

1 **Lawyers' use of humor as persuasion**

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5 PAMELA HOBBS
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12 *Abstract*

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14 *Legal humor is a topic of perennial appeal, and has long been a prolific*
15 *source of books, articles, and scholarly commentaries which are avidly con-*
16 *sumed by popular and professional audiences alike. However, although a*
17 *number of scholars have analyzed the use of humor in judicial opinions,*
18 *there is no comparable body of scholarly examinations of lawyers' use of*
19 *humor in their role as legal advocates. This omission is significant, because*
20 *in the American legal system, humor and wordplay serve as highly-valued*
21 *evidence of forensic skill which is deemed appropriate for display both with-*
22 *in and outside of the courtroom. Accordingly, this paper attempts to fill the*
23 *gap in the existing literature by examining attorneys' use of humor as per-*
24 *suasive advocacy in two widely divergent settings, informal court-mandated*
25 *mediation and oral argument before the United States Supreme Court. In*
26 *these data, the attorneys use humor aggressively to ridicule the plaintiffs'*
27 *claims, depicting them as laughable and unworthy of serious consideration,*
28 *while placing themselves at the center of a comic performance which allows*
29 *them to display their linguistic skills. These data thus demonstrate that hu-*
30 *mor can be a potent weapon in an attorney's arsenal.*

31
32 *Keywords: Humor; legal discourse; persuasion.*
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35 Legal humor is a topic of perennial appeal, and has long been a prolific
36 source of books, articles, and scholarly commentaries which are avidly
37 consumed by popular and professional audiences alike. These works
38 include collections of anecdotes, judicial opinions, and assorted miscel-
39 lany (Bigelow 1871; Prosser 1952; Cameron 1988), as well as extensive

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1 bibliographies attesting to the popularity of the subject (Bander 1982;
2 Gordon 1992). In addition, a number of academic authors have ad-
3 dressed the use of humor by lawyers and judges; these articles include an
4 examination of the (notedly infrequent) use of humor by lawyers in law
5 review articles (Knight 1993), and numerous critical analyses of the use
6 of humor in judicial opinions (Jordan 1987; Rudolph 1989; Rushing
7 1990; G. R. Smith 1990; see also Editors 1992). However, although the
8 latter address judges' use of humor in fulfilling their primary function—
9 that of legal decision maker—there is no comparable body of scholarly
10 examinations of lawyers' use of humor in their role as legal advocates
11 (but see S. A. Smith 1977). One reason for this may be that judicial opin-
12 ions, as primary legal materials, are readily available in law libraries,
13 whereas copies of transcripts of trials and hearings, and archived legal
14 briefs, are more difficult to obtain.

15 Nevertheless, the omission is significant, because in the American adver-
16 sarial system, where the core professional activity is verbal jousting, humor
17 and wordplay are ubiquitous, and serve as highly-valued evidence of foren-
18 sic skill which is deemed appropriate for display both within and outside of
19 the courtroom: Thus renowned trial attorney Melvin Belli is known to
20 have opened trials with a joke (Walsh 2004: B1). And while some have
21 questioned the use of humor in such a serious setting, prominent criminal
22 defense attorney Mark Geragos' humorous quips during the course of his
23 client Scott Peterson's capital murder trial for the deaths of his wife and
24 unborn child have reportedly produced laughter from jurors, courtroom
25 spectators, and even the presiding judge, causing one commentator to re-
26 mark, "I think Mark Geragos is winning this case through humor" (Ibid,
27 quoting law professor and Fox TV analyst Stan Goldman).

28 In an effort to fill the gap in the existing literature, in this paper I exam-
29 ine attorneys' use of humor as persuasive advocacy in two widely diver-
30 gent settings: informal court-mandated mediation, and oral argument be-
31 fore the United States Supreme Court. In so doing, I demonstrate that
32 humor can be an effective tool in destroying an opponent's credibility
33 and neutralizing his arguments.

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36 **1. Humor**

37

38 Konrad Lorenz called humor "a faculty as specifically human as speech
39 or moral responsibility" which, "[i]n its highest forms," "appears to be

1 specifically evolved to give us the power of sifting the true from the false”
2 (1966: 293), and although the crude comments that often pass for witti-
3 cisms in the world of workaday reality might seem scarcely to merit this
4 accolade, one is immediately reminded of biting political satires such as
5 Jonathan Swift’s *A Modest Proposal* and George Orwell’s *Animal Farm*.
6 Nevertheless, most humor is far more humble in both its realization and
7 effects. Like speech, it is an ordinary everyday activity (Mulkay 1988: 7;
8 see also Norrick 1993), and is one that is frequently realized through lan-
9 guage, although not exclusively so: thus a wide variety of unintentional
10 acts, from slips of the tongue to slips of the foot, may trigger a humorous
11 response (Hockett 1977: 257). This paper will examine intentional humor,
12 a subject which has interested scholars in a number of disciplines (see,
13 e.g., Freud 1960; Fry 1963; Lorenz 1966; Bateson 1969; Milner 1972;
14 Nash 1985; Raskin 1985; Mulkay 1988; Attardo 1994; Bergson 1999;
15 Wild et al. 2003).

16 Humor has been described as “the precipitation of a logical paradox”
17 (Fry 1963: 8; see also Bateson 1969: 164), “the discursive display of op-
18 posing interpretative possibilities” (Mulkay 1988: 26), and “the ability to
19 find similarity between dissimilar things” (Freud 1960: 11). A more con-
20 cretely descriptive definition is offered by Levine:

21 Humor is initiated by the metacommunication ‘this is a joke,’ which is itself a para-
22 dox. This is followed by a situation operating at different levels of abstraction,
23 creating a paradox to be revealed by the incongruity or duality of meanings in the
24 punch line. (1969: 5)

25 Wit is a specific application of the humorous mode characterized by
26 a conscious, sophisticated cleverness. The witty individual, Bergson ob-
27 serves, puts both his words and himself “on the stage” (1999: 98). *The*
28 *Random House Dictionary of the English Language* (1969: 692) contrasts
29 the terms ‘humor’ and ‘wit’ as follows:
30

31 Humor consists principally in the recognition and expression of incongruities or
32 peculiarities present in a situation or character. It is frequently used to illustrate
33 some fundamental absurdity in human nature or conduct, and is generally
34 thought of as more kindly than wit: *a genial and mellow type of humor; his biting*
35 *wit*. Wit is a purely intellectual manifestation of cleverness and quickness of ap-
36 prehension in discovering analogies between things really unlike, and expressing
37 them in brief, diverting, and often sharp observations or remarks.

38 Although much humor is sheer play, humor is used for serious pur-
39 poses as well; the primary purpose of satire is to instruct, not to amuse

1 (Witke 1970: 3). Humor also may be used as a vehicle for the expression
2 of common group sentiments, exercising social control through the per-
3 petuation of stereotypes and the covert advancement of norms not openly
4 endorsed (Paton 1988: 211). Thus Lorenz noted the central role of humor
5 in fostering group solidarity:

6
7 [L]aughter produces, simultaneously, a strong fellow feeling among participants
8 and joint aggressiveness against outsiders. Heartily laughing together at the same
9 thing forms an immediate bond, much as enthusiasm for the same ideal does.
10 Finding the same thing funny is not only a prerequisite to a real friendship, but
11 very often the first step to its formation. Laughter forms a bond and simultane-
12 ously draws a line. If you cannot laugh with the others, you feel an outsider,
even if the laughter is in no way directed against yourself. (1966: 293–294)

13
14 The aggressive use of humor was also described by Freud, who remarked
15 that “[b]y making our enemy small, inferior, despicable, or comic, we
16 achieve in a roundabout way the enjoyment of overcoming him” (1960:
17 103), and Levine credits Roosevelt’s jokes about Churchill during the
18 1943 Tehran Conference as the strategy that won Stalin’s cooperation
19 (1969: 12).

20 All of the uses of humor described above—as an aid in distinguishing
21 truth from falsity (Lorenz 1966); as a means of displaying cleverness and
22 wit (Bergson 1999); as a platform for instruction (Witke 1970); as a vehi-
23 cle for fostering solidarity and advancing group norms (Paton 1988); and
24 as a tool for the disparagement of enemies (Freud 1960)—provide pow-
25 erful incentives to lawyers to use humor instrumentally in the achieve-
26 ment of professional goals. This incentive is particularly strong in settings
27 involving collegial talk,¹ which typically serve as ‘jousting arenas’ (Brown
28 and Levinson 1987: 247) for competitive verbal displays. In such settings,
29 lawyers (see Hobbs 2003a: 249–251) and even judges (see Perry 1999:
30 103–104) may form what Norrick (1993: 131–132) has referred to as ‘cus-
31 tomary joking relationships’ in which competitive humorous wordplay
32 is the conversational norm, allowing legal professionals to vaunt their
33 rhetorical skills by engaging in fast-paced repartee that is taken to denote
34 the ability to ‘think on one’s feet’ that is critical to courtroom success. In-
35 deed, in my own practice as a personal injury litigator in the metropolitan
36 Detroit area between 1985 and 2000, I found joking and humor to be uni-
37 versally accepted as highly-reliable indicators of a lawyer’s professional
38 efficacy, and came to consider my ability to tell the complicated narra-
39 tive jokes that lawyers favor to be one of my most effective techniques in

1 achieving an advantageous settlement agreement. However, while joke-
2 telling in the course of settlement negotiations may serve a persuasive
3 purpose (i.e., by increasing rapport and thus facilitating cooperation and
4 agreement), the persuasion is unrelated to, and thus does not serve to
5 comment upon, the merits of the case itself. Accordingly, this paper will
6 more particularly address itself to the aggressive use of humor to attack
7 the validity of an opponent's claims, and will address the circumstances
8 under which such a strategy may be effective.

