



# Once Upon a Mediation

The Role of Narrative in ADR

BY C. ADAM FOSTER



*This article considers the practice of narrative mediation as a tool for helping parties interact more productively both during and after mediation.*

**N**arrative plays an important role in forming personal identity and worldview. Narrative also helps explain why a party might reject a settlement that seems economically favorable if it does not comport with the party's subjective view of fairness. Accordingly, narrative is a useful tool in understanding and resolving legal disputes.

The practice of narrative mediation is particularly useful in addressing conflicts where the parties will continue to have a relationship with each other in the future. A growing body of literature defines narrative mediation as its own unique approach to alternative dispute resolution (ADR), but narrative techniques can be used in a wide variety of ADR settings, including traditional settlement conferences.

#### **Narrative Matters**

We all learn from events in our lives. Our need for coherence and identity causes each of us to weave those events into an ongoing story about life and the people and events that affect our lives. In so doing, we develop a continuing narrative about ourselves and our relationships with others, which informs our choices moving forward. We create multiple narratives in different contexts that inform how we see ourselves in various social roles, such as professionals, spouses, parents, and friends. These individual narratives interrelate with larger social narratives involving class, race, gender, sexual orientation, religion, and many other aspects of our identities. Whether on a conscious or subconscious level, our narratives reaffirm our values and identity: "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."<sup>1</sup> This notion of interrelated individual narratives and larger scale social discourse has been adopted into the practice of narrative mediation.

Narrative mediation is premised on the idea that we shape our lives through our narratives. The narrative mediator seeks to help the parties author stories that highlight strengths and reconcile conflicts in their relationships. This helps people to be more cooperative and respectful and thus resolve their conflicts more effectively.

Narrative mediation exploits the potential to address conflict by disrupting and restructuring the parties' narratives. It is based on the hypothesis that the closer the relationship the parties will have following mediation, the more important it will be for them to establish key elements of a joint narrative. There are specific questions that mediators can use to enable parties to articulate their existing conflict narrative and forge a new narrative that will permit them to interact in a more productive fashion in the future.

#### **The Importance of Storytelling in Legal Disputes**

The statement of facts is arguably the most important part of any legal brief because it is the narrative that

gives life to the legal issues. Citation to legal authorities is meaningless unless the decision maker understands the specific factual context of the case. Whether in a statement of facts, an opening statement, or a mediation conference,

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a properly crafted narrative creates moral tension, suggests a proper result, and makes the decision maker care about the outcome. A compelling narrative provides integrity by fitting the facts together in a logical fashion that supports the party's message.

Judges, juries, and arbitrators generally want to achieve a fair outcome. To guide them to the desired outcome, attorneys must recognize that the decision maker is different in a bench trial, a jury trial, an arbitration, and a mediation, and attorneys should tailor their narrative to the appropriate audience. A large part of this litigation strategy focuses on advancing the client's narrative and suppressing or disrupting the opposing party's narrative. Moreover, each individual involved in the proceeding—the parties, attorneys, mediator, arbitrator, judge, and jury—is trying to make sense of two related, but distinct, narratives: a narrative regarding the facts of the case and a desirable outcome, and a meta-narrative involving who they are as a person and how the case fits in with their life story.

In mediation, it is critical that the parties tell their narratives. Parties want to achieve a favorable outcome but also want to be heard and validated in the process, so allowing them to tell their stories helps accomplish a good settlement that will be adhered to. A party who achieves a favorable financial outcome but doesn't feel heard may walk away dissatisfied and try to undermine the settlement when the opportunity arises.

Common sense dictates that it is usually more important for parties to agree on certain elements of a joint narrative if they will be in a continuing relationship (e.g., in a workplace or parenting time dispute) versus a one-off transaction (e.g., a tort settlement for money damages). But it is often necessary to establish legal and factual stipulations to settle any type of dispute. Litigation will result in a judgment, but may not further agreement on a joint narrative.

### The Role of Self-Serving Bias

The standard economic model of legal disputes posits that settlement occurs when there exists a positively valued *settlement zone*—a range of transfer amounts from

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the defendant to plaintiff that leave both parties better off than they would be if they went to trial. The location of the settlement zone depends on three factors: the parties'

probability distributions of award amounts, the litigation costs they face, and their risk preferences.<sup>2</sup>

In an economic model of legal dispute resolution, non-settlement is generally blamed on imperfect information, which causes the parties to misestimate the “real” value of the case.<sup>3</sup> The modern discovery process seeks to remove this information imbalance by making pertinent information available to the litigants.

