

Conversations With Women in IP

Transcript: Judge Sue L. Robinson

Irena Royzman

Hello, everyone. Welcome to Conversations With Women in Intellectual Property. I'm your host Irena Royzman, head of Life Sciences at Kramer Levin. I'm joined today by the Honorable Sue Robinson. Judge Robinson served on the District Court of Delaware from 1991 through 2017. In 2000 through 2007, she was the first and still the only woman chief judge on that court. Judge Robinson has presided over a hundred patent trials and more than 1,500 patent cases. She has issued thousands of patent opinions on every patent issue imaginable and managed the patent docket few judges will ever have. Judge Robinson now practices patent law as a mediator and arbitrator and trial consultant at Farnan LLP with her colleague on the district court of many years, Judge Farnan. We discuss how Judge Robinson was involved in turning Delaware into one of the most important venues for patent litigation, managed it all and the challenges she faced along the way. The conversation is also a personal privilege for me. My first jury trial and first summary judgment non-infringement defense win were before Judge Robinson many years ago, and I appeared before her again shortly before she retired. I hope you enjoy the conversation.

Judge Robinson, I'd like to start with your career. I'd like to start at the beginning. What inspired you to become a lawyer?

Sue Robinson

I believe when I look back, aside from my thought that the profession matched my skill set, which was reading and writing, my grandfather after he retired from the army at the end of World War II went to law school in his 50s and practiced law for 30 years after that in Florida, where he had retired, representing migrant workers and retired folks like him. So he was an inspiration and quite frankly, with the background I came from, the only lawyer I actually knew.

Irena Royzman

After your obtaining your law degree from the University of Pennsylvania, you began a career in private practice. What did you do? And do you think there's value to judges having private

practice experience?

Sue Robinson

Well, what I did was research and writing, reading and writing as a young associate, only the senior partner who started, got into the courtroom. Certainly any kind of experience that a judge brings to the bench is helpful. I think having just the experience I had as an associate, I appreciated the work that associates had to do and try to be mindful of that because the lawyers, the partners were always coming into the office, asking me for something that they didn't need for a month, but wanting it right away. So I was, I believe I was mindful of the stresses that being an associate in a large law firm encountered.

Irena Royzman

After that you joined the U.S. attorney's office in Delaware in 1983. What made you do that? And what did you learn there and how did it shape you?

Sue Robinson

That was the formative experience of my legal career. I was characterized as a litigator in my law firm because I wasn't a transactional lawyer, but I never got into the courtroom. And at some point I decided I really needed to get that experience before I was in my 40s. So I had the opportunity and accepted it and handled my own cases, got into the courtroom, tried cases in front of judges and juries. I basically found my own voice, found my own style and in my mind finally became a lawyer.

Irena Royzman:

What type of cases were you handling?

Sue Robinson

Well, certainly not patent cases. In order to try a case before a jury, it had to be a criminal case. Luckily I was in a small office where I could, although I was the head of the civil division, which was me, try some criminal cases to get my experience in front of a jury. And they were mostly white collar crime, so it fit nicely in with my civil experience, fraud cases primarily. So it wasn't as though the cases were like the cases that I eventually, well, it certainly wasn't patent cases, but as a judge sitting in the federal court, I still saw all the same sorts of cases coming across my desk from the U.S. attorney's office. So it was, as I said, it was the formative experience of my career, I believe.

Irena Royzman

After that, you became a magistrate judge in the District of Delaware in 1988. Were there other women judges on the court at the time, and what made you decide to become a magistrate judge in the first place?

Sue Robinson

Well, the opportunity came by for me to apply and I believe in taking advantage of opportunities and just trying, and if it works out, it's great; if it doesn't, you tried. There was only, well, there

was one district court judge who was a woman, Jane Roth, who was, had been, our first woman on a district court bench. I didn't interact with the judges a lot back in the day, and our bankruptcy judge was a woman. So we had two women on the federal bench in Delaware plus me, but there wasn't a whole lot of interaction between us. We lived in our different worlds, doing our different things.

