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Humor in the Courtroom

Humor should only rarely be used in the courtroom, and it must be respectful.

On the morning of my last Delaware Supreme Court argument, my good friend, colleague, and mentor, Joseph T. Walsh, wished me luck and then added, "Don't forget; no jokes." My reputation was worse than I thought. I have argued more than 10 cases to the Delaware Supreme Court, and I have never told a joke there — honestly, it's true. Oral argument before the highest court of our state is no place for humor, just as it is no place for a pink, or even dark blue, shirt. But humor does have a place in court sometimes.

Humor is a big part of my life. I was blessed to have as a father the funniest person I have ever been around — no doubt. If you knew John D. Kelly III, you know that I am not exaggerating. He had great material and impeccable timing (he appeared on national television three times). But he told jokes not just when he was on stage or at the podium, he told jokes all of the time. It did not matter where he was, he *always* told a joke. He began every meeting at work with a joke, he told jokes at the dinner table every night, he told jokes while he was working out (if you exercised at the Main Branch YMCA during the '60s and '70s you know what I am talking about), he told jokes in his campaign speeches, he joked in church (as an usher he often pretended that he was

stealing money from the collection basket just to get a laugh),¹ and he even told jokes in court. His courtroom quips while serving as Register in Chancery could fill many volumes.

So I grew up thinking that it is okay to use humor in any situation. My identical twin brother (good-looking guy) is an orthopedic surgeon in Philadelphia. Stop by while he is operating or delivering a lecture and you will surely hear at least three or four good ones. My sister, who is also an attorney, will give you five or six good ones, no matter where she is. I once saw her have the whole Delaware Senate in stitches. We Kellys try to find humor in everything. And we have learned that humor can be endearing, if you know when to take your shots.

I believe that, to be a good trial

lawyer, one needs to always keep in mind what the jury, and judge, may be thinking. If either is getting bored during the presentation of your evidence, you are in trouble. What can one do to save the day? My first instinct is to tell a joke. After all, if my father can tell jokes in court, why can't I, if the joke can help my cause? Four years ago, on day two of a painful bench trial, I felt like I was losing the judge. My opposing counsel

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could have been the poster child for Sominex. I needed an opportunity to break the monotony, and my witness gave it to me. I had to tell a joke:

Q: So, you don't take any medicine for your pain?

A: No sir, I do not.

Q: How about aspirin or Tylenol?

A: Not even aspirin or Tylenol. I don't like to take any medicine.

Q: Really?

A: Yes, you see I am Homeopathic.

Q: I wouldn't know anything about that; I prefer women.

Naturally, I knew that the judge was not homeopathic. Also, I would never have done this in front of a jury — too risky. You have to know your audience.

About three years ago, in closing argument before a jury, I had three jurors who were males over 60 years old. My opposing attorney, during trial, made much use of sports analogies. (I felt like he stole from my playbook.) I noticed that the three older, corpulent, "couch potato" type jurors were unmoved by the references to swimming, biking and running. I had my chance to win them over:

"Now some of you may not be athletes. I used to be an athlete, having played football for thirteen years. But now I can't do much at all. I do jog every morning, but it is to the bathroom and back."

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All twelve laughed, the three Archie Bunker look-a-likes most heartily. I had won over at least three. The bad news is that the presiding Superior Court judge (you know who you are), after presenting the jury instructions and excusing the jury, called me to sidebar to admonish me: "Mr. Kelly, this is a courtroom, not the Logan House." What he will never admit, however, is that he too laughed.

Believe it or not, that was the only time I have been reprimanded by a judge. My values compel me to offer the highest respect to the tribunal. They have a tough job, and are underpaid for what they do — it must kill a judge to see a snot-faced first year associate bungle his way through a trial, knowing that the associate is making more money. Besides, it is never wise to irritate the judge — it won't help you in the case at bar, or in the next case you have. Humor should only rarely be used in the courtroom, and it must be respectful.

There is a popular state court judge (I won't say which court) who invites humor. Once I get that invitation, I always oblige. A few years back His Honor asked why I looked so tired, and suggested that I had been out drinking late the night before at the family pub. The fun began:

MPK: Actually, Your Honor, I am tired because I couldn't fall asleep last night. You see, I concluded last night that my wife might be cheating on me.

THE COURT: Really, Mr. Kelly?

MPK: Yes, Your Honor. You see, we just moved from North Wilmington to Hockessin, and I found out last night that we still have the same mailman.

Just last year, before this same well-respected judge, in a criminal case where I had already negotiated a plea for my client, I again succumbed:

MPK: Your Honor, my client is here for something he did not do.

THE COURT: What is that, Mr. Kelly?

MPK: Run fast enough.

(Aside to Disciplinary Counsel Andrea Rocanelli: I would not have said this to any other judge, and I did not perceive any prejudice to my client (who is a good friend). It will never happen again.)

My humor before this judge does not diminish my respect and reverence for him.

When a joke is invited by the judge, you are safe. Unless, of course, your joke is, what we call in the stand-up trade, a bomb. You cannot ever deliver a bomb in court. There is no worse feeling in the world. I only "bombed" once in court, and I will never forget it.

I was in federal court (I won't say which district—I try cases in many jurisdictions) before a judge I have grown to admire greatly, if not idolize. I was about to argue a summary judgment motion and, as I had appeared before this judge many times, I thought that a joke at the beginning of my argument would "warm up the crowd." It happened that the day before, the acrobat known as "the Human Cannonball" (you know, the guy who used to get shot out of a cannon) had passed away. His death made the front page of *The News Journal* (which is a story in itself). I saw an opportunity for a joke:

MPK: Your Honor, I am not myself today. I am a little under the weather.

THE COURT: Why is that, Mr. Kelly?

MPK: Well, I don't know if Your Honor read this morning's paper, but there is a story on the front page about the death of the Human Cannonball.

THE COURT: Yes, I did see that, Mr. Kelly.

MPK: Well, Your Honor, you see I am saddened by his death, as I personally knew him.

THE COURT: I am very sorry to hear that, Mr. Kelly.

MPK: And what bothers me the most, Your Honor, is that I know I will never again meet a man of his caliber.

No laugh from the judge — not even a smile. I had bombed with that joke. I felt like crawling under a rock. I then began my argument, knowing that I got off to a very bad start.

I recovered from that fateful day, in part because the judge, obviously moved with pity, invited me to tell another joke at the conclusion of the hearing. He is a great judge: smart, well-prepared, and compassionate. By

the grace of God, my second joke ("The witness is so old, he was a waiter at the Last Supper.") got a laugh from His Honor. But the scars from "the bomb" remain, and I left the courtroom that day all the more cautious and humbled. I will never be as funny as my father. I carry with me his memory, and his material, but I will never have his perfect delivery. And, for better or for worse, I carry on his tradition of finding an opportunity for a joke in every situation — even in the courtroom. I don't use humor in the courtroom often, and it is always respectful to the court, the jury, my opposing counsel, and anyone else in the courtroom. But when the respectful joke gets a laugh from the judge or jury, there is no better feeling — well, almost no better feeling. ♦

'Editor's note: John D. Kelly, III was also reputed to have stopped when a congregant put nothing in the collection basket and intoned sotto voce, "Come on, Joe Smith, you don't mean to tell me you're taking a pass this Sunday, are you?"

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