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# perspectives

## Message from the Chair

by Amy E. Boyle

As Chair of the Younger Lawyers Division, it is my honor to introduce you to the YLD *Perspectives* e-newsletter. This is our final newsletter during my term as Chair.

The YLD is an active and engaged division of the Federal Bar Association with over 4,000 members from all federal circuits. With the support of the FBA National Staff, our 15 committees dedicated countless hours to the work of the YLD. I am proud to share a year in review of what the YLD has been up to this past board year.

Over the course of the year, the YLD's Education Committee collaborated with other FBA sections and divisions to plan educational programming, including Nuts & Bolts / Introduction to Practice CLEs that include presentations by younger and more experienced lawyers about what it is like to practice in certain areas. The Rising Professionals Symposium Committee also worked in partnership with FBA National leaders and local Chapters to support Rising Professionals programming created for rising attorneys who want to elevate their career. As part of the StepUp Pro Bono Challenge, participants completed a total of 1,844.35 hours of pro bono service.

The YLD's Publications Committee published two issues of YLD's Perspectives Newsletter with a total of nine articles on a variety of topics ranging from "The Early Bird Gets the Worm: How the First-to-File Rule Can Determine Venue for Similar Subsequently Filed Cases, and Recommendations for Motion Practice" to "What Hip Hop Can Teach Us About Legal Writing."

In March 2023, the YLD held its annual Thurgood Marshall Memorial Moot Court Competition in-person, hosting 40 teams and volunteer judges from across the country. The YLD congratulates the following competition winners:

1st Place – University of Kansas School of Law;
2nd Place – University of Minnesota Law School;
3rd Place – St. Mary's University School of Law.

In May 2023, the YLD hosted its United States Supreme Court Admissions Ceremony where 14 FBA members were admitted to the Bar of the Supreme Court of the United States, witnessed a celebration of Justice Breyer, and met with the

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Chief Justice. Mark your calendars for next year's ceremony scheduled for May 30, 2024.

Also in May 2023, in cooperation with FBA's Diversity, Equity and Inclusion Committee, the YLD sponsored a CLE webinar entitled "Being an Inclusive Leader" where Dr. Artika Tyner gave attendees an overview of the practical steps to pursue justice and equity in their work spaces. With the support of a Diversity Grant awarded by the FBA Foundation, the YLD provided a free copy of Dr. Tyner's new book to the first 30 registrants.

This summer, the YLD hosted its Summer Law Clerk Program, which kicked off at the Watergate in Washington, D.C. with speakers including Senior Judge Royce Lamberth of the U.S. District Court for the District of Columbia and Col. Daniel G. Brookhart of the US Army Judge Advocate General's Corps. The SLCP also included a Library of Congress Career Panel & Tour and a series of panels with both virtual and in-person options, allowing interns working in the federal sector for the summer to meet Federal government lawyers, and discuss career development, agency missions and operations, and employment opportunities.

We hope you will join us for these events in the future and consider getting involved with the YLD!

Amy E. Boyle
2022-2023 YLD Chair

*Amy Boyle is a partner at MJSB Employment Justice in Minneapolis, Minnesota. She handles all types of employment matters, with a particular focus on representing women who have experienced sex discrimination, sexual harassment and assault, and retaliation at work and whistleblower clients who have reported illegal workplace practices or companies engaged in deceitful conduct. In addition to her role as Chair of the Younger Lawyers Division, Amy serves as the Programming Co-Chair of the FBA Alternative Dispute Resolution Section.*



# Message from the Editors

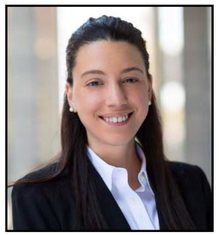
## by Ashley Gallagher and Dan Weigel

Dear Younger Lawyers Division Members:

Welcome to the Summer 2023 edition of *Perspectives*, the Federal Bar Association Younger Lawyers Division's newsletter. Our names are Ashley Gallagher and Dan Weigel, and it is our pleasure to serve as Co-Chairs of the *Perspectives* Publications Committee.

We are excited to offer our readers another issue filled with insightful articles discussing a variety of topics from legal updates to guidance for recent bar exam-takers entering federal practice. This edition also features a reflection on the career of former U.S. District Judge Lee Yeakel of the United States District Court for the Western District of Texas by one of his former law clerks and the Younger Lawyers Division's 28th Annual Thurgood Marshall Memorial Moot Cout Competition's return to in-person proceedings after two years of virtual proceedings due to the COVID-19 pandemic.

We are also excited to share that the *Perspectives* newsletter will receive a Meritorious award during the upcoming 2023 Annual Meeting and Convention in Memphis, Tennessee! We are so proud of this newsletter and are so grateful to our fantastic authors, the 2022-2023 Publications Committee, Younger Lawyers Division Chair Amy Boyle, Director of Sections and Divisions Mike McCarthy, Program Coordinator Daniel Hamilton, and you—our readers—who all play a critical part in the successful publication of this newsletter each season.



*Ashley Gallagher is a Partner at Johnson Jackson PLLC in Tampa, Florida, practicing management-side labor and employment law in both the private and public sectors. She has served on the board of the Federal Bar Association Younger Lawyers Division since 2020 and is currently Vice President of the Tampa Bay Chapter of the Federal Bar Association.*

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*Dan Weigel is a Litigation Attorney at Taylor English Duma, LLP in Atlanta, Georgia, with a practice focusing on Intellectual Property and Commercial Litigation matters. He has served on the board of the Federal Bar Association Younger Lawyers Division since 2020 and is an active member of the Atlanta Division of the Federal Bar Association.*

# The Fifth Circuit Endorses a Broader View of "Adverse Employment Action" in a Pair of Recent Title VII Opinions

by Laura Avery

To establish a *prima face* case of Title VII discrimination based on circumstantial evidence, the plaintiff must show she: "(1) is a member of a protected group;[1] (2) was qualified for the position at issue; (3) was discharged or suffered some adverse employment action by the employer; and (4) was replaced by someone outside [her] protected group or was treated less favorably than other similarly situated employees outside the protected group." Title VII itself prohibits discrimination with respect to an individual's "compensation, terms, conditions, or privileges of employment."[2] However, under Fifth Circuit precedent, an adverse employment action for Title VII discrimination claims includes *only* "ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating."[3] This narrow interpretation has resulted in decisions holding that the following do not constitute adverse employment actions for purposes of Title VII: an employer making false or misleading statements to the EEOC;[4] requiring plaintiffs to submit to a drug test following an accident pursuant to company policy;[4] threatening to reduce an employee's pay; [6] and, notably, refusing or failing to sufficiently train an employee.[7]

