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Judicial Jesting: Judicious?

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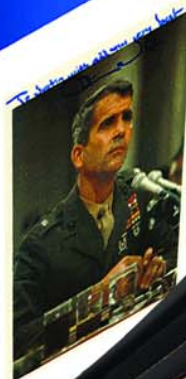


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Judicial Jesting: Judicious?

BY GERALD LEBOVITS

Many warn against using humor of any kind in a judicial opinion. Nearly all warn against using humor that does not assist the opinion's utility, goes outside the record, or ridicules or offends a litigant, the disinterested reader, or a cause of action.¹ Questionable humor has no place in writing meant to create precedent and reflect reasoned judgment. And this assumes that the opinion's author is funny. In the case of judges, that's rarely true. There are few funny judges, after all – only funny people who've made career mistakes.

The master, Justice George Rose Smith, once wrote, "Judicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down."²

Lightening wit is typically unenlightening. A judicial opinion demands propriety and professionalism. Humorous opinions, written to satisfy some need to be humorous, can cross the line. Some humor offends by exclusion and false notions of superiority. Humor also deflects from accountable decision making and judicial responsibility. It's one thing to have a sense of humor and grace on the bench, or to be clever during an after-dinner speech. It's another to express humor in writing. As recited in a judicial disciplinary opinion, "Under the heading of 'Ancient Precedents' in the canons of judicial ethics adopted in 1924 by the American Bar Association this appears: 'Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue.'"³

Dean Prosser agreed. He wrote that "the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig."⁴ That, however, did not stop him from compiling opinions for his book on the subject, *The Judicial Humorist*. Dean Prosser doubtless took his title from Gilbert and Sullivan's *The Mikado*. Sir William Gilbert, a lawyer, had the Lord High Executioner sing about persons who could be executed and not be missed, including "that *Nisi Prius* nuisance, . . . The Judicial humorist – I've got *him* on the list!"

Justice Cardozo's approach to humor was more tolerant than Dean Prosser's, but Cardozo did not recommend it. He explained that "the form of opinion which aims at humor . . . is a perilous adventure, which can be justified only by success, and even then is likely to find its critics almost as many as its eulogists."⁵ New York State judges have been on opposite sides of this question. In the Appellate Division, First Department, for example, Justice David Saxe rejects humor, while the late Justice Richard Wallach favored it as effective and memorable.⁶

Effective and memorable is truly funny humor that pokes fun at law or society, is in good taste, and does not belittle the litigants, demean the judiciary, or make future litigants apprehensive. And the humor must not dominate the opinion. The humor must be brief.

Judicial humor also has no place in important opinions. Would our perception of *Marbury v. Madison*⁷ be different if Chief Justice John Marshall had used a few off-color asides? What

if in *Brown v. Board of Education*⁸ Chief Justice Earl Warren had been a punning prankster?

But humor is acceptable when it's inherent in, relevant to, or complements the subject.⁹ Two examples. In *Peevey v. Burgess*,¹⁰ the Appellate Division, Fourth Department described how the defendant, a tobacco chewer, had attached a homemade spittoon to his pickup truck's emergency brake release. The truck needed repair. When the defendant's mechanic released the brake to go down a ramp, "six ounces of spit" sprayed into the mechanic's face. The mechanic, "disoriented," fell out of the pickup truck, which rolled down the ramp and struck another mechanic. With deadpan humor, the Fourth Department concluded "that it was . . . reasonably foreseeable that defendant's conduct . . . could . . . be a proximate cause of injury to a third party."

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In the second case, *United States v. Prince*,¹¹ the defendant so desperately wanted the court to relieve his public defender that he relieved himself on his defender's table in front of the jury. From the Tenth Circuit's opening paragraph:

While the public's perception of lawyers seems to reach new lows every day, parents – we are told – still encourage their children to enter this profession. But the parent who happens to read this opinion may not be so quick to urge a loved child to become a lawyer after learning how the defendant in this case expressed his extreme personal dis-

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like of his lawyer. Likewise, the would-be lawyer raised on the hit television series, *L.A. Law*, to believe a law degree is that golden ticket to a glamorous career of big money, fast cars and intimate relationships among the beautiful people may think twice before sending in his or her law school application when word of this case gets out.¹²

Some opinions are famous for their humor. *Miles v. City Council of Augusta*¹³ concerns whether Blackie the Talking Cat was exempt from paying taxes. While discussing Blackie's free-speech rights, the judge pretended that he actually spoke to Blackie. To the Fifth Circuit that opinion was the cat's meow, not a cat-o'-nine-tails. The district court's cataclysmic opinion was the catastrophic catalyst that catapulted the catatonic reviewing court to use every categorical "cat" catechism known to felinekind. No one can tell whether you will purr or hiss if you read the Fifth Circuit's opinion.¹⁴ Read it anyway. It has nine lives. And you should have *Miles* to go before you sleep.

For erudite humor in opinion writing, study anything by Judge Alex Kozinski of the Ninth Circuit.¹⁵ Few of us can write like Judge Kozinski does. Even fewer should try. It takes a lifetime of study to succeed. It takes a lifetime appointment to dare. Judge Kozinski, rated among the greatest American opinion writers, believes that it is not enough to be right. To Judge Kozinski, a judge must also be remembered.

Perhaps Judge Kozinski's greatest hit is *United States v. Syufy Enterprises*,¹⁶ an antitrust action against movie theaters. The court's opinion obliquely contains 207 movie titles. A few might give this star-chambered opinion das boot, but you should read it before it's gone with the wind. See how many movie titles you can spot.