Irena Royzman What types of cases were you exposed to as a magistrate judge?

Sue Robinson Oh, those were back in the old days when magistrate judges handled all the habeas corpus cases —

Irena Royzman I see.

Sue Robinson ... all the Social Security appeals, and then did all of the search warrants and initial appearances on the criminal side. Luckily I had one or two judges who sent me discovery disputes in patent cases to expand my horizons a little bit, but there was only one magistrate judge for four district judges, then I was the only magistrate judge. So my plate was full with a lot of routine, uninteresting things. I sometimes felt like I was a black hole where every prisoner in the state could dump on. It was not my best couple of years.

Irena Royzman But it was only a couple. So in 1991, you were nominated to the bench by George Bush Sr., and you took the seat that was preceded by Jane Roth, and you became the second woman district judge in Delaware. What was that like at the beginning?

Sue Robinson Well, I was lucky because within a year of my becoming a district court judge, we filled our fourth seat, which meant that three of the four district court judges were all relatively young. I went on at 39, and the other young judges were in their early 40s. So in terms of collegiality, it was a very collegial court, and we all had an interest in invigorating the court and, quite frankly, in encouraging complex litigation so that we could be challenged. So it was a very exciting time in the court's history, I believe, still continue to believe.

Irena Royzman How did you try to encourage complex cases in Delaware? And when did patent cases take off in Delaware?

Sue Robinson They started to take off, I went on the bench in '91, they started to take off in the mid to late '90s. And Delaware was in a unique position because, number one, we had judges who wanted complex litigation; a lot of judges, I understand, shy away from that. And number two, we had such a modest, I will say, criminal

case load that we actually had the time to handle civil cases and try civil cases, whereas big courts with heavy criminal dockets, it was hard for them to fit civil trials in. So we were uniquely positioned at a time when software and computer patents were taking off and pharma was taking off to be able to accommodate. Even though it was a small court, we were still able to accommodate civil trials. And I guess in terms of encouraging, you know, to some extent we, I think just our local Delaware council encouraged it, and of course, when we spoke at conferences, we let people know that we weren't afraid of patent cases and we had time for them. So it was a combination of things.

Irena Royzman

Do you think that the experiences of your male colleagues on the bench were different from yours, or you felt that the issues that you were facing were largely the same?

Sue Robinson

I don't know whether it's simply my perception or whether it was the case, but when I first went on the bench, everyone in the courtroom was male except me. And I'm a quiet person, and I had the distinct impression that these male lead counsel were, if not speaking down to me, they were acting up just to see if they could get me flustered. So I think I had a different experience than my colleagues who were much more comfortable in that environment, who could make jokes about sports. You know, they just were more comfortable in that environment. And I think I struggled a little bit more making sure that I controlled my courtroom. And I think by the end, I was considered a very formal judge who had rules and assumed you needed to stick to them as opposed to a more casual judge. But that stems back from my early days.

Irena Royzman

Interesting. Did your experience on the bench change as the number of women in the court increased? Of course you were the only district court judge, but magistrate judges were added and you were often paired with Judge Fallon. Did that change the feel of the court?

Sue Robinson

I believe it did. It wasn't until the last five to 10 years of my experience that we started to see more women, not only among my colleagues, but also in the courtroom. And it didn't necessarily change. Well, I believe there was a different feel to the courtroom. When there's more diversity, it's just more interesting, and it's not one lead counsel running the show — it's a team of people, but it was also nice to have more women at conferences, at meetings, at our judges' luncheons, again, just to make it more interesting. And so it made life an easier place and it made me feel like finally I'm coming into an environment that I

was more familiar with and more comfortable with.

Irena Royzman

You had one of the busiest patent dockets of all time, and I think one that few judges will match in the future. You had more than a hundred patent trials, more than 1,500 cases. You issued hundreds of decisions on every subject. I read three decisions of yours over the weekend on Section 271 (g); every subject that there is you have written on — issues of first impression, issues that repeat all the time. How did you handle such an extraordinary load?

