

**ORAL HISTORY OF JUDGE MICHAEL W. FARRELL  
FIFTH INTERVIEW  
NOVEMBER 12, 2015**

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Judge Michael W. Farrell. The interviewer is Lory Barsdate Easton. The interview is taking place at the District of Columbia Court of Appeals on November 12, 2015. This is the fifth interview.

JUDGE FARRELL: [Describing a recent trip to Italy] We spent about two weeks there, the first half of it up in Tuscany. We rented a place at one of the two—what do they call these—agriturismo. Rebuilt, upgraded, updated, fancified farmhouses on an actual practicing farm, most of them are—raise grapes, that’s about it, but a lot of them, right near San Gimignano, one of the leading hill top towns that people go to, and within driving distance of three or four others. So, it was a nice central place. And we spent four or five days there. The weather was glorious, and we had a lot of fun. The one thing I didn’t like, and it’s the last time I’ll do it probably, is the driving in Italy. You know, we went just the two of us. And the windy roads and the pressure of being pushed off the road by Italian drivers at every turn kind of got to me after a while. But we survived it and had fun. And then we went to Florence just for a day. I’d been to Florence before, a couple times. And it’s so, so, so, crowded. God, it’s incredible. Then we took a train from there down to Naples, and spent three, three and a half days in the town of Amalfi on the Amalfi Coast.

MRS. EASTON: Oooh!

JUDGE FARRELL: Yep. You have to get a driver to take you over the mountains and down over to the coast. They call it the Amalfi Coast. And that was very nice, although the temperature was in the nineties. But, it's not bad at night. It drops down and you have the glorious view of the sea and you go up to Ravello and you can swim, and we swam every day in the Mediterranean. It was nice.

MRS. EASTON: Oh, nice!

JUDGE FARRELL: And then the high point for me, we went over to Florence—to Naples for three and a half days or so. I'd never been to Naples and I loved it. It's a wonderful city. It's like all these old historic, huge cities. Eighty percent of the city you don't see and you don't really want to see, and it's got enormous problems of unemployment, crime, and mob control and everything else, I assume, from what they tell me. But the ten, fifteen plus percent that tourists see is very nice. It's a city that's overwhelmingly rich in history. You know, all the dynasties that were in there, and the French, and the Austrians, and everybody. So, the museums are just a treasure trove of interesting things, particularly wonderful marble sculpture, because they have great marble down there in the southern part of the country. And we stayed in the old city, which was nice, and got a chance to do a lot of things, including taking a funicular up to a fort way up at the top of the city from where you get one of the wonders of the world, in my view: a view of the Bay of Naples. On a nice day, you can see Vesuvius over on your left

and you can see all the way out to Sorrento, and it's just a spectacular azure blue view of the Mediterranean, polluted or not.

MRS. EASTON: Yeah.

JUDGE FARRELL: And you really just kind of luxuriate in it because it's so—it's so nice. And the food is great in southern Italy. It's simple, but it's all fresh. And it was nice because not that many tourists in Naples, enough, but not nearly as many. I had read a couple novels or one and a half novels on Italy—Naples during the war, or immediately after the war, and what a dreadful, dreadful place it was where thirty thousand people were killed from Allied bombing alone, not to mention what the Germans did. And it was just dirt poor. And it was all degradation—prostitution, starvation, you name it. And here sixty years later it's come back pretty nicely. It's a very, very nice city. But that was it, and it was quite enough. I was ready to come home.

MRS. EASTON: (Laughing.) And you brushed up on your Italian while you were there?

JUDGE FARRELL: Oh, yeah! I got huge plaudits from my wife, I guess, and other people that we took taxis with because I was sitting up front chatting away with the taxi driver, and of course, the others in the car didn't know that some of it I was faking.

MRS. EASTON: (Laughing.)

JUDGE FARRELL: But, so, they were hugely impressed with what appeared to be my Italian, you know.

MRS. EASTON: Your fluent Italian!

JUDGE FARRELL: A lot of it was my hands and stuff. (Both laugh.)

MRS. EASTON: Had you learned Italian back when you were studying European and German literature?

JUDGE FARRELL: No, no, I had no knowledge of Italian then. I only learned Italian as something to do; in 1995 I started after my first wife died. And I was bored, and I was just, you know, kind of aimless, wandering. I was still working full time. But as a pastime, since I had always known languages—French, some through my marriage with her, and German from my years of teaching, I figured well, here’s another language I like because I’ve always liked opera and had read some Italian fiction of the post-war era in translation and enjoyed it, so I said, “Why not?” So I just picked up books and studied and with a view toward learning to read it. I knew I’d never have a great deal of opportunity to speak it, though I did actually for about six months do some tutoring, conversational, with a professor at the Georgetown University who was kind of moonlighting and needed some cash. But anything I learned from him in the way of speaking, I forgot over the years after that from lack of opportunity. So, when people ask me, I say, “I can read it fluently. Give me a book and I’ll show you. But if you want to carry on a conversation, you know, make it simple.” (Judge laughs.)

MRS. EASTON: Oh, fantastic. (Laughs.) Well, when we concluded the fourth session last time, we had gotten to just about the point in your first year on the

bench when you were switching over and with great relief welcoming some criminal cases onto your docket. (Both laugh.)

