Chief Judge Diane P. Wood

Judge Diane P. Wood joined the United States Court of Appeals for the Seventh Circuit in 1995 after being appointed by President Clinton. Judge Wood was born in New Jersey and earned her J.D. from the University of Texas at Austin. After graduation, she clerked for Judge Irving L. Goldberg of the Fifth Circuit and for Justice Harry A. Blackmun at the U.S. Supreme Court. Judge Wood was one of the first women to clerk at the Supreme Court, and in September 2013 she became the first woman to serve as Chief Judge of the Seventh Circuit. She is also a senior lecturer at the University of Chicago Law School.

BAG: I wanted to ask you, first of all: what was it like clerking for Judge Goldberg on the Fifth Circuit?

DPW: It was wonderful clerking for Judge Goldberg. I have never in my life known such a warm, intelligent, inclusive kind of person. And I knew that from the minute I first encountered him — which was right after I sent my application off. I was studying for my exams as a second-year law student. The telephone rang. I picked up the telephone, and I hear somebody saying [imitating Judge Goldberg's voice], "Is this Diane Wood? Irving Goldberg here" [laughter]. And it was a great relationship from that moment onward.

BAG: Did he have the habit, even in those days, of a slightly outlandish prose style?

DPW: He did. He was very proud of it. And in fact, when I interviewed with him, he looked at me very firmly and he said [imitating Judge Goldberg's voice], "Now, you're not picky about writing, are you? I mean, if somebody wants to say something in a colorful way, I hope that doesn't bother you" [laughter]. I assured him it didn't bother me — so, yes.

BAG: And would he take a clerk's draft and sort of embellish it a little bit with his stamp?

DPW: Sometimes he did that. I would say, by the time I worked for him, more often than not, the clerk would do the first draft. He was the kind of person who bounded in and out of your office every two minutes, and so if you were creating what you're calling a "clerk's draft," there was a great deal of input from him that was done in that very informal way. But you would put a draft on the table, and he would be the one who would add most of the more flamboyant stuff.

BAG: Did clerks try to imitate that style themselves and find something that would delight him that he might then accept?

DPW: One of my co-clerks did that, and the other two of us did not. It's not really my style, so I didn't think I could "out-Goldberg" Goldberg. I just figured that I would leave that up to him.

BAG: And then you went on to clerk for Justice Blackmun?

DPW: Yes.

BAG: What was that like?

DPW: In a completely different way, it was a wonderful year too. He was a person of a very different personality from Judge Goldberg's. Judge Goldberg was a very oral person — he liked talking through everything, liked just tossing ideas around. He didn't care if we gave him bench memos at the last second, and he would just absorb it all by our talking to him — whereas Justice Blackmun liked everything in writing. Everything. So even for the smallest comment on a cert memo, you would write a little note to him about that. The clerks would have some opportunities to chat with him orally, but mostly over breakfast. And sometimes breakfast was just about the daily news, or the Minnesota Twins, or whatever it might be about. And then sometimes, he'd suddenly say, "Well, have you seen that draft that so-and-so has sent around?" And you had to be ready to offer a quick opinion. But mostly he wanted it in writing.

BAG: And Justice Blackmun was very careful about words, wasn't he?

DPW: Oh, yes. Oh, yes.

BAG: A grammatical stickler, would you say?

DPW: He was — not more so than Charlie Wright, who had been one of my professors at the University of Texas. But if somebody split an infinitive, you'd get a little, tiny pencil circle around the *to*, and that's all he would do — he'd just kind of mark it. But he reviewed every word that came to him — whether it was a bench memo, a cert memo, a markup of a cert memo, an opinion draft — and made it his own.

BAG: What did you learn about writing during your clerkships?

DPW: I think I learned about the importance of organizing what it was one has to say. There was such a huge volume of writing to do — especially with the Justice, maybe a little less so with the Judge — but if you weren't a careful thinker, and if you didn't have in mind what you wanted to say, how you wanted to get it out, you would drown. I mean, you couldn't possibly sit around there and wallow in legal research and do 25 drafts. The year would have been over. So I learned the importance of thinking it through very carefully in your own mind first, organizing it, and then getting it down on paper.

BAG: What kind of mentor was Charles Alan Wright for you?

DPW: He was a very interesting mentor for me because I was not, you know, one of his "legal eagles." I wasn't one of the guys, by any means. But he took a real interest in me, I think. I had him both for the big federal-courts class, and I was in his seminar, which was a fairly small seminar — I'll say maybe ten people. And he really ran a nice seminar. I would say there was much more interaction at that point. He was tremendously supportive of my career after I left the University

of Texas. So he wrote really nice letters for me. I've not seen them, but I understand . . . actually, I guess I could see them today if I wanted to because they're in Justice Blackmun's papers. But I know he was very supportive, particularly with the Justice, but I think as well with the Judge.

BAG: Were you assigned to be a Justice in that class, in the seminar class?

