
A Serious look at Humor in Litigation: What's So Funny?

By Laurie R. Kuslansky, Ph.D.

In a high-profile murder case, defense counsel opened cross-examination of the prosecution's star witness by saying, "No questions, your honor." But then he quickly added, "Just kidding." The courtroom filled with laughter. Everyone had anticipated a character assassination instead. The legal levity not only eased tensions, but softened the blow of the attack to come.

In another trial, a dull expert witness was asked to qualify his credentials on the stand: "Why did you become an auditor?" to which he responded, "Because I didn't have enough charisma to become an accountant." Again, the court erupted. The witness's humor endeared him to the jury and made him instantly more interesting.

Humor is no laughing matter in litigation because it

affects being liked and believed ...or not. In the courtroom (or your own home), it's hard to believe someone you don't like. Since credibility depends on likeability, and humor enhances likeability (or detracts if used inappropriately), it makes sense to take a serious look at humor in litigation.

Not only is it common sense, but according to the "friendship/liking rule" (Shavitt & Brock. Persuasion – Psychological Insights and Perspectives. Massachusetts: Allyn and Bacon), people are more favorable to people they know and like and are more willing to comply with their requests. This principle is borne out by one of the most successful business models to evolve: the Tupperware home party. Tupperware found that sales pitches are received more positively from friends and neighbors than

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from strangers, since we believe people we like more than ones we dislike.

No Sex, No Drugs, No Rock and Droll

Humor is important because persuasion depends on a variety of circumstantial factors surrounding facts, not just the facts. Like other people, jurors use two different routes of persuasion: central and peripheral. (Petty & Cacioppo) Using facts is the most powerful way to persuade jurors, using the “central route.” If the facts are too complex, too dull, or both (too scientific, technical, theoretical or statistical), and the subject matter is not seductive, thoughtful consideration of the facts is unlikely.

In such instances, jurors resort instead to positive or negative “cues” that they associate with the issues (not the issues themselves) as shortcuts to base their decisions on, using the “peripheral route.” For example, jurors might be persuaded to find for a defendant because defense counsel showed more documents, brought more experts and played up their credentials better than plaintiff counsel, not because of the quality of defense arguments or opinions. The less personally involved jurors are with evidence, the more they tend to rely on peripheral cues than on an argument’s actual strength (Ibid). Being liked is an important ingredient in the cocktail of peripheral cues jurors use to decide whom to believe.

What Increases “Liking”?

Compliance professionals (such as car salesmen) know and use this information – perhaps too well. Attorneys and witnesses who do not share an existing friendship with jurors can still benefit from applying the liking/friendship rule by understanding a number of relevant factors outlined below. (Shavitt & Brock) How?

Appropriate vs. Inappropriate Humor in the Courtroom: What Is Funny?

Allowing jurors to see you smile, share a laugh, have something in common, laugh with you, laugh at a common enemy – this is humor. If used properly, it can be powerful. But, like knowledge, a little humor can be dangerous if misused.

Appropriate humor is not at the expense of a litigant or witness who will be hurt and sympathized with; instead, it brings consensus, provides comic relief, or is self-disclosing, universal, and honest.

Recommendations on Using Humor Appropriately (Hamlin)

In voir dire: Humor can be used to create contact, compliments and cooperation with prospective jurors. For example, asking about driving experience (say, in vehicle accident cases) to someone who carpools children frequently, you might respond, “So, you’re a professional driver.” Instead of disregarding people like stay-at-home moms, your lightheartedness while validating and acknowledging them creates a useful bond.

In opening statement: Humor can be used during introductions, poking fun at your own name. “My name is Laurie Kuslansky. With a name like that, it isn’t easy making reservations in a hurry.” “With a name like Bob Johnson, I have to work twice as hard and dress better so people remember that I am THAT Bob Johnson.” OR “My name is Andrije Czernovsky – which is too hard to spell, so most people call me Joe.”

In closing argument: Remind jurors of lighter moments of the trial to show you identify with them. “There were times you’d rather be somewhere else...ME too!” “Speaking of the technology, which, fortunately, we heard about AFTER the judge gave us all a coffee break...”

Benefits of Humor in the Courtroom

Humor makes attorneys less “lawyerly,” more human and animated, rather than talking heads. Appropriate humor also provides other important benefits, besides likeability; e.g., it allows jurors to see you smile, relaxes them, disarms the authoritarian setting of a courtroom, makes you more accessible, makes jurors want to listen to you, creates bonding (if it uses a common denominator or is universal), helps jurors identify with you, enhances jurors’ attention and memory, and lightens things up when jurors feel oppressed or stressed. Evidence of jurors’ need for comic relief comes from the fact that they often come up with playful nicknames for key players in the case, including counsel, as revealed in post-trial jury interviews.