Economic and psychological research demonstrates a pervasive “egocentric” bias that leads most people to systematically overestimate qualities as diverse as “the fraction of credit that they deserve for a collaborative task, how well they drive (compared to others), the esteem in which others hold them, or how well they have performed a task . . .”<sup>4</sup> Egocentric bias also results “from the use of judgmental *heuristics*—cognitive rules of thumb that are naturally adapted to limited human information-processing capabilities—instead of optimal statistical rules.”<sup>5</sup> The result is that self-serving bias skews what people consider a “fair” outcome in favor of an outcome that serves their individual needs and preferences. As a consequence, individuals will often reject an outcome that seems to favor them economically if it does not meet their subjective criteria for fairness.<sup>6</sup> Moreover, people seek out and assimilate information that confirms their preexisting beliefs. This is called confirmation bias.<sup>7</sup>

Informing parties of the existence of cognitive bias has no significant effect on experimental outcomes in terms of the magnitude of the bias or settlement.<sup>8</sup> Interestingly, people tend to believe that others are affected by cognitive bias, but that they are able to evaluate information objectively themselves. Some authors have noted an important exception: “[O]ne type of intervention stands out as effective against a wide range of biases. This involves having subjects question their own judgment by explicitly considering counterarguments to their own thinking.”<sup>9</sup>

Personal bias explains, in part, why parties' narratives may be so divergent. The constraints of cognitive bias require narrative mediation to go beyond simply exhorting parties to consider the other side's arguments. The practice of

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narrative mediation encourages the parties to work together to craft a new story that will define their relationship going forward.

### The Narrative Mediation Process

In conflict situations, people often find themselves in the middle of a relationship story that is not of their preference. Their relationship with other protagonists in this story may have developed a character of hostility and suspicion, if not outright aggression, that does not fit with their usual personal identity stories and can often only be explained with recourse to a blaming of the other.<sup>10</sup>

Narrative mediation focuses on helping the parties revise the stories they have told themselves by focusing less on blaming the other party and more on the type of relationship they would each like to have moving forward. This mediation style is particularly effective in addressing disputes where the parties must continue to work together in the future in areas including family law, workplace disputes, disagreements between neighbors, and disputes involving ongoing business relationships.

Narrative mediation will not be appropriate to address every conflict, especially where a party's primary goal is to seek a determination of blame and an award of money damages, for example, when the case involves a multi-vehicle car crash where a severely injured victim seeks compensation from several other drivers. The car crash example can be contrasted to a dispute between divorced parents regarding how they should exercise decision-making authority for their child. In the family law context it is unlikely that the parties will ever agree on a precise apportionment of fault for the breakdown of their marriage. An attempt to place blame is likely to simply make the parties resent each other more without yielding any benefit to their joint goal of raising a healthy and well-adjusted child. "Much conflict resolution (especially through the legal system) is based on the [idea] that only when the responsible parties are identified is it meaningful to engage in resolution processes. On the contrary, narrative practice argues that pointing fingers at guilty parties will likely only further enhance polarization."<sup>11</sup>

Revising narratives involves redefining the problem. "Conflict stories tend to cast oneself in the role of the victim and protagonist, which contrasts against the other party in the role of the victimizer, the antagonist."<sup>12</sup> Thus, a key component to narrative mediation is "externalizing" the problem, which is often described as encouraging the parties to realize that "the people are not the problem, the problem is the problem."<sup>13</sup> This conceptual shift disrupts past rhetoric and makes it easier for the parties to reexamine their assumptions regarding their relationship and begin the process of revising their existing story regarding the conflict.

Many practitioners define three phases of narrative mediation. These phases do not always proceed in sequence because the process may involve backtracking and repositioning as the mediator and the parties explore the assumptions underlying the conflict story and engage in creating an alternative narrative. The basic stages are:

**1. Engagement.** The mediator establishes a rapport with the parties and invites them to tell their existing stories regarding the conflict. It may be helpful for the mediator to first meet with each party individually, invite them to tell their story in their own words, and then provide an overview of how the mediator will seek to help the parties jointly author a new, more productive story. The mediator then meets with both parties together and invites them to share their respective stories with each other while the mediator facilitates this conversation.

**2. Deconstruction.** The mediator engages in "double-listening," which is hearing "not only the pain of the conflict story but also the individual's hopes for something different."<sup>14</sup> The mediator encourages the parties to question the assumptions underlying the conflict narrative and externalize the problem. The goal is for the parties to view the problem as stemming from a breakdown in communication related to their competing experiences and assumptions, as opposed to an intractable character flaw in the other party. Here the mediator describes both parties

as victims of the problem, as opposed to casting the other party as the antagonist or aggressor. This process may lead the parties to reflect on their own contribution to the conflict. The mediator also attends to possible values that can be a foundation for the new narrative:

A narrative consists of a number of organized events, highlighting competences and values, performed by the persons involved in the story. Thus, a process of spotting untold events is developed, bringing to the foreground competences or values which have been forced into the background by the conflict, so they can serve as the building blocks of new stories.<sup>15</sup>

The process of identifying "building blocks" leads to jointly constructing a new narrative.

