# Amusing Anecdotes on 'What Not To Do'

by Bruce McKenna

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You may find that this Sidebar is a little different from the usual. It may best be described as a humorous look at what not to do.

What prompted this Sidebar was a piece written in the *Oklahoma Bar Journal*[1] by Oklahoma Supreme Court Justice John F. Reif, who had spent many years as a district court judge and a judge of the Oklahoma Court of Civil Appeals. Justice Reif provided examples from papers filed with the Oklahoma Supreme Court, the content of which makes you wonder what the authors could possibly have been thinking was appropriate or persuasive about the following remarks.

- "[Judge X] lied by claiming to have examined the pleadings, heard testimony, and reviewed the evidence."
- "It is sufficient to say that [Judge X] is an embarrassment and a disgrace; [Judge X] is merely a typical judge."
- "The Supreme Court of Oklahoma is hereby noticed: The people of Oklahoma are fed up with this type of crap coming out of the district courts of Oklahoma and this Supreme Court's appellate divisions."
- "[Judge X] came from an insurance defense background and lost all common sense of fairness upon appointment to [the] bench, [which was] a mandate to assist big business and insurance companies."
- "[Judge X] no more understands his role as a jurist than Dennis the Menace understands growing up and leading a productive life."
- "This is [*sic*] Court is well aware that [Division X of the Court of Civil Appeals] has taken upon themselves [*sic*] … to inject their [*sic*] own personal philosophy and policy considerations into decisions handed down for their [*sic*] review."

What follows is a list of what are hoped to be interesting stories, all of which describe actual events—well, maybe some are urban legends—that make the point: "what not to do!"

## Cursing

Cursing while on the record is generally not a good idea. Doing so can lead to sanctions, bar complaints, or, in the case of one lucky lawyer, a chuckle and a wry smile from the trial judge who merely suggested that counsel in a jury instruction conference following a three week trial "take a deep breath and all calm down." The backstory to the court's generous advice arose at a moment when one of the attorneys made what was believed by another attorney to be an entirely unsupportable comment that did not accurately reflect the testimony that had been elicited during the trial. Outraged by the impropriety of the comment, the lawyer looked quizzically at his opponent and promptly responded, with voice somewhat raised, that what counsel had said was "**** ****, and you know it." U.S. Circuit Court of Appeals Judge Irving Kaufman, who is reputed to have stated that "[t]he trial lawyer does what Socrates was executed for: making the worse argument appear the stronger," would not have approved of the outburst. In any event, accusation riddled with profanity is certainly not the best persuasive tactic and does nothing to endear one's self to counsel or the judge. As noted, the judge was very understanding, and the repartee has provided some good laughs to numerous attorneys over the years.

In the early 1980s, a now-retired attorney who was one of that lost breed of gun-slinging, shoot-from-the-hip trial lawyers, once ventured into the forbidden zone, using profanity when predicting to a judge that his order granting summary judgment would unquestionably be reversed. The attorney had been practicing for many years and was known to push the envelope, so his talent and his reputation allowed a certain amount of leeway from the judges. No background information or explanation is required to conclude that remarks of the following type should *probably* be avoided at all costs: "Bob [yes, he called the judge by his first name while in chambers, on the record, and in the presence of opposing counsel], if we don't get that one reversed, I will kiss your *** in Bartlett Square [in the center of downtown Tulsa] and give you 15 minutes to sell tickets!" Surprisingly, the judge was neither outwardly offended by the remark nor prompted to enter any sua sponte sanction. In contrast, the attorney's young associate, who had written the summary judgment papers, was shocked by the remark and was placed into the potentially embarrassing position of failing to obtain the

promised reversal that had been so boldly predicted and then having to eat humble pie with the judge. When telling the story these many years later, the then young associate continues to express a heartfelt depth of relief upon learning that the decision was reversed, by which time the good judge had retired.

### Expressing Displeasure With a Ruling

As I recently noted during a presentation to a group of first year law students to whom I was speaking about professionalism in advocacy, we all lose pre-trial motions, issues argued during trial, and cases. Arguing with the judge after an adverse ruling is not, however, a good idea. What follows are some examples of counsel expressing displeasure with a court's ruling in ways that are, well, *questionable*:

- Rolling your eyes.
- Ignoring the judge when asked to approach the bench when an objection has been interposed.
- Repeatedly telling the judge that the ruling was "baloney sauce" (you get the idea).
- Upon hearing the decision, slamming a file on counsel table, declaring, "Oh my God," and leaving the courtroom without asking to be excused.

