which offer conflict resolution training and mediation services, have been established in Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Macedonia, the Ukraine, and Russia. Many of these centers have received significant assistance from U.S.-based practitioners who have traveled to the region to help in training and dispute systems design (Wildau, Moore, and Mayer, 1993; Votchal, 1993; Shonholtz, 1993). Specific areas of focus for practitioners and centers have been family disputes, conflicts in schools and universities, labor-management disputes, environmental conflict, and ethnic disputes. In this last area, a number of ethnic commissions have been established in Bulgaria and Slovakia, composed of majority and minority group members. These commissions advocate for fair treatment of minorities, conduct educational activities on multicultural relations, act as community problem-solving forums, and provide third-party mediation services (Mayer, Wildau, and Valchev, 1994).

Now that some of the history and applications of mediation in a variety of settings, situations, and cultures have been reviewed, we turn to an examination of the mediation process. In the next chapter, we will examine some of the variations in the roles of mediators, their orientations toward influence, the focus or goal of intervention, and the phases and tasks commonly used to achieve resolution of tangible issues and to address problematic relationships.

Chapter Two

How Mediation Works

This chapter examines the various roles of mediators and their relationships to parties. It also explores levels of directiveness of intermediaries and their choice of focus between problem solving and addressing relationship issues. An overview of general mediator approaches and activities is also presented.

VARIATIONS IN MEDIATOR ROLES AND PROCEDURES

The definition and description of mediation given in Chapter One generally outlines the role of mediators and the processes used to assist parties in reaching voluntary agreements. However, the fact that mediation is practiced in diverse situations, forums, conflicts, and cultures has led to variations in both roles and procedures.

In general, there are three broad types of mediators, defined by the relationship the mediator has with involved parties: (1) social network mediators, (2) authoritative mediators, and (3) independent mediators. Table 2.1 illustrates some of the characteristics of each type. To some extent, the type of relationship the intermediary has with disputants also influences the kind and degree of influence that is used to assist the parties. A variety of mediator types can be found in most cultures, although the development of mediation in a specific culture may emphasize or legitimize one form over another.

Social network mediators are individuals who are sought because they are connected to the disputants; they are generally part of a continuing and common social network. Such a mediator may be

Table 2.1. Types of Mediator.

	Authoritative Mediators			
Social Network Mediator	**Benevolent Mediator**	**Administrative/ Managerial Mediator**	**Vested Interest Mediator**	**Independent Mediator**
• Prior and expected future relationship to parties tied into their social network • Not necessarily impartial, but perceived by all to be fair • Very concerned with promoting stable long-term relationships between parties and their associates	• May or may not have a current or ongoing relationship with parties • Seeks best solution for all involved • Generally impartial regarding the specific substantive outcome of the dispute • Has authority to advise, suggest, or decide	• Generally has ongoing authoritative relationships with parties before and after dispute is terminated • Seeks solution developed jointly with the parties, within mandated parameters • Has authority to advise, suggest, or decide	• Has either a current or expected future relationship with a party or parties • Has a strong interest in the outcome of the dispute • Seeks solution that meets mediator's interests and/or those of a favored party • May use strong leverage or coercion to achieve an agreement	• Neutral/impartial regarding relationships and specific outcomes • Serves at the pleasure of parties • May be "professional" mediator • Seeks a jointly acceptable, voluntary, and non-coerced solution developed by the parties
• Frequently involved in implementation • Generally has ongoing relationships with parties after dispute is terminated • May use personal influence or peer/community pressure to promote adherence to agreement	• May have resources to help in monitoring and implementation of agreement	• May have resources to help in monitoring and implementation of agreement • Has authority to enforce agreement	• May have resources to help in monitoring or implementation of agreement • May use strong leverage or coercion to enforce agreement	• May or may not be involved in monitoring implementation • Has no authority to enforce agreement

a personal friend, neighbor, associate, coworker, business colleague, or religious figure (priest, minister, rabbi, Moslem *'ulama,* shaman), or a respected community leader or elder who is known to all parties; the person is generally someone with whom those parties have an ongoing relationship. Lederach refers to network mediation using the Spanish term *confianza* mediation (1995): "Key to why people were chosen were the ideas of 'trustworthiness,' that 'we know them' and they can 'keep our confidences'" (p. 89). He continues: "*Confianza* points to relationship building over time, to a sense of 'sincerity' a person has and a feeling of 'security' the person 'inspires' in us that we will 'not be betrayed'" (p. 89).

The social network mediator often has a personal obligation to the parties to assist them as a friend—a desire to help them maintain smooth interpersonal relationships, both in the present and over the long run. He or she may also have a commitment to maintain harmony within the parties' broader social networks.

Social network mediator involvement with potential disputing parties often begins long before a specific conflict starts and may extend throughout the life of the resolution process, including the implementation of the agreement. The social network mediator's relationship with the parties is ongoing and enmeshed.

One example of a network mediator's activities comes from a dispute I observed in a Philippine community near Manila. A man and a woman had engaged in a heated public argument, the man claiming that money was due to him for his services as caretaker of the woman's garden and chauffeur of her children. He had come to her house twice to collect his pay; on the first occasion, she was out, and on the second, she told him she didn't have the money. When he came the third time and was denied payment, he created a noisy scene on the street in front of her home that roused her neighbors, and as he left he slammed her gate so forcefully that it came off its hinges. She in turn yelled at him and charged him with slandering her good name. They both ended this confrontation knowing that if the conflict was to be resolved, they would need some help.

The woman tried to think of a third person with whom they could talk, who could help them resolve their differences and restore the positive aspects of the relationship that they had maintained for several years. She decided on a respected community leader who was "related" to both of them: the woman was his *comadre* or godparent, and the man had grown up with him in the same village and had been his boyhood friend.

The woman approached the leader and obtained his agreement to mediate. He then approached the man and, after a long and informal chat, arranged for a joint meeting. This meeting involved discussion of the issues in dispute, the long-term relationship that the parties had with each other, the need to return harmony to the community, and the concern that each restore the good name of the other in the minds of their neighbors. After an extended discussion, the parties reached an agreement on all issues. Full payment was made for the gardener's services, apologies were exchanged, and each agreed to speak courteously and positively to the other in future conversations, as well as to use courteous language about each other when talking with neighbors about their past problem. (Some of the neighbors attended the open mediation session, saw the results, and were more than willing to spread the word that the relationship had been patched up by the respected leader.)

In this dispute, the authority of the mediator was embedded in the relationships he had with the parties, the trust and respect that the parties had for him as an individual, and his personal knowledge of their histories and the issues at hand. The relationship between the parties and the mediator was in fact the key to resolving the differences.

Although this dispute occurred in the context of Filipino culture, social network mediators are at work in almost all cultures. They are especially common in interpersonal disputes, whether in neighborhoods or organizations. However, they may also be found in larger public or political disputes; a respected communal or political leader is asked to intervene because of a past or ongoing personal relationship with the parties or because he or she occupies a particular position that engenders trust and respect on the part of the disputants.

The second broad category of mediator is a person who has an *authoritative* relationship to the parties in that he or she is in a superior or more powerful position and has potential or actual capacity to influence the outcome of a dispute. However, authoritative mediators, if they stay in a mediator role, do not make decisions

for the parties. For any number of reasons—a procedural commitment to direct decision making by disputants, belief that a solution developed by the parties will result in greater satisfaction and commitment among their constituents, limits on the capacity or authority of the third party to unilaterally impose a decision—these intervenors usually try to influence the parties indirectly and attempt to persuade them to arrive at their own conclusions. This does not mean that they do not, on occasion, exercise significant leverage or pressure, perhaps with a view to limiting the settlement parameters. They may even raise the specter of a unilateral decision, as a backup to collaborative decision making if the parties cannot agree on their own.

The authoritative mediator's influence may have as its basis personal status or reputation, but it is also generally dependent on formal position in a community or organization, election or appointment by a legitimate authority, rule of law, or access to resources valued by the contending parties. Whether the authority, regardless of form, is actually exercised—and how it is exercised—depends very much on the situation and the intermediary's orientation toward influence.