**3. Coauthoring.** The parties describe a new story in which they work together as allies in solving the problem. The mediator uses questioning techniques to elicit the new narrative. For example, the mediator might ask, "How did it make you feel when she acknowledged how hard you worked on that project?" The mediator searches for specific examples that challenge the conflict narrative and open the door for a more constructive future relationship.<sup>16</sup>

It is often helpful to reduce the parties' agreement implementing the new narrative to writing. It is also useful to schedule a follow-up meeting to discuss whether the parties' hopes and expectations are being met and how their words and actions can continue to become more closely aligned with the goals expressed in the document.

It is easier to describe this process than to employ it effectively, but most mediators already use a variety of active listening techniques that will prove invaluable to the practice of narrative mediation.<sup>17</sup> For the process to be effective, the mediator must be aware of power differentials both between the parties' and the mediator's own discursive position.

The accompanying sidebar provides examples of questions a mediator might ask in different contexts to encourage parties to

## SUGGESTIONS FOR MEDIATORS HANDLING NARRATIVE MEDIATIONS

### Addressing Logistical Issues

- Consider meeting with the parties individually at the outset to explain the process and encourage them to share their respective stories privately with the mediator.
- Be aware of power differentials and make a strategic decision about who will speak first.
- Set a ground rule of no interruption—at least while each side explains his or her side of the story and goals for the mediation.
- Probe for statements or examples of conduct that are inconsistent with the conflict narrative, and use targeted questions to disrupt the conflict narrative.

### General Questions

- How do you think he will respond to that?
- You mentioned that she [insert positive quality]. Give me an example.
- I'd like you to tell me that part of the story again, but focus on his [positive quality].
- What can you do to make that happen? What would you like to see her do in return?
- If he can do that, what does that open up that you can offer back to him?
- Describe what things might look like if you were able to address this problem together.
- If [sadness/anger/resentment] wasn't there so much, how would that help the relationship develop?
- Now that you've heard that apology, does that open up any possibilities for the future?
- What else would you like to see in this agreement?

### Questions for Family Disputes

- Describe your parenting style.
- Describe his parenting style.
- What kind of parent would you like to be? What kind of parent would you like him to be? How could he help you to be that type of parent? How could you help him?
- What goals do you share as parents?
- If you are able to \_\_\_\_\_, what effect do you think that would have on your relationship? On your child?

### Questions for Employment Disputes

- What type of supervisor are you?
- Describe your management style.
- Describe your ideal boss.
- What could she do to help you be a better manager?
- How could you help her to achieve her professional goals?
- If he disagrees with your decision, how would you like him to communicate that to you?
- What's your favorite part of your job/workday?

### Questions for Homeowner Association Disputes

- What kind of neighbor are you?
- What kind of neighbor would you like to be?
- What do you like best about the community?
- If someone thinks you are not obeying the HOA bylaws, how would you like them to tell you about that?

examine their existing narrative and encourage them to create a new story that will give meaning to their relationship going forward.

### Narrative Mediation in Settlement Conferences

Mediators who handle a large number of personal injury and commercial cases will be intimately familiar with situations in which one party is very comfortable with the power differential and has no intention of relinquishing that greater power. Also, many companies would argue that it would be a breach of the company's duty to its shareholders to give away any larger sum than the minimum necessary to settle the case. Moreover, in many tort or contract disputes neither party really wants to have an ongoing relationship with the other, and ADR is seen as a tool for avoiding the cost and expense of a trial, as opposed to a vehicle to gaining deeper insight into the other party's experiences and values. A deeper understanding of narrative can nonetheless expand the range of tools available to an evaluative mediator conducting a settlement conference. Here are some tips:

- Encourage the attorneys to spend time crafting a settlement statement that effectively tells their client's story. For the attorney, the settlement statement is an excellent opportunity to make sure that the attorney and the client agree on the key elements of the narrative and the theory of the case. It gives them a chance to discuss the strengths and weaknesses of the case and what evidence and exhibits will be presented at trial. Working collaboratively on the mediation statement also encourages the attorney and client to discuss settlement scenarios that meet the client's needs and may allow the mediator to explore a range of options with the adverse party (i.e., lump-sum settlement versus an interest-bearing promissory note, whether a confidentiality clause should be included, whether a certain settlement structure or stipulations in the agreement may permit a party to minimize tax liability). Encouraging the parties to incorporate narrative into their settlement statements also permits

the evaluative mediator to more readily identify factual disputes and competing moral claims.

