Evidence and the One Liner: A Beginning Evidence Professor’s Exploration of the Use of Humor in the Law School Classroom

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I. INTRODUCTION

About a week after I accepted the offer for my current academic position, I got a call from our then associate dean. The substance of the call will seem familiar to most who have held academic positions. While I had been hired to establish a legislative clinic and teach professional responsibility and negotiation, the law school now needed an evidence professor. The associate dean suggested I take some time to think about picking up evidence and mentioned that both he and the dean thought that teaching evidence would be in my professional interest. Let’s see. I was returning to the world of law school teaching, in an untenured position, where my profession would be law professor. While I didn’t expect to find a horse head in my bed, the offer to teach evidence was one I couldn’t refuse.¹

So, I was going to be teaching evidence. Having been a Legal Services attorney and clinical teacher, I had tried many cases over the years. I knew something about evidence law, but my trial experience was in jurisdictions that had not codified their evidence law,² and evidence courses are now almost uniformly based on the Federal Rules of Evidence.³ In addition, I

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¹ In the interest of collegial harmony, I should mention that, now having gotten to know our then dean and associate dean, I realize there really was no threat involved and that picking up evidence was solely in my professional interest. Right. While I wrote this article from the perspective of a beginning evidence professor, the reader might wish to know that I have been teaching evidence since 1994.


³ See MUELLER & KIRKPATRICK, supra note 2, at xxxi, 3; EDWARD J. IMWINKELRIED,
have to admit that I never really understood that hearsay stuff about the sea captain walking around a ship and then setting sail. I had a job ahead of myself and needed to develop a strategy for designing and delivering the course.

One strategy for delivering the course was to package myself as one of my professors. Could I control the classroom as did my own evidence professor, Faust Rossi, with his Italian animation and warmth? Did I have the analytical skills of a Bob Summers to put a class through its Socratic paces? Was I a master of the subject matter in the fashion of a Rudolf Schlesinger? These patently rhetorical questions could quickly be answered, but what would allow me to at least hold my own in the evidence classroom? I decided it would be the trait that has so often helped me in life and occasionally exacted a toll—my sense of humor. In the classroom, I would live or die by the one-liner.

II. PREPARING THE COURSE

Knowing that I needed help, I contacted a number of friends who teach evidence. I asked questions about which text I might select, which topics were most important to cover, and which approach might be best for a veteran clinical teacher and beginning evidence professor. Two very helpful suggestions came from Faust Rossi. He suggested that I not give out a syllabus at the beginning of the semester; I would not cover all that I expected and the students might consider me disorganized. He also suggested that I select a text with a thorough and strong teacher’s manual.

4. The reader who has gotten this far might be incredulous at this boast. She should keep in mind, as I have found out during the course of writing this article, that being funny in print, where inflection and mannerisms are lost, is far more difficult than being amusing in front of one’s audience. “That’s my story and I’m stickin’ to it.” JIMMY BUFFET, That’s My Story and I’m Stickin’ to it, in OFF TO SEE THE LIZARD (MCA Records 1989). I should also mention, in case it is not yet apparent, that I have a dry sense of humor. In fact, it is so dry that sometimes I don’t even know if I’m being funny.

5. The persons I contacted were not pleased with the texts they were using, but only one seemed willing to change texts after the initial commitment. It struck me that, for some of us, the selection of an evidence text was likely to be a more lasting decision than the selection of a mate.

6. I would have three classroom hours in a semester to teach what seemed like six credits of substantive material in an area of law that is rife with opportunities to teach many important lawyering skills, including analysis, statutory interpretation, and trial practice.

7. The problem approach and the case approach were two obvious variations.
Whether he checked my evidence grade before giving me this later advice I
can’t say, but I followed it. I then focused on organizing my course and
mastering the law of evidence. While I knew that humor would be a vehicle
for delivering the law of evidence, at the time, I gave no systematic thought
to my goals in using humor or the ways in which it may be appropriately
used.

