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Chapter One

Approaches to Managing and Resolving Conflict

Conflict or disputes seem to be present in all human relationships and in all societies. From the beginning of recorded history, we have evidence of disputes between spouses, children, parents and children, neighbors, ethnic and racial groups, fellow workers, superiors and subordinates, organizations, communities, citizens and their governments, 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 ways of peacefully resolving their differences. In seeking to manage and resolve conflicts, they have tried to develop procedures that are efficient; that satisfy their interests; that build or maintain relationships, where appropriate; that minimize suffering; and that control unnecessary expenditures of resources.

In most conflicts, the parties involved have a variety of means at their disposal to respond to or resolve their differences. The procedures available to them vary considerably in the *way* the conflict is addressed and settled and often result in different outcomes, both tangible and intangible.

This chapter begins with an analysis of a specific interpersonal and organizational conflict and explores some of the procedural options available to the parties involved for managing and resolving it. Mediation, one of those options, is examined in depth, and a detailed description is given of its historical and present-day applications and variations.

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

Fairview 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 every doctor who joined 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 covenant not to compete, or a no-competition clause, stating that should a doctor choose to leave the clinic prior to the expiration of the agreement, he or she would not be allowed to practice medicine in that town or county during the time remaining on the contract; violation of this clause carried an undefined financial penalty. The clause was designed to prevent a staff doctor from building up a practice at the clinic and then leaving with his or her patients to start a private competitive practice in the community before the term of the contract had expired.

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When Janelle and Andrew joined the Fairview staff, they each signed a contract and initialed all the clauses. Both doctors performed well in their jobs 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 tension between them mounted to the point where they decided to get a divorce. Because they both wanted to be near their two young children, they agreed to continue living in the same town.

Every physician at the clinic had a specialty, and all relied on consultations with colleagues, so some interaction between the estranged couple was inevitable. Over time, their mutual hostility grew to such an extent that they decided one of them should leave

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the clinic—for their own good and that of other clinic staff. Because they believed that Andrew, as a pediatrician, would have an easier time finding patients outside the clinic, they agreed that he was the one who should go.

Andrew explained his situation to Singson and noted that because he would be leaving for the benefit of the clinic, he expected that no penalty would be assessed for breaking the contract two years early and that the no-competition clause would not be invoked.

Singson was surprised and upset that his finely tuned staff was going to lose one of its most respected members. Furthermore, he was shocked by Whittamore's announcement that he planned to stay in town and open a medical practice. Singson visualized the long-range impact of Whittamore's decision: the pediatrician would leave and set up a competing practice, taking many of his patients with him. The clinic would lose revenues from the doctor's fees, incur the cost of recruiting a new doctor, and (if the no-competition clause was not enforced) establish a bad precedent for managing its doctors. Singson responded that the no-competition clause would be enforced if Whittamore wanted to practice within the county, and that the clinic would impose a penalty for breaching the contract. He estimated that the penalty could be as much as 100 percent of the revenues that Whittamore might earn in the two years remaining on his contract.

Whittamore was irate at Singson's response, considering it unreasonable and irresponsible. If that was the way the game was to be played, he threatened, he would leave and set up a practice, and Singson could take him to court to try to get his money. Singson responded that he would get an injunction against the practice if necessary and would demand the full amount if pushed into a corner. Whittamore stormed out of Singson's office mumbling that he was going to "get that son of a gun."

This conflict has multiple components: the Whittamores' relationship with each other, their relationship to other staff members at the clinic, the potential conflict between Andrew Whittamore's patients and the clinic, and the relationship between Andrew Whittamore and Richard Singson. For ease of analysis, we will examine only one of these components: the conflict between Richard Singson and Andrew Whittamore and the various means of resolution available to them.

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CONFLICT MANAGEMENT AND RESOLUTION APPROACHES

People in conflict have a number of procedural options to choose from to resolve their differences. Figure 1.1 illustrates some of these possibilities, which vary in terms of the formality of the process, the privacy of the approach, the people involved, the authority of the third party (if there is one), the type of decision that will result, and the amount of coercion that is exercised by or on the disputing parties.

At the left end of the continuum in the figure are informal, private procedures that involve only the disputants or a process assistant (a mediator). At the other end, one party relies on coercion and often on public action to force the opposing party into submission. In between are a variety of approaches that we will examine in more detail.

Disagreements and problems can arise in almost any relationship. The majority of disagreements are usually handled informally. Initially, people may *avoid* each other because they dislike the discomfort that accompanies conflict, they do not consider the issue to be that important, they lack the power to force a change, they do not believe the situation can be improved, or they are not yet ready to negotiate.

When avoidance is no longer possible or tensions become so strong that the parties cannot let the disagreement continue, they usually resort to *informal problem-solving discussions* to resolve their differences. This is probably where the majority of disagreements end in daily life. Either they are resolved, more or less to the satisfaction of the people involved, or the issues are dropped for lack of interest or inability to push through to a conclusion.

In the Singson-Whittamore case, the Whittamores avoided dealing with their potential conflict with the medical clinic until it was clear that Andrew was going to leave. At that point, Andrew initiated informal discussions, but they failed to reach an acceptable conclusion. Clearly, their problem had escalated into a dispute. Gulliver (1979, p. 75) notes that a disagreement becomes a dispute "only when the two parties are unable and/or unwilling to resolve their disagreement; that is, when one or both are not prepared to accept the status quo (should that any longer be a possibility) or to

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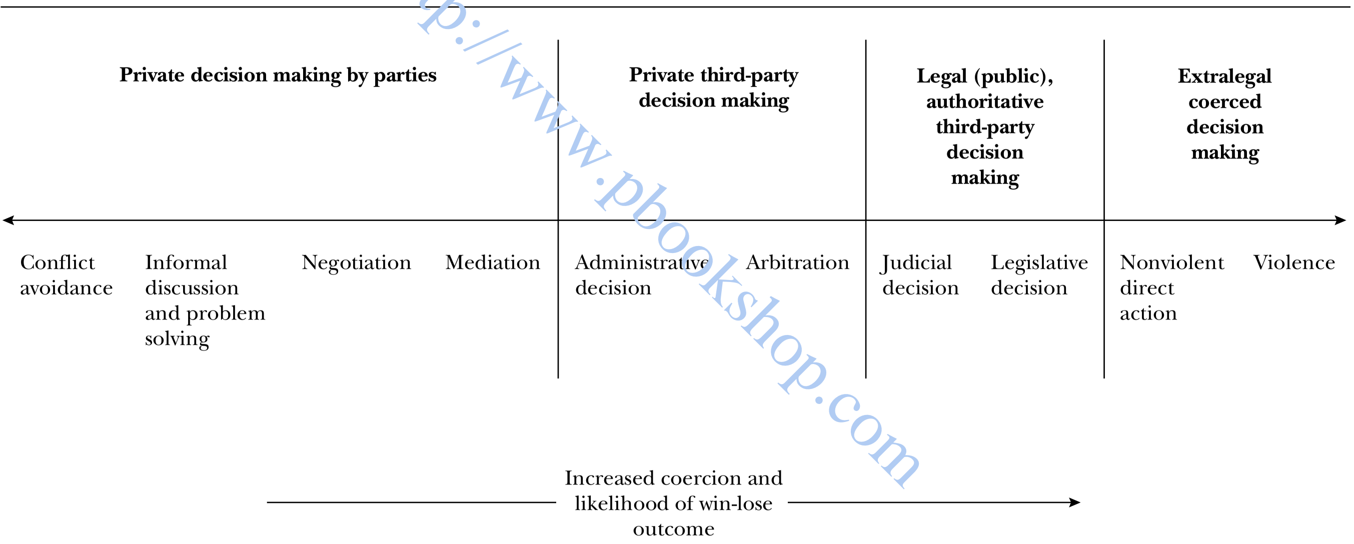
Figure 1.1. Continuum of Conflict Management and Resolution Approaches.



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accede to the demand or denial of demand by the other. A dispute is precipitated by a crisis in the relationship." People involved in a conflict that has reached this level have a variety of ways to resolve their differences. They can pursue more formal and structured means of voluntarily reaching an agreement, resort to third-party decision makers, or try to leverage or coerce each other to reach a settlement.

Other than informal conversations, the most common way to reach a mutually acceptable agreement is through *negotiation* (Fisher and Ury, 1981; Shell, 1999; Thompson, 2001). Negotiation is a bargaining relationship between parties who have a perceived or actual conflict of interest. The participants voluntarily join in a temporary relationship designed to educate each other about their needs and interests, to exchange specific resources, or to resolve less tangible issues such as the form their relationship will take in the future or the procedure by which problems are to be solved. Negotiation is clearly an option for Whittamore and Singson, although the degree of emotional and substantive polarization will make the process difficult.

