

USING MEDIATION STORIES TO IMPROVE THE TEACHING OF CONFLICT RESOLUTION

Forrest S. Mosten[†]

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[†] Forrest (Woody) Mosten is Adjunct Professor at UCLA School of Law where he teaches mediation and has been in private practice as a mediator since 1979. The author of four books and numerous articles on mediation, collaborative law, legal access, and building a peacemaking career, Professor Mosten has also taught at Pepperdine, University of Southern California, was a visiting professor at law schools throughout the world, and was Director of Clinical Education at Mercer Law School. He served as convener for the 1999 international symposium, Training Mediators for the 21st Century, and was Guest Editor for the Family Court Review's special issue featuring papers from that conference. He has also been Guest Editor for FCR's special issues on unbundling (2002) and collaborative law (2010). Professor Mosten has received the ABA Lawyer as Problem Solver Award, the ABA Lifetime Legal Access Award, and Peacemaker of the Year Award by the Southern California Mediation Association. He trains mediators, collaborative professionals, and lawyers in conflict resolution courses ranging from basic to master classes and keynotes conferences throughout the world. Since 1989, Professor Mosten has served as Chair of the Brown-Mosten International Client Consultation Competition for law students, a program which is affiliated with the ABA. Professor Mosten can be reached at <http://www.MostenMediation.com>.

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INTRODUCTION

My life's work is the practice, study and teaching of peacemaking.

As I eagerly turned from one story to the next in Eric Galton and Lela Love's *Stories Mediators Tell*,¹ I felt that I was a student in a master class of mediation taught by thirty-one Hall of Fame conflict resolution professors.

Due to confidentiality concerns, it is rare that conflict resolution professionals are able to be a fly on the wall to observe the work of our colleagues.² This collection of experiences from some of the best mediators in the field is a treasure trove of insights for peacemakers regardless of their levels of experience.

As I discovered one lesson after another from the fascinating and well-written stories in this volume, I began to reflect on how a more frequent, strategic, and institutional acceptance and use of mediation stories could improve mediation training on every level.

One of the many reasons why this book makes such a contribution to the field of mediation is that it reminds us of the power of helping with a personal touch. In law school and professional training circles, telling "stories" in class may be viewed as "light," "fluff," "trivial," or even "pedestrian," while case analysis and argument are generally accepted as "strong," "professional," "important," or "relevant." Trainers and professors who utilize story-telling may be viewed as less serious or lawyerlike than those who apply Socratic questioning. However, students generally are enthralled with practitioner stories, which are easy to listen to, come from the practical experience of the instructor, and frequently anchor a student's understanding, memory, and ultimately the use of key teaching points.

So, what is the true source of the resistance to the use of stories? While most professional conflict resolution trainers are aware of the positive student satisfaction that students express in respect to teacher storytelling, I, along with most of the trainers and law professors whom

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

² In *Mediation Career Guide: A Strategic Approach to Building a Successful Practice*, I recommend reciprocal Fly on the Wall engagements as an inexpensive and highly effective manner of receiving training and describe a protocol for doing so. FORREST S. MOSTEN, *MEDIATION CAREER GUIDE: A STRATEGIC APPROACH TO BUILDING A SUCCESSFUL PRACTICE* 79 (2001).

I deeply respect, keep practice stories to a minimum or delete them altogether from their classroom teaching.

In the faculty lounge, those instructors who rely on stories are often viewed as taking the easy road—being second-rate instructors who peddle “cheap pedagogy.” Telling stories to rapt listeners is often criticized as taking up valuable class time at the expense of intensive focus on learning objectives, tight lecture modules supported by Power Point visuals, focused demonstration of skills with interactive feedback, and well-designed role-plays that require participation and reflection by all class members in a variety of roles.

In my own trainings, I have limited story-telling due to my strategic preference to have my classroom serve as a metaphor for the mediation room.³ Applying the metaphor to practice, the teaching point is that mediators who tell “war stories” to participants often do so with the belief that such stories build trust with clients. Research on divorce lawyers finds the opposite: these stories stoke the egos of the divorce lawyers; clients listen out of respect and a sense that the war stories might either help them in their own case or at least reaffirm their confidence in their chosen lawyer. Frankly, clients would rather talk about their own situation and have the professional listen, diagnose, and find a solution for the client.⁴ To complete the mediator-trainer metaphor, I have made a conscious choice to use class time to focus on material being presented address the questions and comments from the class, and weave those comments into the teaching points. This allows students to be involved in their own learning and address student questions and concerns, rather than commandeer class time by telling practice stories regaling students with my feats in the mediation room.

A second reason that I have been “light” on storytelling is the law school culture that reveres the process of using Socratic teaching to extract legal theories from judicial opinions. To fill the gap of the “real world,” law professors often invite guest lecturers from the practice world or hire adjunct faculty members to serve up practice tips and case lore to students hungry for such information and eager for a break in the demanding rigor of the hard thinking required in connecting facts with legal principles.