Sue Robinson

I've been thinking about that. I think two ways. Number one is the mantra "First in, first out." You focus intensely on the decision you've got to write at the moment, but when it's done, it's out the door and you're working on the next one. You can't jump in and out, you can't linger; it's got to be intense focus. And the second thing was having a routine, having default standards, having schedules that were consistent so that I didn't tend to have to make small decisions. I could focus on the big decisions because the rest of the process was pretty much explained and people pretty much followed it, while you always had those exceptions. But so once I got the process established, then I could really focus on trying to do the best I could on the decisions that were expected of me.

Irena Royzman

You were chief judge from 2000 to 2007, the first and only woman to hold that position in the District of Delaware. Did that responsibility change the way you saw the bench and change your experience?

Sue Robinson

I have to say it was fun having the title. I admit that, but in reality, in a small court, the chief judge, of course, is just an administrative. Every seven years, someone becomes the chief judge; it's not anything because of your merits. But in a small court, you end up having all the additional administrative responsibilities without any extra help as you might get as a chief judge in a big court. So it was just yet another challenge to handle that, and luckily I had a fabulous staff because it was because of my staff that the process flowed so well, but it was, you know, there's always bureaucratic nonsense in every organization. And it brought the title of chief right back down to earth. It was just more work.

Irena Royzman

One of your initiatives as a judge, and you've alluded to it, changed the practice of patent litigation. You were one of the first to make changes to your schedule in order to really streamline patent cases. How did those rules help you? How did they help the bar? How did they change the experience of

magistrate judges?

Sue Robinson

Well, I'll start with the last first. I'm not sure it changed the experience of magistrate judges because when I started on this path, we only had one and because we only had one, she was, and she still is, our settlement guru. So in that respect, the changes I made to the practice really didn't affect our magistrate judges at all. I think it affected the practice because predictability is certainly of high value to clients. They want to be able to come in and know exactly what to expect, and although the outcome isn't predictable, certainly, the process is and should be. So I believe it helped me because I didn't have to create a new process with every case. It was set pretty much in stone unless the parties agreed to change it, but there was always very little agreement among patent lawyers. So I could focus on reaching the best decision I could. So predictability and I think having a level playing field where every case was treated the same, plaintiffs were treated, defendants were treated the same. I think that accounts for a lot, in terms of the vision that people have of the judicial system.

Irena Royzman

What do you think patent attorneys can do to make patent cases easier for judges?

Sue Robinson

Well, the one thing that is the most challenging about patent cases, besides the complexity of the technology, is the volume of paper. And it strikes me that relatively few patent attorneys, and I never knew whether this was purposeful or whether they just really didn't know how to organize all that information in an orderly way that made a coherent story that they were trying to tell. And I still find that even reviewing papers now, in my role as a special master or a litigation consultant, I still see lawyers having good points, but they're lost in all the information that they give the judges. I think that's a talent and a skill set, and I don't think that lawyers use it enough unless they're trying to obfuscate the issue, which I hope is not the case, but sometimes I had the feeling that it was.

Irena Royzman

What did you like the most about patent cases, if you could say?

Sue Robinson

Absolutely. It was learning from the best lawyers and the best experts about often cutting-edge technology. It was very exciting. It got less exciting towards the end because we, you know, but with all due respect, all the software patents about one part of one chip wasn't as exciting as a new drug, and the generic cases weren't as exciting as the cutting-edge drugs that we got back in the day, but still it's this cutting-edge technology, and when you had good patent lawyers and, of course, most of

them are very good, I felt privileged, especially in the bench trial when I was a classroom of one, and I still reflect on that and appreciate the opportunity I have had in that regard.

Irena Royzman

And what would you say you liked, the least — maybe the stacks of paper?

Sue Robinson

It was a never-ending flow of work, and that does become daunting at some point. But I think what I liked least as the years went on, I felt as though litigation itself was getting more aggressive. And although I had standards in place, that lawyers were less respectful of them. And so I ended up getting in the weeds about small issues that should have been agreed upon, especially with me, because I tend to take a middle ground. If you say you need six months for depositions and the other side says a year, I'll probably take nine months. I mean, this is not rocket science, and I don't want to take a lot of time. I didn't want to take a lot of time with those sorts of decisions. And as time went on, it seemed as though I was spending more time than I wanted to. And so I didn't like that aspect of it.

