



President's Column: *What If?*

By Keishunna R. Webster



The holiday season is upon us. Parties, good cheer, and shopping lie ahead for many of us. The holidays are a special time of year. A time to share special moments with family and friends. A time to cherish loved ones. A time to reflect upon the year soon to end. A time to anticipate the year about to begin.

But what if this holiday season, we performed a few good deeds—consistent not only with the holiday spirit, but also with CABA's mission to serve the public and our members? What if we assisted a deserving family in the tri-county area by agreeing to perform legal services *pro bono* in the new year? If we found a way to offer a hand-up, not a hand-out, to someone searching unsuccessfully for work in this tight economy? If we were able to help a citizen striving, but unable, to feed his or her family? If we bought one gift, educational or whimsical, for a child who will find no present underneath the tree? And within CABA, what if we publicly praised a colleague worthy of recognition for long-standing community service? If we surprised an adversary with an unexpected (perhaps even undeserved) act of professionalism and civility?

As lawyers, we hold the privilege of being members of the greatest profession in the world. But that privilege obliges us to give back to

the communities and profession we serve. The rendering of legal services to those least able to access or afford them is a hallmark of the legal profession, because protecting the basic rights of all citizens is essential to preserving our democratic system. It is also an effective vehicle for mending the unflattering image of the legal profession held by many in society.

I often hear judges and lawyers alike lament the lack of professionalism and civility among lawyers. In the spirit not only of the holidays but also our Code of Professional Conduct, let's pledge to model exemplary professionalism and civility. Indeed, it is our responsibility to ensure that our professional behavior is conforming to the Mississippi Rules of Professional Conduct. The Rules admonish us to treat opposing counsel with courtesy and respect. We are instructed to provide zealous but honorable representation without resorting to unfair or offensive tactics. As professional colleagues, we should encourage and counsel new lawyers by providing advice and mentoring, and foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of our clients.

This holiday season and beyond, lend a helping hand to someone less privileged. Choose civility over hard-ball tactics. Be honorable. Make a difference—not by mere words, but by good deeds worthy of emulation. Do so and you will be surprised at just how inspiring and uplifting your good deeds can be to others. And, in many respects, that really is the reason for the season. I wish each of you a safe and joyous holiday season. ➔

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February 18

CABA Membership Meeting
Noon • River Hills

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Have a
Happy New Year!
From our CABA family to yours!



PRACTICE POINTERS:

Unrefrigerated dead fish and other tips for making the most of the standard of review

By Deborah Challener



The standard of review (“SOR”) is the lens through which an appellate court examines a trial court’s or agency’s decision making and often determines the outcome

of an appeal. Consider the tips below to get the most out of the SOR.

1. A former Tenth Circuit judge once remarked that to an appellate judge, the SOR “is everything.” Judge Deanell R. Tacha, former Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, quoted in Harry T. Edwards & Linda A. Elliott, *Federal Courts Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions* (Thompson West 2007). In drafting your appellate brief, stop and consider how your audience—judges and law clerks—will think about application of the SOR to each issue.
2. SORs can vary widely from jurisdiction to jurisdiction. Take the time to research the SOR for each issue.
3. Sometimes the SOR is clear, but sometimes it is undecided or ambiguous. Look for the wiggle room and use it to persuade the court to apply the SOR that benefits your client.
4. Where the applicable SOR is decisive and benefits your position, weave it into your argument throughout the brief. Use it to identify the mistakes the trial court made. Put it in the summary of the argument, headings, topic sentences and concluding sentences. Remind the court about it in your conclusion. The SOR might be your whole argument!
5. Where the applicable SOR is decisive on an issue and hurts your position, consider dropping the issue or put it at the end of your brief. If it’s clear that the SOR is the death knell for your appeal, consider whether the appeal is really worth it.
6. Federal Rule of Appellate Procedure 28(a)(8)(B) requires a concise statement of the SOR for each issue. The statement may appear in the discussion of the issue or under a separate heading before the discussion of the issues. Don’t just recite the SOR here. Think carefully about where to place the SOR and how to word the statement. Cite case law that supports your position. Although the appellee is not required to include a separate statement of the SOR, don’t give up the opportunity to write the statement persuasively and cite favorable authority.
7. Find out if your jurisdiction has any specific rules about or has provided any guidance on the SOR. For example, [the Fifth Circuit’s Practitioners’ Guide](#) recommends two resources on SORs: *Federal Standards of Review* by Steven Alan Childress and Martha S. Davis and *Appeals to the Fifth Circuit* by George Rahdert and Larry Roth.
8. Consider whether your issue involves (or arguably involves) a mixed question of law and fact. A mixed question asks “whether ‘the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.’” *U.S. Bank Nat. Ass’n ex rel. CWC Capital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 394 (2018) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n. 19 (1982)). The SOR applicable to a mixed question depends “on whether answering it entails primarily legal or factual work.” *Id.* at 396. If the work is primarily legal, the SOR is de novo. If the work is primarily factual, the SOR is deferential. Use the ambiguity in the SOR for a mixed question to argue for the level of deference that benefits your position.
9. When you’re arguing in favor of a particular SOR, use the rationales behind the different levels of review to support your argument. For example, the more deferential standards of review, such as abuse of discretion and clearly erroneous, typically apply to issues that trial judges are in a better position to decide, e.g., credibility and the admissibility of evidence. If you’re arguing that an appellate court should apply a deferential SOR, tell the court why a trial judge is in a better position to decide the issue than an appellate judge. If you want a de novo standard, tell the appellate court why it’s in a better position to decide the issue than the trial judge.
10. If you ever struggle to define the clearly erroneous standard for a court, consider using the Seventh Circuit’s definition: “To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.” *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228 (7th Cir. 1988), cert. denied, 493 U.S. 847 (1989). ➡

