Judge Frank H. Easterbrook

Judge Frank H. Easterbrook served as Chief Judge of the United States Court of Appeals for the Seventh Circuit from November 2006 through September 2013. He joined the court in 1985 after being appointed by President Reagan. Judge Easterbrook was born in Buffalo, New York, and he earned his law degree from the University of Chicago Law School. After graduation, he clerked for Judge Levin H. Campbell of the First Circuit and worked in the Solicitor General's office as Deputy Solicitor General of the United States. He's also been a member of the faculty at the University of Chicago Law School since 1978.

BAG: So I'm here on April 2, 2007, with Chief Judge Frank H. Easterbrook, Seventh Circuit. I wanted to ask you, first of all: why is it so important that a lawyer, an oral advocate, be able to explain, straightaway, why appellate jurisdiction is proper?

FHE: Because if there isn't any appellate jurisdiction, why are we here? You know, I've got behind you a little political cartoonish thing that was given to me by my law clerks that has me, on the bench, pressing "the button," which I sometimes use metaphorically, that opens a trapdoor under the lawyer, and shooting a lawyer down the 27 floors — winds him out on Dearborn Street from the 27th floor, where the Seventh Circuit courtroom is located. Because if we don't have jurisdiction, then why are you here? And the lawyer will often say — if he really wants to get off to a bad start with the court — when there's a jurisdictional question, the lawyer will say, "Oh, Your Honor, jurisdiction was not contested." To the judge, all that means is both sides were asleep at the switch. Jurisdiction can't be waived or forfeited or anything else, and if we don't have jurisdiction, we might as well be op-ed writers. So jurisdiction is the first question in every case, and it's often the last question in the case. And

the lawyers who just think they're here to address what they want to address — rather than what the court needs to have them address — need to think again.

BAG: For the record, Judge Easterbrook has a cold today. Thank you for agreeing to do the interview, nevertheless.

FHE: Sucking on cough drops to reduce the side effects.

BAG: How could oral advocates improve what they do?

FHE: First, they need to prepare for the things that the court cares about. Appellate jurisdiction, subject-matter jurisdiction in the district court are obviously things that the court has to care about, whether the lawyers care about it or not. Second, lawyers should just relax. They need to understand the difference between an oral argument and a brief. The brief is their opportunity for a monologue. They talk to the court. If the court talks back, it's only in ink in the margin. But all the things that the judges have found intriguing about the case are saved up for oral argument. And when the oral argument comes, it's time to have a conversation. You can't have a good conversation with the court if you think that appellate advocacy is the same thing as high-school or college debate, where your job is to stand up and make as many points as you can before anybody interrupts you. Not at all. The interruptions, the questions, are the whole point. When you arrive at the oral argument, the judge gets to verbalize what he or she wrote in the margins in the brief, and now asks the questions to you. This is your shot. The judges have problems; now it's your time to address them. And the best way to do that, the way you would do it if you were talking to another human being — judges are at least marginally human most of the time — is to just have a relaxed conversation with them. Just imagine what it would be like if you were sitting with a friend and trying to persuade your friend

about some important proposition, like what's the best football team, or is the world warming up from carbon dioxide, or you name it. Whatever's important to you, you would never think of doing that by talking as fast as you can and not letting your friend get a word in edgewise, right? Your friend would be likely to hit you and walk out. Not an effective advocacy strategy. You need to think about this as an exchange because otherwise it's not going to work.

BAG: How familiar do advocates need to be with the accoutrements of the courtroom — knowing that there's a white light that's going to come on that tells you now you're eating into your rebuttal time, knowing that the microphone is not amplifying your voice, but merely creating the recording, this kind of thing?

FHE: Oh, the mechanics of the oral argument are, I think, way down on the list of important things. It's nice to know that the white light is signaling the beginning of the time reserved for rebuttal because if you don't know that, you'll speak too much before the rebuttal time and not enough afterward. But as compared to understanding that oral argument is a time for conversation with the court, it's trivial. The lights will go on; your time will expire sooner or later. The question is, Can you make the most of it while you're at it? What lawyers should know . . . somebody who hasn't argued in a given court before should show up and watch the oral argument in that court. They should show up not just a case or two before their case and watch, but they should get to know the way in which the court proceeds in oral argument. When I was back in the advocacy business and argued not only in the Supreme Court but I think in seven or eight of the courts of appeals across the country, I just never would've dreamed of giving an oral argument without going in at least one day

before the argument — just watching the panel the day before, seeing how different judges on the court handle the oral argument — because the different courts of appeals have different styles; different judges have different styles. You want to learn something about that.

BAG: What would you say to a lawyer in private practice who said, "Well, I would love to do that, but my client's not paying me for that time, that extra time"?

FHE: Your client didn't pay you for your time going to law school either, but you do need to invest in picking up the skills of the trade in order to do a good job. And if your view is you won't do anything your client didn't pay you for expressly, I assume you're not reading the law or magazines, or not watching TV, or not being aware of what's going on in the world. You need to make investments; the lawyer needs to make investments in making himself a better lawyer. You can charge a higher hourly rate when your clients are willing to pay you.

BAG: I had a lawyer the other day ask me to pose the question: how do you balance the drive that clients have to keep costs down with the demands of what it takes to write well — the time that it takes to write well? What is your answer to that?