Irena Royzman

Are there any patent cases that are particularly memorable to you?

Sue Robinson

Well, I think the whole series of cases with the stent wars that went on for 10 years was memorable — frustrating, but memorable — because I saw the technology, which was so innovative and no one thought it would work. I saw that from the beginning and how it transformed and evolved over the course of 10 years. So I thought that was a remarkable opportunity I had, to witness that from the ground floor. So I think that was the most memorable.

Irena Royzman

And what work are you most proud of from your time on the bench? And I realize that's a hard question.

Sue Robinson

It's really not. I was so proud of myself for just keeping up and not particularly losing it, leaving the bench with, you know, not too many black marks against me.

Irena Royzman

Okay. So why did you decide to step down from the bench in 2017?

Sue Robinson

Well, between my time as a magistrate judge and a district court judge it had been almost 30 years, and I was ready for something new. And as I alluded to earlier, it got to the point where our patent docket was beginning to be just ANDAs and software cases with lawyers fighting over even the schedules, and that was challenging to me. So I was looking for something new, and I

thought as long as I had a few good years left in me, why not try something else? Although I apologize to my colleagues for leaving them in the lurch, I gave everyone lots of time to replace me and they didn't do it right away. So I tried.

Irena Royzman

What has the transition to private practice then been like?

Sue Robinson

Remarkably challenging. I was looking for challenges and I got them. You know, when you're a district court judge, especially in our district, there was never a dearth of work, and all of a sudden I was responsible. I'm in a small firm, so I was responsible for bringing in my own work. I've been responsible for my own IT, responsible for everything. It's been interesting. I feel like I've learned probably more in the last three years than I did in the last 20.

Irena Royzman

Are you enjoying being in private practice?

Sue Robinson

I am. There's a different level of stress, but, you know, as a district court judge with lifetime tenure, you did your best, but you knew nothing bad necessarily was going to happen if the Federal Circuit reversed you. Here, if you don't do a good job, you don't get called back. So you actually, you have to perform, is one of my favorite lines from — I'm a stupid movie fan — in "Ghostbusters." In the private sector they expect results.

Irena Royzman

Tell us about your work now and what do you enjoy the most?

Sue Robinson

I've got an interesting combination of being a litigation consultant, where I review briefs, arguments, issues for clients. I have arbitrations, which is essentially being a judge. Except that being a party-selected arbitrator is a different experience for me, because although you're supposed to be neutral, I find that my other party-appointed arbitrators are not necessarily neutrals and that clients don't expect you to be neutral. And so being an advocate in that kind of setting has been challenging for me. And mediation, I also find enjoyable but challenging because instead of my making the decision, I'm trying to make other people make reasonable decisions. And so that's a different exercise altogether than I was used to being a district court judge. But it's an interesting mix, and I'm enjoying it and I will continue to do so, I will continue to work as long as I continue to enjoy it.

Irena Royzman

That's the way to do it. Are you still handling or involved in patent cases these days?

Sue Robinson

It is primarily patent cases. Although the patent cases are now

bleeding into antitrust cases, certainly into contract cases, because I've had quite a few cases where patent cases have settled, then there are settlement agreements and then there are disputes about whether they've lived up to the settlement agreement. So most of the cases I deal with have their genesis in patent litigation, but by the time it gets to me, it's a different iteration of the initial dispute.

Irena Royzman

Let's turn to COVID for a second. And you're at home and we've been at home for some time now, but are now coming out of that, thankfully. How has COVID changed or impacted your practice?

Sue Robinson

Well, in a way, and I know this is not necessarily a popular view, but in a way it has made it easier for me because before COVID, I was traveling, and even when, for mediations, even when I got to where I was going, you know, you were going from floor to floor, from party to party; quite frankly, I have enjoyed being able to switch from party to party from the comfort of my home. So it's been challenging technologically, but having mastered that, it would be interesting to see how anxious people are to get back in person, despite the costs and the inconvenience. So I haven't had clients ask for it yet, but I suspect, you know, it will start up again.