A pair of January 2023 Fifth Circuit opinions casts doubt on whether a failure to train an employee is not an ultimate employment decision and is therefore not an adverse employment action under Title VII. In *Wallace v. Performance Contractors, Inc.,*[8] the plaintiff, Magan Wallace, worked for a construction company, Performance Contractors, Inc., ("Performance") that was contracted to work at a chemical manufacturing complex. She was originally hired in December 2016, laid off as part of a reduction in force in April 2017, and then rehired shortly thereafter. In her first stint, she was hired as a "laborer," but in her second stint, she was hired as a "helper."[9] Because laborers performed administrative work and kept the job site clean while helpers had a more hands-on role helping with construction, working either on the ground or "at elevation," this was considered a promotion.[10] Though laborers technically could work at elevation, only those with prior experience and who expressed interest were allowed to do so.[11] Thus, in practice, only helpers worked at elevation.[12] Wallace was the only female "helper" in her designated area.[13]

As set forth in her *prima facie* case, prior to working at Performance, Wallace worked at elevation for another construction company. She claimed that she wanted to work at elevation at Performance to improve her skills, advance her craft, and achieve pay raises.[14] However, she was denied the opportunity. In fact, the area's general foreman publicly told her she could not work at elevation because she had "t*** and an a**."[15] In addition to alleging that she was prevented from working at elevation based on her sex, Wallace also alleged that Performance violated Title VII by subjecting her to offensive and vulgar comments, physical assaults (including an incident she subsequently reported where a welder grabbed and massaged her shoulders), and other harassment, causing her severe anxiety and depression for which she sought medical treatment.[16] When Wallace missed work to go to a doctor's appointment to treat her anxiety and depression, Performance suspended her.[17] Though Wallace tried to call HR about her suspension, no one ever called her back.[18] A few weeks later, she was terminated.[19]

Wallace filed a charge with the EEOC, received her right-to-sue notice, then sued Performance under Title VII.[20] She brought three claims: (1) sex discrimination; (2) sexual harassment; and (3) retaliation.[21] Performance moved for summary judgment, which the district court granted. With respect to Wallace's sex discrimination claim, the district court held that Wallace did not suffer an adverse employment action because Performance's decision to prevent her from working at elevation was not an "ultimate employment decision" under Fifth Circuit precedent.[22]

On appeal, Wallace argued that Performance's refusal to allow her to work at elevation and/or its refusal to train her to work at elevation constituted a de facto demotion which amounted to an adverse employment action.[23] The Fifth Circuit agreed with Wallace and reversed summary judgment on her Title VII claim, in part, because "a reasonable juror could find that Performance took adverse employment action against her by preventing her from working at elevation because she was a woman."[24] Specifically, the Court stated:

A reasonable juror could conclude that Wallace's being prevented from working at elevation effectively demoted her back to the laborer role she previously occupied. Wallace produced evidence to show that, to advance in this industry, she needed the experience of working at elevation, which provides the most hands-on experience she could attain in this role. Working at elevation was the most beneficial and important aspect of the helper position. Working only on the ground made Wallace less "useful" and a less-valuable "asset" than if she worked at elevation. And it made it less likely that Wallace would be able to be promoted and advance in her career down the line. Even though Wallace's pay was no different while working on the ground, the opportunities she was afforded while working on the ground were significantly less than if she were working at elevation.[25]

In the second recent opinion, *Rahman v. Exxon Mobil Corp.*,[26] the plaintiff, Omar Rahman, worked at Exxon Mobil's polypropylene production plant in Baton Rouge. At this plant, "Exxon require[ed] prospective operators to pass an extensive, multi-pronged training program."[27] Rahman was fired after failing to pass the required tests. He then sued Exxon, claiming he was not fairly trained by staff due to his race. The district court disagreed on summary judgment, finding Rahman could not show his alleged inadequate training amounted to an adverse employment action. *Id.*

On appeal, Rahman argued that inadequate training could constitute an adverse employment action if "directly tied to the decision to terminate," while Exxon argued that Fifth Circuit precedent regarding failure to train claims foreclosed Rahman's theory.[28] Although the Fifth Circuit ultimately held that Rahman's claim failed because he was granted an equal opportunity to access the necessary components of the training program, the Court *agreed* with Rahman that a failure to train may constitute an adverse employment action where there is a direct connection between the training and the job.[29] The Court noted that Fifth Circuit precedent suggests "a training decision—particularly a failure to train—may constitute an adverse action if it has some effect on an employee's 'status or benefits'" but admitted the standard has not been "clearly delineated . . . at times."[30] Considering this precedent, the Court held that "an inadequate training theory can satisfy the adverse action prong of *McDonnell Douglas* if the training is directly tied to the worker's job duties, compensation, or benefits."[31]

Time will tell whether these recent decisions indicate the Fifth Circuit's willingness to find other less categorically restrictive employment actions (*i.e.,* termination, demotion, etc.) meet its "ultimate employment decisions" standard and can constitute adverse employment actions under Title VII, or ultimately forecast a determination it should disregard its "ultimate employment decision" precedent.

*Laura Avery is an ADA Coach for ComPsych Corporation, where she provides guidance to institutional clients on ADA standards and compliance and complicated issues involving personal medical leave under the ADA. Laura is also an adjunct professor at Tulane Law School, where she teaches a class on employee medical leave in the Masters in Jurisprudence - Labor and Employment Law program. Prior to becoming a consultant, Laura was in private practice in several New Orleans-area law firms, most recently representing plaintiffs in employment discrimination litigation. Laura lives in New Orleans and is a member of the Federal Bar Association and the Louisiana Bar Association.*

**Endnotes**

[1]*McCoy v. City of Shreveport,* 492 F.3d 551, 556 (5th Cir. 2007).
[2]42 U.S.C. 2000e-2(a)(1).
[3]*McCoy,* 492 F.3d at 559 (quoting Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d 642, 657 (5th Cir.2002)).
[4]*Paugh v. Lockheed Martin Corp.,* 474 F. Supp. 3d 861, 868 (W.D. Tex. 2020).
[5]*Thompson v. Exxon Mobil Corp.,* 344 F. Supp. 2d 971, 982 (E.D. Tex. 2004).
[6]*Brandon v. Sage Corp.,* 808 F.3d 266, 272-73 (5th Cir. 2015).
[7]*Hollimon v. Potter,* 365 Fed. Appx. 546, 549 (5th Cir. 2010).
[8]57 F.4th 209 (5th Cir. 2023).
[9]*Id.* at 214.
[10]*Id.*
[11]*Id.*
[12]*Id.*
[13]*Id.*
[14]*Id.* at 215.
[15]*Id.*
[16]*Id.* at 216.
[17]*Id.*
[18]*Id.*
[19]*Id.*
[20]*Id.*
[21]*Id.*
[22]*Id.*
[23]*Id.* at 217.
[24]*Id.*at 219.
[25]*Id.*
[2656 F.4th 1041 (5th Cir. 2023),
[27]*Id.* at 1043.
[28]*Id.* at 1045-46.
[29]*Id.* at 1046.
[30]*Id.*
[31]*Id.*

# The YLD's Thurgood Marshall Memorial Moot Court Competition – A Return to In-Person

by Mike McCarthy, Director of Sections and Divisions

Teams representing schools from across the country participated in the 28th Annual Thurgood Marshall Memorial Moot Court Competition on March 22-23, 2023. The competition was held in-person this year after being completely virtual the past two years due to the COVID-19 Pandemic.

