



## Should Judges Make Jokes?

By J. Trout Lowen

What's funny to one person may offend another. And as any standup comic knows, when it comes to humor, context is everything. Even the best joke falls flat if the hearer lacks the necessary context to understand it—just imagine telling an Ole and Lena joke to someone from California.

But what if that context is the courtroom, a place where most of human misery comes seeking resolution, is there any place for humor there? That question became the subject of fervent debate among the state's bench and bar, and the legal blogosphere in October when Hennepin County Judge Stephen Aldrich reprised a decades-old Jack Benny joke during an order of protection hearing brought by a woman against her husband. Aldrich told the couple, who were discussing reconciliation, "I've been married 45 years. We've never considered divorce, a few times murder maybe."

The same joke has been retold, in one form or another by public figures from Dr. Joyce Brothers to Ruth Graham, the wife of the late Rev. Billy Graham. But in this case, the fallout has pitted a well-thought-of nonprofit that looks out for the interest of battered and abused women and children against a well-respected county judge with a penchant for the bon mot. Both sides have supporters inside and outside the legal community.

A tall man with a grandfatherly demeanor, Aldrich's sense of humor is well-known, although not always

well appreciated. Aldrich says he told the joke to break the tension between the parties. And it did. According to the attorneys involved, the husband and the wife and their attorneys laughed, and no one involved in the hearing was offended. But not everyone in the courtroom thought the judge's remark was funny. The court-monitoring organization WATCH had a volunteer observer in the courtroom. Two weeks later, WATCH filed a complaint against Aldrich with the Minnesota Board on Judicial Standards charging that Aldrich's comments and behavior "undermine the integrity of the court," and calling for his removal from the bench. WATCH also sent copies of the complaint to the media.

It's the first time in the organization's 16-year history it has called for a judge's resignation, but it's the third complaint WATCH has filed against Judge Aldrich in the past two years. One complaint resulted in a private warning to the judge; the other complaint has not yet been resolved, pending consideration by the state Supreme Court of a related issue.

"It's kind of like the straw that broke the camel's back," WATCH Executive Director Marna Anderson says of why she went public with the complaint. "It's one of a number of issues." Complaints to the Board on Judicial Standards are usually dealt with quietly, out of public view. Proceedings are confidential until a formal statement has been filed with the Minnesota Supreme Court, or unless the judge under investigation waives confidentiality.

The Battered Women's Legal Advocacy Project and the Domestic Abuse Project have joined WATCH's most recent complaint. "There are just some things that aren't funny," says Rana Fuller, managing partner of the Battered Women's Legal Advocacy Project, "especially in light of recent events. We've had two very high-profile murders in domestic violence contexts. It's not appropriate."

Aldrich says he was unaware his comment had

caused any offense until WATCH's complaint hit the media. Since then, he has publically apologized, saying he "chose the wrong words." But during a lengthy interview, it's clear that he's angered by WATCH's accusations. After the story broke, he prepared a four-page list of his accomplishments and activities with regard to the protection of women and children. The judge also suggests that WATCH has gone out of its way to target "one of their own." WATCH has repeatedly criticized his decisions on bail and his position supporting visitation for fathers in some domestic abuse cases, he says, and sought to prevent him from hearing felony bail cases, with occasional success, and more recently from hearing domestic abuse cases in family court.

"I've been doing things to prevent domestic abuse since the day I became a prosecutor in St. Paul," Aldrich notes, pointing to his 37-year career as a family lawyer and a county judge, which has included making case law granting mothers the right to seek asylum in another state with their children to protect themselves or their children from abuse, and helping to draft a statute to provide spousal maintenance for displaced homemakers. The state legislature later approved of the draft. He was awarded the 2002 Hennepin County Bar Association Pro Bono Publico award for work with Volunteer Lawyers Network and with Chrysalis and Cornerstone, and was chosen Mentor of the Year in 2008 by Mothers Against Drunk Driving.

"One could make the argument that WATCH's attacks on me on style are because they haven't been able to get me to change my decisions that I make as an independent judge based on facts and findings," Aldrich says. "So this whole humor thing in court, some days it feels like a stalking horse for their political agenda."

### **Context Matters**

The evidentiary hearing where Aldrich made the remark was a routine proceeding, says Scott Rodman, the attorney for the petitioner. Both sides

had already agreed to seek dismissal of the order of protection once a no-contact order limiting contact to the telephone was in place in family court, Rodman says. The couple said they intended to continue working toward reconciliation. The attorneys requested and Aldrich granted a continuance of the evidentiary hearing until that was done.

The incident “arose out of a heated argument between the parties, basically,” Rodman says. “Judge Aldrich was aware. He had read everything. This was not a situation where there was, as some people believe, there was an attempt to murder her, or to seriously injure her.”

Rodman’s female law clerk, also an attorney, attended the hearing with the client, and then left him a detailed message about what had transpired. There was no mention of Aldrich’s remark, he says. When the issue came up at the second hearing, which had been converted to an initial case management conference, “it was completely news to me,” says Rodman. At the beginning of the proceeding, Aldrich explained that WATCH had called for his removal because of the joke, and that an article about it was going to appear in the Star Tribune. Aldrich offered to recuse himself and seal the case file, whatever would make the parties comfortable, Rodman says.

“I leaned in to my client to talk to her and she was absolutely indignant about this,” recalls Rodman. “[She] said that it was a funny comment, that it made everyone laugh, that it put her at ease and helped them to resolve the matter.”

After the hearing, Rodman and the husband’s attorney, Robert J. Hajek, issued a joint statement saying that WATCH had taken the comment “completely out of context and far too seriously.” Rodman points out that his client’s case was to be heard in family court by Judge Jay Quam, but that she had requested—before the WATCH story broke—that it be transferred back to Judge Aldrich because she liked him. Aldrich is still overseeing

the case.

