

Stories Mediators Tell

Review by Wayne Brazil

The stories in *Stories Mediators Tell* are not about mediators. They are not vehicles for demonstrating subtle techniques or for illustrating cutting-edge tools. Nor are they about mediation, per se. Instead, these stories are about people mediators have served and about the remarkable things these people have been able to do when provided with the kinds of opportunities mediation can create.

There is, in these stories, a sustained lyricism about the capacities of human beings—about their ability to withstand the consequences of tragedy, the depth and power of their feelings, the resilience of their spirit, their desire to understand, their ability to re-shape their sense of self, to re-orient their energy, to forgive, and to re-connect. What these stories show is how mediation can help people discover the good, the courageous, the creative, and the generous in themselves. They demonstrate that what makes mediation remarkable is the opportunities it creates for its users to locate and mobilize what is best in them. In these ways, *Stories Mediators Tell* re-connects us with why we have chosen this field.

This is not to suggest that these *Stories* contain no lessons for experienced mediators. Perhaps it is because they do not obsess about tools and techniques that these *Stories* expose so clearly some of the most important truths about our calling and craft, truths that probably elude even the saintliest mediators on some occasions.

These truths are rooted in the principle that mediation is not about us. In these stories, it is not the mediator who has suffered the crushing loss, or whose deepest values have been challenged, or whose livelihood is threatened. It is not the mediator who is the source of the resources, intangible and/or tangible, without which repair is impossible. Often, it is not the mediator's ideas that enable the parties to emerge from the thicket.

By keeping us focused on the center of things, these *Stories* teach us lessons critical both to honoring the philosophic underpinnings of mediation and to maximizing the benefits that parties can achieve through the process. When we read these stories with an active dialectical engagement, we see how our errors of ego can (1) imperil the principle of self-determination, (2) communicate disrespect for and enervate participation by the parties (and their counsel), (3) leave underlying sources of problems undiscovered and unaddressed, and (4) impair access to the full range of possible components of solutions.

Some of the "errors of ego" (my phrase) about which these *Stories* warn us include:

- Assuming what the mediation process is, that we own it, and that we are responsible for preserving it in a pre-ordained form.

- Assuming that one of our responsibilities is to “maintain control” over the process—which includes maintaining control over the other participants, the direction of their thinking, and the way they respond to developing situations.
- Assuming that we are responsible for securing a settlement, for identifying a solution, or for effecting a reconciliation.
- Assuming that we get the credit if the dispute is resolved and the blame if it is not; saying or thinking, “I settled that case,” or “I failed to settle that case.”
- Assuming that it is essential that we “add value” when we mediate.
- Assuming that it is essential that we “help others” each time we mediate.
- Assuming that other participants in the mediation will need our help.
- Assuming that we really understand what is going on, why, and what kind of solution would be “best.” Even when we are mediating a type of case for the hundredth time, we should abandon the illusion that we understand completely the parties’ circumstances and the implications of each of their options.
- Assuming that the whole or the essence of any person can be captured or categorized in one word or concept, i.e., a complete jerk, completely selfish, or motivated only by greed.
- Assuming that our behavior or performance is the source or cause of a participant’s negativity, rigidity, rude behavior, or hostile emotions—even when we appear to be its principal target.

Framed a little differently, these *Stories* teach us not to take *ourselves* quite so seriously, and not to take *personally* the insensitive, rude, or even cruel behaviors that participants in mediations sometimes exhibit. If we permit our emotional focus to shift onto ourselves, or if we slip into trying to defend our values or our conduct, we have lost sight of the center and have diverted our attention from where it belongs—on the others and the sources of their problems.

Additional Lessons from these *Stories*

1. If you have the opportunity, press parties to mediate as early as possible in the life of their dispute. While the passage of time sometimes cools tempers, it also can intensify anger and deepen distrust. The passage of time also can eliminate some solution options. And filling the time that is passing with litigation can deplete resources and exacerbate ill-will.
2. Dig deeper in *ex parte* pre-mediation interactions with parties and counsel. Open substantial and confidence-building lines of communication with parties (or, at least, with counsel) before the mediation session. Use pre-mediation dialogue to press (lightly) to identify the real issues and any especially sensitive matters *before* the mediation session—then help the parties be prepared to address these matters during the session, e.g., by bringing experts or completing economic analyses.

