Chapter Three

Managing Initial Contacts with the Disputing Parties

Mediators enter disputes as a result of (1) direct initiation by the parties, (2) referrals by secondary parties, (3) direct initiation by the mediator, or (4) appointment by a recognized authority such as a government official or agency. Each of these means of entry poses specific strategic choices regarding mediator activities and may affect the quality, type, and probability of a settlement.

Direct initiation by a party or parties is probably the most common mechanism by which a mediator enters a dispute. The request for mediation may come from a single party, a subgroup or coalition of parties, or all the disputants. It may occur before or after the start of negotiations. The source of the request and the timing of the proposal for mediation may have a significant effect on the dynamics of negotiations. I will first explore requests for entry of a mediator made by single parties and subgroups of disputants and then examine requests made by all involved parties.

A request for mediation by a single party, whether an individual or a team, can have a variety of effects on the dynamics of negotiation and on subsequent strategies of the negotiators. One party commonly either proposes mediation to an opponent or takes unilateral action to obtain a mediator. For example, a husband may call a mediator and request help in negotiating custody arrangements with his estranged wife, or a government agency may request assistance in negotiating with a public interest group. If the parties have not started to negotiate, the request for mediation may mean that discussions are preferable to avoidance, stalemate, or alternative approaches to dispute resolution such as going to court. A

request for mediation may also signal a desire to cooperate for mutual benefit, a willingness to make concessions, or a belief that total victory is not possible.

People in conflict are often reluctant to ask for a third party's assistance; they are afraid that their request for intervention will weaken their negotiating position and damage the possibility of a satisfactory outcome. Reluctance to call a mediator is especially strong once parties are in the midst of negotiations and have reached an impasse. Theodore Kheel, a labor mediator, describes the problem faced by a party who is initiating the entry of a mediator: "If you've reached an impasse, it can be assumed that both sides have put forth what they claim will be their final offers. In that situation a proposal by one side or the other to bring in a mediator is obviously a signal that side is willing to go still further" (and grant more concessions, for instance) (Shapiro, 1970, pp. 41–42). Reluctance to appear weak or to make additional offers often discourages a request for a mediator. If such a request is made, the party from whom it comes has probably been following the traditional negotiator rule, "Always save something for the mediator" (Downing, 1960, p. 62).

Similar problems to those just described hold true for subgroups or coalitions of parties who request mediation. However, risks may be mitigated when more than one party makes such requests. The initiative can be framed in terms of the needs of all disputants rather than those of a single party, thus lowering the expectation of new concessions.

A proposal for mediation, especially in interpersonal or community disputes, raises the possibility of procedural rejection by another party. Several studies have examined the rate of refusal to initiate mediation in community and interpersonal disputes. Cook, Rochl, and Shepard (1980) found that people refused mediation services in 1,898 of 3,911 cases—a refusal rate of 48 percent. Pearson (1982) found a rejection rate of 50 percent among divorcing couples in Denver, Colorado, who were offered free mediation services. Davis, Tichane, and Grayson (1980) found that in felony offenses among acquaintances, 32 percent of those referred to mediation failed to report, and 12 percent refused outright to participate in the process.

Researchers have attributed the rejection of mediation services to (1) unfamiliarity with the process, (2) rigid adherence to a win-lose approach to dispute resolution, (3) intense emotions that block communication, and (4) habitual attachment to judicial means of dispute settlement (Cook, Rochl, and Shepard, 1980). Single-party requests for mediation services generally seem to result in fewer instances of mediation.

Given such rejection rates, what should the mediator do if approached by only one party? After talking with the initiator, he or she must contact the responding party. In some situations, the mediator or agency will mail a letter to the responding party, explaining the process of mediation and its advantages, liabilities, and cost, and stating that the mediator will call within a short time to answer any questions and to discuss whether the party is interested in using the process. This letter serves to prepare the responding party for the mediator's call and provides an opportunity to consider the viability of mediation before any discussions with the mediator take place.

When calling the respondent, the intervenor should not assume that there is a willingness to mediate. Most people are not familiar with the process, and the intervenor may therefore need to educate the respondent before a commitment to mediate can be elicited. Adequate time should be allowed for the explanation and for questions from the respondent. The approach should not be a "hard sell"; the respondent should be able to freely select or reject the option and should not feel pressured to use the mediator's services. The parties' personal commitment is crucial to successful settlement.

One mediator uses a paradoxical approach to demonstrate the merits of mediation. Instead of promoting the process himself, he asks the respondent to explain why he or she should use mediation. The respondent is thereby placed in the position of mediation advocate.

In some situations, especially those involving cultures in which writing or the telephone are not the preferred means of making an initial contact, the mediator may visit the disputants in person as a way of establishing a connection. This first visit may be facilitated by an introduction from a mutual friend or associate.

In cases in which the mediator is approached by both parties, a significant psychological step toward a cooperative resolution to the dispute has been made.

> Implicit in such an invited third-party role are two assumptions: first, the disputants are sufficiently motivated to address their conflict that one or both of them are willing to enlist the services of a third party; and second, the third party is regarded as sufficiently attractive by one or both disputants that this party is invited to intervene rather than some other individual. From the third party's vantage point, an invited role is desirable both because it suggests that the disputants are ready to work and because the third party is placed in a unique position to exercise influence [Rubin, 1981, p. 11].

To date, no data exist that correlate joint initiation of mediation with successful intervention. However, mediators generally find that a cooperative initiation of mediation by all parties minimizes escalatory dynamics between the disputants at the beginning of the intervention and indicates willingness to solve the dispute to the satisfaction of all.

Referral by interested secondary parties is another way that mediation services are obtained. Secondary parties fall into two categories: first, persons or groups who have no direct stake in the settlement of a dispute but are concerned about the general ramifications of continued conflict; and second, parties who, although they are not principal actors, do have tangible investment in the settlement of a dispute.

Examples of the first type are close friends or neighbors who referred parties to a mediator—or vice versa—and a private foundation that was concerned about general community turmoil that could result from escalating conflict (Lansford, 1983). These parties did not have a direct stake in the outcome but do want the dispute settled.

Secondary parties who have a more direct interest in the settlement also initiate activities that facilitate mediator entry. For example, in one particular workplace dispute, two managers were in conflict over how a job was to be performed. A third manager—a peer—was uncomfortable with tension in the office. He talked to a fourth person in the office, a woman with no authority over the disputing managers, and asked her to intervene.

Lincoln (1976) described a school desegregation conflict in which a mediator was invited by the mayor and the school superintendent to mediate between two hostile groups of students—one black and the other white—that were threatening to vandalize school property and physically harm each other. Although the secondary parties were not directly involved in the negotiations, they clearly had high stakes in the outcome.

Occasionally, secondary parties have authority over the people in conflict and will intervene to encourage disputants to mediate. Mediation organizations often establish referral relationships with judges, lawyers, court clerks, police officers, and personnel in planning departments, social service agencies, and educational and public interest organizations to route disputes to mediation.

Some secondary parties may not only refer cases to mediation but also influence the probability of settlement. Bench referrals by judges, prosecutors, public attorneys, and police officers generally have a higher rate of settlement than referrals by community social service agencies, legal aid organizations, or governmental agencies (Cook, Rochl, and Shepard, 1980). The prospect of a litigious alternative is undoubtedly a significant factor in the influence of certain referral sources on the probability of settlement. Parties know that if they do not reach an agreement in mediation, the case will probably go to court, an undesirable alternative in many instances.

Interventions initiated unilaterally by the mediator are not unusual in complex community disputes that are public in nature, involve multiple parties, and do not have a set of defined primary actors who can request mediation. In this form of entry, the mediator usually learns of the dispute from published written material or an interested secondary party. After careful examination of the dispute, the mediator takes the initiative to contact one or more disputants and offer his or her services. Entry of this type is complicated by the fact that the mediator may have difficulty building credibility with disputants, may lack their psychological commitment, may be subject to ethical issues related to the perception of "ambulance chasing," and will need to consider the possible effect of the intervention on the coalescence of power among the parties involved.

Gerald Cormick and Jane McCarthy, mediators of an environmental dispute concerning flood control and land use along the

Snoqualmie River in Washington State, became involved in this way. They entered the conflict on their own initiative and assisted the primary parties in identifying and including additional disputants. "In determining whether mediation would be acceptable to the disputants, Cormick and McCarthy discovered who the key participants were by asking everyone involved: 'Can you name 10 or 12 persons who if they could agree on something, would have stature and influence enough so that you, who are in disagreement, could reasonably support them and any agreement they might reach?' Those named most often became part of the group that would meet with Cormick and McCarthy to work out a compromise" (Dembart and Kwartler, 1980, p. 47).

