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Law Imitates Art, or Something Like That

Written by:

Hon. Harlin D. "Cooter" Hale¹
 U.S. Bankruptcy Court (N.D. Tex.); Dallas
 judge_harlin_hale@txnb.uscourts.gov

Most lawyers and judges have attended CLE presentations using movie clips to bring home an important message. Last year, in part to celebrate the 50-year anniversary of my favorite movie, *To Kill a Mockingbird*,² many bar groups effectively used the film as part of an ethics presentation. Lawyers actually wept at the end when the folks stood up out of respect for Atticus Finch.

With all due respect to Harper Lee,³ *Twelve Angry Men*⁴ and the like, and with thanks to the American Film Institute (AFI) for its list of the Top 100 Movie Quotes,⁵ I have selected a few memorable lines that have great application to the bankruptcy process. For movie buffs, I have identified the relevant films in footnotes. While this article is quite a bit less moving than a presentation featuring film clips of Atticus Finch, perhaps you will find some use for the lines in the future.

1. "Frankly, my dear, I don't give a damn."⁶ I put this one in first to grab the attention of any reader who might just be skimming. This quote does not really fit the courts that I know. Most judges really do care. They spend a lot of time preparing for their hearings and they often lose a lot of sleep after a ruling.

2. "Toto, I've got a feeling we're not in Kansas anymore."⁷ This line should be used by out-of-town counsel at the first surprising ruling of the local judge. It also has great application when a beloved judge retires and the newbie just does not seem to do things the old way. Things change from time to time in court. Learn the local practice or the new judge's processes.

¹ None of the statements contained in this article constitutes official policy of any judge, court, agency or government official or quasi-governmental agency.

² *To Kill a Mockingbird* (Universal Int'l Pictures, 1962).

³ Harper Lee, *To Kill a Mockingbird* (HarperCollins, 1960).

⁴ *Twelve Angry Men* (MGM, 1957).

⁵ See www.afi.com/100years/quotes.aspx (last visited June 2, 2011).

⁶ *Gone with the Wind* (Warner Bros., 1939).

⁷ *The Wizard of Oz* (Warner Bros., 1939).

About the Author

Hon. Harlin "Cooter" Hale is a judge for the U.S. Bankruptcy Court for the Northern District of Texas.

3. "What we've got here is failure to communicate."⁸ This one may be used by lawyers when the judge just does not get it, and vice versa. While it is fair to assume that the judge and law clerk have read your pleadings, still cover the basics, and at the end, ask if the judge has any questions.

4. "Show me the money."⁹ This line works well at confirmation hearings. Having the funds in the bank account, or exit financing lined up, beats a promise any day.

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5. "I see dead people."¹⁰ Lawyers see their case through their client's often-optimistic eyes. The court sees reality. Most judges have thousands of cases on their dockets. They deal daily with entities and people who have failed in some way. Experienced judges often will be able to see rather quickly which debtors have life.

6. "There's no crying in baseball."¹¹ Or in court. Or after a hearing. Save that kind of stuff for the office, with the door shut.

7. "Gentlemen, you can't fight in here! This is the War Room!"¹² The courtroom is for professionals and not professional wrestlers. Speak to the court and not opposing counsel. Politely answer and do not dodge the judge's questions. Remain calm at all times.

8. "You talking to me?"¹³ As hard as it might be to imagine, often the court's

⁸ *Cool Hand Luke* (Jalem Prods., 1967).

⁹ *Jerry Maguire* (TriStar Pictures, 1996).

¹⁰ *The Sixth Sense* (Barry Mendel Prods., 1999).

¹¹ *A League of Their Own* (Columbia Pictures Corp., 1992).

¹² *Dr. Strangelove Or: How I Learned to Stop Worrying and Love the Bomb* (Columbia Pictures Corp., 1964).

¹³ *Taxi Driver* (Columbia Pictures Corp., 1976).

comments, rulings and orders are directed exactly at you.