DPW: No, it was really more topics that interested people. We would each pick a topic that we wanted to write about, and then people would make presentations during the course of the semester, and Charlie would take up whatever that subject was. This was a time, I recall, that *Edelman v. Jordan*[1] was a big issue, and immunity of states, which has in some ways never ceased being a big issue. But he was involved with that. I was working with federal venue; it was just an assorted-topics seminar.

BAG: What do you most admire about Charlie Wright's prose style?

DPW: Well, he's a beautiful writer. I think one of the things that makes him a beautiful writer is that, again, it's a very clean prose style: it's not convoluted with lots of long clauses that you get lost in the middle of; the vocabulary is a very lively vocabulary; and it certainly does follow all of the traditional grammatical rules — that may not be 100 percent necessary, but it certainly works well if you can do it.

BAG: How often do you see a brief where you feel as if you really are swept along with the prose, and it's an admirable style?

DPW: Rarely. It's much more common to see a brief that is frustrating because you have a feeling you're on a treasure hunt. You get some idea what the lawyer is trying to say, but the

[1] 415 U.S. 651 (1974).

lawyer isn't presenting the point as clearly as he or she should. And it takes a while to ferret out what you think the real point is. Occasionally, though, you see a beautiful brief or hear a beautiful argument.

BAG: How important is style in brief-writing?

DPW: It's important. And I would say we need to separate two things. One is whether a person is making a point at all. I think of that as, Have you hit the side of the barn? If you have hit the side of the barn, I'll take it from there and try to think about what I think of the merit of your position. But if one side has presented a beautifully organized and written brief, and the other leaves me trying to decide if they've hit the side of the barn or not . . . there's an inherent advantage to the side that's done it well. There just is. I can sit there all I want and try to equalize it in my own mind — and believe me, I do — but there's still an advantage for the person who wrote it well.

BAG: Because really, style and content . . . you can't divorce the two, can you?

DPW: Absolutely not. Because I get back to what I said about my own writing experience — which is, the well-written brief is going to be one that's organized well, that has a thought progress, that has a theory of the case, that knows where it wants to go, that has nice transitions where one point does logically flow from the last one you just talked about. All of that is very helpful to any reader, including judges.

BAG: What is the most important part of the brief to you?

DPW: Well, once you get into the legal arguments, I think it's the way they're put together. It's the way they're organized. So maybe in the summary of the argument, I'm going to look at that and try to get some overview of where you're going. Now, of course, a statement of facts is important, and if the

facts are complex in any way, then the way you tell the facts is going to influence how the judge will look at it. But stating the facts with the correct standard of review in mind is important — but also, just that organization of how do you want to present your legal positions.

BAG: Why is the statement of facts so important?

DPW: Well, because we decide cases — we don't write law-review articles — and the facts are what they are. And as I say, you have to state them with the standard of review in mind. If you're going against a grant of summary judgment to the other party, then the standard of review is de novo, and you're on strong ground. If there's been a bench trial and you have to show that what the judge did was clearly erroneous, you are facing a much different task. Maybe you need to think a little harder and see if there's some legal error underneath it that will allow you to get away from that clearly-erroneous standard. I can remember as a lawyer at the Justice Department how hard it is to convince an appellate court that a trial judge was clearly erroneous. On the other hand, you can't just reargue the cases as if there were no findings of fact by the trial court — you're wasting your time. The judges are going to say, "Well, you just disagree with the trial court. We're done."

BAG: What is the purpose of a good conclusion to a brief?

DPW: You would be surprised the number of people who don't know what they want. And a good conclusion to a brief is going to wrap up what the case is about, what's the governing legal principle, and what you want us to do. Do you want us to remand? Do you want us to issue an injunction? Do you want money? What do you want? I heard a case this morning where I thought a lawyer was not at all clear on what he wants as that particular case has evolved by now.

BAG: How can that happen? I hear judges say that happens very frequently.

DPW: [Laughter.] It shouldn't happen at all. But maybe — giving the benefit of the doubt to this guy's case — events have been unfolding since the time the case began. What they may have wanted at the very outset might or might not have changed because of those events. He should have thought about that because sometimes if you're dealing with something where you really need the status quo preserved, then maybe you should ask for that to happen. If the status quo hasn't been preserved . . . and maybe you're looking at monetary relief of some type; maybe even the measure of damages changes over time; maybe partial payments are being made; or maybe the stock market changes; or maybe things are happening outside the litigation that affect what you want. And I don't know why people don't think about it, but they don't think about it as much as they should.

BAG: I had a judge recently tell me that. I asked him to quantify how often it was sort of unclear in the lawyer's mind what he or she was asking for, and he said 80 percent of the time.

DPW: Hmm.

BAG: Does that seem high to you?

DPW: That seems high to me. I don't know if this was an appellate judge or a trial judge. But certainly at the appellate level, because summary judgment is so common, a great number of our appeals are from decisions granting summary judgment, and what they want is very simple — they just want a trial. So those cases aren't the problem cases. Other kinds of cases — where you're looking at injunctive relief, or damages, or there's actually been a trial — are the ones where I think this would be less clear, but I don't think that matches my experience. I would never say 80 percent.