The Thurgood Marshall competition is one of the premier moot court competitions in the country, with oral argument rounds that mirror real court proceedings. As in previous years, the volunteers who served as judges in the competition were state or federal judges, practitioners, or scholars, thereby reinforcing the "real world" experience for the law students.

This year's problem was a civil rights case involving former felons and voting rights. Each of the teams submitted a written brief, supporting either the Petitioner or Respondent, and participated in two preliminary rounds, taking place on March 22 in Arlington, VA. Following the preliminary rounds, teams were ranked based on a combination of written and oral argument scores, and the top sixteen teams advanced. The playoff rounds, which consisted of the round of sixteen, quarterfinal and semi-final rounds, were held on March 23 at the U.S. Court of Federal Claims in Washington DC, The teams advanced in the playoff rounds based on a combination of written and oral argument scores.

The final round was held during the evening of March 23 at the U.S. Court of Appeals for the Armed Forces in Washington DC. During this round, the competition champion was selected based on oral argument in the final round only. Honorable Kevin A. Ohlson, Chief Judge of the U. S. Court of Appeals for the Armed Forces delivered welcome remarks, and the final round panel consisted of Honorable Gregory E. Maggs, U.S. Court of Appeals for the Armed Forces, Matthew C. Moschella, FBA National President, Colonel Timothy P. Hayes, Jr., Associate Judge, Army Court of Criminal Appeals, United States Army, Jennifer Fischell, Moot Court Problem Co-Author (along with Caitlin Bailey), and Amy E. Boyle, YLD Chair.

The annual Thurgood Marshall Memorial Moot Court Competition is the Younger Lawyers Division's signature event. Initially developed as a means to demonstrate the value of the YLD's board to the FBA and FBA membership at large, the competition has grown to be one of the most prestigious moot court competitions in the country, creating the opportunities for law students to develop their written and oral advocacy skills.

This year's Competition Directors, Ben Reese (YLD Board Member) and Daniel Ritter (YLD Chair-Elect), thank all who volunteered their time to serve as judges during the weeklong competition; the final round judges; the YLD Board; the Moot Court Committee; the Army JAG Corps, who generously sponsored the competition; the Foundation of the Federal Bar Association, which provided additional financial support; the problem authors, the participants and their coaches, who impressed with their oral advocacy skills and careful preparation; and the dedicated FBA staff whose efforts make the competition a success year after year.

If you know of any law students eager to learn about federal practice, please encourage them to participate in the 2024 Thurgood Marshall Memorial Moot Court Competition. The YLD Moot Court Committee is also looking for a Problem Author for the 2024 Competition. If you are interested, please contact Ben Reese (breese@flannerygeorgalis.com).

### 2023 Moot Court Award Recipients

**Overall Competition Winners:**

First place: University of Kansas School of Law (Team 10)

Second place: University of Minnesota Law School (Team 36)

Third place: St. Mary's University School of Law (Team 34)

**Best Final Round Oralist Award:**

Amanda McElfresh - University of Kansas School of Law

**Awards for Preliminary Round Oralists:**

First place: Haley Harvey - St. Mary's University School of Law

Second place: Kathryn Cantu - St. Mary's University School of Law

Third place: Allyson Monson - University of Kansas School of Law

**Awards for Best Brief:**

First place: University of Minnesota Law School (Team 36)

Second place: University of Minnesota Law School (Team 37)

Third place: Seton Hall University School of Law (Team 17)

# Pre-Trial Proceedings in the Post-Pandemic World: Amending Federal Criminal Rule 53 for Virtual Criminal Hearings[1]

by Benjamin R. Syroka

**Introduction**

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"),[1] passed in 2020, included a provision much of the general public never noticed—it afforded federal courts the flexibility to utilize video and telephone conferencing in criminal cases. Over the past four years, virtual or "Zoom hearings" became a staple in criminal pre-trial hearings. But the authorization to use this technology expired in May 2023,[2] and the judiciary now grapples with the prohibition on virtual criminal hearings.

By amending the rules governing virtual hearings in specific criminal proceedings, we can improve access to justice for defendants and pave the way for more efficient criminal dockets. So, forget about "waiting for the host to start the meeting"—we're about to login to a new digital era of federal criminal procedure.

**The Pandemic's Silver Lining: Zoom Hearings**

Under the CARES Act, if the Federal Judicial Conference found that if "emergency conditions due to the national emergency declared by the President with respect to COVID-19 will materially affect the functioning of the federal courts generally,"[3] then chief district judges may authorize virtual hearings for certain criminal proceedings.[4] This provision allowed video and telephone hearings in criminal cases "under certain circumstances and with the consent of the defendant . . . during the COVID-19 national emergency."[5]

Zoom hearings emerged as unexpected heroes of criminal dockets in federal courts during the pandemic.[6] Previously, virtual hearings were allowed only for arraignments and initial appearances.[7] But now district courts had flexibility to conduct several types of hearings remotely: waivers of indictment; detention hearings; probation and supervisedrelease revocations; pretrialrelease revocations; and appearances for failing to appear in another district after violating conditions of release.[8] The CARES Act even authorized virtual guilty pleas and felony sentencings, so long as the judge on the case outlined "specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice."[9]

Virtual hearings streamlined the pretrial process, making it more efficient and allowing courts to better serve defendants.[10] This technology increased accessibility, reduced travel costs, and—most importantly—eased scheduling constraints induced by limited "socially distanced" courtroom space. It also facilitated greater transparency and public access to the courts, allowing victims to testify from home and interested members of the public and media to tune in.[11] However, "[t]he end of remote criminal court access means the public and media must now attend hearings in-person."[12]

Lawyers can—and often do—debate whether virtual technology is a positive development in the law. But irrespective of opinions on virtual practice, many district courts would likely have struggled to stay afloat without virtual technology. With courthouse doors bolted shut, virtual hearings were a life saver. The CARES Act allowed courts to conduct hearings while adhering to public-health guidelines—meaning they could avoid backlogs on their criminal dockets and keep cases moving. In doing so, they were able to avoid constitutional and Speedy Trial Act issues resulting from long delays.[13]

Fast-forward to 2023. With vaccines readily available, COVID-19 has become an afterthought in many districts. On May 11, the Judicial Conference Executive Committee found "[t]he COVID-19 emergency is no longer affecting the functioning of the federal courts."[14] However, a "COVID backlog" of cases, specifically trials, still floods many district-court dockets, leaving courts with limited space and tight schedules. As the courts work through this buildup, the CARES Act expiration has the potential to cause a logjam.