9. "Well, nobody's perfect."¹⁴ You, your client, the court staff and sometimes even the judge will make mistakes. The key is fixing them or learning to live with them.

10. "Well, here's another nice mess you've gotten me into!"¹⁵ Good to remember for associates or secretaries who cause you to miss a deadline. Actually, most courts hate shifting the blame, so this one is better thought than said.

11. "Well, as of this moment, they're on DOUBLE SECRET PROBATION!"¹⁶ Most judges have a mental list of troublemakers: lawyers who wait until the last minute for requests, are always late, squabble, miss deadlines and sometimes combine one or more of the above (*i.e.*,

by being late to their late-requested emergency hearing, and then squabbling). Avoid being on the judge's "double secret probation" list.

12. "After all, tomorrow is another day."¹⁷ To be used after a particularly hard day in court, and to remind ourselves that bankruptcy is a process, with many ups and downs. Seldom does one hearing determine the fate of a client.

Conclusion

Bankruptcy lawyers are a unique breed. The consumer lawyers do not make a lot of money, and they deal with plenty of the financial and personal problems of their clients. Business bankruptcy lawyers handle high-stress, "bet-the-company" litigation regularly. I am proud of both the consumer and business bankruptcy bars.

Good luck in court. And, "May the Force be with you."¹⁸ ■

¹⁴ *Some Like It Hot* (Ashton Prods., 1959).

¹⁵ *Sons of the Desert* (Hal Roach Studios, 1933).

¹⁶ *Animal House* (Universal Pictures, 1978). Note: This was not one of AFI's Top 100 Movie Quotes, but it makes me laugh.

¹⁷ *Gone with the Wind* (Warner Bros., 1939).

¹⁸ *Star Wars* (Lucasfilm, 1977).

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Disagreeing without Being Disagreeable

What Can We Learn from a Used Car Salesman?

Contributing Editor:

Hon. Alan S. Trust¹

U.S. Bankruptcy Court (E.D.N.Y.)

Central Islip

ast_hearings@nyeb.uscourts.gov

This article is not a tirade about how lawyers have often been ranked in popularity just above or below used car salesmen,² and is not meant to be a sermon about how we as lawyers need to be more respectful of each other and those who come in contact with our profession and the courts; I have preached from that pulpit before. This is also not another chance to reveal my appreciation for Tom Hanks's body of work in major motion pictures. This time, I draw from a recent personal experience that I hope can serve as an example of the benefits of disagreeing without being disagreeable.



Hon. Alan S. Trust

In 2005, I thought it made sense for my older daughter to have a car after her freshman year of college. She had always been responsible, and was not interested in driving fast or late at night.

At the time, we were living in Texas, a state where just about everyone drives just about everywhere to do just about anything. She would be attending a college on the outskirts of a major urban southern city, and could use a car to run the off-campus errands associated with living on her own. While home between semesters, she would not have to depend on her parents for mobility. So, we bought her a sensible, pre-owned, well-known model of car.

In 2007, car troubles started—electrical, to be specific. These issues cropped up intermittently during her junior year, during which she was fortunate enough to secure a summer internship for between her junior and senior years,

About the Author

Hon. Alan Trust is a bankruptcy judge for the Eastern District of New York in Central Islip, N.Y.

at an office about 30 minutes from campus. One hot, muggy, humid day during the summer of 2008, the air conditioner (AC) went out. When I learned the AC was powered (or was supposed to have been) by the faltering electrical system, my hope was to patch the problem over long enough to get her through the rest of the summer, and then come up with plan B. She would be studying abroad the fall semester of her senior year and would not need a car, but she would need wheels for her final semester of college.

During this period of automotive bliss, I was selected for my position on the bench in New York, and my new geography could also be a factor in my

ents accelerated her desire to find a job and alternate shelter; she quickly found both, we moved her out and she did not need the now not-so-new car.

Now what? As with any important decision, I procrastinated; also, I was waiting to see how my daughter took to living in a big city with ready access to mass transit (something she had never done), and working full time (*id.*) Both went well.