9

10

11 **2. The art of advocacy**

12

13 A lawyer is, above all, an advocate, and the goal of an advocate is to
14 persuade—to move her audience to embrace her arguments and endorse
15 her client's position (Hornstein 1984: 6–7). The technical term for persua-
16 sive communication is rhetoric, and rhetorical skill is central to a lawyer's
17 art (Ibid: 1–2). Lawyers devote considerable professional energy to per-
18 fecting their persuasive skills, using introspection, peer modeling, and
19 practice manuals to develop techniques that reliably produce the desired
20 result (Hobbs 2003b: 484). Of course, a lawyer must take into account
21 both the nature of the case and the nature of the audience in determining
22 what techniques to use; some lawyers may elect not to use humor because
23 they feel that it is incompatible with the type of cases that they handle,
24 and the effect that they wish to create. Peter Keane, a former public de-
25 fender who was asked to comment on Mark Geragos' use of humor in the
26 Peterson murder trial, stated flatly: "I would never use humor in a mur-
27 der trial. From the standpoint of the defense, you want this jury to feel
28 this is very important" (Walsh 2004: B4). Another criminal defense attor-
29 ney, Jim Collins, also confirmed that he avoided humor at trial, but for a
30 far different reason: he felt that he was unable to use it effectively (Ibid).
31 However, unlike Keane, Collins maintained that a lawyer who can elicit
32 chuckles from a jury will create a favorable opinion of himself and, by as-
33 sociation, of his client (Ibid).

34 A lawyer can use humor to create interpersonal involvement and build
35 rapport, and can also use humor aggressively to ridicule an opponent
36 or his case (compare Norrick 1994: 409). Geragos used both of these tech-
37 niques in the Peterson trial, drawing laughter by teasing a witness into
38 'confessing' that she had not really been ill when she called in sick the
39 day after Christmas (a fact that had no bearing on the case), and gleefully

1 mocking police investigators as he played a video clip of a television show
2 which corroborated his client's version of the events immediately prior to
3 his wife's disappearance (Walsh 2004: B4). And although the decision to
4 use humor in a capital murder trial may appear to be an unlikely choice,
5 lawyers have long used humor as a strategic courtroom tool.

6 The intrinsically adversarial nature of the American trial encourages
7 oratorical display, and lawyers who attempt to arouse jurors' emotions
8 by evoking anger, pity, contempt, horror, or surprise, do so on the theory
9 that the most convincing presentation is the one that yields the most vivid
10 impression. Yet such tactics may lay the groundwork for a devastating
11 counterpunch where a dramatic presentation is aided by the incorpora-
12 tion of established routines. For although all lawyers, to a greater or
13 lesser extent, use such routines—consisting of tried-and-true themes,
14 phrases and mannerisms that have proven to be effective in the past—
15 the exposure of a lawyer's reliance on such set-pieces will rob his perfor-
16 mance of its force, rendering it inauthentic and fraudulent. Thus a lawyer
17 who ridicules an opponent for relying on a set routine unleashes aggres-
18 sive humor's powerful persuasive force.

19 In a collection of celebrated nineteenth-century legal anecdotes, Bige-
20 low describes the ignominious defeat at trial of a famed New York crim-
21 inal defense attorney, who was doubtless confident of a victory after de-
22 livering a closing argument that ended on this thrilling note: "Gentlemen
23 of the jury, if you can find this unhappy prisoner guilty of the crime with
24 which he is charged . . . pronounce your fatal verdict; send him to lie in
25 chains upon the dungeon floor, awaiting the death he is to receive at
26 your hands; go to the bosom of your families, go lay your heads on your
27 pillows—*and sleep if you can!*" (1871: 159–160; emphasis original). How-
28 ever, the effect of this eloquence was destroyed by his opponent's rejoinder,
29 which left the courtroom "convulsed with laughter at the burlesque
30 of the result" (Ibid: 159). The speech took the form of a mocking tribute:

31
32 Gentlemen of the jury, I should despair, after the weeping speech which has been
33 made to you by Mr. Williams, of saying any thing to do away with its eloquence.
34 I never heerd Mr. Williams speak that piece of his'n better than what he spoke
35 it now. Onct I heerd him speak it in a case of stealin', down to Schaghticoke;
36 then he spoke it ag'in in a case of rape, up to Æsopus; and the last time I heerd
37 it, before jest now, was when them [Negroes] was tried—and convicted too, they
38 know'd him to speak it so elegant and effectin' as when he spoke it jes now
39 (Ibid).²

1 S. A. Smith reports a similar incident which occurred during a trial in
2 the Arkansas Territory in the early 1800's. The two attorneys, Walker and
3 Sneed, were frequent opponents; Walker habitually relied on reason and
4 authority, while Sneed trusted to strategic maneuvering and wit. On this
5 particular occasion, it appeared that Walker had the upper hand; however,
6 when he left the courtroom to retrieve an authoritative legal text, Sneed
7 seized the opportunity to turn the tables on his opponent by describing
8 in great detail the routine he would perform on his return. When Wil-
9 liams reentered the courtroom and unconsciously fulfilled his adversary's
10 predictions, the jurors were overcome with laughter (1977: 328–329).

11 Aggressive humor in the form of ridicule and mockery may also be
12 used to highlight an opponent's failed strategy. Thus prosecutor Christo-
13 pher Darden's tactical miscue, during the sensational nationally-televized
14 murder trial of O. J. Simpson, in instructing Simpson to put on the glove
15 found at the murder scene, inspired the versified retort that became the
16 thematic centerpiece of his defense: "If it doesn't fit, you must acquit."
17 This phrase, repeated again and again by Simpson attorney Johnnie Co-
18 chran in his closing argument, framed his ultimately devastating critique
19 of the prosecution's case.

20 Cochran's use of mockery was calculated to provoke outrage rather
21 than laughter. However, although these may seem to be radically differ-
22 ent responses, in some situations there is a thin line between the two.
23 A surprising number of cases assert seemingly preposterous claims of lia-
24 bility or damages,³ presenting a classic dilemma to the defense, for to
25 take such a case seriously is to legitimize its claims, while to fail to take
26 it seriously risks defeat. Defense attorneys view such cases as "legal
27 blackmail"—crass bids to obtain settlements actuated solely by the de-
28 sire to avoid litigation costs—and seek to develop strategies that will dis-
29 courage future filings. These strategies may involve invoking outrage to
30 arouse the judge's wrath, or resorting to the comic to ridicule an oppo-
31 nent's case, thus exposing him to the contempt of his peers.

32 One factor influencing the lawyer's choice of techniques is, as noted
33 above, his intended audience; and, although the foregoing examples are
34 taken from jury trials, today the vast majority of cases are resolved short
35 of trial, by dismissal, settlement, or plea.⁴ Thus in most cases, the intended
36 recipient(s) of the lawyer's persuasive speech will be either a judge or a
37 panel of mediators or arbitrators who are themselves attorneys. In one
38 sense, this is good news for lawyers, who are increasingly able to submit
39 their cases to decision-makers who are known to them, either personally

1 or by reputation, and who are thus optimally positioned for determining
2 that, e.g., Judge C., who is intelligent, hot-tempered and impatient, will be
3 readily incensed by a high-powered law firm's attempts to ratchet a settle-
4 ment out of a clearly frivolous case (see fn 3, Case B). This allows greater
5 latitude in the use of techniques, such as humor and outrage, which may be
6 highly effective where the audience shares the speaker's views, but which
7 may backfire if they fail to resonate with community norms.

8 This paper examines lawyers' use of humor in two such contemporary
9 legal settings.

10

11

12 3. Background and setting

13

14 The data presented here consist of two instances in which a defense attor-
15 ney in a civil case used humor in developing his or her 'theme' or 'theory
16 of the case' (McElhaney 1981: 4, 39–40; Hornstein 1984: 9–10). These
17 terms refer to the central message that the attorney intends to deliver to
18 the judge or jury, which will serve both to organize the evidence and to
19 justify a decision in favor of his client. Like an advertising slogan, the
20 theme ideally is presented as a simple, unitary concept that is easy to
21 grasp, and that will reflect positively on the client and/or negatively on
22 the 'competition' (e.g., Hertz' famous 'We try harder'), that is, the oppos-
23 ing party (see Hornstein 1984: 9–10). The facts of the cases examined here
24 are in some sense illustrative of contemporary trends which have tended
25 to erode public confidence in the law. However, as defense attorneys are
26 quick to note, the law is not responsible for the motives of individuals
27 who bring such cases—unless, that is, it fails to take strong measures to
28 discourage them in the future. The attorneys in both of these cases sought
29 to elicit such discouragement through the development of a theme de-
30 signed to destroy their opponents' credibility and neutralize their argu-
31 ments. This theme, embodying perhaps the most devastating defense that
32 a lawyer can advance in a civil case, is encapsulated in the simple phrase,
33 "This case is a joke."