FHE: I think the more time you invest in learning how to become a good writer by reading nonlaw, nonlegal things — in the example I just gave, watching the way the court proceeds and learning about the court — the more you know these things as a general matter, the easier it is for you to keep costs down because you won't waste your time doing silly things or pursuing dead ends in your brief. An appellate lawyer should be very well versed in the law. So when the Supreme Court hands down cases, you should be reading those cases, even if there are no billable hours in it. If you

understand what kinds of arguments fly in the Supreme Court and what kinds of arguments don't and a lot about the basic law, which . . . as Holmes said, the highest court of any jurisdiction recapitulates the whole law of that jurisdiction every 20 years. So if you keep up with what the Supreme Court is doing, or maybe read the decisions from whatever court of appeals you're practicing in, you'll be able to complete your brief better and in fewer hours. Your clients will be happy, and you'll be more successful. And again, the point is that your investments don't have to pay off immediately. If firms made only those products that would repay their investment in the next two months, you wouldn't have any computers to work with.

BAG: Let's go back to this point about relaxing in an argument before the Seventh Circuit. There are some very intimidating judges on the Seventh Circuit. I can imagine it would be hard for counsel to think, These are my friends, and in a relaxed way explain to them what I think the holding should be in this case.

FHE: It's very hard. It's *very* hard. And it's not just that there are some intimidating judges or judges that may even be outright hostile to your position. It's the whole ambience of the place: the courtroom is large, it is very formal, the lawyer stands at a lectern, the bench is elevated, the judges show up wearing black robes. There are all sorts of formal things that establish a distance between the advocate and the court. And one of your jobs is to be able to overcome that distance with how you present the case. But it's one reason why appellate advocacy is much more of an art form than writing a brief is — particularly in the courts of appeals, where the panels are always shifting, unlike the Supreme Court, where you get the same nine, day in and day out, and you get to know

them well. The panels shift, the dynamics on the panels shift, and it may be very hard for you to follow it. But it does seem to me that a good advocate is a relaxed and open advocate. And the very best advocates are the best at having this conversation with the judges.

BAG: And probably the key there is being truly prepared — knowing your stuff.

FHE: You have to know your stuff or there's no point. But your stuff, when it comes to an oral argument, is really two kinds of things. There's of course the simple kind of thing — your stuff is this case, and the record, and the little corner of the law in which it sits. But your other stuff is the rest of what a generalist court thinks. One of the reasons why oral argument is so hard is because the judges come to this case as a bunch of generalists. If you're arguing a tax case, don't assume that these judges know very much about tax, right? The judges in the American system are complete generalists: they go from a tax case to a securities case to an employment-discrimination case to a cocaine prosecution that raises issues under Rule 404(b) and the Fourth Amendment. Extremely spread out compared to any one advocate. But that also means that the judges have a good sense of where general legal principles work. There are similar principles in a lot of different segments in the law. If you stand up in your tax case or your bankruptcy case or your copyright case and start making arguments that don't jibe with the judge's understanding of how trademark cases or other things are being handled, you're in trouble because you're asking for something the judge thinks implausible. The good appellate advocate knows his little corner of the law but is also a generalist because that matches with what the judges are. It's one reason why so many firms have opened their

own appellate-advocacy departments, where you don't have specialists in particular subject matters, but you have lawyers who, like the court, are generalists.

BAG: You think that's a good thing?

FHE: Oh, it's a wonderful thing. It's expensive for clients, of course.

BAG: Why did so many of the traditional firms, for so long, oppose having appellate sections?

FHE: I assume it's because they thought they couldn't make a profit.

BAG: But the trial lawyers were the ones who opposed it, in my experience, saying, "No, you tried the case; you handle the appeal. You know more about the case than anybody else."

FHE: Most people who have worked with a case would like to stay with it, so I completely understand that belief on the trial lawyer's part. But it's also an expression of concern for cost to the client. Once the trial lawyer has learned all about the record of this case and has researched the law pertinent to this little subject, the client is likely to say, "Why should I pay another group of lawyers to learn this all again?" — because those will be billable hours when that appellate group sits down and reads through the record. To which the answer is — which I think more and more clients are finding out — that when you have a high-stakes case, you want somebody who is a generalist like the judges because then it's much easier to have this conversation; you're much less likely to make mistakes.

BAG: What is the best use of rebuttal time in oral argument?

FHE: The very best use of rebuttal time is to not use it. The judges are ever so happy when you say, "I have nothing further, Your Honor." I argued, I think, 15 or 16 cases in the Supreme Court as a petitioner, and I gave rebuttal in one of them.

BAG: Do you remember that rebuttal?

FHE: Oh, I remember that rebuttal vividly. I had used up all my time, and then some. I had not planned on giving a rebuttal. And Chief Justice Burger said, "Well, Mr. Easterbrook, we asked you a lot of questions when you were on the floor, so I'll give you an extra 15 minutes for rebuttal" — the first time I'd ever heard that. And then I stood up and was bloodied by the Justices yet again. The position I was taking on behalf of a United States senator was very unpopular with the Justices because I was asserting legislative immunity on behalf of my client. My client had sent a chief of staff of a Senate committee to do some investigating, and it was said that in the course of doing this, the chief of staff had poked his nose into places where, under the Fourth Amendment, it did not belong. The Justices are no fan of absolute immunity for anybody other than judges, and since the legislator here was asserting absolute immunity, there were all sorts of questions about, "Suppose the senator came and punched the defendant," or "Suppose they . . ." And this went on for quite some time, trying to learn the limits of how far I would go. And after they had exhausted 30 minutes of that, they wanted a chance to do some more. And I was trying very hard to give limits that were both palatable to the Justices in this case and consistent with my duty to my client not to give away the legislative-immunity store. That was a difficult line of argument to give. The case was under advisement in the Supreme Court for nine months. It was argued in October, and on the very last day of the term, the Justices issued the following order, and I quote it in full: "Per curiam: The writ of certiorari is dismissed as improvidently granted."

BAG: Wow.

FHE: Justice Stevens later told me that it was just too hard. They obviously had fractured in too many ways, so they just decided to give it up and try again some other day.

BAG: Who was your client then?

