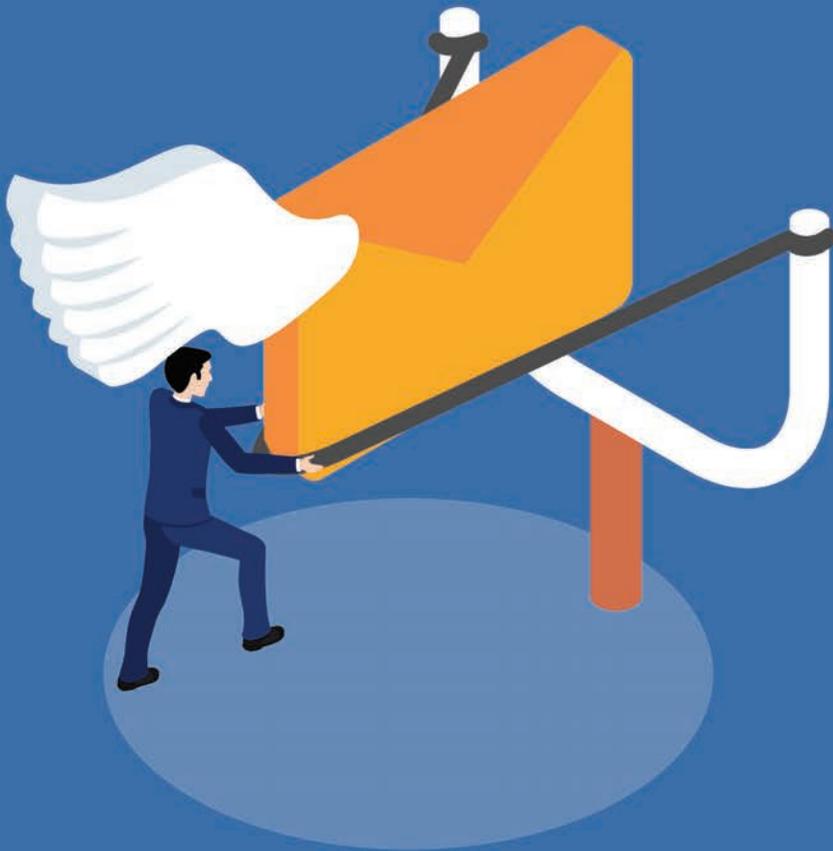


emails to a federal judge



BY D. BROCK HORNBY

RECENTLY AN ESTEEMED member of the bar died. In closing out the lawyer's laptop, a legal assistant discovered a trove of emails the lawyer had composed and addressed to a federal judge but never sent. The assistant asked if I would like to see these emails. "Of course," I said, and the assistant forwarded them to me. With the estate's permission, I present them here, unedited. Perhaps their contents will be useful to other federal judges, or cathartic for lawyers who practice in federal court.

OUTSET OF YEAR 1

Congratulations on becoming a brand-new federal judge. That was a pretty impressive (well, over-the-top) investiture ceremony last week, with all those people extolling your virtues. Most folks — even most public officials — don't get that kind of treatment until their funerals. You'll obviously need someone to keep you grounded. Your mother, were she alive, would find a way to puncture your aura. From now on, most lawyers (your staff likewise) will be afraid to be candid with you, and you don't have any bosses to evaluate you except when the court of appeals occasionally writes an opinion critical of one of yours. As a lawyer who doesn't appear in federal court, I'm therefore going to listen to what other lawyers say about you and compose emails from time to time to tell you, as feedback, what I see or hear. I may not have the courage (or death wish) to actually send the emails, but they might relieve the frustrations that I, like many lawyers, harbor about federal judges. So I've just composed my first email now, when I have nothing negative to report, in case I don't have a lot of those. 😊

HALFWAY THROUGH YEAR 1

The early reviews are pretty good. Lawyers love having a new kid on the block as a federal judge. They're enthused about your youth, your

recent experience of what it's like to be a lawyer, your early tentativeness as a judge, and your openness and willingness to learn. I did hear one comment that you're arrogant, but that was from a lawyer who by all accounts was unprepared for oral argument and unappreciative of your showing her up in front of her client in the courtroom. You may want to think about whether you need to shame a lawyer in front of a client. Perhaps you can accomplish your goal of improving lawyer performance in a subtler way.