**Judicial Conference Policy and Rule 53**

The Judicial Conference, comprised of all chief circuit judges and one district judge from each circuit, serves as "the national policymaking body for the federal courts" and is responsible for the Federal Rules of Procedure.[15] The Conference has already addressed virtual technology in civil cases.[16] Under Federal Rule of Civil Procedure 43, courts may allow virtual hearings or testimony "with appropriate safeguards," so long as there is "good cause."[17] Through Rule 43, the Judicial Conference has allowed for the use of virtual hearings in civil cases, aiming to strike a balance between efficiency and the rights of the parties.[18]

But virtual technology isn't a one-size-fits-all solution in federal court. Why? Criminal cases require a higher degree of procedural safeguarding.[19] Remote testimony doesn't always cut it.[20] Enter Federal Rule of Criminal Procedure 53, which prohibits "broadcasting" criminal proceedings from the courtroom.[21] Unlike Rule 43(a), Rule 53 limits judicial discretion: "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."[22]

The Judicial Conference and the United States Courts Administrative Office ("AO"), responsible for carrying out Judicial Conference policies, have taken a narrow view of this rule, considering virtual hearings to be "broadcasts" of criminal proceedings.[23] This means virtual hearings are permitted only when "otherwise authorized" by other procedural rule or separate statute. Prior to the CARES Act, virtual hearings were authorized only for initial appearances[24] and arraignments.[25] And even in those cases, the hearing could not be "broadcast" to the public. So, for instance, a family member or victim could not observe remotely—they must be in the courtroom.

**Historical Context and the Rationale for the In-Person Requirement**

The tradition of in-person proceedings in criminal cases traces back to common law and the United States Constitution.[26] The Sixth Amendment guarantees defendants the right to a public trial and the right to have compulsory process for obtaining witnesses in their favor.[27]Important here, the Sixth Amendment's Confrontation Clause guarantees defendants' right to confront witnesses in person.[28] These rights are grounded in the belief that being physically present ensures the integrity of the judicial process and promotes public confidence in the justice system.[29]

Admittedly, in-person hearings offer several advantages. Three top the list. First, for the triers of fact—being physically present in the courtroom allows the judge or jury to assess the credibility of witnesses and the demeanor of those accused of crimes.[30] Second, for defendants—in-person proceedings provide defendants the opportunity to confront their accusers face-to-face, which can be crucial for effective cross-examination and testing the veracity of witness statements.[31] Finally, for the judicial process—the ability of the public to attend proceedings serves as a check on potential abuses of power by ensuring that the proceedings are conducted fairly and impartially.[32]

**Amending Rule 53: the Case for Virtual Pre-Trial Hearings**

The legal profession is slow to change, but often quick to point out the pitfalls in a proposed new approach. It is undeniable that "[t]he fundamental feature of the court system is that it's heard in court."[33] Without the looming specter of COVID-19, some traditionalists will argue it's time to lace up the wingtips and return to our wainscoted courtrooms.[34] Our history of "open courts" has long centered on in-person observation, not virtual viewing.[35] There are also practical concerns: "Conducting hearings remotely may interfere with a defendant's ability to communicate privately with counsel, ability to advocate for himself, and right to confront witnesses."[36] But a conscientious judge, who understands how to operate the technology, can easily remedy these potential issues by thoughtfully explaining the hearing format and employing features such as breakout rooms.

And let's not forget—we're not talking about *every* criminal proceeding. The court's experience during the pandemic demonstrated that remote hearings offer significant benefits, particularly for: initial appearances and preliminary hearings;[37] waivers of indictment; probation- and supervised-release-revocation proceedings; and appearances for failing to appear in another district after a violation. These pre-trial hearings do not implicate the same credibility and confrontation concerns of a suppression hearing, sentencing, or jury trial. Virtual technology, in these instances, provides district courts flexibility to manage their docket without implicating the Sixth Amendment.

But what about safeguards? Easy. The CARES Act already hit that nail on the head. Virtual hearings "may only take place with the consent of the defendant . . . after consultation with counsel."[38] Make it simple—virtual hearings, for any type of pre-trial criminal proceeding, are not permitted without the defendant's informed consent.

Overall, the positives outweigh the negatives. Where defendants provide informed consent for hearings, advanced technology now makes it possible to conduct hearings that closely replicate the presentation experience of in-person hearings, allowing for effective communication between the parties and the court. Amending Rule 53 would boost efficiency, reduce cost and delay, and improve access to justice—speedy justice, that is—without undermining defendants' constitutional rights. And this amendment could provide district courts with specific, clear guidance on how to appropriately conduct virtual hearings in compliance with the Rule, similar to the CARES Act.

**Conclusion**

The expiration of the CARES Act, as well as the improvements made to virtual platforms in recent years, has revealed the need for a fresh look at the "broadcasting" of criminal pre-trial hearings. As an institution, the judiciary should not be so inflexible

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that "we do it this way because we always have." The pandemic taught us many lessons—why not learn from them? Let's hit the "Join Now" button on progress, help the judiciary adapt to the post-pandemic world, and continue the mission of ensuring efficient, fair, and accessible justice.

*Benjamin R. Syroka is a Career Law Clerk to the Honorable Jack Zouhary. He also serves on the FBA Editorial Board, FBA National Federal Judicial Law Clerk Committee, and the Northern District of Ohio Advisory Group. In his spare time, Ben teaches upper-level legal writing at the University of Toledo College of Law, serves as volunteer counsel for the Reentry Realities program, and referees NCAA Men's College Basketball.*

**Endnotes**

[1]This article will also be published in the Federal Bar Association Litigation Section newsletter, the *SideBAR*.

[2]Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (hereinafter, CARES Act).

[3]*Id.* at § 15002(a).

[4]*Id.* at § 15002(b)(1).

[5]*Id.*

[6]*Id.*

[7]Ann E. Marimow, *Federal courts shuttered by coronavirus can hold hearings by video and teleconference in criminal cases,* Wash. Post (Mar. 31, 2020, 5:59 PM), https://www.washingtonpost.com/local/legal-issues/federal-courts-shuttered-by-coronavirus-can-hold-hearings-by-video-and-teleconference-in-criminal-cases/2020/03/31/9c831814-7372-11ea-87da-77a8136c1a6d_story.html.

[8]Virtual technology was previously authorized for these hearings under Fed. R. Crim. P. 5 & 10.

[9]CARES Act, *supra* note 2, at § 15002(b)(1).

[10]*Id.* at § 15002(b)(2)(A).

[11]Judge Willie J. Epps Jr. & Cailynn D. Hayter, *Zoomed In to Justice: Remote Proceedings During a Pandemic,* A.B.A. (Nov. 22, 2021), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2021/november-2021/zoomed-to-justice-remote-proceedings-during-pandemic/.

[12]For instance, nearly half a million people tuned into live Supreme Court oral arguments, broadcast online due to the pandemic, and over two million people listened to the recorded versions provided online. Lee Rosenthal, et al., *The Zooming of Federal Civil Litigation,* 103 Judicature 2 (2020-21).

[13]Jaqueline Thomsen, *Federal courts to winddown remote access as US COVID emergency ends,* Reuters (May 19, 2023, 10:36 AM), https://www.reuters.com/legal/government/federal-courts-wind-down-remote-access-us-covid-emergency-ends-2023-05-11/.

