YLD
Allegheny County Bar Association

Point of Law

The E-Newsletter of the Young Lawyers Division of the Allegheny County Bar Association

Summer 2022

ACBA YLD BLI Class of 2022 Women's Shelter Toiletry Drive a Success

By Matthew J. DeMaio

The Bar Leadership Initiative Class of 2022 successfully completed a toiletry donation drive for several local shelters, concluding the drive at The Foundry on the North Shore. Members of the Bar Leadership Initiative placed empty boxes at law firms and organizations throughout Pittsburgh and advertised the drive on various platforms. Excitement and generosity were the general responses, as toiletry items are one of the most requested class of items in shelters.

After collecting the donation boxes, members of the Bar Leadership Initiative delivered the items to the Allegheny County Bar Association headquarters in the Koppers Building. After collecting more than $600 in online donations and purchasing toiletry items at Target, all donations were then distributed to three local shelters. The drive benefitted Gwen's Girls, the Latino Family Center, and Three Rivers Youth.

Members of the Bar Leadership Initiative Class of 2022 sorting donation items.

Capping off the toiletry drive was a happy hour at The Foundry where a special drink, called the Bar Liquor Initiative, was a featured item. Consisting of seltzer, gin, cucumber, mint, lime, and sugar, a percentage of all sales of the Bar Liquor Initiative were donated to the YLD and used to purchase additional toiletry items for the shelters. More than fifty people appeared at The Foundry and offered their support of the toiletry drive.

The toiletry drive concludes a successful Bar Leadership Initiative year, where members attended various YLD committee meetings and community events. The Bar Leadership Initiative is a program of the YLD designed to encourage active participation in the

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Bar Association by young lawyers. The Bar Leadership Initiative Class of 2023 is currently accepting applications. ■

Matt is an Associate Attorney at Robb Leonard Mulvihill LLP practicing insurance defense and commercial litigation. Matt graduated from the University of Pittsburgh School of Law in 2020 and Saint Vincent College in 2016.

Some of the donated toiletry items destined for area shelters.

Members of the Bar Leadership Initiative Class of 2022 pose at The Foundry.

The Court Jester, or so to Speak . . .

By Renel Datulma

In the legal profession, the adversarial nature creates tension and anxiety. There is a proverbial tug of war in pleading cases and attempting to stave off the consequences of losing in court. This, at times, leads to the strangest occurrences. Here are some of the most outrageous things ever said in a legal proceeding:

Haluck v. Ricoh Electronics, Inc., 60 Cal. Rptr. 3d 542 (Ct. App. 4th Dist. 2007).

In an employment discrimination case, the defense attorney's use of comedy resulted in the loss of a jury verdict in his favor. A plaintiff testified that being fired left him feeling like he was trapped in a white, windowless room with no exits. The defense attorney began this cross-examination:

Defense Attorney: Have you ever heard of The Twilight Zone?

Witness: Yes sir.

Defense Attorney: Goes kind of like this, do do, do do . . . You're traveling through another dimension, a dimension not only of sight and sound, but of mind, a journey into a wondrous land, whose boundaries are that of imagination; that's a sign post up ahead, your next stop, The Twilight Zone. Do do, do do. Do do, do do.

The plaintiff's attorney pleaded with the court to order the defense attorney to "stop singing." However, the singing was only a small part of the trial. At one point, the judge announced that "we're going to the soccer method here," as he began issuing "red cards" whenever he disagreed with the plaintiff's legal objections. The judge also fashioned a handmade sign reading "overruled," creating a courtroom version of the judges' paddles on Dancing with the Stars. The next day, the defense attorney brought his own, "much nicer version" of the overruled paddle for the judge to use.

The California appellate court reversed the defense verdict and remanded the case for retrial before a different judge because of the "circus atmosphere," the trial judge's "misguided attempt to be humorous," and particularly how defense counsel "played into it." The court of appeals concluded that "a courtroom is not the Improv and the presider's role model is not Judge Judy."

People v. Melton, 750 P. 2d 741 (Cal. 1988)

In a death row case, one defense attorney was attempting to describe a hypothetical scenario in which he shot another defense attorney:

Defense Attorney: If I were now to harm, shoot someone, Mr. Strople here, if I shot him right now—

Court: Permission granted.

Defense Attorney: That might be justified—

Court: Mr. Strople is a public defender, for the record.

On appeal, the defendant claimed that this joke revealed the judge was biased against defense attorneys (because it is "justified" to shoot them). The appellate court agreed that the jokes were "unfortunate," but rejected a new trial, calling the jokes "relatively brief and mild," and noting that the defense attorneys themselves participated.

Miscellaneous Courtroom Exchanges

Exchange #1

ATTORNEY: Doctor, before you performed the autopsy, did you check for a pulse?

WITNESS: No.