JUDGE FARRELL: That's right. The first year and a half there was none.

MRS. EASTON: Right. (Laughs.)

JUDGE FARRELL: And I think I sent you some opinions, which you—with your busy schedule you probably had no time to even look beyond the heading.

MRS. EASTON: I did look at them, but they were not short.

JUDGE FARRELL: No, they were not short. I had a long—there were two sins that I committed that first year: one, to hire a law clerk who loved to write, and second, to have him do drafts. And believe me I learned my lesson that year. (Laughter.) We'll talk more about that. But he produced long, long stuff, which more often than not, I had to spend an inordinate amount of time cutting down to a third of the space, or half, and even then they ended up fairly long. And of course, too, because they were all civil and involved issues that I had no familiarity with. I mean, I didn't remember the stuff about *res judicata* from law school. There's a sense in which when you pick up something to learn for the first time, and to write an opinion on it the first time, you kind of put down the fruits of your education on paper—because you're kind of teaching yourself, and you want to be as sure as you can that A is followed by B, by C logically, and so forth. So, they tend to be longer than they ought to be, but they were and it's largely a function of my not knowing the subject matter and having to learn it. And it was a

very intense first year because I just got a succession of, I thought, fairly complex civil cases involving issues I had no familiarity with, and then, as you say, things got a little easier the second and a half year, third year when I got criminal cases and got an even mix.

MRS. EASTON: And is the docket for the court fairly even?

JUDGE FARRELL: I'd say it's about roughly fifty percent criminal, and the rest is a combination of civil and administrative law (a lot of administrative law because we get the appeals from virtually all of the administrative agencies). Often—frequently they go through the superior courts, so we're kind of the second appeal. But in many cases they come directly to us, and so that's a good sizeable part of our docket. And the usual civil cases, too—medical malpractice, different kinds of things like that.

MRS. EASTON: So, tell me more about how you used your clerks then differently and how that evolved.

JUDGE FARRELL: I think a general statement of it would be that over my, well, twenty-six, -seven years now on the court, I have tended to regard my relationship with my clerks as a little bit like a three-or four-person little law practice where everybody is working on something at the same time. What that meant in year one, back in 1989, was more dependence on the law clerks to do initial drafts for me, which I would then take, and as I say, I'd edit and rewrite and so forth to get them down to something that looked like me. That is the way many judges

operate, particularly in busy courts, you kind of depend on your clerks oftentimes to do a first draft. I don't—can't imagine how Supreme Court justices could function in ten months, whatever, without relying on clerks to do first drafts in cases. Of course, they've got the best legal talent in the world to do them for them. But, I came to learn fairly quickly (laughs), by about the beginning of my second year or so, or a little later than that, that I could function a lot better if I used them this way: I would have the clerks, and have continued to have the clerks, give me kind of bench memos in certain cases in advance of the oral argument, if the case is going to be argued. And I'd tell them to be comprehensive and tell me everything that they think the senior partner in the law firm would want to know about the case, and to err on the side of being more comprehensive than less. But I didn't want them to be, you know, an *amicus curiae*. I wanted them to tell me what the issues were, what the problems were on either side, but then give me their best judgment on how the case ought to be decided. That's the rule I've tended to follow over the years so that they will give me that four or five days in advance of argument. We'd then sit down and discuss it before argument. They come into oral argument with me. We have two clerks, so one clerk would work on each particular case. After oral argument, I'd sit down and talk to them about it and say, "Well, we decided not to go the way of your memo," or "We want to go the way of your memo, and thank you very much,

but the next thing you'll hear from me on this case is when I give you a draft." And then I'll sit down—this is my rule, which I have followed as best I could—as soon as I could after that case had been argued, I would sit down and rough out a first draft for myself as thoroughly as I could without having done, say, extra burrowing into the case law if I felt that wasn't necessary. I want to get my thoughts on the case down, my initial impressions, so that you don't run into the situation that a lot of judges do of having forgotten so much about the case by the time you finally get around to it seven or eight months later. You clerked, right? You know the drill.

MRS. EASTON: Oh, yeah. I know exactly what you mean.

JUDGE FARRELL: You know the drill.

MRS. EASTON: You're starting all over again.

JUDGE FARRELL: You're starting all over again. And the law clerk is starting all over again and everything. So, that did not always work, but it was a practice I've tried to follow, and I was pretty well prepared to follow because I had been doing appellate writing for so many years before that. So, I had a natural sense of what I thought needed to be said in the case, how much needed to be said, how little needed to be said. And after I finished drafting it, I would do one of two things: One, I'd call up the clerk—or back then we didn't even have email I don't think—I'd tell the clerk, here's an outline, here's my initial draft. You got to find me some case law that either supports some of my

propositions or refutes them. You know, I would take what I could from the briefs, but they're not always there. And the clerk would then have the first crack at the final draft, and what I told them was that: "What I want from you is your absolute honest judgment as to whether I'm right or wrong and where the gaps are in my reasoning and how we can correct them." And more often than not, the clerks would come back and, with the appropriate deference of course, say, "Wonderful job, Judge, I just have these following comments." But in a significant number of cases over the years, clerks would come back and say, "I really can't accept the analysis. I really think it's weak on the following point," and so forth, and they'd make me go back to the drawing board. Sometimes, quite often over the many years, if the law clerk had given me something analytically sound and good and reasonably well written in their memo for me in advance, that would make its way into the opinion, and as you know from experience, clerks love that because they feel they're being recognized. Meanwhile, the other law clerk of my two would be working on the next case and the same kind of a thing. But of course, since law clerking is kind of a prelude to practice in law firms and law practice, they would have three or four other things to be working on at the same time. You know, the triage, the juggling five or six things you had to do. Opinions would come in from other judges where I would want the clerk's input into whether I should join and so forth. Specific