[14]*Judiciary Preparedness for Coronavirus (COVID-19),* Admin. Office of the U.S. Courts (Mar. 12, 2020), https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19.

[15]*Judiciary Ends COVID Emergency; Study of Broadcast Policy Continues,* Admin. Office of the U.S. Courts (May 11, 2023), https://www.uscourts.gov/news/2023/05/11/judiciary-ends-covid-emergency-study-broadcast-policy-continues#:~:text=The%20COVID%2D19%20emergency%20is,bankruptcy%20proceedings%20as%20they%20did. This finding "set[] in motion a 120-day grace period in which federal courts may continue to provide the same remote public audio access to civil and bankruptcy proceedings as they did during the emergency." Id.

[16]*About the Judicial Conference,* Admin. Office of the U.S. Courts, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference#membership (last visited May 23, 2023).

[17]Fed. R. Civ. P. 43(a).

[18]*Id.*

[19]*See Long Range Plan for Information Technology in the Federal Judiciary,* Admin. Office of the U.S. Courts (2019), https://www.uscourts.gov/sites/default/files/long_range_plan_for_it_in_the_federal_judiciary.pdwf (noting that "[i]mprovements and efficiencies are being realized from digital video and centralization of audio platforms and videoconferencing systems).

[20]*See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004) (holding that introducing previously recorded witness statements against a criminal defendant violated the Confrontation Clause).

[21]Fed. R. Crim. P. 53.

[22]*Id.*

[23]*Id.*

[24]See Joanna R. Lampe & Barry J. McMillion, Cong. Rsch. Serv., CRS-IN11344 The Federal Judiciary and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") (2020) ("Federal Rule of Criminal Procedure 53 ('Rule 53') constrains federal courts' ability to conduct criminal proceedings by video or audio conference, prohibiting, with limited exceptions, "'the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.'").

[25]Fed. R. Crim. P. 5

[26]Fed. R. Crim. P. 10.

[27]*Crawford*, 541 U.S. at 42-43.

[28]U.S. Const. amend. VI.

[29]Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-16 (2009).

[30]*In re Oliver,* 333 U.S. 257, 266-67 (1948).

[31]*Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

[32]*Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

[33]*Waller v. Georgia*, 467 U.S. 39, 46-47 (1984).

[34]Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, B. L. (May 18, 2023, 4:45 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XB4E6MAG000000?bna_news_filter=us-law-week#jcite (quoting the Honorable David Barron, Chief Judge of the U.S. Court of Appeals for the First Circuit).

[35]*See* Rosenthal, *supra* note 12 (Courthouse decorum is important: "These traditions of solemnity and formality bring home the fact that even in the most mundane of hearings in the least complicated of cases, this third branch of government, an institution to cherish and support, is the justice system at work.").

[36]*Id.*

[37]Epps & Hayter, *supra* note 11.

[38]As noted above, virtual technology is already authorized for these two specific kinds of hearings under Fed. R. Crim. P. 5 & 10.

[39]CARES Act, *supra* note 2, at § 15002(b)(4).

# A New Chapter In A Legal Career As Big As Texas: Judge Yeakel Re-Enters Practice

by Alexander Clark

As a former law clerk for U.S. District Judge Lee Yeakel, it is my distinct privilege to reflect on the career of a mentor, a role model, and an exemplary public servant on the occasion of his retirement from the bench. It's an occasion marked with mixed feelings, as we bid farewell to a paragon of jurisprudence whose incalculable contributions have indelibly shaped our legal landscape. Judge Yeakel's decision to transition to a role at King & Spalding as Senior Counsel in its Trial and Global Disputes group signals a new chapter in a professional journey that has been defined by a tireless commitment to justice, an unwavering adherence to legal principles, and an indomitable spirit of public service.

Before his distinguished tenure on the federal bench, Judge Lee Yeakel amassed an impressive legal career that laid the groundwork for his future judicial successes. A proud alumnus of the University of Texas and The University of Texas School of Law, he was an esteemed figure in the Texas legal community, boasting a diverse career in both public and private practice. After law school, he was in private practice for over 28 years. He was a member of the American Law Institute, a life member of the National Conference of Commissioners on Uniform State Laws, a sustaining life fellow of the Texas Bar Foundation, and a fellow of the American Bar Foundation.

It is not talked about enough, but Judge Yeakel was also an officer in the United States Marine Corps. It should be no surprise because he embodies its core values: honor, courage, and commitment.

During his tenure on the bench (both state and federal), which spans twenty-five years, Judge Yeakel served with integrity, fairness, and immense dedication. He was nominated to the Western District of Texas by President George W. Bush and confirmed by the Senate in 2003, and his name has since become synonymous with a judicious understanding and practical application of the law.

A bastion of fairness and impartiality, Judge Yeakel has presided over countless cases with unerring adherence to the rule of law. His remarkable capacity for clear, thorough reasoning has led to landmark decisions that have rippled through our legal landscape, setting precedent and providing guidance for future deliberations. His insights and acumen are reflected in his well-constructed opinions, which have been lauded for their precision, depth, and erudition.

Judge Yeakel's judicial opinions are revered not only for their precise and thorough legal reasoning, but also for doing what he thought was right even if it meant inviting controversy. He would often joke that being reversed by the Fifth Circuit was an occupational hazard. His ability to navigate complex legal landscapes, tease out the nuances of intricate cases, and deliver landmark decisions has significantly shaped our legal landscape. Each opinion served not only as a judicial directive, but also as an invaluable lesson to those of us fortunate enough to work closely with him.

As a mentor, Judge Yeakel's impact on countless careers (including my own) has been invaluable. He fostered an environment of growth and learning, patiently guiding and nurturing young legal minds. His mentorship extended beyond the nuances of law, imparting crucial lessons about integrity, empathy, and responsibility in the field of justice. He would also give incredibly practical advice on the benefits of picking up the phone and calling opposing counsel. These lessons will be carried forward by all who have had the honor of learning from him, ensuring his impact endures beyond his time on the bench.

During his time on the bench, Judge Yeakel was awarded the 2012 Samuel Pessarra Outstanding Jurist Award by the Texas Bar Foundation, and the University of Texas School of Law's The Review of Litigation named Judge Yeakel the Outstanding Texas Jurist for 2014. In 2020 the Texas Bar Foundation named him an Outstanding 50-year lawyer. The Honorable Lee Yeakel Intellectual Property American Inn of Court is named in his honor. He has also spoken at various professional development courses and regulatory conferences.

Beyond his professional achievements, Judge Yeakel's empathy for those affected by his rulings added a profound sense of humanity to his role. This keen awareness of the human element of law was a constant reminder that behind every case are real people, with real lives and experiences.