³ The classroom as metaphor for the mediation room has several components. The teacher acts in every way like a mediator and the students are metaphorical mediation parties. Everything the teacher says and does, and the resources used, can be translated to the mediation room. Illustrations include the way teachers role-model mediator behavior by asking students for their questions and concerns, and asking the students to reframe their comments. Another illustration is the way in which the classroom uses visual aids, such as flip charts, has resources for student self-learning, and overtly balances the structure of classroom time for required material with flexibility for interactional moments of clarity and insight.

⁴ AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53–58 (1995).

Since first reading *Stories Mediators Tell*, I have intentionally injected more stories into my teaching of law students and training of mediators and collaborative professionals with great success.

My key teaching strategy in the presentation of mediator stories is to have students read a selected story aloud.⁵ Each student reads a paragraph or two and then passes the book to the next student. I find that the time that this process consumes is well justified by the interest the story engenders; this is particularly so with the “tangential” setup and background of the mediation within the story context that often sheds light on the mediator strategies and interventions within the mediation room. Instead of my describing the story or even asking students to set up the facts of the story from their pre-class assignment, the actual words being read by different voices in a classroom of other students produces an involvement and appreciation for mediation craft that is quite different and deeper than many other teaching strategies. I compare this experience with a bare reading of brilliant books such as *The Handbook of Conflict Resolution*.⁶ The concepts in that book are essential to producing a competent mediator’s thinking and skill set. Yet when the concepts are applied to one of the stories in *Stories Mediators Tell*, due to the emotional connection created by the storytelling, the concepts come to life and can be more easily learned and used by students.

In exploring how mediator stories fit into current mediation standards of practice, I surveyed standards in a variety of settings: federal and state courts; mediator membership organizations (ACR, AFCC, ABA, International Academy of Mediators); and State Mediation Funding Organizational Guidelines (*e.g.*, California Dispute Resolution Program Act⁷). I could not find written stories of mediators (and their

⁵ Reading aloud has long been a teaching favorite as a metaphor for mediation practice. For over 25 years, I have asked students to read aloud facts for role-play, Power Point slides, or portions of a resource book. The metaphor connection is that in the mediation room, when the mediator wants to make sure that parties (and/or their professional consultants) read and understand turgid material, such as contracts, reports, statutes, and the like, the best way is to take mediation time to have the participants each read aloud a portion of such material. To overcome student resistance to the amount of time such activity consumes, prior to starting the read-aloud exercise, I often take a poll of how long the students believe such reading will consume. I then ask a student to time the exercise with an iPhone stopwatch (another metaphoric move of involving students and making them responsible for their learning just as mediation participants are ultimately responsible for their own agreements). Invariably, the time expended for the read-aloud exercise is on the low end of time predicted.

⁶ MORTON DEUTSCH & PETER T. COLEMAN, *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* (Eric C. Marcus ed., 2d ed. 2006).

⁷ As an example, title 16, section 3622(c) of the California administrative code, entitled Orientation and Training of Neutral Persons, provides for the following mediation training criteria:

(c) The classroom training shall consist of a minimum of 10 hours of lecture and discussion, and shall address the following topics:

reflections) to be included in *any* training criteria for *any* organization, except those institutions that are dedicated to narrative mediation.

Most, if not all, mediation accreditation bodies require extensive simulated role-plays as an essential facet of mediation training. Playing the role of one of the parties translates theoretical practice into deeper understanding of how a party might feel both about the conflict and also about the mediation process. Playing the role of mediator forces

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- (1) The history of dispute resolution as a problem solving technique and its relationship to the traditional justice system;
 - (2) The Act and these Regulations;
 - (3) An overview of the structure of the California justice system and the traditional methods of processing civil and criminal cases;
 - (4) The structure, design, practice, and theory of dispute resolution proceedings and services, as defined, including the varying roles, functions and responsibilities of neutral persons, and the distinction between binding and non binding processes;
 - (5) Communication skills and techniques, including developing opening statements, building trust, gathering facts, framing issues, taking notes, empowerment tactics, effective listening and clarifications skills. Face-to-face as well as over-the-telephone communication skills shall be addressed;
 - (6) Problem identification and disagreement management skills, including instruction in the establishment of priorities and areas of agreement and disagreement, and the management of special problems that threaten the process;
 - (7) Techniques for achieving agreement or settlement, including instruction in creating a climate conducive to resolution, identifying options, reaching consensus, and working toward agreement;
 - (8) General review of fact patterns present in typical disputes, including landlord-tenant, customer-merchant, and neighbor-neighbor cases;
 - (9) Administrative and intake skills related to dispute resolution services, including completion of paperwork involved in handling and tracking cases, administrative and reporting forms, correspondence with disputants and referral agencies, agreements to mediate or arbitrate, and the drafting of settlement agreements and awards;
 - (10) The role and participation of attorneys and witnesses in dispute resolution proceedings;
 - (11) The organization and administration of dispute resolution programs, including intake procedures, follow-up procedures, and record-keeping; and
 - (12) The necessity of the voluntary and consensual nature of a disputant's participation in any dispute resolution proceedings.
- (d) The practical training shall consist of a minimum of 10 hours, which shall include role plays of simulated disputes and observations of actual dispute resolution services, including intake procedures as well as actual dispute resolution proceedings.
- (e) The training shall provide for personal assessment and evaluation of the trainee.
- (f) Grantees shall provide written verification of the dates and times at which the training was attended and completed to all trainees who satisfactorily complete the required orientation and training program.
- (g) Any neutral person who has received training which complies substantially with these Regulations, or who has had at least 25 hours of dispute resolution experience prior to his or her provision of dispute resolution services, shall be deemed to have met the orientation and training requirements mandated by these Regulations. Such prior training or experience shall be verified by the program or organization through which it was rendered.