In general, there are three types of authoritative mediators: benevolent, administrative/managerial (Kolb and Sheppard, 1985), and vested-interest (Rubin, 1981; Watkins and Winters, 1997). A *benevolent authoritative mediator* often has the ability to influence or possibly decide an issue in dispute but generally values agreement making by parties over his or her own role as a decision maker. A benevolent mediator wants a settlement that is mutually satisfactory; he or she is not particularly concerned with getting his or her own substantive needs or interests addressed in the resolution. (However, benevolent mediators may have procedural interests of fairness, efficiency, economy, and minimization of overt conflict; and psychological interests of maintaining a personal position, gaining respect from the parties and other observers of the dispute by effectively assisting the parties to resolve their differences, or being seen as a servant of wider community interests for peace and harmony.)

Examples of benevolent mediators are the interventions of highly respected religious or community leaders or elders into family or community disputes. The religious leaders or elders generally do not directly have the ability to decide the issue, but their status, knowledge, experience, reputation, and persona may highly influence the involved parties. A carefully measured statement by the respected benevolent mediator may significantly sway one or more of the disputants and move them toward agreement. It should be noted that benevolent mediators are very common, and in fact are more common in non-Western cultures than in the dominant cultures of Western societies.

A second type of authoritative intervenor is the *administrative-managerial mediator.* He or she has some influence and authority over the parties by virtue of occupying a superior position in a community or organization and having either organizational or legal authority to establish the bargaining parameters in which an acceptable decision can be determined (Kolb and Sheppard, 1985; Morril, 1995). This type of mediator differs from the benevolent type because he or she has a substantive interest in the outcome, albeit an interest that is institutionally or legally mandated.

Two brief examples of an administrative/managerial mediator, one within an organization and the other with concerned publics, illustrate this type of relationship with the parties. The first involved the services rendered by an executive who helped settle a workplace dispute. Two department heads were engaged in a hotly argued dispute over how a particular job, which required cooperation between the two departments, was to be handled and performed. They tried to talk directly about the issues but reached an impasse because of strong feelings about the problem and disagreements about how similar issues had been handled in the past. They both agreed to talk together with one of their colleagues, the chief executive officer of the company. Although the CEO could ultimately make a decision about the issue being brought before her, she did not at the time have a firm personal or "organizational" opinion about how the problem should be resolved. She was also not constrained by any organizational or legal requirements that would define the parameters of the solution. She did believe that it was better for the parties involved, for their subordinates, and for the organization as a whole if the two disputants reached their own decision on the question at hand. However, she was willing to provide procedural—and if necessary, substantive—advice. After a brief joint discussion with the CEO, who suggested some principles that

might constitute a framework for an acceptable decision, the coworkers discussed the issues in more detail and developed a mutually acceptable solution to their differences.

A second example of managerial mediation comes from the Bureau of Environmental Impact Assessment, a government agency in Indonesia, though it could have occurred in any number of organizations or agencies around the world. The bureau was mandated to control and prevent water pollution from industrial plants and to protect environmental quality. A public interest law group brought a complaint to the agency that charged a particular company with polluting local waters and a claim that the releases were having an adverse impact on crops and the health of people downstream. The agency investigated and determined that the company was indeed releasing effluent that was above the legal limits. The company was notified that it had to control its releases, clean up past pollution, and possibly discuss past impact with the affected downstream parties.

Company representatives reluctantly agreed to meet with the agency and the affected parties. The meeting was chaired, and ultimately mediated, by one of the deputies in the agency. After being presented with the agency's test results, the company representatives agreed that they might be polluting and that measures needed to be taken to prevent these problems in the future. The government offered some technical assistance to the company and participated in the company's negotiations with the public interest group concerning the technology, procedures, and timing for installation of pollution control equipment. The company, however, was very reluctant to negotiate on compensation to the downstream interests. The agency could not mandate compensation but agreed with the public interest group that some action had to be taken to address past costs. It strongly suggested to the company that some form of acknowledgment needed to be made that the business had caused the local people serious problems.

Ultimately, in continuing negotiations with the public interest group, the company agreed to make a "contribution" to the community rather than paying "compensation." The company said it was not prepared to publicly admit fault or potentially adverse effects from its past pollution, but it would be willing, as a good neighbor, to aid the community in its time of need. The contribution that was ultimately agreed on was to haul fresh water into the community by truck, explore how the village could be hooked up to the water system of the adjacent municipality, and construct a new mosque and community center.

The third kind of authoritative mediator is a *vested-interest mediator.* This role is similar to that of the managerial mediator in that the intermediary has both procedural and substantive interests in the outcome of the dispute. What makes it different is the degree to which the intermediary's interests are advocated. Whereas the managerial mediator establishes the general parameters for a settlement that will meet organizational or legal norms and encourages and assists the parties to work within this framework, the vested-interest mediator often has specific interests and goals regarding all aspects of the dispute and pushes these objectives with enthusiasm and conviction (Smith, 1985). Some observers have noted that in this model the mediator is hardly an intermediary but merely another party who strongly advocates for his or her substantive interests.

The clearest examples of vested-interest mediators at work are probably found in the international arena. Henry Kissinger had strong vested interests when he acted as mediator for the Arab-Israeli disengagement negotiations in August 1975 (Rubin, 1981). So did President Carter in his role as intermediary in the Camp David Egyptian-Israeli peace talks (Carter, 1982; Princen, 1992), as did U.S. Ambassador Richard Holbrooke (Holbrooke, 1998) and the various UN mediators involved in the ethnonational conflicts of the former Yugoslavia. The United States has had longstanding political, economic, and strategic interests in the Middle East and assertively intervened as a broker in attempts to promote stability in the region. The United States has played the role of a mediator with muscle. Its representatives have at various times persuaded, cajoled, or aggressively pressured involved parties to seek a permanent peace; they have offered both arms and resources for development to help achieve these ends.

The U.S. and United Nations mediators in the former Yugoslavia, although representing national governments or an international organization, sought solutions that met the interests of key UN members as well as those of the parties on the ground. Much of their activity involved putting together proposals based on principles

established by either the United States or the UN and then trying to persuade the combatants to accept these frameworks (Owen, 1995; Holbrooke, 1998).

Vested-interest mediation differs significantly from a number of other forms of intervention that place a higher degree of emphasis on the parties' reaching their own decision. The latter view is manifested particularly in the independent, impartial mediator, who will be discussed next. Vested-interest mediation can be highly effective in certain circumstances and is a common variety of mediation practice, but it might better be called "third-party advocacy."

The *independent mediator* is the final type to be discussed here. The name derives both from the relationship that the intervenor has to the parties—one of neutrality—and the stance that he or she takes toward the problems in question—one of impartiality. The independent intermediary is commonly found in cultures that have developed traditions of independent and objective professional advice or assistance. Members of these cultures often prefer the advice and help of independent "outsiders" (who are perceived to have no personal vested interest in the intervention or its outcome) to assistance from "insiders" (with whom they may have more complex and often conflicting relationships or obligations). Members of cultures that favor independent mediators tend to keep the various groups in their lives—family, close friends, neighbors, superiors and subordinates at work, business associates, recreational companions, civic associates, political affiliates, church members—in separate compartments. They may rely on specialists such as therapists, employee assistance counselors, financial advisors, legal counsel, golf pros, ward leaders, and clergy to help them function well and handle potential or actual problems in each area. An advisor or assistant in one arena may have little or no connection with another aspect of an individual's life, and members of these cultures seem to like it that way.

Independent mediators are also most commonly found in cultures in which there is a tradition of an independent judiciary, which is a model both for widely perceived fair procedures and impartial third parties as decision makers.

This type of intervention has in recent years been called the North American model of mediation (Lederach, 1985). This label is somewhat of a misnomer, as the roots of the process can be

found in Western Europe, and specifically Northern Europe, which during the Middle Ages and Renaissance produced Western models of compartmentalized relationships, professionalism, impartial advice, and independent procedural systems for resolving disputes. Although this type of mediation has been articulated, and perhaps most actively practiced, in North America, the model and its corresponding values are not culture-bound. They have spread around the globe and influenced the dispute resolution approaches of numerous cultures, which have either become acquainted with them as a result of colonial experience or selected them voluntarily because they have been seen to be efficient and fair.