FHE: My client was Senator Eastland. I also had a deceased client, and that was one of my main problems. My deceased client was the estate of Senator McClellan, who was also involved in the case. And as it was reformed in the Supreme Court, the caption was *Estate of McAdams v. McSurely*.[1] One of the complications in the case was whether the right of action survived — whether estates have Speech and Debate Clause immunity. There were all sorts of ancillary questions that cropped up besides the merits that made it difficult. And you can just imagine that they might have been unable to produce any coherent opinion if some of the Justices thought the claim didn't survive, and so on.

BAG: What is your favorite litigation story — litigation that you were involved in — that teaches some important lesson?

FHE: Oh, gee.

BAG: Some vignette that you occasionally . . .

FHE: I don't know that I have one.

BAG: No?

FHE: Maybe I should think on that and see if I can think of one.

BAG: Okay. How often do you get lawyers who waive rebuttal?

FHE: Not nearly often enough. It's the same, by the way, with reply briefs, which aren't really reply briefs most of the time; they're just repeat briefs. I had about the same ratio when I was practicing. I almost never filed a reply brief — because if you've done your job well, you anticipate all of the arguments the other side is going to make. And you address them,

[1] 438 U.S. 189 (1978).

not in the form of counterpunching — "They say this, but X" — but in your affirmative case. You build your case up, knowing what the other side is going to say. And that's equally true by the time oral argument comes. You've had the brief; you've seen the other side's brief; you know perfectly well what the other side is going to say. You should present your oral argument and craft it in a way that makes rebuttal unnecessary. Now, if you're the appellant or the petitioner in the Supreme Court, you'll want to save a minute or two in the event the other side takes an opportunity to raise a brand-new argument that no one has ever heard of before or makes an assertion about the record that is easily refutable. So it's a bad idea to run out of your time and not have time available to do those kinds of things. But mostly, if you've done your job well, there's no need for rebuttal.

BAG: Have you ever seen it happen that an appellant would use rebuttal time to bring up something new and highly prejudicial as a sort of sandbag?

FHE: I've seen them try.

BAG: What do you do as presiding judge when you see that happen?

FHE: I tend to say something like, "Counsel, this is time to be used in rebuttal. What, particularly, are you rebutting?" I've seen almost everything tried at one time or another. I've seen appellants' lawyers stand up and say, "Oh, I don't have anything to add to my brief," and sit down. The appellee's lawyer says something; then the appellant's lawyer stands up and tries to give the main argument in rebuttal, as if that were a good strategy — "I'm going to be the one who argues last, so I'll just save all my time" — and we don't like that. You have to give your argument, and then rebuttal time is to be used for rebuttal.

BAG: This is happening in California. Appellant's counsel will stand up and say, "I reserve all my time for rebuttal."

FHE: And the presiding judge should then say, "In that event, there won't be any time for rebuttal." You're free to waive oral argument if you want. But you're not free to say that the appellee has to argue first and the appellant argues second. That's not the way the court sets it up, and with good reason. You might as well say the appellee should file the opening brief.

BAG: But it's an example of sandbagging, isn't it?

FHE: Mm-hmm.

BAG: Are there any other sandbagging tactics that you've encountered lately?

FHE: Well, that's just the extreme. You'll have lawyers who, if there are two issues in the case, will argue one of the issues, but say nothing about the second. The appellee tends to argue only the issue raised by the appellant. Then the appellant will get up during the rebuttal and try to argue the second issue. And again, I tend to ask, "Well, what exactly are you rebutting here?" It's the same kind of limitation that trial judges apply on cross-examination. You can't engage in redirect on an issue that wasn't raised in cross. It's all the same in a court of appeals.

BAG: There's no kind of waiver issue that comes up with regard to the oral argument, is there? That is, as long as it's raised in the brief. It's just that you shouldn't devote oral-argument time to that second issue. There's no waiver.

FHE: You mean by not raising an issue orally?

BAG: Yes.

FHE: No. It's never waived. The issues are preserved in the brief. Now, the trickiest thing to do, and this is not in the category of sandbagging . . . That is, suppose you pick up the brief

and start preparing for the oral argument — this is a problem particularly where you were not the principal author of the brief and maybe weren't even listed on the brief. You pick up the brief, start preparing for oral argument, you read the appellee's brief, and you realize the appellee has a much better argument. Indeed, your argument in the brief is profoundly silly. The question is, How can you save the case? Well, you can save it only with a new line of argument — you hope sufficiently similar to the argument in the brief that the judges aren't going to say that you forfeited it. One of the very first arguments I ever saw in the Supreme Court was of that kind. It was the *Regional Rail Reorganization Act Cases*.[2] Congress had, basically, confiscated the property of the Penn Central and several of the other Northeast railroads, and formed Amtrak and other federal corporations. And they said, not surprisingly, that this confiscation was a violation of the Takings Clause. The Solicitor General's brief, prepared by one of my friends in the SG's office — and nominally reviewed but not closely reviewed by Robert Bork, then the Solicitor General — said, "Well, what do you expect? Railroads are traditionally a heavily regulated occupation. If you go into the railroad business, you should expect for the government to confiscate your property every now and again." Bob Bork picked up this brief to prepare for oral argument and went, "I signed that?!" You might as well publish *The Takings Clause Act of 1900*: Congress hereby declares that it can confiscate any property it pleases. And then ten years later just say, "Well, the Takings Clause doesn't apply anymore; we've already told everybody we can confiscate their property." So Bork made a completely

[2] 419 U.S. 102 (1974).

