

# THE FUNNY THING ABOUT MEDIATION: A RATIONALE FOR THE USE OF HUMOR IN MEDIATION

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## I. INTRODUCTION

Humor is a tool used effectively in many contexts. When used properly, it can help relieve tension, provide perspective, allow people to flirt with fear, anger or other afflictive emotions, capture paradox, subvert the dominant paradigm, and signal willingness to engage in a playful manner.<sup>1</sup> In understanding that humor has numerous benefits, the question then follows: why are so many mediators reluctant to use this valuable tool to their advantage?

Some mediators think that mediation has no place for humor,<sup>2</sup> but others, including some mediation clients, are inclined to disagree.<sup>3</sup> Kevin W. Cruthirds wrote the only law review article to date

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<sup>1</sup> See Dave Keppos & Carrie Fox, *Humor Session: Better Mediation Through Irreverence: Humor in Practice*, 1, 2, available at [http://www.csus.edu/ccp/collaborative/humor\\_in\\_practice.pdf](http://www.csus.edu/ccp/collaborative/humor_in_practice.pdf) (last visited Oct. 26, 2007). The authors note:

Humor: [r]elieves tension; [s]peaks truth to power; [e]xcludes and denigrates, or conversely; [b]onds; [p]rovides perspective; [a]llows us to flirt with fear, anger, or other afflictive emotions; [c]aptures paradox; [t]urns status relationships upside down; [s]ubverts the dominant paradigm; [c]an signal willingness to engage in a playful manner; and [a]llows multiple levels of meaning. In addition, laughter provides specific psychological benefits. Getting groups to take a deep breath is very difficult, and often just plain odd. . . . But getting a group to laugh works just as well.

*Id.* at 2 (internal bullet points omitted).

<sup>2</sup> See Charles Q. Choi, *Study's Punch Line: Humor at the Office is Serious Business* (Jan. 11, 2008), <http://www.livescience.com/strangenews/071107-office-laughs.html>.

<sup>3</sup> See John Lande & Rachel Wohl, *Listening to Experienced Users: Improving Quality and Use of Commercial Mediation*, 13 DISP. RESOL. MAG. 18, 20 (2007) ("Focus group participants said a mediator needs skills to establish trust and rapport, including enthusiasm, respectful and active listening, empathy, emotional detachment, sincerity, candor, sensitivity to confidentiality concerns, integrity, impartiality, fairness, humor and the ability to ask difficult questions sensi-

that specifically addresses humor in relation to mediation.<sup>4</sup> Lawyer-mediator Robert Burns noted that “the best mediators I’ve seen are the ones who really like people and want to resolve people’s disputes—and they have a sense of humor.”<sup>5</sup> Some mediators depend on their use of humor in order to further the goals set forth by their profession.<sup>6</sup> When used at appropriate times, humor may be an important element in a successful mediation.<sup>7</sup>

This Note will show that, because of the lack of scholarly research addressing the use of humor in mediation,<sup>8</sup> general perceptions about the legal profession,<sup>9</sup> and current perceptions about the use of humor in mediation,<sup>10</sup> some mediators shy away from using humor in their practice because they do not fully understand when to use it and how to embrace it. While there are significant risks to consider when assessing whether humor is appropriate for a particular mediation, this Note seeks to identify some of the benefits of

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tively.”); see also Leonard A. Riskin, *Decisionmaking in Mediation: The Old New Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 29 (2003) (suggesting that potential mediation clients learn whether or not a particular mediator has a sense of humor, among other characteristics).

<sup>4</sup> Kevin W. Cruthirds, *The Impact of Humor on Mediation*, 61 DISP. RESOL. J. 33 (2006).

<sup>5</sup> Charles F. Thensted, *Roundtable Discussion: Mediation*, 48 LA. B.J. 202, 206 (2000).

<sup>6</sup> See Susan M. Hammer, *A Tribute to Sid Lezak*, 66 OR. ST. B. BULL. 39, 41 (2006). Lezak, a man known as a pioneer of dispute resolution programs in Oregon, is best known as the longest-serving Attorney General of all time. In this tribute, Hammer notes that Lezak, who advocated mediation at a time when it was not widely accepted, was remembered for his meditative skills which tied his sense of humor to his “love of people” and “his gentle persuasive powers.” *Id.*

<sup>7</sup> For an example of humor as an important element of a successful mediation, see Max Douglas Brown, *Rush Hospital’s Medical Malpractice Mediation Program: An ADR Success Story*, 86 ILL. B. J. 432, 435 (1998). This article presents an overview of a mediation program introduced at Rush Hospital to mediate medical malpractice disputes, allowing a 60–90 minute opening presentation where plaintiffs could tell their side of the case. This aspect of the program encouraged participants to reinforce the tone of the process, which included a tone of humor and optimism. Also, program facilitators would emphasize the role of the mediator, who could establish trust with clients by using, among other tactics, humor.

<sup>8</sup> See Cruthirds, *supra* note 4, at 34:

Eileen Carroll and Karl Mackie later came up with some similar desirable qualities [in mediators], like credibility, humility, diplomacy, intellectual rigor, integrity, patience, persistence and energy. . . . [L]ittle has been added to the list of a mediator’s important ‘professional equipment.’ However, there is a tool available to mediators that may facilitate their work: humor. (internal citations omitted).

See generally Jeff Kichaven & Deborah Rothman, Commentary, *Make it Funny: It’s a Risk, but Humor Can Ease ADR Tension*, 21 ALTERNATIVES TO THE HIGH COST OF LITIG. 49 (2003); ROD A. MARTIN, *THE PSYCHOLOGY OF HUMOR: AN INTEGRATIVE APPROACH* 366–67 (Elsevier, 2007); John W. Cooley, *Joke Structure: A Source of Creative Techniques for Use in Mediation*, 33 U.S.F. L. REV. 85 (1998).

<sup>9</sup> Part VI of this paper, *infra*, discusses humor’s role in the legal profession.

<sup>10</sup> Part IV of this paper, *infra*, discusses the risks of using humor in mediation.

using humor in practice. It offers a rationale for the use of humor in mediation, showing that, as long as mediators retain common sense when assessing whether humor will be beneficial in the mediation session, they will find that, in certain situations, the combined benefits may significantly outweigh the potential risks. Further, this Note is an attempt to dissuade some fears about using humor in mediation by presenting some examples of the successful use of humor in mediation.

As the role of mediation continues to expand in the legal profession, so too will the need to find creative solutions to the issues that mediators encounter. Addressing the use of humor in mediation should persuade mediators to incorporate humor into their mediation practice. Mediators should experiment with the use of humor, a tactic which has proven effective in many other disciplines.

## II. PERCEPTIONS ABOUT HUMOR IN MEDIATION

Humor is not widely recognized as a useful tactic in mediation.<sup>11</sup> Although not extensively written about, the use of humor in mediation is not a novel topic. Most legal research articles addressing humor in mediation do so only in passing, for instance, by suggesting that a mediator use “occasional humor,”<sup>12</sup> or noting that humor is a building block for positive rapport.<sup>13</sup> There are few articles directly addressing the use of humor in mediation or other

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<sup>11</sup> See Cruthirds, *supra* note 4, at 39 (“Humor is not a widely recognized element of mediation.”).

<sup>12</sup> Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735, 737 (2000) (suggesting the use of occasional humor during videoconferencing in online mediation); see also Michael Geigerman, 20 ‘Hits’: Reminders of What Mediators Need to Do, 18 ALTERNATIVES TO THE HIGH COST OF LITIG. 187 (2000) (listing “a sense of humor” as one of the twenty things a mediator needs to have). It should be noted, however, that in discussing the need to have a sense of humor in mediation, the writer is not specifically advocating the use of humor in mediation.

<sup>13</sup> Andrea M. Braeutigam, *What I Hear You Writing Is . . . Issues in ADR: Building Trust and Rapport in the Text-Based Environment*, 38 U. TOL. L. REV. 101, 104 (2006) (“[T]he ability to convey and perceive friendliness, attentiveness, humor, emotion, and understanding is instrumental in developing rapport in mediation, as conveyed by our verbal and non-verbal behaviors.”); see also Andrew Leaser, Note, *See Spot Mediate: Utilizing the Emotional and Psychological Benefits of Dog Therapy in Victim-Offender Mediation*, 20 OHIO ST. J. ON DISP. RESOL. 943 (2005) (suggesting in passing that mediators often use humor).

forms of alternative dispute resolution,<sup>14</sup> and most of those articles have been published within the last five years.<sup>15</sup>

Today, though using humor in mediation may seem non-traditional, it is important to note the breadth of its potential benefits. The information that is available concerning the use of humor in mediation implies that humor can actually be a valuable asset.<sup>16</sup> Mediators must therefore learn from what many other disciplines already realize: they should not fear humor.

The advantages of using humor in mediation may prove significant, and this emerging field deserves much more thorough consideration by the legal community. For example, mediators can effectively use humor to help build and maintain relationships with clients, lawyers and others they encounter in practice.<sup>17</sup> Some mediators strongly advocate the use of humor in mediation sessions.<sup>18</sup> Some writers have gone as far as analogizing standup comedy to mediation.<sup>19</sup>

Mediator John Cooley has specifically written about how mediators can use joke structure to achieve creative results in mediation.<sup>20</sup> The premise is simple: (1) conflict or incongruity of some type precedes all creative results; and (2) conflict (or incongruity) resolution is the process that produces creative results.<sup>21</sup> The rationale is also simple: mediators who embrace joke-telling strategies

<sup>14</sup> See Cruthirds, *supra* note 4; see also John Horn, Keith Maurer & Philip Ytterberg, National Arbitration Forum Blog: News Events and Perspectives About Alternative Dispute Resolution, *Humor Disarms Tense Arbitration Proceedings* (Aug. 27, 2007), <http://arbitration-forum.blogspot.com/2007/08/humor-disarms-tense-arbitration.html> (“Angelo sprinkled his dry humor and sarcasm throughout the proceedings which, according to the city’s labor lawyer, Timothy G. Yeung, ‘makes a very tense situation a little more comfortable.’ Another attorney stated that ‘humor is a superb tool anytime for an arbitrator in a tense environment.’”).