Risks of Humor in the Courtroom: When in Doubt, Leave It Out

Humor is like a bowtie: not everyone can carry it off. Don’t risk it if you aren’t sure you can. Inappropriate humor is unkind or makes others uncomfortable. “The witness who is funny may be seen as disrespectful and irreverent.” (Brodsky) Inappropriate humor is at the expense of a person who draws sympathy; it shows mean-spiritedness, is an inside joke that excludes some participants, is about something others cannot relate to, is an expression of concealed hostility (such as saying “Only kidding” to dodge responsibility for a cruel remark). It is sarcastic, smug, bullying, or used in inappropriate settings. It is not appropri-

ate in most criminal cases or ones involving individuals hurt physically or emotionally. What is funny depends on at whose expense it is expressed. Ask yourself whether it is really funny or something else, perhaps snide, veiled anger, defensive, distracting, a lack of confidence, overly self-deprecating, or to conceal your own discomfort. It is not an appropriate way to apologize. If misdirected, humor can create resentment or reduce credibility. It backfires if used as a defense/deflector when actually reacting to anxiety or anger. Humor is also an unreliable way to cover up a lack of preparation or disorganization; just be better prepared and organized. Remember, one minute of a lawyer's time feels like seven minutes out of a juror's life (like "dog years").

Factors of liking and friendship cluster around the following: Physical attractiveness

Pretty positive: Positive reactions to good physical appearance generalize to talent, kindness, honesty, and intelligence. (Dion, et al.; Rich.) Thus, attractive attorneys, witnesses and clients at counsel table are generally more likely to be persuasive at changing attitudes and getting what they request. (Chaiken; Benson, et al.)

The truth isn't pretty: In fact, more physically attractive defendants have yielded less certainty of guilt from jurors and received recommendations for less severe punishments than less physically attractive defendants. (Efran)

Similarity, about opinions, personality traits, dress, background or lifestyle, makes it worthwhile for trial counsel and key witnesses to match styles with the local flavor of the jury, or, as Marisa Tomei said in *My Cousin Vinny*, "You blend" with your decision maker(s). (Emswiller, et al., Suedfeld, et al., Byrne) Mirroring body language by subtly matching the judge's or jurors' postures and gestures makes them feel more at ease and positive about you because you seem more like them.

Compliments can create return liking and willing compliance. For example, the actor McClean Stevenson once said: "My wife tricked me into marrying her – she said she liked me."

Flattery, if not overtly manipulative, creates liking (Byrne & Rhamey) and is just as effective at creating liking when true as when not true, and even when the recipient realizes that the flatterer stands to gain from being liked. (Drachman, et al.)

Cooperation: People working together toward a goal, such as pulling together against a common enemy, feel

more positive toward one another. (Shavitt & Brock) Car salesmen and others often engage the principle of good cop/bad cop by setting up their manager or "Corporate" or someone more senior as the villain so the salesman and customer can do battle to win him/her over, creating a common alliance toward a mutual goal. To the extent possible, create mutual goals toward which you can help the jury work with you, whether a mystery you will help them solve, a more efficient way to get through certain procedures, clear tutorial graphics to become educated about facts, or another end you can help them reach.

Scarcity improves positive attitudes because if less is available, what is available seems better. Limited access to information makes us want it more and makes it more influential. (Brock) Hence, explaining "little-known facts of interest," or information only the courtroom is privy to, which are relevant to the case, and making jurors aware of this fact when possible, makes them feel special. Scarcity has increased how things are valued throughout history. Collectors know it; precious mistakes such as a mis-stamped coin are valuable because of it. It's a shortcut to something's value, it can cause the loss of freedoms, and people hate to lose freedoms they already have (because it diminishes personal control), also called "psychological reactance theory." (Brehm) The more threatened we are about losing something, the more we want to keep it and value it (you don't know what you've got till it's almost gone).

Reciprocity: Offering someone something first makes them more likely to want to give you something back, known as the "reciprocity reflex." (Cialdini) Phrasing what you promise the jury in *voir dire* in such terms (I promise to do "x" for you, and rely on you to do "y"), then keeping your word, is one way to act on this principle.

Smooth Talking: People highly responsive in conversation (those who responded faster and more, used more diverse words, and were more effusive when responding) were also perceived to be likeable, intelligent, and interesting, and were valued as a possible friend. (Swann & Rentfrow) This implies that both attorneys responding to the Judge's questions and witnesses responding to attorneys' questions should beware of overly laboring the timing of their responses and should be conversational when responding – without overdoing it. Other factors which have added to likeability are self-disclosure, listening, cordiality, showing interest, and of course, appropriate smiling. Need I say more?

In the end, sincerity bonds people together. Allowing them to see in you the same truths and human quirks they recognize in themselves makes you genuine, likeable, and believable, and that's no laughing matter.

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