

The Master Mediator

The Benefits and Pitfalls of Humor In the Bargaining Room

BY ROBERT A. CREO

Inviting people to laugh with you while you are laughing at yourself is a good thing to do. You may be the fool, but you're the fool in charge.

—Carl Reiner

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Jeff Kichaven and Jeff Krivis, two Los Angeles-based mediators and colleagues on the *Alternatives* Editorial Board, and good friends for decades, have addressed the subject of humor and cheerfulness on these pages with depth and insight. See Jeff Kichaven & Deborah Rothman, "Make it Funny: It's a Risk, but Humor Can Ease ADR Tension," 21 *Alternatives* 49 (March 2003) (available at <http://bit.ly/2iJN7O8>), and Jeffrey Krivis, Standing Up for Mediation: A Veteran Neutral Trains in Comedy and 'Settles' for Getting Laughs, 20 *Alternatives* 93 (May 2002). Krivis took extensive classes in comedy and improvisation to enhance his skills as a communicator and mediator.

The subject of humor in mediation has been extensively commented upon by many others so I have included an extensive if not exhaustive list of sources and references at the end of the article. Here is my take on some of the key points based upon my own experiences as a mediator and with the nature of humor.

The author is a Pittsburgh attorney-neutral who has served as an arbitrator and mediator in the United States and Canada since 1979. He conducts negotiation behavior courses that focus on neuroscience and the study of decision-making, and was recognized by Best Lawyers in America in both 2017 and 2014 as Pittsburgh Mediator of the Year. He is the author of numerous publications, including "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bise Co. 2006). He is the principal of Happy! Effective Lawyer (www.happy.lawyer), an initiative focusing on lawyer contentment, soft skills, and peak performance. He is a member of *Alternatives'* editorial board, and of the CPR Institute's Panels of Distinguished Neutrals. His website is www.robertcreo.com.

SOCIAL 'LUBRICANT'

In the article cited in the accompanying box on page 7, Kevin Cruthirds notes that "mediators can use humor to increase their status in the eyes of the parties and increase their ability to guide the parties. Research supports this, showing that self-enhancing humor is particularly effective at garnering power from a group."

He states that "observational studies have shown that humor is a social 'lubricant' that facilitates relationships and reduces tension among team members. It enables them to feel as though they are part of the group."

Jeff Kichaven and Deborah Rothman in *Alternatives* quoted a lawyer from a mediation session who stated that "venting tends to exacerbate tensions and even hostility. Once all that venting is done, a little humor in an uncontrived way can go a good distance toward dissipating that negative energy."

Andrea Braeutigam wrote that the "ability to convey and perceive friendliness, attentiveness, humor, emotion, and understanding is instrumental in developing rapport in mediation."

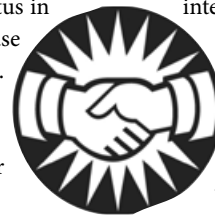
Clark Freshman and his co-researchers performed a study on students that showed a correlation between obtaining settlement and priming the setting by viewing a humorous video just prior to negotiations.

There also is a body of research and literature that correlates creating trusting relationships with humor. The past year I have told stories five times—not a comedy routine—at The Moth StorySLAM held in Pittsburgh each month.

Another lawyer has won four out of the seven times she has presented. Her personal stories are hilarious and delivered with impeccable timing. She has placed second or third

the times she has not won, and me, well, I am the always in her rearview mirror!

Laughing with someone in any setting engages dynamics which creates bonds and interpersonal connections.



DON'T BE DISTRACTED

There are downsides. Humor can be distracting. Participants come to solve a problem and not to be entertained.

Patricia Ewick and Susan S. Silbey consider research in New Jersey where people reported on their own encounters with the law. They conclude that while people may find the law funny, "they do not tend to find their own experiences with the law humorous."

Kevin Cruthirds cautions that that humor "can distance participants from the objective at hand, thereby costing the mediator his or her leadership position. So even mildly aggressive humor must be used with extreme caution and only by mediators highly skilled in its use."

THE THEME

Columnist Bob Creo is in the midst of a long-running series on emotions in mediation. Emotions are present in all participants in a mediation session, including the mediator. The dynamics of the overwhelming majority of litigated cases and interpersonal claims involve negative emotions. Many of these columns have focused on the negatives. (You can read the columns with a subscription at <http://bit.ly/1BUALop>.) But in more than three decades of serving as a neutral, notes Creo, there have been bright and shining moments of joy, serenity, hope, gratitude, grace, humility, kindness, humor, and cheerfulness. The examination of positive emotions continues here.

While attending the local bench-bar retreat years ago, the stage entertainment was a professional comedian. I responded to a question from my colleague, Pittsburgh mediator Louis Kushner, about why I was not laughing. I told him that many stand-up routines involve shouting a series of insults at as well as demeaning comments to a captive audience.

Most jokes or quips target individuals or groups by labels. These are usually outgroups, based upon ethnic, demographic, or other stereotypes. The humor exploits the demographics, intelligence, and especially the vulnerabilities of human behavior. It often involves imbalance-of-power dynamics which result in the misdirection that makes the unexpected punch line successful.

Reality is exaggerated at the expense of the higher virtues of empathy, gratitude, forgiveness, grace, and humility. Most of this type of humor involves someone being a loser. But when it is the speakers themselves, or those with standing to represent their own group, then the foibles, decisions, and vulnerabilities—the humanness of it all—can be humorous. We may laugh heartily at Larry David on *Curb Your Enthusiasm*, who brings out the worst in human behavior while recognizing, in the end, that he gets his just desserts.