In my time serving as a clerk under Judge Yeakel, I witnessed his deep commitment to the principles of justice and due process. Every litigant that came before him was assured their constitutional rights were safeguarded, irrespective of their standing in society. Judge Yeakel was especially thorough and thoughtful when weighing the sentencings of criminal defendants. He viewed the law as a powerful tool of fairness, always striving to ensure it was accessible and equitable.

As we reflect on his remarkable tenure, we should all be met with a sense of gratitude for his invaluable contributions to our judiciary. Judge Yeakel leaves behind a legacy defined by dedication to justice, unwavering commitment to the rule of law, and a deep respect for the people he served.

As Judge Yeakel embarks on his new journey at King & Spalding, we are confident that his experience, wisdom, and commitment to justice will continue to serve him well. As the only former judge from the Western District of Texas ever to rejoin private practice, Judge Yeakel will offer clients a unique perspective across the arc of the dispute process. I know that I am not alone in wishing him every success and express our heartfelt appreciation for his impactful service.

The bench loses a true guardian of justice, but his legacy remains an inspiring testament to the power of dedicated public service. To Judge Yeakel, I extend a personal note of deep gratitude. Thank you for your mentorship, the example you set, and the inspiration you continue to be.

On behalf of all who have had the privilege to learn from you, we salute you for your service and wish you the best in your next chapter.

*Alexander Clark is an Associate in the Dallas office of Haynes and Boone, LLP specializing in Crisis Management and Insurance Recovery where he also serves as the co-chair of the firm's Military, Veterans, and Partners (MVP) Network and a Wellness Champion. Before joining Haynes and Boone, Alexander was a clerk for U.S. District Judge Lee Yeakel, an Air Force intelligence analyst, a Teach For America corps member, a political campaign organizer, and a Young Life area director. Alexander graduated with honors from Austin College, the Community College of the Air Force, and The University of Texas School of Law.*

# *FCA Relief can be for Belief:* U.S. ex rel. Schutte v. SuperValu, Inc. *and the Supreme Court's New Scienter Standard for the False Claims Act*

by Jacob D. Hopkins

On June 1, 2023, the U.S. Supreme Court unanimously decided the highly anticipated False Claims Act (FCA) case *U.S. ex rel. Schutte v. SuperValu*, No. 21-1326, providing practitioners new insight into the FCA's scienter standard as it relates to claims involving so-called "legal falsity." Of particular interest, the Court's opinion resolves a question raised by the Seventh Circuit below: Is the defendant's subjective intent—i.e., its beliefs in its behavior's legality—relevant to determining whether it "knowingly" violated the False Claims Act?

## I. Background

The claims before the Court were consolidated from two cases heard before the Seventh Circuit Court of Appeals, *United States ex rel. Schutte v. SuperValu Inc.*, and *United States ex rel. Proctor v. Safeway, Inc.*[1] These cases centered on reimbursement claims the defendant pharmacies had submitted to Medicare and Medicare. Under the Federal Centers for Medicare and Medicaid Services's (CMS) regulations, reimbursement for certain Medicare or Medicaid outpatient prescription-drug coverage is limited to the operator's "usual and customary charges [for the drug] to the general public."[2] The CMS had not defined the "usual and customary charge" term further in "authoritative guidance" and the only CMS interpretation of the term that the CMS had issued to pharmacies was contained within a footnote in a provision of the CMS Manual.[3]

At the time of the alleged misconduct, the defendants had a practice of matching prices charged by competitors for cash sales, while listing the retail price as the "usual and customary" price when seeking a reimbursement from CMS. The relators asserted that the defendants, by failing to disclose the *discount price* to CMS as their "usual and customary" price, violated the FCA by inflating their reimbursements. To support their claims, the relators had produced evidence that supported a theory that the defendant "believed" that the discount prices were their "usual and customary" prices. However, the defendants rebutted this theory by claiming that any subjective intent derived from their beliefs was "irrelevant" as their interpretation of the CMS's regulations regarding "usual and customary" prices was "objectively reasonable" considering existing guidance.[4]

The Seventh Circuit, agreed with the defendants' FCA interpretation, affirming the grant of summary judgment against the relators. The Seventh Circuit reasoned in *Schutte* that the U.S. Supreme Court's scienter test in *Safeco Insurance Company of America v. Burr* (*Safeco*),[5] which interpreted the Fair Credit Reporting Act (FCRA), applied to the FCA because it "articulated an objective scienter standard for establishing willful violations" and interpreted "common law requirements."[6] It then applied this reasoning to reach its decision in *Proctor*. "Under *Safeco*, an objectively reasonable interpretation of a statute or regulation does not shield a defendant from liability if authoritative guidance warned the defendant away from that interpretation."[7] In applying *Safeco*, the Seventh Circuit reasoned that the "defendant's subjective intent" was "irrelevant" to determining whether they violated the FCA because "[a] defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown."[8]

## II. The Supreme Court's Opinion

The Supreme Court disagreed with the Seventh Circuit and held that "[t]he FCA's scienter element refers to respondents' knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed." In articulating this holding, the Supreme Court subsequently observed, drawing heavily from the text and legislative context of the FCA, that (i) the FCA's scienter analysis largely follows that of common-law fraud claims, and (ii) *Safeco* does not apply to the FCA.[9]

The Court reasoned that the FCA's definition of "knowingly" follows the traditional common-law scienter requirements for fraud. As the FCA is "largely a fraud statute" and "was first enacted in 1863 to 'sto[p] the massive frauds perpetrated by large contractors during the Civil War,'"[10] it conceptually tracks that, without contrary statutory text, the FCA's terms would incorporate the "well-settled meaning."[11] The Court noted that the FCA's scienter standards focus on thought and belief, as derived from common-law fraud, regarding the claims in question because the terms "actual knowledge," "deliberate ignorance," and "reckless disregard" all require analyzing what the defendant thought or believed regarding the their claims.[12] Alone, this language was sufficient for the Court to determine that the scienter analysis under the FCA is a *subjective inquiry*—driven by thoughts and rationalizations, rather than a reasonable person's evaluation of the end result. Accordingly, the Court reframed the Seventh Circuit's intent analysis by centering the inquiry on the *defendant's* interpretation, as opposed to focusing on a potential reasonable person's interpretation. Thus, the defendant's intent under the FCA only considers subjective belief at the time claims are submitted—not "post hoc interpretations that might have rendered their claims accurate."[13]

Drawing from the case's contextual differences, the Supreme Court also rejected the Seventh Circuit's reliance on *Safeco*. The Court distinguished *Safeco* on two grounds: (i) it interpreted the FCRA, not the FCA; and (ii) it did not provide some "objective safe harbor."[14] In construing *Safeco*'s application, the Supreme Court found that, though it interpreted common law standards, *Safeco* could not have applied to the FCA because the opinion interpreted the term "willfully" in the context of the FCRA, which provides a different scienter standard than the FCA (the so called "*mens rea*"[15]) for violations.