<sup>15</sup> See Cooley, *supra* note 8. However, Cooley’s article does not specifically address the benefits of using humor in mediation and instead focuses on the structure of a joke and how mediation can be guided by a similar structure.

<sup>16</sup> Cruthirds, *supra* note 4.

<sup>17</sup> See Keppos & Fox, *supra* note 1.

<sup>18</sup> Ed Brodow, *Ed’s Articles: Mediation Is No Laughing Matter . . . Or Is It?* (2007), <http://www.brodow.com/Articles/HumorInNegotiations.html> (“First, when you inject a little humor it can really lighten things up. Second, humor makes it easier to be tough without offending anybody. And third, humor helps when you don’t want to answer a question.”). For a discussion of lawyers who think humor is never appropriate for mediation, see Kichaven & Rothman, *supra* note 8.

<sup>19</sup> See Jeffrey Krivis, *Standing up For Mediation: A Veteran Neutral Trains in Comedy and ‘Settles’ For Getting Laughs*, 20 *ALTERNATIVES TO HIGH COST LITIG.* 93, 94 (2002); see generally Lawrence E. Mintz, *Standup Comedy as Social and Cultural Mediation*, 37 *AM. Q.* 71 (1985).

<sup>20</sup> See Cooley, *supra* note 8.

<sup>21</sup> *Id.* at 85.

can use this knowledge to become more effective mediators.<sup>22</sup> However, Cooley's article does little to explain how humor can be incorporated into mediation sessions, and focuses instead on the parallel structure between jokes and mediation sessions.<sup>23</sup>

Humor, at its best, is a form of persuasion.<sup>24</sup> A joke makes a person laugh because it convinces that person that something is funny.<sup>25</sup> Similarly, mediation also seeks to persuade audiences, usually by enticing parties to accept differing points of view.<sup>26</sup> Mediators use persuasion to help resolve parties' tensions and to convince them to reach agreements about their conflicting points of view.<sup>27</sup> This directly parallels the role of humor in mediation. Once mediators begin to understand this, they can begin to use humor to their advantage in practice. The use of humor in mediation is a topic that clearly deserves more in-depth analysis.

### III. BENEFITS OF HUMOR IN OTHER DISCIPLINES

Humor is a useful tool in various disciplines.<sup>28</sup> Anthropologist Mahadev Apte researched more than 200 countries, religions, ethnic groups, nationalities and tribes around the world and found that humor is universal.<sup>29</sup> This finding emphasizes the breadth of the role of humor around the world. However, in a survey of more than 100 mediation schools' websites, only two showed that they

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 87. Cooley goes on to state:

It is this second craft—creating or designing jokes—that mediators and mediation advocates need to study and master. It is there—in the design and structure of jokes—that many creative techniques reside, and it is there that the ways to produce creative results can be carefully analyzed and studied.

*Id.*

<sup>24</sup> Steven Lubet & Thomas Hankinson, *In Facetiis Veritas: How Improvisational Comedy Can Help Trial Lawyers Get Some Chops*, 7 TEX. REV. ENT. & SPORTS L. 1, 2 (2006).

<sup>25</sup> *Id.*

<sup>26</sup> See generally Robert Gatter, *Unnecessary Adversaries At The End Of Life: Mediating End-Of-Life Treatment Disputes To Prevent Erosion Of Physician-Patient Relationships*, 79 B.U. L. REV. 1091, 1111 (1999).

<sup>27</sup> See Debra A. Gilin & Paul W. Paese, Graduate Student Paper, *Mediation as Persuasion: Central Route Attribution Change as a Conflict Resolution Technique*, IACM 15th Annual Conference, available at SSRN: <http://ssrn.com/abstract=304971> (last visited Nov. 9, 2007) (showing how effortful consideration of attribution-focused intervention can suspend or reverse conflict escalation).

<sup>28</sup> See generally *Humor*, The Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/humor.htm> (last visited Oct. 26, 2007).

<sup>29</sup> See Cruthirds, *supra* note 4, at 37.

had humor training as part of their curriculum.<sup>30</sup> This absence of humor training, tied with the lack of legal research on this topic, demonstrates that the potential of this mediation tool has not yet been fully realized.

There are numerous benefits to using humor in everyday life.<sup>31</sup> Humor is shown to be effective in reducing pain and stress, improving the cardiovascular system, lowering blood pressure and promoting a person's sense of well-being.<sup>32</sup>

Negotiators use humor in practice.<sup>33</sup> Some of the concerns with using humor in negotiations also apply to using it in mediations.<sup>34</sup> By analogy, mediators can look to the successes of using humor in negotiation. One study shows that business and psychology students who were exposed to a funny video before a negotiation session more easily came to resolutions during the sessions than did students who were not exposed to such humorous content.<sup>35</sup> Some of the principles that govern negotiation are also applicable in mediation contexts,<sup>36</sup> thereby demonstrating that the principles and conclusions of the study can also be applied by analogy to mediation.

Research also indicates that humor helps to establish trust relationships.<sup>37</sup> Because it is necessary for mediators to establish trusting relationships with clients,<sup>38</sup> it is evident that one could use humor strategies to his advantage in mediation.

<sup>30</sup> *Id.* at 39. Presumably, Cruthirds conducted the survey himself for his personal research.

<sup>31</sup> Charlie Rickman and Linda J. Waybright, *Humor—It Works!!!*, Extension Service, W. VA. U. (2006), available at [http://www.wvu.edu/~exten/infores/pubs/fypubs/WL\\_224\\_HumorIt\\_Works.pdf](http://www.wvu.edu/~exten/infores/pubs/fypubs/WL_224_HumorIt_Works.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> For a brief discussion of some of the pros and cons to using humor in negotiations, see John Livengood, *Addressing Bias and Conflict in Dispute Resolution Settings*, 62 *DISP. RESOL. J.* 53, 54–55 (2007).

<sup>34</sup> *Id.* at 55 (noting that both mediation and negotiation do not involve a third-party decision maker and instead aim for the parties themselves to reach a mutual agreement).

<sup>35</sup> Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 1 *J. DISP. RESOL.* 1, 11 (2002).

<sup>36</sup> See Lawrence H. Fleischman, *A Client's Guide to Mediation*, 44 *ARIZ. ATT'Y* 30, 30 (2007) (stating the general proposition that mediation is essentially a form of negotiation).

<sup>37</sup> See Braeutigam, *supra* note 13.

<sup>38</sup> Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 *OHIO ST. J. ON DISP. RESOL.* 321, 340 (2007).

## IV. RISKS OF USING HUMOR IN MEDIATION

Some mediators reject the idea that humor should ever be used in mediation.<sup>39</sup> There are numerous reasons as to why this might be. Humor always runs a risk of rejection.<sup>40</sup> The use of humor in mediation is risky and can backfire.<sup>41</sup> For instance, if a mediator selects an inappropriate “target”<sup>42</sup> for her joke, another person might find that joke offensive.<sup>43</sup> Telling a successful joke is an art, and it can be a stressful task to stand in front of an audience

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<sup>39</sup> See Kichaven & Rothman, *supra* note 8, at 49. The authors note that:

Peter F. Laird of Los Angeles' Edelman, Laird & Sobel, who represented radio funnyman Rick Dees in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), recalls that “of all the legal proceedings in which I have been involved, mediation is the one where I can honestly say I have never seen anything funny happen. Settlements leave both sides unhappy and mediation brings pressure on people to compromise. It doesn't lend itself to humor.” Trial lawyer Lawrence P. Grassini of Woodland Hills, Calif.'s Grassini & Wrinkle, who represented the interests of puppeteer Paul Winchell and his friends Jerry Mahoney and Knucklehead Smith in *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805 (1983), cautions that “In some kinds of cases, such as wrongful death matters, any attempt at humor might detract from the seriousness of the situation and would just be inappropriate.”

*Id.* For a comment about using humor from a judge's perspective, see Hon. Daniel E. Wathen, *When The Court Speaks: Effective Communication as a Part Of Judging*, 57 ME. L. REV. 449, 451 (2005):

[T]hroughout my school career I “talked” a lot in plays, public speaking, debate, and, eventually, moot court and writing for the Maine Law Review. As a trial lawyer, my favorite tasks, in descending order, were final arguments, cross-examining witnesses, and, when I had the time, writing briefs. I enjoyed thinking on my feet, speaking on the spur of the moment, and trying to move the fact finder with both logic and emotion. Thus, I was somewhat chagrined to discover that, as a justice of the Superior Court at the tender age of thirty-seven, my principal function was to listen attentively and impassively. The trial judge interacts infrequently, never with emotion, and rarely with humor. Why? Humor and emotion from the bench just do not work. It is difficult for impartiality to survive an emotional outburst or an attempt at being funny, particularly at the expense of someone else in the courtroom.