BAG: Lawyers ought to probably study the mandates of appellate courts, shouldn't they?

DPW: Mm-hmm, yeah. They definitely should study the mandates. And they should study opinions and see what relief at the end of the opinion the appellate court orders. If it's an affirmance, what does that mean? If it's any kind of modification — reversal, remand, additional proceedings — what's going to go on?

BAG: What does intellectual honesty mean to you, in the appellate context?

DPW: It means to me, at a minimum, that the underlying facts — I don't mean inferences from facts or the like, but the underlying facts — are being portrayed honestly, that you're confronting the bad ones and you are making transparent to me your reasons for drawing the inferences from those facts that you have. And I would say the same thing on the legal side: you're giving me a fair reading of the cases, or statutes, or constitutional provisions, or whatever it is that you're relying on. And a good lawyer will do that. It's actually a very foolish thing not to do that because if I don't get your take on what to do with seemingly unfavorable facts or law, I'll just make up my own mind. I would think that any lawyer would want to have a voice in that decision.

BAG: But a lot of lawyers do seem to run from the weaknesses in their cases, don't they?

DPW: Mm-hmm. They do. One of my colleagues on this court has a habit of asking hypothetical questions to lawyers, and his hypotheticals always do sound fairly extreme, but what he's trying to get them to face up to is what path they are really taking us down. If we agree with you today on this proposition, then tomorrow, or the next day, or the next year, are we going to be down here at this hypothetical? And the very

worst thing a lawyer can do — at least for this colleague — is say, "Well, that's not this case." Because what they'll get is a withering, "I know it's not this case; it's a hypothetical. But I would like your answer." And he has a perfectly good reason for wanting to know what that trajectory looks like. So they should . . . they're afraid to answer because they're afraid if they answer, they'll give away their case — because he structures them in a way that it does make the answer sound pretty unattractive. But they just need to understand, you know, what rule do you want? If you say, "Well, here's the answer to the hypothetical you asked, but that's actually not quite the rule we're asking for: we're asking for modification A of that rule, and our modification isn't going to take us down the path that your hypothetical suggested" — that would be a great answer to a question like that, but not everybody's up to it.

BAG: Would you say that lawyers ought to think of all the hypotheticals they can and what their answers would be to them so that they're prepared to answer hypotheticals?

DPW: I think they should. Actually, occasionally in oral argument — I haven't done this for a little while — but occasionally, if I'm really not sure what rule the person wants, I will actually say to a lawyer: "Dictate to me the first three sentences of the opinion you want me to write." And some people are not ready to do that, but I think that people should be ready to do that. Because I almost always will start my opinions with an opening paragraph that is a very concise summary of what the case is about, what people want, and what we're going to do. And lawyers certainly should know what it is they want an appellate court to do. And it's very unsatisfactory to say, "Rule for me," because we make precedent.

BAG: Maybe the reason you stopped doing that is you were getting bad answers.

DPW: [Laughter.]

BAG: I can't imagine that somebody, off the cuff, would — unless the person had taken the time to construct what I call a deep issue: sort of the major premise, the minor premise, and the conclusion. Unless you understand those things and have actually taken the time to state them, it'd be very difficult to do, don't you think?

DPW: It would be difficult, but you could, in all sorts of cases — you know, a Fourth Amendment case — you could say, "We think, as a matter of law, you should say that 'duplexes are more like private houses than they are like high-rise apartments, and so there is an expectation of privacy if something's as small as a duplex.'" Okay, if you don't think that — if you think that duplexes are sometimes private and sometimes not private — you might have to put some bells and whistles on that. The Fourth Amendment's a very fact-specific area, and yet the Court has rules for the Fourth Amendment. So you have to think about your area. And of course, given our job, one of the fun parts of the job is that you get to think of everything sooner or later. But you need to think about what rule you do want. Later on, you see some cases cited — I mean, I've been on the court almost 12 years now — so I see my cases cited all the time, and it's interesting to see how people decide to use them.

BAG: Could you talk more particularly about exactly what you try to do in the opening paragraph of an opinion?

DPW: All right. What I try to do in the opening paragraph is I try to make it clear what the case is about — it's a criminal case; it's a civil case; it's an ERISA case; it's an immigration case; whatever it is. What happened to the person — what did

the district court or the board or whoever do? And what do we want to do about it? You know, "We don't find any clear error, so we're going to affirm," or whatever. And the reason I do that is twofold. First of all, I want people to understand what the case is about in general, and I think it's helpful to give a very quick summary. Maybe they don't like immigration law, and they don't want to read that opinion or something. Then this isn't where they want to go. Second, for the parties, it's a courtesy not to keep them in suspense. This isn't a novel, after all, where you have to wait for the last chapter to find out who did it. They ought to know. And then I go back, and I fill in the background, and usually do it in a particular way.

