



AN INTERVIEW WITH JUDGE **John D. Tinder**

*by Brian J. Paul**

Born in 1950 in Indianapolis, Indiana, Judge John Daniel Tinder is a 1975 graduate of Indiana University School of Law. Between stints at the U.S. Attorney's Office for the Southern District of Indiana, an office he would eventually head from 1984 to 1987, Judge Tinder served as a public defender, a deputy county prosecutor, and a private practitioner. In 1987 President Ronald Reagan nominated him to be a district court judge for the Southern District of Indiana, a position he held until 2007 when he was confirmed to a seat on the U.S. Court of Appeals for the Seventh Circuit.

Q. How did you come to the attention of President Bush as a potential nominee for the appellate bench?

A. I don't know for sure, because I've never talked to President Bush, and no one on his behalf told me directly. I can draw some inferences, though. Whether they're accurate or not, I'll have to see. I think it was some time in the Spring of 2007, I got a call from someone on behalf of Senator Lugar's office. Calls were being made around to let people know there was the likelihood of an opening because Judge Manion was going to become a senior judge as of a certain date. And the inquiry was, do you know of people who would be qualified and interested for consideration for appointment? I responded to that, giving names of various people that might be obvious and then said, by the way, I would be interested in that. Subsequent to that, I had occasion to meet with Senator Lugar and discuss my interest in the position. Sometime after that I was contacted by people within the administration, asking me questions, and I provided information and so forth, and the process was ultimately underway. I'm assuming that Senator Lugar or someone on his behalf may have mentioned my interest to someone in the administration.

Continued on page 9

**Mr. Paul is a partner in the Appellate Practice Group of Ice Miller LLP in Indianapolis. This is an edited transcription of a recorded interview that took place on September 26, 2011.*

Interview: Judge John D. Tinder

Continued from page 8

Q. Is the job what you expected?

A. It is. There are parts of it that I suppose I wasn't as familiar with as a trial judge as I should have been. The aspect of petitions for rehearing and how important those are to the court and how that draws each judge on the court into the consideration of every case in which there is a petition for rehearing was something I really hadn't thought about much as a district judge. And it's a very frequent process in the Seventh Circuit. I think petitions for rehearing are filed in maybe more than 25% of the cases. In the district court in the Southern District of Indiana, motions for reconsideration or post-trial motions were relatively rare. But on the court of appeals, petitions for rehearing are quite common. And so rather than just a three-judge consideration of the legal issues, you're actually drawing all the judges into it. So, that's something I really hadn't anticipated.

The travel time is a little greater than I suspected, but I'm becoming a better traveler. I think I'm becoming more efficient. With say 25 sittings a year, you're making 25 trips [between Indianapolis and Chicago]. The best time you can make on a trip is a little over six hours, a round trip, so that's several hundred hours a year in a car or some other means of transportation. And that either comes off your work time or your leisure time, and there's no way you can take it off your work time. You've still got to do the same work as everybody else, so it comes out of your leisure time. I guess I hadn't thought about that that much. But other than that, it's what I expected.

Q. In recent years Chief Judge Easterbrook has invited district court judges to sit on the appellate court as visiting judges. As a former district court judge yourself, do you

think the experience is helpful to district judges?

A. I had done that back in '92 or '93 and I thought it was very helpful as a district judge because it gave me a greater familiarity with what the work of the court of appeals is and gave me a perspective about what a record looks like to an appellate judge and what sort of considerations go into the review of the trial record. I hope that helped me to become a better trial judge, at least better at explaining why I would do certain things, and how I was doing them, and the reasons for it.

A few years ago, someone pointed out to me that one of my experiences there also turned out to be kind of noteworthy, but I didn't know it at the time. I was able to sit on one panel that



included Judge Posner and Judge Bauer, and we had a case involving a securities arbitration issue that was really well argued by both sides, very interesting case, and I really enjoyed the case and thought it was well lawyered. Someone pointed out to me a couple of years ago and said go back and look to see who argued that case for the winner. It turned out to be a young man named Barack Obama. And I remembered the case as being well argued, but for the life of me I can't remember him actually arguing. Unfortunately, those recordings aren't available, but in fact, on the record, he did argue it. I wasn't alert enough to spot him as a future president.