If negotiations are hard to initiate or have started and reached an impasse, the parties may need some assistance from a party who is outside of the dispute. *Mediation* is an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited (or no) authoritative decision-making power. This person assists the principal parties to voluntarily reach a mutually acceptable settlement of the issues in dispute. As with negotiation, mediation leaves the decision-making power primarily in the hands of the people in conflict. Mediation is a voluntary process in that the participants must be willing to accept the assistance of the intervenor if he or she is to help them manage or resolve their differences. Mediation is usually initiated when parties can no longer handle the conflict on their own and when the only means of resolution appears to involve impartial third-party assistance.

Whittamore and Singson might consider mediation if they cannot negotiate a settlement on their own. We will return to this process later on, once their other procedural options have been evaluated.

Beyond negotiation and mediation, there are a number of approaches that decrease the personal control the people involved

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have over the dispute outcome, increase the involvement of external decision makers, and rely increasingly on win-lose and either-or decision-making techniques. These approaches can be divided into public and private, and legal and extralegal.

If the dispute is within an organization or, occasionally, between an organization and members of the public, there is often an *administrative* or *executive dispute resolution approach.* In this process, a third party who has some distance from the dispute but is not necessarily impartial may make a decision for the parties in dispute. The process can be private, if the context within which the dispute occurs is a private company, division, or work team; or public, if the difference is a public dispute and is conducted by a governmental agency, a mayor, a county commissioner, a planner, or another administrator. An administrative dispute resolution process generally attempts to balance the needs of the entire system and the interests of individuals or concerned groups.

In the Singson-Whittamore dispute, both parties might choose to appeal to the board of directors of the Fairview Medical Clinic for a third-party decision. If both parties trust the integrity and judgment of these decision makers, the dispute might end there. However, Whittamore is not sure that he would get a fair hearing from this board.

Arbitration is a generic term for a voluntary process in which people in conflict request the assistance of an impartial and neutral third party to make a decision for them regarding contested issues. The outcome of the decision may be either advisory or binding. One person or a panel of third parties may conduct arbitration. The critical factor is that they are outside of the conflict relationship.

Arbitration is a private process in that the proceedings, and often the outcome, are not open to public scrutiny. People often select arbitration because of its private nature, and also because it is more informal, less expensive, and faster than a judicial proceeding. In arbitration, the parties frequently are able to select their own arbiter or panel, which gives them more control over the decision than if the third party were appointed by an outside authority or agency.

Whittamore and Singson have both heard of arbitration but are reluctant to turn their problem over to a third party before they are sure that they cannot resolve it themselves. Neither wants

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to risk an unfavorable decision. In addition, Singson fears an external decision that might erode the clinic's prerogative to control the contract process.

A *judicial approach* involves the intervention of an institutionalized and socially recognized authority in a dispute. This approach shifts the resolution process from the private domain to the public. In the judicial approach, the disputants usually hire lawyers to act as their advocates and the case is argued before an impartial and neutral third party—a judge, and perhaps a jury as well. These decision makers take into consideration not only the disputants' concerns, interests, and arguments but also the broader society's standards and values. The judge or jury is usually required to make a decision based on and in conformity with case law and legal statutes. The outcome is usually win-lose and is premised on a decision regarding who is right and who is wrong. Because the third party is socially sanctioned to make a decision, the results of the process are binding and enforceable. The disputants lose control of the outcome but may gain from forceful advocacy of their point of view and by a decision that reflects socially sanctioned laws or norms that are in their favor.

Whittamore and Singson have both considered using a judicial approach to resolve their dispute. Singson is willing, if necessary, to seek a court injunction that would enforce the no-competition clause in the contract by prohibiting Whittamore from establishing a private practice. Whittamore is willing to go to court to test the constitutionality of the clause. But both see a risk in this procedure, as the outcome may be highly detrimental to their underlying interests.

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The *legislative approach* to dispute resolution is another public means of solving a conflict by recourse to law. It is usually employed for larger disputes affecting broad populations, but it may have significant utility for individuals. In this approach, the decision regarding the outcome is made by another win-lose process: voting. The individual has only as much influence on the final outcome as he or she, and those who share his or her beliefs, can bring to bear on legislators. Furthermore, the win-lose aspect of the outcome is only partly softened by the compromises that go into a bill.

Whittamore has considered using this approach to resolve his dispute. He believes there should be a law against no-competition

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clauses, and some of his patients agree with him. One patient has even suggested a campaign to pass a bill prohibiting this type of contract. But Whittamore also realizes that a legislative approach to this problem might take a long time—time he does not have at his disposal. Also a change in the law might not cover contracts entered into before the new law was passed.

Finally, there is the *extralegal approach.* The approaches examined so far are either private procedures the parties use alone or with the assistance of a third party to negotiate a settlement, or third-party decision making that is either privately or publicly sanctioned. The last category is extralegal in that it does not rely on socially mandated—or on occasion, socially acceptable—processes and generally uses stronger means of coercion to persuade or force an opponent into compliance or submission. There are two types of extralegal approaches: nonviolent action and violence.

Nonviolent action involves a person or group committing acts or abstaining from acts so that an opponent is forced to behave in a desired manner (Sharp, 1973). These acts, however, do not involve physical coercion or violence and are often designed to minimize psychological harm as well. Nonviolent action works best when the parties must rely on each other for their well-being. When this is the case, one of the parties may force the other to make concessions by refusing to cooperate or by committing undesirable acts.

Nonviolent action often involves civil disobedience—violation of widely accepted social norms or laws—to raise an opponent's consciousness or bring into public view practices that the nonviolent activist considers unjust or unfair. Nonviolent action can be conducted by an individual or by a group and may be either public or private.

Whittamore has contemplated nonviolent action on both the personal and group levels to resolve his dispute. On the individual level, he has considered fasting or occupying Singson's office until the director agrees to bargain in good faith and give him a fair settlement. He has also considered opening a private practice, challenging the terms of the contract, and forcing the clinic to either take him to court or drop the case. If he goes to court, he could exploit the publicity and place the clinic in a dilemma: dismiss a widely esteemed doctor and earn the wrath of the community and bad publicity, or reach a negotiated settlement favorable to Whittamore and avoid the bad press.

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One of his patients has suggested organizing a picket or vigil outside the clinic to embarrass Singson and the clinic into a settlement. If that is unsuccessful, the patient has suggested a group sit-in. Whittamore is unsure of the likely effects of these approaches, as well as of the costs.

The last approach to dispute resolution is *violence* or *physical coercion.* This approach assumes that if the costs to the person or property of an opponent and the costs of maintaining his position are high enough, the adversary will be forced to make concessions. For physical coercion to work, the initiating party must possess enough power to actually damage the other party, must be able to convince the other side that it has the power, and must be willing to use it.

Although Whittamore and Singson are very angry with each other, they have not come to blows. Both are physically fit and could conceivably harm each other, but neither feels he could force the issue with a private fight. Whittamore, in the heat of anger, mumbled that he ought to sabotage some of the clinic's valuable equipment, but such an action would go against some of his deeply held values and would also hurt patients. Singson, in a moment of rage and fantasy, also considered violence and wondered what Whittamore's reaction would be if he were to be assaulted by agents Singson could hire for that purpose. He, too, has decided against physical violence as too risky, costly, unpredictable, and unreasonable.

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The question remains: Which of the approaches represented in Figure 1.1 will Whittamore and Singson choose to resolve their dispute?

Whittamore wants to stay in town so that he can be near his children. He also wants to practice medicine. Establishing a new practice will be expensive, so he wants to minimize his dispute resolution costs. He hopes for a quick decision so that he may leave the clinic soon to avoid more adverse contact with Janelle and to minimize any harm to his personal relationships with other staff members. A positive ongoing relationship with the clinic and its staff is important because the clinic has the only laboratory and high-tech medical equipment in the town. Whittamore also needs to establish a private practice quickly so that he can generate income. Physical violence was a fleeting fantasy. Nonviolent action is

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still a possibility if the clinic does not yield. Judicial and legislative approaches seem unreasonable at this point because of the cost and the length of time they will take to effect a change.

Singson is also trying to decide what action he will take. He wants to keep management control over the contract process; seeks to solve the problem himself and not rely on outside agents; and wants to minimize such costs as legal fees, patient attrition, and bad publicity. He wants to find an amicable solution but feels that his interactions with Whittamore have reached an impasse.

