

Introduction

STORIES

What is the purpose of a book of stories that mediators tell?

Consider your favorite stories. *Once upon a time ... My grandfather once told me ... In the beginning ... I had a farm in Africa at the foot of the Ngong Hills ... Arma virumque cano* With these exciting words, we are transported into another world.

Stories entertain and while they do they explain the world, teach, inspire, enshrine community norms and bind a community together both with respect to current members and across generations. Stories are windows into other worlds—other times and places where the listener or reader cannot go without them.

There are numerous examples of peoples with oral traditions where stories provide the glue for a community, passing down, from one generation to another, wisdom and inspiration. The Native Americans in North America or the Aborigines in Australia, for instance, have stories that explain the earth—its creation and operation, so that each new generation can survive in an optimal manner, harmonious with the earth and each other.

The famous Uluru (also known as Ayer's Rock), for example, according to Aborigine story, was created in Dream Time by Creation Beings, and most of the rock formations have stories about the larger-than-human Creation Beings interacting with one another and thus forming particular caves, outcroppings and pools. Each Creation Being has a particular animal manifestation—an animal it is related to and whose form it takes. Legend describes one of the caves at Uluru being formed by a Creation Being, who is a relative of a burrowing animal, and who needed to welcome other Creation Beings to Uluru. The cave was made after many unsuccessful tries to burrow directly into

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the stone (so the actual stone at Uluru is pitted in this place) until finally the Creation Being discovered it was possible to burrow near the ground, under the stone, and make a wonderful cave. When the visiting Creation Beings came they were welcomed into an awesome new cave-home. For the visitors to Uluru and for Aborigines, the story is a lesson in hospitality, perseverance and ingenuity made vivid at the beautiful cave where the story is set.

Geologists at Uluru tell another story, how the rocks were compressed over millennium until the plates of the earth rubbing together thrust up the rock forms we now see. The science story too is mind-boggling and inspiring.

Both stories can be told side by side. Both can generate awe. Some of us won't remember the geological explanation but may remember the story of the burrowing creature, the pitted rock and the cave, and the advice it imparts about the effort necessary to welcome visitors properly. Others will remember the geological explanation.

In the United States, we have stories that are retold to every school child: George Washington chopped down a cherry tree to try out his new hatchet and afterwards could not lie to his father about his transgression. Whether or not true, our first president is used as an exemplar for truth telling. The story can educate and inspire listeners about right conduct, more than a lecture on morals. Stories about our leaders, like the stories of the Iliad and the Odyssey, or stories from the Bible or Koran, instruct us about bravery and honesty, goodness and personal sacrifice.

Sometimes fiction—or the exaggerations and distortions of any history—can illuminate more than a recitation of “facts”. For example, another famous story, that is not true, has been told and retold in news media and novels and by word of mouth. It is the story of Dr. Charles Drew, an African-American physician who discovered how to use blood plasma for transfusions before World War II, and thus saved countless lives. During that war, a blood bank was created that refused to accept African American blood. Drew became a well-known figure protesting this insulting policy, particularly insulting since African-American soldiers were spilling their blood in the war effort. Drew was seriously injured in

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a car accident in North Carolina and taken to a near-by hospital, where, the story goes, he was denied treatment, including a blood transfusion, because the black beds were full, and as a result he died. That story was true for countless black patients (though it was not true about Drew who received the best care possible at a small hospital where he was recognized as a famous doctor), and it needed a figure like Drew to carry it as a myth. The story certainly played some role in touching hearts and changing public policy.

OUR MEDIATION STORIES

Some of the stories in this book are factual, an effort to recount precisely what happened in a particular mediation. Some are an effort of the writer to give an accurate account, but with the license of a fiction-writer who wants to convey the feel and tone and mood of a situation. This license is necessary in some cases to preserve confidentiality, and in others to help the reader step into the shoes of people in the story.

Unlike trial lawyers, who are permitted to tell “war stories,” write about infamous trials, or use real cases to teach, mediators have been silenced because of the need to preserve confidentiality. Confidentiality is one of the safety nets that allow disputants to share their inner thoughts and feelings, trusting that their confidences will not come back to haunt them. Until now, with a few exceptions, the only way a good mediation case got told was in the form of a role play, which is a common training tool used to teach about the process or about a mediation technique. Roleplays are typically derived from real cases. Apprentice mediators “perform” the conflict as parties, while a trainee mediates, and, in so doing, they create potential resolutions. Despite nearly three decades of the modern mediation movement, this “storytelling” used in training has been largely focused on those who aspire to become mediators. This book brings these wonderful stories to a wider audience.

Our stories were not collected to glorify or to vilify mediation, but to make the process accessible to readers generally. We are motivated by the belief that mediation is not well understood—even

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its practitioners are often limited to their own experience, particularly given confidentiality strictures.