This uninvited form of entry is often the only one available to mediators who perceive that they may be helpful to disputants but also understand that the latter may not be aware of mediation as a means of dispute resolution.

Appointment is another means of entry. In institutionalized labor disputes, mediation is often legally required before the parties can proceed to other means of dispute resolution, and mediators are appointed by state or federal agencies. There are some interpersonal, community, civil, and court-related disputes in which government agencies may mandate the process, appoint mediators, or do both.

In the marital conciliation court system of California, for example, parties in child custody cases are required to try mediation before court action (Comeau, 1982). There are also numerous instances in which elected officials have appointed a mediator to respond to a community dispute (Dembart and Kwartler, 1980; Lansford, 1983; Clark-McGlennon Associates, 1982).

In the Whittamore-Singson case presented in Chapter One, both parties attempted unassisted negotiations and were not successful. Singson was familiar with mediation and had his lawyer ask a mediator to propose the process to Whittamore. The mediator sent Whittamore a letter of introduction, followed it up with a phone call, and then scheduled private meetings with both Whittamore and Singson to explore whether they wanted to use the process. When they indicated that they did, he instructed them to proceed with data collection on the case.

Tasks of the Mediator in the Entry Stage

Regardless of how a mediator enters a dispute, he or she must accomplish certain specific tasks in the first stage of the mediation process. These include (1) building personal, institutional, and procedural credibility; (2) establishing rapport with the disputants; (3) educating participants about the negotiation process, the role of the mediator, and the function of mediation; and (4) gaining a commitment to begin mediating.

Building Credibility

Mediators must build credibility with those in conflict by developing their expectations that the mediator and the mediation process will help them successfully address the issues in dispute. In general, there are three types of credibility: personal, institutional, and procedural.

Personal credibility refers to the mediator's possession of certain personal characteristics that both mediators and disputants have long seen as crucial to the success of the intervention process (Davis and Gadlin, 1988). Landsberger (1956) found that disputing parties in labor negotiations, when asked to name desirable attributes of mediators, mentioned

Originality of ideas

An appropriate sense of humor

The ability to act unobtrusively in a conflict

The ability to create the feeling of being "at one" with the disputants and concerned with their well-being

A willingness to be a vigorous salesperson when necessary

Control over his or her feelings

Persistent and patient effort

The ability to understand quickly the dynamics and complexities of a dispute

Some specific knowledge of the field in which he or she is mediating

Activities by mediators that allow them to personally exhibit these qualities will generally reinforce beliefs held by disputing parties that the mediator has personal attributes that will assist them in resolving the dispute.

Institutional credibility refers to the reputation of the organization that employs the mediator. Such credibility is based on an organization's history of successful performance in the particular field of dispute resolution for which a mediator is needed, a history of unblemished impartiality among personnel, and often a background of neutral—or at least, not overtly biased—sources of funding. Institutional credibility may be a crucial factor in the acceptance or rejection of mediators or mediation organizations. Mediators wishing to build institutional credibility may

1. Produce brochures describing their expertise and services
2. Present a list of former clients to prospective users (subject, of course, to client approval and the limits of confidentiality)
3. Offer examples and explanations of the types of disputes they have mediated
4. Present credentials of membership in recognized dispute resolution associations
5. Disclose organizational funding sources to demonstrate institutional impartiality

Two case examples illustrate the importance of building institutional credibility. A company executive considered using a mediation service to assist him in settling a community dispute to which he was a party. The mediation firm was asked to make a presentation about its services to some of the involved parties. During the meeting, the executive looked at the firm's brochure and began to put pluses and minuses next to the names of the firm's board members according to his perception of whether they would be positively or negatively disposed toward his interests in the dispute. When he counted the marks, he noticed that they came out even, and he accepted the firm's claim to impartiality.

In another case, an environmental group wanted the names and telephone numbers of other public interest groups that had used a mediation organization to settle conflicts over min-

ing. The organization provided the data to build institutional credibility.

Procedural credibility refers to the belief of the disputants that the process the mediator has proposed has a strong likelihood of success. Some mediators are reluctant to describe the procedures by which they propose to resolve a dispute. By claiming that they respond differently to each conflict or by arguing that mediation is an art form rather than a series of scientific interventions, some mediators shroud their practice in secrecy and leave the disputants ignorant of the mediation process. Mediators following this approach argue that procedural credibility is enhanced by mystifying the process. However, this is not the majority view on the issue.

The practice of obscuring the mediation process has been sharply criticized by those who advocate a candid education of the parties about general mediation procedures that might be used in their dispute. Clear procedural descriptions enable the parties to make informed judgments about the viability of the process, and they demonstrate how the procedure might work in the particular case. In building procedural credibility, the mediator should stress that successful resolution rests primarily on the disputants themselves and that the best possible process will not guarantee that recalcitrant parties will come to terms.

An example of procedural credibility building occurred when mediators from my company, CDR Associates, were asked to intervene by the Public Utilities Commission of Colorado in a dispute over the creation of a new rule on telephone access charges. As the process of negotiated and mediated rulemaking had a very limited history in Colorado, and none of the major parties had ever engaged in such a process, the mediators conducted an educational session for the disputants in which case histories and procedures used for regulatory rulemaking in other settings were presented. Successful case studies built procedural credibility and enabled the parties to visualize how the process might work for them.

Establishing Rapport with the Disputants

Personal, institutional, and procedural credibility is merely the starting point for a mediator's entry into a dispute. The greatest

factor in the acceptability of an intervenor is probably the rapport he or she establishes with the disputants. *Rapport* refers to the degree of freedom experienced in communication, the level of comfort of the parties, the degree of precision in what is communicated, and the quality of human contact. Rapport is clearly influenced by the mediator's personal style, manner of speech, dress, and social background; by common interests, friends, or associates; and by the amount of communication between the mediator and the disputants. Mediators often talk about the need to develop some form of bond with the parties. This may be accomplished early in the mediation by identifying common personal experiences such as recreation, travel, children, and associates; by talking about common values; by genuinely affirming one or more of a disputant's attributes or activities; or by demonstrating one's sincerity through behavior.

In an intervention a few years ago, I was encountering significant difficulty in building rapport with a party over the telephone. He answered most questions, even open-ended ones, with yes or no answers or a grunt. Finally, he asked about the weather where I was in Colorado, and I knew that was the opening. On learning that it was snowing, he began to reminisce about time he had spent in the mountains. I followed up with a few open-ended questions about his experiences, and after a few minutes, we discovered that we had both done winter camping. The beginning of rapport had been established.

In another case, Kakwirakeron, a Mohawk leader in a dispute involving Native American land claims at Moss Lake in upstate New York, described the manner of Rowley, a mediator with the American Arbitration Association, as follows:

> When I first met Rowley I remember the white hair which he has, and the type of face he has is to me an honest face. And he always had the ready smile, which is a genuine smile, not just for the show of it. He had a manner, a very easy manner which is easy for us to identify. He really doesn't have a mask on. He is not trying to put on a show or an air of importance. He is just honest and straightforward and our first impression of him held up all the way through [Kwartler, 1980, pp. 15–16].

Educating Participants About the Mediation Process

To build initial procedural credibility, the mediator should explain enough about his or her role and mediation procedures to create a willingness in disputants to try the process. In the later phases of a mediator's efforts to enter a dispute, he or she will spend additional time educating the parties about the particular negotiation and mediation process. This educational effort should be undertaken to (1) minimize surprises that might result from misunderstandings about the negotiation and mediation processes; (2) clarify the sequence of steps so that disputants know what to expect and know what roles they will be playing; and (3) gain both conscious and unconscious feedback from the participants, reflecting their feelings and reservations about the intervention procedure. Although the goal of mediation is not primarily an educational exercise, it is still a process designed to *teach* participants how to solve their problems. Disputants must thus have at least a minimal understanding of the process for the intervenor to be successful. Some of the matters that the parties should understand include

- The role of the mediator (neutrality and impartiality as appropriate for the particular type of mediator role being performed)
- The way information or data about the dispute will be collected
- The procedure that will be used to "work" on each issue
- The limits of confidentiality in the mediation process
- The potential use of joint sessions and of caucuses (private meetings)
- The possible forms that an agreement, if reached, might take

Before committing themselves to mediation, the parties should assess all the procedures available to them to resolve their dispute. Careful explanation and evaluation of the alternative approaches enhance the probability that mediation, if it is selected, will be successful.