Going forward, the Court summarized the FCA scienter test for these types of cases as follows:

> Under the FCA, petitioners may establish scienter by showing that respondents (1) *actually knew* that their reported prices were not their "usual and customary" prices when they reported those prices, (2) *were aware of a substantial risk* that their higher, retail prices were not their "usual and customary" prices and intentionally avoided learning whether their reports were accurate, or (3) *were aware of such a substantial and unjustifiable risk but submitted the claims anyway.*[16]

## III. The Significance of *SuperValu*: Is this a big win for Relators and is there a silver lining for Defendants?

The *SuperValu* opinion provides some clarity regarding how scienter is evaluated under the FCA but, like the Supreme Court's 2016 opinion opining on the FCA's materiality standing *Universal Health Services v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016), will likely serve to generate litigation centered on determining the reach of its "captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit them anyway" language. A likely unintended effect of *SuperValu*'s subjective-only intent standard is a change in corporate communication practices. Companies may try to insulate themselves out of fear of liability by taking regulatory compliance discussions off-line or discouraging open dialogue over discoverable media because the documentation of any internal disagreements about resolving such issues could be used by a relator to show the defendant's subjective intent pertaining to a particular practice. Likewise, this focus on subjective belief may also create implications for the attorney-client privilege. At oral argument, the respondents noted that without *Safeco*'s protection, companies could be forced to waive this privilege to prove that they believed their interpretation complied with the law.[17] Because the Court rejected *Safeco*'s FCA application, companies now have to consider waving attorney-client privileges in future FCA cases to use otherwise protected discussions to rebut claims of subjective intent. Therefore, *SuperValu* will likely increase the importance for companies to memorialize contemporaneous justifications for their interpretation of ambiguous regulations, while also leaving communications adopting these justifications off the electronic record.

For relators, the win provided by *SuperValu* is that the Supreme Court has prevented *Safeco's* objective disregard standard from applying to future claims. Before *SuperValu*, relators bore the onerous burden of *Safeco*, having to prove that the defendant submitted a objectively false claim—one not in reliance on an interpretation had not been ruled out by definitive legal authority or guidance. Yet, *SuperValu*'s test may be only marginally easier. Showing "reckless behavior" requires facts proving both awareness *and* disregard. *SuperValu*'s holding explicitly demonstrates that the FCA does not apply to "honest mistakes" relating to compliance. Accordingly, relators can now argue that the conscious disregard of a substantial risk language referred to in the *SuperValu* test could be inferred at the pleading stage from *objectively reckless conduct*. But it is unclear at this point what effect this language will have on a relator's ability to survive the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Similarly, relators are likely to argue that their burden of proof of a "knowing" violation is satisfied if a defendant *did not seek formal guidance* from the agency before adopting its interpretation of an ambiguous provision. Courts are unlikely to impose such a handholding requirement as it would tax already thin agency resources to fill the advice gap. Accordingly, *SuperValu* is a marginal victory for relators: *Safeco* is not the FCA scienter standard but few other barriers to FCA relief were removed.

For defendants, the loss in *SuperValu* will most likely affect company conduct and behavior going forward (as discussed above) but it is not expected to open the floodgates to potential liability. Instead, *SuperValu*'s strongest impact is

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in "borderline cases" where a defendant already took a questionable risk in filing a claim (or has significant discoverable communications detailing that defendant "believed" it was questionable). Though "post hoc rationalizations" may no longer be used to justify conduct, honest mistakes in interpretation with the intent to comply will likely prevent liability. In that vein, defendants will most likely embrace the rigidity of the opinion's language and its reliance on the common law fraud analog, both benefits the defense bar has enjoyed with the adoption of *Escobar*'s materiality standard. Defendants will likely use the "substantial and unjustifiable risk" language in the *SuperValu* test to argue at the pleadings stage that relators must assert that the defendant *consciously* knew of such a serious risk and then acted contrary to that knowledge—a stiff burden to prove without access to the defendant's decision-related risk assessment. Though it is not a victory for defendants per se, the *SuperValu* opinion appears to have a few unseen benefits for them to utilize in future cases.

Overall, *SuperValu* creates more questions than it answers, but, to an extent, it benefits both relators and defendants in clarifying the FCA's scienter requirements.

*Jacob D. Hopkins is a law clerk for the Honorable Clifford L. Athey, Jr., a Judge on the Virginia Court of Appeals, in his time as a litigation attorney his practice area focused on consumer financial service litigation and representing clients in governmental investigations.*

**Endnotes**

[1]*United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649 (7th Cir. 2022); *United States ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455 (7th Cir. 2021).

[2]*United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326, slip op. at 8 (June 1, 2023) (citing 42 C.F.R. § 447.512(b)(2) (2021)).

[3]*Proctor*, 30 F.4th at 659 (citing *Schutte*, 9 F.4th at 471).

[4]*Schutte*, 9 F.4th at 463–65.

[5]551 U.S. 47 (2007)

[6]*Schutte*, 9 F.4th at 465.

[7]*Id.*

[8]*Schutte*, 9 F.4th at 468.

[9]The *SuperValu* Court also opined that an argument that at the common law, misrepresentations of law would not be actionable as fraud, thus preventing FCA claims derived from a solely a legal misrepresentation would fail because statements involving some legal analysis remain actionable if they "carry with [them] by implication" an assertion about "facts that justify" the speaker's statement. *SuperValu Inc.*, slip op. at 25 (citing Restatement (Second) of Torts §545, cmt. c).

[10]*SuperValu Inc.*, slip op. at 17 (citing *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U. S. 176, 181 (2016)).

[11]*Id.*

[12]*SuperValu Inc.*, slip op. at 9 (citing Restatement (Second) of Torts §526 (1976); Restatement (Third) of Torts: Liability for Economic Harm §10 (2018)).

[13]*SuperValu Inc.*, slip op. at 11.

[14]*SuperValu Inc.*, slip op. at 14.

[15]*SuperValu Inc.*, slip op. at 13. Though *mens rea* is usually used to define a criminal's intent under criminal statutes, the *SuperValu* court uses the term to describe the difference in *scienter* requirements.

[16]*SuperValu Inc.*, slip op., at 26–27 (emphasis added).

[17]*See* Oral Argument at 49:33, *United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326, https://www.c-span.org/video/?526486-1/united-states-rel-schutte-v-supervalu-consolidated-oral-argument (responding to a question by Justice Neil Gorsuch on the potential consequences of having to defend FCA suits under a subjective intent standard).



# Writing for the Court

## by George Scoville & Evan Rothey

Recent law school graduates and young lawyers are often inundated with advice—sometimes even good advice! Allow us to join the chorus of advisors on one particular topic: court filings.

But first, congratulations—you made it! You finished law school, passed the bar exam, and joined the ranks of your federal, state, and local bars. You have embarked on your legal career, doing the important work that your clients need you to do for them. Hopefully, you feel personally accomplished and professionally fulfilled; these are no small feats.

Every rose, however, has its thorns; the legal profession is no different. Sometimes, your feelings of relief, joy, and exhilaration about the momentous events you have just lived may give way to existential dread and disillusionment. It can be hard to juggle court-imposed deadlines, manage internal workflows at your firm or organization, write for multiple supervisors, balance the competing demands of work and family life, and deal with the occasional unreasonable opposing counsel or client.