legal issues would come up in cases that weren't argued, or so-called summary calendar cases where I needed help from a clerk. By and large though, my practice tried to be what I had learned over in Maryland clerking on the Court of Special Appeals there, working for a judge who basically wanted as much as possible for me to concentrate my efforts on one matter at a time, to focus my work as much as I could on a single project, get it done, and get it done satisfactorily. Now that's a luxury you don't have in law firm practice by and large. And you don't have it in the court of appeals either if the judge is really requiring the clerk to do almost everything, to do bench memos, first drafts, second drafts. My sense was that I felt that I would have been, as a law clerk, driven from pillar to post if the judge was continually coming into me with these different kinds of things. So I tried to focus the clerk's attention on a particular thing. In that way, I was always working on a draft, a clerk was always working on a draft of mine or a bench memo in the next case. And it was like three lawyers with a wonderful secretary—we called them "secretaries" then, now they're judicial administrative assistants—who basically ran the administration of the office and did it beautifully and would keep us in line as to when cases are coming up and all the rest of the stuff. So, that was the model I tried to follow over the years. And that's the model I've preached to almost all of my new colleagues in the ensuing years as to the way they might want to think about

running their practice. There is a way that gets the maximum done in the least amount of time and to leave them time for another life, and that is to get into the habit very early of doing your own writing as much as you can because it becomes second nature to you in a way. You're never going to do it perfectly because you're always going to need more work on it by a law clerk, more research, second drafts, third drafts, but I found that there were real advantages in doing it that way myself. I felt much more responsible for the work rather than working from a lengthy draft. I had a good idea of how much I thought the opinion needed to give good guidance to the bar for the present case and future cases, but also how little needed to be said without, you know, planting the seeds of future confusion and future misunderstandings by lawyers who might think you're saying more than you've said. Because that's a wonderful gift of lawyers: They can take whatever is said in footnotes and anywhere else and treat them as an authoritative statement by the court when, in fact, it may have been an afterthought, it may have been something a clerk put in a footnote, or it may have been something the judge really didn't consider and wasn't essential to the case. So, I always thought I could be not only more streamlined, more concise, but also have greater control over the opinion and the analysis if I did the first draft myself and traced out in as much detail as I could the line of reasoning that I

thought we should follow—subject to the clerks having this, you know, the kind of the next crack at it.

MRS. EASTON: It's so much more efficient than having a clerk start from scratch—

JUDGE FARRELL: Absolutely, especially in the criminal law. If you put clerks—law clerks to work, you know, given my background—if you put law clerks to work on getting into an issue they've never seen before and writing up a lengthy kind of a first draft or something—

MRS. EASTON: By definition, every issue they see. (Laughs.)

JUDGE FARRELL: That's right. They're going to spin their wheels. They're going to waste a lot of time, whereas I can do it a lot more economically. And also another rule I followed was: When you were preparing a memo for Judge Farrell in anticipation of oral argument, if you had the least difficulty about where you were going, if you felt your wheels were really spinning and you were just in a corner, you know, don't get writer's block, don't get scared. The door is open, come in and let's talk about it. And with all the experience I've had, especially in criminal cases, more often than not I can kind of free up your writer's juices and tell you where the hurdles are and how you can avoid them. What I have always needed the clerks more over the years for I think in general was to do me the kind of hard research that you need for civil litigation at the appellate level where so much of the law is uncertain, where so often (a) I never had any exposure to it and (b) there's reasonable things to be said on both sides. You know, things

like the Restatements of Law, as you know, in some ways, they're wonderful, but in other ways, they're so general that it's hard—that each side can take something from them to support their position.

MRS. EASTON: Exactly. And do.

JUDGE FARRELL: Yeah, and do. And those were the kind of cases, and have been over the years, where I really needed the clerks to go out and get me the best research they could and do it thoroughly, because in a way, I'd have to say, over the years, more and more as the years have advanced particularly with computerization, I have found that the clerks in a way are much more gifted than I am in doing basic research.

MRS. EASTON: Well, they're efficient at that.