Gaining a Commitment to Mediate

The mediator must believe that there is a common commitment by the parties both to the process of negotiation and mediation as a means of resolving their dispute and to the mediator as an assistant

in this effort. The commitment to the process and to an intervenor has been referred to in organizational development literature as a "psychological contract" (Schein, 1969, pp. 81–88). A psychological contract is a tacit agreement between mediator and disputant that their relationship exists for the purpose of settling the dispute and that it will be based on certain core values, such as openness and honesty.

At this point, mediators usually have to make a strategic decision about how explicit or formal the commitment process should be and what form it should take. In some situations and cultures, oral agreements to participate may be all that will be necessary. In others, the contracting may be more formal.

Formal contracts often specify fees, expected time expenditure, and specific services to be or not to be performed. Mediators vary considerably in the degree of formality they introduce into mediation contracts. Some want an explicit signed statement that the parties are committed to achieving a jointly satisfactory solution with the mediator's assistance. Others rely exclusively on more informal documents.

In some disputes, an attempt to gain overt commitment to mediation, either oral or written, may lead to a failure to begin negotiations at all. Mediators occasionally delay asking the parties to formally commit to mediation until a series of successful procedural and substantive decisions has been made. In this approach to achieving commitment, mediators first seek agreement that they can talk with one or more parties alone or in informal joint meetings. In these conversations, the disputants may discover common interests that can be built on to develop rapport between the parties and later, perhaps, to form substantive agreements. Such common interests are used to initiate formal discussions.

Between the two extremes of explicit written commitment and informal oral commitment is a strategic third option. Through questioning of and discussion with the disputants, a mediator may discover specific conditions under which conflicting parties will be willing to negotiate. These might include understandings about how the parties will interact in negotiation, the timing and location of sessions, or specific symbolic gestures that are demanded before discussions can begin. The mediator may work with the parties to meet these behavioral preconditions for negotiation. By set-

ting the stage and building a commitment contract, the mediator can encourage involvement without seeking a formal statement to that end. This approach has the advantage that parties do not have to overtly commit to the process to begin dialogue. However, it also has drawbacks: a precedent may be established that requires the mediator to constantly overcome limits or hurdles thrown up by participants who are not committed to the process; and the parties may balk at formalizing their commitment to any agreements.

In some large public disputes, mediator entry may initially be for data collection, and a party's participation in this phase of the process does not mean that a mediation will result or that the interviewee will necessarily be a participant. This form of entry is often called "convening" and will be described in Chapter Five. In this scenario, the intermediary wants to collect data that will be used to determine if mediation is desirable and feasible; invitations to participate and the commitment process that has been described will occur later.

Implementation of Entry

So far, I have explained the four general means of entry and the tasks to be accomplished by the mediator during this stage of intervention. I now turn to specific ways in which mediators initiate contact with disputants. These include letters, phone calls, personal visits, and third-party introductions. Depending on the mediator, institution, type of dispute, and characteristics of the disputants, various combinations of the above may be effective. Some mediators and mediation organizations make first contact with clients by phone, whereas others rely more heavily on personal interviews. Frequently, a combination of letter, brochure, and phone call is used to build credibility, describe the process, and gain commitment to mediate.

In complex disputes in which access to the main actors is tightly controlled or limited by some barrier such as race, channels of authority, or even physical inaccessibility (examples are volatile community conflicts and cases involving highly bureaucratic and hierarchical organizations), a secondary party may be used to introduce the mediator to one or more disputants. These introductions may be invaluable to the intervenor seeking entry into a closed dispute.

Two types of intervention activity are usually considered when determining the point at which a mediator should enter a dispute: data collection and problem-solving mediation activities. Although both types of intervention require entry by the mediator, their impacts on the dispute are quite different.

Data Collection

Entry to gather preliminary data about a conflict can be initiated at almost any time in the development of a dispute, although information may be more difficult to collect during certain phases of conflict development, such as the early escalation stage before the parties have decided to negotiate, or the stage in which negotiations have commenced but the parties do not believe a mediator is necessary.

The major strategic decisions about intervention for data collection focus primarily on whom to talk with, the sequence of interviews, and the content of interviews. More will be said about entry strategies for data collection in Chapter Five.

Problem Solving

The timing of mediator intervention to solve problems, as opposed to collecting data, is one of the most intensely debated topics in the dispute resolution field (Simkin, 1971; Kerr, 1954; Carpenter and Kennedy, 1979; Pearson, 1984). Some mediators argue that early intervention limits hostility and emotional damage. It may also alleviate the tendency for parties to polarize on substantive issues. Early entry may enable the mediator to prevent the development of a hard-line commitment on one side to options that are unacceptable to the other.

Another argument for early intervention concerns procedural advantages. Polarization often results when disputants fail to understand productive means or procedures to resolve their controversy. Early intervention can discourage unproductive negotiation behavior, can route the parties toward behavior or procedures that will result in settlement, and can deter energy-draining responses that may escalate a dispute and create barriers to settlement based on poor process rather than substantive differences.

Arguments for later mediator entry into a dispute center on

parties' needs to mobilize their power, to equalize the means they have to influence each other, and to occasionally demonstrate their coercive power before negotiations. Later entry may also allow for polarization to develop that often clarifies issues; provide time for the parties to vent emotions; and allow the parties themselves to request the assistance of an impartial mediator after they have exhausted their own procedural and substantive options.

Proponents of later intervention argue that parties need time to mobilize their forces and gather their means of influence in order to affect the other parties involved (Cormick, 1982; Crowfoot, 1980). They claim that early entry hinders this process; that the weaker party, who is not as well prepared for the conflict and therefore has less influence, may be overwhelmed; and that an unfair settlement may be either reached or imposed. Mobilization of resources might include visiting a lawyer and obtaining advice on the strength of a legal case, conducting research necessary for informed negotiations, mobilizing a community group to protest a particular policy, filing a case in court, or planning a strike.

Early-entry adherents generally do not disagree with those advocating late entry about the needs of parties to mobilize and, whenever possible, equalize power. Failure to gather the necessary data before negotiations is tantamount to playing a game of poker without looking at the cards. Failure to assess legal power or, when appropriate, extralegal action before negotiations can enable one party to take advantage of another.

Advocates of early entry diverge from their colleagues who advocate late entry on the question of demonstrating coercive power. They argue that mobilization and exercise of coercive options should be separated. Early-entry advocates point to experimental research (Rubin and Brown, 1975) demonstrating that the exercise of coercive power, although it may promote negotiations, does not necessarily promote cooperative behavior. This finding seems to be corroborated by research on outcomes of actual negotiations. Pearson (1984), for example, found that couples in divorce settlement mediation who had used coercive court mechanisms to obtain temporary orders had a lower rate of settlement than those who had not used legal coercion before settlement negotiations.

Late-entry advocates counter with valid case examples in which the exercise of force—by means of legal suits, strikes, or demonstrations—has been necessary to demonstrate a party's power and, in some cases, to force an opponent to negotiate. Last-minute pressure has clearly inclined parties toward agreement and has motivated them to request a mediator's assistance.

Mediators who look for easy answers regarding questions of power and timing of the impartial party's entry will probably find none. The best answer is that these factors depend on the case. If parties can mobilize power so that they are informed and so that the other side knows that they are dealing with a prepared and powerful adversary, the power may never need to be exercised, and the mediator may be able to intervene before a crisis exacerbates relationship problems or inflicts costs that provoke escalation. Early entry in the case may prevent unnecessary damage to either of the disputing parties. On the other hand, if the parties have unequal power, need a confrontation to mobilize resources, or must test each other's strength before good-faith bargaining can begin, mediators are advised to delay entry.

The argument for a period to vent emotions is also not contested by early-entry proponents. They do, however, maintain that unstructured and prolonged venting, which may occur if the mediator delays entry, may result in hostile or unproductive behavior that causes unnecessary psychological barriers. The final argument, which relates to the "ripeness" of a dispute for settlement, is an extremely important strategic issue that bears directly on the timing of intervention. Numerous mediators and negotiators have observed that disputes go through specific cycles, and that resolution of issues often cannot occur until disputants have performed ritual acts (Douglas, 1962). Mediator entry too early in a dispute, it is claimed, damages this developmental cycle.