All of us probably have witnessed worse than the above. A course in basic manners would help any attorney who feels compelled to express outrage at a court's decision. Suffice it to say, all of the above are, at best, rude, and all of us have seen enough "rude" in court, depositions, meetings, and social functions to know that being rude just does not go over well, in court or otherwise. Neither does "rude" that questions an expert's innate intelligence go over well during the expert's deposition that will unquestionably be presented to the court when deposition designations and objections are submitted. Simple civility goes a long way and is appreciated by all. Based on the attorney-client privilege, directing your client not to respond to a deposition question designed to elicit testimony related to conversations between the client and a third party is a questionable tactic, at best. Kicking a witness under the table to warn her that a question might be dangerous is one thing; having the witness tell you not to kick her as she prepares to answer the question is, well, embarrassing but not the end of the day. Fisticuffs is a bad idea at a deposition.

### Know Your Audience

In seeking discretionary appellate review of a decision, counsel for the petitioner included in his papers that the decision of the intermediary appellate court had left "no teeth in the mouth of a barking dog." According to the other lawyers involved in the case, no one ever exactly knew what that meant in the context of the issues. Counsel for the respondent began his opposition papers as follows: "Petitioner's toothless dog is barking up the wrong tree." Although there is nothing inherently wrong with this (in fact, when you step back from the remark, it is actually more than a little clever), counsel for the respondent had appeared in countless appeals, and, because he knew his audience, he also knew that the remark would in all likelihood be well received with, at the very least, an appreciative smile

**At Sidebar** *continued from page 5*

and chuckle from the high court.

Although what follows was not an actual courtroom experience, it is an occurrence that I witnessed while coaching the University of Tulsa National Health Law Moot Court Competition team at the national championships sponsored by, and conducted at, Southern Illinois University. The protagonist in this story was a member of the University of Tulsa College of Law team that won the national championship and who was deservedly awarded the honor of being the best oralist for the national competition. In any event, what occurred during the semifinals of the competition is certainly amusing and reflects the student's assumption that the panel of judges would be familiar with *Seinfeld*. In his rebuttal argument, when attempting to characterize the appellee's position as lacking merit, the student referred to what had been argued as so much "yada, yada, yada." Obviously, given the result of the competition, the judges appeared not to have been fazed in any way by the student's remark and even commented during their critique of the student's performance that it was the first time that they had ever been involved in an oral argument that involved a reference to *Seinfeld*. It seems fair to say, however, that the remark probably would not be appropriate in an argument presented to the Supreme Court that involved important issues of constitutional law and public policy.

Great care should be taken when citing to prior decisions, especially when criticizing them. In one recent case, the district court had rendered a decision on a preliminary matter in a criminal prosecution that involved the admissibility of evidence of other crimes committed by the defendant. The appellate court considered the issue and affirmed the district court's decision. The opinion was published and was quoted in a trial court brief submitted by an attorney in another case to the very same judge who had rendered the initial decision. In his brief in which he criticized the appellate court's decision, the attorney referred to the district judge who made the initial decision as an "idiot." To her credit, the judge showed great restraint and merely commented that she was very familiar with the previous case. Apparently, however, the attorney never made the connection.

Bravado goes with the litigation territory. Sometimes trial counsel can, however, be overcome by confidence in relation to any given position. In encouraging a party to go to trial and rest the outcome on the credibility of an expert, one should carefully consider the propriety of making the following comment at the pre-trial conference: "I can't wait to get that guy on the stand. I am gonna shoot him like a mudcat in a barrel." Some judges may not take kindly to such hyperbole. Fortunately for this attorney, the judge was not the least perturbed by the remark.

That same attorney was even luckier with another judge who was presented with cross motions for sanctions based on a dispute that arose during a deposition. Counsel for the party deponent had made several objections based on attorney-client privilege and work-product protection and, based on those doctrines, directed his client not to answer. Counsel taking the deposition believed that the inquiry merely sought to inquire into the facts of the claim. When the attorneys could not resolve their dispute, the deposition was terminated, but, while still on the record, the inquiring counsel declared: "You are the piece of **** that everyone says you are!" To no one's surprise, counsel took umbrage with that assertion and filed a motion for sanctions. What may very well be to everyone's surprise, however, is that the court sanctioned the attorney who directed his client not to respond but declined to sanction the attorney who made the untoward remark, finding merely that counsel "should know better" than to make such a comment.