<sup>40</sup> See Steven M. Sultanoff, *Using Humor in the Counseling Relationship*, originally published in *Laugh it Up*, Pub. Of the American Association for Therapeutic Humor, 1 (1992), available at <http://www.humormatters.com/articles/therapy1.htm> (“USING HUMOR IN ANY SITUATION INVOLVES THE RISK OF THE HUMOROUS INDIVIDUAL BEING REJECTED.”). Even professional comedians have experiences where their attempts at humor are rejected by audiences. This is called “bombing” and it happens to almost every comedian at some point during his or her career. See Louis C.K. as told to Danny Freeman, *What It Feels Like . . . to Bomb Onstage*, *ESQUIRE* (July 16, 2007), <http://www.esquire.com/dont-miss/wifl/louisck0807>.

<sup>41</sup> Kichaven & Rothman, *supra* note 8, at 49.

<sup>42</sup> Humor targets are discussed in more detail in part VII, *infra*.

<sup>43</sup> For a thorough discussion of people's reactions to humor that they find offensive, see generally Steven Hartwell, *Humor, Anger, Rules, and Rituals*, 13 *CLINICAL L. REV.* 327 (2006).

and say something humorous.<sup>44</sup> Further, mediations usually start with a plenary session, during which lawyers and clients make their points and vent their feelings.<sup>45</sup> This venting tends to exacerbate tension and even sometimes lead to hostility,<sup>46</sup> which may make mediators hesitant to use humor.

When people find something humorous, it is because they have perceived a breach of a norm or a value, and their reaction is that they find it funny.<sup>47</sup> Steven Hartwell describes this as a conflict between thinking and feeling, or the difference between the way something “is” and the way it “ought” to be.<sup>48</sup> This might be better thought of as a tension between rationality and absurdity. When people laugh together, they are collectively demonstrating shared values.<sup>49</sup> These values are varied, but sometimes they include targets that are non-threatening, such as objects or products.<sup>50</sup> One author categorizes race, gender and religion as topics that a person usually must obtain some sort of unspoken permis-

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<sup>44</sup> For an anecdote about a mediator’s reflections on his first time doing standup comedy, see Krivis, *supra* note 19.

<sup>45</sup> See Kirchaven & Rothman, *supra* note 8, at 66. In discussing plenary sessions, the author, quotes Gary Stabile, who represented the interests of political cartoonist Paul Conrad in *Yorty v. Chandler*, 13 Cal. App. 3d 467 (1970), who says:

That’s when people have their game faces on . . . Lawyers are making points to their own clients as well as to the other side and the mediator. It’s the time to show how strong your case is and how tough you are. When clients speak, it’s often in the nature of venting. It serves a good purpose, and lets clients get stuff off their chests. But that venting tends to exacerbate tension 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.

*Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Hartwell, *supra* note 43.

<sup>48</sup> *Id.*

Both humor and anger consist of a momentary separation between thinking and feeling. There is an instant when people are pulled between two contending mental forces: their thinking system reports that ‘everything is rationally normal,’ while their feeling side reports the situation is ‘not feeling normal.’ Worded differently, they experience a sudden tension between is (thinking) and ought (feeling).

<sup>49</sup> *Id.* at 336

[I]ndividuals whose conventional morality centers around group loyalty . . . find racist and sexist jokes humorous . . . because in laughing they signal that breaching a value that one should not tell racist or sexist jokes is an acceptable breach. That is, in participating in such humor they both recognize that a breach of propriety exists, but signal that the breach is morally acceptable.

<sup>50</sup> *Id.* See also 2 MEL HELITZER & MARK SHATZ, *COMEDY WRITING SECRETS* 36–41 (Writer’s Digest Books) (2005). For examples of humor targeted toward objects, consider the popularity of commercial parodies on the television show *Saturday Night Live*.



sion in order to joke about.<sup>51</sup> A racist, sexist or religious joke that might work for a professional comedian is unlikely to be successful in a mediation session.<sup>52</sup>

Some mediators will have reservations about using humor in their practice. In some circumstances, such fears are justified. However, mediators' reservations should be limited to assessing whether humor should be used in a particular mediation session, rather than taken as a sweeping assumption that humor must never be used in mediation. This need to examine the potential of using humor to assist in the flow of the mediation should be assessed on a case-by-case basis, especially when one considers the potentially powerful results of using humor in the mediation setting.<sup>53</sup>

Humor in a mediation session where emotions are especially tense, such as a wrongful death situation, is discouraged.<sup>54</sup> It might alienate a client, or cause a person to be perceived as not taking the client's needs seriously.<sup>55</sup> This can be harmful in establishing a trusting relationship.<sup>56</sup> Other concerns with using humor in mediation include the fear of offending a client,<sup>57</sup> the perception of non-professionalism with clients,<sup>58</sup> and the fact that the legal profession is considered very serious and traditional, and therefore may seem as though it is not an appropriate setting in which to use humor.

However, there are a number of attorneys who have successfully used humor to advance their careers. Paul Mercurio practiced law for several years before becoming a writer for *The Daily Show* with Jon Stewart, which landed him an Emmy.<sup>59</sup> Karen Bergreen

<sup>51</sup> See Hartwell, *supra* note 43, at 341.

<sup>52</sup> See Cruthirds, *supra* note 4, at 38.

<sup>53</sup> See Josefina J. Rendon, *Under the Radar? Prejudice in Mediations and Settlement Negotiations*, 30 THURGOOD MARSHALL L. REV. 347, 378 ("At the risk of being accused of taking the subject of discrimination and injustice too lightly, I would argue that having a sense of humor can often produce powerful results. People who laugh together can work together and respond to each other better.").

<sup>54</sup> Kichaven & Rothman, *supra* note 8, at 49.

<sup>55</sup> See Sultanoff, *supra* note 40, at 1

Using humor in any situation involves the risk of the humorous individual being rejected. . . . Humor must be in the client's interest and not for the counselor. By using humor the counselor risks alienating the client, being perceived as not taking the client's predicaments seriously, being perceived as less competent and therefore less capable of helping, etc. Effective use of humor requires that the counselor assess the client's ability to relate to humorous interventions.

<sup>56</sup> For a discussion of the racial and ethnic considerations that a mediator must take into account when determining whether to use humor, see Cruthirds, *supra* note 4.

<sup>57</sup> *Id.*; see also Hartwell, *supra* note 43.

<sup>58</sup> See Hartwell, *supra* note 43, at 334-40.

<sup>59</sup> Paul Mercurio, Biography, <http://www.paulmercurio.com/bio> (last visited Oct. 26, 2007).

is a Harvard Law School graduate who now has a successful comedy career.<sup>60</sup> Comedian Demetri Martin dropped out of New York University Law School, where he attended on a full scholarship, in order to pursue his career in comedy.<sup>61</sup> Self-proclaimed “Humorist-at-Law” Sean Carter offers Continuing Legal Education courses that incorporate humor.<sup>62</sup> Humor is present in the numerous jokes made at lawyers’ expense,<sup>63</sup> and some legal professionals occasionally participate in legal-oriented amateur stand-up comedy shows.<sup>64</sup>

The concerns outlined above are not particular to mediation, but are also risks that people encounter with the everyday use of humor. Yet people continue to use humor, knowing that there are risks involved. Perhaps this is because of the great potential of using humor in everyday situations. Mediators should therefore be less concerned about the risks of using humor and instead, learn to focus their fears in order to help determine when the use of humor is appropriate.

One mediator recites an anecdote about a faculty meeting where a participant referred to Unitarians as “atheists with kids.”<sup>65</sup> This joke was justified<sup>66</sup> because the participant had experience with Unitarians, and from his point of view, it was not ill-intentioned or tasteless.<sup>67</sup> While most people at the meeting laughed at this humorous interjection, one person, who remained silent during the episode, later commented that he found the joke “offensive and unacceptable.”<sup>68</sup> This vocal reaction to the joke affected the mood of the crowd, thereby causing the crowd, which had previously been quite jovial, to dissolve.<sup>69</sup>

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<sup>60</sup> *From Courtroom to Comedy Club*, 106 *HARV. MAG.* 3 (2004), available at <http://www.harvardmagazine.com/on-line/010475.html> (last visited Oct. 26, 2007).

<sup>61</sup> *Demetri Martin: Live and in ‘Person,’* Fresh Air Broadcast Interview (Sept. 24, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=14653866>.

<sup>62</sup> Sean Carter, Personal Website, [www.lawpsided.com](http://www.lawpsided.com) (last visited Nov. 8, 2007).

<sup>63</sup> See generally *Lawyer Jokes and Attorney Humor*, [http://www.ahajokes.com/lawyer\\_jokes.html](http://www.ahajokes.com/lawyer_jokes.html) (last visited Nov. 8, 2007).

<sup>64</sup> See Oregon State Bar, Briefs, *LAF-OFF Returns By Popular Demand*, available at <http://www.osbar.org/publications/bulletin/07oct/briefs.html> (last visited Oct. 26, 2007).

<sup>65</sup> See Hartwell, *supra* note 43, at 334–40.

<sup>66</sup> Merriam-Webster defines “justify” as “(1)(a): to prove or show to be just, right, or reasonable.” Merriam-Webster OnLine, Online Dictionary, available at <http://www.m-w.com/dictionary/justify> (last visited Oct. 26, 2007). In comedy, justification means essentially the same thing, but refers to the underlying theme of the comedic sensibility.