students to make real choices, based on their theoretical learning. *Stories Mediators Tell* supplements this type of vital, hands-on learning by providing mediator observation of many typical mediations, both in joint session and in caucus.⁸ As discussed elsewhere in this Essay, I believe that mediator stories should supplement, not supplant, role-playing as a valuable mediator training tool.

The benefits of telling stories go beyond teaching about the choices that mediators make in practice. The human aspects of the mediator stories provide a different type of frame from which to observe mediator behavior—the depth and emotional context of hurt, angst, concern, and fear that overcome parties are challenges that can only be partially captured by the social scientist.

The field of mediation has long appreciated the importance of mediators who walk in the shoes of the parties. In their important study about what makes mediators successful, Steven Goldberg (and Margaret Shaw in Part 3 of the study)⁹ conclude that a mediator's rapport with the parties, including the expression of empathy, is one of the two most important mediator attributes.¹⁰ Mediator stories are rich opportunities for student mediators to witness such mediator empathy as a foundation for their conflict resolution work.

Stories Mediators Tell builds on the important work of two books on the lives and craft of leading mediators, *ADR Personalities and Practice Tips*¹¹ and *When Talk Works: Profiles of Mediators*.¹² In *ADR Personalities*, Eric Galton, at an earlier stage of his peacemaking journey, teamed up with James Alfini, a noted ADR scholar, to profile twenty-three practicing lawyer mediators and arbitrators from a variety of fields of law. Each profile provides biographical backgrounds and tips for best practices in the emerging area of ADR. *When Talk Works: Profiles by Mediators*, edited by Deborah Kolb, profiles a wide range of mediators from different disciplines, ranging from President Jimmy Carter to community and family mediators. The profiles, written in the third

⁸ In a conversation on February 18, 2013 with David Hoffman, co-editor of *BRINGING PEACE INTO THE ROOM* (David Hoffman & Daniel Bowling, eds., 2003), he observed that the joint session-private caucus debate that exists in the mediation field was overshadowed by the magic of resolution and forgiveness demonstrated in *Stories Mediators Tell*, *supra* note 1, inasmuch as magical moments occurred in both caucus and joint sessions. Indeed, some of those moments could only have occurred in joint sessions, while others could only have occurred if the mediator used caucuses.

⁹ Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 *NEGOTIATION J.* 393 (Oct. 2007) (reporting that the two attributes most commonly found in successful mediators are the ability to establish rapport with parties and the parties having trust in the mediator).

¹⁰ The other attribute is the trust and confidence that parties have in the mediator, often influenced by empathy.

¹¹ *ADR PERSONALITIES AND PRACTICE TIPS* (James J. Alfini & Eric Galton eds., 1998).

¹² *WHEN TALK WORKS: PROFILES OF MEDIATORS* (Deborah M. Kolb et al. eds., 1994).

person, are accompanied by Kolb's introduction describing the field of mediation and goals to highlight the diversity in the field and the struggles that mediators face in "an evolving professional culture." The collection of profiles concludes with the following statement by Kolb and Kenneth Kressell, probably the most recognized social science researcher on mediation,¹³ highlighting the themes contained in the profiles: "The real stories are in the profiles."¹⁴

In *Stories Mediators Tell*, the real story is in the participants' stories. We learn about the process of mediation and the insights and skills of the mediators by focusing on how the process and the professionals touch and impact the parties and their families personally, in a manner rarely covered by even the best mediation texts.¹⁵

Stories Mediators Tell is the most recent book in the long quest for improved mediation teaching in this young and evolving field. In his recent article, *Mediation: 50 Years of Creative Conflict*,¹⁶ noted practitioner and scholar Bernard Mayer traces the history of the search for answers to these questions. Mayer begins with the first major book in the field, *Structured Mediation in Divorce Settlement* by O.J. Coogler, which didactically offered a recipe for mediation performance that "seems unbelievably rigid from today's vantage point. Specific issues were to be discussed in a prescribed order and at a prescribed session. How each issue was to be handled was also described in detail and with accompanying forms."¹⁷

Mayer contrasts Coogler's orthodox approach with the "mediation as art" approach of John Haynes, whom Mayer declares the winner of the mediation as art versus science debate. No less ardent in his approach than Coogler (Haynes' mentor), Haynes held "very strong views" about how to conduct a mediation session, but he essentially saw mediation as an art requiring very skilled and flexible practitioners.