Anyway, it was a very good experience for me as a district judge. And I think it's a great experience, looking at it from an

appellate judge's perspective, too. I think it helps us stay in touch with what is happening on the district courts, because in our lunches and other discussions, we are able to get updated from those out in the field, so to speak, and it also helps us be more familiar with those people who are on the district court. We're not just looking at a name in a transcript. We have a much better opportunity to interact with them and kind of bridge that distance between the district court and the court of appeals a little bit. I think it's a great process, and I hope we continue to do it. And I think we have found that it's well accepted both by the appellate colleagues and by the district judges.



Interview: Judge John D. Tinder

Continued from page 9

Q. How does being a former district court judge color your thought process as an appellate court judge?

A. We're all informed by the experiences of our life. I think it certainly gives me a perspective on some of the pragmatic challenges of being of district judge, the volume of cases which you have to handle, some of the scheduling stresses that a district judge has. For example, if you're in the midst of one trial with a jury, and you've got another jury scheduled to begin in a couple of days, and witnesses are flying in from all over the country, and it's been scheduled for a long time, and there's an ice storm coming, you're worried about whether these jurors you have now are going to be able to get home safely and back, and so forth. And when an issue comes up before you, say an evidentiary issue, you may make an effort to rule on that very quickly. Whereas in calm reflection you might want to have a two to three hour hearing over it.

So, I have those experiences that give me that perspective. But I don't think it's necessarily a superior perspective to anyone else on the court. We all come from a variety of backgrounds, and each lends something that I think is useful to the overall composition of the court. I think it's nice to have a mix of those who come from a litigation trial background and those who come from an academic background and those who come from others as well.

Q. Do you think your experience as a district court judge affects your willingness to reverse?

A. I certainly don't start in the cases saying, let's find a way to affirm this judge, or let's find a way to reverse this judge. I try to look at each case on the merits of the case itself. I do hope that trial judges show patience and preparation and pay due attention to the law and so forth. And I would expect trial judges to perform well generally. So, I hope that prior history doesn't cause me to tip the scale one way or the other. I was a prosecutor at one time. I hope that wouldn't cause me to favor the government in a case or disfavor the government. I was also a defense lawyer at other times. And I did both civil and criminal. So, I hope there's enough of a balance in my history to help keep me on track and be fair in each case.

Q. Are there aspects of being an appellate court judge that you prefer over being a district court judge? Are there aspects you do not prefer?

A. The short answer is yes. One of the great things about being an appellate judge is when you get one of these knotty legal issues, you really can drill down and take a really deep look at those things. And you have the opportunity to share your ideas with your colleagues on the panel and hear their ideas as well. And when you've got three appellate judges, or the entire court for that matter, on an en banc matter, looking at this, you really get down to the core of the matter. On the trial court, it's really just you, for the most part. The lawyers make their presentations, you can consult with your law clerk about it, but in terms of an experienced lawyer looking at it, it's you. You don't get that benefit of your colleagues' input in the same way that you do on the appellate court.

Another aspect of the appellate bench that certainly keeps me going is the range of things that you see is a good bit broader than you'd see in any given district. We have seven districts within our circuit, and things that happen in Chicago and the Chicagoland area are quite different than might happen in the Western District of Wisconsin or the Southern District of Indiana and what have you. So, you get to see a broad range of different business activities, business relationships, employment situations, and a wide range of different accusations and criminal activities. And that's really pretty stimulating to be able to see a wider range of things. And you're also quite conscious of what our circuit is doing relative to what the other circuits are doing.

There are aspects that are not as preferred to being on the trial bench. One of them is scheduling. As a trial judge, you are the conductor of the train. You decide when you start, how far you go, how many stops you make in between. And you know when you're at the end of the line. You've reviewed the briefs and decided that summary judgment is going to be granted. It's granted, and you don't have to consult anybody else about it. But, as an appellate judge, you're always the passenger on a train that's being driven by someone else. That is, the schedule has to be coordinated among three judges. When you feel that you've evaluated the issues as much as you need to and your opinion is written, you have to get the approval of at least one other judge before it's final. So, you're always depending on someone else to agree with you, and that's not true on the trial court.

Continued on page 11



Interview: Judge John D. Tinder

Continued from page 10

Another thing that I miss somewhat from the trial court is there are lots of cases that are really tough knotty cases, and they're set for trial and you prepare for those events, and all of a sudden, the Friday before the Monday start of trial, sometimes they go away, sometimes they settle at the last minute. And all of a sudden, where you thought you'd be in trial for two weeks, you have two weeks where you're not in trial, and that provided the opportunity to do a lot of other things, work-related and also the occasional day where you didn't have pressing matters. In the court of appeals, if that case is fully briefed and set for argument, it almost never goes away. I miss that part of being a trial judge.

