

The Mediation Process

*Practical Strategies
for Resolving Conflict*



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THE MEDIATION PROCESS
Practical Strategies for Resolving Conflict
by Christopher W. Moore

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Preface

All societies, communities, organizations, and interpersonal relationships experience conflict at one time or another in the process of day-to-day interaction. Conflict is not necessarily bad, abnormal, or dysfunctional; it is a fact of life. Conflict and disputes exist when people are engaged in competition to meet goals that are perceived as, or actually are, incompatible. However, conflict may go beyond competitive behavior and acquire the additional goals of inflicting physical or psychological damage on or destroying an opponent. It is then that the negative and harmful dynamics of conflict take their full costs.

All disputes, however, do not have to follow the negative course described above. Conflict can lead to growth and be productive for all parties. Productive conflict resolution, however, depends on the abilities of the participants to devise efficient cooperative problem-solving procedures, the participants' capacities to lay aside distrust and animosity and work together, and the availability of solutions that will at least partially satisfy all of the participants' interests. Unfortunately, many people in conflict are unable to develop an effective process, deal with the psychological barriers to settlement, or develop integrative solutions on their own. People in conflict often need help to resolve their differences.

Mediation, the assistance of a neutral and impartial third party in helping people resolve their own differences, has a long history of application. However, until now there has not been a comprehensive work that details what mediators actually do to aid people in conflict. There are several reasons why so little has been written on the actual practice of mediation, as opposed to defining the procedure's merits or applications. First, mediators themselves disagree about whether mediation is an art or a science. Many mediators believe that their practice is closer to an art form and have been reluctant to encourage, or have actively resisted, systematic study of what they do.

Second, many mediators subscribe to what might be described as the "magic theory" of mediation. A mediator's skills or moves are considered secrets that, if revealed to the public, would render them less effective. Thus some mediators have inhibited research by protecting their "secrets."

A third argument against careful analysis of the mediation process is the confidential nature of the subject matter that the people in conflict discuss and the confidentiality of the mediation process itself. This confidentiality has often been a barrier to research. (Yet for years researchers have studied psychiatric cases, which presumably fall under the same privacy or confidentiality restriction as mediated disputes.)

A fourth inhibiting factor is the problem of inserting researchers into highly polarized, multiple-party disputes where the acceptability and presence of "neutral" third parties is in itself controversial. The mediator's presence is often tenuous. Parties are often even less likely to accept the presence of researchers who wish to study the process of mediation.

Fifth, researchers in conflict resolution have generally focused more on negotiation as a means of dispute resolution than on mediation. Negotiation has been studied by game theorists, economists, social psychologists, anthropologists, legal scholars, industrial relations researchers, and international relations scholars. Clearly more emphasis has been placed on resolution of disputes by the principal parties than on resolution through third-party intervention.

Finally, mediation has not been studied because the pro-

cess encompasses a variety of skills and is practiced in so many different ways that researchers have encountered difficulties in focusing on such a comprehensive process.

During the past twelve years, I have been actively involved as a mediator of organizational, environmental, family, community, criminal, and public policy disputes. This broad experience leads me to believe that there are some common mediation principles and procedures that can be applied effectively to a wide range of conflicts. This belief has been confirmed by the literature in the field of mediation. There is a great need for a general work on mediation that details the “how-to” aspects of the process.

The Mediation Process: Practical Strategies for Resolving Conflict integrates my personal experience and research, detailing what is known about the mediation process as it has been applied in a variety of areas and types of disputes. This book outlines how mediation fits into the larger field of dispute resolution and negotiation and then presents a comprehensive stage-by-stage sequence of activities that can be used by mediators to assist participants in disputes to reach agreement.

I have written this book for several groups. First are the practicing mediators who work in a variety of arenas and who have repeatedly expressed their need for a comprehensive description of mediation process and theory. The book should be helpful to practitioners in labor, family, organizational, environmental, public policy, community, and other diverse areas of mediation practice.

Second are professionals—lawyers, managers, therapists, social workers, planners, and teachers—who handle conflicts on a daily basis. Although these professionals may choose to become full-time mediators, they are more likely to use mediation principles and procedures as additional tools to help them within their chosen fields of work. The material presented here will aid any professional who wishes to promote cooperative problem solving between his or her clients.