OUTSET OF YEAR 2

This is scary. I'm composing emails to a federal judge, emails that will be candid and sometimes critical, even if I don't actually send them. Dare I send them? Anyway, here goes. I watched that sentencing you conducted last Tuesday, when you sentenced the female defendant to two years in federal prison for possessing crack cocaine with the intent to distribute it. I overheard one lawyer say to another lawyer afterward that you went easy on the defendant because she was female, that you would have been much tougher if the defendant were male. I'm not saying a defendant's gender makes a difference to you, I'm just saying some lawyers apparently think so, and they're starting to observe your sentencing practices and generalize from what they see. You should

probably read up on implicit bias and be mindful of how it affects you, especially at sentencing.

HALFWAY THROUGH YEAR 2

I read one of your opinions last week. It took a lot of effort, and I don't mean yours in writing it, but mine in reading it. Do you really need all that legal jargon and boilerplate? And your usage referring throughout your opinion to "the court" was off-putting. At first I thought you were talking about another court (like the court of appeals), but then I realized you were referring to yourself. Sort of reminded me of how people used to make fun of Bob Dole for talking about himself in the third person; or the old rule in high school that you could never use the word "I" in an essay, but had to say "the writer" or "the author." Seems pretty archaic. Everyone knows it's you speaking; why not just say "I"? Plus, the writing really didn't sound like you; it was stilted. Are you relying too heavily on your law clerks' drafting?

OUTSET OF YEAR 3

Rumor has it that you were offended by the media's negative reaction to the jury verdict in the civil rights suit against the police department, and that you're considering responding, in order to defend the outcome. Don't! We expect judges to be above that sort of thing. It's normal for there to be criticism, but if you respond, then you enter and prolong the debate and you as the judge look like just another political commentator with a point of view. We want our judges to be reserved arbiters, not players in the public arena.

HALFWAY THROUGH YEAR 3

You said at a bar meeting that you're surprised and disappointed at the lack ►

of trials, especially jury trials; that when you were confirmed you thought you were becoming a “trial judge”; and instead, you spend most of your time taking guilty pleas, sentencing, and deciding complex motions in civil cases. Surprised? Really? Where have you been for the past two decades? The decline in trials has been discussed for years. Savor the trials you do have and make them as satisfying as possible for the lawyers, the parties, and the jurors. But find your job fulfillment in those things that have become the primary role of a district judge and in doing them well; believe me, in most parts of the country that isn’t trials. For that matter, a lawyer’s role has changed dramatically as well, and many of us aren’t very happy about it. So suck it up, and stop bemoaning what won’t change and what you should’ve expected.

OUTSET OF YEAR 4

I hear you had a high school social studies class come to court to watch a proceeding. That’s great. There seems to be very little time or resources to teach civics to high school students these days, and that deficiency poses a challenge to the sound governance of our republic. For federal judges to step up and show how the third branch operates is wonderful.

But I see you also appeared at a meeting of the Federalist Society (maybe it was the American Constitution Society — it doesn’t matter which, for purposes of my comment) and talked about the need to appoint more federal judges who think like you do on how to interpret the Constitution. That’s definitely not a good idea. It was fine for you to be involved in that organization before you were appointed, and I understand they supported your nomination. But now you’re a judge, and you should no longer align yourself in the culture

It was fine for you to be involved in that organization before you were appointed, and I understand they supported your nomination. But now you’re a judge, and you should no longer align yourself in the culture wars. . . . Federal judges shouldn’t diminish their reputation for impartiality by favoring organizations that take, or are perceived as taking, a stance on public issues.

wars. Many will view your remarks as endorsing that organization. I’m sure a lot of the attendees liked your speech, but I expect many nonmembers, when they heard about it, did not. Federal judges shouldn’t diminish their reputation for impartiality by favoring organizations that take, or are perceived as taking, a stance on public issues. (I know, some of these outfits deny that they take positions, but that’s not how the world sees them.) Keep your views to yourself except as they’re material to an opinion you’re writing in a particular case or controversy.

HALFWAY THROUGH YEAR 4

(I still haven’t sent any of these emails, but it sure feels good to write them.)