Because impartiality and neutrality are often seen to be the critical defining characteristics of this type of mediation, it is important to explore these concepts in more detail (Young, 1972). *Impartiality* refers to the absence of bias or preference in favor of one or more negotiators, their interests, or the specific solutions that they are advocating. However, impartiality does not necessarily mean that the mediator is totally separate from the people or the conflict systems and issues in which they engage (Bowling and Hoffman, 2000). In many ways, a more accurate definition of impartial is "multipartial" or "omnipartial," in that mediators are involved with and concerned about how to help achieve satisfaction of all parties' issues and interests (Cloke, 1994). *Neutrality*, on the other hand, refers to the relationship or behavior between intervenor and disputants. Often, independent mediators have not had any previous relationship with disputing parties, or at least they have not had a relationship from which they could directly and significantly benefit. They are generally not tied into the parties' ongoing social networks. Neutrality also means that the mediator does not expect to obtain benefits or special payments from one of the parties as compensation for favors in conducting the mediation.

People seek an independent mediator's assistance because they want procedural help in negotiations. They do not want an intervenor who is biased or who will initiate actions that are potentially detrimental to their interests.

Impartiality and neutrality do not mean that a mediator may not have a personal opinion about a desirable outcome to a dispute or feel closer to one party than another or disconnected from people with home they work. No one can be entirely impartial.

What impartiality and neutrality do signify is that the mediator can separate his or her personal opinion about the outcome of the dispute or relationships that have developed during the mediation process from the performance of their duties and focus on ways to help the parties make their own decisions without unduly favoring one of them. The ultimate test of the impartiality and neutrality of the mediator lies in the judgment of the parties: they must perceive that the intervenor is not overtly partial or unneutral in order to accept his or her assistance.

Kraybill (1979) and Wheeler (1982) address the tensions between impartiality/neutrality and the personal biases of mediators by distinguishing between substantive and procedural interests. Wheeler argues that mediators generally distance themselves from commitments to specific substantive outcomes—the amount of money in a settlement, the exact time of performance, and so forth—but do have commitments to such procedural standards as open communication, equity and fair exchange, durability of a settlement over time, and enforceability. Mediators are advocates for a fair process and not for a particular settlement.

Let us take as an example an independent mediator in a personal injury claim case in North America. The parties, the insurance adjuster, and the plaintiff's lawyer corresponded and talked by telephone, reaching a decision to explore the use of mediation to resolve their differences. They agreed that the adjuster would seek the assistance of a mediation firm that had a reputation for impartiality and experience in resolving this kind of dispute. The firm gave them the résumés of three possible intervenors. After reviewing this information, the parties eliminated two of the candidates, one because she had previously acted as an arbiter in a case involving one of the parties and issued an unfavorable opinion, and the other because the number of years he had spent in the practice of mediation was considered inadequate. The mediator who was selected was not known personally to either party but had a significant reputation for being fair, impartial, efficient, experienced, and knowledgeable in handling this type of case.

A premediation interview was held with the chosen mediator, where the parties confirmed their decision to use his services and explained the background of the case. They then proceeded to a first joint session. During the subsequent half-day mediation session, the mediator asked both parties to explain their view of the case, helped them identify key issues and interests, assisted them in generating some possible settlement options in joint session, and then conducted a private meeting with each of them to explore which options were most viable and to break a deadlock on one particularly difficult issue. During both the joint sessions and the caucuses, the mediator asked the parties a number of questions, helped make their interests explicit, and assisted the parties in developing some fair and objective standards and criteria that offered a formula for settlement. He made few, if any, substantive recommendations on how they should settle and did not indicate his personal opinion or approval of the solution that they ultimately developed.

VARIATIONS IN MEDIATOR DIRECTIVENESS AND FOCUS

In addition to the diverse roles and relationships that mediators have with parties, intermediaries also differ with respect to the degree of directiveness or control that they exercise over the dispute resolution process and the relative emphasis they place on the substantive, procedural, and psychological or relationship interests of the parties.

In general, regardless of the type of mediator role being performed, intermediaries vary along a continuum from highly directive to highly nondirective with respect to substantive issues, the problem-solving process, and the management of relationships between the parties. Kolb (1983) described the ideal types at the ends of this spectrum: the "orchestrators" and the "dealmakers." In brief, orchestrators generally focus on empowering parties to make their own decisions; they offer mainly procedural assistance and occasionally help in establishing or building relationships. They are less directive than are deal makers and intervene primarily when it is clear that the parties are not capable of making progress toward a settlement on their own.

In contrast, deal makers are often highly directive in relation to both process and the substantive issues under discussion. Generally, they are very more prescriptive and directive with respect to problem-solving steps, questions of who talks and to whom, types

of forum (joint sessions or private meetings), and the types of interventions made. Deal makers are also typically much more involved in substantive discussions and on occasion may give substantive information or advice, voice their opinion on issues under discussion, or actively work to put together a deal that will be mutually acceptable to the parties.

In addition to directiveness, intermediaries vary significantly in terms of the emphasis they place on the purpose or focus of the mediation. Here too, there is a continuum, with some mediators emphasizing problem solving and agreement making on tangible, substantive issues, and others (who sometimes call themselves "problem-solving facilitators") placing more stress on improving the parties' relationships. The latter generally work to establish or build cognitive empathy, trust, and respect. When necessary, they will seek to terminate a relationship with the least possible psychological harm (Bush and Folger, 1994; Rothman, 1992).

In recent years, some practitioners and academics writing about the field have locked themselves into rigid positions on the appropriate degree of intermediary directiveness or the optimal area of emphasis for mediators (problem-solving versus relationship orientation). This narrowness has not been productive. It ignores the range of successful models for practice, the variety of disputes, the specific capabilities of the parties, the expressed needs and goals of the disputants, and the diversity of cultural contexts in which interventions are practiced. A more productive approach would be to explore the specific situation and adapt the process to meet the needs of the parties. This would mean that in some disputes the intermediary might be highly directive, whereas in others he or she would merely orchestrate the process. Equally, in some conflicts the mediator would emphasize a more substantive problem-solving focus, whereas in others the emphasis would be placed on establishing or building relationships.

What is characteristic of good practice, and what is needed from effective mediators, is the ability to be a "reflective practitioner" (Schön, 1983). Such a person can match mediation theory and the learnings of others with his or her own past experience in resolving disputes, so that situation-specific approaches and interventions can be developed that assist parties in establishing and building respectful and trusting relationships and resolve the issues that divide them.

MEDIATION, CULTURE, AND GENDER

The earlier description of mediator roles and relationships to parties raised the issue of culture. Culture comprises a wide variety of wordviews, beliefs, assumptions, and behaviors that are characteristic of specific groups of people. Throughout this book, I will note a number of potential cultural mediation and negotiation patterns and practices that may be encountered with individuals and groups from specific cultures. It is important to note that members of any cultural group have both common and diverse ways of thinking and behaving. Therefore, clues or recommendations on possible mediation approaches or responses of either mediators or disputants from a cultural group are just that: clues. They are possible ways that people from a designated culture *may* think or behave in a conflict; but then again, they may not conform to common cultural norms. Clues should not be considered to be definitive or prescriptive about how any person or group mediates or will act as a disputant.

Closely related to culture is gender. In the mid-1970s, when Jeff Rubin and Bert Brown wrote *The Social Psychology of Bargaining and Negotiation* (1975), there were already a tremendous number of psychological studies that compared gender differences. Since that time, there has been a growing amount of research on this issue based on a variety of theoretical frameworks such as the direct study of difference in negotiation behavior or outcomes; the social factors that may contribute to gender differences in conflicts of efforts to resolve them; the deficit model that generally studies what men have and women don't; and studies that value difference and are more likely to present women's perspectives (Kolb and Cooldige, 1992; Kolb, 2000; Kolb and Williams, 2000).