Irena Royzman

Do you think remote proceedings are as effective as in person?

Sue Robinson

I'm not sure how effective they are. I think it all, it all comes down to effective. Well, in mediations, it still comes down to, do the parties want to settle and can you find a path for them? Although there are certainly mediators who believe that you need to be there in person to make that happen, but so many of the cases I have, we have people from all over the country and other parts of the world. So in some ways being effective it's just getting everyone together in a cost-effective way. I'm not sure, I haven't had arbitrations that have been remote. I haven't had as an arbitrator yet, they're scheduled in the near future, so I don't know about judging the credibility of witnesses. I would think you could do that, but I'm not absolutely sure that's as effective as in person. It remains to be seen.

Irena Royzman

So I wanted to talk a little bit about making opportunities for women in IP. In the nearly 30 years that you spent on the federal bench had much changed in terms of who was presenting the cases to you? For the cardiac stent wars that you handled for over a decade, all the lead counsel were men, I believe. And why do you think that is?

Sue Robinson

Well, it was interesting. Not only were the lead counsel men, but in the early days, my experience was that the lead counsel, the male lead counsel did everything. I mean, everything from opening, every witness, closing, one person did everything. And even the male team members were just support staff basically. So it's been quite an evolution to where the one male lead counsel became a team of male counsel, became a team that included women and other diverse groups, that became a team where everyone had a meaningful part because there are lots of judges who've now said, "I don't want to see people on the team who aren't actually doing something." You know, you're not just there as a pretty face; you've got to be participating. So it's been, it's been slow, but as you said at the beginning, and with the stent wars, which were in the early, starting in the late '90s, it was all men. And the last case I had, which was an antitrust trial, both leads were female. So, you know, we've come a ways.

Irena Royzman

Do you think diversity in the courtroom is an asset? Do female and male judges want to see women presenting cases in court? Do juries want that?

Sue Robinson

Absolutely. Certainly juries expect to see a reflection of their composition in the courtroom. I think they would be aghast if they were confronted with an all-white, all-male legal team, as it used to be. And judges certainly want to see that as well. It's interesting, if I can just go back a minute, when I was out of Penn for 10 or 15 years, they invited some of the graduates back who would become judges and had Sandra Day O'Connor and Judge Ginsburg, and the panel was, do women judge differently than men?

And the bottom line basically was we probably reached the same decisions but our analytical paths are probably different. And so I believe that having a diverse legal team means that you do have different perspectives, different analytics in terms of your trial strategy and presentation. And quite frankly, again, with all due respect, patent trials can be really boring. And if you only have one perspective and one voice, it gets really boring. So just having a diverse team makes the courtroom so much more interesting. I think it's helpful analytically, and it's helpful from a performance point of view to have a diverse team.

Irena Royzman

Approximately one-third of district court, Federal Circuit — Federal Circuit is a little higher — Supreme Court and PTAB judges are women, and though that's not 50%, that's considerably better than the private sector, and that is considerably higher than the number of women presenting patent cases, which are more complex, more high stakes. What

do you think can be done to increase the number of women presenting patent cases? And I mean done at a variety of levels. What can be done by judges? What can be done by women? What can be done by clients? What are your thoughts?

Sue Robinson

Well, as to judges, and I admit I wasn't at the forefront of this, but certainly there are judges who insist that less-senior members of the team, which usually include women and other minorities, have to be able to present motions, et cetera, if they want the motion heard. And so that's a great way for judges to encourage that, as well as judges, when they're out participating in events like Federal Bar Association events or other conferences, talking about how diversity is important in the courtroom. So those are two ways they can help.