JUDGE FARRELL: They're efficient at that as long as they can spot the issues and find the relative material and not a lot of extraneous stuff, they can dig it all up for you. They can tell you what the Supreme Court of Iowa said in a case that factually looks a little bit like this or something. And that's critically important. But the main thing is that my guiding rule has always been that the legal analysis should be as clear and as logical as it could be. I mean, we can't duplicate it, but it's as though we were doing a report or an analysis at the end of a laboratory experiment. As a scientist, you want to lay it all out in a way that anybody can, what's the word—can replicate. So anybody can repeat your steps of your analysis and reach the same conclusion. The law is much more (laughs) uncertain and vague and ambiguous, but that's what any, I

think, self-respecting appellate judge aims for: to be simple, to be clear, to be logical, to give guidance to the trial bench without overwhelming them with a lot of ponderous legal case law citation—but to be convincing and persuasive. And, you know, whether I’ve succeeded over the years, anybody else can judge, but I learned that fairly early on. I have to say that I preached to the judges over the years two rules: One, do it yourself as much as you can, and second rule, pick your cases. We’re a busy, busy court, which combines intermediate appellate functions with Supreme Court functions. You can’t write a masterpiece, a *Marbury v. Madison*, on every case. You got to pick the cases that you think—where it’s necessary. And the other cases occasionally maybe you would be willing to accept, for your own purpose or your own pride, second best, as long as you’re satisfied that the result is correct and the analysis basically sound. Now, I’m not sure how much I’ve succeeded. I think that in my preaching—I think over the years more of my judges that I’ve seen on the court than not have chosen to work from first drafts. Maybe that’s the way they did it in their prior jobs and in law firms and so forth.

MRS. EASTON: Well, that’s one thing I wanted to ask about. Because you came from a background where you were drafting appellate briefs constantly—

JUDGE FARRELL: Right.

MRS. EASTON: —so you understood—

JUDGE FARRELL: Drafting or reviewing them, yeah.

MRS. EASTON: Exactly, and then you were reviewing them, and so you were very comfortable in either mode, but you found it to be optimal use of your clerks and efficient to do your own initial rough draft—

JUDGE FARRELL: Right. But—

MRS. EASTON: Somebody who's coming—

JUDGE FARRELL: Judge Jones from the superior court bench who has never written an opinion, or written very few, [it's not] easy to tell them to do that. They may just not have the writing in their fingertips, you know, or on their keyboard. Nonetheless, I told them [my colleagues], you know, "If you continue—if you rely too much [on your clerks] you're going to get in trouble because you're going to fall behind." You've got to at least make the effort early on, maybe increasingly over the years, to make it your own product as an original matter. Think it through and get it down on paper, at least a rough outline for the clerks to follow so that they don't go astray, so that they have enough guidance to begin with. Some judges, I have to say, on the court, I won't name them, over the years I have sensed from a distance, were—are masters—have been masters, and there are probably many federal appellate judges are too—at, after oral arguments, sitting down with the law clerk and giving them chapter and verse guidance. You know, almost meticulous kind of guidance so it's as though the clerk can simply put it on a recording and then sit down and write and it—and there's the logic, there's the outline. Not always the case, but many judges can do

that well. I didn't think I could ever do that. Ever since I began writing as an appellate lawyer, I have found that I really don't know what I'm writing and where I'm going until I begin to draft. It's an odd thing to say because you have to have a general idea of where you're going. But when you sit down and start writing, things look very different and they lead you in different directions from where you thought you were going originally. At the end of an opinion I could often look back and say, "Gee, I never thought of all that stuff beforehand," it just kind of came as I burrowed into the subject and had to defend my thinking by putting it down on paper. So, you kind of learn by doing. It's the old John Dewey message, you learn by actually doing something. And I think some of the judges who've come from the trial bench have picked up that habit fairly easily. Others did a lot of writing when they were on the trial bench like Judge Frank Schwelb who died last year, one of my colleagues. He had been a trial judge, but he had written a lot while on the bench. Judges who have come from law firms generally have had to do a good deal of writing. They found it an easier task to—to kind of start doing it themselves. But there are different ways of running chambers, and for all I know, others have run their chambers magnificently—and acting in very different ways. We get good law clerks. We do not get law clerks who are of the caliber of Supreme Court law clerks, stands to reason. We struggle to get good law clerks because there's a natural

inclination on the part of young people coming out of law school, if they want to clerk and if they have the stuff to clerk, they take federal clerkships. And their law professors often tell them, “Why clerk for Judge Farrell on the D.C. Court of Appeals or someone, when you could clerk for District Judge Jones in Iowa.” And we say, “What are you thinking?” But they say, “There’s a prestige component to it that is hard to duplicate.” So, we—while we get very good clerks, there’s always a certain gamble that a given clerk in a given year is not really going to be well equipped to sit down and do original drafts, first drafts. And a judge who can say, “Okay, I’ll use that clerk for other things in a different way,” has an advantage, if the judge can say, “I’ll take over the writing and you, clerk, take over the critiquing for me.”

MRS. EASTON:

Right, right. One point I’m intrigued by, this is a very busy court.

Tell me, sort of over the arc of your career here, how has that changed and how do you manage that? How many—from one sitting to the next, there isn’t enough time—

JUDGE FARRELL:

Yeah.

MRS. EASTON:

—to complete the work. (Laughs.)