BAG: You are in the vast majority of judges stating what the outcome is at the end of the first paragraph. Two of your noted colleagues, Judge Posner and Chief Judge Easterbrook, prefer the impure style — or what Judge Posner calls the impure style — of postponing until the end what the resolution is. Have you discussed this issue with them?

DPW: No, I haven't. We do discuss opinions. If I've written something, sometimes they have suggestions for me. If they've written something, sometimes I have suggestions for them. And we have a very nice give-and-take about that. But I think we're all reluctant to get too deeply into another person's style.

BAG: Do you think you were influenced much by the better writers on the Fifth Circuit: people like Judge Goldberg, Judge Rubin, Judge Tate — was Judge Higginbotham on the court at that time?

DPW: He was actually a district judge when I worked there. I wouldn't say so. And as a matter of fact, there's one aspect of what Judge Goldberg did that I have quite deliberately

not done. I worry in some of Judge Goldberg's opinions, or John R. Brown's — who was Chief Judge in the Fifth Circuit quite notably for a while — that if you get too playful with the facts of a case, you're doing the parties a disservice. There are other judges around the country who will put movie names in opinions, or judges who will write in poetry, or what have you. And I'm not comfortable with that myself because, however repetitive the case may seem to us, it's somebody's case. And I think they deserve some respect, and I'm afraid they won't think they're getting it if somebody gets too flippant with the way the opinion's written.

BAG: So you especially wouldn't admire punning on litigants' names throughout an opinion?

DPW: I wouldn't do it. I would never do it.

BAG: Let's talk about trial-court judgments and findings of facts and conclusions of law. What is your view about how good findings of fact and conclusions of law are written?

DPW: It's more helpful to me if they're written as particular findings of fact — you know, paragraph by paragraph on the findings-of-fact part. I don't think it makes a difference for conclusions of law. Again, I think there you just want it to be clear. And as you have probably told many people, and I constantly say, "Good writing is good writing." I don't know if there's good "legal writing" or good "anything else" writing. As a matter of fact, I happen to have been reading something recently by Alan Lightman, who's one of my favorite authors. Are you familiar with his work?

BAG: No, no.

DPW: He's a physicist, and he's written this wonderful little book called *Einstein's Dreams*, in which each chapter presents an alternative reality in a particular place depending on how you think about time and space. But he doesn't tell you

that's what he's doing. It's just apparent as you read on in the book that's what he's doing. But he's a fabulous writer. And he happened to have something in the bulletin of the American Academy of Arts and Sciences recently that I was reading because he got interested in what were the 20 greatest discoveries, scientifically speaking, of the 20th century. It was just a pleasure to read it. I'm not a physicist. I don't think I would do too well reading some highly technical physics journal, but this guy's a fabulous writer — period. So it doesn't matter what you're doing — if you're a good writer, you're a good writer. And people who write these long, complicated things — whether it's a district-court judge or whether it's a court-of-appeals judge — are not helping themselves.

BAG: Do you think opinions could be a lot shorter than they are?

DPW: Yes — unequivocally. Even some of my opinions, I look at and I think, "Boy, I could shorten this." And then sometimes I don't have enough time to sit down and give it one last ruthless, red-pencil edit. But there are a great number of areas of the law in which we write opinions that don't need a whole lot of new insight: employment-discrimination cases; a lot of the federal criminal appeals — one cocaine conspiracy is probably about the same as the next one. You don't need deeply detailed accounts of the facts in those cases. Some of the facts are going to matter, and you ought to mention them. Many of the rest don't, and you can easily do without them.

BAG: What about findings of fact and conclusions of law — do you like very ample ones or bare-bones findings of the critical facts? Or is it okay to throw in a lot of facts that really don't bear directly on the issues?

DPW: It doesn't bother me if a district judge has done that because I'm a pretty good skimmer at this point. If I think it's

important, I'll spot it. And it's probably, from a district judge's point of view, not a bad idea to have a bit of an insurance policy in there: they're not sure which facts somebody else will think are important. They're trying, in some sense, to convey to another person their intuitive sense of where the facts are after, say, a full trial. So all of us need to give our interlocutor a little bit of help, as we're trying to convey that information.

BAG: Let's talk about oral argument. What are the characteristics of a first-rate oral argument?

DPW: All right. A first-rate oral argument is one in which the lawyer, and this would be true of both lawyers, know what it is they want — what we were talking about before — and are ready to engage with the panel on the soft spots. The hardest cases don't have obvious answers. And the judges are going to say, "I'm troubled about this point. Why is it that this isn't a bad point for you?" This morning there were some very difficult cases: are you talking about something that's within the discretion of an administrative agency, or are you talking about something that's really fundamentally a question of law? It makes all the difference in the world. We can't touch the administrative agency's discretion. We are supposed to worry about questions of law. And the lawyers who will engage in that and who will give you a good, rational explanation about why their position is as it is do well. Of course, they will be courteous to those on the other side. It doesn't help to shout or do things like that in oral arguments. Most people don't; a few people do [laughter].