different argument. He said, "Look, this is all quite beside the point. What they want is an injunction against the statute. You can never get an injunction against the statute under the Takings Clause. All the Takings Clause ever entitles you to is compensation. And there's a federal statute that's the Tucker Act.[3] The Tucker Act says, 'The federal government took your property; you just go to the Court of Federal Claims and seek your compensation.'" So Bork basically abandoned the line of argument that there was no Takings Clause problem and said, "But nonetheless, the government wins this case. And if it has to pay out a few billion dollars under the Tucker Act, well, I've at least postponed the evil day." By the way, when the evil day came, members of Congress were so incensed with what Solicitor General Bork had done that a delegation came to the Supreme Court filing amicus briefs. And Brock Adams, who was then the chairman of the House Transportation Committee, came and argued the case as amicus curiae. Representative Adams was asked only one question — it was by Justice Brennan. Justice Brennan said, "Well, Representative Adams, when you passed the Regional Railroad Reorganization Act, did you plan to repeal the Tucker Act?" And Adams said, "No, Justice Brennan, we didn't give the slightest thought to the Tucker Act." And you could see nine Justices fold their arms and lean back. The opinion of the Court then said, "Repeal by implication is disfavored, and the principal author of the legislation conceded on his feet that he had basically never heard of the Tucker Act and had given no thought to it. Obviously, it wasn't repealed, and therefore the railroads have

[3] 28 U.S.C. § 1491 (2012).

their claim under the Tucker Act."[4] Now, the question is, Can you get away with this? I saw Bob Bork get away with this twice — once as Solicitor General as I've just described, and once in private litigation, where he came to the case late and managed to completely turn the case around with a brand-new argument. You need a certain gravitas in order to be able to do that. You have to be able to explain if you're challenged: Did you make this argument? Hasn't it been forfeited? And the like. You've got to be able to relate your new line of argument to some argument that was made. I got away with it once in my life when I had been retained as a private lawyer during my years after I had left the Solicitor General's office and before I joined the bench. But I had prepared a whole script about how this was really just a subtle difference of an argument that had been made all along. They let me get away with it. And they decided the case in my favor on the new argument.

BAG: What do you do as an advocate when you have a judge who is downright hostile to your position, but it's only one of three?

FHE: The fact that a judge is hostile to your position at oral argument doesn't mean that you shouldn't try for the judge's vote. It may mean that the judge hasn't understood all of your arguments from the writing. I often try to ask the lawyers the hardest questions I can think of about their cases, and for the appellant it may seem like I am hostile to their view, until I ask of the appellee questions that seem hostile — because I'm trying to figure out: Here's the hardest problem. Can you solve it? And if you can solve it, then you have my vote. So the first thing is, when a

[4] *Regional Rail Cases*, 419 U.S. at 132–33.

question seems hostile, don't assume that the judge is beyond redemption. You may be able to answer the judge's question and get the judge's vote. But if the judge is hostile in a way you know you can't cure . . . take, for example, you're making a First Amendment argument in the Supreme Court, at a time when Justices Black and Douglas, two absolutists, would just never allow any government regulation of speech, and you're attempting to argue for government regulation. In the *Pentagon Papers* case,[5] when Justice Black was harassing him at oral argument, Solicitor General Griswold said, "Justice Black, I very well know your absolutist positions, and I know I cannot hope for your vote in this case. But I would like to give my argument to the Justices with open minds." Justice Black respected that and shut up. It's much harder to do that in a court of appeals because the judges don't have as distinct personalities, since we're all trying to apply the law laid down by the Supreme Court. But you hope when a judge is implacably hostile that you can give an answer that will stop the flow of interruptions and allow you to present your case to the other judges, which — certainly in my experience, that's always been done in the Seventh Circuit. The judge whose vote you cannot possibly hope for doesn't try to obstruct your argument to the other judges. But you have to make your judgment at some point that if there's really no hope left, then you've still got two more to go.

BAG: Have you ever had an advocate for one of the panels that you were on try a strategy like the one you just described from Erwin Griswold?

FHE: No.

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[5] *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1971).

BAG: It's a difficult thing to carry out.

FHE: It's very hard. And as I said, it's much harder on the court of appeals where you can't say to Judge X, "Well, I know you're an absolutist, and I'm making an argument about balancing" — which is what Griswold was doing in the *Pentagon Papers* case — "and so I can't possibly win your vote. I know that; you know that; we all know that. Let's move on." But the judges on the courts of appeals are all trying to carry out law authoritatively established by higher-ups, so it's a little harder to do.

BAG: What does this platitude mean: you can lose a case at oral argument, but you can't win one there?

FHE: Well, it means that someone hasn't really thought through the process. I would say it's easier to lose a case at oral argument than to win it. It is possible to win cases at oral argument. I've seen it done. I've seen it done watching other advocates do it. I've seen it done as a judge. That is, one can make really compelling points at oral argument. I was giving you the generic example: I ask the lawyer the hardest question I have, and if the lawyer has an answer for it, he can get my vote. That's the way to win a case at oral argument. The judge comes off the brief saying, "I think there's a terrible problem here," and the lawyer shows that it's not a problem. But losing a case at oral argument . . . well, here's the easiest way to lose a case at oral argument: The judge comes out of reading a brief thinking, Gee, the only way party X can win is if proposition T is true. And the judge then says at oral argument, "Counselor, are you contending for T?" The lawyer says, "Oh, no, Your Honor. We'd never make such an argument." And the judge thinks, Okay, well, you're not arguing for the only thing that can win your case. All right, the lawyer is the master of his case. Or the lawyer

can say, in response to a fact-based question, something like . . . the judge can say something like, "Counselor, it looks like your position depends on some particular fact. Did you put that fact in the record?" And the lawyer will say, "No, we didn't." Goodbye case. Now, of course, it may be that that case wasn't winnable. If there's some essential fact and it's not in the record, you're not going to win the case. Often, after I've read the briefs, I think, Gee, this case depends wholly on who's right about some factual proposition. I just need to figure out what the record shows. I think it's probably unfair for the lawyer to say that he's lost the case at oral argument when he tells you that the record doesn't support his view of the facts. The record is what it is; the appellate lawyer can't change that. But it is the case that a judge comes in with an open mind and leaves with his mind made up.