Recent public surveys regarding mediation demonstrate a very positive impression of mediation, albeit with certain misunderstandings. For example, the majority of the public believe one has to have a lawyer and be in a lawsuit to access mediation. Not true. Another misapprehension is that mediation is limited to resolving small neighborhood disputes. Also not true. Finally, the majority of the public believe a mediator must be a lawyer. Also untrue.

These misapprehensions demonstrate that while mediation has become “mainstream” in the United States legal community and many legal communities abroad, the modern mediation movement has not become even partially integrated into the American culture. We think this is regrettable. Families involved in conflict often find their troubles exacerbated in costly and extended litigation. Business relationships are severed. People lose jobs. Long term conflict adversely impacts health and quality of life.

Despite these misapprehensions and the serious costs of conflict, the relationship between mediation and the law has been successful. Mediation has unclogged court dockets and has allowed many lawyers to evolve into better problem solvers for their clients. The question remains, however, whether the public will come to understand how and when to use mediation. The earliest mediation intervention may produce the maximum financial savings and may enhance the preservation of relationships, allowing parties to access their creativity and discover alternatives that our justice system could not offer.

Some of the stories highlight the good that mediation can do. Some are funny. Some provide lessons in what mediators should not do. The stories stand as a contrast, a different route in conflict resolution, to the far more familiar route of litigation and adversarial contest. We believe that the “other path” needs to be illuminated by stories. In that sense, this book is important. We hope that it marks the beginning of a tradition where the omnipresent stories about litigation have side by side companions of stories of showing “another way” to address conflict.

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We thank the mediators who have contributed to this volume. We asked them to write their story because of the abiding respect of the mediation community for their work. The invitation that went to the current authors called for “a rich array of stories about moving, successful, unsuccessful, happy, sad and funny mediations or incidents in mediations. The goal is to shed light on the dynamics and realities of a process that is little known by the public and to share stories among professionals that might expand their sense of possibilities in the mediation process—or hidden dangers that are lurking there. The book’s target audience is broad: users of mediation (the public), lawyers and other advocates in mediation, and mediators.” The writers and mediators represented in this volume rose to that challenge!

On behalf of all the writers of these stories:

Readers should note that to protect the identity and privacy of mediation participants, the authors in many of the stories have changed the names of individuals and institutions, have “recreated” dialogue, and have changed details.

These stories were collected from many sources. Some already were written when we began this project, for example: the Sisters of the Precious Blood, Glen Cove and Mediation as Parallel Seminars. Others were solicited from committed and successful mediators who were likely to have important stories to share.

SECOND THOUGHTS:

After each of the authors submitted their story, we asked them for additional thoughts: Why did they choose to tell the story they told? What meaning did they find in the particular story? What lessons did the story speak for him/her After the end of each story, you will find a segment called “Second Thoughts” where each author reflects on their story. On the one hand, the stories stand on their own, and we will all glean different meanings. On the other hand, the reflections of the author enrich each narrative.

A word about the organization of the stories and the themes of the nine Parts. From our perspective, the stories organized themselves

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around certain central experiences shared by most mediators. We summarize them here:

PART 1. TRAGEDY, REVENGE AND RECONNECTION

We begin with the hardest cases. All of the stories in this part involve a tragic death or catastrophic injury and a subsequent action by the bereaved against those whom they believe caused the loss.

The stories vividly chronicle mediation's potential to advance healing and closure, even in situations of enormous grief, rage and hostility. The dramatic reconnection of parties in these stories—both with their own sense of positive purpose and with their counterparts—is brought about by mediation. Parties in these stories are enabled to turn their tragedy into something of value. The stories show how a mediator's attention to details—to the setting, to the co-mediation team, to insuring the presence of helpful participants, to the needs of the parties—can pay off by promoting life-changing shifts. These stories are a testament to the human spirit which can—with the help of thoughtful intervention—rise up and become generous, courageous and whole after great loss, and also a testament to the value of a skillful and patient mediator.

PART 2. SURPRISING CONCLUSIONS

Entering a mediation, the mediator never knows where a case will go. These stories show that outcomes can be surprising—and delightful—and sometimes result in further complications. And the central lesson? Go with the flow. Good mediators do not get in the way of party driven—and sometimes creative—outcomes.

PART 3. THE PRINCIPLE OF UNKNOWABILITY

The stories in this part highlight that “you never really know”. You never know if someone who acts immovable will suddenly move. You never know why people are acting badly—or well. You never know when dramatic shifts have already occurred, under the surface, and are being masked by unreadable faces determined to “save face”. The lessons you will find vividly illustrated in these stories are: be present,

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be attentive, keep listening, and don't become a judge. Above all, be humble about what you think you know.

PART 4. LISTENING FOR THE UNDERCURRENTS AND FINDING MISSING PIECES

One aspect of mediation is that it can reveal undercurrents and it can add the missing pieces of the puzzle to bring resolution. Conflict is influenced by things that happened decades earlier; by old alliances and enemies, by professional and personal orientations, by values and preferences, by youth and age, by the pressures of debt or the prisons of addictions, by personal needs of all types, such as the need for order and clear lines, and by connection and loyalty to certain people due to one's own history. All these things can aid or aggravate conflict resolution. All of these things, if understood and used, can provide a bridge to make the pieces fall into place—to generate understanding and options. These stories show how mediation can potentially weave the undercurrents and the missing pieces into a workable whole.