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RUNNING A HALF-MARATHON: *A Cautionary Tale*

By Nathan Smith



Numerous autobiographies have been written that detail a seemingly “normal” person’s fall from good circumstances to the rock bottom. This short article will describe how a human being descends into

the madness of running a half-marathon. Hopefully by telling my story I can prevent others from falling into this trap.

It all started innocently enough. When I was in junior high and high school I was required to run regularly during the week for PT. My only memory of that was that I found it very difficult to run a full mile without stopping. I should have left it at that.

But no, I did not leave it at that. When I hit my first mid-life crisis I happened to be living near a one-mile walking path. I started running the path periodically out of boredom ... and because I was tired of seeing the inside of a gym. Eventually that old goal of running a mile without stopping reared its ugly head. Of course I had to do it. I still remember finishing that first mile without stopping and feeling a great sense of accomplishment. I even gradually pushed it to two miles without stopping. I should have stopped!

At this point I should have detected some very dangerous warning signs. I had purchased a dedicated pair of running shoes and noticed how much lighter and softer they were than shoes I typically wore. I had an app on my phone that tracked my runs. I was somewhat versed in the running parlance.

I knew the typical run distances of 5k, 10k, half-marathon, and marathon. I could even convert the kilometers to miles, which should have immediately raised red flags.

Instead of stopping I began to run 5ks. A 5k is approximately 3.1 miles, which seemed like an extremely challenging distance to run. For a slower runner such as myself, it meant running for 30 minutes straight. But if I managed to do it, the app on my iPhone noted specifically that I had run a 5k and not a lesser distance. I was hooked.

My first formal 5k was (of course) the Legal Beagle. I’m not sure how to convey what a mistake this was other than to note that about 10 years before running the Legal Beagle I had served as a volunteer at the Legal Beagle and laughed at the torture the runners were putting themselves through. Who was laughing now? Not me, I was suffering. But I finished, middle of the pack.

I do recall that the pandemic struck before I ran another “official” 5k. Everyone changed their patterns during the pandemic, especially during those early lockdown months. But whereas some people adopted healthy habits, like learning to bake sourdough bread, I started running even more. Now I was running multiple 5ks a week. Then the evil thought began creeping into my head ... what if I could do a 10k? One day I did just that, I simply continued running until I had covered 6.2 miles. My app congratulated me, digging my grave even deeper.

Even after I began putting multiple 10ks under my belt, though, I never contemplated running a half marathon (a little over 13 miles). That was for crazy people. Marriage came along during the pandemic (no joke, that could be a completely separate article),

and a kid followed not too long thereafter. For a period of about 3 years I was a normal ... dare I say recovering ... person who only ran periodically for shorter distances.