BAG: Is it a bad thing to concede at oral argument, as a proffer to the court, that you didn't try the case?

FHE: There's no problem with letting the court know that you didn't try the case; it's what often comes next in that construction. Sometimes I will ask a question about the record, and the lawyer will say, "Oh, Your Honor, I didn't try the case, so I don't know what's in the record." And I've thought about not only the possibility of opening a trapdoor under the advocate because what are you doing here if you don't know the record? But there are all sorts of other possibilities. I could have my law clerk throw spitballs at the lawyer. That branch of the answer pretty much concedes that they don't know what they're talking about, and then why should I care? It's absolutely terribly important for somebody who wasn't the trial lawyer to learn the record, to learn the portions of the record that are potentially important. Again, I

think back to my own practice where I had an appellate practice both in the Solicitor General's office and when I was teaching appellate practice on the side. I tried very hard to figure out which parts of the record would be important, and then I just learned them cold. And it's really very impressive to the judge, who knows that you weren't the trial lawyer, when the judge asks you a question and you say, "Your Honor, the answer to that question is on page 1263 of the trial transcript." I sometimes said that, only because I had a card in front of me with critical page citations listed. It's not that I had them all memorized. If you know the institution, you will get a sense of what they are likely to ask about, and you can have the answers on a 5-by-8 index card. It doesn't take a lot. So the fact that somebody didn't try the case usually means that they are more objective; they've brought a fresh eye to the case; they are not wedded to losing arguments. All too many lawyers come to court determined to repeat the line of argument that they already know didn't work. And they're going to do it more loudly this time. Well, it still won't work. Somebody who comes to the case fresh isn't going to make that mistake. So I'm perfectly happy with lawyers who I know didn't try the case — they just have to have done their homework. Otherwise, it's the trapdoor.

BAG: When I was a third-year associate at a Dallas firm, I wrote a brief that got us into the Texas Supreme Court; it was accepted for review. I was sitting at counsel table with one of the most famous trial lawyers in Texas, the one for whom I'd written this brief. He stood up — and we'd discussed the case, and I really thought he understood the theory of the case, but he apparently had not really read the brief or focused on it, did not understand the theory of the

appeal — and by three o'clock that afternoon, the appeal was dismissed as having been improvidently granted. Now, how often do you think you've seen that happen, where a big-name trial lawyer, big-name lawyer, comes before you and doesn't seem to know what's in the brief?

FHE: These days, it's very rare. I saw that almost never in the Supreme Court because when the big names took over the cases, it was important enough for them to prepare. The big problem in the Supreme Court was the trial lawyers who did not hand it off to the appellate specialists. But when I became a judge here, I saw that all too often: the name partner in the law firm showing up without having worked the case through. And I would say, over the last ten years, I've seen only one or two examples of that. It ramped down very sharply in the late 1980s and beginning of the 1990s. Also, I think there are many fewer cases being argued by the big names in the law firms. Oral arguments are much more likely to be passed to the junior partners or the senior associates — precisely because the more senior partners know that they may have gotten the client, that they may be responsible for holding the client's hand, but that they're not the ones who know the case best. Now, this may also be a billing problem. Senior partners are much more expensive, and they can tell the client they've assigned the case to someone with a lower hourly rate. This might be a case where the pressures to contain the costs of the case might be working along the lines of a higher quality of presentation.

BAG: Is advocacy getting better on the whole — oral advocacy?

FHE: I think oral advocacy is getting better, holding the stakes of cases constant. That is, if you have a large-stakes piece of commercial litigation, I think it's argued substantially better now than it was 15 or 20 years ago. But we also have a

larger supply of small-stakes cases in federal court. Many of these are small stakes in an absolute sense: they're small consumer bankruptcies; they're prisoner suits that might end with one dollar in nominal damages if the prisoner wins. Some of them are small-stakes cases in the sense that there's very little money involved, even though there's a great deal of liberty involved. Take immigration cases where someone claims the right to asylum. The fee collected by the immigration bar in these cases is very small — mostly because the person claiming asylum can't afford to pay very much, in part because, often, their employment in the United States is illegal. They are litigated on a shoestring, and cases litigated on a shoestring tend not to be litigated well. So when personal liberty is at stake, there's often a mismatch between the quality of lawyering and the real stakes of the case. But holding stakes constant, I think major, large-stakes cases are litigated better than they used to be. In part that's a result of their being argued by the junior partners rather than the senior partners, and in part that's the result of the specialized appellate groups. These cases are being turned over to people who are good oral advocates, rather than just the people who handled the trial.

BAG: How does the oral advocate learn to transition from an answer to a question to the advocate's next point?

FHE: Practice, practice, practice. I don't think there's any way to describe that except lots of experience. It's another reason why this is like an art form, rather than something that you can just give someone a book and tell them how to do it. When you go and argue a case, you would want to have, mentally, probably in an outline, a list of the topics you want to hit. I always thought, when I was an advocate, that what I was doing was hitting the highlights of the arguments in

order to fish for the marginalia in the briefs so that we could get a discussion going. You never can tell where a discussion is going to flow, and you then want to come out of it with the next logically linked point. Well, there's no algorithm for doing that. You can certainly do it only if your argument is fluid, if you have in your mind a series of points and you're prepared to go through them in any order. It's one reason, of course, why appellate courts keep saying, "Don't read your argument," because the lawyers who come to the court with prepared texts tend to view the questions as disruptions. Then they go back to their text, even if that's no longer the sense in which the argument is flowing. I wish it were possible to say more than that, but watching it happen, you don't have to do it all the time. But watching other people do it is very helpful. Now, I never got the experience of trying to do this aurally, since you can get, these days, the recordings of oral arguments of many appellate courts, including the Supreme Court. I don't know, since I never had the experience of preparing that way, how much you can do just by listening to the flow of oral argument in that court. You would always be thinking, How would I make the argument? What argument would I be coming back to next? The more often you do it in your head, even with other people's cases, the easier it will be when you have to do it on your feet.