Negotiation studies have been the focus of more gender-related research than mediation. To date, the final results are not conclusive regarding how much women and men differ in their negotiation approaches, styles, behaviors, or success rates (Menkel-Meadow, 2000). Some studies have found that "men negotiate significantly better outcomes than women (Stuhlmacher and Walters, 1999), while others have found that women are more cooperative than men (Walteres, Stuhlmacher, and Meyer, 1998). Still other studies find that "there are no statistically different differences in negotiation outcomes and performance between men and women" (Craver and Barnes, 1999).

On the topic of mediation, there are relatively few studies on gender differences in practice or outcome (Weingarten and Douvan, 1985; Maxwell and Maxwell, 1989; Stamato, 1992). A study by Maxwell (1992) of thirty-three male and twenty-seven female mediators who mediated the resolution of misdemeanors under the auspices of the Cleveland Prosecutor Mediation Program found that men and women were both effective in bring parties to a settlement, with women only slightly more so. Maxwell noted that the difference was not statistically significant. However, the research did find that women were more likely to reach conclusions that would ultimately be binding than were men, This was especially so in cases that involved actual or potential ongoing relationships between disputants and cases in which high emotions were present. As in the field of negotiations, research on gender difference in mediation, for either intermediaries or parties, is not conclusive. Nevertheless, it will be important as we examine various situations, power relationships, and ways that mediation is practiced that we be aware of when gender might or might not be salient in how mediators perform and in ways that disputants or different genders think and act.

THE APPROACH TO DESCRIBING THE MEDIATION PROCESS

As can be seen from the preceding descriptions, mediators can have many types of relationships with disputing parties, and the nature of the connection can significantly influence the process and the types of interventions that are initiated. Because this book is about general processes of mediation and describes a range of mediator intervention approaches that can be used in many situations, it will be helpful for me to describe my own orientation toward these processes and procedures.

Generally, my experience and orientation in mediation are those of the independent mediator who leans toward the orchestrator end of the directiveness spectrum (at least, by North American standards). However, I am familiar with and have worked extensively with intermediaries who have different orientations toward directiveness or the focus of the mediation process. I have also taught intervention approaches and skills to intermediaries who specialized in social network, authoritative, and vested-interest

assistance. Because of this experience, I recognize the value, complexities, variations, and situational or contextual appropriateness of various orientations.

Writing a book that encompasses all types of mediators and mediation would be very difficult, if not impossible. Therefore, this text is primarily oriented toward describing the approach, strategies, and tactics of independent mediators who lean toward the orchestrator or moderately directive end of the procedural or substantive-directiveness spectrum, and with an emphasis on both problem solving as well as enhancing the parties' relationships. This emphasis should not be taken to imply that other types of mediators or their orientations are not valid or effective. However, for the sake of clarity and to facilitate a general understanding of how mediators work, I will describe a specific process that is widely practiced in a number of settings and cultures. In subsequent chapters, I will also describe some of the variations of practice that arise from differences among intervenors, kinds of disputes, and cultural contexts. It is my hope that this method of exploring the mediation process will present both a comprehensible and a cohesive approach to mediation for individuals who want to become effective practitioners.

MEDIATION ACTIVITIES: MOVES AND INTERVENTIONS

Negotiation is composed of a series of complex activities, or "moves," that people initiate to resolve their differences and bring the conflict to termination (Goffman, 1969, p. 90). Each move or action a negotiator performs involves rational decision making in which possible actions are assessed in relation to these factors:

- The moves of the other parties
- Their standards of behavior
- Their styles
- Their perceptiveness and skill
- Their needs and preferences
- Their determination
- The amount of information the negotiator has about the conflict
- The negotiator's personal attributes
- Available resources

Mediators, like negotiators, may initiate moves. A *move* for a mediator is a specific act of intervention or "influence technique" focused on the people in the dispute. It encourages selection of positive actions and inhibits selection of negative actions relative to the issues in conflict (Galtung, 1975). The mediator who is a specialized negotiator, generally does not directly effect changes in the disputants by initiating moves, as do the parties themselves; he or she is more of a catalyst. Changes are the combined result of the intervenor's moves and those of the negotiators (Bonner, 1959).

In negotiations, people in conflict are faced with a variety of procedural or psychological problems, or "critical situations," (Cohen and Smith, 1972) that they must address or overcome if they are to reach an agreement. The largest categories of critical situations and most frequent problems are hereafter referred to as *stages* or phases because they constitute major steps that parties must take to reach agreement. There are stages or phases for both negotiation and mediation, and for the most part they parallel each other.

Mediators make two types of interventions in response to critical situations: *general* or *noncontingent* moves or activities, and *contingent* moves or activities (Kochan and Jick, 1978).

Noncontingent moves are general interventions that a mediator initiates in virtually all disputes. These activities are responses to the broadest categories of critical situations and correspond to the stages of mediation. They are linked to the overall pattern of conflict development and resolution. Noncontingent moves enable the mediator to:

1. Gain entry to the dispute
2. Assist the parties in selecting the appropriate conflict resolution approach and arena
3. Collect data and analyze the conflict
4. Design a mediation plan
5. Initiate conciliation
6. Assist the parties in beginning productive negotiations
7. Identify important issues and build an agenda
8. Identify parties' underlying interests
9. Aid the parties in developing resolution options
10. Assist in assessing the options
11. Promote final bargaining, agreement making, and closure
12. Aid in developing an implementation and monitoring plan

I will examine these activities and stages in more detail later in this chapter.

Smaller, routine, noncontingent activities are also initiated by mediators within each stage. Examples of this level of intervention are activities to build credibility for the process, promote rapport between the parties and the mediator, and frame issues in a more manageable form, as well as develop procedures to conduct cost-benefit evaluations on settlement options.

Contingent moves are responses to special or idiosyncratic problems that occur in some negotiations. Interventions to manage intense anger, bluffing, bargaining in bad faith, mistrust, or miscommunication are all in this category of specific interventions. Though some contingent moves, such as the caucus—a private meeting between the parties and the mediator—are quite common, they are still in the contingent category because they do not happen in all negotiations.

HYPOTHESIS BUILDING AND MEDIATION INTERVENTIONS

For a mediator to be effective, he or she needs to be able to analyze and assess critical situations and design effective interventions to address the causes of the conflict. However, conflicts do not come in neat packages with their causes and component parts labeled so that the intervenor will know how to creatively respond to them. Causes are often obscured and clouded by the dynamics of the parties' interactions.

To work effectively on conflicts, the intervenor needs a conceptual road map, or "conflict map" (Wehr, 1979), that details why a conflict is occurring, identifies barriers to settlement, and indicates procedures to manage or resolve the dispute.

Most conflicts have multiple causes. The principal tasks of the mediator and the parties are to identify and take action to address them. The mediator and participants in a dispute accomplish this by trial-and-error experimentation in which they generate and test hypotheses about the sources of the conflict.

First, the mediator, in dialogue with the parties (either individually or together), observes and identifies elements of the parties' attitudes, perceptions, communication patterns, or ongoing interactions that are producing a negative relationship or hindering a positive one. The mediator tries to determine if lack of information, misinformation, the manner in which data are collected, or the criteria by which data are assessed are at the root of the conflict. He or she identifies both compatible and competing interests, while also exploring any structural causes of conflict, such as differences in authority or resources or the impact of time. Finally, the mediator ascertains similarities and differences in the values held by the parties. From all these observations, he or she tries to identify the central causes of the dispute. Often, a framework of explanatory causes and suggested interventions, such as that presented in Figure 2.1, will be used.

For example, in the Singson-Whittamore case presented in Chapter One, the mediator might determine that:

- There are relationship problems between the doctor and the clinic director that need to be addressed
- There is a significant amount of data missing on the cost of opening a new practice and on the potential adverse financial impacts on the clinic of losing a doctor
- Each of the parties has a variety of interests that need to be explored
- A major cause of the problem is structural proximity and day-to-day interaction between the Whittamores
- There might be common or dissonant values regarding parents' involvement with children that the clinic staff and Whittamore share

This information will help the mediator develop a strategy for approaching the problems faced by the disputants and a plan for sequencing his or her activities.