But then came December of 2023. I don’t believe in New Year’s Resolutions, mainly because I think if you are of the mind that you need to change your life, you should do it regardless of the time of year that the thought hits you. But for whatever reason I signed up for half-marathon training to begin in January 2024. It was possibly my first New Year’s Resolution. And like all New Year’s Resolutions, I broke it very quickly.

The training program was fantastic. Structured, with specific workouts and rest days planned all the way out to the “Run the Rainbow” event that benefits Friends of Children’s Hospital. There were group runs twice a week, with one of them being at 7 a.m. sharp every Saturday, just like the race would be. But through a series of events and excuses, I didn’t even complete half of the training. Let me list the excuses. My favorite one was that my kid was new to daycare and brought home a new illness to me on a weekly basis. This actually was true - I was sick more times than I could count last spring. The second was that waking up at 5 a.m. every Saturday morning to run distances I hadn’t previously run in usually very cold weather was something that my mind (rightfully) rebelled against.

Race day came and I ran the 10k, not the half-marathon. I finished middle of the pack and was very happy with the result. I didn’t tell anyone that I had tried to switch even lower to the 5k but it was already sold out. Lesson learned, right? All’s well that ends well.



Can you guess what happened next? This is how it happens ... this is how people end up running half marathons (and worse). I was very unhappy with myself for not completing the original goal of running a half marathon. When the training opened back up again this fall, I immediately signed up. The goal was to run the St. Jude Half-Marathon in Memphis.

This time, I completed almost all of the group runs. I got used to waking up at 5 a.m. Saturday mornings, although it never got easier. The mileage increased each week, and on the day I was supposed to run 10 miles, I kept going. Just like the first time I ran a 10k, I simply ran until I had gone 13.1 miles. My Garmin watch congratulated me. Oh yes, there is now a dedicated running watch and more pairs of running shoes than I care to admit.

This month's St. Jude marathon will be the last thing I mention in this sordid tale. It was in the upper 20s at the start of the race,

and around 22,000 runners were participating. Mercifully the start time was at 8:00 a.m., not 7:00. Suffice to say, I did not warm up sufficiently, hydrate properly, sleep well enough, or anything else prior to the race. As a result, I dealt with some significant pain in the first few miles. But then things smoothed out and it turned into just another long run like the numerous ones I had done in months prior.

Except it wasn't just another long run. There were spectators the full length of the scenic course through downtown Memphis and along the river. Most of them had funny signs, which did nothing for the pain I was experiencing. I take that back, one of the signs said "This is excessive. Just get Ozempic." THAT made me chuckle between groans. I was also offered beer, lemon drop shots, fireball shots, and probably illicit drugs throughout the 13.1 mile route. What kind of madness was this?

The part that hit me in the gut though was the run through the St. Jude campus. The kids were out there waving and cheering. Suddenly I felt like a real jackass for not doing a little fundraising before the race. Now I was crying from pain AND emotions. It was an experience I won't ever forget. Nor will I forget about how good I thought I was doing during the last two miles until I started getting passed by people who were doing the full 26.2 marathon, meaning that they were more than twice as fast as me for twice the distance.

I finished middle of the pack and proceeded to drink the single most delicious beer of my life. One table at the finish line was handing out milk. "Do you want some milk?" the gentleman asked me. "No sir, absolutely not." I responded. I guess they are determined to make you puke at some point during the event.

Post-race I was checking out of the hotel and overheard a conversation between two other runners. One was what I'll describe as a "hardo" marathoner while the other was casual runner who had done the 5k. "Why would you run a marathon?" asked the casual guy, "I mean, I work out and do some running, but I'd never run that far." "Let me tell you something," responded the hardo (probably a lawyer), "even runners don't like running. We do it for the sole reason of being able to brag that we did something that nobody else can do."

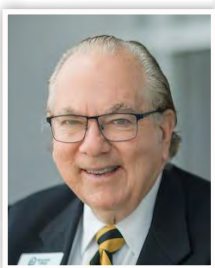
I laughed and he darted eyes at me and then I did that thing where I tried to keep the smile off my face like Pvt. Pyle in Full Metal Jacket. Running a half or a full marathon isn't anything to brag about ... unless you are one of those elite runners that really pushes time boundaries. Hopefully this article is enough to warn people away from doing them at all. But the comment did make me reflect on why I was doing it. I think back to one of the few group runs I made it to last spring. Part of the route went through a cemetery to add some distance. As we coursed through the headstones, I remember thinking "there will be plenty of time for me not to be active when I am in one of these." For now, I'm grateful for my health and the opportunity to run and give to charitable causes in the process.