BAG: Is there any practice tip you have that you used as an oral advocate to figure out you could argue the points in any particular order?

FHE: I didn't have any clear means of doing that. When I was in the Solicitor General's office, I, like most other people in the SG's office, went and listened to a lot of cases at the Supreme Court that I wasn't involved in. So you learned

what oral arguments tended to be like. And then I prepared for oral argument, not by going through moot courts — which I think are a waste of time: they're too staged; they aren't the real thing; the people asking the questions aren't the real judges, and everybody knows it. So I don't think it helps. I prepared for oral argument by giving the briefs, my brief, the other side's brief, to other people in the SG's office, and sometimes other lawyers I knew, and they were a bunch of generalists, just like I was, and they would read the briefs and tell me what they thought the weak points were. Where is Justice Stewart going to pounce? At what point are you going to get an elbow from Justice White? — who was famous for throwing elbows in court as well as on the basketball court up on the fourth floor of the Supreme Court. If you got a sense from other generalists where they thought the Justices would pounce, what would trouble them, you would then have a good sense of, I'm going to get the following five questions, and where that would lead. And then you could think about where that would lead. In general, I usually got maybe one-third of the questions I was prepared for. But if you've thought through where the questions you've prepared for are likely to lead, you'll have an idea of when it comes — and it never comes in just the same way you've imagined it or in just the same way your friend thought it would come — when it comes, it won't be a surprise to you. And so you have your continuation thought about.

BAG: Would advocates be well advised to think of the extreme hypotheticals that test their own theories of the case and what their answers will be to those kinds of questions? Is there a way to anticipate an Easterbrook or Scalia hypothetical?

FHE: I don't think you can anticipate the particular hypotheticals. I think you can anticipate what they're worried about. Any lawyer worth his salt should be able to see that the line of argument he's making could be thought to lead to the following slippery slope. What hypothetical one will be asked based on that concern, no one can predict. I don't even know which hypotheticals I'm going to ask. They come, like the oral advocate, out of whatever was happening before, and I will try to tailor the hypothetical to the kinds of things we've been talking about. But you can see what the problem would be, and therefore where you're going to need to be able to offer stopping points, or principles that will bail people out, without jeopardizing some important rule over in an adjacent part of the law. If you've thought about those things, then you can get out. The case I mentioned to you earlier . . . in the case of *McAdams v. McSurely*,[6] most of the Justices' questions in the form of hypotheticals were testing for what is really within the scope of the Speech and Debate Clause immunity. It had been held by the Supreme Court long ago to cover more than just your statements in the well of the House or the Senate. It included committees. It included gathering evidence for committees. Well, does it therefore include burglary to gather evidence to put on in committees? Can you take your set of burglar tools to someone's home and gather evidence that the Senate Select Committee thinks it needs to do its job? And so on. Most of those questions are pretty obvious once you think about, How are you going to add a stopping point to say that the Speech and Debate Clause reaches things that are not speeches or

[6] 438 U.S. 189 (1978).

debates, but are preparatory speeches or debates? And the advocate will have had to think through those problems, address them, in part, in the briefs, and be prepared to address them on his feet no matter which way the hypothetical is set up.

BAG: We talked a little bit earlier about the difference between briefing and oral argument, and I've read, over the last several months, hundreds of articles on oral argument. It's amazing, the breadth of literature on this subject. I've been amazed at how many judges write articles and say, "You need to understand that an oral argument is not a brief." But then they fail to follow through and say what the critical differences are. Now, you've mentioned one: that a brief is a monologue, and an oral argument is a dialogue. But what are the other salient differences?

FHE: One other salient difference is that a brief, being a written document, can be reasonably complex. You can not only have complex sentences with dashes and colons and dependent clauses, you can organize your briefs in such a way that you can assume that if the reader has any trouble, the reader can go back and look. And if you're arguing a fairly complex administrative case, you can even come up with special acronyms. I've seen briefs with tables of acronyms in them, and I've had to refer back to the table of acronyms to see what they're talking about. Oral argument is completely different. It is linear. No one can go back and rewind the tape. You never in an appellate argument say, "Court reporter, please start reading from two pages earlier. Let's do this again." It's linear. So no complex constructions; simple, active-voice sentences; no acronyms. That's very hard for lawyers, it turns out. And the whole thing has to be logically organized so that you don't have to think back. The

difference between an oral presentation and a written presentation is really quite fundamental, but it's not anything peculiar to law. Just think about how a good Roman orator, or a good Greek orator for that matter, would give an oral presentation totally different from what you would do in writing. So preparatory to the conversation — where the questions and answers will take care of themselves — your introduction, your run-up, your hitting the highlights to spark the questions has to be simple, linear, direct, and otherwise geared to the differences between the written and the oral word. People have to just think for a while about what those are. Otherwise, they'll get lost.

BAG: What do you think about brief-writers who refer to "privatized municipal services" as PMS?

FHE: Isn't that premenstrual syndrome?

BAG: Yes.