Late-entry proponents argue that parties are not psychologically or strategically prepared to use an intervenor's services until they have reached an impasse and recognize that they cannot reach a settlement without third-party assistance.

> The safest rule postulates that a mediator should not enter a negotiation until there is a bona fide deadlock. The reason is self-evident. A premature intervention by the mediator relieves the parties

> of the pressure under which they are working. The reciprocal pressure is the basic force that keeps the parties moving through proposals and counterproposals. Entering the situation before a genuine deadlock is reached creates an atmosphere of relaxation in the parties, and consequently, the mediator has no basic element to keep the parties moving. Requesting the services of a mediator before the bona fide deadlock is usually a trick used by one or both parties to extend the negotiations. An intervention at this time will discourage the parties from reaching an agreement. One or both parties will relax their efforts while the mediator gets his fingers burned [Perez, 1959, p. 717].

Proponents of early entry, on the other hand, argue that the development of psychological readiness and motivation for settlement can often be accelerated by an efficient mediation process introduced early in a dispute. Early introduction of mediation can decrease levels of frustration, diminish polarization, and promote positive results. Success, rather than mutual frustration, can then become the driving force in negotiations.

The timing of entry is clearly an important strategic decision for mediators. At the current stage of research, not enough is known to specify in an unqualified manner the conditions under which early entry is superior to later intervention. Mediators should assess whether early entry is likely to be more detrimental to the disputants than delay. If the answer is no, an early intervention is probably the safer route.

Chapter Four

Selecting a Strategy to Guide Mediation

In Chapter One, I presented several approaches to conflict management and resolution. These spanned a continuum, with conflict avoidance at one extreme and physical violence at the other. As one moved from left to right in the diagram (see Figure 1.1), the approaches became progressively more directive and coercive. My concern in this chapter is with the processes people in conflict use to select a particular approach or combination of approaches along this continuum. Of particular concern is how and under what circumstances people select mediated negotiation as the principal way to manage or resolve conflict.

Related to the selection of approach is the selection of an arena. Arenas are locales for conflict management and resolution that vary on several dimensions: publicness and privacy, informality and formality, institutionalization and noninstitutionalization, and voluntariness and coercion. Any given approach can be acted out in a variety of arenas. For example, mediation can occur in a private setting that is informal, voluntary, and uninstitutionalized—as in child custody and divorce settlements conducted by a mediator in private practice. Alternatively, mediation can be conducted in a highly public setting with standardized behaviors and rituals, formal rules for participation, and an institutionalized structure. This is the type of arena used when the U.S. Environmental Protection Agency and other concerned parties engage in a negotiated rulemaking, or "reg-neg," to formulate new, consensually based regulations.

Parties need to select both the approach and the arena they think will best meet their needs and satisfy their interests.

Approach and arena selection is a relational decision, in that it occurs as a result of interaction between the people in conflict. Parties may use the same approach and arena, may partially coordinate their approaches or arenas, or may use entirely different approaches and arenas. To achieve a termination of the conflict, the parties must usually coordinate at least some of their dispute resolution activities.

A mediator can assist parties in selecting and coordinating approaches and arenas. He or she is often more aware of approaches and arenas than are disputing parties and can therefore educate them about alternatives in the early stages of prenegotiation and assist them in selecting an appropriate means of conflict management and dispute resolution that will best meet their needs and capabilities.

The Mediator-Disputant Relationship and Decision Making

The roles available to mediators in helping disputants make decisions about conflict approaches and arenas are similar to those from which lawyers must select. Hamilton (1972, p. 41) outlines three philosophical stances that a lawyer may take in advising and counseling clients:

A. Collect the facts, explain how the law applies, analyze, recommend a best course, or courses, of action, and argue for its adoption.
B. Collect the facts, explain how the law applies, analyze, explain the course of action open to the client, and leave the decision entirely to him.
C. "B" above, except with discussion of the ramifications of the course of action and the situation until the client is able to make his decision.

Mediators must choose among the same three stances, with the exception that they do not interpret the law.

The majority of mediators probably see their role as defined by option C, in which the task is to assist disputants in making their own decision based on information supplied by the mediator about the opportunities available through various approaches and are-

nas. Most mediators view their relationship with the disputant as collaborative; information is shared to develop the wisest and most considered decisions possible.

The Approach and Arena Decision

Mediators do not automatically assume at the beginning stage of intervention that mediated negotiation is the best approach for conflict management or resolution. It is only through a careful assessment process that the disputants and the mediator may jointly arrive at this conclusion.

There is no one decision-making procedure that is appropriate in all disputes for determining whether mediation is the best approach. Mediators can, however, assist disputants in accomplishing some of the following tasks:

1. Identifying the interests or goals that must be satisfied in a potential settlement
2. Considering the range of possible and acceptable dispute outcomes
3. Identifying the conflict resolution approaches that may assist disputants in reaching individual, subgroup, or collective goals
4. Identifying and assessing criteria for selecting an approach
5. Selecting and making a commitment to an approach and arena
6. Coordinating, if necessary, the approaches used by the disputants

In the following sections, I will explain each point in more detail.

Interests to Be Satisfied

At this point, the mediator often talks with the parties separately and will encourage them to carefully examine their own interests and those of other parties to arrive at answers to the following questions:

1. What interests (substantive, procedural, and psychological) must be met by a conflict management approach and resolution?

2. What interests are mutually incompatible or overlap with the interests of other parties?
3. What interest is there in an ongoing relationship?
4. What forms of actual or potential power do the parties have that would allow them to impose their will on other disputants in order to achieve their interests?
5. How important or salient are the various interests to each actor in the dispute?

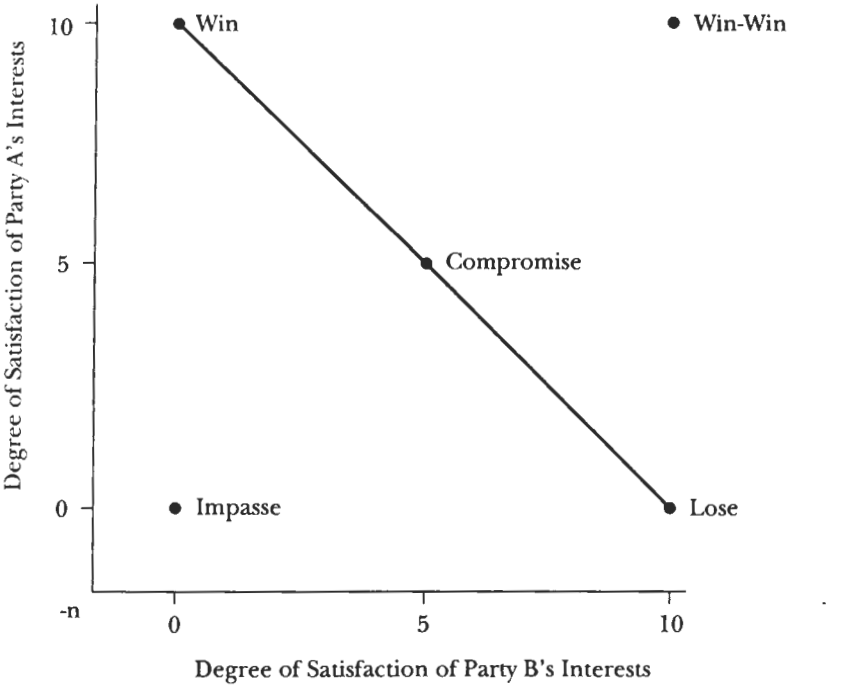
The analysis of interests enables the parties and the intervenor to determine whether any common interests exist and to assess the purity of the dispute (Kriesberg, 1973). *Purity* refers to the degree of exclusivity of interests. A pure conflict is one in which all interests are incompatible—for example, no settlement options are available that can satisfy one party's interests without sacrificing those of another. A mixed conflict allows for some satisfaction of all interests. If a conflict is pure, parties have little to negotiate. If it is mixed, negotiation and mediation are appropriate approaches to dispute resolution.

For example, if divorcing spouses both demand legal custody of their child and there are no provisions in their jurisdiction for joint custody, the conflict could be pure: neither party could win legal custody without the other losing. On the other hand, if both parents want to share their relationship with the child and are interested in allocating time equitably, the conflict is mixed and suitable for negotiation.