JUDGE FARRELL:

Yeah. (Both laugh.) Recently, the court has changed on an experimental basis to bunching the oral arguments in say the first two weeks of the month to free up more time for the judges to actually sit down and work in the last few [weeks]. Over the years generally, though, we have scattered the oral arguments out over the month, on

the theory that it's not productive for a judge to spend the first two weeks entirely in court or entirely immersed in those particular cases. The judge needs that time also to work on drafts, past cases, and so forth. We are a very busy court. We're the busiest appellate court in the land among states that have only one appellate court. Now, that's not many, there are only a handful. Most states have the two-tiered appellate system. But there are a handful that have only one. And for a city of only 600,000 people we get a lot of stuff and more than Rhode Island and some of these other states that only have the one tier. So, we're a busy court. On the other hand, you know, courts whose business is mostly intermediate court of appeals work—appeals of right, not discretionary appeals—an awful lot of what comes up to us doesn't require deep thoughts on the part of the judge, pondering it by looking out the window and just turning the issues over in his mind, her mind. A lot of them we place on our so-called summary calendar, and unless the parties ask for oral argument and give us a reason there is no oral argument. That saves time, less court time. And many of those cases, all of us—myself included—feel confident in giving to law clerks to take the first crack at it. That is probably, in any given year, that can be 70 percent or more of the actual cases that come to you, cases that don't need oral argument. But they don't—that doesn't mean that they occupy 70 percent of your time. You need to leave at least half your time, or more, for the tough cases, the cases that are

argued. So, that's where I have always felt comfortable using the law clerks to do an initial draft—on a summary calendar case, which in all likelihood means an affirmance, or we can reverse in summary calendar cases, but work can be done usually in three or four pages with the instruction that, “If you, law clerk, think there's something complicated there, because you're getting the first crack at it, tell me. We can set it for oral argument or we can talk about it as long as you need to talk about it, and then I can send you back and you can do the work on it.” That's another important aspect of what I call the three-to-four-person law shop. They are always working on the summary calendar cases, too. And that's the only way in which we can be as efficient as possible. Given the volume of cases that we have, it's the fortunate thing in a way that so many of the cases on appeal don't require lengthy opinions. We pride ourselves in this court, I think, on giving reasons for any decision. You'll find state courts around the country, you may have, you know, in your many years of practice seen state court appellate opinions, particularly from the intermediate court, that are a little more than a statement of the issues and a judgment.

MRS. EASTON: A decision.

JUDGE FARRELL: And a decision. And you say, “Well, okay. Did they read my brief? Do they have any understanding?” We do our absolute best to at least give reasons. They may not be fully substantiated with all the case law we could put in there. They may leave certain ambiguities in some

instances. But in general, we are satisfied with the result, and we are satisfied we've given the losing litigant a fair explanation for the decision. And that takes time. But that's something we've kind of prided ourselves on. And we also allow people to ask us to publish an unpublished opinion. They can come in and give us a reason. More often than not, we will publish it. Some judges are reluctant to do that because they feel that now I have to kind of sign it. I don't want to hide behind a per curiam opinion, and people will recognize that maybe my logic, while it's sound, you know, there are steps in between that I would have fleshed out if I were writing an opinion for a publication. But generally, we allow people that safety valve. Because over the years, as you know, there have been complaints in the bar in almost every state about secret law, about courts of appeals not publishing everything—"do not cite," no citation rules and so forth. And it's especially annoying to litigants now with the internet, where virtually everything is out there, unpublished or published, and to see something that seems to fit your case well, but that has a heading up on top, this is governed by the no citation rule of our court, it kind of irks you, but that's generally the practice. And our answer is if you want to cite it, move to publish it.

MRS. EASTON:

Uh-hum. How complicated is that process to ask for something to be published?

JUDGE FARRELL: Oh, it's not complicated at all, but the difficulty, and why it's not an adequate answer for many litigants, is because you have to do it fairly contemporaneously. You can't do it five years after the fact. There's an MOJ I can't— we call it an MOJ, a “memorandum of judgment,” unpublished opinion, that, “Gee, I wish I could rely on it.” You can't come in and ask the publication. That, it is said by some, provides an unfair advantage to the institutional litigants, like the U.S. Attorney's Office, the Public Defender Service, the Attorney General for the District, because they have appellate staffs who read all these cases and they can make a judgment, should we ask to have it published, or not? But, frankly, we don't get a lot of motions to publish, I'd say no more than five or six or seven a year, and that is, I think, because most lawyers recognize that we're fairly honest in distinguishing between published and not published. That is, the published opinions, by and large, the great majority of them, really do not say anything new, they're just factually slightly different applications of principles that are agreed on. And they're judgment calls. And while they might look close enough to the case you're litigating now, the court of appeals is not going to be persuaded that the facts really make a difference. It's the legal principles that control your case and the other case as well, and those are basically the same. So, we are a busy court. But being a busy court has the effect that we really cannot go *en banc*, sit *en banc*, very often. This year the court is doing it four or five

times, which is a record in recent history. And that's because of the fact that we are both a supreme court of the jurisdiction and the intermediate appellate court, with a heavy caseload of mandatory appeals. There's only so much time for the entire court to take—to replay and repeat an issue, or issues, that have been dealt with by a three-judge panel. And so we pick our cases fairly carefully. One they have coming up soon for oral argument, the active judges, will involve whether the court should at long last adopt the federal rule for expert evidence, the *Daubert* rule. So, unless a case is one that's going to really give necessary guidance going forward to others at a fairly general level, we are a court that mainly relies on three-judge panel decisions, and that doesn't prevent lawyer after lawyer from petitioning us for rehearing *en banc*. But the Supreme Court gets the same thing, thousands of them a year.

MRS. EASTON: Exactly. Is the civil docket made more complicated by the relatively small population of the state? I mean, do you have to look to other jurisdictions for legal principles more often than a typical state court?