Following the pioneering efforts of Coogler and Haynes, Mayer found that the literature evolved to discuss the responsibility of

¹³ See KENNETH KRESSEL ET AL., *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* (1989).

¹⁴ WHEN TALK WORKS: PROFILES OF MEDIATORS, *supra* note 12, at 466.

¹⁵ The book that I have chosen to teach law students in my mediation class at UCLA is DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO INTEGRATED TEXT* (2d ed. 2012): well organized, and easy to read, the book captures the interest of students with its written content illustrated by its video text. As good as this and other leading texts are, they primarily focus *inside* the mediation room. *Stories Mediators Tell* provides a wider and richer lens from which to understand and appreciate how mediation works and its potential for healing. It makes an excellent companion reading with most mediation texts as well as with *BRINGING PEACE INTO THE ROOM* (David Hoffman & Daniel Bowling eds., 2003), which discusses the mediator's presence, in terms of how it impacts the participants and how mediators in turn are impacted by those being helped.

¹⁶ Bernie Mayer, *Mediation: 50 Years of Creative Conflict*, 51 *FAM. CT. REV.* 34 (2013).

¹⁷ *Id.* at 35.

mediators for the outcomes of our work, the importance of personal growth of the participants versus reaching agreements, the tension between satisfaction of the parties and the impact on systems, whether mediation is a preferred method of dispute resolution or one from a longer menu, whether mediators should be part of broad multi-disciplined professional organizations or more specialized groups, and how mediation affects the disempowered members of our society.

Stories Mediators Tell contributes to the discussion of these issues in a different way. Building on the importance of stories of participants as described by Winslade and Monk in their seminal book *Narrative Mediation*,¹⁸ Galton and Love focus on the mediator telling the story about what happened in a past mediation rather than on how the mediator should facilitate the storytelling by the parties within the mediation. Winslade and Monk state:

At the risk of oversimplifying the mediation process, we compare narrative mediation with other approaches to mediation as an “outside-in” phenomenon rather than as an “inside-out” phenomenon A narrative approach to mediation helps mediators and their clients make sense of the complex social context that shape conflicts.

Winslade and Monk venerate the importance of parties telling their own stories and creating an alternate story rising above the conflict. Narrative mediation depends on stories, offers strategies to invite mediation parties to tell stories, and explain and elaborate on “the storying process” in which “we use stories to make sense of our lives and our relationships.”¹⁹

The best description of storytelling that I have found is in Thoren Hansen’s *Narrative Approach to Mediation*.²⁰ In this dynamic article, Hansen eloquently lays out the parameters of storytelling by mediation parties:

1. “Telling one’s story in mediation serves simultaneously the ethical mandate, ‘participation’, as well as the pragmatic mandate to move ‘from story to settlement’”²¹
2. “The story is at once its content, contained within the body of the story itself (the actual set of events) and its telling, or

¹⁸ JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000).

¹⁹ *Id.* at 3.

²⁰ Thoren Hansen, *The Narrative Approach to Mediation*, *MEDIATE.COM* (Sept. 2003), <http://www.mediate.com/articles/hansent.cfm>.

²¹ *Id.*

the complete discourse around the way the story is delivered.”²²

3. “In mediation, the conflict parties’ stories act like ‘theories of responsibility,’ which construct the logical, causal linkages between actors, their actions, and outcomes.”²³
4. “People can actually be said to think in terms of stories and their constituent parts (the themes, roles, and plots), which work together to create a system of meaning around particular people and events.”²⁴
5. “The stories that one constructs fit into a wider web of stories relating to other stories created by the same individual, to stories created by members of one’s social network, and even to cultural stories on a societal level.”²⁵
6. “In a mediation, ‘narratives are interactively developed, modified, and contested as disputants elaborate portions of their own and each other’s conflict stories.’”²⁶
7. “Conflict stories tend to cast oneself in the role of victim and protagonist, which contrasts against the other party in the role of the victimizer, the antagonist.”²⁷
8. “For mediation to effectively use the storytelling metaphor and create a cooperative climate among disputants, it becomes necessary to destabilize those ‘theories of responsibility’ which simultaneously serve to legitimate one’s point of view and de-legitimate the point of view of the other party. This leaves conflict parties with a previously “closed” interpretation (their story) open to new possibilities and interpretations. This new climate of openness could lead to the genesis of a new account and mutually satisfying interpretations and outcomes.”²⁸

As a coda to Thorenson's insights, movie mogul Peter Guber offers the following insights to the power of the story:

I’ve come to see that stories are not only for the big screen, Shakespearean plays, and John Grisham novels . . . [stories] are far more than entertainment. They are the most effective form of human communication, more powerful than any other way of packaging information. And telling purposeful stories is certainly the most

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

efficient means of persuasion in everyday life, the most effective way of translating ideas into action, whether you're green-lighting a \$90 million film project, motivating employees to meet an important deadline, or getting your kids through a crisis.