III. THE APPROPRIATE USES OF HUMOR

While humor is extensively used in law teaching—several of my own
professors were masters of the sarcastic method—and many have written
humorously on law school, few have written on the use of humor in the law
school classroom. Perhaps law professors have shied away from the topic,
thinking it excessively mundane; this has never been a problem for me.
Perhaps little has been written because “[o]ften important things are missed
because they are so simple that one overlooks them.”

Law professors have a myriad of reasons for using humor in the
classroom. For example, I use humor for my own enjoyment. Since my
salary is a fraction of that of most of my law school classmates, I figure I
might as well have fun, and a room with smiling faces is a pleasant sight. But I expect that neither my employer nor my students, despite my
comparatively paltry salary, believe that I should be compensated for
enjoying myself. This is probably true despite the positive spillover effect a
happy John Capowski may have on the effectiveness of his teaching. So, in
discussing humor’s purposes in the classroom, I am focusing on a few that
most directly aid learning.

Three uses of humor in the classroom that assist pedagogy are to
maintain interest, to help explain a point of law or concept, and to help
make the point or concept memorable. The importance of maintaining
interest seems patent since the student who is not paying attention is
unlikely to perceive what is being taught and this, of course, makes learning
more difficult. But humor has a benefit that goes beyond getting a student
to pay attention. It seems that “laughter causes significant increases in

8. See generally Andrew J. McClure, The Law School Trip (2001); Peggy S. Ruffra,
The ‘King of Jokes’ Proves There is Humor in Law School, L.A. DAILY J., July 12, 1982.
9. A rare example is James D. Gordon III, Humor in Legal Education and Scholarship,
11. I should also acknowledge that, at certain points in my evidence and procedure
courses, a room filled with students with confused expressions also gives me a great deal of
pleasure.
catecholamines, the so-called alertness hormones that include adrenaline.⁹¹² There appears to be a physiological basis for why humor enhances human attention.

Humor also can help explain a concept in a manner analogous to non-humorous explanations but has the added potential benefit of making persons less defensive about looking at concepts and problems with a new perspective and less defensive about changing their views. For example, the application of a general principle to a range of factual situations can make for absurd and humorous results. Many law professors have lovingly shown the naive student who adopts one of these general principles the absurd and humorous results that can arise from its application to various scenarios. The professor proverbially pushes the student down the slippery slope.¹³ If done well, all benefit.

The appropriate use of humor can also make a point or concept memorable. Increased memory may come from the increase in adrenalin I mentioned earlier. At a less neurobiologic level, we may simply remember things that cause emotional reactions, whether those of pleasure or discomfort. While the student may initially remember the joke that embodied the concept, the association between the joke and concept will resolve over time, and the concept, one hopes, will stand on its own in the student’s mind.

While there are certainly other pedagogically viable reasons for using humor in the classroom, some of which I will mention shortly, I believe that maintaining interest, helping to explain a point, and aiding recollection are primary. Of course others may value things differently than I and be less inclined towards this trinity of pedagogical humor goals. A joke might promote only one of these goals. For example, one might begin a class with a humorous story¹⁴ simply to get the class’s attention, although even here

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¹² Gordon, supra note 9, at 316 (citing Jamie Talan, Laughing on the Outside: Sick Humor May Be a Way We Release Our Tensions, DESERET NEWS MAG., May 4, 1986, at 51). Because of the lightweight name of the magazine in which Talan’s article appeared, credential-conscious individuals might appreciate knowing that the article reported on the findings of a Stanford University study.

¹³ A professor’s view of what is loving and humorous may differ from that of her students. In an evaluation of my teaching, one of my students suggested, “Prof. Capowski is very funny but may not seem so to the student he is working with at the time.”