Now it is 2011, and time to sell the car. Unlike selling the electrically deficient car for the only offer the dealer made, I decided the best way to proceed would be to treat selling this car as I would have approached trying to settle a case while I was in private practice. There are similarities there, at least to me. A car, like a lawsuit, only has a certain value. Although that specific value may vary from seller to seller (plaintiff to plaintiff) and from buyer to buyer (defendant to defendant), most

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decision. So, at the end of the summer, I sold her car to a used car dealer for the non-negotiable amount they offered.

Plan B presented a dilemma: Do I buy another car, not knowing where my daughter would be living after graduation, and if so, do I chance purchasing another preowned car? The women in my household quickly nixed the idea of buying another used car.

Do I lease a car for six months, if such an option were available at less than a king's ransom? After my daughter returned from foreign shores, we did our due-diligence, car shopping and test driving, and settled on purchasing a sensible new car. We bought a car generally considered safe, reliable and able to retain its resale value, one that my daughter would not be embarrassed to be seen driving, yet practical enough to transport her belongings to and from her final semester. She was happy, and we were happy. Her final semester went as planned. We schlepped her stuff to our new, northern home after graduation, and her job search began. As with many college graduates, living again with her par-

reasonable people would see the value within the same general parameters once the essential facts were known. For a car, those factors would be make, model, miles, condition and features; for a lawsuit, the categories would be liability facts, damages considerations, litigation expense and collectibility of any judgment.

The next step was to research car values, gather my facts and try to find a buyer. I decided to start by doing a little research, and then went to a nearby car dealer who primarily sold new and pre-owned makes of the car I had. The meeting was cordial enough; the guy there who knows all about the value of these kinds of cars spent, oh, 45 seconds looking at it. (Not even the proverbial kicking of the tires!) I waited a few minutes for the arrival of The Salesman with that infamous piece of paper on which the offer is penned. I have never been sure why car dealers tend only to write but never say the offer; there must be some body of research that people react differently and better to written offers than spoken, at least when it comes to car

¹ None of the statements contained in this article constitutes official policy of any judge, court, agency or government official or quasi-governmental agency. The author thanks his former law clerk, Nicole D. Mignone, current law clerk to the Hon. Joel B. Rosenthal, for her assistance with this article. The dates used in this article are for illustrative purposes, and the dialogue is paraphrased.

² See Aziz Rana, "Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship," 77 *Fordham L. Rev.* 1665, 1665 ("Public opinion polls routinely give attorneys low marks for honesty and ethical standards, ranking them behind virtually every occupational group except for insurance salesmen, advertising practitioners, and car salesmen.")

sales. Also, my experience is that it does not matter what type of paper is written upon—a sheet of looseleaf paper, paper torn from a spiral notebook or legal pad, a takeout menu, the back side of a piece of printer paper that has some outdated information on the reverse side (kudos for recycling)—because the importance lies in writing the number down and signifying its importance by setting it off within a circle and/or underlining, but not in uttering the amount. Once written, I openly expressed my disappointment in the low offer. When asked, “How much were you expecting?,” I calmly and truthfully responded that I had not finished my research but would get back to The Salesman. I secured a business card, with reluctance on his part.

The drive home was short, but by the time I entered my home, I was actually pretty upset. I told myself that I should not be offended at the offer because I had not invested the time or energy to come to a value conclusion grounded in a solid factual basis. So, I simmered while I completed my online research. As a result, my unfounded negative reflex was solidified by research that bore out that the offer was a good 30 percent or so below the fair value of the car based on the trade-in value, not a private-party sale, which bore a higher amount.