BAG: People shout?

DPW: Yeah, it's happened. And some people just get carried away. They're clearly trial lawyers — they're used to talking to juries, and so they're not really being rude, so much as they

forgot which kind of courtroom they're in. So what they need to do is just focus on the case at hand.

BAG: When people say, "Don't make a jury argument to an appellate court," what does that mean to you, exactly?

DPW: To me, it means two things. It means don't ask the appellate court to make the kinds of credibility findings and to make calls as to which evidence matters and which evidence doesn't matter. That is the jury's job to do. You certainly are free to say there's no evidence — no competent evidence, more likely — on a particular crucial point. But you're wasting your time if you're trying to say to the appellate court, "The jury shouldn't have believed this drug dealer. They should've instead believed somebody else." It's not for us to do. So that's one thing. And I think the other thing people mean is, stylistically, trial lawyers are sometimes going to be trying to appeal to the emotions of the jury, trying to say to the jury, "We're good guys, rule for us," and the like. And we try not to decide on that kind of basis. That's why we have three judges, I think. You get three different viewpoints, and you're trying to eliminate that raw emotionality.

BAG: And it's almost an affront to an appellate judge, isn't it, to have an appellate argument that is crassly appealing to somebody's emotions?

DPW: It's just not right. We're not supposed to decide on that basis. Obviously, we're human beings — we're going to be moved by sad circumstances, which sometimes come before us. We once had a very sad case that had to do with education of disabled children, and the particular child was there, and the child had terrible, terrible needs. I commented to my colleague afterward that it was a very sad thing. And he said, "Yes, that's true. But on the other hand, it does seem she had a very supportive family, and we just have to decide

how the rules are going to be structured." And we'll have discussions like that. We'll say, "Here's this child, but actually society has to support the rest of the children too. If the school district has to spend every last cent that it has on this one child, what happens to everybody else?" And so we can explore why it is we have to be nonemotional about it. I'll put it that way.

BAG: How often do you hear, "If it please the Court," as opposed to, "May it please the Court"?

DPW: Not very often.

BAG: That's sort of fallen out of fashion.

DPW: I think so.

BAG: I'm listening to old recordings of oral arguments and hear people saying, "If it please the Court."

DPW: "If it please the Court" — I think that's a Britishism?

BAG: Maybe.

DPW: It might be.

BAG: How often do people begin an oral argument with . . .

DPW: "If it please Your Lordship"?

BAG: [Laughter.]

DPW: You know, that's what started in the back of my mind [laughter].

BAG: How often do people begin an oral argument and forget to say, "May it please the Court"?

DPW: Not often. I think they usually say that. It wouldn't worry me that much if they didn't say it. I think what I try to tell people about oral argument — and I'll tell you an anecdote; hopefully, this won't be recognizable — is: your demeanor, and your statements, and your clothes, and your hair, and all those things can vary, but they shouldn't be distracting. If you come to court and you're wearing clothes that are going to distract the panel because they're just not quite . . .

they're just a little too far out of the boundary, you're doing a client and your case a great disservice. I remember one guy whose hair was strange. I spent half the oral argument trying to figure out if he was wearing a wig or not, and then I sort of thought, Oh, my gosh, I've got to think about what's he saying [laughter]. And then I think, Wig? Not wig [laughter]? And that's not good. I shouldn't have been doing that. I can think of men and women alike — this is not a particularly gender-specific comment. If you're distracting, either in your speech patterns . . . some people get a little too chummy, and you don't want to do that — you know, leaning on the podium and saying, "Hey, Judge." That's not right for the setting either.

BAG: In terms of argumentative style in an appellate court, what are a couple of the most remediable problems that otherwise pretty good counsel fall into?

DPW: Well, you say otherwise good counsel?

BAG: Mediocre, but could be excellent.

DPW: I think a lot of people are still too wedded to large notebooks full of every last scrap of paper that might be relevant to the case. And it's perfectly okay to have those things sitting over there on counsel table, but you should never take them up to the podium. One of the lawyers today did what I think pretty much everybody should do: he came up to the podium, and he just opened up a manila folder, and it was clear that he had put . . . I mean, I couldn't see what was written there, but given the space, what he must have done was put reminders to himself about the key points that he wanted to make. That lawyer can engage with the panel better. She can make better eye contact. You should know your case well enough that that's all you need. And a lot of people can't bear to get rid of their crutch, but they'll do better if

they do get rid of the crutch. And so I think that's one thing that would be a very easy step for anyone who wanted to improve his or her oral-argument style to take. Another is thinking in terms of an outline with your most important point first and going down — but being ready, on a dime, to change to what the court wants to think about. Maybe they're already persuaded on your first point, but they're worried that there's some weakness in a subsidiary point. But if the judges want to talk about something, you either have to have a very economical way of telling them that that point isn't important to the case, or you'd better be ready to talk about it.

