2013

Lawyers and Mediation: Lessons from Mediator Stories

Sharon Press
Mitchell Hamline School of Law, sharon.press@mitchellhamline.edu

Publication Information
34 Cardozo Law Review 2433 (2013)

Lawyers and Mediation: Lessons from Mediator Stories

Abstract
In Stories Mediators Tell, Lela Love and Eric Galton have compiled a compelling anthology of stories about mediation. Not surprisingly, most of the stories involve a significant moment when something special happened for the parties. The author was reminded of presentations by Baruch Bush and Joe Folger in the early 1990's (around the time the first edition of The Promise of Mediation was published). They would ask mediators who attended their sessions to recount to a partner one of their memorable mediations. Inevitably, the stories were about transformative moments - of parties obtaining clarity for the first time - of connections being made. Only rarely did someone share story that lacked this human element. Twenty years later, despite the fact that the practice of mediation has continued to move in a direction which makes these moments less likely, these still are the stories which stay with mediators and that remind all of the power - an the promise - of mediation.

In this article, the author - a professor at a law school - analyzes stories without lawyers and the possible outcome if lawyers were involved. The author uses pieces from various stories to identify lessons about the law, lawyers, and legal education.

Keywords
Mediation, Mediators, Lawyers, Dispute resolution, Negotiation, ADR, Legal reform

Disciplines
Dispute Resolution and Arbitration

LAWYERS AND MEDIATION: LESSONS FROM MEDIATOR STORIES

Sharon Press†

In *Stories Mediators Tell*,[1] Lela Love and Eric Galton have compiled a compelling anthology of stories about mediation. Not surprisingly, most of the stories involve a significant moment when something special happened for the parties. As I read, I was reminded of the presentations by Baruch Bush and Joe Folger in the early 1990's (around the time that the first edition of The Promise of Mediation[2] was published). They would ask mediators who attended their sessions to recount to a partner one of their memorable mediations. Inevitably, the stories were about transformative moments—of parties obtaining clarity for the first time—of connections being made. Only rarely did someone share a story that lacked this human element. Now, twenty years later, despite the fact that the practice of mediation has continued to move in a direction which makes these moments less likely, these still are the stories which stay with mediators and that remind us all of the power—and the promise—of mediation.

While reading the book, I was also mindful of how much our personal perspectives would impact what each of us would take away from the book.[3] Given my current role as a professor in a law school, I personally found myself drawn to the role of the lawyers in the various stories. In those stories where there were no lawyers, I found myself wondering: what would have been different if lawyers had been involved? Specifically, would the lawyers have allowed the open, frank communication that led to the break-through? And, what can we learn from these stories that should impact legal education? With these

† Director, Dispute Resolution Institute and Professor of Law, Hamline University School of Law.

1 STORIES MEDIATORS TELL (Eric R. Galton & Lela P. Love eds., 2012).

2 ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

3 In negotiation, this phenomenon is known as confirmation bias, which is defined as a tendency to search for or interpret information in a way that confirms one's preconceptions. Here, no doubt, our individual essays reflect this phenomenon.

questions in mind, in my essay I will use pieces from various stories to identify lessons about the law, lawyers, and legal education.

ATTORNEY/CLIENT PREPARATION FOR MEDIATION

The lawyer's role in mediation begins before the actual mediation session. The mediators' stories include a broad range of practices relating to what happens before mediation begins including what parties learn about mediation prior to the session and who will attend the mediation.[4] The level of familiarity and experience lawyers have with ADR has a positive impact on their recommendation of ADR to their clients.[5] It also should be obvious that how lawyers prepare their clients for mediation will have an impact on the clients' expectations and ultimately their participation in the process.

It is interesting to contrast the range of ways that clients receive information about an upcoming mediation and what they are told. As is common in most civil suits, in *A Meeting of Strangers*,[6] the lawyers prepared their clients for mediation.[7] The defendant's lawyer told her "he would do most of the talking at mediation and that the mediator was there to help everyone arrive at 'a number' that would settle the lawsuit."[8] In contrast, the lawyer for the plaintiffs "provided a full explanation of what mediation was and what might happen" and also suggested the possibility that "sometimes weird things happen."[9] The defendant was given a very narrow frame for the mediation—a process in which the mediator would help the parties arrive at a number.[10] On

---

4 Whether to submit a pre-mediation statement and what is contained if one is submitted is another important way lawyers impact the mediation. See, for example, Lee Jay Berman, *A Day in a Life*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 203, 205, in which the plaintiff's lawyer opted not to submit a pre-mediation brief so that the plaintiff could save money and "tell her story rather than the lawyer doing so."