<sup>67</sup> See Hartwell, *supra* note 43, at 334–40.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

This joke led to the perception of an unprofessional demeanor, but only to the one man who had complained.<sup>70</sup> However, the effects of the joke caused the crowd to disperse. Such a reaction could be incredibly problematic in a mediation session, because even if everyone else finds the joke funny, the one offended person can set the tone of the mediation. This humor attempt was a risk, mainly because the joke-teller chose a risky target—religion. Such targets are more likely than others to backfire, primarily because a person’s politics and ideologies are not visible just by looking at an individual, and therefore it is more difficult to assess their reservations about particular subjects.<sup>71</sup> Targets such as religion, race or gender that play off of stereotypes are considered especially risky targets.<sup>72</sup>

Mediators can take much away from the instance described above. From that anecdote, mediators can learn the importance of properly assessing a client or group in deciding whether to use humor. Just as a mediator instinctively would not use humor in an emotionally-charged mediation, he would also refrain in a situation where he was not in tune with the shared values of the group.

Mediators may also be afraid to use humor for fear that they might distance themselves from the clients and the objective at hand, thereby costing them their position as a leader within the group.<sup>73</sup> But these fears are subject to criticism based on the fact that humorous people are shown to command more respect through their charismatic demeanor.<sup>74</sup> If a mediator makes a joke, and that joke is perceived as offensive or does not otherwise elicit a response, the best way to address this is to simply apologize.<sup>75</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> HELITZER & SHATZ, *supra* note 50, at 41.

<sup>72</sup> *Id.*

<sup>73</sup> See Cruthirds, *supra* note 4, at 36:

[T]here are risks in using any form of aggressive humor in mediation. It 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.

<sup>74</sup> *Id.* (“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.”).

<sup>75</sup> Keppos & Fox, *supra* note 1, at 4.

V. HUMOR IN OTHER DISCIPLINES THAT INCORPORATE  
MEDIATION TACTICS

Humor is perceived as a useful tool in various disciplines.<sup>76</sup> Anthropologists, for example, have used humor to unearth truths about the internal workings of the workplace, and have found that people can use humor to break down barriers within their profession.<sup>77</sup> A recent survey has shown that humor in the workplace has a major impact on ensuring cohesiveness in the work setting, contrary to previous ideas that humor is inappropriate for work.<sup>78</sup>

Humor can be useful in sales contexts.<sup>79</sup> It can help persuade a potential buyer to purchase a product.<sup>80</sup> This even applies when a person might not initially be interested in a product.<sup>81</sup> Using humor can thereby put associates closer to making a sale.<sup>82</sup>

In the news media, reporters and anchors must use mediative tactics in order to reach their journalistic goals.<sup>83</sup> Members of the news media must sometimes serve as mediators between parties who have strong opinions on sensitive issues.<sup>84</sup> In this context, the interviewer becomes the mediator.<sup>85</sup> Walter Cronkite often used humor as a tool in order to mediate tensions with the guests he interviewed on his program.<sup>86</sup> Ted Koppel also uses humor when mediating discussions in order to resolve conflicts between parties on-air.<sup>87</sup> The nature of his position requires that he remain sensitive to interviewees' often emotional opinions.<sup>88</sup> In order to do this, he will sometimes incorporate humor in order to retain con-

<sup>76</sup> See generally, Humor, The Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/h/humor.htm> (last visited Oct. 26, 2007).

<sup>77</sup> See Janet Holmes & Stephanie Schnurr, *Politeness, Humor and Gender in the Workplace: Negotiating Norms and Identifying Contestation*, 1 *J. OF POLITENESS RES.* 1 (2005).

<sup>78</sup> Choi, *supra* note 2.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See generally TERRY PAULSON, *MAKING HUMOR WORK: TAKE YOUR JOB SERIOUSLY AND YOURSELF LIGHTLY* 47-48, (Crisp Publications 1989) (discussing how humor can be useful in the sales context).

<sup>83</sup> See generally Carol Pauli, *News Media as Mediators*, 13 *No. 4 DISP. RESOL. MAG.* 8 (2007) (discussing journalistic forays into conflict resolution).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 10.

<sup>87</sup> *Id.* Researchers who observed Koppel's conversational strategies found that he used humor with opposing parties.

<sup>88</sup> *Id.*

trol of the interview and over the interview subject.<sup>89</sup> If speakers such as Cronkite and Koppel can use humor to assist with the mediative components of their journalism positions, mediators in other settings should also use humor in their fields. Tremendous benefits, including the establishment of a strong, positive rapport, could result merely because the mediator devoted a few minutes to using humor to help create a relationship of trust and respect.<sup>90</sup>

Public speakers and other notable personalities are often remembered for their humorous remarks.<sup>91</sup> Politicians are also mediators who can successfully use humor to their advantage.<sup>92</sup> One commentator views a sense of humor as one of the qualities that make many politicians successful mediators as well.<sup>93</sup>

Finally, in classrooms, teachers and college professors use humor to effectively reduce stress and create an overall positive environment.<sup>94</sup> One study showed that fifty-five percent of college sophomores found that professors' humor was effective in the classroom.<sup>95</sup> The study also found that humor helped develop a positive rapport between the students and the professor.<sup>96</sup> These examples of the successful use of humor help illustrate that media-

<sup>89</sup> Pauli, *supra* note 83, at 10.

<sup>90</sup> See Braeutigam, *supra* note 13 (“[T]he ability to convey and perceive friendliness, attentiveness, humor, emotion, and understanding is instrumental in developing rapport in mediation . . . . Mediators earn rapport-based trust by facilitating a process that intentionally fosters feelings of involvement, positive attitudes, and understanding.”).

<sup>91</sup> Carl J. Debevec, *Another Funny Thing Happened on the Way to Resolution* (Aug. 2004), <http://www.mediate.com/articles/debevecC3.cfm>.

<sup>92</sup> See Tom Melling, Symposium, *Dispute Resolution within Legislative Institutions*, 46 STAN. L. REV. 1677, 1701 (1994).

<sup>93</sup> *Id.* In this article, the author discusses former United States House of Representatives Congressman Wayne Owens, and his ability to mediate through certain political situations. In the article, the author says:

There are several good reasons for politicians to remove themselves from the traditional role of an agent and step into the role of mediator. Many of the typical characteristics of politicians make them effective mediators. Mediators must have intelligence, stamina, energy, patience, a sense of humor, persuasiveness, credibility, and impartiality. Except perhaps for impartiality, these are valuable skills for anyone who hopes to win a grueling campaign for elected office. Without these skills, Representative Owens would not have been nearly as successful in bringing the groups together and mediating the dispute. For example, his sense of humor often kept disagreements from escalating out of control.

*Id.*

<sup>94</sup> See Karen Steele, *The Positive and Negative Effects of Humor in the Classroom Setting* (May 1998) (unpublished M.A. Thesis, Salem-Teiko University) ([http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/17/44/2e.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/44/2e.pdf)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

tion sessions, although notably different than the workplace, the newsroom, the political arena, and the classroom settings, might also provide an atmosphere in which humor can be applied as a way to connect with others.

## VI. HUMOR IN THE LEGAL PROFESSION

When ordinary people think about the role of the law in their lives, they seldom think of humor.<sup>97</sup> People rarely find anything funny about their experiences with the law.<sup>98</sup> Perhaps by necessity, lawyers are sometimes perceived as serious, professional, or humorless.<sup>99</sup> When ordinary people find humor in the law, they often find it embodied in extreme exaggerations of legal authority, exercised devoid of common sense.<sup>100</sup> For example, in one study, a researcher interviewed a woman who had found humor in the exaggerated seriousness of a relatively minor welfare violation being treated as a serious crime.<sup>101</sup>

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<sup>97</sup> Patricia Ewick & Susan S. Silbey, *No Laughing Matter: Humor and Contradictions in Stories of Law*, 50 DEPAUL L. REV. 559, 565 (2007).

<sup>98</sup> *Id.* The article describes a study that consisted of asking ordinary residents of three counties in New Jersey to reflect on their encounters with the law. The authors go on to note that “[t]his fact is all the more puzzling given the abundance of law jokes that circulate . . . . While people find the law funny, they do not tend to find their own experiences with the law humorous.”

<sup>99</sup> See generally *Global Crossing Founder Sees No Humor in Cards*, INT’L. HERALD TRIB., Business Section (July 15, 2003), available at <http://www.iht.com/articles/2003/07/15/cards.php>. Some lawyers tend to embrace this stereotype, the effect of which can be humorous. For an unintentionally humorous commercial for an attorney asserting his “seriousness,” see the video *Serious Lawyer—San Francisco Bay Area*, available at [http://www.youtube.com/watch?v=\\_4VN-6-rHYA](http://www.youtube.com/watch?v=_4VN-6-rHYA) (last visited Oct. 26, 2007).

<sup>100</sup> Ewick & Sibley, *supra* note 97.

<sup>101</sup> *Id.* The article discusses an incident where a former welfare mother recounts an experience she had in court involving a disputed welfare benefit. When asked if she could tell us more about this experience, she replied, ‘[i]t was funny.’ When probed as to what was funny about the story, the interviewee went on to explain,

‘[t]here were people up there that owed them like twenty-five, thirty thousand dollars (as opposed to her debt of \$3,200). And it was a really funny day. I mean, they fingerprinted us (here she laughs). Took our picture. But they told me all I had to do was go up there and get it expunged, or something. I said the heck with that. What do I want to do that for, I’m no big time criminal (laughs). I was just trying to survive and take care of my kids . . . . It was hilarious.’