Possible Dispute Outcomes

After identifying the interests involved in the conflict, mediators usually work with each party separately to assess potential—and in some cases, probable—conflict outcomes. Thomas (1976) identifies five possible outcomes to any given issue in dispute. Clark and Cummings (1981) elaborate on Thomas's themes. Their combined results are represented in Figure 4.1. For the sake of clarity, this figure represents a dispute with only two sides and illustrates a conflict from the viewpoint of Party A.

Figure 4.1. Possible Outcomes of a Dispute as Viewed by Party A.



Win-lose outcomes occur in the upper left and lower right corners of the chart. The difference is in which party wins. Win-lose outcomes are most common when

- One party has overwhelming power.
- Future relationships are not of great concern.
- The stakes for winning are high.
- One party is extremely assertive and the other is passive or not as aggressive as the "winner."
- Satisfaction of the interests of the disputants is not dependent on their mutual cooperation.
- One or more parties are uncooperative and are unwilling to engage in cooperative problem-solving negotiations in which interests can be mutually satisfied [Moore, 1982b, p. V–3].

Impasse outcomes are present in the lower left corner. These outcomes result when parties are not able to come to an agreement. They occur when

- Both parties choose to avoid the conflict for whatever reason.
- Neither party has enough power to force the issue.
- There is lack of trust, poor communication, expressive emotion, or an inadequate resolution process.
- The stakes for winning are low or neither party cares about the dispute.
- The interests of the parties are not related.
- One or more of the parties are uncooperative [Moore, 1982b, p. V–3].

Compromise outcomes are illustrated by the central portion of the diagonal line. Such outcomes occur when all parties give up some of their goals to obtain others. They are likely to happen when

- Neither party has the power necessary to win totally.
- The future positive relationship of the disputants is important but they do not trust each other enough to work together for integrative solutions with mutual gain.
- The stakes for winning are moderately high.
- Both parties are assertive.
- The interests of both parties are mutually interdependent.
- The parties have some leeway for cooperation, bargaining, and tradeoffs [Moore, 1982b, p. V–3].

Win-win outcomes occur when all parties feel that their interests have been satisfied. Conditions for win-win outcomes are present when

- Both parties are not engaged in a power struggle.
- A future positive relationship is important.
- The stakes are high for producing a mutually satisfactory solution.

- Both parties are assertive problem solvers.
- The interests of all parties are mutually interdependent.
- Parties are free to cooperate and to engage in joint problem solving [Moore, 1982b, p. V–3].

Mediators discuss with parties various possible outcomes and how they meet the interests of the disputants. Ideally, the outcomes and interests should match.

Range of Approaches

Once a party has assessed its interests and those of other parties and reviewed potential dispute outcomes, it must select a particular approach to reach the desired end. Approaches are general procedures for resolving disputes; they include such options as unassisted negotiations, negotiations with the assistance of an advocate, conciliation to handle emotional or relationship barriers, facilitation, mediation, arbitration, and litigation.

Approach selection depends on a variety of criteria, including the outcome that is desired and the strategy that is to be used. Mediators review general strategy options open to the parties and how these strategies may be applied within the context of a given approach. Strategy assessment is usually conducted by the mediator privately with each party.

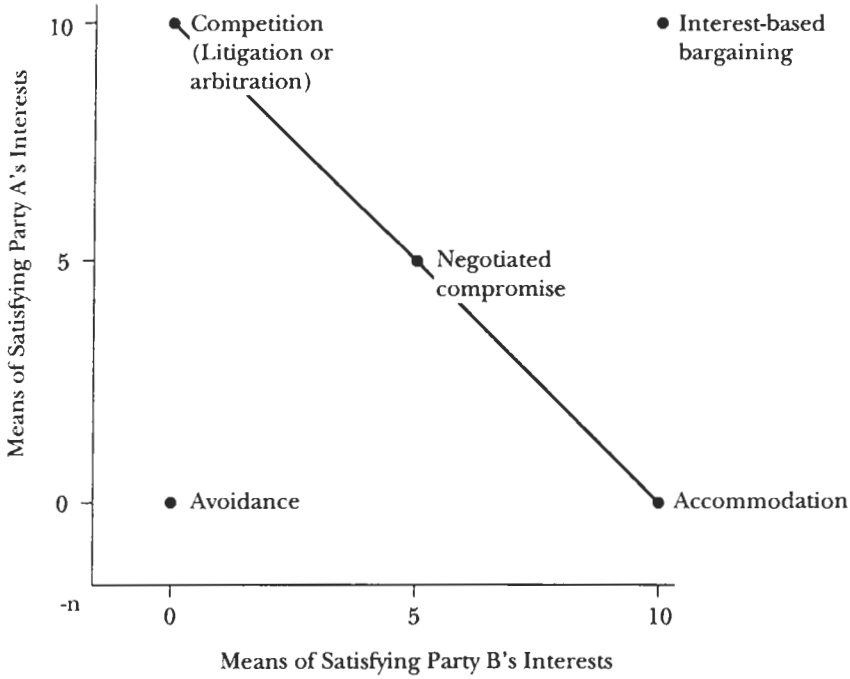
There are five general strategy options: competition, avoidance, accommodation, negotiated compromise, and interest-based negotiation. Figure 4.2 describes strategy options as viewed by Party A.

Competition

In some situations, a party's interests are so narrow that they can be met by only a few solutions, none of which are acceptable to other parties. Such a party may choose a competitive approach and strive for a win-lose outcome, especially when it has more power than its opponent. Competitive approaches include litigation, arbitration, and extralegal activities such as tactical nonviolent direct action and violence.

In deciding to use a competitive approach, a party should weigh the costs as well as the benefits of its conflict behavior:

Figure 4.2. Conflict Strategies as Viewed by Party A.



- Will the party get what it wants over the long term as well as short run?
- Will competitive behavior destroy relationships that will be important in the future?
- Does the party have enough power to guarantee a win? What happens if it loses?
- Will competition provoke competition in other areas?
- Will a competitive strategy lead to the most desirable solution? [Moore, 1982b, p. V–4].

Avoidance or Stalemate

Conflict avoidance can be either productive or unproductive in satisfying interests. People avoid conflict for a variety of reasons:

fear, lack of knowledge of management processes, absence of interdependent interests, indifference to the issues in the dispute, or belief that agreement is not possible and conflict is not desirable.

Blake, Shepard, and Mouton (1964) noted that avoidance approaches have various levels. The first may be to claim a position of *neutrality.* Stating "We have no position on this issue at this time" is a way to avoid being drawn into a dispute.

At the second level of avoidance, *isolation,* disputants pursue their interests independently, with limited interaction. Groups are allowed to have their "spheres of interest" if they do not impinge on another's domain. This strategy is used frequently when a conflict of interest exists, but overt conflict is not desirable. For example, in organizational disputes, individual managers or departments may be assigned exclusive decision-making authority over specific matters. In divorce cases, some parents agree to spheres of interest regarding educational or religious upbringing for their children or different norms for the two homes. For example, at one parent's home, the child is allowed to watch television three hours a day and at the other's may not watch at all. The parties agree to disagree on parenting styles, and they contract not to fight each other on the issue.

People or groups that have been repeatedly defeated frequently use *withdrawal* to ensure their continued existence and to avoid any conflict that might lead to another defeat. Withdrawal means total dissociation of disputants. This strategy does not encourage or promote mediated negotiations.

Accommodation

Accommodation occurs when one party agrees to meet the interests of another at the expense of its own needs. An accommodation strategy is pursued when

- Sacrifice of some interests is required to maintain a positive relationship.
- It is desirable to demonstrate or foster cooperation.
- Interests are extremely interdependent [Moore, 1982b, p. V–5].

A positive accommodative approach may be pursued when there is hope that a more collaborative process or benefit trading may occur later on other issues. For example, when a developer voluntarily agrees to spend additional funds to add an amenity demanded by a dissatisfied homeowners' group, he is accommodating himself to their needs. He does not have to spend the money but decides that a positive ongoing relationship is worth the expenditure.

Accommodation may also be pursued for negative reasons:

- Parties lack the power necessary to pursue an alternative strategy.
- Parties are passive or unassertive.
- Parties have a lower investment in the outcome [Moore, 1982b, p. V–5].

