



# A Conversation About Facts, Stories, and Truth in Mediation

By James Coben, Kenneth Fox, and Lela P. Love

*To explore the important and complicated theme of this issue, we asked three experienced mediators and scholars to sit down and discuss how they think facts, truth, and stories do (or do not) matter in the practice of mediation.*

**James (Jim) Coben:** In thinking about all this, I see a surprising orthodoxy: mediators describe the past as a troubled and confusing place and contrast it with a much more attractive future, one that parties can control and shape.<sup>1</sup> I believe that part of this false duality is the denial of truth.

Mediators routinely lead people from that murky past to the future in an attempt to overcome the paralysis that neutrals feel blocks people's progress in reaching resolution. Litigation, mediators assert, is the place where parties should go to focus on the past, to determine what happened and evaluate who was right and who was wrong. I suspect most mediators would assert that they don't devote much effort to determining facts or seeking objective truth because people's stories are more important than any objective truth. Moreover, many would argue that objective truth isn't

discernible or particularly relevant or useful to people who are navigating their way through conflict. In other words, facts are mutable, and the effort to determine them wasted and inefficient.

**Lela P. Love:** I don't share the premise that mediators eschew the past. First, the past informs the future. No mediator should ignore the past, as it powers parties' reactions and undergirds future possibilities. A line that places the past on the litigation side and the future on the mediation side seems wrong; ideally, mediators help parties understand the past while also challenging them to craft the future.

Second, credible information is always enlightening and persuasive. To know that a person was not present at the scene of a crime, or that the intent of someone who has done harm was to do good, or that DNA proves the paternity of a parent seeking parental involvement — these are a few examples of information that may be very helpful in the context of a dispute. Data about zoning or the tax code, about the lease, or about the workplace rules provide critical boundaries for possible accords. Facts, however, may not serve truth-seeking if they are an end in

themselves. In the adjudication context, "facts" are the version of the story that the judge or arbiter finds most persuasive. If one considers a document dump (for example, years of email communication) that becomes a part of discovery in the litigation context, it is apparent that many "facts" can be extracted from the documents that certainly represent an aspect of truth but, when taken out of context, may involve half-truths that are highly misleading.

In mediation, the parties themselves hear each other's perspective on history or events. The parties themselves are probably the most knowledgeable about that history or those events coming into the conversation. And the result of sharing and listening is movement in the direction of an expanded and enlightened view of what happened or of the "truth." If the mediator allows storytelling without judgment (without the need for neutral fact-finding), then the parties themselves, as the ultimate arbiters in mediation, are positioned to have a more balanced view of the situation that encompasses their counterpart's reality. With that, they can move forward wiser and better able to craft a mutually acceptable future arrangement.

**Kenneth (Ken) Fox:** In my view, it's even more than storytelling without judgment. Philosopher John Searle makes an important distinction between "brute facts" (such as the physical presence of Mount Everest) and "institutional facts" (such as those pieces of inked paper in my wallet that have a socially agreed-upon exchange value wherever I shop).<sup>2</sup> This distinction matters because "institutional facts" do not exist independently of social agreement. And where there is no social agreement, there can be

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conflict — just try buying groceries with "Disney dollars" and see how the cashier reacts.<sup>3</sup>

Money is an easy institutional fact to understand. But the many ways people develop shared meaning about their complex social experiences — that is not as easy to understand. We share a common understanding about many — but not all — institutional facts. Because different social experiences can lead to different understandings about what things mean, people can arrive at different institutional facts about what appear to be the same events. Such differences are an important source of conflict and can be challenging to unpack.

Different social experiences also lead to differences in the meaning embedded in language. As a result, people not only understand their social experiences in different ways, but the very language they use to express their differences is intertwined with their particular experiences. As a result, when parties interact with each other in conflict, not only do they make "sense" of the conflict in different ways (leading to different institutional facts), but they can also experience a linguistic gap even in how to articulate their differences. The result can be a breakdown in their ability to interact constructively as they try to work through their conflict experience. And that is where mediation can be a valuable tool.

Facts, then — in an institutional sense — are important in mediation but not to establish objective (or brute) realities. Instead, facts are a useful means to understand and unlock the parties' own subjective experiences of a conflict and to discern the meaning and language they use to express it.