¹⁴ An example is: A funny thing happened to me on the way to class today. I was passing by a student car. It was one of those cars that looks like it’s inhabited by a homeless person—water bottles, candy bars and wrappers, and the other detritus of a human life strewn about the interior. Two things especially caught my eye. There was a resume kit and a Victoria’s Secret catalogue. Two different, although not necessarily mutually exclusive, approaches to the job search.
example, to believe that stress production was a pedagogical positive. Stress in the classroom was probably lauded for a number of reasons. First, as mentioned earlier, adrenaline can increase attention and learning.18 Second, the practice of law is stressful, and I expect that many professors believe that a stressful classroom experience can prepare students for practice, especially courtroom work, the formality of which many law school classrooms mirror.19 Third, some law professors argue that no matter how badly they behave in the classroom, their behavior will be mild when compared with that of the attorneys against whom our students will practice. The professors' behavior prepares the students for the adversarial environment.20

Before talking about humor's positive effect of decreasing stress in the law school classroom, I should mention a few points about why the classroom environment is stressful. First, many of our students are coming from educational environments of certainty, or at least that is the impression. For example, in an art history course they might learn that Fairfield Porter was an art critic and figurative painter during a period of abstract expressionism.21 At law school, they move into a world with fewer clear answers and where uncertainty appears the norm. They also move from an environment where knowing information may be the goal to an environment where knowing information is only the beginning of learning.

discuss the difficulty and responsibility of law practice. The professor used the subjunctive in phrases such as, “Mr. Weinberg, were you to become an attorney . . . .” The professor ended by saying, “Well Mr. Weinberg, I guess we can't count on you any longer,” and, with a grand gesture we all could see, marked an X over Weinberg’s name on the seating chart. This incident happened years before I had heard the phrase, “humanistic legal education.” See generally ELIZABETH DVORKIN ET AL., BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (1981).


19. The physical structure of many classrooms mirrors that of other settings where authority is garnered through physical design. Courtrooms and churches are examples, where the one in authority is placed at the front of the room, often on an elevated platform, and separated by a railing or other physical barrier from those who are subservient.

20. One of the problems with this argument, an argument that I have occasionally made, is that the behavior of law professors may be both creating and approving a practice environment in which discourtesy is appropriate.

one might suggest other purposes. But I believe the ultimate classroom joke is one that fulfills all three primary purposes and may aid a couple others as well. A brief example seems appropriate.

Like other evidence professors, I have been saddened when I read a generally strong exam from a student who failed to properly distinguish between the very basic terms "sustained" and "denied." The confusion may come from the fact that when an objection is sustained, the evidence is excluded, or, alternatively, denied admission. Perhaps the confusion comes from the stress of the exam situation. Regardless, a joke, and one that satisfies my pedagogical humor trinity, can alleviate the problem, if not solve it completely. After explaining the confusing nomenclature, perhaps after a student has just made the error in class, one writes on the board: Sustained/EXcluded. This humorous device gets attention, helps to explain the point, and also makes the point memorable.

In addition to aiding attention, explaining concepts, and making points memorable, humor can relieve stress in the classroom. Law professors of my generation may be surprised that I am citing stress relief as a positive. Given that many of us suffered through charades like the shrouding depicted in the television version of The Paper Chase, we were trained, by

Of course one needs to exercise caution when using jokes that have sexual content and, as discussed later in the article, some humor is clearly inappropriate and the appropriateness of humor may depend upon many factors, including who one is and one's relationship with one's audience. For example, the preceding story may have offended some of my readers, but a group of evidence students half way through the semester with me would have a different view of the story's offensiveness. In addition, the affect of the storyteller has a great deal to do with how his story will be received. The comedian and actress Sarah Silverman, "[l]ike Chris Rock, [] can get away with almost anything because her gleaming smile signals mischief rather than malice. ('I want to get an abortion but my boyfriend and 1 are having trouble conceiving.')" Richard B. Woodward, She's Funny, but Can TV Find a Spot for Her?, N.Y. TIMES, Aug. 4, 2002, at Arts & Leisure 27.

15. As I will discuss shortly, stress relief can assist learning and a humorous story is likely to have that effect.

16. This example is from Prof. John Barkai at the University of Hawaii School of Law. Each year John asks his students for mnemonics that might assist learning in the course. This was one of the entries.