Third are people who have to negotiate solutions to complex problems. Since mediation is an extension of the negotiation process and, in fact, a collection of techniques to promote

more efficient negotiations, an understanding of the mediation process can be tremendously helpful for people directly involved in bargaining. Mediation can teach negotiators how to be cooperative rather than competitive problem solvers and how to achieve win-win rather than win-lose outcomes. An understanding of mediation can also aid negotiators in deciding when to call in a third party and what the intervenor should do for them.

Fourth are trainees and students in both mediation training programs and academic seminars in alternative dispute resolution. This book is suitable for use in law, business, social work, counseling, management, education, sociology, and psychology seminars. Undergraduates as well as graduates will find it useful in learning mediation skills.

Overview of the Contents

Part One provides an overview of the entire process of mediation and dispute resolution. Chapter One describes the broad field of dispute resolution and details how mediation fits in as an important means of handling conflicts. In this chapter I present a spectrum of conflict management approaches and identify when mediation is appropriate and when it has a high probability of success. Chapter Two examines the mediation process in more depth. After defining mediation, I explore some of the types of disputes to which the procedure has been applied, introduce the twelve stages of the mediation process, and survey several variables that determine how directive the mediator should be in his or her interventions.

Part Two discusses mediator activities that occur *prior* to joint negotiations between the disputing parties. Chapter Three covers procedures for mediator entry and explores both how an intervenor becomes involved in a dispute and what impact being invited by a sole party, all parties, or an uninvolved secondary party has on the final settlement. Chapter Four describes the process of searching for a dispute resolution approach and arena with the parties. Procedures that can assist disputants in evaluating the various methods of resolving their conflicts are covered, and the means of deciding which approach to use are explored.

Chapter Five presents data collection techniques that mediators can use to gather information about the parties' negotiation procedures and the substantive issues in dispute. Special emphasis is placed on the skills used to intervene in conflict situations. Chapter Six explores procedures for designing a mediation plan. Who should be involved, the physical setup of the session, and strategies for the first session are detailed. Chapter Seven examines procedures for conciliation, the process of emotionally preparing the parties for negotiation over substantive issues. Techniques for responding to strong emotions, perceptual problems, and communication difficulties are discussed.

Part Three explores mediation procedures in joint session with all disputants present. Chapter Eight focuses on beginning a joint session with the disputing parties. Strategies and opening statements for both the intervenor and the parties are described and analyzed. Chapters Nine and Ten examine the steps by which the issues in dispute can be identified; an agenda can be developed; and the substantive, procedural, and psychological interests of the parties can be explored. The useful technique of reframing, or defining, issues and interests is presented. Chapter Eleven presents procedures and strategies for generating settlement options. The technique of proposal-counterproposal as well as more cooperative problem-solving methods is described.

Part Four covers the conclusion of mediation and the various steps involved in reaching a settlement. Chapters Twelve and Thirteen present procedures for assessing settlement options and preparing final agreement packages. In these chapters I explore acceptable bargaining ranges, incremental convergence, leaps to agreement, procedures for building bargaining formulas, and the usefulness of deadlines. Chapter Fourteen discusses how agreements can be finalized. Procedures for drafting, increasing compliance, and monitoring agreements are examined. Chapter Fifteen addresses specific techniques and problems that are encountered in some but not all disputes. Both the caucus and mediator power are examined, as are procedures for working with multiparty disputes and for funding mediation. A brief conclusion rounds out the text.

The resources contain a code of professional conduct that

has served as a model for several states and mediation programs, a sample contact letter, a form that explains the confidential nature of the mediation process, and two sample agreements.

Acknowledgments

All knowledge is socially produced. Although I bear responsibility for the identification, elaboration, and development of the ideas presented in this book, I have clearly drawn on the experiences and advice of others engaged in the practice of mediation.

The first group of people to whom I am indebted are my fellow mediators. Since 1973 when I first became involved in mediating an intense interracial community dispute, I have worked with four active groups of mediators and conflict resolvers. Each group has contributed significant insights and pushed me to develop my thinking.