Q. Name an appellate judge (living or dead) that you think is worthy of emulation by other appellate judges.

A. That's tough because there are so many. Among my living colleagues of the court, I'd hate to overlook someone. So what I'm going to do is pick the colleague that I lost recently, Terry Evans. He was a really terrific guy and a great member of our court, a very valuable member. And of all the things that I think he did well, I think his writing is what all of us should try to emulate. And that is, he always wrote concisely, clearly, and in a common sense way so that the knotty legal issues could be unraveled and understood by anyone who would pick up the opinion. And he wrote so that his opinions were very readable, interesting, enjoyable, and you'd want to read them start to finish. I think those traits are things that every appellate judge ought to emulate.

Q. Do you subscribe to a particular judicial philosophy?

A. Not that I know of. I didn't sign up for any particular area of jurisprudence or philosophy. I try to be thorough, I try to be prepared, I try to be accurate, I try to be fair. If that's a philosophy, then sign me up. But I'm not trying to be in any particular school of jurisprudence.

Q. Which areas of the law particularly interest you?

A. I think civil cases in general are often more interesting and nuanced than criminal cases. And it's hard to pick a particular type of case. ERISA cases can be fascinating. Bankruptcy cases, shockingly, can be very interesting. Civil rights cases are obviously, at least to me obviously, very interesting because you have the intersection of a lot of different societal interests. And sorting that out through our civil rights laws are absolutely fascinating problems. Real estate issues that come up I find to be very interesting. Even tax cases can be very interesting. I'm unfortunately not very selective. I guess my view on that is summed up by something I said before, and that is, the job of a federal judge is one in which it's quite possible to become tired, but impossible to become bored. Each day's arguments presents six new fascinating puzzles. I don't try to find any single area or groups of areas, because if I did, I would be overlooking some really fascinating other areas.

Q. Did your time in the U.S. Attorney's Office in any way turn you off to criminal law?

A. No, criminal law is a wonderful area to be in. It's chock full of characters — the people who work as law enforcement, criminal defense lawyers, prosecutors — they're all pretty interesting characters (or for the most part pretty interesting characters). The people who are involved as witnesses, victims, and defendants are everyday people off the street that have very interesting stories to tell and very interesting motivations. Criminal cases tend to go more quickly than civil cases. And in almost every criminal case, no matter how solid the case is, even in the ordinary, slam dunk, run of the mill case, you can mine a constitutional issue somewhere along the line. So that always makes it very interesting.

But just overall, I think civil cases can take on many different aspects. And there's also more gray in most civil areas. In the criminal sector, with the advent of public defenders and appointed counsel, virtually every issue that one can think of has been raised somewhere, sometime, in some court. In the civil arena, because of economic considerations, some things don't get litigated or don't get appealed and so forth. So it's much more difficult in the civil area to find settled law. And so I think maybe that's part of what makes it more interesting to me.

Continued on page 12



Interview: Judge John D. Tinder

Continued from page 11

Q. How do you go about the process of writing opinions? How do you use your clerks in that process, for example?

A. It probably starts with the preparation for the argument. And I think this is something you may intend to ask later on. Both a law clerk and I will read the briefs in anticipation of the argument taking place, and a memo is prepared. Sometimes the law clerk and I will talk before the memo is prepared, and I'll give specific direction as to the areas that I want briefed in advance. Or sometimes we don't have a chance to talk before the memo gets written, and the law clerk and I will go over what's in the memo, what I find in the briefs, what they find in the briefs. And sometimes I have additional research done, some other exploration maybe of the record. In any event, that becomes sort of my working document going into the argument. The arguments are held, and we have a conference immediately following the arguments. The three judges then discuss the cases and give a tentative vote. And then the presiding judge assigns the writing of the opinion to a particular judge. If it's me, I sit down with my law clerk, we talk about the discussion the judges had and the argument that preceded it. I'll generally give the law clerks specific directions about the overall structure of an opinion indicating what we're going to do with the case, affirm or reverse or a little mix of both, and the areas we're going to discuss and how to get there. And generally, the law clerk will take a first cut at a draft and will eventually get me that draft, which will then undergo a series of rewrites, and rewrites, and rewrites. Sometimes just a few; sometimes as many as 10, 15, maybe more to get the opinion to where I feel comfortable with it. Then it's circulated among the panel, and there may be more revisions after that. It's a writing and rewriting process. The bulk of my time is spent on rewriting and revision and expansion and so forth. That's essentially how we do it.