17. JOHN J. OSBORNE, JR., THE PAPER CHASE (anniversary ed., Whitson Publ'g Co. 2002). This citation is to the book, which does not include the television version's shrouding, in which Professor Kingsfield, following a poor response by a student, places a shroud over the student's head. The Cornell Law School version of shrouding was played out on the seating chart. Approximately two weeks into the semester, our contracts professor called on one of my classmates to discuss a note following one of the cases. After a response that I thought was as good as, if not better than, I might have delivered, the professor provided the student with the "Jealous Mistress Lecture." The professor began, "Well Mr. Weinberg, are you telling us by the character of your response that you are unwilling to put in the time and effort that it takes to become a lawyer?" He then went on, for what seemed like an interminable amount of time, to
Second, this new environment is accompanied by, for many, a new method of teaching we inappropriately call the Socratic method.\(^\text{22}\) In the student's former educational environment, professors provided answers. In the student's new environment, the professors may provide only questions. The fact that students find stress in this mirror of their former experience, this new bizzaro world,\(^\text{23}\) is natural. Third, the students are called upon, not to sit idly in the classroom if they wish, but to involuntarily perform upon demand. With public speaking the leading phobia in this country,\(^\text{24}\) most students to some degree, and many to a great degree, will find this experience frightening. Fourth, the law school environment is a competitive one, and, for many law students, this competition will add stress.

Given the multiple causes of stress in law school, and I have mentioned only those most prominent in the classroom, and the fact that excessive stress affects our senses\(^\text{25}\) and impedes learning,\(^\text{26}\) some efforts at stress reduction can be positive and humor is certainly one way to provide this relief.

### IV. The Inappropriate Use of Humor

While humor has a positive role in legal education, it can also be inappropriately used. Vulgarity is inappropriate and, obviously, "[j]okes based on racial, sexual, or religious bias are also inappropriate; they injure people and relationships, reinforce uncharitable attitudes, and promote bigotry."\(^\text{27}\) The more difficult question is whether jokes that have class

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\(^\text{23}\) Superboy No. 68 (D.C. Comics, Nov. 1958); see also Seinfeld: The Bizzaro Jerry (NBC television broadcast, Oct. 3, 1996).

\(^\text{24}\) \textit{Facing Down the Number One Fear}, 10 \textit{COMMUNITY BANKER} 55, 55 (2001).

\(^\text{25}\) Seth D. DuCharme, \textit{The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance}, 70 \textit{FORDHAM L. REV.} 2515, 2541-42 (2002). Dr. Alexis Artwohl, a clinical psychologist, has found that when persons experience extreme stress as a result of being placed in life threatening situations, they often experience numerous physiological changes. \textit{Id.} at 2541. These changes include: "[t]unnel vision" ("the loss of peripheral vision [...] due to changes in the way the eye transmits information to the brain"); "[h]earing distortions" (the most common being a kind of hearing loss known as "‘auditory exclusion’"); and "[t]ime [d]istortion" ("[e]vents may seem to occur in slow motion or, conversely, extremely rapidly"). \textit{Id.} at 2541-42; see also Devera Pine, \textit{She's Got the Blindness Blues}, \textit{HEALTH}, Jan. 1988, at 20.

\(^\text{26}\) \textit{WHITMAN}, supra note 18; see also \textit{ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL} 26-32 (3d ed. 1997) (discussing the effect of stress on memory).