**Lela:** So what do our perspectives on fact and truth mean for mediation practice? If, rather than attempting to find facts, the mediator gives each party the storytelling floor, the parties may be shifted by the power of each other's narrative (sometimes assisted by advocates and the translating function of the mediator). The telling of the story and the sharing of information shifts the speaker; the hearing of the story and the consideration of new information potentially shifts the listener; and the parties can become more amenable to finding an accord.<sup>4</sup>

**Ken:** Adjudication processes are designed to find facts in a brute sense. In contrast, mediation — a process grounded in the principle of party

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self-determination — should be a process that supports parties in their efforts to understand and work through their own conflicts. By understanding the different context and meaning embedded in each party's institutional facts, the parties are able to examine how their different social experiences can lead to very different understandings about their conflict. This, in turn, opens the possibility for constructive dialogue about the embedded meaning in the conflict and how they might move forward.

The distinction between brute and institutional facts changes the job of the mediator. Instead of trying to determine what facts are and are not true, the mediator can listen to the parties' expression of their own institutional facts as entry points for supporting the parties' own work to better understand themselves and each other. The mediator does not try to shape new understanding, interpret, or create common ground, since the mediator would then be imposing his or her own social meaning on the parties. Instead, the mediator listens and reflects back what she or he hears. This gives the parties a chance to hear themselves and each other, to explore what different understandings of the conflict they may have, and to decide what is important to them to address to move forward.

From this perspective, the job of the mediator is not to be a passive observer, a potted plant. Instead, the mediator is actively and deeply listening for the embedded and veiled meaning that drives the parties' understanding of their conflict. The goal is party

clarity and a more complete understanding of the party himself or herself, the other party, and the conflict. By supporting greater clarity and understanding, the parties are better able to make the decisions they need to make for themselves and the conflict.

**Lela:** The role of the mediator, then, is to be a good listener. A good listener makes sure that the speaker is encouraged to speak by the listener's attention and by the listener's demonstrated understanding of what is said. This is called "looping" by two well-known mediation theorists and trainers.<sup>5</sup> Also, the mediator is charged with encouraging parties to listen to each other and reflect on what the counterpart is saying. This can be done in a number of ways. In a joint session, the mediator's presence can make a frank conversation less threatening and overwhelming. The mediator can use reframing, which takes the emotional edge out of the message so that the information can be considered without a crippling reaction. The mediator may use reality checks to ensure the counterpart has taken stock of an opposing view of reality. In short, the mediator asks parties to listen to each other, to become more enlightened, and to expand their own views of the situation in keeping with what is said.

Picture a judge — stern and aloof as she considers information to find the facts. She must listen critically to assess the credibility of each assertion. She requires corroboration and proof. The mediator, on the other hand, listens for the content of what is being said but also is searching for common interests, bargaining issues, proposals, feelings, the parties' BATNAs, each party's cherished values and principles. Hearing these, and framing them so that everyone appreciates them, can transform the dispute.

**Jim:** I don't disagree about transformation potential. But I do worry that conceptualizing disputing this way ends up giving people permission to do what they are inclined to do anyway: confront complexity by living their own truths reinforced by all sorts of cognitive biases, rather than doing the uncomfortable and difficult job of sorting out reality, of separating fact from fiction. By endorsing the necessity of such a sorting effort, I don't negate Ken's assertion that "different social experiences can lead to different understandings about what things mean." I do, however, believe strongly that some "understandings" are much more

closely aligned with “brute” facts than others and therefore come closer to truth.

If we give people permission to ignore that reality at what is arguably one of (if not *the*) most contentious moments of any individual disputant’s private life — a conflict so difficult that he or she has sought out a mediator’s assistance — what is the implication for society writ large when it comes to engaging in the most critical public policy issues of our time, almost all of which are characterized by uncertainty?

As we thread that needle between adjudication and privatized justice, I’d urge us not to give in to the post-modernist temptation that we are all entitled to their own truth. Admittedly, in the Trump era, where the daily news leaves us all at sea, inundated (and perhaps exhausted) by fact denial, that is no small challenge. Moreover, we might want to confront the possibility that mediation consumers (like anyone else) might actually be hungry for the recognition of truth. And, by truth, I do not mean the relativist, post-modernist framing Ken uses to differentiate between “brute” and other facts, or Lela’s lauding of storytelling without judgment, which might or might not lead people to revise their individualized view of “what happened.”

In an era where political polarization so routinely leads to outright denial of objective fact with resulting loss of personal accountability, why is the mediation movement so confident that entitlement to separate “truths” is the preferred path forward? When dealing with uncertainty, might we be stronger as a society with more science (with its foundational assumptions of peer review, constant reevaluation, and testing)<sup>6</sup>

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and more, rather than less, reliance on time-tested principles borrowed from law, concepts like shifting burdens of proof, rigorous testing of evidence, and application of socially negotiated norms? Failure to insist on at least some measure of “fact” accountability in resolution of individual claims seems destined to contribute, albeit unintentionally, to much greater societal problems: the systematic devaluation of science (and for that matter, expert opinion of any sort) and the undermining of legal institutions as well. As a nation, it feels like we are entering uncharted and very dangerous territory.