34

35

36 3.1. Case one: *Carpenter v. Bobenal Investments, Inc.*⁵

37

38 3.1.1. *The facts of the case.* The *Carpenter* case was filed in 1997 in the
39 circuit court of Jackson County, Michigan. At that time, I was one of

1 approximately 15 attorneys employed in the Livonia, Michigan office
2 of a large regional insurance company handling automobile and gen-
3 eral liability cases, and the case was assigned to me. Plaintiff Mark
4 Carpenter alleged that, on October 19, 1994, he sustained a serious and
5 debilitating knee injury when he slipped and fell on three blackened ba-
6 nana peels while alighting from his van in the parking lot of an Arbor
7 Drugs store located in Brooklyn, Michigan. Carpenter testified at his
8 deposition that he was familiar with the parking lot, which was located
9 in a strip mall in the vicinity of his workplace, and that the entire lot
10 was always littered with oil bottles, oil spots, fast-food bags and other
11 trash and litter. Somewhat paradoxically under the circumstances, he
12 admitted that he had not looked down as he had stepped out of his
13 van and that, had he done so, he probably would have seen the ba-
14 nana peels. Carpenter claimed to have sustained a torn medial menis-
15 cus (kneecap) in his fall, resulting in residual pain that was so severe
16 that he was unable to have sexual relations with his wife, who conse-
17 quently divorced him. He eventually underwent arthroscopic surgery in
18 February, 1996, following which the couple reconciled and remarried. Al-
19 though the foregoing may appear frankly unbelievable (as it certainly did
20 to me), it should be emphasized that it is based upon the allegations and
21 sworn testimony of the plaintiff.⁶ The data examined here were presented
22 as Defendants Margie Simons and Arbor Drugs' Mediation Summary.

23
24 3.1.2. *Mediation.* Mediation is a procedure designed to encourage
25 the settlement of cases and thus ease the burden upon the courts. It is
26 mandatory in Michigan in tort (personal injury) cases, a class of cases
27 including, e.g., those alleging automobile negligence, premises liability,
28 and medical malpractice. Conducted with none of the pomp and cir-
29 cumstance of the courtroom, mediation is arguably the least formal of
30 case-related procedures. A mediation hearing is an out-of-court pro-
31 ceeding in which three disinterested attorneys appointed by the court
32 convene to consider the relative strengths and weaknesses of the plain-
33 tiff's claims and the defendant's defenses. The case information on
34 which they base their determinations comes from a written mediation
35 summary filed by the attorney for each party two weeks in advance
36 of the hearing, and a brief (usually no more than five- to ten-minute)
37 oral presentation by each attorney at the hearing itself. Immediately
38 thereafter the mediators convene privately to discuss their impressions
39 of the case, following which they issue their "award," a specific dollar

1 amount recommended as the fair settlement value of the case. The attor-
2 neys for the parties are required to report this figure to their respective
3 clients, and to either accept or reject the award within 28 days. Mutual
4 acceptance results in settlement of the case for the amount awarded; in
5 its absence, the case proceeds. However, monetary sanctions may be im-
6 posed upon a party who rejects a mediation award and subsequently fails
7 to better his position at trial.

8

9

10 3.2. Case two: *Barnes v. Glen Theatre, Inc.*⁷

11

12 3.2.1. *The facts of the case.* The *Barnes* case was filed in the federal
13 district court for the Northern District of Indiana in 1988 by two corpo-
14 rations offering so-called adult entertainment at venues located in the
15 city of South Bend, including the Kitty-Kat Lounge, a bar featuring
16 seminude ‘go-go dancing,’ and Glen Theatre, a theater featuring both
17 movies and live performances; several of the performers were also
18 plaintiffs in the lawsuit. The suit challenged the constitutionality of In-
19 diana’s public indecency statute, which made it a criminal misdemeanor
20 to appear in a public place “in a state of nudity”, and which, by specify-
21 ing the body parts that could not be displayed, effectively required female
22 dancers, if otherwise unclothed, to wear “pasties” and a “G-string” while
23 dancing. The plaintiffs claimed that this statute, as applied to them, vio-
24 lated their First Amendment right to freedom of expression by interfering
25 with the “erotic message” that their movements were intended to convey.
26 The district court ruled that the type of ‘dancing’ performed by the de-
27 fendants was not expression protected by the First Amendment; however,
28 on appeal, the federal Circuit Court of Appeals reversed, and found that
29 the ‘dancing’ was indeed protected expressive conduct. The State of Indi-
30 ana then filed a petition for certiorari in the United States Supreme Court,
31 requesting that court to hear the case. That request was granted. The data
32 examined here are taken from Deputy Attorney General of Indiana
33 Wayne E. Uhl’s oral argument before that court on January 8, 1991.

34

35

36 3.3. *Oral argument in the United States Supreme Court*

37

38 The United States Supreme Court is the final arbiter of questions of fed-
39 eral law, including those concerning the interpretation of the federal Con-

1 stitution. By the time such questions come before the Court, they have al-
2 ready been subjected to several layers of judicial scrutiny by either state
3 or federal trial and appellate courts; as a result, the Supreme Court's ju-
4 risdiction is discretionary rather than mandatory. A party is required to
5 request the Court's permission to present his case (i.e., by filing a petition
6 for certiorari), and such permission is sparingly granted, for the Court
7 agrees to hear no more than one to two per cent of the cases submitted
8 to it. Accordingly, aside from a handful of highly-distinguished lawyers
9 who regularly appear before the Court, there are few attorneys who
10 will ever do so, and the opportunity to present an oral argument in the
11 Supreme Court is viewed as a once-in-a-lifetime experience. So great is
12 the awe inspired by the Court that the occasion is akin to a papal audi-
13 ence, and it is not uncommon to hear the voices of experienced and
14 otherwise confident lawyers crack under the strain of addressing their
15 black-robed betters. In such a setting, humor is the exception, rather
16 than the rule.

17

18

19 **4. Data and analysis**

20

21 4.1. *Carpenter v. Bobenal Investments, Inc.*

22

23 These data are an exact reproduction of the mediation summary filed on
24 behalf of defendants Margie Simon and Arbor Drugs; the footnotes are a
25 part of the original document, allowing for the insertion of information
26 omitted from the body of the text.

27

28 **DEFENDANT MARGIE SIMON AND ARBOR DRUGS'**

29 **MEDIATION SUMMARY**

30 **September 10, 1998**

31 **11:15 a.m.**

32 **(Facts)**

33 There once was a man named Mark Carpenter

34 Who slipped in the parking lot at Arbor.¹

35 He said three banana peels caused his fall

36 And claimed he couldn't see them at all²

37 Because they were as black as they could be³,

38 So he slipped on them and injured his knee.

39

40

41

1 according to a standard format under the headings Facts, Liability, and
2 Damages, followed by the traditional ‘prayer for relief’: “Wherefore the
3 plaintiff [*or* defendant] respectfully requests this panel for an award of
4 \$X.” The text should reference attached exhibits consisting of police re-
5 ports, medical records, etc., which support (in the case of the plaintiff)
6 or undermine (in the case of the defendant) the claims being made.

7 Bergson notes that a comic effect may be achieved by “transposing the
8 natural expression of an idea into another key” (1999: 113). In this case,
9 although the standard headings of Facts, Liability and Damages are re-
10 tained, the discussion of each of these topics, which normally occupies at
11 least several paragraphs, is reduced to a six-line stanza whose forced
12 rhymes and staggering meter contribute to the production of the desired
13 comic effect (see Nash 1985: 155). Thus the mediation summary skewers
14 the plaintiff with a mock-heroic “poetic” presentation of his claims. The
15 presentational style was suggested in part by a versified opinion written by
16 Judge John H. Gillis of the Michigan Court of Appeals; the opinion, a par-
17 ody of Joyce Kilmer’s “Trees,”⁹ is well known to Michigan attorneys and
18 to commentators on judicial humor alike (see, e.g., Rudolph 1989: 183).

19 The summary begins with the stereotypic phrase, “There once was a
20 man . . .,” reminiscent of a limerick, which signals that what is to follow
21 should be given a humorous interpretation (see Fry 1963: 141; Mulkay
22 1988: 53). The use of comic verse serves to organize and enhance the co-
23 medic elements that are inherent in plaintiff’s claims: the slip on a banana
24 peel that is emblematic of slapstick humor, the pure parody of sexual-
25 dysfunction-induced divorce. The mediation summary lampoons the
26 plaintiff—and, by extension, his attorney, who accepted the case—with
27 a burlesque imitation of these claims which demonstrates that exaggera-
28 tion is unnecessary to present them as ridiculous. Thus the case itself
29 stands revealed as a joke.