PowerPoint presentations may be powered by state-of-the-art technology. But reams of data rarely engage people to move them to action. Stories, on the other hand, are state-of-the-heart technology—they connect us to others. They provide emotional transportation, moving people to take action on your cause because they can very quickly come to psychologically identify with the characters in a narrative or share an experience—courtesy of the images evoked in the telling.²⁹

As the joint product of a practicing mediator and a law professor and mediation scholar, *Stories Mediators Tell* supplements clinical teaching models with stories of mediation participants written by the mediators who facilitated the conflicts. In so doing, *Stories Mediators Tell* challenges the omission of the power of the story.

I. PRESENTATION OF MEDIATOR STORIES IN *STORIES MEDIATORS TELL*

Building on the conceptual importance of storytelling in mediation, *Stories Mediators Tell* presents thirty-one stories by mediators from a variety of fields, including those by the editors who each contributed multiple stories. The stories are packaged into nine parts; each part is a theme of stories, instead of a bundle of theories, strategies, or interventions.³⁰ The themes reflect the many layers of mediation and a glimpse at its possibilities well beyond “making a deal” or digging for a litigant’s “settlement number.”³¹ The nine sections are:

1. Tragedy, Revenge and Reconnection
2. Surprising Conclusions
3. The Principle of Unknowability
4. Listening for the Undercurrents and Finding the Missing Pieces

²⁹ Peter Guber, *The Inside Story*, PSYCHOL. TODAY (Mar. 2011), available at <http://www.psychologytoday.com/articles/201103/the-inside-story> (emphasis omitted). My appreciation to David Hoffman for alerting me to this illuminating article and for his close and insightful editing of this article.

³⁰ See also MICHAEL LANG & ALLISON TAYLOR, *THE MAKING OF A MEDIATOR* (2000) (organizing mediator behavior into theory, strategy, intervention, and reflection based on the work laid out in DONALD SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983)). It should be noted that Schön drew on his study of architects, businesspersons, lawyers, and therapists, never mentioning the word mediator—possibly due to the early stage of mediation’s development in 1983.

³¹ “The number” is mediator- and litigator-slang for each party’s reservation price.

5. Staying in the Middle Without Judgment or Favoritism
6. Momentous Shifts
7. Self Reflection and Reflection on Practice
8. Addressing Issues that Litigation Cannot
9. Beyond Agreements

The stories within each section are not limited to the stated theme. I ask my students to look for and discuss *all* nine parts in *every* story.

While the stories themselves are the marquee feature of the book, each story is followed by some reflections of the mediator-author. Entitled “Second Thoughts,” these reflections allow the mediator to highlight lessons for the reader and provide concepts for further discussion.

The strength and weakness of *Stories Mediators Tell* is the presentation of story after story without the theoretical or strategic justification for the inclusion of that story. The authors let the stories themselves do the teaching.

Stories Mediators Tell uses mediator stories as a looking glass to discover mediator skills and tools and how they are used. Within *Stories Mediators Tell*, the storytelling is described in a variety of ways.

Debra Gerardi, a mediator with a dual background of law and nursing, describes stories:

Narratives are a powerful window into the complexity that comprises another human being—a reflection of our beliefs, hopes, fears, values and ideas. Every story we choose to tell to another projects what matters most to us, and reflects what we want others to understand about how we make sense of the world around us.³²

Jan Schau, a mediator who is a past president of the Southern California Mediation Association, states:

[E]verybody has a unique story. Once you’ve gained the trust of the participants, they are usually glad to share their stories. And once you’ve heard those stories, there is usually something that reveals not only the reasons that they were unable to fully communicate their issues, which led them into the dispute in the first place, but also the ways in which they can improve their communication and thus achieve a satisfying resolution.³³

³² Debra Gerardi, *Noah’s Gift*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 19, 28.

³³ Jan Frankel Schau, *The Bad Boy Who Almost Got Away*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 151, 163–64.

Perhaps the most illuminating discussion of the storytelling process within *Stories Mediators Tell* is Kenneth Cloke's division of conflict stories into three levels:

In the stories we tell about our conflicts, every word we select, every fact we recite, every transgression we recount, indirectly chronicles our life choices. Every detail in our stories provides a clue to who we are, what we think, how we feel about ourselves and others, what we have done and failed to do, what we fear and hope will happen to us, why we remain stuck, and what we might be willing to do to transform and transcend our conflicts.

If we listen correctly, every conflict story allows us to reach deeply into the subconscious mind of the storyteller. Every conflict story exists on three levels: there is the *external story* that we tell to others; the *internal story* that we tell ourselves; and the *core story*, which consists of the reasons why we made up those other two stories.³⁴

With *Narrative Mediation* now followed up by *Stories Mediators Tell*, conflict resolution teachers have two important ways of using stories in mediator education. *Narrative Mediation* is less a toolbox and more of a school of mediation practice with institutes, conferences, and literature encouraging mediators to practice primarily or exclusively within the narrative mediation model. The approach in *Stories Mediators Tell* is more modest and organic: here are the stories—mediators may approach the challenges of our craft with a variety of techniques without an endorsement for a particular one.