You’re hitting your stride. The lawyers no longer speak of you as a new judge. But their enthusiasm is dimin-

ishing as they realize that any judge will disappoint them at some juncture. They say you’ve become aloof and are no longer much fun at the bar after dinner at a lawyers’ meeting. That’s probably a good thing. But lawyers also complain about the inaccessibility of federal court. They say all their motions get decided on the papers with no eye contact with the judge, no oral argument, no interchange. They’re not even sure whether they’re getting your attention or that of your law clerks. I think you should hold oral argument on motions more regularly, especially since the lawyers now appear before you in trials so infrequently. It’s good for federal court to be open and for federal judges to interact visibly with the lawyers.

On another subject, it irks lawyers when you disqualify yourself from a case without explaining your reason

except to cite the recusal statute. Why can't you give the reason, as in "I own stock in a party," or "I am acquainted with one of the parties"?

OUTSET OF YEAR 5

I hear you're showing yourself to be overly sensitive to circuit court reversals and inclined to make belittling references about that court. That's not good for your reputation, and I don't mean with the appellate court. Your criticisms or snide remarks may provoke initial laughter from lawyers, but in the long run they don't contribute to your being perceived as a sober and fair-minded judge. Instead, you look arrogant. Same thing with snide comments about Congress's legislative drafting or that of the state legislature. Cut out the snark. Some may think your criticisms are well-deserved, but a substantial number of others, including members of the other branches of government, will be offended. Just stop it! It diminishes your standing.

HALFWAY THROUGH YEAR 5

There's talk about one of your colleagues falling behind in workload and seldom appearing on the bench in open court. Are you aware of this, and are you taking steps to investigate to determine if there's a physical, mental, or emotional problem, or a medication or substance abuse issue? The reputation of your court as a whole is at stake.

Separately, and it's a minor complaint, but why can't you start your court proceedings promptly at the scheduled time? The lawyers say you're very critical when they're late, but you don't seem to hold yourself to the same standards. I know there are lots of things that can delay you, but remember that lawyers' time is valuable and costs their clients money. You probably know that jurors complain to

court staff when they're the ones who have to wait. You as judge need to set the example.

OUTSET OF YEAR 6

I see no progress in dealing with the concerns about your colleague. You say each federal judge is independent, appointed on good behavior, and subject only to impeachment. Those are high-sounding words, but they don't capture the seriousness of what your colleague is doing to the federal judiciary. Does the chief judge of the circuit know? Has anyone spoken to the judge's family to inquire what's going on? You can't let this situation continue. It's a microcosm of a larger problem in the country — a handful of federal judges are behaving badly and the mechanisms for dealing with them are too cumbersome and too slow.

By the way, on a more positive note, at a sentencing I attended last week where you imposed a fairly stiff sentence, I heard the defendant say to his lawyer as you left the bench, "At least the judge was fair to me." That's a pretty strong compliment in my book.

HALFWAY THROUGH YEAR 6

Finally! I'm glad to see your colleague took early disability retirement. I hope your court has found a way to deal more quickly and effectively with such issues in the future. As judges age and stay on the bench, there will inevitably be recurrent problems with medication side effects, early dementia, etc.

I've thought a lot about your controversial sentencing a month ago of a child pornography defendant who had been a teacher, the editorial reaction that your sentence was far too lenient, the critical letters citizens sent you, and the verbal harassment of your children at school by their schoolmates whose parents were unhappy with

your decision. I don't know the facts well enough to determine whether your sentence was the right one. I do know that criticism comes with the job, including the collateral impact on your family. You just have to do your best to explain to them that this happens to judges, that it's your responsibility to decide difficult cases, and that inevitably not everyone will like your decisions. But above all, don't respond to the criticism; it will just lower you to the level of your critics (and it is probably contrary to your ethics rules). Your opportunity to explain your sentence was when you imposed it. It's probably a good lesson that even when no one is in the courtroom except the defendant and lawyers, a federal judge needs to do a good job of explaining the sentence — not only for the benefit of the defendant and lawyers who are physically present, but because others later may become interested and investigate.