30 In an adversarial legal system, the conduct of cases is confrontational
31 (Hobbs 2002: 413); however, engaging in confrontation concedes the
32 existence of contested claims. Conversely, laughing at one’s opponent
33 signals that he is not viewed as a serious threat (Mulholland 1994: 127–
34 128). In addition, Freud notes that, by ridiculing an opponent, “we
35 achieve in a roundabout way the enjoyment of overcoming him—to
36 which the third person . . . bears witness by his laughter” (1960: 103).
37 This aggressive use of humor creates a triangular relationship between
38 the speaker, his target and the audience, and aligns the audience with the
39 speaker and against the target by inducing their laughter at the target’s

1 expense (Ibid: 100). Moreover, the mediation hearing provides an ideal
2 setting in which to deploy this strategy, since the recipients are the target's
3 peers: the attorneys who serve as mediators. The purpose of mediation is
4 to encourage the settlement of cases, and thus to avoid the expense and
5 risk of trial. Accordingly, mediation proceeds as a kind of ritualized con-
6 frontation (see Lorenz 1966: 111–112) in which the parties measure them-
7 selves against one another in order to determine who has 'the better case.'
8 However, the focus of this determination is not the evidence, but the law-
9 yers' display of forensic skills. Thus the settlement value of a case is the
10 estimated jury verdict assuming that the plaintiff can prove his claims,
11 discounted by the factor of the defense's perceived persuasive abilities.

12 Here the defense attorney uses humor to mete out poetic justice, un-
13 masking the plaintiff's claims and revealing them for the gross parody
14 that they are. The comic portrayal of his allegations turns the tables on
15 the plaintiff by exposing a highly-unflattering interpretation of his acts
16 which depicts him, not as the wrongfully-injured victim of a negligent
17 business owner, but as a buffoon who is willing to humiliate himself in
18 order to obtain a monetary award. This satiric presentation not only
19 mocks the plaintiff and, by extension, his attorney, but implies a negative
20 social judgment of his actions (i.e., in filing a frivolous lawsuit), while
21 constituting the mediators as morally responsible and thus capable of see-
22 ing through this ploy (Lorenz 1966: 295; Witke 1970: 14). Moreover, the
23 framing of the attack as humor makes it difficult for the attorney to parry
24 his opponent's thrusts, since to respond that "That's not funny!" is ulti-
25 mately self defeating (Attardo 2003: 1288). The result in this case was a
26 mediation evaluation of \$25,000, considered to be "nuisance value" in
27 light of the plaintiff's documented surgery. Moreover, the plaintiff's at-
28 torney, whose initial expressions of outrage at the disrespectful treatment
29 of his client's claims extended to threats of retaliation, had become not
30 only conciliatory but positively cordial by the time of the settlement con-
31 ference, thus tacitly admitting that he found himself, in this instance, to
32 be overmatched.

33

34

35 4.2. *Barnes v. Glen Theatres, Inc.*

36

37 The data presented here are excerpted from Deputy Attorney General of
38 Indiana Wayne E. Uhl's oral argument before the United States Supreme
39 Court. The proceedings are audiotaped by the Court, and are publicly

1 available, but no cameras or other recording devices are allowed in the
2 courtroom. These data were transcribed from the official audiotape of the
3 proceedings accessed via the *Oyez* website maintained by Northwestern
4 University.

5 Oral argument occurs in the Supreme Court's ornate, high-ceilinged
6 courtroom, before the nine black-robed justices seated behind the long
7 bench against the imposing backdrop of a crimson curtain. The sessions
8 are open and are attended by the justices' law clerks, media correspond-
9 ents, and members of the public, the latter being admitted on a first-come,
10 first-seated basis. Collectively, these groups of onlookers make up the
11 audience of the oral argument; the justices, like the attorneys, are partic-
12 ipants, and are the intended recipients of the attorneys' persuasive advoca-
13 cy (compare Goffman 1981: 131–140). Laughter from the gallery (audi-
14 ence) is noted at several points in the transcript. Because no videotape
15 record is available, it is impossible to ascertain the segment of the audi-
16 ence from whence this laughter emanated; however, it is probable that
17 was the justices' law clerks, registering their appreciation of the humorous
18 repartee between their superiors and Uhl.

19 Although oral argument is a time-honored component of appellate pro-
20 ceedings, its influence on the outcome of cases is disputed; some argue
21 that its function is largely ceremonial, while others insist that it is integral
22 to the decision-making process (Hornstein 1984: 238–239). However,
23 while the weight accorded to oral argument may vary from court to
24 court, few who have witnessed the justices' vigorous questioning of coun-
25 sel could doubt that oral argument before the Supreme Court is more than
26 a mere formality. Moreover, because the function of the Supreme Court
27 is not primarily to correct legal errors affecting the rights of individual lit-
28 igants, but to ensure the proper interpretation of the Constitution and of
29 federal statutes, the kind of open debate between counsel and the court
30 that is only possible at oral argument is critical to the attorney's ability
31 to respond to the broader implications of the issues which the justices
32 may address.

33 Nevertheless, although the experienced attorney welcomes questions
34 from the bench, he also dreads the loss of focus that results from an
35 overabundance of questions which may detract from the points he is at-
36 tempting to make, or indeed (because of the time limits imposed on oral
37 argument) prevent him from making them (Ibid: 283–284). Thus the law-
38 yer will attempt to channel the discussion through the development of a
39 theme that serves both to found and to summarize his argument (Ibid:

1 9–10). In this case, attorney Wayne Uhl, finding himself called upon
 2 to address the United States Supreme Court on the question of whether
 3 nude go-go dancing constitutes ‘expression’ protected by the First
 4 Amendment, asserted his refusal to dignify the question by adopting a
 5 humorous frame, thus developing the theme, “This case is a joke.” The
 6 response that he received provides an ideal opportunity to examine a
 7 lawyer’s humor performance from an interactional perspective (see At-
 8 tardo 2003: 1289).

9 Uhl’s argument lasted twenty-five minutes and the entire transcript
 10 runs to 443 lines; accordingly, it is not possible to examine it in its en-
 11 tirety. Instead, three excerpts have been selected which display the jus-
 12 tices’ response to Uhl’s humor, in order to ground an analysis of the effect
 13 achieved.

14
 15 4.2.1. *Excerpt 1: Lines 1–59.* The use of humor in appellate proceed-
 16 ings is unorthodox, to say the least: Hornstein’s classic hornbook on
 17 appellate advocacy states quite flatly that “attempts at humor are mis-
 18 placed” (1984: 257). Accordingly, in a setting in which the most accom-
 19 plished appellate advocates have been known to quail, Uhl must have ex-
 20 perienceed a sensation similar to that felt by William Tell as he drew the
 21 bow to shoot the apple off his young son’s head when he delivered his
 22 opening salvo to the Court:

23 3 Uhl: Thank you, Mister Chief Justice, and may it please the Court.
 24 4 J. Rehnquist: [unintelligible]
 25 5 Uhl: In Indiana, under Indiana Code Section thirty-five forty-five four
 26 6 dash one, a person cannot leave his home naked and walk down the street.
 27 7 He cannot give a political speech in a park without —
 28 8 Voice: [inaudible]
 29 9 J. Stevens: — without being in trouble.

30 In this introductory segment of his oral argument, Uhl establishes a
 31 humorous frame by listing common activities which, if performed in the
 32 nude, would violate Indiana’s public indecency statute. The statute, at-
 33 tacked by Uhl’s opponents on the grounds that its implied prohibition of
 34 nude go-go dancing violated the First Amendment’s guarantee of free-
 35 dom of expression, provides criminal penalties for “public indecency” or
 36 “indecent exposure,” including knowingly or intentionally appearing in a
 37 public place “in a state of nudity.”¹⁰ However, Uhl’s mock-serious atti-
 38 tude (Fry 1963: 141) in evoking visual images of a naked man walking
 39 down the street or giving a political speech in a park converts the statute’s

1 prohibitions into a series of comic vignettes; this transposition of “the solemn into the familiar” is the essence of parody (Bergson 1999: 113). Uhl’s
2 foray into the comic provokes an almost immediate response in kind, an
3 interruption of his monologue which offers an ironic commentary on the
4 predicament of the naked politician: After an inaudible remark by another justice,¹¹ Justice Stevens completes the sentence, “He cannot give a
5 political speech in a park without—” with the phrase, “without being in
6 trouble,” spoken in a humorous tone.
7

8
9 Hay notes that a speaker “can show enthusiasm and appreciation for
10 another’s humor by . . . using overlap or other means of signaling general
11 involvement in the conversation” (2001: 65). Here, although it is clear
12 from what follows that Uhl had intended to say “without his clothes on,”
13 he endorses Justice Stevens’ contribution by affirming “That’s correct,”
14 an acknowledgment of the justice’s humor that is approved by prolonged
15 laughter from the audience. He then continues to develop his verbal
16 sketch of the naked man, now invoking the very setting in which his opponents, the go-go dancers, claim the constitutional privilege of nudity,
17 while preserving the incongruity which is “an essential and persistent feature of humor” (Mulkay 1988: 35):
18
19

20
21 10 Uhl: That’s correct. ((*prolonged laughter in gallery*)) He would get in
22 11 trouble, Your Honor, if he walked into a public place such as a bar or a
23 12 bookstore without his clothes on. Once inside the bar, he could not walk
24 13 naked up and down the aisles in the bar, nor could he sit down at a table
25 14 without his clothes on. Nor could he stand up on the bar, or on a stage at
26 15 the front of that public establishment without his clothes on.