BAG: When we use the phrase "hot court," what does that mean to you? And I'm thinking in particular: is the court "hot" if all the judge has seen is a bench memo of three or four pages but not the briefs?

DPW: What I thought people meant when they said that was that the judges were asking a lot of questions of the lawyers. And I would further think those questions would have to be good questions. I've never, in 12 years, sat on the bench having only read a three- or four-page bench memo, so I have no idea what that would be like. As a matter of fact, when I interview my law clerks . . . I know I'm not the same as many of my colleagues on this point, but I tell my potential law clerks, and I have my existing law clerks, devote a tremendous amount of time to the pre-oral-argument preparation of the case. We get the record down in chambers; we look up all of the — "we" means "they" [pointing to law clerks' offices] — the references to the record in the briefs; they look up the cases; they make sure for me that neither the Seventh Circuit nor the Supreme Court, or possibly at some high level, the other courts of appeals, have

done something that the lawyers have missed. And my reason for that is twofold. One, I get the most out of oral argument with that kind of preparation. I will have read the briefs; I will have read the major cases — I usually sit there with Westlaw open while I read briefs, and if somebody cites something and I think, Gee, I'm not sure that case says that, I'll just quickly open up the decision and take a quick look at what they're saying, so I get more out of oral argument that way. And remember, we conference the case immediately after argument. We walk off the bench, the most junior judge in the panel begins with case number six, and we come to a decision — at least a tentative decision. So preparation afterward wouldn't be as valuable to me. And I do ask the clerks, for the most part, to write bench memos because that way it fixes it in a time and space, both for me if they're opinions that I'm supposed to write — even more so if one of the other two judges on the panel is writing. Then they send a proposed draft around. We already know that record; we know what the case is about. We have some point of comparison to see if we like what the other judge has done or if we think it's within the realm of something I could be comfortable with. So I'm a huge believer in front-loading preparation.

BAG: Do you go into court with a kind of rebuttable presumption about how you think it comes out?

DPW: Probably. I say to people, "Look, if you've written a good brief, and I've read the district court's opinion and your brief and your opponent's brief, and I've read the major cases, you shouldn't be surprised if I've got some idea of how I think the case should come out" [laughter]. Of course I do. Very often, though, what it will do for me is identify some areas of inquiry that I really need to know about. I need to

nail these down before I'm going to come to a final decision. And the lawyers ought to know the record better, they ought to know the relevant law better, and if they can help me on that, they will have used their time very well.

BAG: How often do lawyers come into court and are not able to explain why appellate jurisdiction is proper?

DPW: Oh, jurisdiction [laughter]. When it's a problem, they often have not thought about it as carefully as the court has. They make assumptions, and we have waves of cases . . . for a while we had a wave of cases where lawyers weren't paying any attention to the fact that a dismissal without prejudice might not be a final judgment. They saw the words "we're dismissed" and thought "we're done." Then we had a wave of cases where people were being careless about alleging diversity jurisdiction: they were saying, "He's a resident of Illinois," instead of a "citizen." They're especially vulnerable in removal cases because what they're going to do is take a complaint filed by a perfectly rational plaintiff in state court — where it's probably fine to say you're a resident of Cook County, or whatever. And then it gets removed to the federal district court, and they don't realize — oops, that's no longer a sufficient jurisdictional allegation. You can't just lift it out of the state-court complaint and keep going. So that's a perennial problem, actually — people aren't careful with jurisdiction and removal. Then, of course, there are many fancy jurisdictional rules that people need to be aware of.

BAG: And the Seventh Circuit is . . .

DPW: Notorious [laughter].

BAG: The judges are sticklers, aren't they?

DPW: Yes [laughter].

BAG: For these kinds of things?

DPW: Absolutely. We're busy enough with the cases that belong here. We don't need the cases that don't.

BAG: But anybody who's going to be in an appellate court should have down pat what the jurisdictional basis is for the presence.

DPW: Absolutely. And what they should do, I think, if they were making a checklist for themselves, is they should first say, "What was the jurisdictional basis for the federal involvement with the first level?" Usually a district court, but maybe an administrative agency. And because that's one version of a jurisdictional problem that can exist, then they have to separately look at, "What is the basis for appellate jurisdiction? Does this case belong right now in an appellate court?" And if they think of both of those separately, they probably will tease out whatever issues exist.

BAG: How often do you get mumblers before your court?

DPW: It happens, but I wouldn't say too often. People are confused because they speak into a microphone, but the microphone is not amplifying their voice; the microphone is creating our recording of the oral argument. So they just misunderstand, I think.

BAG: Because it does amplify in the U.S. Supreme Court and in some courts.

DPW: There are some other microphones, I think, that do amplify a bit, but the one they're speaking directly into, I'm pretty sure, is the recording one.

BAG: That's probably something to get used to and know about.