II. LESSONS FROM MEDIATOR STORIES FOR TEACHING CONFLICT RESOLUTION

A. *A Mediator's Feelings on Non-Neutrality*

Although neutrality as to issues and impartiality toward participants³⁵ are cornerstones of mediator behavior, training courses on every level discuss how to manage non-neutral feelings when they come up in the mediator.

Tracy Allen and Jeffrey Kichaven illustrate in story-form two ways in which mediators manage non-neutral feelings. In Allen's story, *The Cookie Monster*, she, a nationally-recognized mediator and trainer from Detroit, shares her frustration with and then her anger toward a lawyer

³⁴ Kenneth Cloke, *Conflict Stories: Three Case Studies in Mediation*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 225, 238–39.

³⁵ Although neutrality and impartiality have some differences, references to neutrality will include both concepts for the purposes of this Essay.

who was a last minute substitute in this mediation. This lawyer walked in late and unprepared. He not only resisted each of the mediator's attempts to reduce the gap of positions, but personally was a lout and a gourmand by commandeering communal chocolate chip cookies intended for all of the mediator participants, taking the cookies for himself and his daughter's Brownie troop in order to save himself a trip to the bakery after the mediation (he never even offered his own client a cookie!).³⁶ In *The Buzzard*, Kichaven of Los Angeles describes his dislike for a lawyer who acted as if he was the smartest person in the room (he may have been but his egocentric behavior did not produce an effective working relationship).³⁷ In both situations, the mediator authors share how they managed their non-neutral feelings and, through time, patience, and professionalism, enabled those lawyers initially disliked by the mediator to play key roles in the settlement of the conflict.

B. *Curiosity and Humility*

In my training classes, I attempt to inject the importance of mediator humility, curiosity, and a conscious intention to park one's ego at the door. About twenty years ago, I learned the "Colombo" training presentation from co-trainer Jim Melamed of Oregon (founder and CEO of Mediate.com). In order to teach how to motivate parties to help solve their own problems, Jim would rub his forehead like Peter Falk and mutter, "I just don't know what to do, can you (parties) help me?" Jim always gets a laugh and I use this routine to this day, even though fewer of my students remember Colombo.

David Hoffman, a mediator and founder of the Boston Law Collaborative, drove a similar point home in his story, "The Whistle Blower." Hoffman told how a casual conversation during some downtime in a wrongful termination mediation revealed the plaintiff's yearning for a more structured work life in which he had thrived during his prior military career—this insight giving the mediator an opening for a creative solution.

In his story, *Rosa and Gordon*, Hawaiian mediator Charles Crumpton describes how he stayed positive and helpful even when the parties made it clear that they considered Crumpton no higher than their second choice as mediator to world renowned Tony Piazza (losing the fashion show for mediator selection has happened to every mediator I know).³⁸ Undeterred, unassuming, without attitude, and loyal to the

³⁶ Tracy Allen, *Cookie Monster*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 101, 110.

³⁷ Jeff Kichaven, *The Buzzard*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 93, 95–96.

³⁸ Charles W. Crumpton, *Rosa and Gordon*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 51, 55.

parties' welfare, Crumpton agreed to serve as Piazza's co-mediator and worked in a backup role with him and a litigation consultant to bring a challenging conflict to agreement.³⁹

C. *Working with Parties Outside the Mediation Room*

When training mediators, I emphasize the overreliance of position change and/or "ah ha" moments in the mediation room itself. I stress the importance of time to help the parties "ruminate" on ideas learned from the mediator (or the other parties) in order to change ingrained perspectives and well dug-in positions. Also, parties often need to discuss possible movement of their positions with the important people in their lives: partners, friends, clergy, hair stylists, and the like. In her story, *Sarah McCrae*, Susan Hammer of Portland, Oregon describes the efforts of her co-mediator Brian: by staying in touch with parties after the first attempt of a gathering of all parties did not result in success, Brian built trust individually with the parties, leading to ultimate agreement.⁴⁰ While every trainer teaches the importance of trust in the mediator, the use of this story shows vividly how trust develops and how it pays off when a final settlement is stitched together.

D. *Mediation of Disputes to Create New Opportunities and to Prevent Future Conflict*

While the angina of current disputes predominates the orientation of most mediation trainings, my own courses stress the use and importance of mediation in forming new relationships (business partnerships, marriage, etc.) and the symptomatic and asymptomatic prevention of future disputes.⁴¹ In Austin, Texas author Ben Cunningham's *Duffer v. Mulligan: ¿Quien Es Mas Macho?*, he eloquently tells how a partnership mediation can lead to a new business deal between the former partners who otherwise might have never spoken again due to the litigation but for the safe setting and future orientation of the mediation.⁴²

³⁹ *Id.*

⁴⁰ Susan M. Hammer, *Sarah McCrae*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 57.

⁴¹ See FORREST S. MOSTEN, *COMPLETE GUIDE TO MEDIATION* 293-320 (1997) (Chapter 19: Prevention of Future Conflict).