One of those challenges is the art and science of legal writing. Since we were fortunate to learn from two excellent judges, we offer a few tips as you develop your voice and habits as a legal writer.

**Keep Your Tone in Check, Even When Opposing Counsel Does Not.**

In all cases, lengthy, emotional tirades—even when justified by an opposing counsel's unreasonable conduct—are unhelpful and disruptive. Despite what some advanced legal writing professors or wily law firm partners will tell you about needing to "punch up" your prose, frothy rhetoric will rarely, if ever, carry the day. Courts must go where the law takes them, so colorful or forceful language in a brief will never be as persuasive as carefully reasoned analysis drawn from on-point precedent. Calmly distinguishing the authorities in your opposing counsel's brief will go further than dressing down your opponent.

We have observed seasoned attorneys forfeit credibility and strong legal positions by stooping to the level of heated attacks. Step back from the personal fray in your mind. Opposing counsel may be wrestling through some individual turmoil that is hijacking their better judgment. In other words, "[b]e [kind], for every man is fighting a hard battle."[1] Opposing counsel may also just be a jerk—but, "I learned long ago never to wrestle with a pig. You get dirty, and besides, the pig likes it."[2] In either case, you will represent your client (and yourself) better by keeping your tone in check.

Learning to deal with unreasonable opposing counsel (and people in general) is a lifelong pursuit. No lawyer, young or not-as-young, should ever forget that court filings are addressed to the court. You are addressing a judge, her law clerks, and her staff. Your tone in every court filing should reflect this basic proposition. You may be busy, and opposing counsel may misbehave, but the court is handling everyone's cases. Take the time to pull any fire and brimstone out of your draft filings.

**Follow the Rules.**

Yes, that means complying with page limits. And page limits, like speed limits, are not minimums. As one of our judges would often footnote when granting reasonable requests for enlargements of page limits, "brevity is the soul of wit."[3] Hit the brakes on your brief length well before you get to the page limit.

This also means following citation conventions. Clients, in their moments of tribulation, need great lawyers. Serving on law review is neither a precondition for nor a guarantee of great lawyering. But odds are that the law clerk reading your brief was a law review editor.

Say what you will about *The Bluebook*. But the person evaluating the strength of your advocacy was tempered on the anvils of comma placement, footnote font size, and citation conventions for case names, statutes, administrative materials, and explanatory parentheticals during their law review heyday. We say that to say this: lack of attention to detail and failure to conform your writing to common grammar, punctuation, and citation conventions may send up red flags to your reader. Fairly or unfairly, you may undermine your client's position with careless citations or slapdash drafting.[4]

In our experience, only *pro se* litigants get a break on the form and content of their court filings. Like it or not, as learned counsel, courts expect more from us.[5] Express your individuality somewhere other than legal citations, lest you risk the ire of a Bluebook stickler in chambers.

**Follow the Local Rules and the "Local-Local" Rules.**

This also means knowing (and following) the local rules and the "local-local" rules. Most courts have their own local rules, which fill in the gaps left by rules of procedure and set out guidelines and requirements for a variety of court filings. For example, many courts have a meet-and-confer

*Writing for the Court* continued on page 18

requirement before counsel files a non-dispositive motion.[6] As a young lawyer, you are likely expected to have read those local rules and ensured that any court filing abides by them (even if your partner or supervisor fails to communicate that expectation).

On top of the local rules, however, each judge also has their own judicial preferences that may differ from their colleagues' preferences—the "local-local" rules. In Tennessee, we are fortunate that these local-local rules are often found on district courts' websites.[7] For example, one magistrate judge in the Middle District of Tennessee requires that counsel meet and confer about discovery disputes *by speaking—not just by exchanging emails—before bringing the dispute to the judge's attention*.[8] Other local-local rules are only discovered when those rules are broken (like a legal equivalent of the game Operation). Before you file, pause to consider whether you are following the judicial preferences of the judge assigned to your case. Again, this is another area where young lawyers can particularly add value to their firm or organization and ultimately their clients.

**Writing for the Court**

There are many things to learn as a young lawyer, but we all know not to get on a judge's bad side. In your court filings, remember:

(1) However angry opposing counsel makes you, keep your tone in check. The court does not want to mediate squabbling attorneys, and it will be persuaded by calm, accurate legal analysis.
(2) Be respectful of your reader's time and attention span by writing succinctly and adhering to the rules that govern legal writing. Law review is not required for great lawyering, but the judge or her law clerks may be sticklers.
(3) Follow the local rules and the local-local rules when you file with the court. At best, your attention to the court's preferences wins you credibility. At worst, you avoid judicial rebuke (which would likely come in a footnote in the court's order).

Best of luck as you begin your professional journey.

*George Scoville and Evan Rothey are commercial litigation associates at Sims|Funk, PLC in Nashville, Tennessee. Before entering private practice, George clerked for the Honorable Sheryl H. Lipman in the U.S. District Court for the Western District of Tennessee at Memphis, and Evan clerked for the Honorable Pamela L. Reeves in the U.S. District Court for the Eastern District of Tennessee at Knoxville.*

**Endnotes**

[1]Ian Maclaren, Brit. Wkly. (Dec. 25, 1897).

[2]This quotation is often apocryphally attributed to author George Bernard Shaw.

[3]William Shakespeare, Hamlet act 2, sc. 2. Admittedly, these authors struggle with this principle, as you can tell from this article.

[4]Consider, for example, your opinion of these authors if you find any grammatical or citation errors in this article!

[5]If *The Bluebook* intimidates you, we understand. These authors believe that, if a citation accurately guides a reader to where she can find the source material cited, the writer has, in theory, done enough. But young lawyers can add value by wielding The Bluebook effectively. Practice citing some of the materials that are lying around your office. Googling "the bluebook practice exercises" pulls up almost 900,000 results and includes links to law schools' legal-writing-programs' exercise sheets. Believe it or not, you may have to cite a since-deleted Facebook Live video in a motion, as these authors recently discovered. Figure out what works for you, whether you choose an online subscription to The Bluebook, the battle-worn hardcopy of *The Bluebook* that your law school forced you to buy, or something else.

[6]*See, e.g.,* M.D. Tenn. L.R. 7.01(a)(1).

[7]*See, e.g.,* Judicial Preferences—Chief Judge Waverly D. Crenshaw, Jr.—Middle District of Tennessee (April 20, 2020), available at https://www.tnmd.uscourts.gov/sites/tnmd/files/Judicial%20Preferences%2020200420.pdf.

[8]*See* U.S. Magistrate Judge, Practice and Procedural Manual for Judges and Magistrate Judges for the Middle District of Tennessee—Magistrate Judge Alistair E. Newbern, available at https://www.tnmd.uscourts.gov/sites/tnmd/files/Newbern%20Practices%20and%20Procedures%202.pdf.

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