3. When parties are at ideological or cultural odds, consider using co-mediators with very different backgrounds to enhance credibility with diverse constituencies.
4. In technical or complex business cases, especially if parties seem stuck, consider suggesting that they jointly retain a neutral expert to analyze large data sets impartially and/or to develop solution options.
5. Remind parties that the litigation process vests considerable power over their lives in opposing parties and counsel.
6. Sometimes, lawyers project their perceptions of the opposing party onto the opposing lawyer (or vice versa). Encourage more discriminating understandings.
7. While our culture, generally, features “low context” communication, the communication that takes place during mediation is often “high context,” meaning that speakers tend not to be explicit or direct about what they mean or want and that listeners need to extrapolate meaning from subtext and code. To reduce the risk of misunderstanding and anger, mediators should help parties understand the differences between “normal” low context communication and the “high context” communication that characterizes much mediation.
8. Restraint bespeaks respect.
9. Assertive intervention bespeaks lack of confidence.
10. Lack of confidence is a form of lack of respect.
11. Be patient with lawyers’ predicaments in mediation—especially their need to represent their clients vigorously even when they know their client’s position is weak. Listen to lawyers with a “high context” ear.
12. Work aggressively with yourself to suspend the ubiquitous human instinct to draw conclusions and form judgments—about people, about the merits of the case, about prospects for agreement, about the likelihood that terms will be honored, etc.
13. Do not fall in love, figuratively speaking, with any party or lawyer. Beware especially of first impression infatuation, which is unwise and compromises both your impartiality and your ability to look comprehensively for sources of and solutions to problems.
14. Model what you think are process-constructive behaviors, but do not expect others to follow. The others are not you; they have no duty to act like you; they are not morally deficient because they do not act in ways you think would best advance the process.

15. Capitalize on your curiosity—and encourage others to follow suit. Being openly curious about others tends to pull you off center stage, in your own mind and in the minds of others. Moreover, a person who seems curious is appreciably less likely to be perceived as arrogant. And being perceived as arrogant is the last thing a mediator should want. Asking questions of others, about things that are important to them or about their experiences and perspectives, can communicate respect. It can communicate: “I’m interested in you. You count.” Asking questions about people also can serve as an important route to connection with them and can invite them to think in broader terms or from different perspectives about themselves, others, and the circumstances.

16. After doing lots of listening, do not be afraid to ask the questions that feel most dangerous. Sometimes questions feel dangerous precisely because they target the real center of things. And sometimes it is essential to help parties get to the center of things.

17. Getting a party to participate actively in the search for components of solutions, especially by focusing on the problems and needs of an opponent, can distract a party from preoccupation with saving face (his or her own) and increase his or her understanding of the opponent’s circumstances.

18. The greater the parties’ investment in the process, the greater their incentive to have it bear fruit. Parties’ investment in the process can grow both with the amount of time they devote to it and with how much they have been involved in shaping it.

19. Unless, without success, you have tried in at least several different ways to find some arena of receptivity, never simply assume that the process can deliver no additional benefit or that the parties have exhausted its potential value, e.g., that the parties will never have any real interest in settling or that an apparent impasse is real and insurmountable.

20. If you find yourself feeling that you are not being compensated adequately for the time you are committing and the value you are adding, you probably are not doing a good job—and you probably are wrong.

A Closing Thought

Within the larger universe of mediators, the groups that might be least likely to feel that these *Stories* contain messages pertinent to their work are retired judges and mediators who work primarily ‘high-end’ cases for large fees. Judges are used to being at the center of things and to being the object of at least feigned (sometimes fawning) respect. And mediators who are highly paid by commercially aggressive parties are likely to feel pressure to “deliver value” to their “clients.”

The more pressure a mediator feels to “deliver value” (however measured), the greater

the risk that he or she will devote emotional and intellectual attention to himself or herself during a mediation, i.e., to how he or she is "performing" or faring in the judgments being made by the other participants, fears he or she believes are being formed by the parties and their counsel. The more attention a mediator pays to himself or herself, the greater the risk that he or she will serve the parties poorly. Self-absorption is an enemy of authenticity. It also diverts the mediator's mind from the the dynamic between the parties and increases the likelihood that he or she will miss subtle signals or unselfconsciously provided clues. Authenticity and a relentless focus on the the content and character of the parties' interactions are essential to providing the best mediation service—even by retired judges and highly paid high-end neutrals.

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