DPW: Yeah. And, right, it's a funny thing. We tried to notify people about these things. I think there might even be a little sign on the podium. And there is definitely a sign in the podium that says, "When the white light comes on, if you are the appellant, it means your rebuttal time is starting." And people

regularly fail to appreciate that. Now, some presiding judges will interject when the white light comes on — something like, "You're in your rebuttal time. It's up to you, but if you use it up, you don't have anything else." Or some judges just let them talk on, and if the red light turns, I've seen lawyers, many times, pop up thinking now they're going to have their rebuttal — and again, it depends on the discretion of the presiding judge — but some presiding judges will just say, "Sorry, your time ran out. You don't have any rebuttal time." Other presiding judges will say, "Well, your time ran out, but I'll give you an extra minute." But people ought to know what they're doing — and there is a sign right there on the podium. I think they get nervous, and they don't pay attention to it.

BAG: Should lawyers arrive plenty early and check these things out?

DPW: They should. I'll tell you a horror story from my very early years on the bench. I was sitting with Frank Easterbrook and one other person — I can't remember who the third person was on the panel — and sometimes we're in two different courtrooms. Actually, in those days we used a small room on the 27th floor as an extra courtroom; we now use a different second courtroom. And we got to the last case of the day. Judge Easterbrook was presiding, so he called the case, and the lawyer for the appellant was there, but there was no lawyer for the appellee. And so he asked the courtroom deputy to go look out in the hall to see if this person was anywhere to be found. Answer: "No." And so we waited another few minutes — maybe he was in the restroom, whatever. No show, no show. So Judge Easterbrook decided to allow the lawyer for the appellant to present her argument,

which she did. No sign of the lawyer on the other side, so we just said, "Well, that's that." A little while later — I think we may not have even been finished conferencing the cases — we got the most abject letter I've ever seen in my life. In short, the person had gone to the wrong courtroom. Our no-show lawyer had actually been in the building but was sitting in the wrong courtroom. And, of course, the case never got called because it was never going to get called in that courtroom; they were hearing a different group of six cases. How that happened I really can't say, because there are two different sign-in sheets, and the names of the panel members are at the top of the sign-in sheets. It shouldn't have happened, and the lawyer said [making writing motion], "Sorry, sorry, sorry, sorry. Would you please accept the case on the brief?" Which, of course, we did. It was really their forfeiture, not our problem. But based on that experience, I've said to people, "You know, if you have any uncertainty at all . . ." Are there two courtrooms? Or is there one courtroom? How do the judges pronounce their names? Is it Posner [pronounced PAHZ-ner] or Posner [pronounced POHZ-ner]? Is it Wood or Woods? Just get the lay of the land before you come so that you don't have to worry about it. If you're not sure about the pronunciation, ask the clerk's office people. They'll tell you. They know.

BAG: By the way, it is Posner [pronounced POHZ-ner].

DPW: It's Posner [pronounced POHZ-ner].

BAG: Yes.

DPW: Yes.

BAG: I've had people correct me, though, and try to say it was Posner [pronounced PAHZ-ner].

DPW: Well, they're wrong. [Both laugh.]

BAG: How do you go about preparing an opinion? Could you just describe the process that takes place in your chambers as an opinion gets prepared?

DPW: Okay. I start with my little bench cards, which is where I have written notes down for myself — sometimes they're very cryptic — of the conference that I've had with the other two judges, and this is an opinion that's assigned to me. I will be interested in whether we are unanimous. I'll be interested in whether one person expressed some reservations, and if I know what those were and I can conceive of a way, maybe, to narrow the scope so I can keep them with me . . . or maybe spend some time discussing a topic that I don't think is all that important, but if one of my colleagues thinks it's important, then I incorporate that as part of this notional opinion that I'm thinking of because, obviously, if it all goes well, it will be a joint product of the three of us. I'll decide what I need to talk about and how I need to talk about it. Then I'll look again at the briefs. I'll look at whatever source of facts I have. Usually, again, that's a fairly constrained set. If it's a habeas case, I'm going to need to look at what the state court said. If it's an appeal from a district-court finding or it's summary judgment, it's pretty easy to do if you're going to be careful with the rules. So I'll work out the facts, and I'll kind of map out how I want to approach these various things. Sometimes, if the law clerks have written a long bench memo, or if they've had some time, maybe they'll write something and I'll look at that. Or maybe I'll just sit down and do it myself. I do it both ways these days. It really depends if I'm interested in it, how much time I have, what I'm doing.

BAG: What happens once a draft is ready?

DPW: Once a draft is ready, I'll go through some number of iterations — it depends on how complex a case it is. With the clerks, I'll e-mail the draft to the clerks and say, "Here it is. Please go over it. Cite-check." Or sometimes — I actually did this with a case not too long ago — I had said, "Here's the draft that I've got so far. I'm concerned. Please take another look at the record. Are there any other topics that you think ought to be touched on in the draft?" And so we might decide: do we really want to talk about this, or is that, in the end, unnecessary? Sometimes I'll cut things out that I did put in, just because, upon reflection, I don't think it's really necessary to have it in there.