- Use narrative-focused questions in connection with debiasing techniques, such as: How do you think the defendant would respond to that story? What story would they tell? Have you considered \_\_\_\_?
- When numbers-based negotiations bog down the process, the mediator can shift gears and attempt to create greater convergence between disparate elements of the parties' narratives to overcome impasse on the settlement value of the case. Using narrative can also help to humanize the other party and undermine assumptions regarding their motives and values. Keep in mind that "stories told to mediators are always selective. This gives the mediator licence [sic] to move between and around stories, to draw on a wider range than the initially-presented problem story."<sup>18</sup>
- Work an apology into the settlement, either in oral or written form, to validate the plaintiff's desire to feel heard and help satisfy the desire for a fair outcome.
- Attorneys who participate in a settlement conference often depend heavily on the mediator to tell their client's story. But if the settlement conference is conducted in caucus, where the mediator shuttles between parties in different rooms, the attorney may not feel assured that the mediator is accurately conveying the most important elements of the client's narrative. Thus, attorneys should consider sharing the key narrative portions of the settlement statement with the other party. Attorneys may argue that they have already spent significant time crafting a narrative by filing the complaint or a motion for summary judgment, but the ability to share a confidential settlement statement protected by Colorado Rule of Evidence 408 with the other party opens up opportunities for a more nuanced and candid narrative than pleadings that will become part of the court's case file.
- Attorneys should be aware of the fact that they not only translate their client's


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narrative into "legalese," but actively craft the narrative together with the client, incorporating the attorney's own discursive position along with the client's. Greater awareness of the role that the attorney plays in this process and the fact that attorney and client are constantly crafting and reimagining the narrative together helps the attorney ensure that she is advancing the client's goals.

### Conclusion

We shape our lives through our narratives, and narrative mediation capitalizes on this idea to resolve conflicts more effectively and create lasting positive changes in relationships. Although encouraging parties to abandon an entrenched conflict narrative in favor of a more productive joint narrative may seem a daunting task, most mediators already use a variety of techniques that can be readily adapted to a more narrative approach to mediation.<sup>19</sup> 

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### NOTES

1. Hansen, The Narrative Approach to Mediation (Sept. 2003), [www.mediate.com/articles/hansenT.cfm](http://www.mediate.com/articles/hansenT.cfm).
2. Lowenstein et al., "Self-Serving Assessments of Fairness and Pretrial Bargaining," 22(1) *J. Legal Stud.* 135 (1993) (emphasis in original).
3. Priest and Klein, "The Selection of Disputes for Litigation," 13 *J. Legal Stud.* 1 (1984).
4. Lowenstein et al., *supra* note 2 at 138. The authors also discuss seminal studies demonstrating that fans watching a football game overestimate the number of penalties committed by the other team. *Id.* at 141. Unsurprisingly, when spouses are asked to estimate the percentage of household chores they each complete, the result almost always exceeds 100%. *Id.* at 140.
5. *Id.* at 140.
6. *Id.* at 139.
7. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises," 2 *Rev. of Gen. Psychol.* 175-220 (1998).
8. Babcock and Lowenstein, "Explaining Bargaining Impasse: The Role of Self-Serving Biases," 11 *J. of Econ. Persp.* 109, 115 (1997).
9. Babcock et al., "Creating Convergence, Debiasing Biased Litigants," 22 *Law and Soc. Inquiry* 913, 916 (1997). *But see* Lord et al., "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence," 37 *J. of Personality and Soc. Psychol.* 2098-2109 (1979).
10. Winslade, "Narrative Mediation: Assisting in the Renegotiation of Discursive Positions," 4 *The Int'l J. of Narrative Therapy and Community Work* 64-75 (2003).
11. Kure and Winslade, "A Narrative Approach to Working with Organizations in Conflict," 1 *J. Conflictology* 1 (2010).
12. Hansen, *supra* note 1.
13. *Id.*
14. Cotter, A Narrative Approach to Employment Mediation at 59 (2012), <http://dulwichcentre.com.au/Explorations-2012-1-Alison-Cotter.pdf>.
15. Kure and Winslade, *supra* note 11.
16. *See, e.g.,* Hansen, *supra* note 1.
17. Winslade, *supra* note 10, offers a transcript of an actual family law mediation to demonstrate the effective use of narrative mediation. Similarly, Cotter, *supra* note 14, provides concrete examples of questions she used to help resolve an employment dispute.
18. Cotter, *supra* note 14 at 59.
19. For further reading, see Felstiner and Sarat, "Negotiating Reality and Responsibility in Lawyer-Client Interactions," 77 *Cornell L. Rev.* 1447, 1454-55 (1992); Birke and Fox, "Psychological Principles in Negotiating Civil Settlements," 4 *Harv. Negot. L. Rev.* 1 (1999).