As we all know, some judges have better senses of humor than others. Some judges may appreciate Monty Python; others may not. It seems fair to state, however, that questioning the court's attention span by including in your brief your own rendition of a Monty Python cartoon sketch might cross the proverbial line of decorum. Regardless of one's artistic acumen, counsel should take a good hard look at the wisdom of including a drawing in a brief that depicts a skull with its top hinged open, a small figure ascending a ladder slanted against it, with a cartoon bubble protruding from the figure's lips asking the judge if she is "still reading?"

Doing the right thing can sometimes be achieved by considering a different approach—and teach an important lesson. While what follows is somewhat startling, it is an example of both knowing your audience and ethics in action. During a post-judgment collection proceeding, the judgment creditor testified to something that his attorney knew, with certainty, was false. Upon hearing the testimony, the attorney jumped to his feet and stated on the record: "Dammit, Joe. You know that's not true. Tell the truth." At the conclusion of the hearing, outside the presence of the judge, the attorney told his client that all of his files would be boxed up by the end of the day and delivered to the client's office so that he could find a new lawyer.

At the conclusion of a one week trial in a breach of contract action, the judge advised counsel that they would each be given 15 minutes for closing arguments. Counsel for the defendant strenuously asserted to the court that he needed at least 30 minutes. The court was firm in its ruling. Following the plaintiff's initial phase of closing, counsel for the defendant began his presentation. What became almost immediately apparent was that counsel for the defendant had planned a 30-minute closing argument and was unwilling to deviate from his plan. Speaking at twice normal cadence, counsel outlined the evidence and his position and crammed his 30-minute argument into 15 minutes. When counsel for the plaintiff approached the jury with his final remarks, he wryly stated: "Ladies and gentlemen, you know how you defend a case like this? I will tell you: You hire a fast-talking lawyer." Of course, the comment drew an objection from defense counsel. When the court sustained the objection, counsel for the plaintiff merely stated that he had nothing else to say. Although the judge was not particularly happy with the tactic, it was effective. The jury rendered a verdict for the plaintiff for the full amount demanded. Years later, the judge openly admitted that, upon hearing the remark, he could barely keep a straight face.

### Dealings With Counsel

Civility should be the name of the game. Sometimes, however, that concept goes the way of the mastodons. Here are but a few examples of some questionable tactics.

- If you are going to yell at opposing counsel in open court and accuse him of being unethical, when you throw your pencil at him, try not to hit the court reporter.
- Even if you openly question on the record the number of gray cells and synaptic connections of your opponent, it would be wise

to refrain from stating on the record while in his presence that he is "an idiot and a moron."

- If you question whether an opposing party's counsel has acted improperly in advising a nonparty witness as to whether he should bring to his deposition documents identified in a subpoena duces tecum, it is suspect, at best, to challenge the attorney on the record, while the video is running, to "take this outside and settle it like real men." This would seem to be even more inappropriate when the challenger is 45 years of age and in excellent condition and the challenge is issued to a man nearly 80 years old. That just might get you a bar complaint. In fact, it did. The bar association declined to order any disciplinary action, commenting instead that, while it certainly did not condone the comment, it was not a sanctionable offense.

## Courtroom Decorum

What follows are (one can only hope) some obvious examples of what not to do in the courtroom.

- Do not bring popcorn into the courtroom; if you do, try not to spill it.
- Do not chew tobacco in the courtroom; if you do and the court allows it, try not to swallow the spittle, thus necessitating a hasty flight to the restroom, having turned green in the interim.
- Do not wear Bermuda shorts to an oral argument; if you do, at least apologize to the judge and request indulgence.
- While using a pointer, do your best not to hit a juror in the head with it.
- Do not sing in your closing argument.

There is a lesson in all of the foregoing. It relates to common sense. Both Rule 11 and the rules of professional responsibility are implicated in some of the stories but certainly not in all of them. In fact, although some of the stories did result in the filing of bar complaints or motions for sanctions, the vast majority of those complaints and motions resulted in the complaint being dismissed or the motion being denied with a finding that the conduct or comment, although inappropriate, was not subject to discipline.

Louis Brandeis once remarked that "[i]f we desire respect for the law, we must first make the law respectable." ⊙

## Endnotes

[1]Hon. John F. Reif, *Appellate Advocacy and the Standards of Professionalism*, Okla. Bar J., Dec. 12, 2009, Vol. 80, No. 33.

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