Once the mediator believes that one or more central causes have been identified, he or she builds a hypothesis: "This conflict is caused by *a and probably b,* and if either *a* or *b* is changed or addressed, the parties will be able to move toward agreement." The hypothesis must then be tested.

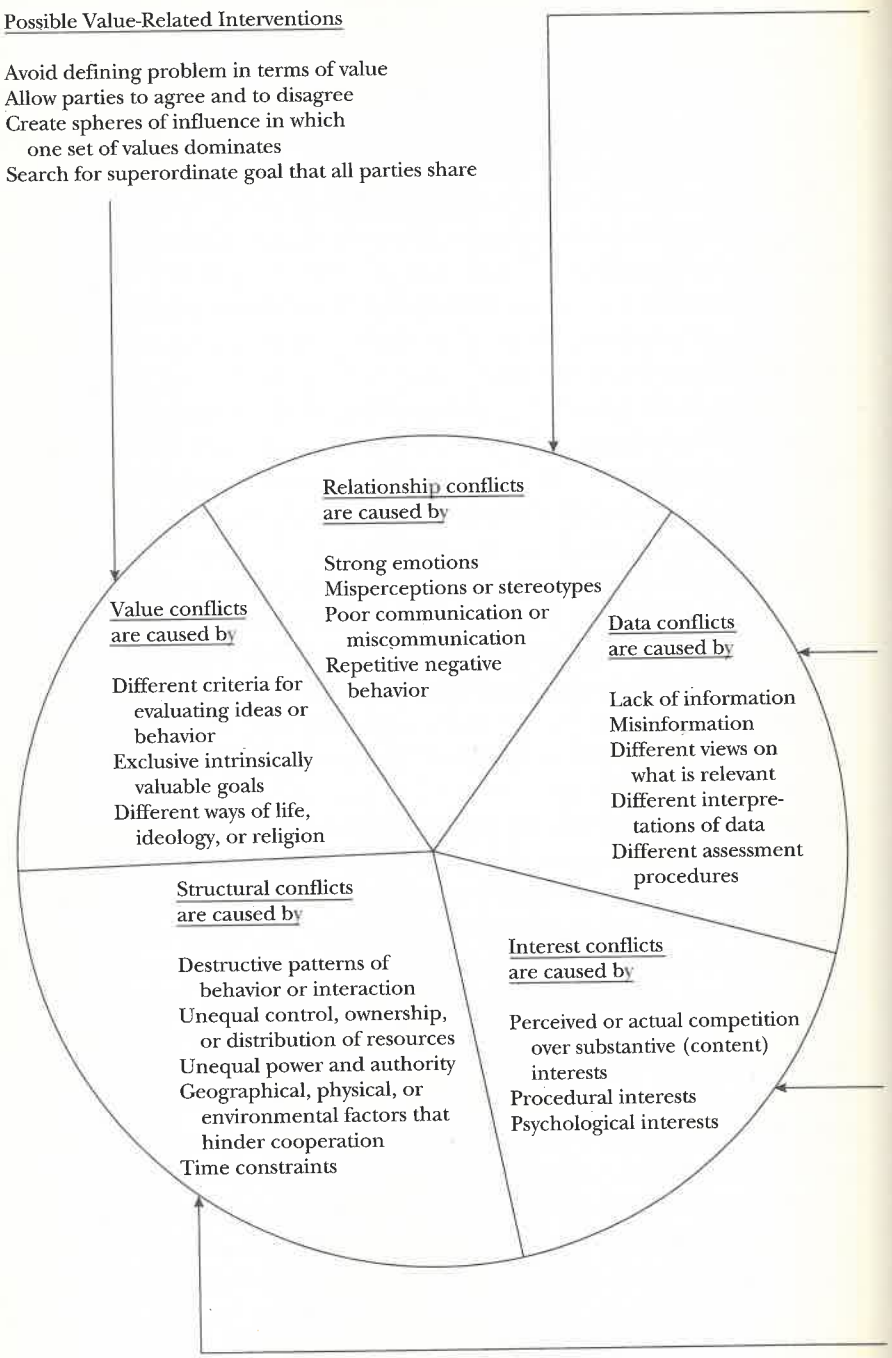
Testing hypotheses about conflicts involves designing preventions or interventions that challenge or modify the attitudes, behaviors, or structural relationship of the disputants. *Preventions* are activities that a mediator initiates *before* parties interact and that inhibit or prevent them from engaging in unproductive communication or problem solving. *Interventions* are activities undertaken by a mediator in response to unproductive communication or problem solving that arises in a joint session or private meeting after negotiations have begun. Preventions are proactive (and interventions reactive) initiatives by the intermediary.

Preventions and interventions are often grounded in a theory that identifies a particular cause of the conflict and suggests prescriptive actions. For example, one theory about the cause of conflict has communication as its base. Most communication theories propose that conflict is the result of poor communication, whether in quantity, quality, or form. The theory postulates that if the right *quantity* of communication can be attained, the *quality* of the information exchanged can be improved, and if this information is put into a mutually acceptable *form,* the causes of the dispute will be addressed and the participants will move toward resolution.

A mediator following the communication theory of conflict might observe disputants communicating very poorly: one barely begins to speak without the other interrupting, or they have difficulty focusing on present issues and constantly digress to arguments over past wrongs that tend to escalate the conflict, turning the dispute into a shouting match. The mediator hypothesizes that one cause of the dispute is the inability of the disputants to talk to each other in a constructive and restrained manner. He or she therefore proceeds to experiment with modifications of their communication patterns (quality, quantity, and form) to see if there is any resulting change in the conflict dynamics. The mediator may suggest preventions—that the parties discuss one topic at a time, may obtain permission to monitor the dialogue and prevent interruptions, or may establish ground rules about insults. The mediator may do an intervention, a caucus, to separate the disputants so that they can communicate only through the mediator.

Each intervention is a test of the hypothesis that part of the dispute is caused by communication problems and that if these difficulties can be lessened or eliminated the parties will have a better

Figure 2.1. Circle of Conflict: Causes and Interventions.

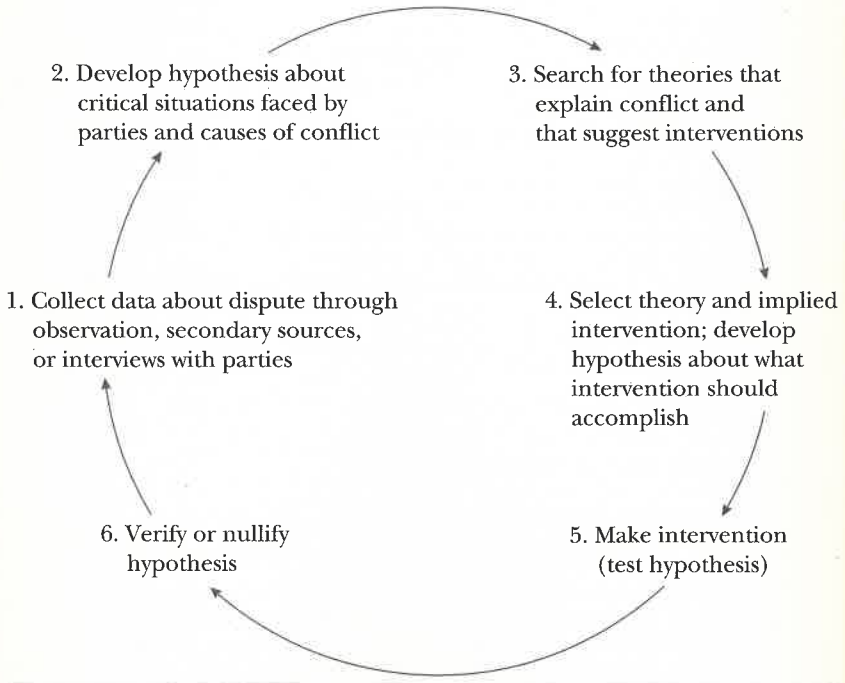


chance of reaching an agreement. If the desired effect is not achieved, the intervenor may reject the specific approach as ineffective and try another. If several interventions based on one theory do not work, the intervenor may shift to another theory and begin trial-and-error testing again. The cycle of hypothesis building and testing is the basic process of intervention and conflict resolution (see Figure 2.2).