Whittamore and Singson's conflict is ripe for negotiation. The two parties are:

- Interdependent and must rely on the cooperation of one another in order to meet their goals or satisfy their interests
- Able to influence one another and to undertake or prevent actions that can either harm or reward
- Pressured by deadlines and time constraints and share a motivation for early settlement
- Aware that alternatives to a negotiated settlement do not appear as viable or desirable as a bargain that they might reach themselves
- Able to identify the critical primary parties and involve them in the problem-solving process
- Able to identify and agree on the issues in dispute
- In a situation in which their interests are not entirely incompatible
- Influenced by external constraints—such as the unpredictability of a judicial decision, potentially angry patients or staff, costs of establishing a new practice, and expenses of recruiting a new physician—that encourage them to reach a negotiated settlement

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These conditions are critical to successful negotiation. However, Singson and Whittamore's relationship also contains elements that will make unassisted negotiations extremely difficult. To overcome these problems, they will need third-party help, and in this case, mediation seems to be the most appropriate dispute resolution procedure to pursue. A mediator may be called into negotiations when:

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- The emotions of the parties are intense and are preventing a settlement
- Communication between the parties is poor in either quantity or quality and they cannot change the situation on their own
- Misperceptions or stereotypes are hindering productive exchanges
- Repetitive negative behaviors are creating barriers
- There are serious disagreements over data—what information is important, how it is collected, and how it will be evaluated
- There are multiple issues in dispute, and the parties disagree about the order and combination in which they should be addressed
- There are perceived or actual incompatible interests that the parties are having difficulty reconciling
- Perceived or actual value differences divide the parties
- The parties do not have a negotiating procedure, are using the wrong procedure, or are not using a procedure to its best advantage
- There is not an acceptable structure or forum for negotiations
- The parties are having difficulties starting negotiations or have reached an impasse in their bargaining

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Because Whittamore and Singson's relationship has some of the characteristics listed here, they will decide to use mediated negotiations as a means of resolving their differences. For the moment, let us leave this case and take a look at the process that they have selected to resolve their conflict. We will return to the Singson-Whittamore dispute in Chapter Two when we explore how the mediation process works.

THE MEDIATION PROCESS

Although mediation is practiced around the world in the resolution of interpersonal, organizational, commercial, legal, community, public, ethnic, and international disputes; and although techniques have been documented in particular applications and case studies, there has been until recently little systematic study or

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description of specific strategies and tactics used by mediators. The analysis that *has* been done has often been presented on the most general level or is so specific as to limit its broad application.

This book addresses the need for a systematic and practical general approach to mediation. It has three major goals: (1) to illustrate the effects and dynamics of mediation on the practice of negotiation; (2) to develop a theoretical explanation for the current practice of mediation as it has been applied in a variety of issues, arenas, and cultures; (3) to provide practitioners concrete and effective strategies and techniques to assist parties in dispute resolution. Let us first attempt to define mediation.

A DEFINITION OF MEDIATION

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Consider these scenarios: a mediator from the United Nations enters an international conflict; a labor mediator engages in negotiations prior to a threatened strike; a commercial mediator settles a business dispute; a lawyer acting as a mediator settles a contentious legal suit; a family mediator assists a couple in reaching a divorce settlement. Who are these individuals, and what relationship do they have with the respective parties? What activities are they performing? What are their goals and objectives and those of the mediation process?

As stated earlier, *mediation* is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between the parties or terminate relationships in a manner that minimizes emotional costs and psychological harm.

A mediator is a third party, generally a person who is not directly involved in the dispute or the substantive issues in question. This is a critical factor in conflict management and resolution, for it is the participation of an outsider that frequently provides parties with new perspectives on the issues dividing them and more effective processes to build problem-solving relationships. More will be said about the variety of possible relationships between the parties and "outsiders" in the next section.

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The next aspect of the definition is *acceptability:* the disputants must be willing to allow a third party to enter the dispute and assist them in reaching a resolution. Acceptability does not necessarily mean that disputants eagerly welcome the involvement of the mediator and are willing to do exactly as he or she says. It does mean that the parties approve of the mediator's presence and are willing to listen to and seriously consider his or her suggestions on how to manage and resolve their differences.

Intervention means "to enter into an ongoing system of relationships, to come between or among persons, groups, or objects for the purpose of helping them. There is an important implicit assumption in the definition that should be made explicit: the system exists independently of the intervenor" (Argyris, 1970, p. 15). The assumption behind an outsider's intervention is that a third party will be able to alter the power and social dynamics of an existing conflict relationship by influencing the beliefs or behaviors of individual parties, by providing knowledge or information, or by introducing a more effective negotiation process and thereby helping the participants to settle contested issues. Rubin and Brown (1975) have argued that the mere presence of a party who is independent of the disputants may be a highly significant factor in the resolution of a dispute.

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For mediation to occur, the parties must begin talking or negotiating. Labor and management must be willing to hold a bargaining session, business associates must agree to conduct discussions, governments and public interest groups must create forums for dialogue, and families must be willing to come together to talk. *Mediation is essentially dialogue or negotiation with the involvement of a third party.* Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants. Without negotiation, there can be no mediation.

Conflicts involve struggles between two or more people over values, or competition for status, power, or scarce resources (Coser, 1967). Mediators enter conflicts that have reached various levels of development and intensity—(latent, emerging, or manifest). These levels differ according to their degree of organization, the activities of the parties, and the intensity of expression of concerns

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and emotions. *Latent conflicts* are characterized by underlying tensions that have not fully developed and have not escalated into a highly polarized conflict. Often, one or more parties, usually the stronger one, may not even be aware that a conflict or the potential for one exists (Curle, 1971). Examples of latent conflicts are changes in personal relationships in which one party is not aware of the seriousness of the breach that has occurred; projected but unannounced staff cutbacks within an organization; developed but unimplemented plans for the siting of a predictably controversial facility such as a mine or waste disposal site; or potentially unpopular changes in public policy.

Mediators (or facilitators, another type of third party) working on latent disputes help participants identify the people who will be affected by a change or who may be concerned about a problem arising in the future. They assist in developing a mutual education process around the issues and interests involved, and they work with participants on designing, and sometimes implementing, a problem-solving process.

Emerging conflicts are disputes in which the parties are identified, the dispute is acknowledged, and many issues are clear. However, a workable cooperative negotiation or problem-solving process has not developed. Emerging conflicts have a potential for escalation if a resolution procedure is not implemented. Many disputes between coworkers, businesses, and governments illustrate this type of conflict. Both parties recognize that there is a dispute, and there may have been a harsh verbal exchange, but neither knows how to handle the problem. In this case, the mediator helps establish the negotiation process and assists the parties begin to communicate and bargain.

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Manifest conflicts are those in which parties are engaged in an active and ongoing dispute. They may have participated in violent or nonviolent activities or may have started to negotiate and have reached an impasse. Mediator involvement in manifest conflicts often involves changing the conflict resolution or negotiation procedures or intervening to break a specific deadlock. International mediators intervene in wars. Labor mediators who intervene in negotiations before a strike deadline are working to resolve manifest conflicts, as are commercial mediators who handle a specific insurance claim over a personal injury. Child custody and divorce

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mediators also usually intervene in fully manifest disputes—a couple's initiation of separation proceedings.

A mediator generally has limited or no authoritative decision-making power; he or she cannot unilaterally mandate or force parties to resolve their differences and enforce the decision. This characteristic distinguishes the mediator from the judge or arbitrator, who is generally empowered to make a decision for the parties on the basis of a prior agreement by the disputants or societal norms, rules, regulations, laws, or contracts. The goal of a judicial or quasi-judicial process is not reconciliation or agreement between the parties, but a unilateral decision by the third party concerning which of the parties is right.

The judge examines the past and evaluates "agreements that the parties have entered into, violations which one has inflicted on the other," and "the norms concerning acquisition of rights, responsibilities, etc. which are connected with these events. When he has taken his standpoint on this basis, his task is finished" (Eckhoff, 1966–67, p. 161).

The mediator, on the other hand, works to reconcile the competing interests of the two parties. The mediator's tasks are to assist the parties in examining their interests and needs, to help them negotiate an exchange of promises, and to redefine their relationship in a way that will be mutually satisfactory and will meet their standards of fairness.

The mediator does not have decision-making authority, and this fact makes mediation attractive to many parties in dispute because they can retain the ultimate control of the outcome. However, mediators are not without influence. The mediator's authority, such as it is, resides in his or her personal credibility and trustworthiness, expertise in enhancing the negotiation process, experience in handling similar issues, ability to bring the parties together on the basis of their own interests, past performance or reputation as a resource person, and (in some cultures) his or her relationship with the parties. Authority, or recognition of the right to influence the outcome of a dispute, is granted by the parties themselves rather than by an external law, contract, or agency.

So far, we have examined some of the characteristics of a mediator. We will now explore some of the functions a mediator performs. Our definition states that a mediator *assists* disputing parties.