Negotiated Compromise

Bargaining to reach a compromise is selected because

- The parties do not perceive the possibility of a win-win situation that will meet their needs and have decided to divide and share what they see as a limited resource.
- Interests are not seen as interdependent or compatible.
- The parties do not trust each other enough to enter into joint problem solving for mutual gain.
- Parties are sufficiently equal in power so that neither can force the issue in its favor [Moore, 1982b, p. V–5].

Many out-of-court settlements are negotiated compromises. A judicial decision is risky for both sides because it is not clear who will win. Parties and their advocates frequently split the difference to ensure that each gets some of what they want, and each party shares some of the loss.

Interest-Based Negotiation

In contrast to competition and compromise, in which the outcome is seen as division of fixed resources, interest-based procedures

seek to enlarge the range of alternatives so that the needs of all parties are addressed and met to the greatest extent possible.

Interest-based procedures work best when

- Parties have at least a minimal level of trust in each other.
- Parties have some mutually interdependent interests.
- Equal, but not necessarily similar, means of influence exist, or the party with the superior power is willing to curtail the exercise of power and work toward cooperative solutions.
- Parties have a high investment in a mutually satisfactory outcome because of mutual fear of potential costs that might result from impasse.
- Parties desire a positive future relationship [Moore, 1982b, p. V–5].

Each of the preceding strategies can be pursued in the context of several approaches and arenas.

Parties must match their strategy with their interests and link it with an approach that offers the best prospects of satisfying them. Mediators should help parties to decide if they want to compete, avoid, accommodate, compromise, or seek a cooperative settlement. Once the party has selected a general strategy, it chooses an approach that best implements the strategy. Of all the strategies described, compromise, accommodation, and interest-based negotiation are the most compatible with the negotiative approach.

Selection of a general strategy to guide a negotiation approach does not mean that other strategies will not be used to respond to particular aspects of a dispute. For example, a party may choose to compete on central or core issues but to avoid or accommodate on others. Selection of a general strategy is merely a guide for subsequent negotiations. Strategy will often change once the parties have started discussions and have become more informed about issues, interests, and means of influence of other parties. Parties commonly select a competitive strategy, decide to negotiate, and then shift to a strategy of compromise or interest-based negotiations.

Mediators aid parties in matching interests, approaches, and strategies by helping them identify and assess an approach's potential for reaching a satisfactory outcome. Generally, a mediator

should suggest, and help a party assess, more than one approach and strategy so that he or she does not seem to be advocating a particular method of resolution. The mediator may also discuss possible arenas that may be combined with an approach. For example, a party might consider litigation as a means of forcing a party to negotiate. The mediator might explore with the party the use of the threat of litigation to promote settlement negotiations.

Criteria for Selecting an Approach and Arena

After presenting possible approaches and arenas, the mediator can assist the parties in identifying relevant criteria that should be considered in making the selections. Criteria may be different for interpersonal, commercial, organizational, and public disputes. There are, however, many similarities. Some of the criteria or variables for selecting an approach or arena are cost, time, the relationship between the disputants, the internal dynamics of the dispute, and power.

The question to be asked with respect to *cost* is: What will be the costs (direct costs, salary costs, delay costs, lawyer fees, and so on) of pursuing each approach or arena?

As far as *time* is concerned, the questions will include

- How long will it take to settle the dispute using each approach or arena?
- Is a rapid or a delayed settlement desirable?
- Are there any critical deadlines or time constraints to be considered? Does a deadline pose an opportunity or a crisis for one of the parties?
- What is the most advantageous time to settle?
- Do the parties need more time to mobilize resources or build credibility and commitment among a constituency for a particular course of action?

With respect to the *relationship between disputants,* the key questions will be

- Is the conflict a single-encounter dispute, or is it occurring in the context of an ongoing relationship?

- What type of relationship is desired at the end of the dispute?
- How will the use of various approaches and arenas affect the ongoing relationship?
- Do any of the proposed approaches and arenas seem unfair or in conflict with relationship or community norms?
- What effect will selection of an approach or arena have on the public image of the party or parties? Do the various options enhance or detract from public credibility?
- Will the selection of a particular approach or arena affect future conflicts of this type?

The questions to be asked about *internal dynamics,* according to Crowfoot (1980), are

- Is the individual or organization stable and effective enough to pursue various approaches?
- Will the approaches involve the membership of the organization? How and at what costs or benefits?
- Will a particular approach or arena build or unify membership and the organization?
- Does a particular approach build self-acceptance, confirmation, essentiality, and a psychological feeling of success or failure (Argyris, 1970)?
- Do the individuals or organizations have the necessary leadership and skills to pursue a particular course of action?
- Do the individuals or organizations have the time, energy, and financial and emotional resources to pursue a particular course of action?

The relevant questions about *power,* as identified by Simokaitis (n.d.), are

- What power or means of influence do disputants have to make the other side give them what they want?
- How powerful does the party believe the other side perceives it to be?
- What possible allies and other sources of power might the party be able to tap?

- What might happen to limit the party's power?
- What are the limits on the power of the other disputants?

Once decision criteria or variables are identified, the mediator should assist a disputant in assessing how important each criterion is, and how it affects the selection of a particular approach and arena. Mediators may assist parties in making this assessment by providing a structure for a cost-benefit analysis (Moore, 1982b), by developing a decision tree (Behn and Vaupel, 1982) that identifies strategic choices and possible outcomes, or by helping participants assess probabilities of outcomes through an analysis of similar cases or trends (Bellows and Moulton, 1981).

An initial statement by parties that they want to mediate should not necessarily be taken at face value. A careful assessment of their interests and their criteria for selecting an approach and arena may reveal that they are not willing to make the substantive, procedural, or psychological offers that would be required by a negotiated settlement. In these situations, the mediator should advise the parties that other approaches to resolving the conflict may be more appropriate.

Commitment to Approach and Arena

Once all approaches and arenas have been compared according to the criteria, the mediator should assist the parties in making a final selection. Careful assessment of valid information about potential outcomes from each procedure usually helps people build internal commitment to a choice of action. "Internal commitment means the course of action or choice that has been internalized by each member so that he experiences a high degree of ownership and has a feeling of responsibility about the choice and its implications. Internal commitment means that the individual has reached a point where he is acting on the choice because it fulfills his own needs and sense of responsibility, as well as those of the system" (Argyris, 1970, p. 20).

Internal commitment to negotiation with the assistance of a mediator will help the parties in dispute to struggle together to reach an agreement. If the mediator has done his or her job well,

assisting the parties in selecting mediated negotiations will have moved them closer to a resolution.

Coordination of Approaches and Arenas

Approach and arena selection by one disputant does not mean that the same approach or arena will be selected by other disputants. The approach and arena assessment process must be conducted with all of the primary parties in a dispute.

Mediators may assist parties who are operating with different approaches or in different arenas in coordinating their conflict resolution efforts so that they can cooperatively reach a solution rather than spend unnecessary time, money, physical energy, or emotional effort on unproductive conflict activity. For example, Party A wants to negotiate a settlement on one issue, but not while litigation is being conducted on another. The mediator may help Party A defer litigation until after the negotiable issues have been discussed.

In collective bargaining situations, where negotiation is the accepted and preferred means of settling conflicts, the parties are less likely to encounter the coordination problems that arise in interpersonal, organizational, or community disputes. In the latter types of conflicts, disputants often lack either a common approach or a common arena. They may in fact have no prior history of interaction and therefore no traditional or accepted way of resolving conflicts. In these types of disputes, the mediator can play a critical function in assisting the parties with the coordination of their conflict resolution efforts.

There are, however, situations early in the negotiation process in which perfectly coordinated procedures are not attainable. These situations arise when parties

- Are not psychologically prepared to commit themselves to a particular approach
- Are not dissatisfied with the approach currently being used
- Want to try noncoordinated activity, hoping for a win-lose outcome in their favor, before cooperating
- Feel that a coordinated approach offers them no advantage

- Feel that they do not have equal influence or power that could be effectively used if a coordinated conflict resolution approach were pursued
- Do not have the resources to engage in a coordinated effort

When faced with parties who are not prepared to coordinate their conflict resolution approaches, the mediator has several strategy options:

1. If coordination of efforts has no advantage to a disputant, the mediator can encourage the parties to pursue their chosen approaches and inform them that if it is advantageous to negotiate or mediate at a later time, the option remains open. In counseling the parties in this way, the mediator should refer to the various costs and benefits identified by the disputant of pursuing the uncoordinated course.
2. The mediator can negotiate a procedural approach to the dispute in which the parties agree to begin negotiations while retaining their right to pursue other approaches or arenas of dispute resolution, including the continuation of hostilities.
3. The mediator may begin negotiations with fewer parties in the hope that others may be persuaded to join later or be impelled to join because of the fear that a settlement will be reached without them.
4. The mediator may obtain a tentative commitment to explore negotiation or mediation through a prenegotiation conference. This conference may have as its goal conciliation or the negotiation of a mutual and cooperative conflict management procedure.
5. The mediator may continue with efforts to persuade the parties to begin negotiations.
6. The mediator may seek out additional parties who may be able to encourage the principal disputants to try negotiation.