JUDGE FARRELL: Yeah, but we have no difficulty doing that. In the civil cases, more often, as much as not, we do look to the states rather than, say, the federal courts, because these are common law civil actions, often breach of contract, employment termination, at-will doctrine, negligence of various kinds. And so we do look to state courts, and we have no hesitancy doing it, but I always tell the law clerks in those

kind of cases, look to the commentators first, because the truth of the matter is, you can find a lot of at least initial groundwork in the Restatement and things like that, or the good hornbooks on negligence, Prosser on Torts, and things like those. They're a good starting point. Yeah. Over the years, we've developed our own body of law in these common law type cases. But as you know, the variables of litigation are infinite and so cases come up that—this is one of the astonishing things about the job, and the clerks shake their head after a couple of months, of how novel everything is. It's rarely a case where you can say, at least a case that's going to require oral argument, where you can say, "I've seen that before and I know the answer." The variations are astounding. And the gift of the law clerk and the gift of the judge is to basically decide which body of case law—often where there are two competing bodies of case law—controls this particular fact situation, this particular issue. I mean, the first thing you learn as an appellate judge is how much more complicated it is in a way than—oh, I shouldn't say this to you, because you're in the litigant situation, as best you can you're going to follow what the client wants. That's what you're paid to do, and that's your professional obligation. But you get on a court of appeals like this or a district judge even, ruling on legal issues, and you've got to try to get it right as best you can, and people have to be able to see that you've gotten it right. And so often the difference between right and wrong, between this result and that result,

is almost paper thin or marginal, and those are the truly hard cases.

And when the law clerks come in to me and say, “Judge, you know, there’s something to be said on both and, you know, there’s six cases.”

I say, “Welcome to the world of judging.”

MRS. EASTON: That’s why the case is here. If it were really lopsided, in most instances the parties would have—

JUDGE FARRELL: That’s right, especially in the civil area. Although not so much in our jurisdiction, because we don’t charge a lot for appeals. (Laughs.) But nonetheless, the point is valid that civil parties, more often than not, are not gonna to spend the time—the money—to have a lawyer waste the time on appeal, unless they have a reasonable chance of prevailing. Having said that, I have seen, too many over the years, instances where what you get in civil appeals from the losing side in the trial court is the same thing that they file before the trial judge in opposition, say, to summary judgment, you know? They lost in summary judgment; they’re taking an appeal in a bold statement at the beginning, [saying] the judge erred in granting summary judgment, summary judgment is not normally granted, blah blah blah. They give you the boilerplate, and then the rest of it [the appellate brief] is just verbatim what they prepared in the trial court. And it’s partly because they know the client does not want them to spend that much more money on the appeal. It’s a remarkable thing at the appellate level—and maybe I shouldn’t say this, but I’ll say it anyway—where you get

interesting issues involving big litigants, even in our state court system, insurance companies for example, a lot of cases, where you think, “Why haven’t they gone out and got—your firm, why haven’t they gone out and got Hogan or somebody else?” Because the issue needs to be really developed and briefed. And the answer is, the client has basically said, “It’s not worth it,” and so a little law firm out in, bless their soul, Fairfax or somewhere else, gets the case and comes in and does a respectable job, but in a way is at a disadvantage. But this is the nature of practice. And that often—that sometimes means that we end up having to do all the work because we recognize it as a hard issue of negligence or contributory negligence, and we haven’t gotten the best work we should have gotten from the law firm challenging the result below or defending it, and so they become hard cases. But I’ll tell you they often are the most interesting cases, the civil ones, because when you’re not dealing with issues of constitutional law or complex judgmental issues in criminal cases, you’re often involved with, much of what you’ve already seen before, was the evidence sufficient to support the verdict, and things like that. And there’s not a lot of excitement attached to it, even though it’s important to the litigants. So, but on the whole, it’s been a fun experience because I’ve learned an enormous amount over the years about my shortcomings and about my skills and the things that I still needed to learn. One of the things that I regret, I think, over the years used to be, when I had

my own clerks, one of the first things I would tell the clerks when I was interviewing, I'd say, "When you clerk for me, if you clerk for me, you're not going to get—I'm not going to be a very good mentor to you in the sense of being a good pedagogue, in the way I would like to be and the way I was able to be in the U.S. Attorney's Office, where you would write something for me, and we're going to sit down, and I'm going to go over it with my red pen line by line with your paragraph structure and all that and send you back to rework it. I don't have that time and frankly I don't have the interest anymore. I'm too busy working on my own stuff. So the way you're going to learn from Farrell, basically, is by seeing your first crack at the case in a memo to me, seeing the final product, and comparing. And you'll get a sense of at least what one appellate judge thinks is good appellate writing. So you'll get the example of learning by imitation or by that kind of mimicry." I know judges who—I don't know where they ever found the time—they had a little table and they'd bring the clerk in and they'd go line by line with the draft, because they felt that they had that obligation, almost pedagogical, to train that kid in good writing. I've often felt I haven't been very good at that with the law clerks; at the end of the year, they probably felt that maybe Farrell didn't appreciate my work enough because he did so much of the stuff himself and because he didn't really rely on me. But my second maxim that I would always recite to them at the beginning was, "You

give me something in what you write for me that is quotable and citable, it's gonna be in the opinion, because I have no pride of authorship, and I want you to do your best to give me stuff I can use, even though you're doing it in a memorandum, not in a draft." And I think they appreciated that. But I've often felt I haven't been a very good mentor to the kids.

