**Mediation Discussion**

**Conflict**

Conflict is the interpersonal response to a threatening event: when feelings of frustration or anger rise beyond control, a conflict ensues. Conflict is an ulti- mate act: it marks the end of a path. Conflict is an opening: it presents an op- portunity to move beyond a problem. Conflict is the sign that resolution is needed: to resolve conflict, history must be addressed and perceptions must be changed. The resolution of conflict is a release and a closure.

**CONFLICT IN THE WORK SETTING**

All conflict, whether in a personal or professional setting, involves emo- tional response. Viewing conflict from an emotional perspective is a logical and common interpretation in private matters. But, in the workplace, it may contradict fundamental beliefs about propriety and professional behavior.

There are a number of reasons why people do not express themselves in emo- tional terms on the job. Expressing emotion in a professional setting is per- ceived as inappropriate. The job site is not a place for free expression of feelings. Responding with emotion comes across as childish and self-centered. It may demonstrate that one’s focus is on personal satisfaction rather than accomplish- ing group goals. Emotion is often associated with irrational behavior and a loss of control. For men, emotion may be perceived as weak and feminine. Women may avoid emotional responses so as not to project negative stereotypes.

Despite the fact that people avoid emotionally expressive language in the workplace, people still respond emotionally. In reporting responses to situations some people use words that clearly describe feelings, such as “I am angry” or “I was humiliated.” There is no question that these descriptions indicate an emo- tional response. However, open expressions such as these are often reserved for friends or escape only during heated moments, with ensuing regret.

It is important not to confuse lack of expression with lack of feeling. Some people are more ready to express feelings than others, and herein lies the problem. Since all people are personally and emotionally affected by the world around them, these feelings, when not openly expressed, may vent in nonproductive ways. Typical outlets for emotions unexpressed on the job are gossip, backstabbing, wasting time, misusing sick leave, expressing negativity, and abusing authority. All of these forms of passive-aggressive behavior have real repercussions for employees and employers. Because people are not ac- customed to expressing their emotions at work, they may not even be aware of their underlying feelings and the ways in which these feelings can affect their behavior.

Take, for example, this scenario: Two colleagues are writing a joint report. A conflict arises over a morning deadline. One person has a family and must get home for dinner; he is willing to suffer the consequences of submitting a late report. The other person is single and would rather work all night; for her, losing face by handing in a late report is unacceptable. Assume that they resolve the conflict amicably: The single person stays late alone, and the mar- ried person agrees to take responsibility for the next project.

It is true that the conflict was resolved in a rational manner, and ideally there will be no further repercussions. Consider, though, what feelings might be oc- curring. The married man wants to be with his family; he loves to eat dinner with his children, and his wife is not pleased when he comes home late. He feels pressures from all sides; he resents the self-centered attitude of his col- league but also feels a sense of shame from not fulfilling his work duties. He knows his work suffers because of his private life and is embarrassed that, as a result of his personal choices, colleagues look down on his performance.

The single person is frustrated and resentful that someone else has the power to dictate what might happen to her on the job. Her priorities are with her work. She is angered that the extra burden must fall on her shoulders, and, if the work is not completed, she will be punished. She feels she is in a bind: either complete the work that belongs to someone else or put her own career in jeopardy.

Even though an agreement has been made, there is a good chance that re- sentment and lack of trust will follow this relationship to the next assignment because none of the underlying feelings have been expressed. Overlooking the real emotions that arise as a function conflict is shortsighted. However, simply recognizing that emotion underlies all conflict does not reduce the cultural taboo against expressing emotion in the workplace. Since emotion is so hidden on the job, its expression often takes inappropriate forms, such as angry explosions, backstabbing, or hurtful gossip. People are simply not so- cialized or properly educated in how to express honest emotion in appropri- ate ways on the job.

It is important to note that recognizing and addressing emotion is not a li- cense to disregard tact. It is also not an invitation for the workplace to be- come an open forum for dramatic emotional outbursts. Accepting the reality that emotions influence behavior in significant ways, and feed conflict, is a strategy for initiating real change, not a suggestion to forgo professionalism for theatrics. The concept, to encourage overt or underlying emotions to be expressed, but in a manner that allows rational response to these expressions, is an attempt to more fully address the emotional repercussions of conflict.

**DYSFUNCTIONAL CONFLICT MANAGEMENT**

Instead of developing safe and effective avenues to express emotion at work, complicated power games are created that afford an outlet for emo- tional energy. Rather than acknowledging that emotional responses are healthy and necessary, and affirming that conflict is an opportunity for com- munication, convoluted power struggles emerge.