OUTSET OF YEAR 7

I hear increasing criticism among lawyers about variations in federal practice not only around the country but even within this District. Apparently you judges each have different rules for when a lawyer can file a motion, the length and nature of oral argument, when it will be heard, what a final pre-trial memorandum must contain, and such like. Why create such a cumbersome and idiosyncratic bureaucracy? We have national federal rules that are supposed to govern procedure in federal court. Why compel lawyers to go to the expense of finding and complying with specific rules for every district and for every judge within a district? Your personal preferences don't merit this kind of expensive variation.

HALFWAY THROUGH YEAR 7

I watched your courtroom ceremony ►

last week naturalizing new citizens. What a heartwarming and uplifting experience it was. In the midst of so much negativity about divisions within our country and where we're headed, it was reassuring to see this affirmation of who we are, and to see representatives of recent immigrants who have become citizens and of organizations like the Mayflower Society, the Daughters of the American Revolution, and the League of Women Voters all welcome these new immigrants to citizenship. Your remarks to the new citizens were inspiring. Keep it up! Invite lawyers and high school students to attend. This is America at its best, and federal judges like you should stay actively involved in the process.

OUTSET OF YEAR 8

By now, you're an experienced hand at this federal judging business. I hear you're actually teaching new federal judges how to do the job, I expect you're a good teacher. I wonder if it might be safe to actually send you these emails now that time has passed since the occurrences that prompted them. They might even be of value to you in teaching new judges. But I'm not ready yet!

HALFWAY THROUGH YEAR 8

How do you decide when to rule orally, when to write your decision, and if you do write, how long to write? I've heard a number of viewpoints from lawyers on that issue and they're not at all consistent. Obviously in a trial you generally have to rule orally, whether it's an evidentiary issue, a motion during the trial, or an objection to a lawyer's conduct. But there aren't many trials, and when you have a suppression motion, a discovery motion, a motion to dismiss or for summary judgment, you have a choice. Here's what I hear from the law-

yers. Some prefer you to make an oral ruling at the close of the hearing. They say that allows them to get on with the case, rather than abide the delay that comes with waiting for a written ruling. Some also like you to have to look them in the eye as you rule rather than await the impersonal (and they say more cowardly) later written ruling. But some don't like receiving a negative ruling in front of their clients and would prefer to read the written ruling and then be able to describe and characterize it to their clients. They also think it shows more respect for the force of their arguments than an immediate ruling does. Most are dissatisfied with the abbreviated text entry you can post on ECF granting or denying a motion, where there's not even a separate document to send to their client. They think that practice greatly trivializes the issue (and depreciates the dollar value of their service to the client).

Of course, whatever form the ruling takes, the lawyers want it as soon as possible. 😊

OUTSET OF YEAR 9

You must have seen the public disapproval of the settlement and attorney fees you approved recently in the consumer class action that was before you for so many years. Are you aware how difficult it is for ordinary Americans to understand that lawyers should get paid hundreds of thousands, perhaps millions of dollars, to obtain a recovery, while the aggrieved consumers get only a few dollars each and have to jump through hoops to demonstrate when and how they purchased something before they can get that? Most consumers don't even bother to try, given the value of their time. I know the theory: When so little is at stake for each consumer, a defendant can thumb its corporate nose at what

is legal or fair without fear of retribution, whereas uniting all consumers in a class action evens the playing field. I also know that a lot of lawyer time and expert fees are required to successfully pursue a class action, and you need a claims procedure that minimizes fraudulent claims.

But here's what happens: The lawyers for the defendant get paid a lot; the class lawyers get paid a lot (except when they lose outright); the individual plaintiffs — even those who successfully navigate the claims procedure — receive very little; and the defendant denies all culpability and says it settled only because it would cost too much to litigate the dispute. In other words, to most appearances, only the lawyers win. The whole thing just smells bad! There has to be a better way. But since class actions aren't going away any time soon (there are too many vested interests) and since all parties favor settlement over trial, the Rules drafters and appellate courts have told you district judges to fix things by paying closer attention and being more demanding of any settlement and attorney fee proposal. In fact, they've given you an impossible task; the class action settlement headache is not fixable by district judge scrutiny. Nevertheless, you're held up to the public as the guarantor of fairness in the outcome, so you must at least protect yourself from public obloquy, just as you do in sentencing, by describing in detail all the factors that are material — even though you're skeptical that collectively they point to any particular outcome. It's a thankless exercise — trying to deflect the inevitable criticism by what is ultimately just a torrent of words. We lawyers and judges know that with some exceptions, the class action industry is driven largely by money. Lawyers talk

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about how they're serving the public good, but what the public focuses on is the dollars the lawyers obtain, and nothing you say or do will change that. My colleagues who bring class actions would be aghast that I said all this, but fortunately this email will never see the light of day.