5 Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J.199 (2002).

6 Eric R. Galton, *A Meeting of Strangers*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 3.

7 Typically, the mediator will have no advance contact with the parties in civil cases in which a lawsuit has already been filed and the parties are represented. In *The Other Sarah*, Mediator Ben Cunningham describes how he overcomes this by

> always spend[ing] time privately with the parties before any joint session . . . to decide whether to have a joint session and, if so, what it might look like. It also gives [him] the chance to start educating the parties (and sometimes their attorneys) about the mediation process, confidentiality, etc. These pre-joint session meetings are also valuable in building some rapport and (most importantly for a mediator) trust.

Ben J. Cunningham, *The Other Sarah*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 33, 39.

8 Galton, *supra* note 6, at 10.

9 *Id.* at 11.

10 Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A*

the other side, the lawyer for the plaintiffs opened the door to the possibility of something else happening at mediation—a broad definition of the problem.[11]

In contrast to the norm, in Debra Gerardi's story the mediator participated actively in the initial party preparation for mediation.[12] She had individual, substantive meetings with both the parents and the doctor to assess the situation and prepare the parties for the mediation. As she describes it, lawyers were not involved in the preparation or in the actual initial mediation between the parents and the doctor. Instead, after that initial mediation, the lawyers for the parents and the hospital worked collaboratively with the mediator to develop a quality improvement plan.[13] The preparation for the initial mediation included conversations with both parties in which the mediator talked with them about "what they each needed from the conversation, what they were concerned about, what they wanted from [the mediator], and any topics that were off-limits."[14] One might be tempted to ask, what would it take for lawyers to be comfortable in giving mediators this type of access to their clients? But that probably isn't the right question.

It is clear that Gerardi has an expansive (broad) view of what can be accomplished in a mediation which she describes as providing a space "where [the parties] are able to listen fully and connect as human beings regardless of whether they are ever able to agree on the details of the past or their desires for the future."[15] As a result of what Gerardi believes can be accomplished in mediation, the preparation these parties received prior to mediation was very different than what the preparation would have looked like from a lawyer *or mediator* with a narrow frame. Thus, the real issue is *what* is shared in the preparatory phase, not *who* shares it. Since most mediators are selected by lawyers and not by individual parties,[16] if the lawyer has narrow expectations for what can be accomplished in mediation, the selected mediator also tends to share those narrow expectations. Thus, we return once again to the critical role that lawyers play in shaping what parties expect to happen in mediation and therefore how they approach a mediation. This in turn impacts directly on what actually happens in the mediation. If the lawyer believes that the mediation is just about finding the number at which the case will settle, she is likely to choose a mediator who shares

---

Grid for the Perplexed, 1 HARV. NEGOT. L. REV. 7 (1996).

11 *Id.*

12 Debra Gerardi, *Noah's Gift*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 19–32.

13 *Id.* at 31.

14 *Id.* at 24.

15 *Id.*

16 Mediators in private practice tend to direct most of their marketing activities to the legal community so most one-time parties are unfamiliar with individual mediators and thus defer to their lawyers to select the mediator.

that philosophy in addition to preparing her client for that type of mediation.

In addition to controlling what information a party learns about mediation prior to the session, lawyers also impact what is possible in the mediation by determining who will attend the mediation. Consider the situation described by Susan Hammer in *Sarah McCrae*.[17] Here there were two mediations—one a year after the incident which led to the mediation and the second a year later. Hammer suggests that settlement was not possible at the first mediation for a variety of reasons, including: multiple defense attorneys representing different defendants—each paid by a malpractice insurer with "a reason to pass the blame to the other defendants,"[18] and none yet ready to face "the reality of the defense costs."[19] Also,

> the defendants were still withholding as much information as possible and counting on the protection of the tort claims cap to limit the recoverable damages.... Finally, the "real people" who represented Community Health [the organization which the parents held responsible for their daughter's death] didn't come to the mediation; only the attorneys and insurance representatives, who were looking at an inexpensive, economic solution, were present.[20]

The "breakthrough" in the second mediation occurred when the parents of the deceased met with the CEO and president of Community Health with no attorneys present. As important as who is in the room is who is not invited. In the second mediation, the CEO/President was there, but Hammer points out that after a year of litigation, the mediator knew who the real players were and "the others were told specifically, but nicely, to stay home."[21]

Despite court rules which suggest that the named party must attend mediation,[22] there are many defense lawyers who will seek permission to bring only the insurance representative to the mediation and to excuse the named defendant since insurance will cover the full amount of the claim. For example, in *The Bad Boy Who Almost Got Away*,[23] Jan Frankel Schau writes that the plaintiff and his lawyer

---

17 Susan M. Hammer, *Sarah McCrae*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 57.

18 *Id.* at 60.