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Assistance can refer to very general or to highly specific activities. We will examine here some of the more general roles and functions of the mediator; we will discuss specifics later, when analyzing intervention activities during particular phases of negotiation.

The mediator may assume a variety of roles to assist parties in resolving disputes (American Arbitration Association, n.d.):

- The *opener of communication channels,* who initiates communication or facilitates better communication if the parties are already talking
- The *legitimizer,* who helps all parties recognize the right of others to be involved in negotiations
- The *process facilitator,* who provides a procedure and often formally chairs the negotiation session
- The *trainer,* who educates novice, unskilled, or unprepared negotiators in the bargaining process
- The *resource expander,* who offers procedural assistance to the parties and links them to outside experts and resources (for example, lawyers, technical experts, decision makers, or additional goods for exchange) that may enable them to enlarge acceptable settlement options
- The *problem explorer,* who enables people in dispute to examine a problem from a variety of viewpoints, assists in defining basic issues and interests, and looks for mutually satisfactory options
- The *agent of reality,* who helps build a reasonable and implementable settlement and questions and challenges parties who have extreme and unrealistic goals
- The *scapegoat,* who may take some of the responsibility or blame for an unpopular decision that the parties are nevertheless willing to accept. This enables them to maintain their integrity and, when appropriate, gain the support of their constituents
- The *leader,* who takes the initiative to move the negotiations forward by procedural—or on occasion, substantive—suggestions

The last component of the definition describes mediation as a voluntary process to reach a mutually acceptable settlement of issues in dispute. *Voluntary* generally refers to both freely chosen participation and freely made agreements. Parties are not forced to mediate and

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settle by either an internal or external party to a dispute. Stulberg (1981b, pp. 88–89) notes that "there is no legal liability to any party refusing to participate in a mediation process. Since a mediator has no authority unilaterally to impose a decision on the parties, he cannot threaten the recalcitrant party with a judgement."

Voluntary participation does not, however, mean that there may not be pressure to try mediation. Other disputants or external figures, such as friends, colleagues at work, constituents, authoritative leaders, or judges, may put significant pressure on a party to make an attempt at negotiation with the assistance of a mediator. Some courts in family and civil cases in the United States have even gone so far as to rule that parties must make a good faith effort at mediation before the court will be willing to hear the case. Attempting mediation does not, however, mean that the participants are forced to reach agreements.

THE HISTORICAL PRACTICE OF MEDIATION

Mediation has a long and varied history in almost all cultures of the world. Jewish, Christian, Islamic, Hindu, Buddhist, Confucian, and many indigenous cultures all have extensive and effective traditions of mediation practice. Here are a number of examples indicating the extensiveness and development of mediation as a means of dispute resolution.

Jewish communities in biblical times used mediation—which was practiced by both religious and political leaders—to resolve civil and religious differences. Later, in Spain, North Africa, Italy, Central and Eastern Europe, the Turkish Empire, and the Middle East, rabbis and rabbinical courts played vital roles in mediating or adjudicating disputes between members of their faith. These courts were often crucial to the protection of cultural identity and ensured that Jews had a formalized means of dispute resolution. In many locales, Jews were barred by exclusionary laws of larger societies from other means of dispute settlement.

Jewish traditions of dispute resolution were ultimately carried over to emerging Christian communities, who saw Christ as the supreme mediator. The Bible refers to Jesus as a mediator between God and man: "For there is one God, and one mediator between God and man, the man Christ Jesus; who gave himself as

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ransom for all, to be testified in due time" (I Timothy 2:5–6). This concept of the intermediary was eventually adopted to define the role of clergy as mediators between the congregation and God and between believers. Until the Renaissance, the Catholic Church in Western Europe and the Orthodox Church in the Eastern Mediterranean world were probably the central mediation and conflict management organizations in Western society. Clergy mediated family disputes, criminal cases, and diplomatic disputes among the nobility. Bianchi (1978), in describing one mediated case in the Middle Ages, details how the church and the clergy made available the sanctuary where the offender stayed during dispute resolution and how they served as intermediaries between two families in a case involving rape. In the resulting settlement, the family of the rapist agreed to provide monetary restitution to the woman's family and promised to help her find a husband.

Islamic cultures also have long traditions of mediation. In many traditional pastoral societies in the Middle East, problems were often resolved through a community meeting of elders in which participants discussed, debated, deliberated, and mediated to resolve critical or conflictual tribal or intertribal issues. In urban areas, local custom (*'urf*) became codified into *shari'a* law, which was interpreted and applied by a specialized intermediary, or *quadi*. These officials performed not only judicial but also mediating functions. Hourani (1991, p. 114) notes that a *quadi* "might interpret his role as that of a conciliator, attempting to preserve social harmony by reaching an agreed upon solution to a dispute, rather than applying the strict letter of the law."

In Indonesia, one of the largest geographic areas influenced by Islam and Arab culture, traditional means of decision making and dispute resolution were blended with Islamic practices. The result was the *musyawarah* process, a consensually based conflict management procedure (Moore and Santosa, 1995). Variations of this process were used, and are still practiced today, throughout the island archipelago to make decisions and resolve disputes on both local and national issues (Von Benda-Beckmann, 1984; Slatts and Porter, 1992; Schwarz, 1994).

Hinduism and Buddhism, and the regions that they influenced, have a long history of mediation. The Hindu villages of India have traditionally employed the *panchayat* justice system, in

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which a panel of five members both mediates and arbitrates disputes; the panel also exercises administrative functions in addressing welfare issues and grievances within the community.

Mediation has been widely practiced in China, Japan, and a number of other Asian societies, where religion and philosophy place a strong emphasis on social consensus, moral persuasion, and seeking balance and harmony in human relations (Brown, 1982). Buddhist sacred texts describe at least three cases in which the Buddha acted as a mediator (*Dhammapada Commentary,* cited in McConnell, 1995; *Kosambi Jataka,* n.d.), and the sangha, or religious community of priests and nuns, has long played a mediation role in Buddhist communities and societies, first in India and China and later in Sri Lanka, Thailand, Nepal, Tibet, and Japan (McConnell, 1995).

With the rise of secular society in the West, mediation and the range of people acting as mediators expanded. In the business world, guilds and their members practiced mediation, as did burghers in disputes arising in the emerging cities. Though the clergy continued to play a role as intermediaries in local, intercommunal, and interstate relations, the rise of the rule of law and nation-states led to the growth of secular intermediaries. Secular judges both mediated and issued judicial rulings. Ambassadors and envoys acted to "raise and clarify social issues and problems, to modify conflicting interests, and to transmit information of mutual concern to parties" (Werner, 1974, p. 95).

Mediation also grew in the American and other colonies, and ultimately in the United States and Canada, where religious sects such as the Puritans and Quakers, and Chinese and Jewish ethnic groups, developed alternative procedures for dispute resolution that were of an informal and voluntary nature (Auerbach, 1983). These procedures functioned in parallel with preexisting dispute resolution mechanisms of Native Americans and First Nations peoples, who often used consensus-based council meetings, led by an elder or elders, to resolve disputes (LeResche, 1993).

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THE CONTEMPORARY PRACTICE OF MEDIATION

For the most part, mediators in other ages and cultures learned their craft informally and fulfilled their role as intermediaries in the context of other functions or duties. Only since the turn of the

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twentieth century has mediation become formally institutionalized and developed into a recognized profession. The modern practice of mediation has expanded exponentially worldwide, especially in the last twenty-five years. This growth is due in part to a wider acknowledgment of individual human rights and dignity, the expansion of aspirations for democratic participation at all social and political levels, the belief that an individual has a right to participate in and take control of decisions affecting his or her life, an ethic supporting private ordering, and trends in some locales for broader tolerance of diversity in all its aspects. Change has also been motivated by growing dissatisfaction with authoritative, top-down decision makers and decision-making procedures; imposed settlements that do not adequately address parties' strongly felt or genuine interests; and the increasing costs—in money, time, human resources, and damage to interpersonal and community solidarity—of more adversarial, win-lose procedures of dispute resolution.

The use of mediation has grown significantly in many countries and cultures, but it has perhaps grown most rapidly in the United States and Canada. The first arena in which mediation was formally institutionalized in the United States was that of labor-management relations (Simkin, 1971). In 1913, the U.S. Department of Labor was established, and a panel, the "commissioners of conciliation," was appointed to handle conflicts between labor and management. This panel subsequently became the U.S. Conciliation Service, which in 1947 was reconstituted as the Federal Mediation and Conciliation Service. The rationale for initiating mediation procedures in the industrial sector was to promote a "sound and stable industrial peace" and "the settlement of issues between employer and employees through collective bargaining" (Labor-Management Relations Act, 1947). It was expected that mediated settlements would prevent costly strikes and lockouts and that the safety, welfare, and wealth of Americans would be improved. Federal use of mediation in labor disputes has been a model for many states. Numerous states have passed laws, developed regulations, and trained a cadre of mediators to handle intrastate labor conflicts.