I do hear lawyer compliments about how you handle discovery disputes, requiring counsel to meet and confer first, then making a magistrate judge available to discuss any remaining dispute by phone or in person and prohibiting written motions until that occurs. The lawyers say that practice reduces much of the expense and delay that bedevils discovery elsewhere.

HALFWAY THROUGH YEAR 9

Over the last eight-plus years, I've watched a number of federal sentencing. As I expected, the Assistant United States Attorneys and the Federal Defenders performed professionally and well. What surprised me, pleasantly, was the performance of the private lawyers appointed to represent indigent defendants. Federal criminal prosecutions have become increas-

ingly complex not just because federal sentencing law is complex (it is), but because there's the growing challenge of digesting the mountains of information electronically contained in wiretaps and on cellphones and laptops. I know court-appointed lawyers don't get paid very well for what they do (although I understand the pay's better in federal than state court), but the ones I saw clearly put their hearts, souls, and intellects into doing the best job for their clients. I think federal courts should publicly recognize what these lawyers are doing.

And while I'm on that topic, how often do you compliment lawyers in any legal proceeding? They hear your expressions of impatience with them and feel their inadequacies are often highlighted while their accomplishments are ignored. Some positive comments (when deserved) would go a long way. You could tell them when they make a good point in oral argument. You could compliment their sentencing advocacy. There are plenty of missed opportunities.

OUTSET OF YEAR 10

I watched one of your infrequent civil jury trials last week from beginning to end. Some observations. You've said publicly that one result of the decline in trials is that lawyers have less experience and less skill in trying a jury case. That sure was manifest last week. I was surprised at how much leeway you gave the lawyers. I thought both lawyers abused the limits of an opening statement (it's not the time to argue the case but to lay out a simple narrative of what the evidence will show) and were sometimes over the top in their closing arguments (for example, expressing their personal opinions about the evidence and arguing that the jury should put themselves in one or the other party's shoes). Not only did neither lawyer object to their opponent's misbehavior, but you didn't intervene to stop it. And both sides wasted so much of the jury's time in repetitive questioning, unnecessary exhibits, etc. Don't you have an obligation to the jury to rein this in when it occurs? The courtroom doesn't belong to the lawyers, but to the public!

HALFWAY THROUGH YEAR 10

Are you aware that lawyers express bemusement at the constant presence of deputy U.S. marshals whenever you and your colleagues attend a public event? Now maybe you're under protection for an active threat, but word from the courthouse staff is that you're not, that you federal judges just prefer the escort. The lawyers observe that state judges travel and appear without attendants. They treat your different practice as part of the imperiousness of the federal court. Is it really necessary?

OUTSET OF YEAR 11

Why do you refer so many dispositive motions to the magistrate judges? The lawyers tell me the magistrate judges ►

are very competent, but the referrals add a layer of expense and delay because, after the magistrate judge makes a recommended decision, the Rules require time for an objection and response, and that entails new briefing. Then there's additional delay while they wait for the district judge to decide the motion. All of this costs more money and is duplication that could be avoided.

HALFWAY THROUGH YEAR 11

I understand that in light of the infrequent opportunities to appear in federal court, you're now increasing the number of oral arguments and encouraging law firms to use their

newer associates to do them. I think that's a great idea. Let me suggest an additional embellishment. How about inviting back to chambers, after the argument, any lawyer (and obviously that lawyer's opponent) who's appearing for the first time? It would help break the ice and make the first appearance more special. You could do the same thing when a lawyer first appears from out-of-state. Maybe it's inconvenient, but it wouldn't take a lot of time. It would be a nice gesture and help cement this District's reputation as a friendly District.

Now, about your steps to deal with the monumental challenge of e-discovery in civil litigation . . .

These fictional emails stop here in the midst of a thought. Readers will have to imagine what more this lawyer might have said about federal judges if given the opportunity. For lawyer readers, I expect that will not be difficult; for judges, it's worth the stretch to try.



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