Chapter Five

Collecting and Analyzing Background Information

Data collection and conflict analysis enable a mediator and disputants to identify the key parties in the conflict, determine the issues and interests that are important to them, and explore the relationships and dynamics—historical and current—that exist between them. The process of identifying the components and dynamics of a conflict is *data collection;* the integration and interpretation of that information are *analysis.*

Through data collection and analysis, the mediator will

- Develop a mediation plan or conflict strategy that meets the requirements of the specific situation and the needs of all parties
- Avoid entering a dispute with a conflict resolution or management procedure that is inappropriate for the stage of development or level of intensity that the dispute has reached
- Operate from an accurate information base that will prevent unnecessary conflicts due to miscommunication, misperception, or misleading data
- Clarify which issues and interests are most important
- Identify the key people involved and the dynamics of their relationships

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Note: The conceptual outline for this chapter was originally published in 1982 by ACCORD Associates as part of their training manual, *Natural Resources Conflict Management,* by Christopher W. Moore in collaboration with other ACCORD staff. The author gratefully acknowledges permission to use some of the original outline and concepts first presented in that manual.

The first part of this chapter will examine methods of data collection. The second part will explore how information is integrated and analyzed. The chapter focuses primarily on data collection and analysis in disputes between more than two people or parties. However, the process is basically the same for conflicts between only two individuals.

The amount of time spent on data collection depends on the complexity of the dispute. An interpersonal conflict clearly requires less time to be expended in data collection—perhaps an hour or two with each party—than does a complex social policy dispute in which months may be needed to gather relevant information.

Data collection can be conducted before negotiation or once negotiation has begun. Because I prefer to perform preliminary data collection before joint sessions, I will assume in this chapter that the mediator is meeting with parties separately before starting formal mediation in joint sessions.

Useful and accurate data collection depends on several factors:

1. A framework for analysis and adequate background information
2. An appropriate method of data collection
3. An appropriate person to collect the data
4. A strategy for data collection and for building rapport and credibility with involved parties
5. Appropriate interviewing approaches that encourage valid responses
6. Appropriate questions and listening process during interviews

Framework for Analysis

All conflicts involve specific people, relatively predictable dynamics of development, competing interests, and tangible and intangible issues. These common components of disputes allow a general framework to be created that is useful in generating questions and explanatory hypotheses about a given dispute.

Mediators may use categories in Figure 2.1 (see p. 60) as a basic framework for analyzing a conflict. Relationship problems, data disagreements, competing interests, structural barriers, and value differences should be considered as potential causes of conflicts.

In addition, factors that promote positive relationships, points of data on which the parties agree, compatible or nonexclusive interests, structural variables that enhance constructive interaction, and common or superordinate values should be identified as factors that may be encouraged or enhanced to promote agreement.

Data Collection Methods

Mediators use several procedures to collect data: direct observation, review of secondary sources, and interviewing. These procedures are used either individually or in combination to provide more accurate or complete information about a given conflict.

Direct Observation and Site Visits

A mediator may watch a couple fighting at the beginning of a mediation session, may attend and observe a public meeting, may visit a proposed development site, or may attend a company briefing to gather firsthand information on how the parties react and interact in a conflict.

Observation goals vary from dispute to dispute. The focus can be on any of three levels: individual behavior, interaction within subgroups, and interaction between groups. From observation, the mediator can determine social class, status, power, and influence relationships; communication patterns; and group routines that will influence the conduct of a conflict.

Consultation of Secondary Sources

Secondary sources are materials that provide information about a dispute without direct observation or interviews. Helpful secondary sources may include financial records, minutes of meetings, maps, organizational or government reports, newspaper or magazine articles, tape-recorded or videotaped presentations, and research conducted on the issues or people involved in a dispute.

Interviewing

The most common way for many mediators to gain information is to interview involved parties. There are two broad types of interviews that may be used in mediation: data collection interviews and persuasive interviews (Stewart and Cash, 1974). The first type is used to collect relevant information, the second to persuade dis-

putants that a particular procedure or outcome is desirable. The focus of this discussion will be on data collection interviews.

Such interviews may be conducted either before or during joint meetings. Some mediators prefer to hold a preliminary data collection interview with each individual or party before a joint meeting. This provides the interviewer with information necessary to understand some of the people, issues, and dynamics of the conflict before interacting in a joint session. Preliminary interviews often provide the mediator with more information about the dispute than is known by any one party. This knowledge enables him or her to plan how the parties will educate each other about issues and interests in joint sessions; it also identifies information that needs to be exchanged to clarify misperceptions, fill in data gaps, and help the parties reach agreement.

Data collection interviews also serve to introduce the participants to the mediator. The personal and organizational rapport and credibility that are built during the interview strongly influence the amount and quality of information gathered and the receptivity of the disputant to the mediator's later interventions. Rapport is often more easily developed in one-on-one interviews than in joint sessions.

Finally, data collection interviews allow an exchange of information about the mediation process. A mediator can use the data collection interview to describe his or her proposed process in more detail and to solicit procedural or substantive suggestions from interviewees. A dialogue on processes for conflict management may be the first step toward collaborative problem solving.

Data collection interviews may also be conducted at the start of joint meetings. Data collection is then performed in the presence of all involved parties. Such interviews allow the parties to educate each other, provide an opportunity for the mediator to watch how the disputants interact, and enable the mediator to verify that information presented in the joint meeting is consistent with that provided in the earlier private interviews.

Data Collector

Many mediators delegate the task of conducting the initial interview to an "intake" worker, whose findings form the basis of a case file. Although this arrangement may save time for mediators, it may

also hinder the subsequent development of rapport and credibility between the mediator and the disputants. Usually, the mediator will have to follow up with his or her own brief data collection interview to build rapport with the parties.

In some conflicts, mediators or their agencies may prefer to collect data and mediate in teams. Male-female or lawyer-therapist teams are often utilized in child custody and divorce cases. In complex public policy or environmental disputes, interviewer-mediator teams may be involved. Co-mediators should take care in data collection to work together as much as possible, to frequently exchange any information that they obtain individually, and to minimize the possibility of working at cross purposes.

In some disputes, assignment of mediators to a particular type of conflict or interviewee may be an important move in securing fuller information from a respondent. Gender, age, race, social class, status, and previous relationship with the interviewer may affect the amount of information that can be obtained. For example, a woman disputant may feel more comfortable relating an incident of domestic violence if one of the mediators is a woman. In some interracial disputes, a minority mediator's presence has made a difference in the willingness of parties to be involved.

Usually, the more the respondent identifies with the interviewer or mediator, the better he or she will respond to the intermediary's influence. Mediators can often manage their own dress, speech, and manners, and can use these attributes to enhance the possibility of interviewer-respondent identification.

Data Collection Strategy

A strategy is a conscious approach for solving a problem. In this context, the problem is how to get enough information about a dispute from the parties so that the intermediary can develop an intervention plan that will assist them. The information includes identification of key parties and a strategy for approaching them.

Identification of Parties

In many interpersonal and organizational disputes, parties are easy to identify, and the mediator can easily determine whom to interview. In divorce cases, for example, the husband and wife and per-

haps the children will be targeted for interviews. The same is true in two-party commercial or insurance claim cases, but it is not always the case in cross-cultural cases, where extended family members—parents, uncles, aunts of the disputants—and numerous other concerned parties may need to be involved in order to resolve a dispute.

In conflicts in which there are multiple disputants and the parties are not well organized or highly visible, the mediator may have to identify main actors before data collection can begin. In public disputes, mediators use procedures similar to those used by researchers in community power-structure research (Aiken and Mott, 1970). The methods about to be described are used alone or in combination to assist mediators in identifying critical individuals, groups, and organizations that must be involved in a dispute resolution initiative.