I think one of the issues with, I think the difference between the public and the private sector is clients. I mean, in the public sector, they don't have to worry about whether the woman that's been appointed is anything other than capable. They don't have to figure out whether she's a rainmaker or et cetera. And I think in the private sector, there's that additional burden that lawyers have of being able to attract clients and have the confidence of clients when they walk into a courtroom to present the client's case, because it's the client's money. So I think that's an extra hurdle, and I think that's where women, you know, especially if they're trying to raise families, do they have time for 18 holes of golf on a Saturday? Maybe — maybe not. I think there's still some disparity there, and the opportunities on the one hand and the learning curve on the other was certainly not a mindset or a skill set that I ever had. I was lucky I was in the public sector.

Irena Royzman

In terms of clients, do you think the increasing number of judges on the bench that are women, and women are deciding many of the key IP cases, patent cases, do you think that's making a difference? Do you think it's impacting clients in terms of selection of women as counsel?

Sue Robinson

Absolutely. I think the private sector is very aware of the fact that judges are going to expect to see women litigators on the teams who are taking meaningful roles. I also think the fact that so many more general counsel, in-house counsel are women, is making a huge difference. And I was speaking in a webinar not too long ago, where with women general counsel, and they were saying, women tend not to call up and make connections and men aren't hesitant to just reach out basically to a stranger. So I think women do have to be a little more aggressive in that way. But certainly in the courtroom, the judges expect to see women take

meaningful roles.

Irena Royzman

If you could turn back time to the beginning, what would you tell your younger self starting out as a new lawyer? What's your advice to you?

Sue Robinson

Not lots, but, and this sounds, I mean, I'm astounded at how confident the younger women I see now are. And so my advice to me wouldn't necessarily reflect well in today's age, but my advice would have been, be braver. As, at the law firm, I was the only woman among 30 or 40 men in an old, established law firm. I didn't fit in clearly, but I wasn't aware enough to find my own niche. I didn't educate myself to find my own niche and my own voice. I didn't do that until I went to the U.S. Attorney's Office with the help of the U.S. Attorney, who was the only mentor I ever had — a male — because I was never in an office with a more experienced woman. So I never had the chance to have a female mentor, but I would have been more self-aware and then a little more aggressive about finding my own way instead of waiting for things to happen for me, because they didn't there.

Irena Royzman

Do you think female mentors help?

Sue Robinson

I would certainly hope so. I've heard stories where the more experienced women had to fight their way to the top, and they're not as ready to share yet, but I'm hoping that that's changing and that women are ready to share their experience and their insights with their younger colleagues.

Irena Royzman

What's the best advice that someone has given you that has helped in your career?

Sue Robinson

Well, it was my mentor, Judge Farnan, with whom, you know, I served on the bench for decades and I'm now there with his firm. When I was at the law firm, I was told by one of the senior partners that "You had to be a born litigator. You might as well not even try if you weren't a born litigator." And Judge Farnan told me in no uncertain terms that "What you have to do is to know yourself and know your case, and then walk into a courtroom with that knowledge so that you can be genuine." And that's what juries and judges, but especially juries, that's what they want to see — someone who is comfortable with themselves, comfortable with their case.

Irena Royzman

What's your best advice to women lawyers interested in complex litigation and really in patent litigation?

Sue Robinson

Well, I think I'm repeating myself, but certainly it's helpful if they

can find a mentor because mentors can open doors, not only give good advice, but open doors for you, especially in the private sector and with clients. Investigate your own path to help create your own opportunities, and certainly take advantage of the ones that are presented. Know yourself, know your case, be genuine. Not everyone is going to present the same way, and you shouldn't try to present your case in any other way than what reflects you, and then work hard at every step.

Irena Royzman

Judge Robinson, thank you. Thank you so much. It has been a true pleasure.

Sue Robinson

Thank you for inviting me. It's my pleasure having this conversation, and I hope that even a little bit resonates with someone out there. Take care.

Irena Royzman

It undoubtedly will. Thank you again to the Honorable Judge Sue Robinson for sharing her story. The private and public sectors present different opportunities and challenges for women in IP, and I can't wait to hear Judge Robinson's thoughts on the private sector again. Thank you all for joining us for Conversations with Women in IP. See you next time.

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