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Lessons from Mediators' Stories

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I. INTRODUCTION

Teaching a first-year Lawyering course colors the way I see things relevant to lawyers. So when I read *Stories Mediators Tell*,[1] I thought about the lessons that dispute resolution professionals, including lawyers,[2] can learn from these stories.[3]

Dispute resolution practice is very hard work. Every day, lawyers and mediators help people struggle with extremely challenging problems that make a huge difference in their lives. Stresses caused by conflict sometimes bring out the worst qualities of parties and professionals. As legal and mediation practices have developed in recent decades, many lawyers and mediators feel pressured to routinize their approaches to satisfy client expectations. For example, social scientist Herbert Kritzer's research describes insurance defense practice as being "commodified."[4] He argues that "many, perhaps even most, insurance companies

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

[2] This essay focuses on the work of mediators and lawyers and uses the term "dispute resolution professional" referring to both roles. Although some people limit this term to professionals who serve privately as neutrals, that usage omits professionals who perform important dispute resolution functions including lawyers, judges, and court administrators, among others.

[3] This essay focuses on the educational value of the real-life stories, which provide a wonderful medium for conveying useful insights. In addition, these beautifully written, touching accounts are just a pleasure to read.

[4] Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2052 (2006).

have come to view the more routine work of insurance defense as something to be purchased in a marketplace where there are a large number of interchangeable providers."[5] Thus insurance companies can wield great power over their lawyers as reflected by their ability to pay significantly lower rates than other legal clients, demand fee arrangements other than hourly billing, closely monitor lawyers' bills, maintain detailed litigation policies sharply limiting lawyers' discretion, and micro-manage litigation and negotiation activities.[6] Although insurance defense practice probably reflects an extreme of routinization and client control,[7] lawyers representing other repeat-player clients may have similar experiences. Even lawyers who do not face such concerted client pressures are likely to develop unconscious habits based on long experience and socialization in their legal culture.

These days, many mediators feel similar pressures to routinize and reduce costs. Courts and lawyers often want mediators to help "dispose"[8] of cases more efficiently. Prominent Los Angeles mediator Jeffrey Krivis argues that, as a result, the "mediation 'product' has become a low margin commodity" that is increasingly standardized as mediators mimic each other's techniques to reduce clients' costs.[9] Obviously lawyers and mediators have more discretion than assembly-line workers, but many may feel that they face intense competition in the market for their services and that their professional autonomy is severely constrained.

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[5] *Id.* at 2055.

[6] *See id.* at 2059-76, 2079-85.

[7] In common parlance of lawyers, the phrase "client control" usually refers to control of clients by lawyers, not the other way around as in many insurance defense relationships.

[8] Courts often use this term, referring to dispositions of cases and removal from their active dockets. "Disposing" of cases has the unfortunate connotation that litigants' disputes are undesirable forms of waste to be discarded.

[9] Jeffrey Krivis, The Preventable Death of Mediation (December 2012), available at http://www.mediate.com/articles/KrivisJbl20121221.cfm.

In this environment, it is easy for dispute resolution professionals to feel that their judgment, creativity, and skills are limited and that they must use more-or-less standardized approaches. *Stories Mediators Tell* offers accounts of real cases to show that, even in this environment, mediators and lawyers sometimes break out of their routines to provide extraordinary service and gain deep professional fulfillment. The book is full of such lessons[10] and this essay highlights a few of them. The cases described in the book are not a random sample and, indeed, most were selected because they were unusual in some way. Even so, they offer important lessons for professionals who want to raise the quality of their work by paying attention to important client interests and resisting pressures to treat cases as standardized processes. Of course, dispute resolution professionals should not abandon all their normal professional procedures. Rather, these lessons suggest that they should be aware of their routines and be open to innovating when appropriate.

The lessons in this essay are familiar to dispute resolution professionals who have reflected on their work. Even so, these stories provide important insights that are worth repeating.

II. MONEY ISN'T EVERYTHING

Many legally-trained dispute resolution professionals assume that for parties, especially plaintiffs, a dispute is "just about the money."[11] To some extent, these views are probably related to the fact that the legal system's remedies generally are limited to payment of money. Moreover, professionals operating in

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[10]These lessons are built into the structure of the book as the mediator-authors provide "second thoughts" about the mediations they describe.