THE STAGES OF MEDIATION

Mediator hypothesis building occurs most intensively in the process of conceptualizing the stages or phases of mediation and designing appropriate preventions and interventions that are based on the causes of the conflict and the level of development that a particular dispute has reached.

Figure 2.2. Mediator Process of Building and Testing a Hypothesis.



The stages of mediation are often difficult to identify; they frequently vary across cultures in sequence, emphasis, and approach. Mediator and negotiator activities seem to blend together into an undifferentiated continuum of interaction. Only through careful observation of negotiations and mediated interventions can distinct stages composed of common and predictable activities be identified. It then becomes possible to generate hypotheses about the critical situations and specific problems that a particular set of disputants may have to address in any given stage.

The stages of mediator interventions fall roughly into two broad categories: (1) activities performed by the mediator before formal problem-solving sessions begin; and (2) activities initiated once the mediator has entered into formal problem solving with the parties, either in joint session or by shuttling between them. Five stages occur in the prenegotiation work of the mediator, and seven stages occur after formal sessions have begun (see Figure 2.3).

In each of the twelve stages, the mediator designs hypotheses and appropriate strategies and executes specific activities. These initiatives are both sequential and developmental in nature and are designed to help disputing parties accomplish specific tasks and overcome barriers that commonly occur at particular points in the negotiation process. If a critical task appropriate at an earlier stage of negotiations has not been completed, either by the negotiators alone or with the assistance of a mediator, there are likely to be problems in moving on to the next stage of negotiation.

Regardless of when a mediator enters negotiations—at the beginning, middle, or end—he or she will usually perform most or all of the general activities characteristic of earlier stages, although if mediation begins late in negotiations the stages may be accomplished in abbreviated form. Naturally, the amount of time spent on the tasks of each stage will vary considerably, depending on factors that will be discussed in the remaining section of this chapter.

VARIABLES THAT INFLUENCE MEDIATION STRATEGIES AND ACTIVITIES

Although mediators make a variety of interventions to help parties move through the negotiation and mediation stages, their moves are not identical from case to case. Although there are general patterns

Figure 2.3. Twelve Stages of Mediator Moves.

Stage 1: Establishing Relationship with the Disputing Parties
- Make initial contacts with the parties
- Build credibility
- Promote rapport
- Educate the parties about the process
- Increase commitment to the procedure

Stage 2: Selecting a Strategy to Guide Mediation
- Assist the parties to assess various approaches to conflict management and resolution
- Assist the parties in selecting an approach
- Coordinate the approaches of the parties

Stage 3: Collecting and Analyzing Background Information
- Collect and analyze relevant data about the people, dynamics, and substance of a conflict
- Verify accuracy of data
- Minimize the impact of inaccurate or unavailable data

Stage 4: Designing a Detailed Plan for Mediation
- Identify strategies and consequent noncontingent moves that will enable the parties to move toward agreement
- Identify contingent moves to respond to situations peculiar to the specific conflict

Stage 5: Building Trust and Cooperation
- Prepare disputants psychologically to participate in negotiations on substantive issues
- Handle strong emotions
- Check perceptions and minimize effects of stereotypes
- Build recognition of the legitimacy of the parties and issues
- Build trust
- Clarify communications

Stage 6: Beginning the Mediation Session
- Open negotiation between the parties
- Establish an open and positive tone
- Establish ground rules and behavioral guidelines
- Assist the parties in venting emotions
- Delimit topic areas and issues for discussion
- Assist the parties in exploring commitments, salience, and influence

Stage 7: Defining Issues and Setting an Agenda
- Identify broad topic areas of concern to the parties
- Obtain agreement on the issues to be discussed
- Determine the sequence for handling the issues

Stage 8: Uncovering Hidden Interests of the Disputing Parties
- Identify the substantive, procedural, and psychological interests of the parties
- Educate the parties about each other's interests

Stage 9: Generating Options for Settlement
- Develop an awareness among the parties of the need for multiple options
- Lower commitment to positions or sole alternatives
- Generate options using either positional or interest-based bargaining

Stage 10: Assessing Options for Settlement
- Review the interests of the parties
- Assess how interests can be met by available options
- Assess the costs and benefits of selecting options

Stage 11: Final Bargaining
- Reach agreement through either incremental convergence of positions, final leaps to package settlements, development of a consensual formula, or establishment of procedural means to reach a substantive agreement

Stage 12: Achieving Formal Settlement
- Identify procedural steps to operationalize the agreement
- Establish an evaluation and monitoring procedure
- Formalize the settlement and create an enforcement and commitment mechanism

of moves, each mediator modifies his or her activities according to variables present in the case. These are the most critical variables that influence preventions and interventions:

- The level of conflict development and the timing of a mediator's entry
- The capability of negotiators to resolve their own dispute
- The power balance of the disputants and the mediator's role as an equalizer and agent of empowerment
- The negotiation procedures used by the parties
- The complexity of the issues negotiated
- The appropriate focus of the process of disputing and the substantive issues in question as jointly defined by the parties and the intervenor

I will examine each of these variables and how they affect the role of the mediator and his or her application of general and specific strategies.

Conflict Development and Timing of Entry

The level of conflict development, the stage reached in negotiations (or the resolution efforts previously made), and the degree of emotional intensity in the parties significantly influence the tasks that negotiators and mediators have to perform. If a mediator enters a dispute in its early stages, prior to extreme issue polarization or the development of intense emotions, he or she will use a different strategy and set of moves from those that would be used at a later stage, when the parties have been negotiating and have reached a substantive impasse or had a highly emotional interchange. If mediation is viewed as a total process, however, the difference in strategy and activities can be seen primarily as one of emphasis rather than substance; the types of initiatives are the same. For example, conciliation, preparing the parties psychologically to bargain effectively on substantive issues, generally occurs at the beginning of negotiations rather than later. If, however, a mediator enters in the later phases of a negotiation—after impasse—he or she will probably have to initiate some conciliatory activities to help overcome psychological barriers to settlement. The mediator will

generally have to complete this phase prior to pursuing the substantive bargaining activities that belong to the stage the parties *believe* they have reached.

Capability of Disputants to Resolve Their Own Dispute

Whether the disputants are capable of resolving their own dispute also strongly affects the mediator's intervention strategies. Parties who are able to negotiate rationally, who are aware of problem-solving procedures, and who appear to be progressing toward a settlement will require less assistance from a mediator. In this situation, the mediator may lend support to the work of the parties merely by his or her presence or by minimal support of the principal negotiators (Perez, 1959; Kolb, 1983). On the other hand, if parties are in the grip of intense emotions, do not have skills or expertise in negotiations or problem-solving, or have reached an impasse on substantive issues, the mediator will probably be more active and more visible in the negotiations. He or she may assist the parties in productively expressing and/or handling strong emotions, framing the specific problems to be addressed, creating an agenda, educating each other about their interests, narrowing the bargaining range, generating and assessing options, and initiating a variety of other procedures or activities that assist the parties in reaching an agreement.

Power Balance Between Disputants

In order to derive mutually satisfactory and acceptable decisions from negotiations, all parties must have some means of influence, either positive or negative, on other disputants at the table. This is a prerequisite for a settlement that recognizes mutual needs (Lovell, 1952). Unless a weaker party has some power or influence, recognition of its needs and interests will occur only if the stronger party is altruistically oriented. If the power or influence potentials of the parties are well developed, fairly equal in strength, and recognized by all disputants, the mediator's job will be to assist the disputants in using their influence effectively to produce mutually satisfactory results. If, however, the influence of each side is not equal and one party has the ability to impose on

the other an unsatisfactory solution, an agreement that will not hold over time, or a resolution that will result in renewed conflict later, the mediator will have to decide whether and how to assist the weaker party and moderate the influence of the stronger one.