I'm just kidding, I do it for that post-race can of beer. 🍀

WORDS: PART II

So Right

By Jim Rosenblatt



There are two schools of thought on the spoken word. One school takes the position that grammar is not that important, that word selection is an approximate process, and that speech can

be filled with utterances that contain no meaning—as long as one generally conveys an idea that allows the listener to get the gist of what one is trying to communicate. If you favor this school of speech, read no further and find something else to do.

Another school of thought views speech as an art that uses established rules of grammar, precise word selection, and concise phrases unburdened by filler words that add nothing to the idea being conveyed. Such speech is accurate and exact and clearly communicates thoughts. It flows smoothly and does not contain unnecessary words or phrases. If this style of speech is to your liking, read on to see how you can embrace this approach.

When a speaker is not sure what to say next or if there is any type of pause, some will resort to the use of a filler word as a crutch. The filler word can start a sentence, be offered mid-sentence, or come at the end of the spoken word. Filler words are often repeated in the course of speech. When I participated in a Toastmasters program while attending the Army War College, the participants would offer a series of short speeches that were critiqued by the listeners. One person would be designated to serve as the “Uh Counter” to listen carefully

and note the number of times the speaker said “uh” during the presentation. This basic exercise encouraged us to be conscious of our speech and to eliminate the use of the dreaded “uh.” Today I notice so many speakers will begin their spoken word with a guttural “Uh” as if that is necessary to start a sentence when they don’t know quite how to begin. They utter this filler word while choosing their initial words. Better to remain silent until the words one wants to use come to mind and then begin talking. Other speakers will sprinkle “uhs” in the middle of a sentence or anywhere, interfering with the flow of real words.

For years and years, the go-to filler phrase was “You know.” This phrase was uttered after sentences for unknown reasons. Perhaps the speaker was not certain that her thoughts had been conveyed and was questioning the listener to see if there was a mutual understanding of what had just been said. Perhaps the speaker was seeking affirmation on the part of the listener. Perhaps the speaker simply needed some words to fill a vacuum at the end of a sentence and before starting the next sentence. In so many conversations and addresses the phrase was merely an empty one that added nothing to the meaning and was just there to detract from the message that was attempting to be imparted. Awkwardly, it had a tendency to force the listener to respond.

In recent years, the filler phrase “You know” at the end of the sentence has been supplanted by two words—one spoken at the beginning of the sentence and one at the end. In speech in the media, in PTA meetings, in the classroom, or in church sermons, one can hear sentences being started with the word “so” and at the end of the sentence the word

“right” being spoken. Neither adds anything to the meaning of the sentence, but are used as crutches by the speaker to start and end a sentence. I regularly listen to a program on Mississippi Public Broadcasting (not “In Legal Terms” with our beloved Adam Kilgore) which offers sound advice and excellent insights for daily living. Substantively, it is helpful and valuable and imparts advice and suggestions from an experienced professional. However, every sentence tended to start with the word “so” and every other sentence ended with “right.” I find such utterances distracting because they take away from the thought of the sentence. More effective would be a sentence that begins with a subject or phrase and ends with the period at the end of the sentence. The speaker can pause at the end of the sentence to allow the point to sink in and be digested in the mind of the listener without having to repeatedly say “right.” Especially in academia, speakers are prone to begin with “so” to get out of the starting blocks.

It is interesting to compare our oral and written communication. The filler words of which I spoke would never be put down on paper or screen. Before our eyes they clearly display their unnecessary nature and are simply not used. Would that our speech could mirror our writing.

I challenge you to put on your listening ears and note the frequency with which “so” and “right” enter speech, and then ask yourself what purpose did they serve in that situation. We can take this lesson to heart in our own oral communication as we speak to a judge, a jury, a client, or a colleague or as we deliver our opinion or advice at a HOA or PTA meeting. ➡

ALL I WANT FOR CHRISTMAS

(is a visit from Code Enforcement)

By Terryl Massey

Halloween and Christmas—my favorite holidays: mostly because they give grownups a chance to act like children. Silly, giddy children, with bad taste in decorating. All my life, I've celebrated these holidays like trashy people with new money. My philosophy for Halloween is that, if I don't make at least one child wet the bed that night, I haven't done my job.