19 *Id.* at 60–61.

20 *Id.* at 61.

21 *Id.* at 70.

22 *See, e.g.*, FLA. R. CIV. P. 1.720 (2013); MINN. GEN. R. PRAC. FOR THE DIST. CT. 114.07(d) (2013).

23 Jan Frankel Schau, *The Bad Boy Who Almost Got Away*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 151. A second example of this issue was presented by Frank Scardilli. Frank J. Scardilli, *Sisters of the Precious Blood v. Bristol-Myers*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 323. The first mediation took place only with counsel. No resolution was possible because the attorneys "had virtually no settlement authority." *Id.* at 325. At the second mediation,

attended the mediation, but on the defense side, only the claims adjuster and his attorney were in attendance.[24] Once that decision is made, the possibility of "something weird happening" during the mediation is foreclosed. In fact, during the mediation, Schau reports that the plaintiff did present new information which defense counsel acknowledged to the mediator suggested that the defense team had not valued the case appropriately before mediation. However, the defense lawyer indicated to the mediator that "[his] hands were tied as he now had succeeded in getting the client to more than double the hoped-for outcome."[25] Ultimately, the case settled but that day they were only able to reach agreement on a recommendation for a final number which was considerably higher than the authority which defense counsel had at the mediation. If the "actual" parties on both sides had been present, perhaps the police officers would have walked away with a new understanding and the plaintiff could have achieved a greater sense of closure. Since the decision was made for the named defendants not to attend the mediation, we will never know.

MEDIATION SESSIONS

Once parties arrive at mediation, there are many opportunities for attorneys to have an impact on what happens. Specifically, the stories include references to attorneys who dictate who speaks in the mediation,[26] how much time is allocated for the mediation,[27] and whether the mediation is conducted in joint or separate (caucus) sessions. Because so many of the stories included references to the use of caucuses, I will focus this Section on that particular decision point.

Consider the differences in the mediations that took place in *A Meeting of Strangers*, and *Cookie Monster*.[28] Galton reports in *A Meeting*

"senior counsel for both sides" were in attendance, along with inside counsel for Bristol and a representative of the advisory committee of the Interfaith Center on Corporate Responsibility, "the real moving force behind the Sisters' litigation." *Id.* at 325.

24 *Id.* at 153.

25 *Id.* at 159.

26 *E.g.*, Galton, *supra* note 6, at 10; Cunningham, *supra* note 7, at 37.

27 *E.g.*, Tracy Allen, *Cookie Monster*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 101.

28 *See also*, Kenneth Cloke, *Conflict Stories: Three Case Studies in Mediation*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 225. In this story, the attorneys indicated that "neither they nor their clients would make any opening statements but wanted to move directly into separate rooms to conduct settlement negotiations." *Id.* at 232. Fortunately for the parties, Cloke did not leave the lawyers with the final word but rather asked if the parties had things they wanted to say to each other. When both clients indicated they did, the attorneys agreed to allow them to speak to each other. Cloke concludes with the observation that "[o]nly their direct communication, heart-to-heart engagement, willingness to apologize for what they had done, and genuine appreciation for each other as human beings allowed them to walk away feeling

of Strangers that the mediation began in a joint session where he made his opening presentation, which was followed by openings by the plaintiffs and the defense. It is interesting to note that both lawyers spoke for their clients.[29] The defendant's lawyer offered an apology on his client's behalf and then went on to talk about the impact of the accident on the defendant. It was at this point that the defendant broke in and spoke directly to the deceased's daughters and conveyed a heartfelt apology.[30] This was followed by a two-hour meeting involving only the defendant and one of the plaintiffs by themselves—without attorneys present. To their credit, the attorneys permitted this to happen. Galton describes that during this meeting, the defendant was able to express "sorrow and responsibility" and to receive forgiveness.[31] He does not share what everyone else did during those two hours or the specifics of the monetary settlement in the case because "the economic aspect of the mediation was the least significant part of the process from the parties' perspective."[32]