In this story, the down to earth, common sense logic of the respondent who is just trying to survive is contrasted with the extreme (and thus comical) measures taken by the court system that processes her as if she were “a big time criminal.” *Id.* The fact that the charges were subsequently dropped serves as the punch line to the developing joke about the excessive allocation of official resources and attention. *Id.*

Some areas of the legal profession, however, have used humor successfully. As a form of persuasion, humor can be incredibly successful in the legal realm.<sup>102</sup> There are a number of lawyer-comedians.<sup>103</sup> John Cooley, noted above, believes joke structure<sup>104</sup> can be effectively incorporated into mediation<sup>105</sup> because he believes that lawyers and comedians both follow a certain internal logic in order to make sense of things.<sup>106</sup> He claims that this structure is comparable to that of telling jokes, mainly that there is a setup, a delivery and a punch line.<sup>107</sup>

With so many jokes about lawyers' personality traits,<sup>108</sup> it seems that lawyers should use legal humor to their advantage. There are many jokes about lawyers,<sup>109</sup> and some of them reflect stereotypes about ambulance-chasing, money-hungry attorneys.<sup>110</sup> But in practice, lawyers who are so inclined can also fight fire with fire, successfully fending off these stereotypes by using their own humorous sensibilities.<sup>111</sup>

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<sup>102</sup> Yxta Maya Murray, *Tragicomedy*, 48 How. L.J. 309, 330 (2004) ("When comedy is used in the legal realm, it may serve as an equally potent tool for persuasion.").

<sup>103</sup> See the discussion of lawyer-comedians in part IV, *supra*.

<sup>104</sup> Joke structure is discussed in part VII, *infra*.

<sup>105</sup> See Cooley, *supra* note 8, at 87.

<sup>106</sup> See John Cooley, *The Joke Model of Creative Thinking*, MEDIATE.COM (July 2004), <http://www.mediate.com/articles/cooley3.cfm>. He says:

In each process there is a fact statement stage and a resolution stage. The primary difference between the two processes is that in the joke process, a stimulus in the form of new information—the punchline—is intentionally and suddenly injected into the process which causes or allows the initial information to be perceived interpreted in a very different way, thus yielding an unexpected, satisfactory resolution or interpretation. It is the quality and the timing of the punchline that comprise the creative act and speeds the joke to a satisfying resolution. It is this same kind of punchline—specially selected new information—that must be injected into the mediation process at the appropriate time in order to yield highly satisfactory, optimal, or even super-optimal, solutions. A point deserving special emphasis, which may indeed serve as the punchline of this article, is as follows: It is the mental process which occurs in joke processing in a microsecond—at the time of and just before surprise—that must be replicated in the mediation setting in order to achieve super-optimum solutions; it is as if that mental process of reframing be viewed under a microscope and in slow-motion to be effectively discerned and applied.

<sup>107</sup> *Id.* Other writers have described a slightly modified version of joke structure or humor structure. See William O. Beeman, Brown University Department of Anthropology, *Humor: Linguistic Lexicon for the Millennium*, 9 J. OF LINGUISTIC ANTHROPOLOGY (2000), available at <http://www.brown.edu/Departments/Anthropology/publications/Humor.htm>.

<sup>108</sup> Ewick & Sibley, *supra* note 97, at 565.

<sup>109</sup> *Id.*

<sup>110</sup> See generally, William P. Skladony, Essay, *I'm Proud to be a Lawyer Because Dick the Butcher Wants Me Dead*, 23 OHIO N.U. L. REV. 363 (1996) (discussing the numerous lawyer-bashing jokes).

<sup>111</sup> *Id.*

One can look to previous successful applications of humor in the legal profession to determine that such applications might be useful in other legal contexts. For example, in discussing law firm employee assessment programs, one author emphasizes that without humor, such programs are ineffective.<sup>112</sup> This is in stark contrast to the dry, dull campaigns that most people tend to implement in these employee assessment situations.<sup>113</sup> The use of humor leads to enthusiasm and motivation for such programs, and allows them to achieve a higher level of success.<sup>114</sup>

As another indicator of the potential of humor in law, one can note the popularity of humor-related Continuing Legal Education programs.<sup>115</sup> Some of these programs even involve the use of improvisational techniques in negotiation.<sup>116</sup> While improvisation in mediation does not automatically suggest comedic improvisation, improvisational comedy is, essentially, improvisational role-playing. Improvisational comedy is a great tool for those who must learn to think quickly on their feet.<sup>117</sup> Some legal professionals encourage attorneys to learn the basic skills of comedic improvisation in order to incorporate them into their practice.<sup>118</sup>

## VII. HUMOR TACTICS FOR MEDIATION

Humor operates through incongruity and irony.<sup>119</sup> It causes negative emotions such as anger and hostility to be redirected, resulting in lighthearted disengagement.<sup>120</sup> All jokes are grounded in realism,<sup>121</sup> and the target is the most important part of the joke.<sup>122</sup> Popular targets include self, sex, celebrity, places, products and

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<sup>112</sup> *Keeping Current*, O7-1 Partner's Report 9, Institute of Management and Administration, Inc. (2007).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Carter, *supra* note 62.

<sup>116</sup> *Mediation with Jeffrey Kravis*, FIRST MEDIATION., available at <http://www.firstmediation.com/main.htm> (last visited Nov. 10, 2007).

<sup>117</sup> See generally MARK BERGEN, MOLLY COX & JIM DETMAR, *IMPROVISE THIS! HOW TO THINK ON YOUR FEET SO YOU DON'T FALL ON YOUR FACE* (Hyperion 2002).

<sup>118</sup> For an overview of how improvisational comedy can be beneficial for attorneys, see Joey Novick, *Improv for Lawyers: Why Improvisation for Lawyers? What Will Lawyers Learn from Improv?*, available at <http://www.improvforlawyers.com/id15.html> (last visited Feb. 22, 2008).

<sup>119</sup> Ellen Yamshon & Daniel Yamshon, *Comics Media in Conflict Resolution Programs: Are They Effective in Promoting and Sustaining Peace?*, 11 *HARV. NEGOT. L. REV.* 421, 425 (2006).

<sup>120</sup> *Id.*

<sup>121</sup> HELITZER & SHATZ, *supra* note 50, at 38.

<sup>122</sup> *Id.* at 37.



ideas, such as those about politics and religion.<sup>123</sup> There are benefits and consequences to using each of these types of targets.

In many contexts, one's self can often be a strong target. New stand-up comedians are often encouraged to use self-deprecating humor, because such humor is considered the least offensive and the most effective.<sup>124</sup> In fact, some comedians make a living telling self-deprecating jokes.<sup>125</sup> But, there are also risks associated with using self-deprecating humor at a mediation session.<sup>126</sup> People who use humor too early can come across seeming presumptuous.<sup>127</sup>

Some advocates of using humor in mediation claim that self-deprecating humor is the best kind of humor to use.<sup>128</sup> However, these kinds of jokes run the risk of making the mediator look foolish,<sup>129</sup> although it is always important to consider that the benefits of successful humor far outweigh the risks associated with using this kind of humor. In applying humor to a situation, mediators have an advantage over others who are usually unfamiliar with much of their audience. In mediation, mediators have the opportunity to become familiar with their clients, thereby allowing mediators to offer clients a feeling of social cohesiveness through humor.<sup>130</sup>

Joke structure incorporates particular elements that anyone can learn.<sup>131</sup> Jokes are based on a structure that includes the setup,

<sup>123</sup> *Id.* at 37–41.

<sup>124</sup> *Id.* at 38.

<sup>125</sup> The Wikipedia entry for “Self-Deprecation,” notes that:

A number of comics, including Chris Rock, Katt Williams, Chris Tucker, Steve Harvey, Sinbad [ ], Adam Carolla, Jon Stewart, Artie Lange, Rodney Dangerfield, Dave Attell, Larry the Cable Guy, Woody Allen, David Letterman, Sean Rouse, Larry David, Ricky Gervais, Jim Gaffigan, Dave Hughes, Russell Peters, Brian Regan, Jim Norton, and, later in his career, George Burns—built their acts around their own perceived unattractiveness, weight, age and/or lack of appeal to the opposite sex.

WIKIPEDIA.COM, Self-deprecation, <http://en.wikipedia.org/wiki/Self-deprecation> (last visited Oct. 26, 2007).

<sup>126</sup> See Keppos & Fox, *supra* note 1, at 3.

<sup>127</sup> *Id.*

<sup>128</sup> See Kichaven & Rothman, *supra* note 8. In discussing the use of humor in Alternative Dispute Resolution generally, attorney Pierce O'Donnell noted that “people are more comfortable with you if you can make a little fun of yourself.”

<sup>129</sup> HELITZER & SHATZ, *supra* note 50 (quoting writer and director Carl Reiner, “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.”).

<sup>130</sup> See Cruthirds, *supra* note 4, at 36 (“Several 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.”).

<sup>131</sup> HELITZER & SHATZ, *supra* note 50, at 7 (“[T]he truth is that anyone can learn to write humor. Although some individuals are naturally funnier than others, just as some individuals

building anticipation, and a punch line.<sup>132</sup> This is often heightened by a “triples” or “three-beat” formula,<sup>133</sup> popular in several forms of comedy, including improvisational, sketch and stand-up.<sup>134</sup> Because this is a formula and not something that some people inherently have and others are born without, it can be taught to mediators. This is contrary to many people’s understanding of the way that humor works.