**Ken:** Recognizing that different people experience different social truths (those institutional facts) is not a slide into relativism as Jim frames it. Instead, it is a recognition of the diversity of social experience and meaning that has always been part of our pluralistic society. Rather than fighting over claims of what is immutably “true” or “reality versus fiction,” we come to see that “truth” — in a social sense, at least — is subjective and contextual. This leads us as citizens to appreciate the complexity and subjectivity of our social experiences. It leads us to recognize that others can hold equally deep and complex understandings of their social experiences that are as equally “true” to them, as our experiences are to us. Finally, it makes clear the need for citizens to shift how we relate to one another away from diatribe and debate over a claimed single truth for our society and toward a focus on understanding and recognition for the complex and different collective realities we inhabit.

My argument assumes a certain genuine belief in one’s own claims. If we want to address the cynical and purposefully manipulative use of “fact” claims that we are seeing in current political discourse, we will need another, different, conversation. However, for those who genuinely believe in their “truths,” then, paradoxically, by acknowledging that our society is divided by different social experience, linguistic expression, and institutional facts, only then are we able build the genuine connections across these differences that can strengthen society. In the same way a mediator must learn to listen deeply and reflect back what the parties themselves are expressing, citizens also need to listen to each other for deeper understanding and for new ways of meaning. Some communication scholars use the term “transcendent

discourse" to describe the deep listening and bridge-building forms of dialogue I describe here.<sup>7</sup> Perhaps it is time to be a little less "brute" with one another and instead strive to be a little more "transcendent."

**Lela:** We might, as a society, want to embrace the idea that to survive we need to cultivate listening skills in order to understand each other and to work on creative problem-solving to develop our atrophied collaboration capabilities. We need only look at political discourse to view the atrophy. A rights-based, fact-finding order offers many possibilities for justice, possibilities we are very attuned to. But, equally, and differently, so does a process that invites human understanding and collaboration in moving past differences and conflict. Such a process does not reject information or data — it welcomes them. It is not "storytelling without judgment" when parties talk to each other; rather, as the parties talk, the counterpart is adjusting/adjudging his or her own view of the matter.

Mediation brings to the fore the perennial questions of justice: Has there been a wrong (or several wrongs), and what is the fair correction that provides a just measure for the kind and degree of harm done? The difference between this and adjudication is that it is the parties themselves who answer the question. If the parties (rather than a judge or arbiter) figure out what is acceptable, they will not only have a solution to the conflict but also, perhaps, a better relationship, community, and society — even if their agreement encompasses the functional equivalent of a divorce.

If the mediation movement can rouse society for this different sort of justice, then we, as a species, may be on a path toward evolution, rather than on a path for destruction. ■

## Endnotes

1 For a more detailed explication of this thesis, see James Coben, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 *CARDOZO JOURNAL OF CONFLICT RESOLUTION* 779, 795-805 (2015), from which parts of Jim's comments are excerpted.

2 JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 1-2 (1995).

3 For a more detailed examination of the social construction of meaning, see Kenneth H. Fox, *Mirror as Prism: Reimagining Reflexive Dispute Resolution Practice in a Globalized World*, 45 *WASH. U. J.L. & POL'Y* 41 (2014).

4 Lela P. Love, *Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 *FAM. & CONCL. CTS. REV.* 27, 35 (2000).

5 See, e.g., GARY FRIEDMAN AND JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008).

6 See, e.g., Joel Achenbach, *What Makes Some People So Suspicious of the Findings of Science*, *GUARDIAN WEEKLY*, Feb. 27, 2015, <http://www.theguardian.com/science/2015/feb/27/science-facts-findings-method-scepticism> (last visited December 9, 2017) ("It's their very detachment, what you might call the cold-bloodedness of science, that makes science the killer app. It's the way science tells us the truth rather than what we'd like the truth to be. Scientists can be as dogmatic as anyone else — but their dogma is always wilting in the hot glare of new research. In science it's not a sin to change your mind when the evidence demands it. For some people, the tribe is more important than the truth; for the best scientists, the truth is more important than the tribe.").

7 W. BARNETT PEARCE AND STEPHEN W. LITTLEJOHN, *MORAL CONFLICT: WHEN SOCIAL WORLDS COLLIDE* 122 (1997).



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