ATTORNEY: Did you check for blood pressure?

WITNESS: No.

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Elon Musk's Acquisition of Twitter and Free Speech Concerns

By Matthew J. DeMaio

You likely have heard that billionaire Elon Musk has acquired Twitter, the de facto digital town square. Proponents of Musk's acquisition believe he will allow a greater range of speech on the platform, removing Twitter's content moderation policies that have led to controversy in the past. Opponents of the acquisition argue that walking back Twitter's existing content moderation policies will result in greater degrees of hate speech and bigotry.

Frequently invoked in these free speech debates is the First Amendment to the United States Constitution. The First Amendment reads, in relevant part, "Congress shall make no law abridging the freedom of speech." A common comment is that the Constitution only applies to state actors, which Twitter is not. While the First Amendment does not directly apply to Twitter, the First Amendment is frequently invoked as the key symbol of free speech.

The concept of free speech, in the English common law tradition, has been in development for quite some time. First appearing in 1215 in the Magna Carta, free speech was a principle codified as the right of English barons to petition the King for redress of grievances without delay. The right to petition was only available to a privileged few, but it laid the groundwork for speech to be used as a mechanism against wrongs inflicted by the King of England, 474 years later.

Enacted by the English Parliament in December 1689, the English Bill of Rights asserted "certain ancient rights and liberties." Among these is that "freedom of speech...in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Bill of Rights (Act) 1969 (England) 1688 c.2 (1 Will and Mar Sess 2). This is one of the first times in the English common law tradition that freedom of speech is expressly codified. The purpose of this ancient right and liberty was to allow Parliament members to speak freely, without fear of repercussion outside of Parliament.

In November 1765, Sir William Blackstone published one of the most foundational pillars of the English common law tradition, *The Commentaries on the Laws of England.* In *The Commentaries,* Sir Blackstone extended the ancient right of freedom of speech from members of Parliament to the press, arguing that then-existing prior restraints on publication were antithetical to freedom. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published." W. Blackstone, The Commentaries on the Laws of England 151-52 (T. Cooley, 2d rev. ed. 1872). Sir Blackstone suggested subjecting speech to prior restraints destroys its very purpose, for those approving the speech are human and thus subject to human biases, flaws, and preconceptions. "To subject the press to the restrictive power of a licenser...is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." Id. at 151-52.

In 1776, the Virginia Legislature passed the Virginia Declaration of Rights containing an endorsement of Sir Blackstone's warnings against restraining the press: "[T]he freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." VA Const. Art. I, § 12. During ratification of the

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When Competency and Creative Arguments Clash

By Renel Datulma

Lawyers are taught from the moment they enter law school to be diligent and prepared for anything that can be thrown at them. This is imperative for lawyers to zealously advocate for their clients. The Model Rules of Professional Conduct state that, "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Model Rules of Prof'l Conduct: Preamble 2 (Am. Bar Ass'n 1983). "Zealous advocacy" is defined as the lawyer's duty to represent a client zealously within the bounds of the law, but these boundaries have not been defined. J. Eagle Shutt, Criminal Defense, Zealous Advocacy, and Expanded Ethics Dialogue, U.S. Department of Justice: Office of Justice Programs (2002), *https://www.ojp.gov/ncjrs/virtual-library/abstracts/criminal-defense-zealous-advocacy-and-expanded-ethics-dialogue.* Ethically, there may be more at stake than fair trials for defendants, such as justice, decency, and decorum. Id.

There are different approaches to effectuate zealous advocacy. Some have used the tried and true method of a serious approach to all matters. Others have found unconventional methods to achieve the desired end results. Some believe humor, puns, and pop culture should be allowed in legal proceedings. Others believe there is no place for such because there is too much at stake in legal proceedings. See, e.g., John G. Browning, Humor in the courtroom: No laughing matter, ABA Journal (July 11, 2019, 6:30 AM CDT), *https://www.abajournal.com/voice/article/humor-in-the-courtroom-no-laughing-matter.*

But what are the consequences of employing humor, puns and pop culture? Should lawyers who display the requisite skill, knowledge, thoroughness and preparation that is reasonably necessary for competent representation be deemed to provide less than such simply because they employed humor? See Model Rules of Prof'l Conduct: Rule 1.1: Competence (Am. Bar Ass'n 1983).

Lawyers have lacked preparedness and diligence in instances without the use of humor or puns. Take, for instance, that opposing counsel in Ed Sheeran's copyright case played an unreleased song of Sheeran's in the court room "by mistake." Amir Razavi, SHIVERS Ed Sheeran furious as lawyers play exclusive unreleased track to High Court, The Sun (Mar. 8, 2022, 12:05 PM ET), *https://www.the-sun.com/entertainment/4845880/ed-sheeran-court-third-day-copyright-battle/.* This occurred as opposing counsel accidentally clicked on the unreleased song while trying to find a recording of Sheeran's "Shape of You" in iTunes. It was reported that opposing counsel's iTunes account contained some unreleased material. This mistake drew the ire of Sheeran, who on the same day was accused of being an "obsessive music squirrel" by opposing counsel. The same opposing counsel "previously branded Sheeran a 'magpie' who steals ideas." Opposing counsel issued an apology to Sheeran for playing the unreleased music. Id.