In contrast, Tracy Allen in *Cookie Monster* described a mediation in which the attorney for the plaintiff arrived late to the mediation and then refused to meet with either the mediator or the other side.[33] Further, he demanded to know "a number" from the other side immediately.[34] Eventually the attorneys agreed to a joint session but only after the defense attorney spoke to the plaintiff's attorney alone. They agreed the joint session would not contain "any debate or advocacy. It would be swift, for the sole purpose of polite introduction and the chance for [defense counsel] to meet [the plaintiff] and see his injury—and . . . so that [the defendant] could give [plaintiff's counsel] its number."[35] During the joint session, plaintiff's lawyer labeled as advocacy any attempt by the defendant to engage with the plaintiff or

---

good about themselves and each other, and reach genuine closure in their conflict." *Id.* at 234–35.

29 Defense counsel had prepared the defendant for the likelihood that the plaintiffs' lawyer "would tell them not to speak" but the defendant was still disappointed when the plaintiffs did not speak. Galton, *supra* note 6, at 12.

30 In *The Power of an Authentic Story*, Lela Love makes a similar point. When in joint session, the claimant in a workers' compensation case, "[u]tterly frustrated by the lack of progress and the sterile way in which her story had been presented so far, . . . addressed the insurance adjuster. Her own lawyer simply could not stop her." Lela Love, *The Power of an Authentic Story*, *in* STORIES MEDIATORS TELL, *supra* note 1, at 299, 300. After hearing directly from the claimant how the injury had impacted her, Love describes that the claimant "went from [a] two-dimensional to [a] three-dimensional" person whom the adjuster wanted to help. *Id.* at 301.

31 Galton, *supra* note 6, at 14.

32 *Id.* at 15.

33 Allen, *supra* note 27, at 106.

34 *Id.*

35 *Id.*

explain how the defendant valued a case and immediately shut it down.[36]

In the former mediation, the party was able to seize control of the situation and give voice to a heartfelt apology offered directly to the other parties because all of the parties were present in the room together. As a result, the parties became the prime participants and drivers of the discussion and resolution. If the defendant had this breakthrough (breakdown?) in caucus and it was conveyed to the daughters of the deceased, it certainly would not have had the same impact on them. In contrast, in *Cookie Monster*, the lawyers were completely in control of the process to such a degree that the mediator indicated that even the ultimate settlement number was developed to be acceptable to the lawyer, not the plaintiff, who "wasn't the impetus behind any number."[37]

Sometimes parties are not able to participate in joint sessions right away, as illustrated by Ben Cunningham in *The Other Sarah*.[38] In this case, the first joint session took place after extensive individual sessions at the beginning of the mediation and then it consisted only of opening statements by the mediator and each attorney. Neither party spoke because the plaintiff was too angry and in pain, and the defendant too frightened.[39] The mediator continued to work in separate sessions until sufficient trust had been built between him and the parties and they felt comfortable engaging in a joint session where the parties could talk directly to each other.[40] While the lawyers remained skeptical about the value of such a joint session, they allowed the mediator to proceed. Cunningham reports that it was only after a powerful joint session that the monetary issues were able to be resolved.[41]

These three stories highlight the different approaches mediators can take in their mediations and the significant impact attorneys can have on the direction of the process. While it is clear that settlements

---

36 *Id.* at 107.

37 *Id.* at 112.

38 Cunningham, *supra* note 7, at 36 (recounting that the defendant's lawyer made it clear to the mediator at the start of the mediation that "under no circumstances [would the lawyer] allow [his] client to be in the same room with [the plaintiff]"). The lawyer justified this in two ways, first that the father was so angry that it would not be productive and secondly, the defendant was so emotional, "[h]e was worried that she would break down in the session or say something that could be used against her later." *Id.* at 36–37. See also Berman, *supra* note 4, at 203, in which the author wrote of a mediation which took place mostly in joint session. When it came time for the settlement offer which had been developed in private to be shared with the other side, Berman suggested that while he could convey the offer, "it would be much more genuine, sincere, and persuasive if . . . [the party] offered it directly." *Id.* at 213.

39 Cunningham, *supra* note 7, at 40.

40 I suspect that the mediator continued to work towards creating a joint session opportunity because the defendant repeatedly expressed how sorry she was. The mediator reports that it was clear to him that the defendant wanted the plaintiff to know that.

41 Cunningham, *supra* note 7, at 47.

can be reached through a caucus process, the type of reconciliation which so many of the mediators write about is not possible without the face-to-face contact which happens in joint session. As demonstrated through these stories, lawyers should consider carefully before demanding that the mediation be structured in such a manner to foreclose joint sessions.