Q. Since you've been on the appellate bench, are there two or three opinions that you've written that you're particularly pleased with?

A. That's like asking someone which of their children is their favorite. I try to do my best on everything that goes out the door. Frankly, there is no one or a handful of opinions that I would say

are my best work. I'd like to think it's all the best that I can do. So, I'll leave it to others to pick out what they think is good or bad in any particular opinion. I don't have special ones that I hold as models.

Q. I found five cases in which you dissented, and only one of those was a panel opinion. The other four were dissents in en banc proceedings. Do you ever disagree with a panel decision but decide not to dissent?

A. I guess that count may be right. I've had a couple of concurrences that one might think of more as dissents because I disagreed with the reasoning of how the majority got there, but I came out to the same place. But to answer your question directly, no, I don't give up a vote simply for unanimity. If I feel strongly enough, if I feel the outcome isn't correct or the logic used and the reasoning is not correct, I would say so. So, I suppose then, if there's just one panel dissent in that period of time, that was the only case in which I felt that way. I know there will be more because of what I'm working on right now. No, I would not give up a vote simply for unanimity.

There have been times when I have been persuaded by the logic of my colleagues. I can give you a specific example. Within the last year there was a case involving sovereign immunity. It's *Board of Regents of the University of Wisconsin System v. Phoenix International Software, Inc.* Initially I wrote the majority opinion, and Judge Wood wrote a dissent. There was a petition for rehearing, and in the course of evaluating that, and we did rehear it, I became convinced that she was absolutely right, and I changed my vote, as did my colleague, Judge Flaum, and the opinion came out of the rehearing as a unanimous opinion offered by Judge Wood. That can happen. I can be persuaded, but if not persuaded with the majority's position, I would certainly dissent.

Continued on page 13



Interview: Judge John D. Tinder

Continued from page 12

Q. You have said in a previous interview that “[o]ral arguments are useful if you are prepared nearly well enough to make your ruling before the argument starts, so that you know the case about as well as the lawyers do.” How do you prepare for oral arguments?

A. Other than what I mentioned before, there is often additional research conducted based on the cases that the parties have cited as a starting point, and we often look for other cases and sometimes just a different way of looking at the issues. There’s often some digging into the record beyond the appendices to make sure we know what happened down below. There’s a fair amount of back and forth between me and my law clerk before argument. The judges do not discuss the case prior to argument, and we do not share memos in advance. I guess that’s pretty much it. The preparation time for argument certainly far exceeds the argument times we allow. I don’t keep good track of it, but I’m going to guess it probably takes me anywhere from 5 to 20 hours to prepare for any particular argument. This month, in particular, I’m sitting on about 40 cases, so there’s a lot of prep time that goes into it. I’ve got six argument days within a month’s period of time.

Q. What sorts of things do you see from lawyers in oral argument that you find to be particularly helpful (or not)?

A. It’s always helpful when a lawyer will avoid the windup and get to the pitch. Sometimes in argument, and I think more often in briefs, it just takes so long for the argument to come forward. I think the lawyers who do better are the ones that get right to the point; why their client should win or why the opponent should lose and to be up front about it. And if there’s a soft spot in your case, to explain it, explain the soft spot and why that’s not a problem. So often lawyers seem to sort of dance around the edges instead of getting right to it. Given the volume of things the judges need to do and the importance of clarity in how we resolve, I think it would be very helpful to get to the point.

Q. There are some very active and aggressive questioners on the Seventh Circuit. How would you describe your style of questioning?

A. If there’s something about a case that I think isn’t being adequately developed by the argument of the lawyer or the insightful questioning of my colleagues, I’ll step in. Often, though, I find my questions having been asked by someone else, areas that I’m interested in, they’ve already gotten into. I don’t feel any particular need to dominate the time being spent in argument. The lawyers only have so much time, so I think they ought to be allowed to develop their argument. If they need to be steered back to particular points that I’m concerned about, I’m happy to step in at an appropriate time to guide them to that point. But I don’t feel the need to dominate the argument.