The private sector has also initiated labor-management and commercial relations mediation. The American Arbitration Association was founded in 1926 to encourage the use of arbitration and other techniques of voluntary dispute settlement.

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Mediation sponsored by government agencies has not been confined to labor-management issues. The federal Civil Rights Act of 1964 created the Community Relations Service (CRS) of the U.S. Department of Justice. This agency was mandated to help "communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin" (Civil Rights Act, 1964). The agency assists people in resolving disputes through negotiation and mediation rather than through recourse to street justice or the judicial system (Klugman, 1992). CRS works throughout the country on such issues as school desegregation and public-accommodation cases. There has also been a burgeoning of diverse state agencies, local civil rights commissions, and private agencies that use mediation to handle charges of race and ethnic discrimination in areas of employment, housing, accommodations, and consumer affairs (International City Managers' Association, 1966). In Canada, the Ontario Race Relations Directorate and other similar agencies in that province have provided dispute resolution services to manage differences between ethnic communities.

There have also been a number of specialized initiatives to utilize mediation to resolve disputes with ethnic or religious elements within and between various groups. The Navajo peacemakers (Bluehouse and Zion, 1993), Pacific Coast Salish tribes conciliators (Mansfield, 1993), Alaskan tribes intermediaries (Connors, 1993), the Mohawks' Akwesasne Peacemaking Program, and a variety of other tribal groups have developed traditional or modified means of resolving internal tribal differences. On the Hawaiian islands, traditional dispute resolution procedures, the Ho'Oponopono, are being revived to manage differences between a number of ethnic groups (Shook and Kwan, 1988; Barnes, 1994). Programs and projects have been developed in Los Angeles and Chicago to address disputes between Korean and African American communities, especially those related to conflicts between business owners and customers. In New York, initiatives have been taken to manage African American and Hasidic Jewish conflicts, and in a number of cities programs have been developed to respond to tensions among the dominant culture, traditional minority cultures, and newer Southeast Asian immigrants.

Since the mid-1960s, mediation has grown significantly as a formal and widely practiced approach to community dispute resolu-

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tion (Bradley and Smith, 2000). In the early years of the field's growth, the federal government funded Neighborhood Justice Centers (NJCs) to provide free or low-cost mediation services to the public so that disputes could be resolved efficiently, inexpensively, and informally. In the early 1980s, many of these NJCs were institutionalized and became part of city-, court-, or district attorney–based alternative dispute resolution services. Some community programs also became independent nonprofit organizations and offered grassroots dispute resolution services in which community members served as solo mediators, co-mediators, or members of mediation or conciliation panels (Lemmon, 1984; Shonholtz, 1984). By 1997, there were over 550 NJCs across the United States (Ray, 1997).

In many U.S. and Canadian communities, mediation is being applied in landlord-tenant conflicts (Cook, Rochl, and Shepard, 1980); issues related to homelessness (Nelson and Sharp, 1995); police work with disputants (Folberg and Taylor, 1984); victim-offender issues (Umbreit, 1985, 1994, 2000); conflicts between citizens and police (Mayor's Office, City of Portland, Oregon, 1994); disputes among elderly residents, nursing home owners, and adult children of aging parents (Schmitz, 1998; Gentry, 2001); and consumer disputes (Ray and Smolover, 1983).

Canadians and Americans have developed community-based programs in a number of provinces. Of special note is the program of the Saskatchewan Mediation Service, based in Regina, which has focused on providing services to farm families. Centers such as this one mediate debtor-creditor and loan restructuring disputes and interpersonal and operations conflicts on family farms (Van Hook, 1990).

In addition to local mediation programs, there are statewide programs in many American states (Susskind, 1986; Drake, 1989). Initially spurred by the advocacy and funding by the National Institute for Dispute Resolution, the number of state-based programs jumped from four in 1984 to twenty in 1995, with some states having more than one program (Khor, 1995). Services provided by state programs include design and implementation of dispute resolution systems; training of state employees in alternative dispute resolution procedures; and mediation of interpersonal, group, and public disputes that involve state governments.

Mediation and other approaches to conflict resolution are also being introduced in primary and secondary schools and institutions

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of higher education (Araki, 1990; Sandy, 2001; Volpe and Chandler, 2001). Some of the initiatives have been teaching conflict management skills and integrating them into the general curriculum, while others involve developing direct peer mediation services (Compton, 2002; Ford, 2002; Batton, 2002). In this setting, disputes are mediated between students (Volpe and Witherspoon, 1992; Smith and Sidwell, 1990; Burrell and Vogl, 1990; Lindsay, 1998; Levy, 1989; Doelker, 1989), gangs (Wahrhaftig, 1995), between students and faculty, between faculty members, and between faculty and administration (McCarthy, 1980; McCarthy and others, 1984; Crohn, 1985). In the 1980s, the National Association of Mediation in Education (NAME) was founded, to link mediation practitioners and programs in the educational arena. In 2000, this organization merged with the Society of Professionals in Dispute Resolution (SPIDR) and the Academy of Family Mediators to become the Association for Conflict Resolution (ACR).

Another interesting effort in the area of education is the use of mediation and other collaborative problem-solving skills to handle problems related to decentralized decision making and school-based management (CDR Associates, 1993a). In this application, consensus-based decision making assisted by a facilitator/mediator is used as a strategy for anticipating, preventing, and managing conflict, as well as a process for fostering collaborative day-to-day decisions.

The criminal justice systems in the United States and Canada have used mediation to resolve criminal complaints (Felsteiner and Williams, 1978) and disputes in correctional facilities (Reynolds and Tonry, 1981). Mediation in the latter arena takes the form of both crisis intervention in prison riots or hostage negotiations and institutionalized grievance procedures. An interesting growth area in the criminal justice system has been victim-offender mediation programs in which intermediaries help concerned parties develop restitution plans or reestablish conflicted interpersonal relationships (Umbreit, 1985, 1994; Coates and Gehm, 1989; Umbreit and Greenwood, 1999).

One of the fastest-growing arenas in North America in which mediation is being practiced is family disputes (Fisher, 1991). Court systems and private practitioners provide mediation to families in child custody and divorce proceedings (Coogler, 1978;

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McIsaac, 1983; Folberg and Taylor, 1984; Folberg and Milne, 1988; Haynes, 1981, 1994; Irving, 1980; Lemmon, 1985; Saposnek, 1983, 1998; Moore, 1988; McKnight and Erikson, 1998, 2002; Taylor, 2002), disputes between parents and children (Shaw, 1982; Wixted, 1982; Vorenberg, 1982), child protection cases (Mayer, 1985; Golten and Mayer, 1987), conflicts involving adoption and termination of parental rights (Mayer, 1985), spousal disputes in which there is domestic violence (Orenstein, 1982; Wildau, 1984; Ellis and Stuckless, 1992; Barsky, 1995; Corcoran and Melamed, 1990; Girdner, 1990; Erickson and McKnight, 1990), and as an alternative separation process for gay and lesbian couples (McIntyre, 1994; Gunning, 1995; Campbell, 1996). In family disputes, mediated and consensual settlements are often more appropriate and satisfying than litigated or imposed outcomes. Models of practice in this area include mandatory court-connected programs in which disputants must try mediation before a judge will hear the case; voluntary court programs; and forms of private practice such as the sole practitioner, the partnership, and the private nonprofit agency.

Mediation is also extensively used within public and private organizations to handle interpersonal and institutional disputes. The scope of mediation application ranges from one-on-one personnel disputes to problems between partners (for example, in law or medical practices), interdepartmental conflicts, altercations between companies, and other commercial disputes (Biddle and others, 1982; Bazerman and Lewicki, 1983; Blake and Mouton, 1984; Brett and Goldberg, 1983; Brown, 1983). In the late 1980s and early 1990s, there was a significant growth of mediation services and programs in the public and private sectors to mediate charges related to racial, ethnic, gender, and sexual-orientation discrimination in the workplace; sexual harassment (Rowe, 1994; Cloke and Goldsmith, 2000, 2001); and accommodation of people with disabilities (Roberts and Lundy, 1995), as well as to process complaints or grievances in nonunion and unionized settings (Skratek, 1990; Feuille, 1992; Goldberg, 1989; Valtin, 1993; Feuille and Kolb, 1994). Programs have been developed in a number of federal and state agencies, such as the U.S. Bureau of Reclamation and the Army Corps of Engineers ("Corps of Engineers Early Resolution Program," 1993), state governments (deLeon, 1994), and private sector firms (Westin and Feliu, 1988; Rowe, 1995; Mares-Dixon,

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1999). The federal government, through the Administrative Dispute Resolution Act, presidential memorandums, and regulations for rule making, has actively promoted use of alternative dispute resolution and mediation (Susskind, Babbit, and Segal, 1993).