[11]Researcher Tamara Relis found in her study of medical malpractice mediations, for example, that lawyers often erroneously assumed that plaintiffs were primarily concerned about receiving a financial recovery. *See* Tamara Relis, *"It's Not about the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 710-732 (2007). Moreover, doctors accused of malpractice often want to participate in mediations to communicate with their patients even though this was not related to possible financial settlements. *See* Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 455-81 (2007).

the shadow of the law[12] often see their goal as settling cases and thus view communication between the parties in terms of whether or not it leads to a financial settlement.

Presumably some parties are concerned only about the financial outcome of their cases but probably fewer parties feel that way than many dispute resolution professionals assume.[13] *Stories Mediators Tell* includes many stories of cases that were not just about the money. For example, in a wrongful death case brought by adult daughters of a decedent in a car collision, it was extremely important for the driver to directly express her deep regret and for the daughters to hear this. Indeed, a critical part of the process involved a two-hour long conversation between the parties without the professionals.[14] In a medical malpractice case in which a doctor's error resulted in the death of a newborn baby, the doctor and parents insisted on having a chance to talk directly, giving the doctor an opportunity to apologize and the parents a chance to hear it.[15] In a

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[12]*See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 YALE L. J. 950 (1979).

[13]Even insurance companies, which might be assumed to be interested only in reducing costs and liability, have interests in addition to financial results of disputes. In a pioneering study of insurance companies, Laurence Ross found that insurance adjusters' decisions are affected by their perceptions of fairness and that companies have strong organizational interests to keep up with the flow of their claims by closing cases. Thus, with some regularity, adjusters do not try to avoid paying every possible dollar. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 45-54, 59-66 (1970). For a list of parties' interests other than money, see JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY 66-67 (2011).

[14]Eric R. Galton, *A Meeting of Strangers, in* STORIES MEDIATORS TELL 3, 3-15 (Eric R. Galton & Lela P. Love eds., 2012). For a similar case in which a driver who drove into and killed a bicyclist and had a heart-to-heart conversation with the bicyclist's grieving father, see Ben J. Cunningham, *The Other Sarah, in* STORIES MEDIATORS TELL 33, 33-47 (Eric R. Galton & Lela P. Love eds., 2012).

[15]Galton, *supra* note 14, at 15-16. For a similar case, see Debra Gerardi, *Noah's Gift, in* STORIES MEDIATORS TELL 19, 19-28 (Eric R. Galton & Lela P. Love eds., 2012).

sexual harassment case, it was important for the harassed employees and their husbands to express their hurt and disappointment directly to representatives of the employer.[16] In a wrongful death case against a community health facility, it was critical that the facility's CEO listened attentively to the plaintiff's complaints about the facility's procedures, which led to changes in some procedures to prevent recurrences of the problems.[17] In a probate case between an unacknowledged daughter of the decedent and the decedent's wife and acknowledged daughters, the mediation provided an opportunity for the parties to meet and decide that they wanted to accept each other as family members.[18] Of course, these mediations included legal and financial issues, not only personal communication. But they were not *just* about the money.

III. IT IS VERY IMPORTANT TO LISTEN EFFECTIVELY

Effective listening is a critically important skill for dispute resolution professionals. This seems obvious but many professionals listen poorly for various reasons including professional habits and assumptions that they need to know only legally-relevant facts, which are similar to facts in other cases that they have handled.[19] Debra Girardi advocates a "conflict engagement" approach that "creates a bridge between what people truly need and the legal system that often blocks them from getting those needs met."[20] Susan Hammer highlights the

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[16]Galton, *supra* note 14, at 16-17.

[17]Susan M. Hammer, *Sarah McCrae, in* STORIES MEDIATORS TELL 57, 57-68 (Eric R. Galton & Lela P. Love eds., 2012).

[18]Lee Jay Berman, *A Day in the Life, in* STORIES MEDIATORS TELL 203, 203-14 (Eric R. Galton & Lela P. Love eds., 2012).

[19]*See generally* Clark D. Cunningham, *What Do Clients Want From Their Lawyers?*, 2013 J. DISP. RESOL. (forthcoming) (describing clients' extreme frustration about poor communication with their lawyers).

[20]Gerardi, *supra* note 15, at 29. For an excellent book providing pragmatic suggestions for such an approach, see BERNARD MAYER, STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES (2009).