MRS. EASTON: Oh, but it's frankly a reflection of much more what they see. It's a rarified and special instance where—

JUDGE FARRELL: Yeah.

MRS. EASTON: —both participants can take the time to sit down and learn.

JUDGE FARRELL: Right. Right.

MRS. EASTON: You know, the pressures of private practice, the pressures of government practice—

JUDGE FARRELL: Same thing. So many times over the years you probably wished that whoever you were working for on a case, when you were, you know, answering to somebody, I could have taken the time to sit down and tell [you] where you've gone wrong and then give [you] you know—what is your—what is your view of my work on this little project? Rather than end-of-year review on all your work globally.

MRS. EASTON: I try—you know one change in technology that helps somewhat with this, I don't know if you've used it in chambers, is redlining.

JUDGE FARRELL: Yeah. Yeah.

MRS. EASTON: Because, you know, if you can see actually where things move and what it is that I've changed from your draft—

JUDGE FARRELL: Right.

MRS. EASTON: —there's a pedagogical aspect to that that I try very hard to preserve in the document's flow (laughs) so that somebody who's interested—

JUDGE FARRELL: Right.

MRS. EASTON: —can go back and look. Now, what I've not ever done research on empirically is how often the associates who wrote things for me went back to see.

JUDGE FARRELL: Ah. (Laughs.) Yeah yeah yeah.

MRS. EASTON: Because they may be just under as much time pressure. (Both laugh.)

JUDGE FARRELL: Yeah, yeah, that's right. And there also is a human instinct among bright young people who have gone into the law not to like it very much when they see a lot of redlining on their product. And you can tell them you have an obligation to go carefully compare, but still, they're a little bit—they're basically saying, "It's in the partner's hands now."

MRS. EASTON: Right. Exactly. Exactly. (Laughs.) Well, in your years on the bench, I do want to start talking about any particular arguments, advocates, cases, issues, that you know, really marked high marks or low marks through the course of your career. I know you served on committees for the court—

JUDGE FARRELL: Yeah.

MRS. EASTON: —and got involved in, you know, rule making and if there are things like that that you want to explore in this history, I want to be sure that we talk about that.

JUDGE FARRELL: Yeah, well, I— to start kind of at the end there, I have been fairly successful over the years because I developed a little bit of an ability to be fairly, to be fairly prompt in getting my cases out and maintaining a fairly small backlog.

MRS. EASTON: Um-hm.

JUDGE FARRELL: In fact, I told the Commission in 19—in 2005, I think when I came up, or 4, when I came up for reappointment that I had set a goal for myself when I started not to leave any case undecided—case assigned to me—undecided for more than ninety days, three months at the outside, and I had succeeded pretty well.

MRS. EASTON: Oh, my heavens! That's so fast. I thought—

JUDGE FERRELL Well—

MRS. EASTON: —you were going to say a year.

JUDGE FARRELL: No, no, no. I tried long—look, occasionally longer than that, but ninety days was what I aimed for, and I was pretty much able to keep that up, partly because, you know, partly because so much of what we do can be done without a lot of time and investment of effort. So there is, despite what people say who are working too hard on this court, there is time to devote to the cases that need full attention and full analysis. Anyway, I managed to keep pretty much to that rule. And as

a result, a couple of the chief judges in succession came to think that I would be an ideal candidate to do administrative law stuff, since I must have had the time left over. And despite my protest that I would like that time to go to the opera and the theatre, they said, well, you serve on the—for example, the joint committee on judicial administration, which administers the two courts.

MRS. EASTON: Right.

JUDGE FARRELL: And I served on that from 1992 to 2008, sixteen years or so. There may have been some other reasons why, maybe this chief judge or that chief judge preferred me to the next person in line, who knows. But—or maybe just they felt that I was a good person, I said yes a lot. But I thought I had made a contribution, and I kind of enjoyed that in a way, although I can't say I ever got very good at the court's budget work. That is one of the main responsibilities of the chief judge. The main reason why I did not put my hat in the ring for chief judge some years ago when I had the opportunity was because I have no interest and no real ability to do budgeting. And I don't have a numbers mind, and I didn't have any interest in that. But I did continue to serve on the administrative body for all those years because I felt it was a contribution to the court and I could do it. And we did some good things, even as mundane and prosaic as revising the court's rules and procedures and system for, you know, procurement, for contracts, you know, vendors and so forth, which is very important to a court on a

tight budget. So, we were able to do things like that. I also had the time to serve over the years as head of various of our committees, our rules committee I served on for quite a few years. And we did some major things during that time back in the early 2000s. We are continuing the process of revising our rules to conform, or not conform, to the federal rules of procedure. We also have our appellate rules that I had to be responsible for redoing with the committee. We have our internal operating procedures, which the public can find online, that are separate, and we had to revise those, so at one point I had to kind of take over the drafting of those significantly. And also, as important as anything else, we have the disciplinary rules. We are the body that imposes discipline in the District of Columbia, and there are, you know, seventy thousand or more lawyers. And particularly with computerization, there's an awful lot of stuff that comes up to us involving lawyers not practicing here, but lawyers practicing in other jurisdictions, where they get disciplined, comes to us alerted to by the computer system nationwide as to their discipline in Wyoming and so forth, and we have to decide whether to impose reciprocal discipline here. It is a very big part of our job, although it results only in a relative handful of opinions each year, bar discipline opinions.