Mediator Kevin W. Cruthirds notes that there are four different styles of humor identified to date.<sup>135</sup> These are: self-enhancing humor, affiliative humor, aggressive humor and self-defeating humor.<sup>136</sup> Self-enhancing humor relates to a person’s ability to sustain a positive outlook on life.<sup>137</sup> Affiliative humor is associated with the type of people who are “the life of the party,” and refers to their ability to beguile others with their amusing stories and anecdotes.<sup>138</sup> Aggressive humor can be either negative or positive and is based on the theory that people will laugh when they feel superior to others, much like bullies.<sup>139</sup> Finally, self-defeating humor relates to humor at one’s own expense, generally using one’s self as the applicable target, and usually applies to people who are emotionally needy and lack self-esteem.<sup>140</sup> He argues that some of

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are more athletic or more musically gifted, humor writing can be taught and humor-writing skills can be acquired.”).

<sup>132</sup> *Id.* See also Krivis, *supra* note 19. Krivis says:

A joke, like a mediation, has a very specific structure. A joke has a setup, connector, and punch line. A comedian plays many roles, not the least of which is an orchestrator of the room. The comedian creates a target assumption upon which the story is built—that is, the set up. The comic then introduces a connector, a thing that is interpreted at least two ways, and surprises the audience by shattering or reinterpreting that assumption—better known as the punch line—getting the laugh. They then follow with various tag lines in order to get more laughs out of one joke. Watch Leno this week and you’ll see what I mean.

*Id.*

<sup>133</sup> This basic principle refers to a situation where a person tells a joke or writes a joke containing three punchy aspects. In comedy, most elements are structured in threes.

<sup>134</sup> HELITZER & SHATZ, *supra* note 50, at 7. No one is completely sure why the triples formula works, but it is supposed that the two early components set up the anticipation, and the third beat maximizes its potential. For an overview of the three-beat “Harold” structure in long-form comedic improvisation, see Wikipedia.com, Harold (improvisation), [http://en.wikipedia.org/wiki/Harold\\_\(improvisation\)](http://en.wikipedia.org/wiki/Harold_(improvisation)) (last visited Nov. 8, 2007).

<sup>135</sup> See Cruthirds, *supra* note 4, at 35.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

these types of humor can be incorporated into mediation in order to impact the success of the mediation.<sup>141</sup>

Also, in using humor, timing is essential. According to Psychologist Steven M. Sultanoff, Ph.D.,<sup>142</sup>

The safest (interpersonally) times to use humor are: 1. When another person uses humor with you; 2. When you have a strong relationship with the other person; 3. When the situation is socially “appropriate[”] (Humor at a party and at a funeral may be experienced differently); 4. When you use humor that is aimed at yourself (as opposed to humor aimed at another person); 5. When you use humor to poke fun at a situation but not at another person or group of persons.<sup>143</sup>

The basic rule of comedy is that timing is everything, and this holds true in the mediation setting as well.<sup>144</sup> Mediations can be combative, and interspersed humorous anecdotes can be just what the parties need in order to lighten the mood.<sup>145</sup> Some mediators find it useful to use humor prior to the mediation session, while in discussions with opposing counsel.<sup>146</sup> Typically, humor should be introduced after parties have had a chance to “vent,” or, in other words, when they are no longer wearing their game faces.<sup>147</sup>

### VIII. APPLYING HUMOR TO MEDIATION

John Cooley notes that a good mediator must have an appropriate sense of humor.<sup>148</sup> Much in the way that trial advocacy is an

<sup>141</sup> See Cruthirds, *supra* note 4, at 35.

<sup>142</sup> Past President of the Association for Applied and Therapeutic Humor.

<sup>143</sup> Steven M. Sultanoff, *Humor Matters: Frequently Asked Questions*, <http://www.humormatters.com/FAQ.htm> (last visited Nov. 10, 2007) (internal punctuation omitted). For a discussion of the appropriateness of humor in mediation, see part IV, *supra*.

<sup>144</sup> Kichaven & Rothman, *supra* note 8, at 49 (“So how, then, can we distinguish appropriate from inappropriate attempts at humor? For starters, the basic rule of comedy-timing is everything-is no less applicable in this context than in any other.”).

<sup>145</sup> *Id.*

<sup>146</sup> Nicole Whyte, *Winning Pre-Mediation Strategies*, 48 ORANGE COUNTY LAWYER 24, 26 (“Light hallway banter among counsel helps to ease the tension between the parties, particularly where counsel are able to make light conversation or find some humor outside of the litigation setting.”).

<sup>147</sup> Kichaven & Rothman, *supra* note 8, at 49.

<sup>148</sup> Gabriel P. Soto, *Environmental Regulatory Mediation*, 8 TEX. TECH ADMIN. L.J. 253, 256 (2007), note 14, citing John W. Cooley, THE MEDIATOR’S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION 28 (2006):

The qualities of a skilled mediator include: ‘patience, creativity, flexibility, open-mindedness, good listening and communication skills, appropriate sense of humor,

art, so is mediation.<sup>149</sup> Humor is a tool that can assist mediators in helping them reach the desired end, which usually culminates in a settlement that the parties can agree upon.<sup>150</sup> Appropriately-timed humor is useful in helping to achieve settlements.<sup>151</sup> It can be useful to use humor when settlements reach a standstill.<sup>152</sup> Humor can serve as a distraction from a tense mediation session.<sup>153</sup> In mediation, it can help overcome an impasse and can also drive a settlement.<sup>154</sup> In mediation involving negotiation, mediators can also use humor to successfully counter inappropriate bargaining tactics.<sup>155</sup>

For example, when a defendant's attorney made an exceptionally low-ball offer of \$15,000 at five P.M. near the end of a media-

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optimism, motivation without coercion, . . . good judgment[.] . . . [being] well organized and punctual and displaying respect for advocates, their clients, and . . . viewpoints . . . .'

<sup>149</sup> *Id.*

<sup>150</sup> See Stephen B. Goldberg, *Neutrals' Skill Part II of II, Research Backs Survey Results: Achieving Rapport is the Key to Getting Mediation Parties to Reach a Settlement*, 24 ALTERNATIVES TO HIGH COST LITIG. 99 (2006).

<sup>151</sup> *Id.*

<sup>152</sup> Michele Mattsson & Kent B. Scott, *Maneuvering Through Mediation: The Tricks, Twists and Turns of Finding Untracked Powder—Resolution*, 18 UTAH B.J. 30 (2005):

When a client draws a line in the sand, it either means he or she is frustrated or that negotiations have reached an impasse. Counsel and the mediator need to determine which it is and avoid the latter, if at all possible. Here are some tips. Review the progress that has been made up to that point. Ask to talk to your client alone. Take a lunch break. Go for a walk with your client. Discuss what will happen if the case doesn't settle. Indicate how much it will cost to proceed and discuss likely outcomes. Talk about risk. Get creative. Throw out new ideas. Add a new twist to an old idea. Keep your independence. Keep a sense of humor. Tell your client what you think is a "good deal" and what is not. The client is always the boss, but the attorney is the professional and must remain objective.

<sup>153</sup> Dwight Golann, *If You're Willing to Experiment, 'Principle' Cases can be Mediated*, 16 ALTERNATIVES TO HIGH COST LITIG. 37 (1998) (noting that in order to reduce feelings of pressure during mediation, one should "Inject humor or tell a story—Your anecdote need not be relevant to the case; being distracting is often enough, especially if one can make litigants smile for a moment."); see also Peter Lovenheim, *Humor, Trustworthiness, and Even Drama: Assessing whether you Have What it Takes to be a Mediator*, 20 ALTERNATIVES TO HIGH COST LITIG. 169 (2002).

<sup>154</sup> Michael Geigerman, *20 "Hits:" Reminders of What Mediators Need to Do*, 18 ALTERNATIVES TO HIGH COST LITIG. 187 (2000); see also Steven P. Goldberg, *Mediators Reveal Their Essential Techniques for Successful Settlements*, 24 ALTERNATIVES TO HIGH COST LITIG. 81, 89 (2006) ("Two other tactics that were frequently cited as effective ways of moving disputing parties toward settlement were using humor to reduce tension and combining patience and tenacity to continue to encourage settlement even after one or both of the parties have become convinced that settlement is impossible[.]").

<sup>155</sup> Joan Protes, *Improving the Prospect of Settlement in Mediation*, 1383 PRACTICING L. INST. 485 (2003).

tion session, the opposing counsel sent his mediator to tell the defense attorney that if he had heard the sum correctly, then he and his client would be on the six P.M. train home, but if he had *meant* to say \$50,000, then the plaintiff's attorney would counter with \$100,000.<sup>156</sup> Upon hearing this, the defendant's counsel immediately countered with a reasonable number, and the parties settled by seven P.M.<sup>157</sup> This anecdote goes to show that "sometimes humor and a little 'Alice in Wonderland' reasoning of one's own can be a very effective tool for getting the negotiation back on track."<sup>158</sup>

Some instances where humor might be useful as a distraction are when the mediation gets off track or when anxiety is so high that parties cannot continue a rational discussion.<sup>159</sup> A joke or a humorous story might then serve as a tactical distraction for the parties.<sup>160</sup> But some mediators are uncomfortable with their capacity to use humor to their advantage in tense mediations.<sup>161</sup> One article, however, notes that among a list of factors, some of the most effective mediation advocates used humor.<sup>162</sup> Mediators must keep a sense of humor because it serves as protection from the mundane and as an important source of energy throughout the mediation session.<sup>163</sup>

In mediations that involve high emotions, which are heightened by the seriousness of the subject matter, humor might be less appropriate. Child custody battles, difficult divorces and anything involving a person's death come to mind. In these kinds of cases, the mediator risks alienating his client through his use of humor, and this alienation could be especially harmful to the client's interests and perhaps even destroy the parties' trust in the mediator.<sup>164</sup>

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Lovenheim, *supra* note 153, at 171.