Conflict is undeniably threatening and often very difficult to face directly. Suggesting that conflict should be used as an outlet for growth presupposes that people have the skills and desire to explore that route. Before being able to generate conflict management strategies that address emotion in functional ways, preconceptions about conflict must be examined to determine in which ways they are dysfunctional.

**Power and the Win/Lose Perspective**

Very often, conflict is conceptualized from a power perspective. Power is equated with aggression, force, and ultimately winning. Although this is an emotional perspective as well, involving intimidation and fear, here power is seen as a weapon. When conflict is handled using power as a weapon, it ac- cepts the notion that there will be a winner and a loser. The power perspec- tive leaves little room to maneuver, except by force.

Since it is difficult for two opponents to both maintain power, there is al- ways risk. Although it is possible to win a power battle, it is also possible to lose. When the battle is lost, the power is lost, resulting in weakness. In this play, one side is inevitably sacrificed. Additionally, a single power struggle usually leads to another; either the loser or another opponent will vie for con- trol. Regardless who wins or loses in a battle for power, both sides expend tremendous energy and are forced to sacrifice.

Does the winner have more to gain if the opponent loses? This may be true in all-or-nothing situations, but in the average workplace, winning is a group effort. In some situations there will be winners and losers on the job—in promotion, for example. But typical work conflicts involve interpersonal frustrations, issues of respect, fairness, acknowledgment, and having a voice. The concept of survival of the fittest just isn’t relevant.

This combative representation of power suggests two warriors, and many people do enjoy a high-stakes game. For most people though, the risk of los- ing is far too serious to turn conflict into a power game. In the average work- place relationship, conflict is less about wielding power in order to destroy others, and more about getting through the day with a job, dignity, and san- ity intact. Power is about having a voice, gaining respect, and achieving suc- cess that does not come at the expense of others. For those people who are not willing to kill or be killed, it makes more sense to reinterpret conflict, sep- arate it from aggressive power, and plan a strategy that includes responding to underlying emotion and finding emotionally satisfying solutions to problems.

Taking emotion into consideration when responding to conflict does not require denying that a power play exists. It is inherent in conflict that strengths and weaknesses will be explored. But there is a great difference be- tween usurping power from others and being personally empowered oneself. One person does not have to be weak for another to be strong. In most situ- ations, each person involved in a dispute will possess some power. Power comes in many forms.

**Passive and Aggressive Bargaining**

Power relationships are affected by the style in which people respond to conflict. A passive approach to conflict resolution can have an equally strong impact as an aggressive approach. Both styles can be effective, and both can also be abused. Either style can be employed to intimidate or manipulate.

Passivity lends itself to accommodation. A passive stance may be an attempt to discourage aggression from an opponent; in a battle, an aggressive person may win by sheer force. In an aggressive stance, adamant positions are taken regardless of the potential costs. This approach may bring success if an oppo- nent concedes, but if an impasse occurs, both sides lose.

Passive and aggressive bargaining both involve risk. When unequivocal po- sitions are taken, there is less control over the outcome. When steadfast about a position, compromise is unlikely. Preoccupation with a viewpoint forfeits the opportunity to examine more subtle desires and intentions. Also, a stub- born attitude may provoke more resistance in an opponent. This type of pos- turing always results in a loser.

Passivity can have similar results. Refusing to take a position can also be in- terpreted as an absolute stance. Although it may be easy to take advantage of a passive person, it may also be very difficult to negotiate with a person who refuses to actively participate. An impasse due to passive bargaining is equally destructive to the relationship.

What is most detrimental, however, is when passive and aggressive bar- gaining is dishonest. It exaggerates positions and obscures true intentions.

Deceptive posturing hinders honest negotiations and leads to dissatisfaction. When taking an exaggerated position, the most that can be expected is reach- ing the midpoint between the two positions. The act of overstating for the purpose of haggling presupposes that the middle ground will be accepted. True needs or desires are obscured. In the end, each party walks away having less than demanded; the result is always a loser.

**The Impact of Context on Strategy**

Circumstances greatly affect bargaining strategies. Behavior and conflict style will be impacted by the context of the relationship. For instance, a forty- year-old man will bargain differently with his eight-year-old son than with his supervisor at work, although these two relationships influence each other.

Imagine that the man has an authoritarian supervisor; there is little room for compromise or error at work. At work the man is powerless. When he re- turns home, he is tired and demoralized. But now, between himself and his eight year old, he has power. He behaves toward his son as his boss did with him; he tolerates little compromise or error. Perhaps this response is a direct result of feeling powerless at work, or possibly he recognizes that aggressive authority is a very effective form of control. Now consider the man’s wife. She is neither a superior nor a subordinate. The man’s bargaining style with his wife is a reflection of additional variables. He is neither powerful nor pow- erless and must adapt his manner again.