Closely related to the use of mediation within or by organizations is the growth of a wider practice of conflict management, institutional decision making, and dispute systems design:

> Decision making and dispute systems design is a systematic process for enabling people and developing mechanisms to make decisions and handle serious chronic disputes. The process involves (1) identification of types and causes of reoccurring issues and conflicts; (2) development and institutionalization of a range of decision-making, conflict management, and dispute resolution procedures that will assist parties to make decisions, lower the number of incidents of destructive conflict, and assist them to resolve their differences; (3) matching of issues and disputes with the appropriate decision making, conflict management or resolution procedure; (4) implementation of efficient operations and administrative procedures (of the system); (5) design of effective information programs to educate potential parties about how the range of decision making and dispute resolution processes can assist them to reach settlements and resolve conflicts; and (6) training cadres of people to work in the new system and provide needed services [Wildau and Mayer, 1992].

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Many dispute resolution systems, whether newly developed or the result of expanding a previously existing system, have involved implementation of a mediation component. Settings in which systems have been developed include corporations; unionized mines; hospitals; social service agencies; natural resource management agencies; human resource departments; and federal, state, and local governments (Ury, Brett, and Goldberg, 1988; Ziegenfuss, 1988; Slaiku, 1989; Constantino and Merchant, 1995; Moore and Woodrow, 1999; Phillips, 2001).

Mediation has grown very rapidly since the mid-1980s in the corporate and commercial arenas, where in some types of disputes it has surpassed arbitration as the method of choice. Common types of disputes that have been mediated in this arena include contract disputes, failure to perform, product liability, patent in-

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fringement, trademark violations, intellectual property disputes, and a variety of insurance claim issues ("AAA Designs ADR Insurance Procedures," 1984). Leaders in promoting the use of alternative dispute resolution procedures, including mediation, to resolve corporate and commercial disputes have been the CPR Institute for Dispute Resolution, the American Arbitration Association, Jams/Endispute, and a number of other national and local private dispute resolution providers, as well as governmental agencies such as the U.S. Army Corps of Engineers. The CPR Institute for Dispute Resolution is a nonprofit coalition of general counsels of Fortune 500 companies and partners in leading law firms who are seeking alternatives to the increasingly high cost of litigation. Through publications, educational forums, and the Corporate Policy Statement (a pledge signed by corporations to explore and use alternative dispute resolution mechanisms as a first resort for settling commercial disputes), they have made a significant contribution to educating North American corporations about the utility of nonadversarial procedures (Henry and Lieberman, 1985).

Court-based mediation programs have been established in a number of jurisdictions in the United States to handle a variety of issues. Starting in the area of family disputes, these programs have expanded to address a range of civil cases. In some jurisdictions, courts have prescribed lower limits for financial claims, below which disputants must try mediation before the court will hear the case. Mediators working in these programs are generally either officials of the court or private mediators on contract. Another court-based mediation initiative that has gained popularity in a number of jurisdictions in the United States and abroad is "Settlement Week" (Dewdney, Sordo, and Chinkin, 1994). In this program, the court docket is set aside for a week, and cases are sent to voluntary mediation as an informal and expedited means of settlement. Mediations are conducted by trained professional mediators, lawyers, and judges. The record of success has led to the adoption of this mediation model by a number of jurisdictions across the United States and in other countries.

Mediation is also used extensively to resolve a variety of large public disputes over environmental and social policy issues (Susskind and Cruikshank, 1987; Laue, 1988; Bingham, 1984; Stamato and Jaffe, 1991; Grey, 1989; Moore, 1991; Susskind, 1994;

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Dukes, 2000). In the environmental arena, mediation has been used to address site-specific conflicts such as those over water project construction, conservation, and operations (Carpenter and Kennedy, 1977; Meeks, 1988; Moore, 1989; Moore 1997; Viessman and Smerdon, 1989); facility siting and locational disputes (O'Hare, Bacow, and Sanderson, 1983; Lake, 1987; Tomain, 1989) and development issues (Sullivan, 1984); wildlife and fisheries management and habitat protection issues (CDR Associates, 1993b, 1995; Mayer, Moore, and Todd, forthcoming); waste management; highway, railroad, and airport siting; hazardous waste cleanup; land management and wetlands protection; and a variety of other local disputes (Bacow and Wheeler, 1984; Talbot, 1983; Cormick, 1976; Lake, 1980; and Mernitz, 1980).

Mediation is also being used extensively by a number of federal and state agencies to develop new regulations through a process of regulatory negotiations, or "reg-negs" (Bingham, 1981; Harter, 1984; Millhauser and Pou, 1987; Haygood, 1988). In this process, key stakeholders concerned about proposed regulations are convened, and negotiations are conducted by mediators or facilitators to develop consensus recommendations that can be submitted to the sponsoring agency or government entity. The federal agency that has sponsored the largest number of regulatory negotiations has been the U.S. Environmental Protection Agency (EPA), although a number of other agencies, such as the Department of Education, the Department of the Interior, the Federal Aviation Administration, the Occupational Safety and Health Administration, the Nuclear Regulatory Commission, and the Department of Agriculture, as well as a significant number of state governments, have implemented similar procedures.

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Some of the topics for reg-negs have included aggregate resource mining regulations; standard setting for volatile organic compound emissions from finishes used in wood furniture manufacturing; use of disinfectants in drinking water; standards for the disposal of nonhazardous construction debris; rules for fossil collection on federal lands; accessibility of airplanes to people with disabilities; and air emissions standards from small engines.

Closely related to the development of regulations is the mediation of permitting and enforcement actions. Mediation helps con-

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cerned parties negotiate acceptable agreements over the conditions for future activity—for example, waste treatment and discharge plans for a new factory or mitigating or cleaning up past environmental problems. Allocating responsibility among potentially responsible parties at U.S. Superfund hazardous waste sites is a case in point; mediators have assisted concerned parties in apportioning financial responsibilities for cleanup and in negotiating remediation plans.

In the area of making public policy, mediation has been used to facilitate policy dialogues (Ehrman and Lesnick, 1988). Like regulatory negotiations, this process involves convening key stakeholder groups and negotiating consensus recommendations that can then be incorporated into policies or legislation. Some examples of policy dialogues are negotiations to develop growth management plans in California and New Jersey, policies and testing procedures for lowering volatile organic compounds in carpets and carpet-related activities, policies for the protection of oyster beds in the Chesapeake Bay, model national energy policies, and control of storm drainage systems.

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In nonenvironmental areas, mediation has been used in site-specific cases; reg-negs; and policy dialogues to enable local, state, and federal agencies to coordinate their decisions on such matters as

- Block grants for program funding (Shanahan and others, 1982)
- Development of educational policies
- Closure or conversion of military bases or weapons production plants
- Policies on the release of drugs to the public
- Promotion of biodiversity and sustainability issues
- Historic preservation of valuable urban properties
- Municipal social service priorities
- Funding allocation priorities for the treatment of AIDS (Hughes, 1999)
- Resolutions of farmer-creditor disputes

One of the newest areas of growth in mediation is the health care industry (Reeves, 1994; Leone, 1994; Marcus and others, 1995; Currie, 1998). In the United States and Canada over the last

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decade, this industry has seen a growing number of disputes. Medical malpractice claims cost the industry roughly $15 billion annually in preventive insurance (Quayle, 1991). These suits are damaging to physicians and a threat to family financial security. Studies on the motivations of malpractice plaintiffs have shown that 40 percent felt humiliated by their experiences with the physician, more than 50 percent felt betrayed by their doctor, more than 80 percent felt embittered by the doctor's response to their complaints or questions, and more than 90 percent were "very angry" at their physician. In addition, 24 percent felt the physician was dishonest or misled them regarding the case or incident, 20 percent felt "court was the only way to find out what happened," and 19 percent felt the need to punish the doctor. When asked what could have been done to prevent litigation, 35 percent of plaintiff-patients responded "apologize or offer further explanations," and 25 percent responded "correct the error"; by contrast, only 16 percent responded "pay me compensation" (Dauer, 1994). Because malpractice disputes are often amenable to negotiation to resolve both emotional and financial issues, a number of insurers (Aetna, Allstate, Chubb, Cigna, Federated, Fireman's Fund, Hartford, Maryland Casualty, Nationwide, Royal, St. Paul Fire and Marine, State Farm, Wausau, and others) have begun to offer mediation as an alternative means of dispute settlement (Slaiku, 1989). To date, the process has been highly successful. In Austin, Texas, where a majority of malpractice claims are now mediated, there is an 80 percent settlement rate (Joseph, 1994).