<sup>160</sup> *Id.*

<sup>161</sup> Goldberg, *supra* note 150, at 100 ("A judicious use of appropriate humor to lessen tensions also appears to be useful in achieving settlement, though some mediators are uncomfortable with their capacity to successfully utilize humor in a tense situation.").

<sup>162</sup> Howard D. Venzie, Jr., *Some Guidelines for Effective Advocacy in Mediation*, 13 PRACTISING L. INSTITUTE 391, New York Practice Skills Course Handbook Series (1998).

<sup>163</sup> Geigerman, *supra* note 154.

<sup>164</sup> See Paul F. Divine, Symposium, *Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?*, 12 ST. LOUIS U. PUB. L. REV. 187, 199 (1993) ("[H]umor may destroy the parties' trust in an emotionally charged setting, like child custody. Under those circumstances, the observation should be directed toward the ability to detect and reduce tension between the parties.") (internal citations omitted).

Using humor in these kinds of situations might not be appropriate; instead, the mediator's energy should instead be focused on the ability to detect and reduce parties' tensions.<sup>165</sup> However, mediators might wish to use humor to "help take the edge off" when parties' emotions get in the way of a successful mediation.<sup>166</sup>

However, other contexts such as commercial mediation are highly conducive to the application of humor.<sup>167</sup> Mediators in the business setting must have a good sense of humor in order to connect with their clients. Of course, in making a choice of whether to use humor in business mediation or not, the mediator should carefully evaluate the costs and benefits to his client. Even though the benefits of humor may strongly outweigh the negative aspects, one inopportune use of the humor could potentially lead to disastrous consequences.<sup>168</sup> Because humor can backfire or be interpreted as offensive, a sense of appropriateness and timing is necessary.<sup>169</sup>

Even if the mediator does not understand the value of using humor, clients do.<sup>170</sup> Although it can sometimes be difficult to see how humor can be used in such situations where tensions are high, sometimes clients are not only interested, but desire its use in their mediation.<sup>171</sup> While humor alone may not suffice to reach the goals of mediation, it will succeed when combined with these other

<sup>165</sup> *Id.*

<sup>166</sup> See Leaser, *supra* note 13.

<sup>167</sup> See Stewart I. Edelman, *Mediation in Commercial Disputes*, 43 TRIAL 42 (2007).

<sup>168</sup> See Kichaven & Rothman, *supra* note 8. The authors tell the story of Christine Johnson, who had sued the Catholic Church, alleging that a priest had molested her son.

The case found its way to Santa Barbara Superior Court Judge Bruce Dodds for a settlement conference. Dodds kept a crystal ball on the conference table in his chambers, where the settlement negotiations took place. After telling her what he thought her case was worth, Dodds pressed a button on the crystal ball. The ball responded "yes," confirming Dodds' settlement evaluation, and he then said to Johnson, "There it is. That's it. That's what you get." Ms. Johnson then found her way to ABC's Prime Time Live, where she told her story to Diane Sawyer and millions of viewers. Dodds then found his way to U.S. District Court in Los Angeles, where he filed suit against the network for defamation. The claims were dismissed, and Dodds appealed. The dismissal was affirmed and reported in *Dodds v. American Broadcasting Co.*, 145 F.3d 1053 (9th Cir. 1998).

*Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See Lande & Wohl, *supra* note 3.

<sup>171</sup> *Id.* ("[F]ocus group participants said a mediator needs skills to establish trust and rapport, including enthusiasm, respectful and active listening, empathy, emotional detachment, sincerity, candor, sensitivity to confidentiality concerns, integrity, impartiality, fairness, humor, and the ability to ask difficult questions sensitively.").

elements that make the use of humor so important to a mediator's practice.<sup>172</sup>

In fact, humor in mediation is so important that some people think that selecting a mediator without a sense of humor can be damaging to a client's case, even in emotionally-charged mediations.<sup>173</sup> For example, in divorce mediation situations where tensions can sometimes be especially high, some mediators recommend that parties look for mediators who have a sense of humor.<sup>174</sup> One mediator recounts a situation where, during a divorce mediation, a couple was arguing about the circumstances that led to the wife's affair.<sup>175</sup> The divorcing wife claimed that her husband had been emotionally detached for a long time, and pointed out that the affair didn't begin until the couple had long been separated.<sup>176</sup> The argument appeared to be well-rehearsed and both parties became defensive.<sup>177</sup> The mediator interrupted this argument by saying that she suspected the couple had gone through this argument before, which brought sheepish smiles to the parties' faces.<sup>178</sup> This is a circumstance where humor was effective at reducing tension and getting the parties back on track.<sup>179</sup> The parties were then able to think clearly about what they wanted to

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<sup>172</sup> *Id.*

<sup>173</sup> See Nathan Goldberg & Dolores Y. Leal, *Tips to Avoid Selecting the Worst Mediator for your Emotionally Charged Case*, 7 ORANGE COUNTY LAW 14, 15 (2006):

The [mediation] process is grueling so that choosing a mediator with a congenial personality, some humor and the ability to curse (at appropriate times) will go a long way toward making the client and the attorneys feel a bond that helps the mediator to facilitate a settlement. It goes over well at the end of a long evening when the mediator tells your client what a pain the opposing party is.

<sup>174</sup> Wendy Newman Glantz & Barbara M. Beilly, handbook supplement, *Mediation*, THE FLA. BAR §8.8 FLA. DISSOLUTION OF MARRIAGE (2006) (noting that a sense of humor is one of the qualities an attorney or party selecting a family mediator should look for); see also Lisa Parkinson, *Mediating with High-Conflict Couples*, 38 FAM. & CONCILIATION CTS. REV. 69 (2000):

Even high-conflict couples often have a disconcerting ability to switch from seething fury to making a joke. Mediators need to understand the dynamics of their relationship and to appreciate the kind of humor that works for them. Humor is often more effective in reducing tensions than are reasoning and common sense.

<sup>175</sup> Joshua Kadish, *Revelations of a Family Law Mediator: What Goes on Behind the Closed Doors to Help Divorcing Couples Reach Agreements?*, 52 OR. ST. B. BULL. 27, 28 (1992).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

gain from the mediation, and were able to set forth those ideas clearly and concisely.<sup>180</sup>

Humor has also been applied successfully in community mediation contexts.<sup>181</sup> In a mediation case involving a dispute about limousine interior enhancement services, co-mediators introduced humor in order to find common ground between the two disputing parties.<sup>182</sup> In that case, humor effectively broke the tension produced by the argument and counter argument.<sup>183</sup> This is simply another example of a positive result arising out of the use of humor in mediation.<sup>184</sup>

The cultural issues concerning the use of humor in mediation are also resolvable. Humor truly is universal,<sup>185</sup> and getting another to laugh, regardless of his or her ethnic background, can ease tension even in the mediation setting. For example, in a survey asking respondents to evaluate their top character traits of a mediator, one Nepalese respondent stressed that mediator humor was important, noting that “[O]nly the same culture, religion or traits doesn’t make the mediator perfect. The sense of humor, his personality . . . also counts.”<sup>186</sup>

## IX. HUMOR PROGRAMS IN MEDIATION TRAINING

Mediators should be educated on the specific benefits of using humor in their practice. Further, they should be educated on how they can use these tactics in an everyday mediation context. This type of training would doubtlessly encourage the use of humor in

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<sup>180</sup> *Id.* The author goes on to say:

I then . . . asked each of them to take a few minutes to think about what was the absolute worst outcome they could imagine in mediation. By asking this question, I wanted to get them further off the track they had been racing down and to give them a few minutes to calm down. After a few minutes, I asked each to answer. Fred said he was afraid of losing everything, including his children. Wilma stated that she was afraid of the same thing.

*Id.*

<sup>181</sup> George Pavlich, *The Power of Community Mediation: Government and Formation of Self-Identity*, 30 L. & SOC’Y REV. 707 (1996) (discussing the political logic of such community mediation programs, using a case study as an example).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Cruthirds, *supra* note 4, at 37.

<sup>186</sup> Nancy Erbe, *The Global Popularity and Promise of Global ADR*, 18 TEMP. INT’L & COMP. L.J. 343, 361 (2004) (explaining the significance of particular cultures in peace-building ADR).



the mediation setting. It would also help to dispel or alleviate some of mediators' main fears of the risks associated with using humor in mediation.

This fear of the risks associated with using humor, coupled with the dominance of lawyer-bashing jokes in and outside the profession, might lead some mediators to conclude that humor is never appropriate in a mediation setting. But, this issue might be confronted based on the lack of humor programs in mediation.<sup>187</sup> It is clear that the field of mediation has yet to embrace the benefits of using humor.<sup>188</sup> Humor in mediation will prove to be incredibly useful in the future and this realization will provide distinct advantages in the field of mediation.

Some mediation teachers use videos of commercial films to teach mediation strategies in the classroom.<sup>189</sup> Such films can illustrate cultural views of the mediation process.<sup>190</sup> Critics have raised the concern that such commercial films show examples of bad mediation tactics, rather than successful ones.<sup>191</sup> One professor uses such videos to provide bad examples of mediation, and then asks students to respond to what they see and note what they might do differently in an actual mediation.<sup>192</sup> He then suggests ways that the students could better coach the parties in a mediation session.<sup>193</sup> However, the use of comedic films as teaching tools does little to encourage future mediators to experiment with humor in their practice.