Whatever the specific variables, a person cannot be separated from his or her circumstances. Conflict always has a context. Reactions to conflict always occur within a context and reflect an individual’s circumstances. This context can be identified and a response can be designed accordingly.

The strategy chosen for dealing with conflict should be conscious and de- liberate. The method should reflect the most appropriate style for any given set of variables in a particular context.

**FUNCTIONAL CONFLICT MANAGEMENT**

Conflict resolution should be conceived to resolve conflict, not merely change its form. Strategy, unlike a win/lose power struggle, does not de- mand capitalizing on secrecy, deception, or manipulation. Rather than to de- ceive and conquer, the strategic goal can be to redirect, reconceptualize, or redefine.

Instead of equating conflict with battle and aggressive power, it is possible to view conflict as a dance. Dance is a series of intertwined steps, passionate and reflective or heated and reactive. Dance can be both choreographed and improvised. To choreograph indicates planned control; to improvise manifests flexibility and freedom. Productive conflict resolution does not deny control, it permits planning and strategy. It also embraces emotion, is tolerant of change, accepts mistakes but attempts to correct them, and is a collaborative effort.

During a dispute, choices are made about how time and energy will be ex- pended. A power battle is all consuming and assumes loss. Since the goal is to win, the focus is on defeating the opponent. There is little room for objec- tive evaluation of the problem and mutual organization of a solution. In con- trast, joining together to address a problem as a collaborative effort unveils the possibility of mutual satisfaction. Accepting the emotional nature of con- flict permits thorough exploration and helps to heal wounds that may infect a relationship. Personal empowerment does not rob others of their rightful po- sition and breeds respect rather then contempt. Conflict can lead to strength, personally and interpersonally. Opening that possibility is a choice.

**Styles of Conflict Management**

The way in which individuals behave during conflict depends on personality, experience, training, and the particular circumstances of the situation. Although predicting behavior is difficult, past patterns inform future conduct. All people demonstrate responses that for them are familiar and comfortable. Some of these habitual responses will prove successful over time and others will generate repeated disruption. Recognizing commonly successful strate- gies, and those that cause frustration, is a useful step in learning to modify behavior and improve satisfaction. Developing the ability to resolve conflict in a strategic fashion helps to increase contentment and decrease stress.

Conflict resolution styles can be labeled and distinguished. Differentiating these styles aids in recognizing and predicting behavior. Recognizing styles helps to identify the tendencies people display. These clearly delineated styles are not a precise reflection of the strategies people adopt, however; most ac- tual behavior reveals a combination of conflict resolution styles.

While it is impossible to control the behavior of other people, personal be- havior can be adapted to help direct communication. If an opponent is behaving in an adversarial manner, responding with a collaborative or accom- modating approach may bring to light an alternative perspective. Strategic thinkers aim to meld styles that work together rather than repel.

A mediator who is aware of his or her own tendencies and motivations may have clearer insight into the perspectives of others. People do not always re- spond in predictable ways. For instance, people who are generally passive may become quite assertive during a conflict. The motivation for particular be- havior is not always apparent. A collaborative approach may be used as a means to deceive. No one conflict resolution style is ideal in every situation.

In designing strategies for resolving conflict, it is useful to identify motiva- tion. Identifying the reason for a particular response can be instructive. Preparing a strategy offers some direction. It is important for mediators to model productive techniques in order to educate parties as to how adjust- ments to their behavior might produce desirable outcomes.

The following presents general categories of conflict resolution styles. Many more subcategories or combined categories exist. This is merely a guide for recognizing common strategies familiar to many people.

**COMPETITIVE**

This is an aggressive stance in which winning tends to be linked to self-worth. A competitive person enjoys argument and the feeling of power associated with defeating an opponent. Those who enjoy competition in work may also enjoy the thrill of battle in interpersonal relationships.

A competitive person is not necessarily aggressive or adversarial, although a competitive attitude may be perceived this way. Competitiveness evokes am- bivalent responses. Although competitive behavior is often promoted and revered, such as in sports and business, it is also disdained in interpersonal re- lationships. People who are competitive are perceived either as strong, com- petent, and independent or as insecure, hostile, and self-involved.

Many people do have a competitive nature but attempt to disguise it in or- der to appear more team-oriented. In the workplace a contradiction emerges where there is pressure to be both a team player and highly competitive. Additional confusion results when it is not clear which circumstances call for which approach. Given this paradox, some people act as a team player for the purpose of self-promotion. This behavior supports the group, but the under- lying motivation is competitive.