"transformational power of deep listening," recommending that dispute resolution professionals and parties "take some calculated risks" by looking for "opportunities to break through the roles of adversaries and allow the parties to reclaim their essential humanity."[21]

Lawyers understandably see their role as protecting their clients, which normally is quite appropriate. Sometimes, however, this well-intentioned protection prevents clients from satisfying an important interest to engage with the heart of the matter. Ben Cunningham describes a case in which the lawyer of a driver who caused the death of the plaintiff's daughter was very reluctant to let his client talk directly with the plaintiff, who was extremely angry. After caucusing with both sides for most of a day, the mediator realized that the plaintiff needed to hear what happened in the accident and the driver needed to express her deep sorrow and tell the plaintiff how the incident affected her and her daughter. The mediator convinced the driver's lawyer to permit a joint session, which enabled both parties to get what they needed. The plaintiff talked first, describing his daughter's life. Then the driver gave a heartfelt account of the accident and remorseful apology, which melted the plaintiff's anger. The professionals left the parties to talk by themselves for a while and came back to find that the plaintiff decided to use the settlement to create a college fund for the driver's daughter.[22]

Having substantial practice experience helps professionals quickly develop hypotheses about the nature of problems and potential solutions, which often is quite helpful. Making confident assumptions, however, can interfere with good listening as it can cause people to ignore important clues or fail to look for them. Jeffrey Krivis recounts a case brought by a couple against a county government that falsely accused them of abusing one of their children. When the county made a generous settlement offer, the wife broke into tears. The husband had decided to get a divorce after the case was settled and the wife realized that settlement meant

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[21]Hammer, *supra* note 17, at 68. The term "transformation" is associated with an approach advocated in Robert A. Baruch Bush and Joseph P. Folger's book, *The Promise of Mediation: The Transformative Approach to Mediation* (2d ed. 2005), in which the primary goal of mediation is to promote empowerment and recognition. Dispute resolution professionals can be open to opportunities for transformation without making it the primary goal in all cases.

[22]Cunningham, *supra* note 14, at 33-47.

the end of her marriage. Dreading the loss of her marriage, the wife did not want to accept the offer. By eliciting this information, the mediator could help the couple resolve the dispute with the county and start planning how to proceed with their lives.[23]

David Hoffman tells of a case where his careful listening helped reveal a party's real interests, which the party himself was not aware of. The plaintiff in a wrongful termination case had been fired after making numerous complaints that the employer had committed unethical or illegal business practices such as entertaining potential business partners with risqué entertainment. The plaintiff had served in the army for twenty years immediately before working for the employer in this case. The mediator felt frustrated that the plaintiff's financial expectations seemed very unreasonable. In a caucus with the plaintiff, after an unproductive discussion about likely consequences of continued litigation, the mediator asked the plaintiff about his experiences in the army. Listening to the plaintiff, he realized that the plaintiff liked the regulated environment in the military and felt out of place in a company where he felt that "anything goes." The discussion helped the plaintiff realize that the problem was that his expectations of the company were unrealistic and that he had chosen the wrong place to work. This realization led him to moderate his demands so that the parties could reach a satisfactory financial settlement.[24]

IV. THE LEGAL ROLE CAN HELP BUT CAN ALSO INTERFERE WITH GOOD SERVICE

Our adversarial legal system is based on the premise that citizens' and society's interests are best served by giving litigants the opportunity to present their cases for decision by neutral courts. Lawyers play an important role by helping clients understand the system and diligently advocating their interests. Lawyers' roles as advocates can, however, undermine their work for their clients. Sometimes lawyers over-identify with their clients. Indeed, sometimes lawyers

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[23] Jeffrey Krivis, *The Broken Family, in* STORIES MEDIATORS TELL 283, 283-91 (Eric R. Galton & Lela P. Love eds., 2012).

[24] David A. Hoffman, *The Whistle-Blower: Mediating an Employment Termination Dispute, in* STORIES MEDIATORS TELL 141, 141-49 (Eric R. Galton & Lela P. Love eds., 2012).

not only take on their clients' one-sided views of the counterparty, they also develop personal antagonisms with the counterpart lawyers. Ideally, at the beginning of a case, counterpart lawyers should develop (or renew) good personal relationships with each other so that they can provide the best possible service to their clients without adding their own disputes to the case.[25] In some cases, lawyers may need help from a third party to help them focus on the parties' issues.[26] For example, Eleanor Barr describes a sexual harassment case she mediated in which the lawyers developed a personal antagonism with each other. The parties reached agreement about the key points of the settlement but the lawyers had problems working out the details after the mediation session, partially due to a recurrence of distrust between from an earlier stage in the case. The mediator arranged a conference call between the lawyers that helped them recognize and deal with the problems successfully .[27]

Law schools train students to "think like a lawyer," which is essential for understanding how the legal system handles cases and how lawyers can best serve their clients. Thinking like a lawyer can, however, also interfere with lawyers' abilities to help their clients. Lawyers' "standard philosophical map" described by Professor Leonard Riskin contributes to problems for some lawyers and law-trained mediators. This map is based on assumptions that disputes must have zero-sum outcomes and should be resolved based on general rules of law.[28] While many disputes have zero-sum elements and legal rules can be helpful or necessary for resolving disputes, sometimes the best results are based on non-legal considerations and that produce benefits for both parties. Lawyers do not provide

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[25] *See generally* John Lande, *Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel,"* 33 U. LA VERNE L. REV. 107 (2011).