The *positional approach* (Jennings, 1964; D'Antonio, Loomis, Form, and Erickson, 1961) identifies the main formal institutions or organizations involved and targets the people who fill their key positions. The chief executive officer of a company, members of a county commission, or the elected president of a public interest group all occupy positions of authority. The assumption of this approach is that those in key formal positions of authority in the institutions or organizations involved in a dispute are those who will make decisions about how the conflict will be handled and resolved. In many cases, this may be true, although positional power holders may not have the authority to decide any given issue. Formal leaders of social, economic, and political institutions may not be as important as an individual without a formal position who can mobilize a group of supporters, make a technical decision, or initiate a lawsuit.

The assumption of the second identification method, the *reputational approach* (Walton, 1966; Hunter, 1953), is that people with a reputation for having power are indeed powerful. Mediators ask a group of reliable informants, "Who are the central people who should be interviewed about this conflict?" These informants are often knowledgeable observers of the dispute—but not active participants—or other primary parties. Names gathered in this process are cross-referenced, and the people who are most frequently mentioned are considered to be central to the dispute.

The weakness of this method, similar to that of the positional approach, is that perceived power does not necessarily mean actual power. Only through interviews can the two aspects of power be correlated.

The third identification method is the *decision-making approach* (Polsby, 1960; Dahl, 1961). In this method, the mediator seeks to ascertain who within an organization or group has been involved in previous decisions on issues similar to the one in question—and at what level they have been involved. The assumption is that certain people are likely to be repeatedly involved in the same type of issue. This method depends on the mediator's ability to review prior decisions and to identify the people who took part in them. It focuses on those participating in a conflict, the processes they have used in the past to influence decisions, and the development of conflict relationships over time.

All these approaches for identifying the key people in a conflict have merits and weaknesses, both in their theoretical assumptions and in their applications. Mediators will usually find that a combination of approaches produces the most reliable data on potential interviewees.

Sequencing of Interviews

After the interviewees have been targeted, mediators should consider the sequence of interviews. In interpersonal disputes and occasionally in other conflicts, the party that initiates mediation is interviewed first. These parties are often more amenable to providing information than those who are responding to another's initiative.

Because the sources of data in conflict situations are individuals under actual or potential emotional stress, great care should be taken to determine a sequence of interviews that will not antagonize anyone.

In multiparty disputes, the mediator will have to develop a more detailed process for sequencing interviews. Often, he or she may have to contact secondary or less involved parties before talking to the principals. This helps to identify disputants, generate a more accurate picture of the conflict, practice questioning techniques, and obtain valuable information on the most suitable interviewing approach before talking with the main actors. Secondary

parties are invaluable resources in disputes, because they often have a more objective view and may also be able to introduce the interviewer to other parties to the conflict. For example, in a university dispute, a department's secretary may be highly informative on the dynamics of faculty members and students and the critical interests and issues that concern them.

The mediator should frequently ask a secondary party, "Who is it important for me to talk with?" and "Who should be talked with first?" Inclusion of interviewees in interview sequencing decisions often gives the mediator valuable information about those most central to the dispute. In some instances, an interviewee may offer to call a friend and provide an introduction.

When secondary sources have provided sufficient data for the mediator, he or she should develop a strategy and a sequence for interviewing the central figures. Questions that frequently guide the sequencing include

- Who are the most powerful or influential people in the dispute?
- Who will be offended if he or she is not interviewed or is not interviewed first?
- Who should be interviewed earlier so that his or her cooperation can be used to induce others to participate in interviews?
- Who is the person most likely to talk about the problem?

Before interviewing the central individuals, the mediator may conduct research on what roles they play in the conflict, what positions they have held on similar issues, their likes and dislikes, and their personal traits. This information may expand the potential for data collection in the interview.

Timing of Data Collection Interviews

Data collection can be conducted before or at the time of joint sessions. Questions that mediators can ask themselves to determine if a premediation data collection interview is necessary include

- Are the parties extremely hostile toward each other? Is there a potential for violence?

- Do the parties have widely divergent viewpoints on the issues in conflict?
- Do their styles of communication in joint session inhibit a clear exchange of views on the issues in dispute?
- Are multiple issues involved?
- Are issues extremely complex?
- Is there a likelihood that additional data or factual information may be needed before a joint session?
- Does one of the parties appear to be weaker than another?
- Does one party express fears of being dominated by another?
- Is one party unclear about the mediation process or the role of the mediator?

A yes to any of the preceding questions indicates that a premediation interview for data collection may be appropriate.

If a mediator decides to use a premediation conference, he or she should carefully explain to all parties the purpose of the interview, its duration, the scope of issues to be covered, and limits of confidentiality of data revealed in the sessions. Most mediators hold to the standard that information exchanged in the premediation data collection meeting and in later separate caucuses is confidential and will only be revealed publicly or in joint session with the consent of the disputants. However, others make exceptions to this rule, most notably when criminal conduct, child abuse, or risk of physical harm is involved.

Some mediators opt to conduct all their initial interviews in joint session, with all disputants present. This choice may be based on strategy, convenience, time constraints, complexity, limits on confidentiality, or a desire to avoid suspicions of partiality. The forum for data collection may also be constrained by the wishes of the disputants—one or more of whom may not wish to meet separately because of distrust of the mediator—or by political factors, such as rules on open meetings or sunshine laws. More will be said in Chapter Eight about conducting data collection interviews at the start of a joint session.

Development of Rapport and Credibility

The first five to ten minutes of any data collection interview may be the most critical to building rapport and establishing personal credibility. This has been called the "social" stage of the interview

(Survey Research Center, 1969). (Clearly, the cultural context of the dispute and the relationship of the mediator to the party will greatly influence the length of time and the content of this activity.) In this brief period of informal conversation, the mediator should try to present himself or herself as an open, warm, intelligent, and interested person. A mediator should first take some time to have an informal conversation on noncontroversial topics of mutual interest. This conversation should not include subjects that might create distance or dissonance between the mediator and the disputant.

Once the initial phase of developing rapport has been completed, the mediator begins the process of credibility building referred to in Chapter Three. A mediator builds credibility from the moment he or she makes the first phone contact, but the face-to-face interview provides an additional opportunity to do so. Mediators usually decide in advance how much to explain about themselves, the mediation organization, their relationship to the various parties, and the mediation process before going on to direct questioning. Disputants may need to know more about the process and the mediator with whom they will be working before they can enter into trusting communication.

The mediator must also motivate the participant to respond. This will be easy or difficult depending on the participant's disposition toward the issue in dispute, the procedure, and the mediator. Responsiveness is often facilitated by rapport building and by the discovery of commonalities between mediator and participant. For example, in collecting data for an environmental case on acid drainage from an old coal mine in rural Pennsylvania, I interviewed an elderly coal miner who sat as a member of a county water board. I asked him about his family's history in the area and then allowed lots of time for him to talk. I did this not only to learn more about the man and his background but also to give myself an opportunity to mention that my grandparents, too, had settled in the area; he could then feel that we had something in common. Some of the motivation strategies that mediators can use to elicit information include

- Explaining the importance and worth of the data to the mediation process so that the disputant feels that he or she can make a genuine contribution toward a positive change

- Stressing the need to hear all views, especially those of the interviewee
- Explaining the benefits of participation
- Answering questions that may decrease resistance to participation
- Demonstrating a positive personal interest in the disputant's concerns, problems, or viewpoints

Most mediators use a combination of these motivation strategies.

Interviewing Approach

The interviewing approach often significantly affects the kind, form, and detail of the information that is collected. It also influences who is in control of the process and content of the data collection effort—the party being interviewed or the mediator.

Focused Versus Nonfocused Interviews

In some data collection interviews, the mediator determines specific areas about which he or she wants to obtain information through prior secondary source analysis. In other cases, mediators are more interested in conducting general exploratory interviews that may become more focused after the disputant has shared his or her perception of the conflict.

Advantages to interviews with specific foci include

- The ability to focus on issues that are deemed relevant by the mediator
- The greater ease of filtering extraneous or irrelevant information
- The ability to gain the most helpful information in the shortest amount of time

The major drawbacks are that

- The mediator may bias the information received by encouraging the disputant to give answers he or she thinks the interviewer wants.
- The mediator may miss valuable information the participant would have revealed if the questioning had been more comprehensive.