27
28 At this point, Justice Stevens makes the humorous interjection, “He
29 can evidently sing in an opera without his clothes on” (line 16). However,
30 Uhl, while acknowledging this remark, continues on, making the point
31 that his remarks have been leading up to:

32
33 17 Uhl: Well, our point, Your Honor, is that the plaintiffs say that if he
34 18 starts dancing, when he gets up on that stage, or up on that bar, then he can
35 19 do anything, or— or do anything that can be defined as dancing, then he’s
36 20 privileged under the First Amendment, to appear naked notwithstanding
37 21 Indiana’s public indecency statute

38
39 Nash notes that jokes amuse by confronting the listener with the implicit questions *Does this follow?* and *Is this likely?* (1985: 5). Here the ‘joke’ that Uhl presents to the justices is his opponents’ argument, which he characterizes as creating a nonsensical limitation on the scope of the

1 state's power. At this point, Justice Stevens repeats his question about op-
 2 eratic performances:

3
 4 22 J. Stevens: What about singing in an opera? Is— am I correct in my
 5 23 understanding of what Indiana law is? That there is an exception to the
 6 24 nudity law somehow, for ((*pause*)) artistic performances? Is that—is that
 7 25 right?

8 26 Uhl: The—the Indiana Supreme Court, in order to avoid an
 9 27 overbreadth challenge, has held that the statute does not affect activity
 10 28 which cannot be restricted by the First Amendment. And, if the—the term
 11 29 that the court used in that case was “a larger form of expression.”

12 30 J. Stevens: But which includes opera but not go-go dancing.

13 31 Uhl: That's correct, Your Honor.

14 The justice's playful tone in the original framing of this question had
 15 signaled his humorous intent. In rephrasing and amplifying the question,
 16 he pauses before pronouncing the word “artistic” (line 24), to which
 17 he gives an ironic intonation. Irony is a form of humor in which the
 18 speaker's affect acts to vary or contradict the literal meaning of his words
 19 (see Hay 2001: 61–62; Mulkay 1988: 49–50). Here the justice's intonation
 20 suggests a perceived incongruity in the association of nudity and ‘artistic’
 21 performance. However, he maintains this ironic tone in commenting on
 22 Uhl's attempts to distinguish ‘artistic’ performance from the respondents’
 23 gyrations (line 30), using humor to express serious meaning (Mulkay
 1988: 5).

24 In his written submission to the Court (read by the justices prior to oral
 25 argument), Uhl had argued that the use of the Indiana public indecency
 26 statute to prohibit nude go-go dancing did not violate the First Amend-
 27 ment. The basis of his argument was that the Indiana Supreme Court, in
 28 interpreting the statute in a case entitled *State v. Baysinger*,¹² had held
 29 that the statute did not prohibit nudity incidental to some “larger form
 30 of expression”, such as a play, ballet, or opera, and that it thus regulated
 31 only conduct, and did not implicate First Amendment rights. In arguing
 32 that the statute, according to *Baysinger*, was inapplicable to theatrical
 33 performances, Uhl had cited, as examples, the contemporary musical pro-
 34 duction, *Hair*, and Richard Strauss' opera, *Salome*, which includes the
 35 erotic “Dance of the Seven Veils.”

36 In humorously characterizing *Baysinger* as creating an exception to the
 37 public indecency statute for opera singers, Justice Stevens satirizes the In-
 38 diana Supreme Court's conceptual category of “a larger form of expres-
 39 sion,” while his ironic questioning of Uhl's contention that the category

1 “includes opera but not go-go dancing” draws attention to the fact that
2 plays, ballets and operas are not exhaustive of the performance genre.
3 When Uhl reiterates his adherence to this distinction, the justice questions
4 his legal basis for making the distinction:

5 32 J. Stevens: Wh-where does that come from?

6 33 Uhl: Uh, Your Honor, the court looked at cases such as *Southeastern*
7 34 *Promotions*, where this Court, um, implied, uh, to the production of *Hair*,
8 35 for example, needed to include nudity, and, I think, drawing from that line
9 36 of cases, it’s presumed that the First Amendment—

10 37 J. Stevens: Is—Is this the ‘good taste’ clause of the Constitution? Is-is—
11 38 How does one draw that line? Between, uh, *Salome* and—and the Kitty-Kat
12 39 Lounge? I-I don’t—

13 However, as Uhl attempts to explain his interpretation of the *Baysinger*
14 decision, Justice Stevens again interrupts him. His ironic question, “Is this
15 the ‘good taste’ clause of the Constitution?” invokes the principle that the
16 fact that expression is deemed to be vulgar or in poor taste does not war-
17 rant the denial of First Amendment protection.¹³ The justice thus presses
18 for a reason to distinguish between the refined sensuality of the Dance of
19 the Seven Veils and the respondents’ more lowbrow erotic performance.
20 As Uhl struggles to articulate the legal distinction between expressive
21 activity and non-expressive conduct, and its applicability to the case at
22 hand, Justice Stevens continues to pepper him with seemingly-whimsical
23 questions. Uhl states the Court’s own test for expressive conduct, which
24 requires an intent to convey “a particularized message”¹⁴ (line 45), and
25 then argues that the respondents have not shown that their dancing con-
26 veyed such a message (lines 47–49), prompting the humorous question,
27 “Because they were not good enough dancers?” (line 50). However,
28 when Uhl denies that this is the basis for his distinction, Justice Stevens
29 continues to press him, ultimately repeating his question:

30 51 Uhl: No, it didn’t have anything to do with the quality of the dance,

31 52 Your Honor. It had to do with—

32 53 J. Stevens: Well, could a dance communicate that?

33 54 Uhl: Yes, a dance could communicate that.

34 55 J. Stevens: And—but this one didn’t?

35 56 Uhl: These dances did not.

36 57 J. Stevens: Because they were not good enough dancers?

37 58 Uhl: No, Your Honor, it wasn’t the quality of the dancing; go-go

38 59 dancing can be good or bad, but in neither instance is it speech.

39 This exchange is highly characteristic of an active approach to oral
argument by an appellate judge, in which the attorney’s arguments are

1 probed by adroit questioning which seeks to expose their strengths and
 2 weaknesses. Lawyers expect such questions, and attempt to anticipate
 3 their content, in order to respond with apparently-spontaneous answers
 4 (Hornstein 1984: 283). They also strive to develop the ability to ‘read’
 5 the court, that is, to discern the nature of the reception that their argu-
 6 ments are receiving (ibid: 243–244). This is surprisingly difficult, as sharp
 7 questioning may mask agreement, while a benign attitude may cloak a
 8 hostile intent. Here the message is contradictory for, while the adoption
 9 of Uhl’s humorous frame can be taken to signal alignment (see, e.g., Hay
 10 2001: 60), the pointed nature of the justice’s questions suggest the possi-
 11 bility of serious disagreement. And indeed, during this exchange, Uhl’s
 12 tone of voice reveals his uncertainty as to whether Justice Stevens is
 13 laughing *with* him or *at* him.

14

15 4.2.2. *Excerpt 2: Lines 135–161.* Some seven minutes into Uhl’s argu-
 16 ment, Justice O’Connor weighs in with her own humorous contributions
 17 to the ongoing colloquy. She begins seriously enough, by asking whether
 18 a state could prohibit rock music (line 135). The question is an oblique
 19 reference to the case of *Ward v. Rock Against Racism*,¹⁵ in which the
 20 Court, in ruling on the constitutionality of New York City’s mandatory
 21 ‘guidelines’ regulating the noise level of music performed in a Central
 22 Park band shell, held that music was expression protected by the First
 23 Amendment and, accordingly, could not be prohibited, although the city
 24 could enact “time, place and manner” restrictions on such expression,
 25 such as the guidelines at issue in that case.

26

136 Uhl: Your Honor, this Court found in the *Ward* case that rock music is
 137 speech under the First Amendment. So no it could not. But th—

28

138 J. O’Connor: So how is it that music is protected, but dance is not?

29

139 Uhl: Music is different from—

30

140 J. O’Connor:— Can you explain that?

31

141 Uhl: Music is different from dance in that the very nature of the

32

142 medium is communicative. By— by the definition of dance that’s been

33

143 submitted by the Respondents—

34

35 After Uhl signals his familiarity with the *Ward* case by noting that the
 36 Court in that case had found that rock music is protected under the First
 37 Amendment (lines 136–137), Justice O’Connor presses the issue, asking,
 38 “So how is that music is protected, but dance is not?” (line 138). How-
 39 ever, when Uhl attempts to answer that music is by nature communica-
 tive, while dance is not necessarily so (lines 141–143), Justice O’Connor,

1 voicing the doubts of many members of her own generation, asks, “You
2 think some of the rock music played in the *Ward* case—um, conveyed a
3 message?” (lines 144–145).

4 146 Uhl: An artistic message ((*laughter in gallery*))

5 147 J. O’Connor: An artistic message?

6 148 Uhl: An artistic message. Yes, Your Honor. Um, whereas not all dance
7 149 conveys an artistic message.

8 150 J. O’Connor: Well, I suggest not all music does, either.

9 151 Uhl: That may be a case-by-case determination. And this Court hasn’t

10 152 addressed that except in *Ward* to say that music in general is

11 153 communicative and therefore is speech under the First Amendment.