One aspect of questioning by judges that I think is useful to observe, and that is that it’s the first time the judges have communicated in each other’s presence about the case. So, when you hear what your colleague is interested in, that may be some reflection of where your colleague might be on that case, what your colleague’s view might be. So that’s very helpful to hear the questions from other judges. I don’t consider myself a hot panelist, nor do I consider myself in the camp that would say judges should not ask questions.

Q. You argued cases in the Seventh Circuit when you were a practicing attorney. Did you learn any lessons from those experiences that influence you now as an appellate judge?

A. I learned pretty quickly to listen to the question and answer that question right away rather than saying, “Judge, I’ll get to that but I want to make these other points first.” If a judge asks a question, it’s something that is intended to direct you to a part of the case that’s very important to that judge, and so you really need to get to it right away. I certainly remember some very early arguments I made as a young lawyer where I didn’t understand that point, but I’ve learned that over time. They’re not asked idly or for someone’s amusement. The questions are asked to steer your argument toward particular points of concern. And it’s not as though the question is asked so that you will give up on your case. It really is to get you to something the judge is concerned about and would like to have some explanation and resolve some concerns about it. I don’t think judges are asking lawyers to agree with them or lose the case. I don’t think that’s the point of the questions.

Continued on page 14



Interview: Judge John D. Tinder

Continued from page 13

Q. How often would say an oral argument changes your mind in a case?

A. That's a very good question and is often asked. I should keep a statistic on it. I don't. I heard Judge Kanne say in about 15% of the cases the argument changes his mind. That sounds like a good number to me. Maybe what I should do over a year's period of time is keep track of the number of arguments, and the number of times my mind changes from my initial inclination as I'm going into the argument. I hope it's apparent to lawyers who argue in front of our court the judges are really well prepared before the argument. Whenever I hear a lawyer, most often who's never argued there before, say something like, "if you'll read my brief" or "if you'll look at this in the appendix," that's really not a good way to phrase it. I'm pretty well assured that that brief's been read and reread and looked at from lots of different angles by the judges, so that's really not a good way to approach the court. But your mind can be changed. To hear the context as the lawyer explains it and to understand how something could have been prejudicial in light of other things that happen during the trial or other rulings that were made, I think it can give some insight that you just can't get from paper. And your mind can be changed. Otherwise we wouldn't have arguments.

Q. What are some of the attributes of a particularly helpful brief?

A. I think clarity rather than volume. I always enjoy a brief that gets to the critical issues and strips them down to what they really are instead of gilding everything and meandering to the point. Just because we allow 14,000 words to say something, that doesn't mean you need to use all of them. The reading load for each day's arguments is just mind-boggling to me. I've heard it estimated at something like 1,500 pages for each day's argument. And that's law reading, that's not reading 1,500 pages of novels. So, you've got this opportunity to capture a judge's mind, and you don't want that judge part way through flipping to the end to see how many more pages he or she has to read. You want them to be eager reading throughout. Try to avoid taking 100 words to say what you could

say in 15. So, clarity and conciseness are certainly attributes of very good briefs.

An explanation of the concepts is also helpful. The concepts are much more important than the cases. We can look at the cases, but why are those cases important? What are the principles behind those cases that make them meaningful?

I always remember something the jurors would say at virtually every trial. I always talked to the jurors afterwards, and they would always say, would you tell those lawyers we got it the first time? They don't have to talk to us like we're third graders and tell us six and seven times these various things. We've got it the first time. The same is true with judges. They do get it, and you don't have to say something six different ways for the judge to get it.

I wasn't very clear and concise in my answer, but those are the points.

Q. Are there things that you wish lawyers would do more often in their appellate briefs? Less often?

A. That's a little bit like that pornography thing: you know a good one when you see one. It is surprising to me how often the reply brief can quickly get to what's really important. And if lawyers would write their opening and response briefs more like reply briefs, I really think that judges would appreciate that. There's such a windup, such a slow unfolding in so many briefs, it's hard to be patient with that. But, believe me, the quality of the briefs in the circuit is great. If there are better circuits than this, I would be surprised.

Get Involved!

Interested in becoming more involved in the Association? Get involved with a committee! Log on to our web site at www.7thcircuitbar.org, and click on the "committees" link. Choose a committee that looks interesting, and contact the chair for more information.