To see how humor can fail, compare Judge Kozinski's work to the opinion in *Republic of Bolivia v. Philip Morris*

*Companies, Inc.*¹⁷ The defendant moved to transfer a tobacco case from Brazoria County, Texas, to the District of Columbia. Over Bolivia's opposition, the court granted the motion:

The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel.

. . .

[T]here isn't even a Bolivian restaurant anywhere near here! Although the jurisdiction of this Court boasts no similar foreign offices, a somewhat dated globe is within its possession . . . [T]he Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks . . . Bolivia, a hemisphere away, ain't in south-central Texas, and . . . the District of Columbia is a more appropriate venue (though Bolivia isn't located there either). Furthermore, as . . . the judge of this Court simply loves cigars, the Plaintiff can be expected to suffer neither harm nor prejudice by a transfer to Washington, D.C., a Bench better able to rise to the smoky challenges presented by this case, despite the alleged and historic presence there of countless "smoke-filled" rooms.¹⁸

I close by hanging my hat on this amusing thought:

It is an unfortunate truism that not all of life's moments are happy occasions; nor can one artificially impose humor where it naturally does not belong. To pretend otherwise would be akin to living in Monty Python's "Happy Valley," where anyone found breaking the law by not being happy at all times is brought before the merriest of judges and sentenced to "hang by the neck until you cheer up."¹⁹

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trial and appellate courts, from which this column is adapted. His e-mail address is GLebovits@aol.com.

1. See, e.g., Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 Tex. Tech. L. Rev. 869 (1993) (book review); Richard Delgado & Jean Stefancic, *Scorn*, 35 Wm. & Mary L. Rev. 1061 (1994) (arguing that judges often heap scornful humor on defenseless litigants); Adelberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. Miami L. Rev. 693 (1987); Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 Scribes J. Legal Writing 125 (1990).
2. George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 Ark. L. Rev. 197, 210 (1967). Justice Smith eventually changed his mind, though. See George Rose Smith, *A Critique of Judicial Humor*, 43 Ark. L. Rev. 1, 25 n.60 (1990) (declaring that "that part of the Primer disapproving judicial humor is hereby overruled, set aside, held for naught, and stomped on!").
3. *In re Rome*, 218 Kan. 198, 207, 542 P.2d 676, 685 (1975) (per curiam) (quoting 1924 Canons of Judicial Ethics).
4. William L. Prosser, *The Judicial Humorist: A Collection of Judicial Opinions and Other Frivolities* vii (1952).
5. Benjamin N. Cardozo, *Law and Literature*, 39 Colum. L. Rev. 119, 122, 52 Harv. L. Rev. 471, 483, 48 Yale L.J. 489, 501 (1939) (simultaneously published), reprinted from 14 Yale Rev. [N.S.] 699 (July 1925).
6. Compare David B. Saxe, *Not a Time for Humor*, Nat'l L.J., Aug. 14, 1989, p. 13 (con), with Richard W. Wallach, *Let's Have a Little Humor*, N.Y.L.J., Mar. 30, 1984, p. 2, col. 3 (pro) (explaining in margin that Justice "Wallach . . . has practiced what he preaches about humor in judicial opinions").
7. 1 U.S. [Cranch] 137 (1803).
8. 347 U.S. 483 (1954).
9. Lord MacMillan, *The Writing of Judgements*, 26 Canadian Bar Rev. 491, 493 (1948) ("[I]n all the best examples of judicial levity the lighter passages are not dragged in by the ears for the mere purpose of display but are strictly relevant to the issue and really advance the argument."). Our Canadian colleagues, by the way, are kidding cousins. Recognized as the best judicial parody is Canada's *Regina v. Ojibway*, 8 Crim. L.Q. (Can.) 137 (Sup. Ct. 1965) (Blue,

- J.) (finding that a pony is a bird); see Jerry Buchmeyer, *Judicial Logic: Birds and Ponies*, 45 Tex. B.J. 1345 (1982).
10. 192 A.D.2d 1115, 1116, 596 N.Y.S.2d 250 (4th Dep't 1993) (mem.).
 11. 938 F.2d 1092 (10th Cir.) (Brorby, J.), cert. denied, 502 U.S. 961 (1991).
 12. *Id.* at 1093 (citations omitted).
 13. 551 F. Supp. 349 (S.D. Ga. 1982) (Bowen, J.).
 14. See 710 F.2d 1542 (11th Cir. 1983). The *Miles* opinions are so notable the West Group published a book in their honor. See Blackie the Talking Cat and Other Favorite Judicial Opinions (1996).
 15. See, e.g., *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir.) (Kozinski, J., dissenting from denial of rehearing en banc) ("For better or worse, we *are* the Court of Appeals for the Hollywood Circuit.") (emphasis in original), cert. denied, 508 U.S. 951 (1993). Then read David A. Golden, *Humor, the Law, and Judge Kozinski's Greatest Hits*, B.Y.U. L. Rev. 507 (1992).
 16. 903 F.2d 659 (9th Cir. 1990).
 17. 39 F. Supp. 2d 1008 (S.D. Tex. 1999) (Kent, J.).
 18. *Id.* at 1009–10. For a discussion of the judge's opinion-writing style in this and other cases, see Steven Lubet, *Bullying from the Bench*, 5 Green Bag 11 (2001).
 19. Marshall Rudolf, Note, *Judicial Humor: A Laughing Matter?*, 41 Hastings L.J. 175, 200 (1989) (citations omitted).