That was easier in Fondren, where I lived in a house with a squeaky gate to the front yard and a winding path that kept kids from seeing the front porch until they were there. By that time, they were confronted with two strangers in black sitting in front of a blazing fire pit. Many parents—especially Dads—compelled their kids to take that walk alone. “If you want some candy, boy, you better get yourself on up there.” One poor kid got to the end of the walk, saw the fire, dropped his bag, and ran. We had to chase him down to apologize and give him extra candy.

It's hard to replicate that experience in a suburban yard in Madison, and, truthfully, that level of effort is excessive for the five or six trick-or-treaters who actually make it down our cul-de-sac. Nonetheless, the Halloween tire (a turned tire planter painted orange, with teeth and eyes cut out like a Halloween pumpkin) goes out, as well as the costumed skeletons and the graveyard. We're doing our best here.

At Christmas, I'm going for a look somewhere between a Mexican restaurant and a used car lot. That look involves lots of colored lights, and I've been known to blow out the front yard by turning on a hair dryer. Again, in Fondren, a tacky light display, crudely hung from one random yard fixture to another, seemed right at home.

It was a shock to move to Madison and find myself on a street full of tasteful white lights. As Madeline Kahn might say, “How ordinawy!” As the newbie on the street, I was somewhat cautious the first year, with just a couple of strands of color. The next year, however, “the City” got into a brouhaha over lighted peacocks on a lady's roof, which apparently upset the neighbors. That got my dander up, and I responded by lighting every structure I could—the porch, the mailbox, the eaves that wrapped around the front porch, windows, bushes, a picket fence, and a crepe myrtle tree—with the brightest colored lights I could find. The peacocks were ultimately ok'd by Mayor Mary, and I strung some more lights in celebration.

In those days, I dragged out every box of decorations I had, and it seemed that, every year, there were more lights. For Halloween, I filled the yard with bags of jack-o-lantern bags stuffed with leaves. There were eyeball lights, ghost lights, and cemetery lights. For Christmas, there was a huge fake tree (I can't haul a real one) and the inflatable one. And, every year, more lights. Poor Thanksgiving, on the other hand, got an autumnal wreath and a Beanie Baby turkey.

As I've aged, however, I've realized that I was the only person in the family who cared that much about holiday decorating. I get them out; I put them up; I take them down. The kids have moved out (not that they were that much help, anyway), and my husband doesn't really see that point. And I've fallen off enough ladders to have a permanent back injury. (The kids have tried to take away my ladder privileges—and my ladders—but I told them they'd have to pry them out of my cold, dead fingers. Now they rely on Tom to keep me no higher than four feet off the ground, and he's a pretty enthusiastic enforcer.)

So, decorating has been scaled back. Instead of getting everything out, putting it all up, and then maybe removing whatever is truly excessive (“truly excessive” being a term of art), I put up one thing at a time, and then judge whether it's enough. So, the tree got put up right after the Egg Bowl (we have our priorities around here, after all), and the lights went on it the next week. No ornaments yet; I'm deciding whether they are essential. No tinsel; I'm never sweeping that up again, if I can help it. There's a lighted garland around the door and a wreath, but nothing hanging from the eaves. The jury's still out on the net lights on the bushes. All of the Santas are displayed inside, but the presents aren't yet wrapped. One thing at a time!

Does this year's lack of effort presage a slow decline into Scroogeville? Nah, I think not. A lot of energy has gone into a bathroom remodel that started before Halloween. (It was going to be a simple job until the dry wall came off with the old tile.) It might be finished by Valentine's Day. In the meantime, the net lights keep calling my name, so they'll likely go up this weekend. And some “carefully curated” (sounds tasteful, huh?) ornaments will eventually get on the tree, along with a tinsel garland (but no tinsel). Trust me, I have lots of tacky ornaments.

And just in case my future roomie at the nursing home is reading this and thinks I'll be arriving with just a box of Depends, beware. I might not be able to bring my stepladder, but the inflatable Christmas tree is coming with me, along with some spiced eggnog. ¡Feliz Navidad! 🍷

2024 Christmas Party



*CABA held its annual holiday party on December 3rd
at The Rick House in Belhaven.*



Christmas Party

Event photos continued...



CABA Membership Meeting *October 15th*

• *Building Better Litigators* •



To view more photos of this CABA Membership Meeting please visit caba.ms

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