\(^\text{27}\) Gordon, \textit{supra} note 9, at 318–19.
members as victims are appropriate. Mark Twain has suggested that "[t]he secret source of [h]umor itself is not joy but sorrow. There is no humor in heaven." Because the only persons in my classroom are my students and me, better that they suffer the sorrow. Now Twain's comment doesn't always apply—there is humor that does not look to pain for its effect in that a not-present third party might be the focus of a joke. But much that takes place in the classroom is humorous, and often the humor is precipitated by an inaccurate student response. While my mid-western colleagues might object, having grown up just fifteen miles from New York City, I am too much the New Yorker to let these opportunities for humor pass. But where is the line between turning students into victims of one's humor and having them be willing and amused participants in a collaborative classroom environment? It strikes me that several factors can mitigate, if not eliminate, the deleterious effects of humor on students who provide the source for classroom humor. First, my humor is often self-deprecating. While belittling oneself may not be the best of personal traits, sharing the bull's eye of jest allows humor directed at others to be less personal and have less sting. Second, I believe one needs to have affection for one's students and convey that to them in one's interactions with them. Different faculty members will do this in different ways, but some small efforts can do much to show this affection. Learning their names, showing an interest in their lives and experiences outside of law school, and being at school and available all show this concern. Third, holding back from using humor in a situation that would allow for the proverbial cheap shot where the recipient of the comment might seem fragile or be a student for whom one has little affection can also mitigate the harmful effects of humor when it is used.

Having often described my job as intellectual stand-up, I consider humor important, but equally important is that one use humor effectively and appropriately.


29. The most productive type of courtroom humor is self-deprecating because it humanizes the attorney to the jury. Jurors appreciate lawyers who don't take themselves seriously, but take their cases seriously. This is confirmed by social science studies showing that people tend to like you better if you use a moderate amount of self-deprecating humor. According to communication expert Professor Charles Gruner of the University of Georgia at Athens, a little self-effacement shows that a speaker feels strong enough to make fun of himself and it creates audience rapport.

Malcolm Kushner, Using Humor to Persuade a Jury, 48 OR. STATE BAR BULL. No. 4, at 8 (Jan. 1988).
In an article on the use of humor in teaching evidence, it seems appropriate to include some additional examples from the evidence class.

A. Federal Rule of Evidence 805 and Polish Magic

Federal Rule of Evidence ("F.R.E." or "Rule") 805 requires that to allow admission when there is hearsay within hearsay, there must be an exception for each hearsay portion. For example, if an individual makes a hearsay statement against his interest and that statement is included within a business record, there need to be exceptions that allow the admission of both the statement against interest and the business record. The rule seems straightforward, at least to evidence professors, but even students who understand hearsay often have difficulty with hearsay within hearsay. Evidence professors often describe hearsay within hearsay as a chain of hearsay with admission requiring that one break, or have an exception for, each hearsay link in the chain. Polish magic can help.

After drawing two chain links on the board and discussing the need to break each link, I form two links using the index fingers and thumbs of my hands. See diagram 1. I then feign an attempt to pull the links apart. While humming what one might describe as carnival calliope music, I put the still-joined links behind my back and, when my hands appear again, the links are separated. See diagram 2. Polish magic grabs attention, helps explain Rule 805, and makes understanding the rule memorable. At least I hope it does.

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30. When talking about and demonstrating Polish magic, one is more likely to be politically correct with a surname that appears Polish, even if one's name is anglicized from the original Ukrainian Cyrillic "Tsapovsky."
31. FED. R. EVID. 805.
32. Rule 805 states: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Id.
33. See FED. R. EVID. 804(b)(3), 803(6).
Before giving an example of meta teaching or even defining meta teaching, I should define meta. Herbert Kohl suggests that meta, "when used with the name of a discipline, designates a new but related discipline designed to deal critically with the original one." So, for example, meta teaching would be a discipline designed to deal critically with teaching. While first year students have no training in teaching and little in law, they often consider themselves masters of meta teaching, and law school administrators encourage this view through the use of teaching evaluations.

One who has taught law for a few years often will know the students' criticisms of his or her teaching—that is, the students' meta teaching concepts—before the students do. Highlighting these criticisms in class through meta teaching can provide humor, aid understanding, and blunt the criticisms. For example, my students long for a simple concept of hearsay and one in which a statement will either be hearsay or not be hearsay. Like an actor making a stage aside, I might feign the role of a student and suggest, "Damn, how does he expect us to understand this stuff? When someone says, 'I'm Joe Forrest from Interstate Gas,' it ought to be hearsay or not. It shouldn't always depend."  

