

## Courtroom Humor

*Honorable Stanley Mosk*

NOT INFREQUENTLY at a bar association luncheon or an equivalent civic occasion, I am asked: "Tell us about humor in the courtroom. Certainly you must have heard some great jokes during the course of oral argument in pending cases." My original inclination was to deny that humor has any place in a courtroom. Certainly the issues are too serious, often complicated, and have such a profound effect on the participants that humor would be distinctly out of place. On reflection, however, I have been compelled to concede that humor does creep into courtrooms from time to time. It takes a number of forms, but should never detract from the seriousness of the proceedings, particularly to the litigants whether criminal or civil. They seldom see anything funny in their predicament.

Justice Cardozo in his book, *Law and Literature* (pp. 26-27), wrote that "The form of opinion which aims at humor from beginning to end 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." Gilbert, of Gilbert and Sullivan

fame, referred to humor as "a drug which it's the fashion to abuse." Thackeray called humor a mixture of "love and wit." There are other comments by great writers, but they discuss written material; few if any have dealt with the validity, the desirability, the obvious and the hidden dangers of humor during oral argument in a court.

There are at least two ways in which a lighter moment invades the courtroom. There are remarks *by* the judge. Parenthetically, the lawyers involved will generally find it advisable to politely laugh. Then there are comments directed *to* a judge. Counsel would find it desirable to undertake this effort with extreme diplomacy if they anticipate a future in that courtroom.

I confess to being one who enjoys gentle humor as long as it is not pointed at the vulnerability of the target. A few recent examples of courtroom humor, all true, come to mind. One may approve or disapprove of what actually transpired. Sort of thumbs up or thumbs down.

Our former Chief Justice, Malcolm Lucas,

generally a serious-minded jurist, had the ability to lighten oral argument without deprecating the participants or in any manner suggesting the cause was unworthy of serious contemplation. I recall a case involving a fortune teller. Her home town passed an ordinance forbidding fortune telling within the city limits. Not regulation, but total prohibition. Obviously there were some First Amendment problems involved. After all, every sports page of a newspaper forecasts how games will turn out. And most ministers forecast in sermons what the hereafter will be like. The fortune teller sought an injunction to prevent enforcement of the ordinance. She lost in the courts below and our court granted a hearing. As the attorney for the fortune teller arose to argue, Chief Justice Lucas said, "Counsel, you have us at a disadvantage." The attorney was incredulous. "Why, Your Honor?" he asked. Chief Justice Lucas replied, "Hasn't your client told you how this case will turn out?" I must say that I could not have fielded that query in an intelligent manner. This lawyer, however, rose to the occasion. "Your Honor must realize that I did not consult my client for advice, she consulted me." Touché!

As a postscript: the fortune teller prevailed in a unanimous opinion. (*Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501.)

A second favorite incident occurred during oral argument in a case of little significance otherwise. An attorney was presenting his contentions to our court. A question was asked of him by one of the justices. The attorney paused a moment, then replied: "Your Honor, it is a strange coincidence that you should ask me that question. I was rehearsing my talk at home last night, and my wife asked me the identical question. She suggested this reply." He proceeded with his presentation. A few minutes later into his argument another question came from the bench. A justice interrupted to inquire: "What did your wife say about that one?"

Getting the last word away from a judge is a sensitive undertaking. In another actual incident, one of our justices anticipated counsel's analysis in a hotly contested matter. Appellant's counsel had concluded his presentation, and respondent was about to begin. While counsel was still collecting his papers and notes at the counsel table, the member of court rather gruffly asked: "Counsel, how do you distinguish the case of *Smith v. Jones*?" Respondent's counsel calmly collected his papers, strode to the podium, spread his notes out in a casual manner, and then replied: "Would Your Honor mind if I said, 'Good morning' first?" A gentle put-down without incurring the wrath of the court.

Then there is the California Court of Appeal justice, William Bedsworth, who wrote an unpublished opinion in what may be described as poetry. In upholding a conviction in the case of *People v. Buenrostro*, the justice concluded in this manner:

[A] gunman . . . was accompanied  
by a female accomplice  
who reached into the register  
to gather the loot –  
While he wielded his handgun  
and threatened to shoot.

The gunman turned to a regular customer,  
as he stood in the foyer –  
And took his \$250 – a Christmas bonus from his  
employer.

Events happened so quickly,  
no one was quite clear  
Who committed the robberies  
'midst the six-packs of beer.

But much to the robbers' chagrin and regret –  
Their misdeeds were taped on a videocassette.

A judicial aspect that appeals to me – unusual though not strictly meant to be

humorous – are opinions of judges that employ phrases or words not in common use. A Ninth Circuit judge has earned a reputation for his requirement that readers of his opinions keep a dictionary at their elbow. How about writing of a party’s “aduncous claim”? Or declaring federal sentencing guidelines that “generate inspissate brumes”? An inadequate brief has been described as a “slubby mass of words.” In short, Judge Ferdinand Fernandez tries to wipe away “some of the fuliginous overlay” in earlier authorities and to clear up the darkness, that is, tenebrific. The distinguished judge is well known for his literary acumen. Generally his opinions are under-

standably received with a certain amount of awe. (See comment in “Holding, A Judicial Choice of Words,” *San Francisco Chronicle*, June 21, 1998, sec. II, p.3.)

The American Bar Association has reported that a number of lawyers have turned to humor as a full-time vocation, actually appearing in comedy clubs professionally. (See “Laughing at the Party,” *ABA Journal*, July 1998, p. 86.)

Many other examples can be recalled. I conclude that modest lightening of otherwise rigid judicial proceedings or writing can be tolerated – if in good taste – whether *by* a judge or *at* a judge. 