⁴² Ben J. Cunningham, *Duffer v. Mulligan: ¿Quien Es Mas Macho?*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 75.

E. *The Prevalence of Sub-Mediations*

People who enter mediation often are incredulous that they find themselves in conflict. It is also common for parties on the “same side” of a dispute to have conflicts among themselves, requiring a second, third, or tenth mediation with the same mediator before the entire matter is resolved. One goal of a conflict resolution teacher is to help students appreciate and empathize with parties being overwhelmed by finding themselves in a mediation room—especially when they feel either that they have done nothing wrong or that they are themselves the real victims. These hostile feelings can be directed to the other side, or to the parties on the same side of the table. Lawrence M. Watson of Orlando, Florida tells the story of a generous building owner who donates a commercial building to a needy charity—only later to find himself as a defendant in an asbestos law suit by a subsequent purchaser of the donated building.⁴³ Proving the adage “no good deed goes unpunished,” once the plaintiffs agreed to a settlement amount, the mediator was back in action mediating a liability allocation among defendants.⁴⁴ This mediator double and triple duty is often necessary to resolve conflicts between different plaintiffs in a construction defect or product liability case, fee disputes between party and lawyer, or other intraparty differences too numerous to list.

F. *It’s Never Just About the Money*

Mediation teachers have different modules for showing how legal issues are often a small part of the conflict, dwarfed by emotional, relationship, and financial concerns. A mediation maxim is that “it’s rarely just about the dollars.” Trainers also use many techniques to point out the difficulty of a “moving target” as well as how often entrenched positions can dissolve in face of the fear and dissonance created by a deadline. In her story, *Something Is Happening Here and You Don’t Know What It Is*, co-editor Lela Love shares her frustrations as she attempted unsuccessfully to resolve rather straightforward legal issues in a mediation with former lovers who also did business together. Lending her insight into the apparent inability of the parties to agree on anything, Love writes: “Each issue had its own back story and generated a lot of heat. And each side had a position, and no one would budge.”⁴⁵

⁴³ Lawrence M. Watson, Jr., *Unexpected Outcomes and Consequences*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 85.

⁴⁴ *Id.* at 86–87.

⁴⁵ Lela P. Love, *Something Is Happening Here and You Don’t Know What It Is*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 117, 120.

Then, ten minutes before the parties and mediator were about to be thrown out of the building following a seven-hour mediation going into the wee hours, the parties settled everything. Love expresses her own puzzlement as to how and why the parties came to terms. While remaining humble and giving credit to the parties, Love shares the lesson of mediator perseverance and ability to let the “magic” of the process work.⁴⁶ Mediation’s ability to defy empirical or logical predictors is a lesson that this story will help us teach.

G. *Professionals Focus on the Needs of the Parties*

Finally, a standard teaching point is that while self-care is crucial to reduce mediator burnout, after assuming responsibility for mediating a case, the parties’ needs and concerns must predominate over the mediator’s. Actually, this is one point for which I have often used a “war story” relating how in a hostile workplace mediation, we reached agreement in principle at 4:00 P.M., but the parties did not sign the written settlement agreement until 9:30 P.M. Even though my wife and I had a dinner party for twelve beginning at 7:00 P.M., I called home to apologize for my absence, and did not leave the parties and lawyers until the signatures were on the dotted line. When I got home, the guests had left and I had the opportunity to wash dishes!

In *Problem of Sharing Space* by Jeff Jury of Austin, Texas, Jury had promised to attend his daughter’s volleyball game scheduled to start at 6:45 P.M., but he missed the start of the game in order to wrap up a gnarly neighbor-neighbor mediation.⁴⁷

I now use Jury’s story rather than my own for two major reasons. First, students often relate better to a published account than to their own teacher’s ramblings. Second, and most importantly, using a story from *Stories Mediators Tell* frees me as a teacher from the appearance of self-promotional storytelling, permitting the instructor to use another mediator’s story as a teaching point and facilitate a discussion that leaves out my own mediator performance.

III. THE USE OF STORIES TO IMPROVE THE TEACHING OF CONFLICT RESOLUTION

As *Stories Mediators Tell* is the first anthology of mediator stories, conflict resolution teachers can build on this effort in several ways.

⁴⁶ *Id.* at 122.

⁴⁷ Jeff Jury, *The Problem of Sharing Space*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 127, 127.