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In addition to malpractice cases, there are a number of other health care disputes in which mediation is being applied or explored. They include conflicts among doctors, administrators, and hospitals; HMO, group practice, and partnership difficulties; disputes between doctors and nurses; insurer denial of coverage; insurer denial of payment; bioethical disputes; credentialing conflicts; and labor-management relations (Joseph, 1994).

An emerging area of mediation practice is electronic or online dispute resolution (ODR). This form of mediation uses a "fourth party," the Internet or other electronic communications systems, to foster discussion, deliberation, and decision making by disputing parties (Rifkin, 2001; Katsh and Rifkin, 2001; Rule, 2002). The technological tools by which electronic dispute resolution is ac-

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complished are highly diverse. Both synchronous and real-time interactions such as can be achieved through the use of chatrooms, decision rooms with multiple linked terminals, electronic mechanisms to collect input and identify areas of consensus, electronic voting (straw or weighted), and face-to-face videoconferencing and asynchronous communications such as e-mail or Web-based messaging may be used.

In online mediation, the role and function of the intermediary also varies, from being primarily a technical manager for information exchange to being highly influential in managing the negotiation process. Because of the limits on communications imposed by the use of electronic technology or the Internet, and the lack of face-to-face interactions, mediators have had to develop innovative approaches for working with disputing parties, including new ways of building trust and developing rapport, facilitating exchanges of emotions, dealing with the lack of verbal and nonverbal cues, coordinating the timing of message exchange, overcoming the tendency for parties to put forth extreme views or engage in "flaming" when communicating through the written word, and responding to the higher likelihood of deadlocks that occur more frequently in nonface-to-face interactions (Landry, 2000; Nadler, 2001; Rifkin, 2001).

Electronic and online dispute resolution have developed to address a variety of disputes, including intraorganizational differences (Landry, 2000) and e-commerce over the Internet (Nadler, 2001). Currently a number of companies have formed, among them Squaretrade (partnered with e-Bay), World Intellectual Property Organization Mediation and Arbitration (international disputes between commercial parties, including domain name disputes), ClickNSettle.com (insurance claims), Cybersettle.com (insurance claims), On-line Resolution (general), Mediate-net (family law), and Internet Neutral (commercial contracts)" (Nadler, 2001).

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MEDIATION AROUND THE WORLD

The modern practice of mediation is not confined to Western societies, and in fact mediation procedures may be more widely practiced in non-Western countries than in the West (Augsburger, 1992). In general, the world can be divided into direct-dealing and

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nondirect-dealing cultures. Members of the former value face-to-face interactions, accept conflict as a given, are generally not uncomfortable with directly confronting those with whom they disagree; they are at ease with direct dialogue, debate, and negotiations. Members of the latter societies generally try to avoid overt conflict, strive to preserve face for themselves and others, and extensively use both informal and formal intermediaries. Many non-Western cultures, especially in Asia, Africa, and Latin America, have highly developed informal and formal mediation processes for resolving conflicts that are integrated into routine day-to-day interactions.

Asia

The Asia-Pacific region has been a particularly fertile area for mediation practice. The People's Republic of China has long practiced mediation to resolve interpersonal, community, and civil disputes through People's Conciliation Committees and court conciliation (Ginsberg, 1978; V. Li, 1978, M. Q. Li, 1988). The People's Conciliation Committees are institutionalized service providers established by the government; they offer mediation services primarily at the neighborhood, village, town, district, and county levels. The mediators are often retired village leaders with high prestige. The court conciliation occurs in the process of settling judicial cases and is often mediated by the hearing judge. More recently, mediation has been introduced to manage environmental and interjurisdictional disputes between governmental entities, which have been given increasing degrees of autonomy from the central government. Hong Kong and Singapore, too, have made significant strides in introducing and institutionalizing mediation in the commercial and family areas through the Hong Kong International Arbitration Centre; the Alternative Dispute Resolution Division of the Ministry of Law and Community Mediation Centers (CMC) in Singapore; and a number of social service agencies, religious and secular, in both locales (Ngoh-Tiong, 2002). In Singapore especially, there has been some effort to build upon the multicultural dispute resolution traditions of its Chinese, Malay, and Indian population. By incorporating Western models of mediation and traditional indigenous philosophies and procedures

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that engender a "*kampong* spirit" (a sense of community and being together), informal use of intermediaries (the *kong chin* among Chinese, *kampong kuta* or *penghulu* among the Malays), village meetings such as the *panchayat* (Indian), gift giving, and tea, Singapore has attempted to build a blended mediation approach.

Japan has a long history of using mediation at the informal level, with elaborate systems of go-betweens carrying communications between disputing parties. Mediation is embedded in the business culture, where intermediaries are used as introducers (*shokai-sha*) and as mediators (*chukai-sha*) to smooth business relationships (Graham and Sano, 1984). Japan also has an elaborate system of court-based mediation for both civil and family cases, which is extensively used to address a range of issues (Krapp, 1992). Family mediation is mandatory for most divorce proceedings and many parent-child issues. Generally, there is a mediation panel chaired by a judge and two other respected professional mediators, the latter handling most of the sessions.

Korea has developed mediation to address family and civil disputes through both independent and court-based mediation programs (Yang, 1988). In recent years, the ruling political party has established the People's Predicament Committee, which performs both ombudsman and mediating functions. The national environmental agency has also developed a mediating committee to address environmental issues.

Thailand, Malaysia, and Indonesia have developed a number of arenas where mediation is used (Muntarbhorn, 1988; Moore and Santosa, 1995; Ihromi, 1988). Thailand has experience in mediation primarily at the village level. Malaysia has developed a formal "conciliation" process, centered on government-appointed mediators, for resolving industrial relations and trade conflicts (Aminuddin, 1990). Independent mediators are also used, though on rare occasions.

Indonesia, which has had a more restrictive government since the imposition of the New Order in 1965, still has maintained the *musyawarah* process for consensus decision making and dispute resolution in many villages and institutions. In addition, labor mediation is offered through a governmental body, the Committee for Labor Conflicts Settlements, which is part of the Ministry for Labor Affairs (Ihromi, 1988). The newest initiative in the area of

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musyawarah and mediation is in environmental dispute resolution. The Ministry for the Environment, the Bureau of Environmental Impact Management, and several nongovernmental public interest groups (Wahana Lingkungan Hidup Indonesia and the Indonesian Center for Environmental Law, among others) have supported and participated in a number of mediations over water pollution issues. The governor of the province of Kalimantan on Borneo has supported the design and institutionalization of a mediation system for resolving environmental disputes. The latter project is conducted in cooperation with the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), a German technical assistance agency; and U.S. conflict management practitioners (Moore and Santosa, 1995).

The Philippines and Sri Lanka have developed highly elaborate community-based mediation programs for resolving civil and some minor criminal disputes. The Barangay Justice System in the Philippines, which was established by President Ferdinand Marcos in 1978, set up a nationwide system of mediation and arbitration panels in neighborhoods and districts to hear community disputes (Pe and Tadiar, 1988). The mediation panels handle cases in a multistep resolution process that includes efforts by the panel chair to settle the case, a mediation hearing, and (if these are not effective) the option of a decision by an arbitration panel. The system now has more than forty thousand boards throughout the country.

Sri Lanka's Mediation Boards Commission was authorized by law in 1988. This founding act set up an independent Mediation Boards Commission under the Ministry of Justice and promoted the establishment of mediation panels of respected citizens in districts throughout the island. With the assistance of U.S. experts in dispute systems design and in mediation, the boards have trained more than six thousand mediators and established more than 240 panels. Thousands of civil cases are processed each year (Herat, 1993).

On the Indian subcontinent today, the *panchayat* tradition described earlier is carried on in India, Nepal, Pakistan, and Bangladesh. In India, mediation is provided by legal aid programs in a number of states, and in Gujarat and Uttar Pradesh states by the *Lok Adalats,* or People's Courts, which offer mediation and conciliation services for matrimonial and civil disputes (Shourie, 1988).

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In India, many of these systems have been strongly influenced by Gandhian principles of decentralized governance. Nepal, Pakistan, and Bangladesh have also taken steps to enhance, develop, and institutionalize mediation services, primarily at the local level (Afzal, 1988; Aryal, 1988; Islam, 1988). The Nepalese have developed mediation procedures to handle forest management disputes (Shrestha, 1995), marital conflicts, and financial transactions. Pakistan and Bangladesh have concentrated on mediating family and civil disputes.