12 Justice O’Connor’s ironic intonation of the word “message” acts to cue
13 the humorous mode, and Uhl signals his understanding of the justice’s
14 humorous intention, by echoing her irony in his confirmatory rejoinder,
15 “An artistic message” (line 146), provoking appreciative laughter from
16 the audience. Justice O’Connor prolongs the moment by repeating Uhl’s
17 statement as a question (line 147). Like Justice Stevens, however, Justice
18 O’Connor uses humor seriously. Thus while repeating a remark is a com-
19 mon method of acknowledging its humor (Hay 2001: 66), the content of
20 the question demonstrates that it has both a humorous and a serious
21 intent, the latter being to encourage Uhl to elaborate his argument. He
22 complies by stating that music conveys an artistic message, whereas not
23 all dance does (lines 148–149), to which Justice O’Connor, continuing
24 her negative ironic commentary on the relative merits of rock music, re-
25 sponds, “Well, I suggest not all music does, either” (line 150). Uhl strug-
26 gles to align his argument with the justice’s suggestion by noting that
27 question of whether all music conveys an artistic message has never been
28 directly addressed by the Court (line 151). He adds, however, that in *Ward*
29 the Court did hold that music in general is communicative and thus falls
30 within the First Amendment’s protection (line 151–153).

31 154 J. O’Connor: Dance in general might be communicative under that test,
32 155 might it not?

33 156 Uhl: We would resist that, Your Honor, because dance can be so
34 157 broadly defined, as to include perhaps what I’m doing here today. It’s—
35 158 dance can be any—

36 159 J. Stevens: Song and dance.

37 160 Uhl: Well, not that kind of song and dance, Your Honor ((*prolonged*
38 161 *laughter in gallery*))

39 Justice O’Connor immediately erects another hurdle by suggesting that
dance in general might also be communicative (lines 154–155). Uhl

1 attempts to breach this barricade by noting that “dance can be so broadly
2 defined, as to include perhaps what I’m doing here today” (line 156–157);
3 however, this attempt backfires when Justice Stevens seizes the opportu-
4 nity to recharacterize this statement in the humorous commentary “Song
5 and dance” (line 159), triggering Uhl’s rueful reaction, “Well, not that
6 kind of song and dance, Your Honor” (line 160–161), which acknowl-
7 edges both the humor of the remark and his own position as its target,
8 and is accompanied by uproarious laughter from the audience.

9 Although the nature of Uhl’s exchange with Justice O’Connor on
10 its surface appears quite similar to his previous exchange with Justice Ste-
11 vens in Excerpt 1, it is notable that, in this excerpt, his tone of voice as he
12 responds to Justice Stevens’ characterization of his presentation as “song
13 and dance” seems genuinely amused. This lighthearted response stands in
14 stark contrast to his uncertain tone during the course of the previous ex-
15cerpt, and suggests that he judges Justice O’Connor’s reception of his ar-
16guments in Excerpt 2 to have been more favorable than that of Justice
17Stevens to his arguments in Excerpt 1. Lawyers closely monitor the reac-
18tions of their audience, including fleeting facial expressions and subtle al-
19terations of tone, and this information is combined with other known vari-
20ables in an ongoing assessment of the success of their arguments. In this
21case, Uhl would have been aware that Justice O’Connor had joined in the
22majority opinion in *Ward*, making it unlikely that she intended to suggest
23that the case was wrongly decided (i.e., on the ground that rock music does
24not convey a message), while Justice Stevens was free to criticize the Indi-
25ana Supreme Court’s reasoning in *Baysinger*. It is probable that Uhl con-
26sidered this information along with the additional evidence presented by
27the justices’ demeanors in attempting to determine their reactions.

28 29 4.2.3. Excerpt 3: Lines 228–260

30 228 J. Stevens: Uh, would the case really be different if the dancer had a sign
31 229 up that — on the stage that said she was a — a member of a nudist colony, and
32 230 she believes it’s healthy for people to attend nudist colonies and — a
33 231 message with it, ‘that’s how I’ll illustrate to you how nice it is to be nude’,
34 232 or something like that. Would that be a different case?

35 In this excerpt, Justice Stevens asks whether Uhl’s analysis would apply
36 if the dancer posted a sign displaying the “particularized message” that
37 she was a member of a nudist colony and that her dance was intended to
38 demonstrate the pleasures of nudity (lines 228–232). Such hypothetical
39 questions ordinarily suggest unexpected applications of the lawyer’s

1 articulated reasoning, and may thus seem designed to embarrass him. In
2 fact, however, their purpose is to explore the scope of the rule being pro-
3 posed, in order to determine how it might be applied in the future, should
4 the Court decide to adopt it.

5
6 233 Uhl: No, Your Honor, that would be no different from the case in uh,
7 234 Florida, of the sunbathers, who claimed that they wanted to bathe out on the
8 235 beach, um, and so —

9 236 J. Stevens: But it's different in the sense that you have a particularized
10 237 message and the dance is supposed to dramatize this message, which is
11 238 altogether signs—

12 239 Uhl: In terms of a particularized message then it would be a different
13 240 case.

14 241 J. Stevens: You — you say that one would be protected but, uh, as long as
15 242 they don't put such signs up it's unprotected.

16 243 Uhl: It would be speech. And whether it would be protected, that is the
17 244 question of whether the state can regulate it. And it would be our position
18 245 that under this statute we can still require her to wear the minimal covering
19 246 because — regardless of the fact that it's speech.

20
21 Uhl answers the question by conceding that the sign would constitute
22 speech, but adheres to his position that the state could still regulate that
23 speech by prohibiting total nudity (lines 243–246).

24 247 J. Stevens: And then why is that?

25 248 Uhl: Well, it's either because of the application of *Employment*
26 249 *Division versus Smith*, because it's a general criminal statute. *Or* it's by
27 250 application of the reasonable time, place and manner test that this Court has
28 251 applied in other contexts.

29
30 When Justice Stevens presses him to explain, he cites two rationales that
31 the Court has approved in previous cases (lines 248–251).

32 252 J. Stevens: Reasonable time, place and manner meaning that there's no
33 253 reasonable time, place or manner. ((*laughter in gallery*)) For this kind of—

34 254 Uhl: Your Honor, reasonable place, in that the statute is limited to a
35 255 public place. And, as the Indiana court very — very carefully defined public
36 256 place. Reasonable manner, in that this is a restriction simply on the manner
37 257 of appearing, that is, that there are certain parts of the body that need to be
38 258 covered. And it's our position that that is sufficiently narrowly tailored, just
39 259 as the clothing on the dancers is narrowly tailored, to accomplish the state's
40 260 interest in prohibiting public nudity.

41
42 Addressing the latter of these rationales, Justice Stevens challenges Uhl
43 with the quip, “Reasonable time, place and manner meaning that there's
44 no reasonable time, place or manner” (lines 252–253), an ironic reference

1 to the fact that the effect of the statute's "regulation" of public nudity is
2 that public nudity is prohibited. However, although the justice's remark is
3 greeted by appreciative laughter from the audience, Uhl treats it as a seri-
4 ous challenge, and proceeds with his argument in support of the reason-
5 ableness of the restrictions imposed, one component of which is a show-
6 ing that the statute is "narrowly tailored." This term, which is commonly
7 used in the constitutional interpretation of statutes, means that the cate-
8 gory or definition created by the statutory language is no broader than
9 necessary to satisfy the legislature's legitimate goal (here, the preservation
10 of public order and decency); statutes that are overly broad offend consti-
11 tutional principles and must be struck down. Uhl has seized on this con-
12 stitutional 'term of art' as ideally suited, under the circumstances, to the
13 maintenance of his humorous frame; thus he delivers this witty defense of
14 the statutory language in question: "And it's our position that that is suf-
15 ficiently narrowly tailored, just as the clothing on the dancers is narrowly
16 tailored, to accomplish the state's interest in prohibiting public nudity"
17 (lines 258–260).

18
19 4.2.4. *Assessing the justices' response.* Because humor is a subjective
20 reaction, absent the perception that something is funny, it is not present
21 (Wild et al. 2003: 2132). The emotion associated with the humor response
22 is variously labeled 'mirth,' 'hilarity,' 'amusement,' and 'exhilaration'
23 (ibid), and is commonly manifested by laughter (Attardo 1994: 13; Nor-
24 rick 1993: 7–8). However, laughter is not the only way to acknowledge
25 humor, and a speaker who contributes additional humor thereby ac-
26 knowledges the humor of the original speaker's remarks (Hay 2001: 60).
27 Here Uhl's selection of a humorous theme seems to inspire the justices to
28 join in the fun: they show their appreciation of his humor not by laugh-
29 ing, but by adding their own humorous contributions. This quintessen-
30 tially male response to humor (see Hay 2001: 60; Norrick 2003: 1346–
31 1347) is typical of lawyers' humorous exchanges: Because the law is an
32 area that is largely male dominated (see, e.g., Pierce 1995: 1; Hobbs
33 2003a: 246), and in which male speech styles, including joking (see Purdie
34 1993: 128; Maltz and Borker 1998: 429) represent the norm, lawyers' talk
35 is essentially a male speech genre—although women may attain 'native'
36 fluency, as Justice O'Connor's contributions reveal. Moreover, a good
37 lawyer strives to be the center of attention and adores the admiration of
38 appreciative underlings (hence the reliable responsive laughter of the jus-
39 tices' law clerks). In a gathering of coequals, lawyers will burnish their

1 rhetorical skills by continually vying for the floor; escalating rounds of
2 competitive humor are frequent in informal settings.