MRS. EASTON: Is there a specialized staff within the court that handles that, or does—

JUDGE FARRELL: No, no these come to us as ordinary cases. Some of them come up—the way we revised our rules, but just to finish the one point first: I

had to take a big responsibility in the revision of the disciplinary rules some years back before I took senior status—in about 2005 and 6—involving some tough issues, but important issues. One of them was whether we should give bar council the authority to negotiate discipline. Many states, most states may have it, kind of plea bargaining in discipline cases, right? And then there were other issues like, for example, there's been a perennial delay complained about over the years by people in the bar about how somebody will be disciplined for serious misconduct, but the discipline doesn't take effect until there's been a challenge at the Board of Professional Responsibility level, that's the peer organization, and then up to the court of appeals, which may take two years to decide it. Meanwhile the attorney practices, continues to practice, even though he may have engaged in some serious misconduct. We got that rule changed too, and in some serious cases, to require immediate discipline unless the attorney can show the contrary why it shouldn't happen. I played a role in those kind of things and I took a certain amount of pride in that, but at every step I had very able co-members of my committee. So I think I have done an awful lot of administrative stuff over the years that I can take some credit for, but it's nice to have very good people working with you, and good colleagues who can make it easier for you. Those have been chiefly my administrative [contributions]. The rest has been writing opinions, um—gosh, I don't know, any particular

case I picked out would be—would sound kind of arbitrary. I have done quite a few in the—in my nineteen years as an active judge and then thereafter. I’ve done my fair share of *en banc* cases, in which the whole court gets together, and then we have to—sitting in this room or in one of the other rooms—decide where we’re going to go, and who’s going to write, and who’s going to write the dissent. And I think I acquired a little bit of a reputation over the years, without bragging, of being a fairly suitable candidate for a sizable number of those *en banc* opinions because of a gift or a knack I had of trying to find the analysis, the route that would command the maximum attention among the judges. Frank Schwelb, a colleague, once called me “the Henry Clay of the court, the Great Compromiser,” which was silly, but it’s something I often aimed for. And when you think of it, intelligent people sitting around in a room where you find that there are widely divergent points of view, can think that maybe the best way to resolve this case is to aim for a lower profile, to aim for an opinion that says less rather than more, but one that can command eight or nine votes rather six or five or four or, you know, unanimity if you can, if for no other reason than to give guidance to the bar and to the trial court. That maxim, that rule, is not followed at the U.S. Supreme Court, it hasn’t been for years, decades, because people feel—and I’m talking there about the controversial cases. The Justices feel they have an obligation to state their position rather than—I sparingly use that

word—trim their position, or you know, refine down their position in a way that you can get a six to three vote rather than a five to four vote. Partly because they feel that even if I'm in the two-judge minority here, or three-judge minority here, who's to say that five years from now, my little dissent may not be adopted as kind of the way—the right rule by a future court. But on a court like ours, it's always been important, we think, in *en banc* cases to try to speak with one voice as best we can—easier at our level than the state court system and at the Supreme Court level. And somehow or other I attracted—it was recognized that I had a knack for doing that. And so I wrote a number of *en banc* opinions over the years, which we even wrote—issued as per curiams because, frankly, they said so little.

MRS. EASTON: (Laughs.)

JUDGE FARRELL: All they were doing was kind of ironing out an inconsistency in prior decisions of ours. They weren't stating broad, important principles for the future, but simply clarifying. And I found a way to do these in a fairly short way and in a fairly simple way. In other cases, I guess, my criminal background made me the right candidate to write the *en banc* opinion if we're in the majority, if I was in the majority, and so we wrote some fairly significant ones over the years, and I happen to be the author of them. One case was a case called *Winfield v. U.S.*, which is very important in criminal law felony cases involving violence and so forth, where the defendant wants to put on evidence, as you can

imagine, that he didn't do it, but a third party did it. They call it third-party culpability evidence, and there are standards for that. So we had to take this case fifteen years ago to kind of lay out the basic ground rules for when that kind of evidence is admissible, and what kind of discretion the trial judge has. That would be an example. Civil cases I've written a number of. For the moment I can't remember them (laughs), but I've had my share of important cases, but I said—and interesting cases in the civil area too. But, as I said, so much of civil law is novel that virtually every other court, a judge on the court can say, "I've written some of the most interesting, some of the most important civil cases that the court has had in that area." If we were to meet again—although I really don't think I want to prevail on your time any more.

MRS. EASTON: I think we should have at least one more meeting—

JUDGE FARRELL: All right. Yeah, I could jot down a few more cases.

MRS. EASTON: Well, why don't we turn to that now? We can—we can kind of wrap up this segment and then talk about what our—

JUDGE FARRELL: Yeah.

MRS. EASTON: —agenda is for the next session.

JUDGE FARRELL: Right.

MRS. EASTON: Because, you know, maybe the next session could be our wrap-up one or one more after that to finalize.

JUDGE FARRELL: Yeah.

MRS. EASTON: But I think that I've made you go on for long enough now— (Both laugh.)

JUDGE FARRELL: No, that's good, we can talk about this and more cases next time.