Australia, New Zealand, Melanesia

Australia and New Zealand have followed a development path in mediation that in many ways has paralleled that of North America. Initially, mediation in several arenas in Australia was financially supported by government agencies. Community mediation centers have been established in most states and in large urban areas. These centers provide either solo mediation or co-mediation and have primarily addressed smaller civil and neighborhood disputes.

Mediation in Australia has also been developed in the courts—in the family arena (Faulkes, 1988; Renouf, 1991); as a component of a settlement week program; and as part of a Supreme Court pilot project on resolving personal injury, mortgaged property, and simple contractual disputes (Dewdney, Sordo, and Chinkin, 1994). Australia also has a very active community mediation sector, with programs in most states (Faulkes, 1990; Stevenson, 1990). Race complaints are also being mediated (Mulcahy, 1992). In addition, mediation is being used to resolve industrial disputes (Interim Rules, 1992) and conflicts between the majority culture and Australia's aboriginal peoples over social service and natural resource issues (Ross, 1995).

New Zealand has developed mediation services to handle a range of commercial, civil, small claims, criminal, family, labor, housing, land, and environmental disputes (Macduff, 1988). In the area of housing, the Housing Corporation of New Zealand has developed extensive services, provided by in-house and external mediators, for resolution of differences between tenants in public housing and between the authority and tenants. The Maori, the indigenous population of New Zealand, have their own traditional

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means of resolving disputes—*taha Maori,* or the Maori way—which until recently they used only within the clan or kinship group. This process involves a ritualized greeting invoking spirits, ancestors, and common bonds; creation of an atmosphere for dialogue; a fairly unlimited and open discussion; and recognition of agreement and reconciliation. More recently, some of these procedures have been used to address Maori altercations with non-Maori Pakiha (Macduff, 1988, 1995) and Maori land claims disputes (Wilson, 1992; Barnes, 2002).

In Melanesia, the Tolai villages in New Britain each have a counselor and committee that meet regularly to hear disputes (Epstein, 1971). The role of the counselor and committee is to "maintain conditions for orderly debate and freedom of argument by the disputants and anyone else who wishes to express opinion" (Gulliver, 1979, p. 27). The process is both a "mode of adjudication" and a "settlement by consensus" of the parties (Epstein, 1971, p. 168).

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Latin America

Latin American indigenous and Hispanic cultures have used mediation historically, and they currently use it to address a range of disputes. Nader (1969) reports on the dispute resolution process in the Mexican village of Ralu'a, where a judge assists the parties in making consensual decisions. Lederach (1984, 1995) describes other mediation models from Hispanic culture that have been transposed to Latin America, such as the *Tribunal de las Aguas* (water court) in Spain. He also details informal mediations to resolve interpersonal disputes in Central America (Lederach, 1988). Riley and Sebenius (1995) and McCreary (1995) describe negotiation, fact-finding, and intermediary assistance in natural resource disputes in Ecuador, Honduras, and Cost Rica. Argentina is in the process of developing family, labor-management, and commercial mediation, and Brazil has a thriving mediation movement.

Africa and the Middle East

Mediation is used in both traditional and modern African societies, with practices varying from tribe to tribe and region to region (All Africa Conference on African Principles of Conflict Resolution and

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Reconciliation, 1999; Ayendo et al., 2001). For example, the *moot court* is often a common means for neighbors to resolve disputes (Gulliver, 1971). The Tswana in Southern Africa use headmen and councils, and some tribes in Nigeria use chiefs, to accomplish negotiated resolutions (Comaroff and Roberts, 1981).

In Kenya and Somalia, mediation work has been undertaken by the Mennonite Central Committee and local secular and religious groups to address ethnic and clan disputes (Lederach, 1993). In these interventions, the emphasis has been to build on indigenous processes and develop culturally appropriate mediation mechanisms to address local disputes.

South Africa has experienced the most extensive development and use of formal mediation processes on the continent. In 1968, the Centre for Intergroup Studies (now the Centre for Conflict Resolution) was founded to create constructive, creative, and cooperative approaches to resolving conflict and reducing violence. In the mid-1980s, Independent Mediation Services of South Africa (IMSSA) was established to handle an increasing number of labor conflicts in various industries. Its success in that area has led to an expansion into the spheres of racial and political conflict.

In the 1980s and early 1990s, a host of highly effective groups and organizations emerged that were active in community and political conflict resolution. Most notable were the African Centre for the Constructive Resolution of Disputes (ACCORD), Vuleka Trust, Wilgespruit Fellowship, the Negotiation Skills Project (Funda Centre), the Institute for a Democratic Alternative in South Africa (IDASA), and a number of dispute resolution programs at the University of Port Elizabeth and the University of Witwatersrand.

In 1991, the major parties to the conflict in South Africa—the government, the African National Congress, and the Inkata Freedom Party—negotiated the National Peace Accord, a nationwide effort to address the growing violence in the country that was threatening progress toward democracy. This highly innovative accord established both regional and local peace committees that were to address actual and potential conflicts on the ground through a variety of conflict management approaches, one of which was mediation. Although it encountered enormous structural, political, resource, and logistical obstacles, this national system of dispute resolution made a significant effort in the peaceful transition

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of South Africa to democracy (Nathan, 1993; Moore, 1993). The boards, staff, and members of the peace committees successfully mediated numerous violent or potentially violent disputes and contributed significantly to the development of positive norms and procedures for peaceful conflict resolution in the country. Since the national elections in 1994, mediation has shifted from a focus on violence to an emphasis on development and reconciliation in South Africa and neighboring countries (Assefa, 1994).

Mediated settlements are also practiced in Arab societies (Salem, 1997). "A society in which conflicts are frequent must develop mechanisms for settling differences which, if allowed to get out of hand, can destroy the entire social fabric. In the Arab world, mediation on the tribal and village level has for centuries been the traditional method of settling disputes, and the same method has, in modern times, been adapted for settling political and military issues within and between Arab states" (Patai, 1983, p. 228).

Mediation is especially critical in Middle Eastern societies when honor is at stake and any concessions will appear to result in loss of self-respect or face. Face-to-face negotiations are often extremely difficult, and an intermediary is needed to separate the parties and work out an acceptable arrangement that preserves honor.

In many Middle Eastern and North African societies, intermediary services are performed by a mediator who is a person of respect. In Iraq and among tribal groups in Morocco and Algeria, he may even come from a special descent group with high status. Generally, mediators in the Arab world must be seen as neutral and impartial, and of high status so that neither of the parties can exert undue pressure on him (Patai, 1983).

Use of intermediaries in resolving business disputes is common across the Middle East. Villages in Jordan practice mediation using local community leaders as intermediaries (Antoun, 1972). Urban Cairo also has its own cultural approaches to dispute resolution (Murray, 1997). In Palestinian communities in the West Bank and Gaza, community and political leaders often mediate family, civil, and political disputes (Awad, 1994). These mediators are generally part of the disputants' social network, helping through the mediation process to assert community norms and reestablish social harmony. In Lebanon, especially during the time of the civil war, a number of political factions provided mediation as a means of

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managing differences during the time the fighting either prevented access to the courts or inhibited them from functioning (Hamzeh, 1994). Tunisia has an administrator or counselor, a *mouwafak el idri,* who is attached to the office of the premier and handles disputes that citizens have with government officials; and market mediators, or *amine,* who resolve disputes between traders and customers in the public markets.

Clearly, mediation has played a major role in Middle Eastern societies in resolving serious diplomatic disputes and wars. Whether in the Arab-Israeli peace process (Carter, 1982; Rubin, 1981), or in the ending of the American hostage crisis in Iran, intermediaries have played a valuable if not critical role.

In Israel, mediation has developed in its secular society to resolve commercial, community, and family disputes (Matz, 1991; Sharon and Schwentzman, 1998). Several dispute resolution and research centers have been started to study and apply intermediary processes to a range of disputes. Among religious Jews, spiritual leaders often play intermediary roles in family, neighborhood, and other community conflicts.

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Europe

Western Europe, too, has begun to more widely adopt and develop mediation processes and institutions. Business mediation has a firm foothold in Great Britain, and family or community mediation services and centers have been developed in Great Britain, Ireland, the Netherlands, Germany, France, and the Scandinavian countries (Acland, 1990). Norway has developed an elaborate system of Boards of Conciliation, which mediate both civil and family cases (Shaughnessey, 1992).

A number of programs and projects in Ireland have been initiated to address some of the sectarian tensions in the North (Morrow and Wilson, 1993). Germany is currently utilizing mediation to address a variety of environmental, natural resource, and development issues (Weidner and Fietkau, 1995).

Since the end of communist rule in the early 1990s, Eastern Europe and the Confederation of Independent States (CIS) have begun to institutionalize mediation as a means of resolving a range of disputes (Mayer and others, 1999). Dispute resolution centers,

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

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

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