3 These data are interesting in part because they depict such competitive
4 humor, and offer a rare glimpse of the justices (known almost exclusively
5 through their written opinions) who cannot resist the temptation to en-
6 gage in sophisticated wordplay that reveals their wit, erudition and intel-
7 ligence. This in turn displays their background qualifications as highly-
8 skilled lawyers who are so familiar with the complex constitutional
9 concepts at issue that they are able to engage in a highly-technical discus-
10 sion of legal principles and precedents while couching them in the playful
11 language of humorous byplay. Their reaction thus appears to illustrate
12 Levine's observation that one source of the pleasure generated by humor
13 is "the sheer exercise of our mental faculties" (1969: 9).

14 But although the justices' extended riffs display their appreciation of
15 Uhl's humor, his primary motive was not to entertain but to persuade.
16 Thus the critical issue is whether he achieved the desired effect of aligning
17 his audience against his targets (see Freud 1960: 100). In fact, in a split
18 decision in which five of the nine justices agreed with the outcome, the
19 Court held that Indiana's public indecency statute, as applied to prohibit
20 nude dancing performed as entertainment, did not violate the First
21 Amendment.¹⁶ Nevertheless, the fact that Uhl prevailed is not, in and of
22 itself, evidence that his use of humor was persuasive to the Court, because
23 the outcome of a case is dependent upon a host of interrelated factors, in-
24 cluding, in addition to the substantive and stylistic aspects of the attor-
25 ney's presentation, the extent to which the existing law favors his posi-
26 tion, the persuasiveness of his opponent's arguments, and the ideological
27 perspectives of the decision-maker(s). In this case, however, Chief Justice
28 Rehnquist's lead opinion in the case leaves no doubt that Uhl's humor-
29 ous presentation was both appreciated and persuasive, for, in a highly-
30 complimentary gesture, the justice ends the opinion, which has consisted
31 of a lengthy and entirely serious discussion of the application of the rele-
32 vant legal principles to the facts, with a statement that recaptures the hu-
33 morous frame by enlarging upon Uhl's playful manipulation of the term
34 'narrowly tailored' and its application to the respondents' scanty attire:

35
36 It is without cavil that the public indecency statute is "narrowly tailored"; Indi-
37 ana's requirement that the dancers wear at least pasties and G-strings is modest,
38 and the bare minimum necessary to achieve the State's purpose. (501 U.S. 570,
39 572; 111 S.Ct. 2456; 115 L.Ed.2d 504 [1991])

1 **5. Discussion**

2

3 Although humor may seem to be an odd choice of courtroom strategy, it
4 has long been used by American attorneys, whether to ridicule their op-
5 ponents, or simply to amuse and entertain, and such strategies remain as
6 viable today as they were in the more distant past. Moreover, in a legal
7 climate where litigation is viewed increasingly as war, humor can become
8 a potent offensive weapon: Ridicule marshals humor's aggressive force in
9 a way that functions to enhance rapport by creating a shared negative
10 judgment of the object of the speaker's contempt (compare Lorenz 1966:
11 293–294; Norrick 2003: 1341–1342). The persuasive power of ridicule has
12 been well illustrated in the political arena, most recently in the failed
13 candidacy of presidential hopeful Howard Dean, who was transformed
14 from the Democratic front-runner into a national laughingstock in less
15 than thirty days after the media ridiculed the “weird yodel-scream” (Riv-
16 enburg 2004) with which he rallied supporters following his third-place
17 finish in the Iowa caucuses.

18 The data examined here are taken from two cases in which a lawyer
19 used ridicule as a defense strategy. Each case involved a sexual element
20 that appeared to invite lampoon; however, while sexual humor may be
21 perceived as particularly amusing (see Freud 1960: 100), not all sexual
22 material will bear a humorous construction. Here the exaggerated nature
23 of the claims—a slip-and-fall resulting in sexual incapacity and divorce,
24 the notion that freedom of speech encompasses nude dancing—when
25 coupled with the sexual theme, provides an ideal target for aggressive
26 humor whose goal is social management, i.e., the embarrassment of
27 those who violate group norms (Attardo 1994: 323–325; see also Paton
28 1988). Claims that seem exaggerated or frankly manufactured naturally
29 invite ridicule, and this intuitive response can form the basis of a strategy
30 which uses the plaintiff's own words to demonstrate that his case should
31 not be taken seriously. The one other case for which I wrote a rhymed
32 mediation summary involved a claim, apparently inspired by the infa-
33 mous \$3 million McDonald's scalding-coffee verdict, that a hospital pa-
34 tient had sustained serious burns when she spilled a cup of soup she had
35 ordered for dinner. That summary began, “There once was a woman
36 named Roseanne/Who sued because a cup of soup slipped from her
37 hand. . . .”

38 Although these cases may seem extreme, cases involving outrageous
39 claims are not uncommon, and have inspired compilations both in books

1 (see, e.g., Percelay 2000) and on legal-humor-related websites (see, e.g.,
2 Law fun links at www.Duhaime.org). And because it is particularly hu-
3 miliating to lose a ridiculous case, such cases act to spur defense lawyers'
4 ingenuity. Lawyers are professional performers who constantly strive to
5 perfect their techniques and to add to their existing repertoires. As such,
6 they are voracious consumers of their colleagues' professional displays.
7 Moreover, a lawyer who sees or hears of a successful persuasive strategy
8 never views the situation in which it is used as idiosyncratic, but treats
9 it as an illustrative example from which effective practices may be ex-
10 trapolated (Hobbs 2003b: 479). Filed in the lawyer's mental inventory,
11 such techniques await an appropriate occasion for their use. Of course, a
12 lawyer should not use humor unless he can use it effectively, given his per-
13 sonality and the facts of the case, but these considerations apply to any
14 potential strategy. And although a humorous approach may not be suited
15 to every case, it has the advantage of being compatible with many presen-
16 tational styles, thus it is equally adaptable to the homespun presentation
17 memorialized in Bigelow (1871: 159–160: "I heerd him speak it in a case
18 of stealin' . . .") and to the urbane playful approach of Mark Geragos in
19 the Peterson trial.

20 In addition, when appropriate to the case, the potential advantages of
21 humor are many: It injects an element of surprise, making the attorney's
22 presentation more memorable (Levine 1969: 4–5); it displays creativity
23 and daring, thus showcasing his rhetorical skill (Mulholland 1994: 127);
24 it invites interpersonal involvement (Norrick 1994) while overtly present-
25 ing him as a performance artist (Nash 1985: 170–171)—and, all the
26 while, it explicitly refuses to dignify the plaintiff's claims. Thus, a fair
27 number of the colleagues to whom I showed or described my mediation
28 summary in the *Carpenter* case responded by describing their own forays
29 into the realm of parody or satiric verse in cases presenting similarly-
30 laughable facts.

31 The use of humor in such cases is far from frivolous; rather, it is a
32 calculated strategy to discredit frivolous claims, and is uniquely suited to
33 doing so, because it is the only strategy that does not, by appearing to
34 take them seriously, implicitly endorse them. Moreover, the fact that the
35 *Barnes* case survived multiple levels of appellate review to become the
36 subject of a decision on the merits by the United States Supreme Court
37 is strong evidence that ridiculous claims may be taken quite seriously by
38 trial and appellate courts, thus pointing to the potential significance of
39 humor as a defensive strategy.

6. Conclusion

Humor is play, but it is also serious business. It can be used to unmask hypocrisy (Lorenz 1966: 295) and to express disapproval (Paton 1988: 211). Humor that generates shared amusement is powerfully persuasive and can be used to destroy an opponent's credibility (Mulholland 1994: 126–127). The adoption of a humorous frame allows a speaker to call attention to the deficiencies of accepted norms of behavior and language use while avoiding the restrictions they impose, making it an ideal vehicle of social criticism (Mulkay 1988: 214–215). Accordingly, while the use of humor may seem an unlikely strategy for a lawyer presenting argument to a court or a panel of mediators, in the right case it can be used with great effect.

Freud noted that “[a] joke will allow us to exploit something ridiculous in our enemy which we could not, on account of obstacles in the way, bring forward openly” (1960: 103), and this observation is applicable to the litigation context. A lawyer may be required to defend a case where the allegations against his client appear to be flatly ridiculous; nevertheless, procedural rules demand that it be taken seriously, by answering the complaint, propounding and responding to discovery requests, attending scheduling conferences, etc. Moreover, although there are specific procedures for dealing with such cases—court rules that provide for the dismissal of ‘frivolous’ or unfounded claims—the successful implementation of these procedures is rare, for the bare fact that the plaintiff has instituted legal proceedings imbues his claims with an aura of legitimacy that is difficult to dispel. In such cases, the serious mode is of little assistance: Once the defendant responds by advancing arguments as to why liability may not be imposed, he has tacitly admitted the necessity of disproving the plaintiff's claims; thus the focus shifts to the defendant's conduct, and the fact that the claims are based on an incident that appears to be borrowed from slapstick comedy recedes. However, a defendant who adopts the humorous frame effects a dramatic reversal by changing the very nature of the proceedings. By declaring the case to be a joke, the attorney initiates a strategy which, if successful, will result in the plaintiff's defeat, for a joke is, by definition, not to be taken seriously. Thus humor allows the attorney to accomplish indirectly what may be highly problematic to establish directly.