A. *Adding Stories from Other Mediation Participants*

In future publications focusing on mediator stories, I hope that more peacemakers will write up their stories and also produce dramatic recreations for use in mediation training.⁴⁸

As the stories found within *Stories Mediators Tell* are written from the perspective of the mediator, students of mediation would also benefit from stories from the perspectives of other mediation participants, including lawyers, family members, experts, and others. In many ways, by expanding the stories to several reporters, the reader can be treated to a Rashomon⁴⁹ effect of differing viewpoints of the same events. However, illuminating as they may be, reactions from actual parties are challenging to obtain. The accounts in *Stories Mediators Tell* were fictionalized in part to protect the confidentiality of the parties and also to alleviate the need for party approval prior to publication. Many efforts to produce “Mediation Reality Shows” have been thwarted because parties treasure their confidentiality—one of the most important benefits of mediation. Mediators are so sensitive to that issue, that when approached, I and most other practicing mediators reject such requests out of hand and generally do not even ask parties for permission to film. Also, in publically describing the mediation, mediators may have a conflict of interest between promoting their own talents and skill and endangering the parties’ strict confidentiality.⁵⁰

B. *Challenges of Bias from Self-Reporting*

Regardless of whether multi-voices of participants can be achieved in a future work,⁵¹ one aspect of the *Stories Mediators Tell* effort needs

⁴⁸ The research of the International Academy of Collaborative Professionals depends on abbreviated write-ups by members of the Collaborative Team. The Association for Conflict Resolution, International Academy of Mediators or other mediator organizations can encourage this practice using the *Stories Mediators Tell* format.

⁴⁹ “Rashōmon is a 1950 Japanese period drama film directed by Akira Kurosawa . . . The film is known for a plot device which involves various characters providing alternative versions of the same incident.” Rashōmon, WIKIPEDIA, <http://en.wikipedia.org/wiki/Rashomon> (last updated Apr, 2, 2013).

⁵⁰ The California Supreme Court case of *Cassell v. Superior Court* inferentially underscores this point by holding inadmissible any conversations between lawyers and clients during a mediation even if such conversations may be the only evidence to prove attorney negligence in a subsequent malpractice claim. *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011); see also Forrest S. Mosten, *Confidentiality in Mediation*, CAL. LAW., Oct. 2011, at 32.

⁵¹ One method that I have used in my teaching is to interview mediation parties on their experiences and share those interviews either live or on DVD with training classes. In 2011, I taped two participants: first, a college dean from a wrongful termination mediation involving lawyers with a caucus-oriented mediator, and second, a wife from a complex high-asset divorce

to be studied: the reporting bias of the mediators telling the story. While a goal of Galton and Love is to show the warts of mediator failure as well as successes, one might question if mediators discussing their own cases would truly risk their reputations to expose incompetent skills or nakedly poor judgment—if honest and probing self-reflection revealed these flaws?

C. *Appropriate Versus Honest Presentations by Mediators
Telling Their Own Stories*

In *Stories Mediators Tell*, several mediators told their tales with either self-doubt or they professed being flummoxed over difficult situations. These humble revelations are in some ways “mediator appropriate” in that few experienced mediators would risk the approbation of the peacemaker community by crowing about their own accomplishments. Mediator hubris is not an attribute that is appreciated by either conflict resolution scholars or by referral sources. While the self-promotion by Gary Spence or Phillip Nizer might appeal to aspiring trial lawyers, quiet self-diffidence is a better sell for mediator storytellers. By relying on mediators to use the “humble card” to tell their own stories, the reader is never certain whether that tone truly reflects mediator attitude and action or is being “staged” for acceptable presentation. However, on balance, humility is a good thing: a positive model for the parties and for other peacemakers. As C.S. Lewis said, “humility is not thinking less of yourself but thinking of yourself less.”⁵²

D. *Standard Protocol and Criteria to Assess Mediator Stories*

Galton and Love’s collection of stories stands on its own with non-structured follow-up sections entitled “Second Thoughts.” Future mediator story-writing by professional mediators and students might be governed by a more extensive structure of criteria to which the author might address their comments. This would provide a protocol for reporting and reviewing case studies that could be compared and contrasted.⁵³

mediation involving out-of-session lawyers and forensic accountants conducted in joint-session by a facilitative mediator.

⁵² Humility Quotes, TENTMAKER, <http://tentmaker.org/Quotes/humilityquotes1.htm> (last visited Apr. 16, 2013). My appreciation to Kenneth Cloke for sharing this quote at a program at UCLA School of Law featuring Lela Love and *Stories Mediators Tell* on March 20, 2013.

⁵³ It is beyond the scope of this Essay to propose such criteria. Just as in mediator certification debates, no unanimity exists as to what criteria define a “competent” mediator. As

E. Teaching Manuals for Mediator Stories

If integrating written stories becomes institutionalized into mediation training, the production of teacher manuals for use of the stories will not come far behind. Injecting the pedagogical approach of an independent conflict education editor will provide teachers on every level with the lessons, teaching points, discussion topics, and exercises to supplement the insight of the mediator authors. Using the technology of the web as pioneered by Guy and Heidi Burgess in the educational website, www.BeyondIntractability.org, teachers can build on the thinking and presentations of others to access stories presented in a variety of media covering the spectrum of mediation substance and process.

CONCLUSION

By accepting stories as an integral part of mediation teaching, the coming years will be a brave new world in mediator training for which Eric Galton and Lela Love will deserve much of the credit for launching the increased use and analysis of mediator stories in ways that cannot be fully predicted.

such, significant work is needed to develop a consensus, or at least range, of criteria by which mediator actions revealed in stories can be assessed.