Humor training is rare in mediation advocacy programs,<sup>194</sup> but some mediators have suggested ways in which humor could prove

<sup>187</sup> Cruthirds, *supra* note 4, at 38.

<sup>188</sup> *Id.*

<sup>189</sup> Dwight Golann, *Using Video to Teach Mediation and Negotiation*, 13 DISP. RES. MAG. 8 (2007).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* One example that Golann specifically cites is a divorce mediation session scene at the beginning of the 2006 comedy film, *The Wedding Crashers*, starring Vince Vaughn and Owen Wilson. This comedic scene involves the stars as divorce mediators, discussing the terms of a divorce agreement between two parties.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Cruthirds, *supra* note 4, at 38. Cruthird's article states:

In surveying over 100 mediation school web sites, only two showed that they had humor training as part of their curriculum. The lack of available humor training may be explained by the relative absence of humor research in the academic literature of dispute resolution. Humor simply has not yet achieved a level of importance in this field as it has in business settings.

to be a useful application in mediation.<sup>195</sup> By teaching the proper humor fundamentals, humor programs could be incredibly useful in teaching students the basics of humor, which they could usefully apply to their mediation skills. Such mediation programs could use humor tactics such as comedic improvisation to help facilitate the agreement within a mediation session.<sup>196</sup>

Improvisational techniques can help develop conflict resolution skills by enhancing creativity and intuition within the mediation context.<sup>197</sup> Comedy and mediation are parallels, which both inherently involve the need to connect with an audience in order to get past barriers.<sup>198</sup> Creative problem solvers must be able to improvise within a loosely structured format.<sup>199</sup> Educational models

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<sup>195</sup> See Krivis, *supra* note 19; Debra Gerardi, *Using Improvisation to Develop Conflict Resolution Skills*, MEDIATE.COM (Sept. 2001), <http://www.mediate.com/articles/geradi1.cfm>; Debra Gerardi, *Developing Creativity and Intuition for Resolving Conflicts: The Magic of Improvisation*, MEDIATE.COM (Sept. 2001), <http://www.mediate.com/articles/geradi.cfm>; JEFFREY KRIVIS, *IMPROVISATIONAL NEGOTIATION: A MEDIATOR'S STORIES OF CONFLICT ABOUT LOVE, MONEY, ANGER AND THE STRATEGIES THAT RESOLVED THEM* (2006); Ed Brodow, *Ed's Articles: Acting Techniques For Speakers* (2007), <http://www.brodow.com/Articles/ActingTechniquesForSpeakers.html>.

<sup>196</sup> Gerardi, *Using Improvisation*, *supra* note 195. See also my discussion of comedic improvisation in humor training at part IX.

<sup>197</sup> *Id.* Role-playing is often used to teach ADR in the classroom. See Golann, *supra* note 189 (suggesting that videos be combined with role playing exercises to maximize results); Jennifer Rosato, Commentary, *Reforming a Traditional Family Law Professor*, 44 FAM. CT. REV. 590, 592 (2006) (noting how the author uses role-playing tactics to help students understand legal choices affecting domestic violence victims in order to illustrate the question of whether mediation is ever appropriate for such victims); see also Charles Pou, Jr., *Scissors Cut Paper: A "Guildhall" Helps Maryland's Mediators Sharpen Their Skills*, 26 JUST. SYS. J. 307, 321 (2005) and Stephen J. Ware, *Teaching Arbitration Law*, 14 AM. REV. INT'L ARB. 231, 238 (2003) (both noting in passing how some people have used role-playing to help train mediators). However, my suggestion is to refrain from limiting the use of comedic role-playing and improvisation to the classroom. I suggest that tactics such as comedic improvisation can be useful during an actual mediation session.

<sup>198</sup> Krivis, *supra* note 19.

<sup>199</sup> John W. Cooley, *Creative Problem Solving for Negotiators and Mediators*, 18 DCBA 16, 18–19 (2005). The author analogizes the role of the mediator to the role of an improvisational jazz musician, but his reference to improvisers "in the arts" suggests that this refers to the quick-thinking strategies used by comedic improvisers as well. He says:

The creative problem solver is continuously oriented not only to see problems, processes, and solutions in different ways, but also to do things differently to find a solution to the overall problem. In short, the creative problem solver must be oriented to improvise. In the arts, improvisers develop their skills by working with each other in a number of loosely structured contexts. Jazz musicians, for example, are conscious of the underlying form of the pieces they perform. They listen closely to each other for direction. When they sense a reaction from their audience or hear another player has taken on a more dominant voice, they call on their knowledge of rhythm, harmony, and balance, to back them up. When a break occurs in the melody, if they hear that a space has been left for them, they take control. They steer the

that use improvisation have proven to be effective in healthcare mediation training programs.<sup>200</sup>

As discussed here, improvisation is used merely as a teaching tool. While practical improvisation differs from comedic improvisation, both require the same quick-thinking skills that lead to dialogue between parties. However, since using humor can help relieve some of the tension of a mediation session, comedic improvisation between parties may provide an outlet in which to achieve the types of creative solutions that mediation aspires to reach. This may prove to be an excellent way to incorporate humor into otherwise emotionally-charged or exceptionally tense mediation sessions.

Existing humor training programs do not specifically address how to use humor within an actual mediation. This is a fundamental flaw of training programs as they exist now. Mediators should embrace the idea of using humor in an actual mediation session, rather than confining its use within classroom barriers. Training programs should demonstrate to mediators that they can use humor as an asset in their mediation practice.

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sound in a new direction, developing their solo performance on the sounds and the creations of which they have been part. This goes on until another break occurs and the time comes to make space for some other member of the ensemble. All the while, they are conscious of underlying form. So too, the creative problem solver improvises.

*Id.*

<sup>200</sup> Virginia L. Morrison, *Hekoya: The Shifting Shape of Dispute Resolution in Healthcare*, GA S.U. L. REV. 931, 936–37 (2007). In discussing interest-based process skills in healthcare, the author says:

Lutheran and other New York community hospitals worked with Pact Training; one joined with a major union to obtain federal training funds for this effort. Using a “structured improvisation” method, Pact enacts and incorporates trainees into simulations, while other trainees offer advice, try different approaches, and debrief. The model reinforces the training through champions in each service area, written materials, follow-up phone assessments, and attention to these skills as part of performance evaluations. After two years, these hospitals report significant improvements in employee and patient satisfaction measures.

Similarly, Community Hospital of Monterey Peninsula developed interest-based skills in a wide variety of staff and leaders, including entire clinical units and physician and administrative leaders. Using an education model based on training for improvisational comedians, Health Care Mediations has participants practice discrete skills and techniques, engage in coached simulations, use appreciative inquiry, and otherwise apply interest-based ideas to their actual conflict situations.

*Id.* (internal notations omitted).

## X. CONCLUSION

Humor is a useful tool in mediation. There is an abundance of evidence demonstrating how humor has been useful in other fields, and mediators should not let their fears of humor rejection keep them from availing themselves to the benefits of humor in mediation. Should it become clear that clients have not responded to the humor positively, mediators can always simply apologize for their actions.<sup>201</sup>

Mediators should evaluate the suggestions offered in this article in order to help them become more confident in using humor in their practice. The benefits of using humor outweigh any negative effects. The primary purpose of this paper is to urge mediators to experiment with the use of humor. A person who does not know how to use a hammer has the potential to injure himself with that tool, but once he learns how to use it, he can do things he would not have been able to do without it. Humor, when applied to the mediation context, is a tool that mediators should not be afraid to use. Once mediators learn how to use humor to their advantage, they are then able to use the tool without fear of hurting themselves.

Using humor in mediation is not a science, but then again, neither is the practice of mediation in general. Upon gauging the numerous ways that humor already affects our lives it would be irresponsible to ignore its enormous potential in the practice of mediation and other areas of dispute resolution. The data and the anecdotes compiled in this paper should serve as evidence that, when properly applied, humor can be incredibly beneficial in the practice of mediation.

Mediators should use the ideas outlined above to help them succeed in applying this valuable tool to their practice. Humor training programs can foster mediators' abilities to effectively use humor to help resolve disputes. Mediation training programs should incorporate humor strategies, focusing not only on humorous ways to teach material in the classroom, but also emphasizing how mediators can use humor in their work.

Further research on this topic might focus on how humor actually functions in mediation. Some studies, mentioned earlier, have already been published, and the results to date show that people tend to prefer mediators who have a sense of humor. Even keep-

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<sup>201</sup> See Keppos & Fox, *supra* note 1, at 4.

ing one's mind open to the possibility of humor in a mediation seems to be a trait that is highly regarded in people's pursuits of an adequate mediator.<sup>202</sup> Most research concerning analytical information about the use of humor in mediation could be obtained through focus groups and other qualitative research. Additional research might evaluate how humor works in other Alternative Dispute Resolution contexts, such as negotiation and arbitration. It might also focus on how lawyers have used humor in litigation, and study the benefits and negatives of using such humor. This research could then be applied to mediation.

Another avenue of research would examine the effectiveness of the humor training programs that exist today. If these programs are shown to be successful, this would provide more evidence that mediation programs should incorporate humor training as part of their curriculum. In the future, such humor training programs could prove essential in furthering an understanding on how humor can be used effectively in mediation.

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<sup>202</sup> Lande & Wohl, *supra* note 3, at 20.