[26] *See* LANDE, *supra* note 13, at 107-11 (suggesting techniques for dealing with problems with the other side in a dispute, including use of third parties).

[27] Eleanor Barr, *Compassion in Action, in* STORIES MEDIATORS TELL 171, 171-79 (Eric R. Galton & Lela P. Love eds., 2012).

[28] Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982). A zero-sum situation is where one party's gain results in a loss of the same amount by the other party.

the best possible service for their clients if they seek solutions limited only to ones of this map,

Lawrence Watson tells a story of a company that made a charitable donation of an office building to a university, which sold the building to some buyers. When remodeling the building, the buyers learned that it had dangerous levels of asbestos, which required expensive renovation to meet current building codes (even though the building complied with the codes when it was built). The donor was infuriated to learn that it was being sued and that no other parties would make significant contributions for the renovation. During the mediation, the buyers indicated that they were having problems getting credit, in part because a recent increase in interest rates pushed their liabilities up to their credit limits. It turned out that the donor could borrow funds at a much lower interest rate than the buyers, which led to an agreement that the donor would make a loan to the buyers.[29] By listening carefully, the professionals were able to help the parties create a solution that was not on the lawyers' standard map. Normally, one would expect defendants to provide compensation to plaintiffs but in this case, the defendant's loan to the plaintiffs enabled the parties to reach a resolution that made both sides better off than a simple transfer of funds.

Karin Hobbs describes another case in which bitter adversaries partnered to advance each other's goals. The case involved neighboring business owners. The plaintiff claimed that the defendant built a building encroaching on the plaintiff's property by four inches. Careful listening revealed a history of miscommunications, hurt feelings, and cultural differences between an old-timer and a newcomer in town. The mediation not only clarified the misunderstandings and prompted apologies, but it also led the parties to take various steps to help each other's businesses and agree on a payment plan for damages that did not hobble the defendant's business.[30]

Lela Love recounts a case in which a city adopted an ordinance prohibiting people from standing on a street and soliciting employment. The ordinance was intended to address problems caused by groups of Central American workers who

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[29]Lawrence M. Watson, Jr., *Unexpected Outcomes and Consequences, in* STORIES MEDIATORS TELL 85, 85-89 (Eric R. Galton & Lela P. Love eds., 2012).

[30]Karin S. Hobbs, *Newcomers and Old-Timers: Lessons We Learn, in* STORIES MEDIATORS TELL 337, 337-47 (Eric R. Galton & Lela P. Love eds., 2012).

gathered at a certain location to be picked up by employers of day laborers. The Hispanic community and civil libertarians filed a $3 million class action suit alleging that the ordinance violated the workers' constitutional rights. In mediation, two years after the litigation began, the parties reached an agreement with provisions that the courts did not have the authority to order at trial. The parties agreed, among other things, on an alternative place for workers to meet employers, plans for meetings to improve relationships between the Hispanic community and other members of the local community, cultural awareness training for police, and an amendment of the ordinance protecting the city's interest in public safety.[31]

V. CONCLUSION

Dispute resolution professionals often handle hard cases that are subject to multiple and sometimes conflicting pressures. Professionals can excel in their work if they actively seek opportunities to provide good service and do not operate simply on "automatic pilot" of professional habit. In addition, outstanding professionals continue developing their craft throughout their careers.[32]

One of the best rewards of being a dispute resolution professional is making valuable contributions to important stories of one's clients, colleagues, and even "opposing" parties.[33] With a continuing focus on providing high-quality service, dispute resolution professionals can be creative in satisfying clients' most important interests and gain great professional gratification.

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[31]Lela P. Love, *Glen Cove, in* STORIES MEDIATORS TELL 331, 331-35 (Eric R. Galton & Lela P. Love eds., 2012).

[32]For techniques that dispute resolution professionals can use to continue to develop their skills, see LANDE, *supra* note 13, at 129-37.

[33]The word "opposing" is shown in quotes because counterparties and counterpart lawyers regularly cooperate – as well as oppose each other -- in litigation. *See* Lande, *supra* note 25, at 107 n.1.