BAG: What is your view of parenthetical case citations?

DPW: The clerks like to put them in, and if the clerks are drafting, I frequently delete them. I think it depends very much on whether it's a controversial proposition of law. If it's not a particularly controversial proposition, sometimes I don't even bother to put a case in at all. If I say, "The standard of review from a summary-judgment motion is de novo," I don't need a cite for that. You probably have 5 million cites for that, and so unless I'm doing something innovative with that point, I might delete the citation altogether. If it's the *McDonnell Douglas* standard, do I need 15 cites to say that? No. If I'm doing something innovative . . . there's been some interesting evolution in that area, actually — some of which has been done by Judge Easterbrook, some of which has been done by me — and there I think it is worth saying: maybe all of this back-and-forth stuff is a clumsy way of getting at what we're trying to achieve. So parentheticals — people can get carried away with.

BAG: They bloat up the paragraphs.

DPW: Oh, they do bloat up the paragraphs. And I don't use footnotes.

BAG: Why not?

DPW: Because I think they're very distracting. I'm a huge believer that if it's important enough to say, I should find a way to say it in the opinion; if it's not, then it doesn't belong there. Once in a blue moon, I'll put a footnote in if . . . maybe if it's a last-minute point. Or — I don't know — I probably have put footnotes in about five opinions I've written in 12 years, so I just don't like footnotes.

BAG: I've been trying to persuade your colleagues, Judge Posner and Judge Easterbrook, that there's no good reason to have "129 F.3d 464, 466" in the body of the opinion — that those things ought to be in footnotes, that nobody would have to look at them.

DPW: But they would look at them; that's the problem. They see that little footnote signal [motions head up and down], and your head is bouncing up and down on the page.

BAG: For maybe 60 seconds, and once you realize there's nothing down there that you'd ever have to look at . . .

DPW: No [shakes head].

BAG: You're not . . .

DPW: Just as easy to skip over it [laughter].

BAG: But have you not seen briefs and judicial opinions where, if you strip the citations out, or even if you skip over them, you realize there's no real train of thought here? Legal writers are having trouble maintaining a train of thought.

DPW: Mm-hmm, I think that's right. And certainly you can take that to extremes. But I think the idea that you have to have a citation after every proposition is silly if you're on an appellate court. Some things are very well established, and they don't need a citation. We're an appellate court. I mean, we

get to say what's going to be the rule. And so if you want to make sure things are grounded, you can sometimes have a paragraph that says, "Here are the propositions of law that we think are going to govern here, blah blah blah." And then go on and just explain the case in plain English. I mean, you can do that too.

BAG: But don't you think in F.3d generally, there tends to be some citationitis — way too much citation?

DPW: Oh, there's much too much citation — much too much citation. There's no need often for two or three cases — certainly not two or three cases from the same circuit. Now, I know some people — Judge Posner's a great advocate of this — think that it's very helpful, if there's something worth citing at all, maybe to have a Seventh Circuit cite and a couple of other circuits just to see: Are we outliers? Are we right there in the mainstream? That's good to know.

BAG: Why is it not analogous to say: what would happen to *Federal Practice and Procedure* if you were to take all of the citations and move them up into the text? What would happen to that treatise?

DPW: It's a scholarly work, and it needs all of those things. People look at that just for the cites. Sometimes I'll just look at footnotes in *Federal Practice and Procedure*, and I'll run down and see what cases are cited there. So I think the way it's used by the user community is quite different.

BAG: Do you think lawyers have a professional responsibility to be the best writers they can be?

DPW: That's a giveaway question. Lawyers do have a professional responsibility to communicate their clients' positions as effectively as they can. I think that's one step away from what you just said. Some people are going to be better writers

than others, but those who are the best writers are going to do the best job.

BAG: By the way, do you fault law schools at all, or do you think it's such a systemic educational problem, we've got to go way back to grade school, or do you think law schools could do more than they do with legal writing?

DPW: If I had to choose between those two, I would take the "we've got to go way back into grade school" hypothesis. I have three children, and I watched the training they got through a very good school system, and even they, I think, would have benefited by more rigorous training about what good writing is. Now, each of them, at some point along the way, was fortunate enough to run into a teacher who really held their feet to the fire. But I'm talking about in high school. So by the time they got to college — I have a son who's a first-year law student — they've been through that; they have already had to learn it. He still has something to learn; so do I. I mean, anybody can get better. But law school's awfully late, and I still teach at the University of Chicago. Most of the students write pretty well. They're required to do a couple of substantial writing projects, but this is the cream of the crop — they should write well.

BAG: If you took legal academics, do you think most law professors write well?

DPW: What do we mean by "write well"? I don't think they make grammatical mistakes. Are they writing in a lively and interesting way that makes me want to finish their law-review articles? Sometimes yes, sometimes not. But it's the choice of topic, probably, in part.

BAG: Well, thank you very much for your time today.

DPW: You're quite welcome.