PART 5. STAYING IN THE MIDDLE WITHOUT JUDGMENT OR FAVORITISM

One of the supreme challenges for mediators is to stay in the middle. Not to lean toward that party who seems weaker, or with whom one identifies, or to whom one's sympathies and affections naturally flow. Can a feminist mediate a matter where a male chauvinist is on one side? Can the mediator stay with party choice even when parties don't choose the best course of action? These are not academic questions but are pressing challenges for the mediators in these stories—and in real life.

PART 6. MOMENTOUS SHIFTS

A mediator bumper sticker reads: "Shifts Happen." Conflicts bring together the danger of people who are angry, frustrated, and sometimes grieving, with the opportunity inherent in having gathered all players necessary to make a change. In that cauldron changes occur. Dogmas we believed as truth as a child can be revealed to be limited.

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Borders of families can move to embrace new members. Ancient hatreds can be abated. Of course, not all shifts are “momentous”. In almost every mediation, parties leave understanding more than when the mediation started. The momentous changes these stories describe stand as a reminder that where big things can happen, so can meaningful small things.

PART 7. SELF-REFLECTION AND REFLECTION ON PRACTICE

Whether practitioners of mediation grow and improve—or whether they repeat the same mistakes over and over—depends on reflective practice. The stories in this part show potential benefits of taking practice up a notch via thoughtful reflections. Analyzing each of one’s choices as a mediator, each of one’s attitudes, tends to reveal that other choices might have been better. Did the mediator make unwarranted assumptions? Did the mediator neglect something that could have advanced the mediation? This section will show master mediators finding fault with themselves, and, enriching their own capacities as they do that.

PART 8. ADDRESSING ISSUES THAT LITIGATION CANNOT

Can constitutional issues be mediated? Why would you mediate a case with a central legal question which calls out for an adjudicated response? The answer is simple. The issues that mediation can address are very different from those that a court resolves. In Tony, for example, there is a question about freedom of speech that might have been adjudicated to a conclusion that would provide a public precedent. The mediation, instead, resolved issues of a high school student’s graduation and eligibility for college scholarships and, on the other hand, the high school’s ability to conduct a graduation without interference from protesters and picket lines. The reputation of the student and the school was on the line, as well as the student’s career. These interests and issues are more important for the individuals and institution involved than the constitutional question of free speech.

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These stories show what can happen when rights take a second seat to interests.

PART 9. BEYOND AGREEMENTS

So, in conclusion, it's not the agreement that's important. The final part offers a case where there is no agreement. In fact, the mediation session itself is almost entirely aborted. The story chronicles, however, that the framework offered by mediation can nonetheless advance important goals—a step up in self-knowledge and an advance towards a richer life.

A DISCLAIMER AND A CLAIM

Truly transformational mediations are rare. Routine mediations where parties exchange information and proposals and perhaps come to an agreement after back and forth negotiation are the norm and might seem unremarkable as stories. Similarly, though, a book of stories about run-of-the-mill litigations or medical procedures or a myriad of other things would not be enlightening. What the stand-out cases offer us is a window into what is possible and what pitfalls are lurking—"the best" and the avoidable errors. We need stars as guides. We need buoys to avoid rocks.

An attorney friend recently told us that devoting a career to mediation was a waste of time. After traveling from New York to Boston, he had just participated in a full day mediation involving a ship captain whose vessel had sunk due to the captain's own misjudgments. The captain was nonetheless suing the company for his allegedly wrongful termination from employment, alleging age discrimination. The relationship between the captain and the company spanned decades. The captain had suffered deeply from depression and post-traumatic stress after his vessel sank. The company actually liked the captain. Nonetheless, despite the long relationship between the parties—coupled with the complications due to the sinking of the ship—the entire session was conducted in caucus. Our friend reported that the sum of the mediator's work was to go back and forth between caucus rooms essentially saying "I need more money" or "You have to

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reduce your demand.” The attorneys who were the spokespersons in the negotiation were deeply set in their positional stance, and the gap between positions was unbridgeable using this technique. The attorney friend who reported this found the mediator’s efforts both depressing and fruitless. The captain and the company representative were marginalized during the mediation. And it was not surprising that very little happened. This case moved back into the litigation stream. So, while the stories in this book—the transformative ones—may be the exception, we hope they will inspire practice that makes every case a potential candidate for stories mediators tell. That captain and his company could have parted ways much differently thanks to a different sort of mediation.

We hope these stories invite you, the reader, to speculate about mediation in the light of the tales told by the master mediators in this book. Whether you are reading this as a sometimes party in conflicts or a mediator or an advocate, you should know that great things are possible in mediation.

Eric Galton and Lela Love