The next day, as promised, I called back. I explained to The Salesman why I believed his offer was too low. I made my counteroffer, and then explained why I thought it was justified. The reaction I received was both unexpected and, to me, unprofessional. As to the amount, The Salesman responded that the car dealer could not make any money reselling my car if purchased at that price. A fair response, I thought, if couched in the context of a “but we can pay you X.” Unsettling was both the lack of a counteroffer of X and a caustic attack on my methodology: “You can’t use the Internet to find out what a car is worth; nobody buys cars on the Internet.” I responded, “Actually, a lot of people buy cars over the Internet, and the website I used for my research is a pretty well accepted source of car values.” He countered: “That’s a take-it-or-leave-it offer.” Me [deep breath]: “No, thank you.” Because of the esteem in which I hold this publi-

cation, I will say the conversation ended with pleasant wishes for each other’s continued health and prosperity.

Afterwards, I was steaming: If he were only going to make a take-it-or-leave-it offer (like the used car dealer I sold the first car to), why not just say so while I was looking at the magic ink encircled on the recycled page? Why create an expectation of at least being somewhat open to a counter offer?³ Surely, there are other ways to communicate a take-it-or-leave-it offer. For example: “That’s really the best we can do, so please let us know;” or “that is our highest offer, and it will be open for 24 hours.” There is a more definitive way of saying “Please only respond with ‘yes, thank you,’ or ‘no, thank you.’”

A few days lapsed before my next sale effort. Now armed with Internet research and an unpleasant exchange but a number to work from, I went back to the original car dealer from whom we bought the car. I called and asked: “I have this car that I bought from you; might you be interested in buying it back?” The dealer responded: “Why, yes, of course we would be happy to look at it; just bring it in.” So, I did. I was introduced to the head of something or other, who along with the head of something else, went out and spent maybe a minute actually looking over the exterior of the car. (Again, no proverbial kicking of the tires; that must just be a cliché.) The head of some department who was assigned to me returned a few minutes later with a piece of printer paper that had been used for printing something unrelated (more kudos for recycling). Again, an offer written, but not spoken, and then circled.

This offer was 25 percent less than the first offer that had so offended me; yet, I was not upset in the least. Why? The delivery. The gentleman politely explained to me how that year of that model is not selling well, and how new cars of a slightly different model actually sell more quickly, and for less than my preowned model. As much as they would like to help me out, they could

only offer Y for my car. “What do you think?” I thanked him, and said “Well, I’ve already turned down more than that and, to be honest, I would rather donate the car than sell it for that. But I am not offended by your offer; I understand you have to make a profit on reselling the car, and that you are telling me what it is worth to you, even though I think I could sell it for more on my own.”

I was asked how much I wanted. I made my counteroffer and expressed how I arrived at it after I did my research. The response? “I understand. Honestly, I might be able to get you a few hundred dollars more than our offer, maybe a thousand, but I don’t want to insult you. I know I cannot get close to your number.” I responded with an extended hand and a “thank you.” Somewhat surprisingly, the gentleman offered some unsolicited advice on how to go about selling the car myself. We shook hands, and agreed that we hoped to do business again some day.

What can we learn from a used car salesman? Many times, it is the *how* that is as important, if not more important, than the *what*. Many times, the packaging is just as important as the contents. Although I would not have accepted the second offer, it was served up in such a respectful fashion as not to be offensive; we disagreed, but without being disagreeable. I am very open to buying a car from that dealership down the road.

I also learned that had I initially done my homework better, I would have been better equipped to respond quickly to The Salesman, and strike while the iron (galvanized steel?) was hot. I chose, mistakenly, to go to a negotiation unprepared, thus losing any chance for a “right here, right now” resolution, even though I knew that part of negotiation strategy is to take advantage of settlement momentum. Had The Salesman made his offer using the same tact as the second gentleman, and had I been better prepared, he might now have my car, and I might now have his money. While I do not plan on trying to resurrect the first offer, I also have no intention of ever trying to buy a car from The Salesman’s dealership.

As a postscript, I still have the car. ■

³ Think of the bar scene in *My Cousin Vinny* (Twentieth Century Fox Film Corp., 1992), when Vinny Gambini (played by Joe Pesci) goes to collect the \$200 that Mona Lisa Vito (played by Marisa Tomei) won hustling pool at a bar, which illustrates the extent to which offers may be met with counteroffers.

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