In contrast, in Dua Lipa's copyright case regarding her song "Levitating," opposing counsel used puns in the legal complaint. Jem Aswad, Dua Lipa Slammed With Two 'Levitating' Copyright Infringement Lawsuits in Four Days, Variety (Mar 7, 2022, 9:57 AM PT), *https://variety.com/2022/music/news/dua-lipa-levitating-copyright-infringement-lawsuits-1235198010/.* Playing on the words of Dua Lipa's song, opposing counsel stated "[d]efendants have levitated away plaintiffs' intellectual property." "Plaintiffs bring suit so that defendants cannot wiggle out of their willful infringement." Id.

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ATTORNEY: Did you check for breathing?

WITNESS: No.

ATTORNEY: So, then it is possible that the patient was alive when you began the autopsy?

WITNESS: No.

ATTORNEY: How can you be so sure, Doctor?

WITNESS: Because his brain was sitting on my desk in a jar.

ATTORNEY: I see, but could the patient have still been alive, nevertheless?

WITNESS: Yes, it is possible that he could have been alive and practicing law.

Exchange #2

ATTORNEY: Now sir, I'm sure you are an intelligent and honest man—

WITNESS: Thank you. If I weren't under oath, I'd return the compliment.

Exchange #3

ATTORNEY: Doctor, how many of your autopsies have you performed on dead people?

WITNESS: All of them. The live ones put up too much of a fight.

Exchange #4

ATTORNEY: Now doctor, isn't it true that when a person dies in his sleep, he doesn't know about it until the next morning?

WITNESS: Did you actually pass the bar exam?

Exchange #5

ATTORNEY: Do you recall the time that you examined the body?

WITNESS: The autopsy started around 8:30 PM

ATTORNEY: And Mr. Denton was dead at the time?

WITNESS: If not, he was by the time I finished.

Exchange #6

ATTORNEY: What happened then?

WITNESS: He told me, he says, 'I have to kill you because you can identify me.'

ATTORNEY: Did he kill you?

WITNESS: No.

Exchange #7

ATTORNEY: So the date of conception (of the baby) was August 8th?

WITNESS: Yes.

ATTORNEY: And what were you doing at that time?

WITNESS: Getting laid.

Exchange #8

ATTORNEY: What was the first thing your husband said to you that morning?

WITNESS: He said, 'Where am I, Cathy?'

ATTORNEY: And why did that upset you?

WITNESS: My name is Susan!

Exchange #9

ATTORNEY: Was that the same nose you broke as a child?

WITNESS: I only have one, you know.

Exchange #10

ATTORNEY: This myasthenia gravis, does it affect your memory at all?

WITNESS: Yes.

ATTORNEY: And in what ways does it affect your memory?

WITNESS: I forget.

ATTORNEY: You forget? Can you give us an example of something you forgot?

Exchange #11

ATTORNEY: Any suggestions as to what prevented this from being a murder trial instead of an attempted murder trial?

WITNESS: The victim lived.

Exchange #12

ATTORNEY: What gear were you in at the moment of the impact?

WITNESS: Gucci sweats and Reeboks.

Exchange #13

ATTORNEY: Were you alone or by yourself?

See Giedre Vaiciulaityte, 50 Of The Most Hilarious Things That Court Reporters Have Ever Recorded To Be Said In Court, Bored Panda (2018), (citing Charles M. Sevilla, Disorder in the Court: Great Fractured Moments in Courtroom History (1999)).

All cases are to be taken seriously. One should be careful to not let the pressure of litigation bring them to create a fractured moment in courtroom history. ■

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U.S. Constitution, James Madison proposed the first draft of what would become the First Amendment. This draft, in relevant part, extended freedom of speech from the press to the people: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Annals of Cong. 434 (1789). This draft was condensed in the final version of the Constitution prohibiting Congress from making any law abridging the freedom of speech, or of the press.

As American jurisprudence further developed freedom of speech throughout the 18th, 19th, 20th, and 21st centuries, freedom of speech solidified into the cultural fabric of the United States. "A special respect for individual liberty in the home has long been part of our culture and our law...that principle has special resonance when the government seeks to constrain a person's ability to speak there." City of Ladue v. Gilleo, 512 U.S. 43 (1994) (internal citations omitted). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. F.C.C. v. League of Women Voters of California, 468 U.S. 364 (1984).