To assist or empower the weaker party or to influence the activities of the stronger (contingent strategies that do not occur in all mediations) requires very specific interventions that shift the mediator's role and function dangerously close to advocacy. This problem has been debated among mediators (Bernard, Folger, Weingarten, and Zumeta, 1984). One argument states that a mediator has an obligation to create just settlements and must therefore help empower the underdog to reach equitable and fair agreements (Laue and Cormick, 1978; Susskind, 1981; Haynes, 1981). Another school argues that mediators should do little, if anything, to influence the power relations of disputing parties because it taints the intervenor's impartiality (Bellman, 1982; Stulberg, 1981b).

In examining this question and how it affects the mediator's choice of intervention activities, it is important to distinguish between the situation in which a mediator assists in recognizing, organizing, and marshaling the existing power of a disputant and that in which a mediator becomes an advocate and assists in generating new power and influence. The latter strategy clearly shifts the mediator out of his or her impartial position, whereas the former keeps the mediator within the power boundaries established by the parties. There is no easy answer to this strategic and ethical problem, but it does have an important impact on the types of moves a mediator initiates.

Negotiation Procedures

Negotiation is a form of joint problem solving. The topical problems that negotiators focus on are often called *issues*. An issue exists because the parties do not agree on a particular topic and because they have perceived or actual exclusive needs or interests.

In the Singson-Whittamore case described in Chapter One, these are some of the issues about which the two people will negotiate:

1. Can Whittamore continue to practice medicine in a town in which he wishes to live?
2. Will there be a penalty for breaking the contract?
3. If there is a penalty, how much will it be?
4. How will the penalty be calculated, and what factors should be considered?
5. Is there a way that Whittamore can stay at the clinic and still maintain some distance from his estranged wife (which is, after all, the crux of the problem)?

Note that the description of the issues is in neutral terms that favor neither party, and that the wording describes a problem to be solved rather than a particular solution to be forced by one bargainer on another.

Parties to a conflict select one of two major negotiation procedures to handle issues in dispute: *positional bargaining* or *interest-based bargaining* (Fisher and Ury, 1981). Positional bargaining usually occurs when a negotiator perceives that contested resources are limited and that a distributive solution, one that allocates shares of gains and losses to each party, is the only possible outcome (Walton and McKersie, 1965). Positional bargaining is generally a win-lose or compromise-oriented process. Interest-based bargaining, on the other hand, occurs when negotiators seek integrative solutions that meet as many of the needs of both parties as possible (Walton and McKersie, 1965). Generally, interest-based bargaining is pursued when parties do not see resources as limited, and when solutions can be found in which all parties can have at least some of their needs met.

Positional bargaining derives its name from the practice of selecting a series of positions—particular settlement options that meet the proposing party's interests—and presenting these to an opponent as *the* solution to the issue in question. A party's position may or may not be responsive to the needs or interests of other negotiators. Positions are generally ordered sequentially so that the first position is a large demand and represents a negotiator's maximum expectation of gain should his or her opponent acquiesce. Each subsequent position demands less of an opponent and results in fewer benefits for the initiating party. Characteristically, positional

bargaining commits parties early in negotiations to very specific solutions to issues in dispute and often reduces the flexibility to generate other equally acceptable options.

Positional bargainers generally reach agreement because they have identified a solution that meets enough of an opponent's interests to induce settlement. However, positional bargainers often fail to maximize the satisfaction of either party's interests because the settlements are compromises or adoptions of one party's proposal, rather than the product of a joint effort to find mutually beneficial solutions.

In the Singson-Whittamore case, one possible position for Whittamore might be: "I refuse to pay any penalty for breaking the contract because the no-competition clause is not constitutional." Singson might respond with a counterposition: "Pay the penalty fee immediately or move out of town," or "You must pay the penalty, but we can negotiate on the due date." If an agreement is reached, the parties might settle at a point between these two extreme positions.

Disputants often adopt positional bargaining when:

- The stakes for winning are high
- The resources (time, money, psychological benefits, and so on) are perceived to be limited
- A win for one side appears to require a loss for another
- Interests of the parties are not or do not appear to be interdependent and are contradictory
- Future relationships have a lower priority than immediate substantive gains
- Parties assume that positional bargaining is *the* way to resolve problems or they are not familiar with other approaches to negotiation, or other approaches are deemed to be inappropriate or unacceptable (Moore, 1982b)

Interest-based bargaining differs from positional bargaining in its assumptions about the issues to be negotiated, the contents of an acceptable solution, and the process by which an agreement is to be reached.

In interest-based bargaining, the negotiators do not necessarily assume that the substantive resource in question—money, other resources, time, behavior, and so on—is limited. They do not assume that the resource must be divided into shares in which one bargainer is a winner and the other a loser. The attitude of the interest-based bargainer is that of a problem solver. The goal of negotiation is to find a solution that is mutually satisfactory and results in a win-win outcome.

Interest-based bargainers believe that settlements in negotiations are reached because a party has succeeded in having his or her interests satisfied. *Interests* are specific conditions (or gains) that a party must obtain for an acceptable settlement to occur. They are of three broad types: substantive, procedural, and psychological.

Substantive interests refer to the needs that an individual has for particular goods such as money and time. Meeting substantive interests is often the central focus of negotiations.

Procedural interests refer to the preferences that a negotiator has for the way that the parties discuss their differences and the manner in which the bargaining outcome is implemented. Possible procedural interests might be that each person have the opportunity to speak his or her mind, that negotiations occur in an orderly and timely manner, that the parties avoid derogatory verbal attacks, that the process focus on meeting the mutual interests of all the parties rather than forcing a party to agree to a predetermined position advocated by another, that the plan for implementing the agreement be worked out in detail prior to final settlement, or that a written document or contract should result from bargaining.

Psychological interests refer to the emotional and relationship needs of negotiators both during and as a result of negotiations. Negotiators want to have high self-esteem, want to be treated with respect by their opponent, and do not want to be degraded in negotiations. If the relationship is to continue in the future, the negotiators may want to have ongoing positive regard from the other party for their openness to future communication.

In the Singson-Whittamore case, Whittamore's interests include:

- Remaining in town so that he can see and parent his children (substantive and psychological)
- Continuing to practice his profession (substantive and possibly psychological)
- Avoiding contact with his estranged wife (psychological and procedural)

- Maintaining amicable relations with the clinic and its staff (psychological)
- Minimizing the amount of initial penalty payments to the clinic so that he has enough money to start his own practice (procedural and substantive)

Some of Singson's interests are:

- Avoiding monetary loss and patient attrition when a doctor leaves the staff (substantive)
- Maintaining clinic management's prerogative to set the terms of an employment contract (procedural, substantive, and psychological)
- Avoiding a precedent in which a doctor leaves the clinic before the expiration of a contract and begins a practice in town (procedural)
- Avoiding a costly lawsuit (substantive and procedural)
- Maintaining, if at all possible, a positive working relationship with one or more of the Singsons (psychological)

Interest-based bargaining begins with joint education and development of mutual understanding of each of the interests of the parties, not statements of positions. Often, the parties identify their interests and those of other disputants in private and then participate in a joint meeting to share their results. Parties discuss and modify their interests on the basis of these early discussions. Once the interests have been described, explored, and accepted, at least in principle the parties can begin a mutual search for solutions that will meet their individual and joint needs. Reaching an agreement requires negotiators to develop settlement options that meet at least some of the substantive, procedural, and psychological needs of all parties.

Interest-based bargaining seeks to identify and address the particular interests of all parties rather than achieve a victory of one party at the expense of another, as is the case in positional bargaining. The procedure in interest-based bargaining is one of mutual problem solving, similar to what happens when two people work together on a puzzle. The parties sit side by side and attempt to develop a mutually acceptable picture or settlement.