First and foremost are the mediators at the Center for Dispute Resolution in Denver, Colorado: Susan Wildau, Mary Margaret Golten, Bernard Mayer, and our associates and interns. They have been my colleagues in developing and practicing many of the ideas contained in this book. Susan Carpenter and W. J. D. Kennedy of ACCORD Associates also provided insights and support in researching and refining mediation theory and practice while I worked as a mediator and director of training for that organization. The members of the Training Action Affinity Group of the Movement for a New Society—Suzanne Terry, Stephen Parker, Peter Woodrow, and Berit Lakey—and the authors of the *Resource Manual for a Living Revolution*—Virginia Coover, Charles Esser, and Ellen Deacon—worked with me to develop intervention skills for multiparty disputes and effective conflict resolution training techniques. Work with academic colleagues was also important. Norman Wilson, Paul Wehr, and Martin Oppenheimer encouraged and supported my research.

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Boulder, Colorado
January 1986

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The Author

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Since the early 1970s, Moore's major work has been in the field of dispute resolution. He has mediated community, domestic, housing, criminal, business, organizational, and environmental disputes, and he has served as a trainer of conflict managers for a variety of conflicts. Moore has developed and conducted training programs on general and domestic mediation and negotiation; these programs are also presented nationwide by the staff of the Center for Dispute Resolution. He has also pioneered seminars on natural resource conflict management that have been sponsored by the U.S. Geological Survey, U.S. Forest Service, Minerals Management Service, Bureau of Land Management, and the U.S. Army Corps of Engineers.

Moore's books include *Natural Resources Conflict Management* (1982), *Building Social Change Communities* (1978,

with others) and *Resource Manual for a Living Revolution* (1976, with others). He is a member of the Society of Professionals in Dispute Resolution, a mediator and arbitrator for the American Arbitration Association, and a member of the Association of Family and Conciliation Courts.

Contents

Preface ix

The Author xxi

Part One: Understanding Dispute Resolution and Mediation

1. Approaches to Managing and Resolving Conflict 1

The Singson-Whittamore Dispute • Conflict Management
and Resolution Approaches

2. How Mediation Works 13

A Definition of Mediation • Arenas of Mediation • Media-
tion Activities: Moves and Interventions • Hypothesis Build-
ing and Mediation Interventions • The Stages of Mediation
• Variables That Influence Mediation Strategies and Moves

Part Two: Laying the Groundwork for Effective Mediation

3. Initial Contacts with the Disputing Parties 44

Tasks of the Mediator in the Entry Stage • Implementing
Entry • Timing of Entry

4.	Selecting a Strategy to Guide Mediation	61
	Mediator-Disputant Relationship for Making Decisions • Approach and Arena Decision: General Move Categories • Identification of Interests • Dispute Outcomes • Criteria for Selecting an Approach and Arena • Conflict Strategies and Approaches • Selecting and Making a Commitment to an Approach and Arena • Coordination of Approaches and Arenas	
5.	Collecting and Analyzing Background Information	78
	Framework for Analysis • Selecting an Appropriate Data Collection Method • Selecting the Appropriate Data Collector • Data Collection Strategy Selection • The Appropriate Interviewing Approach • Interviewing: Appropriate Questions and the Listening Process • Conflict Analysis • Data Reporting • Integrating the Information • Verifying Data • Interpreting Data	
6.	Designing a Detailed Plan for Mediation	103
	Participants in Negotiations • Location of Negotiations • Physical Arrangement of the Setting • Negotiation Procedures • Issues, Interests, and Settlement Options • Psychological Conditions of the Parties • Establishing Ground Rules or Behavioral Guidelines • Establishing a Tentative Agenda • Educating the Parties and Gaining a Commitment to Begin • Identifying Special Problems	
7.	Building Trust and Cooperation	124
	Strong Emotions • Misperceptions or Stereotypes • Special Perceptual Problems • Perception of Trust • Communication and Conciliation • Nonverbal Communication	
Part Three: Conducting Productive Mediation		
8.	Beginning the Mediation Session	153
	Opening Statements • How Parties Begin Negotiating • Choosing an Opening to Negotiations • Turning the Negotiation Session Over to Disputants • Facilitating Communication and Information Exchange • Establishing a Positive Emotional Climate	
9.	Defining Issues and Setting an Agenda	172
	Topic Areas and Issues • Identifying and Framing Issues • Variables in Framing and Reframing Issues • Explicit-	