DEHUMANIZING ASPECTS OF THE LAW – NEED FOR LEGAL REFORM?

The final area I wish to explore is the shadow of the law[42] in which mediations take place. The book begins with the story of a woman, Ginny, who ran a red light and hit another car. The driver of the other car died. The mediator writes:

> After Ginny [the defendant] was in the clear, Ginny wanted to call and visit the family; but her lawyer brother and the lawyer that her insurance company had hired to represent her in the lawsuit told her there could be no contact with the other family. . . .
>
> Ginny thought all that was indecent and certainly not very Christian, but everything about this had become indecent.[43]

There are justifiable legal reasons why prudent lawyers caution their clients from contacting the plaintiffs in personal injury cases prior to the case being resolved.[44] But Galton's story brings home the cost of this advice. On the other side of the table, the deceased daughter is described as having "been infuriated that Ginny had never tried to contact the family or even send a card."[45] Her lawyer assured her that the defendant's inaction was likely to be on advice of counsel, but this was of little solace.

What makes mediation so powerful is that it provides a space for this human interaction to take place within the confines of a confidential setting. Unfortunately, mediation typically does not take place immediately so there are years of frustration, hurt, and anger that builds up in plaintiffs prior to mediation. Some of this anger comes from the lack of acknowledgement from the other side and an inability to learn about the causes of what happened. With regards to medical malpractice claims, hospitals and doctors are increasingly changing

---

42 This idea was introduced by Robert H. Mnookin and Lewis Kornhauser. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

43 Galton, *supra* note 6, at 9–10.

44 *See* Girardi, *supra* note 12, at 22 ("Having an opportunity to make amends and directly address a situation in which an adverse event occurs is often not available to clinicians due to legal procedures, hierarchical conventions, and liability concerns.").

45 Galton, *supra* note 6, at 11.

practices in order to provide early acknowledgement of wrong-doing, apologies, and information,[46] but this is not the norm in relation to cases involving other serious injuries or death.

Perhaps it is due to the fact that in medical situations, there is the possibility for developing systemic changes to prevent the harm from happening to someone else. This possibility often does not exist in individual accidents. But the stories highlight that for many people, there exists a yearning for additional information in order to understand what happened and therefore there is value in the early acknowledgement (recognition) from the other side.

CONCLUSION

Through *Stories Mediators Tell*, we are treated to an insider's view of a variety of mediations. There are so many different lessons that one can take from the stories. For me, it was a clarion call of our obligations as lawyers and legal educators. As members of the legal profession, it is clear that we have an obligation to explore reforms which will allow parties who are so inclined to reach out to each other.[47] People should not have to live with the hurt and anger of not knowing what happened to a loved one and defendants should be able to provide that information to obtain some measure of release from the harm they caused.

As legal educators, we have the obligation to prepare our students to understand the importance of a client-centered approach to lawyering, to pay attention to the needs and interests of their clients, and then to help them to develop strategies to achieve those needs and interests to the greatest extent possible. We must do better at communicating the message that the lawyers should never be the ones preventing the process of reconciliation and should remain open to the idea, as Lela Love states, that "[c]lients can be the better and more persuasive speaker. They will get satisfaction from telling their story AND they may have the best shot at moving their counterpart on the other side."[48]

---

46 For example, see Hammer, *supra* note 17, at 66, in which two years after the death of a young woman who was treated in a hospital, the CEO and President told the parents that she "wanted to change [the hospital's] practice so that there is a meeting with the family and/or patient immediately after a tragedy or an unanticipated outcome." *See also* Jonathan R. Cohen, *The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy*, 17 BARRY L. REV. 89 (2011).

47 See Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CINN. L. REV. 819 (2002), for a discussion of law that exempts fault-admitting apologies from evidentiary admissibility.

48 Love, *supra* note 30, at 301.

Finally, lawyers do a disservice to their clients when they adopt a narrow definition of the problem. If one approaches mediation with the expectation that it is only about developing a number, inevitably the discussion will be limited to just that. It is abundantly clear that the parties in the stories place tremendous reliance on their lawyers to help them to navigate through this scary and difficult period in their lives. As lawyers, we need to think deeply about our level of comfort with conflict and to remain open to the human need not just for settlement but for closure. We should be proactive in adopting a broad problem definition frame for what could happen in mediation and then use that frame in preparing our clients for mediation, choosing a mediator, and structuring the process. We owe our clients the chance at a more healing process which goes beyond just "arriving at a number."