Mediators can help parties conduct either positional or interest-based bargaining more efficiently and effectively. As the goal of mediation is to help parties reach a settlement that is acceptable to all, mediators generally have a bias toward interest-based and integrative procedures.

Parties often engage in a positional process that is destructive to their relationships, does not generate creative options, and does not result in wise decisions. One of the mediator's major contributions to the dispute resolution process is assisting the negotiators in making a transition from positional to interest-based bargaining. This process will be discussed in more detail in later chapters.

Complexity of the Issues

Disputes come in a variety of levels of complexity. The simple landlord-tenant case in which two parties argue over a simple issue, a security deposit, is very different from a child custody and divorce dispute that involves multiple issues and very complex psychodynamics between the disputants. The latter case may in turn be very uncomplicated in comparison with multiparty disputes, such as one involving the EPA, product manufacturers, and environmentalists over new federal air pollution regulations, or a complex commercial negotiation between major telecommunications companies over provision of services.

Mediators must design intervention strategies that respond to the complexity of the specific issues to be addressed. In one case, detailed data collection procedures involving multiple interviews over a period of months may be required to understand the causes and dynamics of the conflict, whereas in another a simple intake interview at the first joint session with the parties is sufficient. In some disputes, the mediator must break a particularly difficult impasse, and when successful he or she may withdraw and encourage the parties to continue and complete negotiations on their own. In others, the mediator may play an active role throughout negotiations and provide the major procedural framework. In exploring the stages of mediation in later chapters, it will be important to consider the complexity of the dispute to determine the amount of initiative and the level of intervention required from a mediator.

The Appropriate Focus: Process, Substantive Issues, or Relationships

Mediators vary significantly in the way they define their role and involvement in promoting successful negotiations. The differences are generally rooted in mediators' judgments about how much they should focus on process, substance, or relationships between the parties. More will be said about a relationship focus in later chapters.

Regarding substance, one school argues that mediators should focus primarily on the process of negotiations and leave substantive content as the exclusive domain of the parties (Stulberg, 1981b). Procedurally oriented mediators define their role this way for a variety of reasons. First, they believe that the parties are often better informed about the substantive issues in dispute than any third party could ever be. They maintain that the best decision is one arrived at by the parties. Second, they believe that what the parties need is procedural help, not substantive advice or a decision by an outsider. Third, they hold that the parties' commitment to implement and adhere to a settlement will be enhanced if those parties make the substantive decisions themselves, as opposed to having a deal forged by the intervenor. Finally, they believe that a focus on the process and an impartial stance toward substance build trust between the intervenor and the disputants, decrease the risk to the parties of involving another party (the mediator) in the substance of the dispute, and make the disputants more open to procedural assistance.

Many labor-management mediators (especially intervenors from the Federal Mediation and Conciliation Service) subscribe to this view (Kolb, 1983). They see themselves as orchestrators of a process that enables the parties to make their own substantive decisions.

Some environmental mediators also follow this procedurally oriented definition of the mediator's role. Bellman (1982), although raising concerns about a substantive agreement with which he disagrees, ultimately sees the terms of the settlement as the prerogative of the parties. He sees himself primarily as a process consultant.

The procedural orientation can be found among some family mediators, too. They argue that in a divorce, for example, the parents generally know what is best for both the children and the family system as a whole (conversation with W. P. Phear at a meeting of the Association of Family and Conciliation Courts, Ethics Working Group, Keystone, Colo., March 1984). The parents do not need a substantive expert to tell them what to do. What they need is procedural help to assist them in problem solving.

The alternative school of thought argues that although the mediator is impartial and neutral, this does not mean that he or she should not work with the parties on substantive matters to develop a fair and just decision (as fairness and justice are understood by the intervenor). Susskind (1981, pp. 46–47), an environmental mediator, argues that intervenors should be involved in substantive decisions when (1) "the impacts of negotiated agreement [will affect] under represented or unrepresented groups"; (2) there is "the possibility that joint net gains have not been maximized"; (3) the parties are not aware of the "long term spill-over effects of the settlements"; and (4) the precedents that they set "may be detrimental to the parties or the broader public." Susskind further notes that "although such intervention may make it difficult to retain the appearance of neutrality and the trust of the active parties, environmental mediators cannot fulfill their responsibilities to the community-at-large if they remain passive" (p. 47). Some labor-management mediators belong to this school. These deal makers intervene substantively when the parties are uninformed, ill-prepared to negotiate, or unaware of mutually acceptable substantive settlements (Kolb, 1983).

Child custody and divorce mediators also have representatives in the second school. Saposnek (1983) argues that the mediator should advocate the unrepresented interests of the children in negotiations between the parents and believes that the mediator should intervene and influence the substantive outcome if those interests are violated or not taken into consideration. Coogler (1978) advocates engagement in substantive negotiations and advocates that the mediator write a letter of nonconcurrence to the court if he or she seriously disagrees with the settlement.

There is a spectrum along which mediators place themselves in defining their degree of involvement in the procedure, substance, and relationships involved in negotiations. At one end are those who advocate mostly procedural interventions; at the other are advocates of substantive involvement by the mediator that may include

actually forging the decision. Between them are mediators who pursue a role with mixed involvement in process and substance.

I lean toward the process end of the spectrum because I believe that the parties should have the primary responsibility for self-determination. On occasion, however, the mediator has an ethical responsibility to raise critical questions about substantive options under consideration by the parties. These occasions include cases where the agreement appears to be extremely inequitable to one or more of the parties, does not look as if it will hold over time, or seems likely to result in renewed conflict at a later date, or cases where the terms of settlement are so loose (or confining) that implementation is not feasible. I believe the mediator should also intervene in cases involving violence or potential violence to one or more parties, either primary or secondary.

Depending on the role that is assigned to the mediator (whether self-assigned or defined by agreement with the parties), he or she will have to determine which types of interventions to perform. In this process, the mediator must decide on (1) the level of intervention, (2) the individual or group to be targeted by the intervention, (3) the focus of intervention, and (4) the intensity of intervention.

The *level of intervention* refers to the degree to which the mediator concentrates on helping negotiators move through the general problem-solving stages, as opposed to a focus on particular idiosyncratic problems that are pushing the parties toward impasse. In some disputes, the parties may need assistance only to move through the broad stages, while in others, they may need help to break a particular deadlock. Sometimes parties need minimal help, and at other times they will need help throughout the bargaining process.

The *target of intervention* refers to the person or people to whom the mediator directs his or her moves. Should moves be directed to all parties, to a constellation within the group such as a subgroup or team, or to a particular person? In a postmarital dispute, for example, will it be best for the mediator to focus on changing the ex-wife's move, the ex-husband's, or both? Or should the focus be on the entire family system, including children, ex-spouses, stepparents, and grandparents? In a community dispute, should the mediator focus on the spokespersons, specific team members, the team as a whole, or the constituents of the parties?

The *focus of intervention* refers to the particular critical situations at which the mediator directs his or her moves. The mediator may focus his or her energies on changing the *psychological relationship* of parties to each other. This is often referred to as a conciliation. He or she may aim at creating the psychological conditions that are necessary for productive negotiations. Alternatively, the focus might be on changing the *negotiation process* or the procedure that is being used by one or more people to solve the dispute. Another option is to focus on the process for moving from one stage of negotiation to the next; for example, a mediator might help a party make a proposal that will be acceptable to the other side.

The focus could be on changing the *substance* or *content* of the dispute. The mediator may look for ways to explore data, to expand the number of acceptable options on the negotiation table, to narrow the choices when the parties are overwhelmed with possibilities, or to integrate proposals made by the disputants.

I will now turn to a detailed examination of the stages of mediation and the general moves mediators make in their efforts to promote agreement. Chapters Three through Seven describe activities that are often conducted prior to formal problem solving or a joint meeting of the parties. Some of these endeavors are generic conflict management initiatives that may be performed by the mediator and the parties as the means of deciding between a number of potential resolution processes; others, such as those in Chapters Six and Seven, are more mediation-specific. Chapters Eight through Eleven describe the mediation process in detail, from the first session to the final agreement.