Implicit Reframing and Timing • Appropriate Language or Syntax • Determining an Agenda • Procedural Assistance from the Mediator

10. Uncovering Hidden Interests of the Disputing Parties 187

Difficulties in Identifying Interests • Procedures for Identifying Interests • Productive Attitudes • Indirect Moves for Discovering Interests • Direct Moves for Discovering Interests • Positions, Interests, and Bluffs • Interest Identification, Acceptance, and Agreement

11. Generating Options for Settlement 199

Developing an Awareness of the Need for Options • Strategies for Option Generation • Procedures for Generating Options • Option Generation Procedures • Types of Settlement Options

Part Four: Reaching a Settlement

12. Assessing Options for Settlement 218

The Settlement Range • Recognizing the Settlement Range • Negative Settlement Range

13. Final Bargaining 227

Incremental Convergence • Leap to Agreement • Formulas and Agreements in Principle • Procedural Means of Reaching Substantive Decisions • Deadlines • Mediators and Deadline Management • Enhancing the Usefulness of Deadlines

14. Achieving Formal Settlement 248

Implementing the Settlement • Criteria for Compliance and Implementation Steps • Monitoring the Performance of Agreements • Formalizing Settlement

15. Strategies for Dealing with Special Situations 262

Caucuses • Mediator Power and Influence • Multiperson Negotiating Teams • Teams with Constituents • Mediation Services Funding • Funding the Parties Themselves

- Conclusion 297

Resource A	
Code of Professional Conduct	299
Resource B	
Sample Contact Letter	308
Resource C	
Sample Waiver and Consent Form	310
Resource D	
Sample Agreements	312
References	321
Index	337

ONE

Approaches to Managing and Resolving Conflict

Conflict seems to be present in all human relationships and in all societies. From the beginning of recorded history, we have evidence of disputes among children, spouses, parents and children, neighbors, ethnic and racial groups, fellow workers, superiors and subordinates, organizations, communities, citizens and their government, and nations. Because of the pervasive presence of conflict and because of the physical, emotional, and resource costs that often result from disputes, people have always sought to find ways of resolving their differences. The solutions they seek are those that allow them to satisfy their interests and minimize their costs.

In most disputes, the people involved have a variety of means at their disposal to respond to or resolve their conflict. An examination of a sample dispute will illustrate the possible options.

The Singson-Whittamore Dispute

Singson and Whittamore are in conflict. It all started three years ago when Dr. Richard Singson, director of the Fairview Medical Clinic, one of the few medical service providers in a small rural town, was seeking two physicians to fill open positions on his staff. After several months of extensive and difficult recruiting, he hired two doctors, Andrew and Janelle Whitta-

more, to fill the respective positions of pediatrician and gynecologist. The fact that the doctors were married did not seem to be a problem at the time they were hired.

Fairview Clinic liked to keep its doctors and generally paid them well for their work with patients. The clinic was also concerned about maintaining its patient load and income and required each doctor joining the practice to sign a five-year contract detailing what he or she was to be paid and what conditions would apply should the contract be broken by either party. One of these conditions was a no-competition clause stating that should a doctor choose to leave the clinic prior to the expiration of the contract, he or she could not practice medicine in the town or county in which the Fairview Clinic was located without paying a penalty. This clause was designed to protect the clinic from competition and to prohibit a doctor from joining the staff, building up a practice, and then leaving with his or her patients to start a private competitive practice before the term of the contract had expired.

When Andrew and Janelle joined the Fairview Clinic staff, they both signed the contract and initialed all the clauses. Both doctors performed well in their jobs at the clinic and were respected by their colleagues and patients. Unfortunately, their personal life did not fare so well. The Whittamores' marriage went into a steady decline almost as soon as they began working at Fairview. Their arguments increased, and the amount of tension between them mounted to the point that they decided to get a divorce. Since both parents wanted to be near their two young children, they agreed to continue living in the same town.

Since each physician at the clinic had a specialty, they all relied on consultations with their colleagues. Thus, some interaction between the estranged couple was inevitable. Over time the hostility between the couple grew to such a point that the Whittamores decided one of them should leave the clinic, for their own good and that of other clinic staff. Since they believed Andrew, as a pediatrician, would have an easier time finding patients, they agreed that he was the one who should go.

Andrew explained his situation to Singson and noted that