and case law authority, all judicial writing has a certain communal aspect to it, which is both its strength and, to some extent, may inhibit innovation or limit glamour and glory.

But the opinions of Giles Rich were always so fresh and vital and advanced the state of the law like a moving frontier that they make fine reading, even long after their issuance.

Therefore, much of the mind and spirit of Giles Rich is indeed still available in every single one of his opinions, not to mention the full body, which must run to the thousands.

It is simply extraordinary what effect he had on colleagues, both in agreement and in disagreement. If we had much effect on him, it may have been simply to redouble his determination to stay alive and alert as he did to the age of ninety-five in order to continue to teach us about what he loved so much. We shall miss him.