Storytelling can also be educational when the moral of the humor—its point—teaches us about the benefits of the positive virtues and the value of honorable character traits. Self-deprecating humor can make us more human, build rapport, and allow us to bond with others.

Stories, however, always should be a minimalist tool because what we do as mediators, and who we are, is about others and not ourselves.

LESSONS LEARNED

I was the mediator in a product liability case involving catastrophic loss to a child. The

Happy Trails

The vision: A mediation room overflowing with laughter, smiles, and agreement.

The reality: All tension, all the time.

The wild card: Humor crops up. It can help. It can really hurt. This column covers how humor fits into ADR.

defense was using a caucus room with a glass window so anyone could see in from the hallway. While the insurance adjuster was taking a bathroom break, I was chatting with the defense lawyer, who was telling me a funny story about something that had happened to her.

As I was smiling and laughing with her, the mother walked by us unnoticed to use the

restroom. A short time later, plaintiff's counsel was in the hallway waving for me to join him outside the defense room. He informed me that his client was very upset and ready to leave because I was yucking it up with defense counsel and obviously taking the injury to her child lightly.

He recounted her statement that I should be focused solely on the welfare of her child and resolving the case. Plaintiff's counsel knew that I was. Nevertheless, we had a serious perception problem requiring immediate damage control.

The plaintiff's counsel and I went into the defense caucus, explained what happened, and then the two of us worked hard with the plaintiffs to get the mediation back on track.

I learned what I already knew. There are no breaks or downtime in a mediation session. Every word, facial expression, and gesture a mediator makes has potential consequences.

Mediation sessions are a holistic, integrated system. It is an artificial construct outside of the daily norms and practices of the participants. There is a complex interplay between participants where any action has a ripple effect among the inhabitants of this ephemeral environment.

Mediators and counsel can design the environment but we can't always know which way the wind is going to blow despite our best efforts to control and influence events and decision making.

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GRAVITAS PERSPECTIVE

As Randy Lowry, a professor and president of Nashville's Lipscomb University, taught me, mediators are invited into the gravitas of a stressful problem, often life-changing, that has been squeezed into a claim in litigation.

It is our case for a day or so, and their lives forever. We are transient facilitators passing as migrants through their claim but not their lives. We can't fix everything in a process designed to usually hit full stride in one face-to-face session.

Participants are not there to be entertained or to escape their pain by suspending disbelief like when they watch a movie. On the contrary, they are there to confront and banish as much pain as possible. If humor and cheerfulness is

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natural, and productive, if it is hopeful, then reach into the tool kit and act appropriately,

SUMMARY AND CHECKLIST

Here is a brief checklist or set of guidelines for the practitioner:

1. Don't force humor. Effective humor is ad-libbed and flows from the situation.
2. Be extremely confident that no one present or any other stakeholder could take offense at your remarks. When in doubt, don't.
3. If anyone's humor offends a participant, deal with it privately in caucus mode, including addressing it with those offended, and use acknowledgement or apology as appropriate but sparingly.
4. Deprecate only yourself, not others.
5. First-person stories are better than structured jokes, especially if it is a joke you heard and are repeating.
6. Acknowledge or laugh at the humor of others only if sincere. A fake grin may suffice; try to avoid eye contact!
7. It's really, really not about you, especially your settlement rate.
8. Respect that mediators serve at the privilege of the participants.
9. Effective humor may correlate inversely to the severity of the loss or trauma.
10. You are not as funny as you think you are! ■

International ADR

Lenders' Trade Group Adopts Optional Arbitration Clause for Model Latin America Documentation

BY RICHARD M. GRAY

The New York-based Loan Syndications and Trading Association, or LSTA, is the leading industry organization in the Americas for lenders and investors in the syndicated loans market. See www.lsta.org.

The size and importance of that market can be appreciated by noting that the total amount of outstanding loans tracked by the S&P/LSTA Leveraged Loan Index as of Oct. 17, 2017, was about \$950 billion. The volume of secondary market trading of syndicated loans reported by the LSTA for the month ending on that date was about \$55 billion.

The area is ripe for an arbitration component to deal with disputes.

In May, the organization delivered, releasing its new model documentation for secondary market trading for par/near par trades with Latin America counterparties. For the first time in any of its model documentation, it included an option for the parties to make a general election for arbitration. This is a potentially significant development for the growth of arbitration in international financial disputes.

To be sure, this single new step in and of itself is somewhat limited. For the time being, it applies only to Latin America secondary market transactions and, even then, only when one of the trading counterparties is located in Chile, Colombia or Peru.

The significance of the move, however, may be best understood as positive progress in light of last year's ICC Commission

Report, "Financial Institutions and International Arbitration" (2016)(available at <http://bit.ly/2fAynMr>), which noted "a marked reticence on the part of financial institutions to use arbitration in international financing transactions," citing syndicated loan transactions as an example. (See p. 17.)

One of the LSTA's continuing core tasks is developing and revising model documentation for the syndicated loan market. In the primary market, this means the loan agreement (also known as the credit or facility agreement) governing the relationship between lenders on one side and borrowers on the other.

Secondary market documentation, on the other hand, governs transfers of loans between lenders and investors, either by outright assignment or by means of participation, and borrowers are not typically parties.



The author is a New York-based independent arbitrator who has served as an expert witness on the syndicated loans market. He is a co-author of the first edition of *The LSTA's Complete Credit Agreement Guide* (McGraw Hill 2009). For more information, see www.grayarbitration.com.