Judge Aldrich's sense of humor is well-known, Rodman says, but in his experience it's not inappropriate. "If the context had been different in this case, I don't think he would've made the comment ... in this context I think it was actually appropriate and helpful."

"I would just have to think if this is going to be the coup de grace for WATCH against Judge Aldrich, where they're actually going to call for his resignation, it should have required a little bit of investigation as to the reaction of the actual woman seeking the order of protection," he adds.

### **No Laughing Matter**

In the larger context, it doesn't matter that the parties involved in the hearing weren't offended, says WATCH's Anderson. "It's kind of like a joke about race. Some people of color might say, well, it didn't offend me. But that's not really the point. I think it's a problem that jokes about domestic violence are OK."

But beyond that, Anderson says WATCH's concern isn't really humor, but about what is appropriate judicial demeanor in the courtroom and about Judge Aldrich's demeanor in particular. "What we're saying is his demeanor, his judicial demeanor, is such that he is not appropriate to serve on the bench."

WATCH filed a complaint against Aldrich with the state Board on Judicial Standards in January 2008 for comments he made during a felony arraignment court that WATCH found "inappropriate and insensitive." In one case cited by WATCH, Aldrich said to a man allegedly stabbed by his wife with a barbecue fork, "Maybe you should do the barbecueing from now on." In another, he commented to a defendant from Somalia, "Maybe we can convert Guantanamo into a civilized place where we could send people when they can't go

back to Mogadishu.”

In response to that complaint, the Board on Judicial Standards deemed there was insufficient cause for a public hearing, but did ask the judge to appear before the board and advised him it considered the comments “improper.” The board also issued a private warning to Aldrich advising him to change his behavior.

Aldrich admits he made the barbecue remark, but says WATCH took it out of context. “The essence of it was the county attorney is saying we should be putting a \$40,000 bail on this woman for jabbing a guy with a barbecue fork. At the time, the man is in court saying ‘I want her home.’ And she’s saying, ‘I’d like to be out.’ I set bail at \$500. WATCH criticized that bail decision. The comment about the barbecue fork was in fact a statement to him—maybe it will be safer for the next time around if you were holding the fork for a while. That’s a protective statement; it’s humorous, but it’s protective. And I don’t feel terribly bad about it.”

In November 2008, WATCH filed a four-page complaint with the Board on Judicial Standards with regard to Aldrich’s handling of the murder trial that took place over several weeks in October and November. According to the complaint, during an omnibus hearing Aldrich referred to the state’s witnesses as a “bunch of drunkards.” He went on to say, “Everyone was drunk. Both cars, right? Idiocy. Somebody died. And we’re supposed to do something with the bodies afterwards. ... we’re not going to do it without all the facts.”

The complaint also states that Aldrich became hostile to the prosecution after the state made a motion to remove him from the trial, arguing he could not function as an impartial fact-finder. Hennepin County Chief Judge James Swenson denied the request to remove Aldrich for cause. The state Court of Appeals dismissed the appeal. The issue is now before the state Supreme Court.

“Once they asked to remove him, he became very

hostile in the courtroom,” Anderson says. Aldrich says he cannot comment until the complaint before the Board on Judicial Standards is resolved.

Aldrich isn't just a judge who tries to use humor to lighten the mood, Anderson says. “That may have been the situation in this last case, but that's not what all of these things have in common. What they all have in common is his inability to judge what is appropriate and inappropriate to verbalize in the courtroom, and how he verbalizes things in the courtroom.”

Even so, when asked to think of a context where humor would be appropriate in a court proceeding, Anderson is hard pressed to come up with one. Aldrich says he considers that view “relatively prim.”

“We deal only with pain, except for adoptions and marriages. Everything else we deal with, something's gone wrong: a contract blew up, somebody was injured, a crime was committed, and so you have people in the court who are under a lot of stress,” Aldrich says. “Humor has value if it's handled correctly in reducing tension for people for whom the court is not a normal place.”

### **Order In The Court**

So just how much leeway do judges have over what they say in their courtroom? Not as much as television shows like *Night Court*, *Boston Legal* or even *Law & Order* would have us believe.

“Generally speaking, judges are extremely cautious about the use of humor,” says David Paull, executive secretary to the Board on Judicial Standards. “There are a few who use it inappropriately, but generally speaking it's really not a problem.”

Over the past four years, the board has received between 120 and 130 complaints a year, the bulk of them fall under the heading judicial demeanor and decorum, which includes a variety of offenses,

including inappropriate humor, intemperate speech, and the disparaging of lawyers, other judges, court personnel and participants. The board gets complaints on inappropriate humor on a regular basis, Paull says. That's not surprising, Paull adds, since for most people, going to court is no laughing matter. Criminal cases, custody cases, divorce and juvenile cases are all serious issues.

While it might be harmless or even beneficial for a judge to have a sense of humor and use that judiciously in court, Paull says, it has to be done carefully so the people involved don't get the idea the judge is treating their case lightly, "which is almost always not the case. But it raises the appearance of that, and that's where the problem lies," he says.

Retired State Supreme Court Chief Justice Kathleen Blatz echoes that caution. "I would never say there's no role for humor in a courtroom. I've been in many courtrooms where there's laughter ... but I think you have to be very careful," she says.

Judges need to guard against the kind of complacency that demanding calendars can bring and remember that for most people, court is an unusual and often stressful event. "That takes another level of sensitivity to the courtroom," Blatz says.

But, Blatz adds, she doesn't buy into the tyranny of the "or": that a judge has to be either somber or hilarious. "The whole entire context for me in the court is that it's serious and respectful, but within that there is room for humor at the appropriate time."

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