In these data, the defense attorneys used humor to focus attention on the inherent incongruity of the plaintiffs' claims, depicting them as laughable and unworthy of serious consideration. Rejecting the plaintiffs' self-

1 characterizations, these attorneys revealed them to be appropriate candi-
2 dates for *Ripley's Believe It Or Not* by launching hilarious scenarios in
3 which the plaintiffs' allegations were repackaged as gross parody. In so
4 doing, the lawyers placed themselves at the center of a comic performance
5 which allowed them to display their linguistic skills, thus showcasing their
6 own talents while presenting the plaintiffs as buffoons.

7 This paper has examined lawyers' use of humor from a defense
8 perspective, and no cases were located in which a plaintiff's lawyer or
9 prosecutor used humor to ridicule a civil or criminal defendant's defense;
10 however, this is not to say that defendants never assert defenses that are
11 perceived to be ridiculous or outrageous. For example, after French-born
12 singer and actress Claudine Longet shot her lover, Olympic skier Spider
13 Sabich, at pointblank range in the bathroom of his Aspen, Colorado
14 home after he asked her to move out, her defense of 'accident' was widely
15 ridiculed in the media: Pundits mocked her with the phrase "I deedn't
16 sink zee gun was loaded," and the comedy show *Saturday Night Live* fea-
17 tured a sketch entitled "The Claudine Longet Invitational," in which the
18 sound of gunshots, coinciding with the skiers' falls, was dubbed into foot-
19 age of Olympic ski trials, while the show's cast members Chevy Chase
20 ('Tom Tryman') and Jane Curtin ('Jessica Antlerdance') presented a
21 mock commentary and analysis, featuring remarks such as "Uh-oh! Uh-
22 oh! It looks to me like he's been accidentally shot by Claudine Longet!"
23 and "Ski shooting, that's very funny!" (*SNL Transcripts* 1976). It is clear,
24 however, that such techniques are not appropriate for the courtroom;
25 thus, the persuasive potential of humor by plaintiff's attorneys or prose-
26 cutors may be limited to strategies that do not involve direct attacks on
27 the defendant's theory of defense.

28 The process of litigating a case has been aptly styled a war of words, and
29 lawyers, as they gain experience, learn to choose their weapons carefully. It
30 is hoped that this analysis will stimulate further research on this subject.

31
32 *University of California, Los Angeles*

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34 **Notes**

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36 Correspondence address: p37954@earthlink.net

- 37 1. As opposed to, e.g., lawyer-client communications.
38 2. In an incident I recall from my own practice, I was speaking to an insurance company
39 representative who had sat through a medical malpractice trial in which one of my

1 senior colleagues had successfully represented the hospital that her employer insured.
2 As she waxed poetic about my colleague's closing argument, admiringly repeating the
3 phrases which had particularly moved her, I was somewhat startled, and not a little
4 amused, to recognize a near-perfect description of a closing argument I had heard him
5 give — although not, of course, in that case.

- 6 3. Representative (but not exhaustive) examples from my own practice include the
7 following:

8 CASE A: Plaintiff Carol Ashley, whose hobby was horseback riding, claimed that she
9 was permanently disabled as a result of an automobile accident, and sought to recover
10 benefits under the Michigan No-Fault Act, including the cost of hiring someone to
11 groom, feed, and otherwise care for her horses. She requested \$15 per hour for five
12 hours a day for the remainder of her life, an amount totaling \$862,783 after reduction
13 to present value. *Carol Ashley and Richard Ashley v. Capital Alliance Corporation d/b/
14 a Advantage Transportation and James Curtis Dickerson*, Washtenaw County [Michi-
15 gan] Circuit Court Case No. 99-5090-NI.

16 CASE B: Plaintiffs Barbara Babik and Virginia Martinelli alleged that their 5- and 7-
17 year-old daughters experienced emotional distress when they discovered that the ice
18 cream in soft-serve ice cream cones purchased from the local MacDonald's was in-
19 fested in maggots (despite the apparent impossibility of fly larvae being generated in a
20 frozen medium). *Barbara Babik, as Next Friend of Crystal Babik, a Minor, and Virginia
21 Martinelli, as Next Friend of Amber Martinelli, a Minor v. R.A.S. Corporation*, Wayne
22 County [Michigan] Circuit Court Case No. 95-523676-NP.

23 CASE C: Following a minor fender-bender, plaintiff Christopher Conlisk — who had
24 apparently caused the accident by repeatedly braking for no reason — physically at-
25 tacked Jeffrey Bushong, the driver of the other vehicle. Conlisk punched Bushong in
26 the face, knocked him down, and repeatedly kicked him in the face and stomach. After
27 Conlisk was criminally charged and convicted of assault and battery, he filed a civil
28 suit alleging assault and battery against Bushong, seeking money damages (the as-
29 saulter suing the assaultee). *Christopher M. Conlisk v. Jeffrey Bushong*, Wayne County
30 [Michigan] Circuit Court Case No. 99-9060060-NO.

31 CASE D: After sharing a joint and downing a 12-ounce Budweiser beer apiece, plaintiff
32 Steven Nichols and his friend Daniel Watt drove to a waterfront state park where they
33 amused themselves by shooting Watt's Glock pistol out of the window of Nichols' car.
34 When they had shot a few rounds, Nichols started to drive away while Watt was at-
35 tempting to return the Glock to its case. The gun discharged, striking Watt's left mid-
36 dle finger and passing into Nichols' right elbow. As a result of the incident; Nichols
37 pled guilty to possession of a firearm while under the influence and use of marijuana,
38 and Watt pled guilty to discharge of a firearm with injury or death, and to use of mar-
39 ijuana. Nichols then sued Watt, claiming that Watt's negligence was the cause of his
injuries. *Steven Allen Nichols v. Daniel Phillip Watt*, Wayne County [Michigan] Circuit
Court Case No. 98-840251-NO.

4. For example, the federal Bureau of Justice Statistics notes that it is estimated that
only 3% of 762,000 tort, contract and real property cases disposed of by American
courts in 1992 were resolved by jury (2%) or bench trial (1%) (U.S. Dept. of Justice
2004).
5. Jackson County [Michigan] Circuit Court Case No. 97-81785-NO.
6. Claims of sexual dysfunction following accidental injuries are surprisingly common in
civil cases alleging negligence; one reason may be that they are perceived as being diffi-
cult to disprove — at least ordinarily. However, this proved not to be the case in one

1 case I handled. The plaintiff claimed he had sustained debilitating back injuries when
2 he slipped and fell on water on the floor of a Burger King restaurant and that, as a re-
3 sult, he could no longer “have sex.” In his deposition, he testified that he lived with his
4 girlfriend and her two children, whose ages indicated that they had been conceived
5 after the accident occurred. I asked him if the children were his children and, after
6 he confirmed that they were, delivered the following riposte, to which he was forced
7 to concede, “Well, then, you have had sex at least twice since the accident, haven’t
8 you?”

7. 501 U.S. 560; 111 S.Ct. 2456; 115 L.Ed.2d 504 (1991), reversing 904 F.2d 1081. For
8 prior history, see 887 F.2d 826; 695 F. Supp 414; 802 F.2d 287.

8. *Michigan Court Rules of 1985—State* (St. Paul: West Group [1988]), MCR
9 2.403(1)(1).

10 9. *Fisher v. Lowe*, 122 Mich. App. 418; 333 N.W.2d 67 (1983). The text of the opinion
11 submitted on behalf of the three-judge panel is as follows:

12 We thought that we would never see
13 A suit to compensate a tree.

14 A suit whose claim in tort is prest
15 Upon a mangled tree’s behest;

16 A tree whose battered trunk was prest
17 Against a Chevy’s crumpled crest;

18 A tree that faces each new day
19 With bark and limb in disarray;

20 A tree that may forever bear
21 A lasting need for tender care.

22 Flora lovers though we three
23 We must uphold the court’s decree.

24 122 Mich. App. at 419. A footnote appended to the opinion explains that the plaintiff
25 had sued to recover for damage to his tree that resulted when it was struck by a car
26 driven by Lowe. The trial court had dismissed that claim, finding no legal basis for
27 the plaintiff’s claim of damages. The Court of Appeals agreed, and affirmed the ruling.

28 10. The statute defines nudity to include “the showing of the human male or female gen-
29 itals, pubic area, or buttocks with less than a fully opaque covering, the showing of the
30 female breast with less than a fully opaque covering of any part of the nipple, or the
31 showing of the covered male genitals in a discernibly turgid state.”

32 11. Although the sound quality is too poor to permit voice identification, it may be in-
33 ferred that the speaker was one of the justices, since anyone else would have been
34 speaking out of turn.

35 12. 272 Ind. 236; 397 N.E.2d 580 (1979).

36 13. In *Cohen v. California*, 403 U.S. 15, 25; 91 S.Ct. 1780; 29 L.Ed.2d 284 (1971), the
37 Court stated, “It is largely because governmental officials cannot make principled deci-
38 sions in this area that the Constitution leaves matters of taste and style largely to the
39 individual.”

14. *See Texas v. Johnson*, 491 U.S. 397, 404; 109 S.Ct. 2533; 105 L.Ed.2d 342 (1989).

15. 491 U.S. 781; 109 S.Ct. 2746; 105 L.Ed.2d 661 (1989).

16. Justice O’Connor voted in favor of Uhl’s position, while Justice Stevens voted against
it.

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