C. Past Recollection Recorded, Present Recollection Refreshed, and Pasta Fagoli

Rule 803(5), in general, allows a writing to be entered into evidence if, among other things, it is accurate and was made by the witness when the subject matter of the memorandum was fresh in the witness's mind. A key requirement of the rule is that the witness no longer remember the

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37. Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial
The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . . (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Id. (emphasis added).
information contained in the memorandum sufficiently to testify fully and accurately.\(^\text{38}\)

The past recollection recorded hearsay exception developed from the earlier practice of present recollection refreshed.\(^\text{39}\) Present recollection refreshed, a trial custom going back to the middle of the 1600s, allows witnesses to testify from present memory after using a memorandum,\(^\text{40}\) or anything else,\(^\text{41}\) to refresh their failed memories. To bring the concept of present recollection to life, Faust Rossi told my evidence class about a case he had “witnessed.” A young district attorney has called his first witness, Mrs. Rossilini, an elderly woman whose home had been burglarized. The attorney asks his witness what happened on the evening of October 25 of the previous year. The witness, imitated with Faust’s best Italian accent, responds, “I donna remember.” The dialogue continues with the panicked attorney attempting to get his witness to testify about the burglary. Failing, he asks for a recess and runs to a nearby restaurant. He returns with a bowl of pasta fagoli, shows it to the witness, and then asks if she remembers what happened on the evening of October 25. The witness exclaims, “I was a cookin’ pasta fagoli, when that man (pointing to the defendant) broke into my house.” I expect my classmates remember that one can use anything to refresh recollection.\(^\text{42}\) They also recall that introducing the item used to refresh recollection into evidence can make the trial process too messy.\(^\text{43}\) Despite my ethnically wanting lineage, I have used this same story with success. The one time it failed, as amusement if not pedagogy, a student suggested that I needed a Ukrainian protagonist and cuisine. I’ll be warming up the holubtsi and pyrogi this fall.

\textit{D. Rule 804 and Chinese menus.}

While Rule 803 provides twenty-three exceptions to the prohibition against admitting hearsay testimony regardless of whether the declarant is

\(^{38}\) \textit{Id.}


\(^{40}\) \textit{Id.}

\(^{41}\) \textit{4 Weinstein’s Federal Practice} § 612.03 (Joseph M. McLaughlin ed., 2002).

\(^{42}\) Faust, in deference to more modern tastes, has substituted fettuccine Alfredo for pasta fagoli.

\(^{43}\) “The device [used to refresh recollection] need not be admissible, and is usually neither admitted into evidence nor seen by the jury. After being used to revive the recollection, the device is devoid of evidentiary status . . . .” \textit{Glen Weissenberger, Federal Evidence} § 612.1 (4th ed. 2001).
available to testify, Rule 804(b) lists five exceptions but requires that the declarant not be available to testify under one of the five listed definitions of unavailability. So why is rule 804 like a Chinese restaurant menu? Because you must select one from column A and one from column B. After the first time I used this analogy, a student came to class with a menu from the nearby New Great Wall Chinese Restaurant. I now explain to students that, for example, under Rule 804, one might admit former testimony if the declarant is unable to be present to testify because of illness, and, at the New Great Wall, one might select General Tso’s Chicken from column A and Broccoli with Garlic Sauce from column B. To have admissible hearsay under Rule 804, one needs a selection from section (a) and a selection from section (b), and you can’t have the Dinner Special without one from column A and one from column B.

Well, that’s it for me on humor in the classroom. Gotta’ get some dinner.

44. Fed. R. Evid. 803.
45. Fed. R. Evid. 804(b).
47. Oakhurst Shopping Center; Linglestown Road; 4412 Oakhurst Blvd.; Harrisburg, Pa.
50. New Great Wall, Menu, Dinner Special (A)(1).
51. Id. at (B)(9).