The debate around what speech should be permitted on Twitter surrounds one of the most foundational and sacred pillars of democracy, and great care should be taken with the decision. For centuries, society has wrestled with developing freedom of speech into a mechanism of protection against the fallible licenser and the omnipotent King, but freedom of speech is more than just protection.

The development of free speech from 1215 through the present has not been the slow and steady construction of a concept, but rather the scientific discovery of a kind-of fabric of the universe. Humanity cannot flourish without the constant criticism of ideas, the checking of hate speech and bigotry, the identification of bad actors, and the demand for fresh ideas that freedom of speech provides. "Freedom of speech and expression is vital to human beings' search for truth and knowledge about our world. A society that values freedom of speech can benefit from the full diversity of its people and their ideas. As the individual level, human beings cannot flourish without the confidence to take risks, pursue ideas and express thoughts that others might reject." The Editorial Board, America Has a Free Speech Problem, N.Y. Times, March 18, 2022, at SR 4.

As Sir Blackstone said in 1765, if one publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. W. Blackstone, supra. Those who speak on Twitter with bigotry, racism, and hatred must face the consequences of their actions – they must be identified by the populace at large and their ideas thoroughly rejected. But in the pursuit of this noble goal, we must take care not to degrade a foundational pillar of democracy. ■

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The Young Lawyers Division (YLD) of the Allegheny County Bar Association is comprised of all lawyers who have been admitted to the practice of law for 10 years or less. Lawyers who join the ACBA and meet the criteria automatically become members of the Young Lawyers Division without paying any additional dues. The Young Lawyers Division provides young lawyers with a means of gaining broader participation in bar activities, a forum for continuing legal education, and a vehicle for social exchange with their contemporaries at the bar.

The YLD is actively involved in helping young lawyers participate in activities of the ACBA and directs activities toward improving the administration of justice and prompting public welfare. The YLD helps young lawyers deal with problems and obligations specific to its members, and advises the ACBA of the needs and opinions of its newer members.

If you're interested in getting more involved in the division, find out more at *www.acbayld.org*.

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Additionally, Elon Musk's lawyers cited Eminem lyrics in their Securities and Exchange Commission ("SEC") filing. Bill Donahue, Elon Musk Quotes Eminem 'Without Me' Lyrics in Latest Legal Clash, Billboard, (Mar. 29, 2022), *https://www.billboard.com/business/legal/elon-musk-eminem-lyrics-sec-consent-decree-1235051035/.* Musk sought to revoke a so-called consent decree imposed by the SEC that required him to seek legal approval before he tweets about Tesla. Musk argued that the order violated his First Amendment rights by "chilling" his free speech with the following: "Compare Eminem, 'Without Me' (2002) ('The [SEC] won't let me be or let me be me so let me see / They tried to shut me down...')..." Id.

In comparing these cases, one can see that the playing of Sheeran's unreleased music by opposing counsel creates new copyright implications, which speaks to the competence and diligence of opposing counsel. However, does the play on words in the Dua Lipa case or citing of rap lyrics in Musk's SEC filings constitute grounds for lack of competence and failure to zealously advocate? Though unconventional and a bit humorous, do those approaches not convey the position of the respective parties in a competent and diligent manner?

The legal profession has not provided a definitive answer as to whether a serious approach or a one of levity is best. What is clear, however, is that regardless of the approach a lawyer takes, the audience will view it through the lens of their personal perception of decency, zealous advocacy, and competence. See Marcel Strigberger, However you spell it, 'humor' or 'humour' is admissible in law practice, ABA Journal (May 23, 2019, 6:30 AM CDT), *https://www.abajournal.com/voice/article/humour-in-the-practice-of-law-seriously.* A humorous advocate can also be a zealous and competent advocate, as long as he or she knows the audience.

Lawyers have lost what were deemed as "winnable" cases and sued for malpractice due to their use of poor humor. See Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997). Cases have been overturned and remanded with a new judge because an appellate court deemed the first trial to be a circus. See Haluck v. Ricoh Electronics, Inc., 60 Cal. Rptr. 3d 542 (Ct. App. 4th Dist. 2007). On the other hand, judges have issued opinions with puns and poems. See Chem. Specialties Mfrs. Ass'n v. Clark, 482 F.2d 325 (5th Cir. 1973); Fisher v. Lowe, 333 N.W.2d 67 (Mich. Ct. App. 1983).

What is clear is that lawyers should anticipate how the client, opposing party, the judge, and jury each would react to the use of humor. One must always be aware of the context of a situation and be guided by the golden rule: "[a]s the ancient Talmudic scholar Hillel said, 'That which is hateful to you, do not do to your neighbor.'" Id. Lawyers should ask if the goal of any humor is to clear tension and promote goodwill or to insult or supposedly amuse without due regard to the recipient or situation. Id. Read the room and be considerate. ■

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