FHE: I've already anathematized most private acronyms. There are a few acronyms . . . NLRB stands for National Labor Relations Board, and you can't get through law school without knowing that. So if somebody on his feet says "NLRB," everybody follows it in a straightforward way. But if somebody gives some weird, private acronym — like the acronym for a subsidiary of one of the parties, or the acronym for some brand-new federal law — it doesn't register with the judge. And this is, in part, the difference between written and oral speech. In the written word, an acronym can have a referent, and you can go back and see the first use. You can never go back in oral argument. The second reason why you want to avoid private acronyms is the difference between the specialist and the generalist. If you're arguing this case as, say, an ERISA lawyer in a benefits case, the ERISA world is just jam-packed with acronyms. There's the MPPAA, the

Multiemployer Pension Plan Amendments Act. The number of judges who know any acronyms beyond ERISA is really small. So if a lawyer stands up at oral argument and starts talking about "the MPPAA does this to that," the judge just goes, What? I'm lost, I'm lost. What are they talking about? And since the nature of oral argument is that it's linear, you can't go back and recap. Using these private acronyms or highly specialized acronyms is just a way to lose your audience. And you want to persuade your audience; you don't want to lose your audience. So I sometimes at oral argument will just go, "Excuse me, counsel. You've lost me. What was that last acronym?" I will sometimes say, "Could you please avoid acronyms?" And the counsel will say, "Oh, certainly, Your Honor. I'll avoid acronyms. The ADPEF then did . . ." And I say, "Counsel, you just agreed to avoid acronyms." And the lawyer will say, "Oh, I'm sorry, Your Honor. That's just how I think about these things." But stop. While you're preparing for oral arguments, stop yourself from thinking about whatever that was as a complex five- or six-letter acronym that's unpronounceable.

BAG: Do you think it's okay for us to have shared acronyms, like FAA? Everybody knows what the FAA is, but a lot of people writing about the Federal Arbitration Act call it the FAA. Do you think that shows bad judgment?

FHE: I think it's generally a mistake for a lawyer to let any part of the specialized discourse of some subset of the law into appellate advocacy. Most lawyers when they hear FAA think Federal Aviation Administration. If those letters are used in a specialized way in your little subset of the law, that's fine; keep it in your little subset of the law. When you talk to a generalized judge, a judge whose jurisdiction includes the FAA — the real FAA — never do that. I had a rule, even

when I was writing briefs, and I urge it on lawyers whenever I have the chance, that you should never use acronyms for statutes. If you have a statute in a case, refer to it as "the Act" — the cap-A Act — and then no one has to worry whether these letters mean your Act or not. As soon as you say, "I'm referring to 49 U.S.C. 12345, paren 'the Act,'" that will carry through the rest of the brief. You're avoiding acronyms, and when you stand up and talk to the judge about the Act, everybody knows what you're talking about; nobody gets confused. So if you've got a case under the Federal Arbitration Act, refer to it as "the Act."

BAG: When you have an environmental case, do you refer to CERCLA, or do you refer to "the Act"?

FHE: I refer to "the Act." If you look at my opinions, there are very few acronyms in them other than the shared ones that we all have.

BAG: What is your best advice for trial judges on how to write good findings of fact and conclusions of law?

FHE: Well, the first thing they want to do is keep them apart. I just get a kick every time I read a judge's findings of fact and conclusions of law, and the first thing in it will say, "Findings of Fact — One: To the extent that there are any conclusions of law in these findings of fact . . . Conclusions of Law: To the extent that there are any findings of fact in these conclusions of law . . . Findings of fact . . ." What baloney! And what then follows will be, if you're going in this formulaic way, "Findings of Fact — One, Two, and Three," with a whole bunch of cookie-cutter findings of fact. I think that's a terrible way of writing an opinion. After a judge holds a bench trial and he makes findings of fact and conclusions of law, the judge should write a narrative. If he thinks the court of appeals would get confused, he should

just say, "This narrative incorporates all of my findings of fact." The judge writes as a narrative what he thinks happened in the case. And then he writes a legal exposition of what he thinks the legal consequences of that narrative are. My recommendation is, don't think of a finding of fact as something that goes in a cubbyhole. As soon as what you think you're doing is putting things in fixed cubbyholes called findings of fact and conclusions of law, and they have to be numbered paragraphs, you write something that is, rhetorically, very ineffective — because there are all these numbered findings, and nobody knows what they mean. And if you don't know what they mean and where they're fitting in a narrative, people don't remember them very well. And if appellate judges don't remember them very well, then they're not very effective.

BAG: They do tend to be very choppy, these numbered sentences.

FHE: Yeah. Tell the story. The judges will remember the story. They can go back and get the details out of the story if they need to.

BAG: Do you have very many trial judges in the Seventh Circuit doing it in your recommended way?

FHE: Quite a few. I think more than half. And I say hooray.

BAG: Has that been a change that's taken place over the last . . .

FHE: Oh, yes. Telling it as a story is the norm for newly appointed judges. The cookie-cutter cubbyhole approach is rolling off.

BAG: Do you think that's true all over the country?

FHE: I don't know about all over the country. I would hope that it was true, but I don't know that it's true. I make no claims for Texas.

BAG: Every appellate court these days tends to think of itself as a hot court. But there are degrees of heat, aren't there?

FHE: In that account, I suppose we're scalding.

BAG: I interviewed Justice Thomas last week, and he bemoaned the degree of interrogation in the Supreme Court. He says that when he first joined the Supreme Court, people were allowed to make their arguments, and they're not allowed to make their arguments now. He thinks a fair number of advocates leave the courthouse thinking, I didn't really get to say my piece.

FHE: But they're not there to say their piece. They said their piece in their brief. They said it completely and uninterruptedly. I do think that it's very hard to have an oral argument with nine judges. It's much easier to have an oral argument with three judges because then there are only four people at one time: the advocate and three judges. And that argument can be shaped and moved in a coherent way. When you have nine judges and one advocate, each judge might want to pursue a very different line of inquiry, and then it becomes extremely difficult to coordinate the oral argument. When we sit en banc, we have 11 judges. I think that people are acutely aware of that problem, so there are many fewer questions per judge when we sit en banc than when we sit on a panel. Indeed, one might think that there are fewer questions in total because we are aware of the fact that you can't have a coherent argument with that many people. So that's a big problem on the Supreme Court. And the other problem — which was certainly the case when I was there in my years as an advocate and has been the case for a long time — is that not all the Justices want to use the argument to have a conversation with the lawyers. Some of the Justices are using it to make points with their colleagues. Now, I'm hoping that that usage has gone down with the replacement of Chief Justice Rehnquist by Chief Justice Roberts because Rehnquist, reacting to the long and rambling conferences

that Chief Justice Burger had, wanted his conferences to be quick and simple — everybody quickly state your position, then go back and vote, and we'll move on to the next case. If you're not going to have a good interchange at the Justices' conferences, then the Justices have no forum for talking to their colleagues other than talking in the oral argument. And so you can have, on the one hand, Justices wanting to have a conversation with counsel, and some Justices wanting to talk among themselves. So you need to strike a balance as an appellate court between how loose your conferences are, so the judges can have a conversation among themselves, and how you use the oral argument. And again, it's much easier on a group of three to have a fairly free-flowing argument and a free-flowing conference after the argument than it is on a group of nine — or, heaven forfend, a group of 15 on the Ninth Circuit, or 16 on the Sixth Circuit, 28 on the Ninth Circuit if they ever had a real en banc out there. I think 11 is at or over the max for that purpose. Nine may be, really, over the max for the purpose of holding a good oral argument and having a good discussion at conference.

BAG: Do you think Chief Justice Rehnquist realized that he was having that effect?

FHE: Oh, he knew it perfectly well. He knew it perfectly well. And he thought it was a good trade.

BAG: Why do you think Chief Justice Rehnquist would just chop the reasoning out of his opinions?

FHE: Well, you may remember that when he was nominated as Chief Justice, one of the lines of criticism was that he had been a loner as an associate Justice. He'd written a lot by himself. When he wrote majority opinions, he sparked off more concurrences and dissents. And he realized, as anybody who thought about it would have realized, that there

is usually within the Court much broader agreement on the result than there is on the reasoning. And it's permissible in a fundamentally common-law system to give a brief explanation of your result and leave the explication of the full principles to the future. That's part of the genius of a common-law system. Chief Justice Rehnquist decided that it was more important for him to have many other people join than to have full explication of his reasons at the time. I don't know whether that was a good decision or a bad one. His decisions were much less fun to read after he became the Chief Justice. But for somebody who's a reader like me, you don't have to manage the institution.

BAG: It would be quite possible, wouldn't it, for a skilled legal writer to take an average Supreme Court opinion, if there is such a thing, and summarize it and condense it and make it about 75 percent shorter, and still have the reasoning in it, don't you think?

FHE: It depends on the Justice and on the opinion. There's a lot of stuff in the average Supreme Court opinion that is not reasoning but not important either: useless recaps of the facts, empty statements of standards of review, summaries of what they have held over the last two centuries on some particular topic — stuff that can be put in by a functionary or a recent law-school graduate and doesn't really do anything. It's fill. And then, of course, the authors of the casebooks can take it right back out again. But that wasn't what Rehnquist chopped out when he turned from being an associate Justice to the Chief Justice. He did tend to take out the reasoning, the stuff that was particular to this case — which, as I say, may have been a wise move for managing the institution, as indeed cutting down the length of the conference,

being more formal as the head of the conference than Burger was. But there were costs, and I think he recognized the costs. I, by the way, try to write opinions that casebook editors can't edit that way. I omit the useless stuff myself and therefore save other people the need to omit it later.

BAG: Elmore Leonard says he leaves out the parts that people skip. That's a good thing for legal writers to try to do, don't you think?

FHE: Mm-hmm.

BAG: Have you had casebook editors who have actually excised parts of your opinion that you know of?

FHE: Oh, I'm sure there have been, but I've had a lot of casebook editors say that they like to put my opinions in precisely because they don't have to edit them; they can put the opinion in. It saves them work.

BAG: What do you think of parentheticals within citations?

FHE: Why do you need parentheticals?

BAG: To bloat up the paragraph, I think.

FHE: I don't think one should cite any more cases than are really necessary. If you think some proposition was established in some case in the Supreme Court, you can cite it. There's no need to cite more than one unless there's some dispute whether that's really what the Supreme Court has said. Now, I fight against some of my colleagues who, after they cite the dispositive opinion of the Supreme Court, then go on to show that eight circuits have later written opinions following the Supreme Court. As if they had any choice. Now, sometimes I'm tempted to write something like, "The Supreme Court established this principle in 1969, and it has thereafter been followed even in the Ninth Circuit," and then cite one Ninth Circuit opinion.

BAG: How many citations do you suppose appear in the average Easterbrook opinion?

FHE: The average Easterbrook opinion — I would bet 15. Have you counted?

BAG: No. It'd be an interesting question, though. I bet it's way below what it is in your average circuit-court opinion.

FHE: Oh, yeah. My opinions are shorter than the average circuit-court opinion, and I'm sure they have fewer citations per page.

BAG: Well, you've been very generous with your time today. Thank you very much, and I hope you get to feeling better soon.

FHE: Thank you.*

* After this interview, Judge Easterbrook gave a lecture on appellate advocacy — recently published as Frank H. Easterbrook, *Friedman Lecture in Appellate Advocacy*, 23 Fed. Cir. Bar J. 1 (2013).