Competition also carries an element of thrill and adventure. Many people view competition as sport. They have no intention of harming others. They simply enjoy the thrill of the game. For those who do not share this percep- tion, competitive people can be quite threatening. A noncompetitive person may shrink in the company of the highly competitive. The motivation of a competitive person may also be misinterpreted, eliciting an aggressive re- sponse out of self-defense.

**ADVERSARIAL**

This tendency involves taking strong and adamant positions regardless of the value of other perspectives. Adversarial relationships are often perceived as less personal or emotional and more rational. Deliberate strategy is employed to advance an interpretation or a plan of action. “Justice” is often the ratio- nale for engaging in adversarial tactics.

The most common reference for adversarial action is the legal system, which is described as an “adversarial system.” An adversarial approach is dif- ferent from a competitive approach in that adversaries take absolute positions based on an interpretation of the problem. Although competition may be perceived as a battle of might, adversaries battle using wit. Adversaries may take positions that they do not fully believe, but that serve to strengthen their point. Those who adopt the adversarial approach are often advocates for a cause.

There are few arenas where the adversarial approach is productive. To fully engage an adversarial philosophy, the opponents must be willing to either sac- rifice all other aspects of the relationship or remove themselves emotionally from the battle. A curious phenomenon occurs, for instance, when lawyers can engage in a heated argument that appears to stem from deeply held be- liefs and moments later they are friendly and harbor no ill will. This is possi- ble because lawyers take positions that are based on ideas, not emotions.

While lawyers certainly feel, professionally they remove themselves from this sentiment and argue the case as necessary. This is a difficult strategy for people who are personally connected to a problem. For this reason, even lawyers will not handle their own legal matters. From an adversarial perspec- tive, emotion clouds judgment.

**COLLABORATIVE**

This style employs teamwork and cooperation to meet some mutually ac- ceptable goal. Various perspectives are examined and the sides come together with a patchwork solution. Collaboration may be difficult to sustain in highly emotional situations.

Collaboration tends to be the approach perceived as the most honorable and productive, and when true collaboration is possible it is a satisfying way to work. However, idealizing this technique disregards the fact that a dispute makes collaborating inherently difficult. Collaboration requires interaction that is basically free from conflict. In collaboration people are able to put their own needs aside for the common good—or at least prioritize the common good over their own needs. Collaboration requires teamwork and an ability to view issues objectively.

Perhaps it is possible for some people to work jointly from a shared per- spective to resolve conflict, but it requires great maturity and self-control. When collaboration is attempted for resolving disputes, controversies may re- main under the surface.

Often, collaboration is an admirable objective and an excellent way to pre- vent conflict from occurring at the outset. Shared perspectives, teamwork, and mutual concern and respect are goals to strive for in all interpersonal re- lationships, business or private. But when people are bogged down with frus- tration, anger, resentment, confusion, fear, or any other emotions typically associated with conflict, the amicable relationship necessary for collaboration may be difficult to attain.

Many discussions on mediation identify collaboration as the ideal strategy for dispute resolution. Some practitioners suggest that the mediator aim to initiate collaborative efforts and that collaboration is the heart of media- tion. In part this is true. Collaboration involves coming together to work toward a mutually defined end. All interaction during mediation can be viewed as collaboration. This interpretation can be very uplifting to the par- ties. People come to mediation in turmoil. Offering collaboration as an al- ternative response may bring a sense of relief and can lead to productive work, even if the parties are unable to collaborate consistently throughout the process.

**ACCOMMODATING**

Although cooperation is necessary in accommodation, sometimes accom- modation occurs despite a desire to act differently. Accommodating consists of capitulating in order to gain or maintain something else of value. Accommodating can be productive in smoothing the way to a solution. However, accommodating can become acquiescing, which can be used to ap- pease or manipulate, leaving the problem yet unsolved.

In many instances accommodation is a positive step and necessary for com- promise. Conflicts often arise from the perception that there is a lack of simple accommodation. Resolving conflict often hinges on small accommodations. From this perspective, accommodation is a necessary part of most resolution.

However, when accommodating is perceived as succumbing, resentments can build. The accommodating person may feel used or disregard feeling they are weak, nonassertive, and perhaps manipulated. The person being accom- modated may feel that the gesture was insincere, that a hidden agenda will be revealed in the future. Trust in the agreement is put at risk if questionable accommodations are made.

Although accommodation is a necessary part of compromise and problem solving, caution should be taken so that the agreement is not precarious. Accommodation may also be used to avoid dealing with a painful, stressful, or an otherwise difficult situation. Conflict resolution should aim to resolve the entirety of the problem, not mask the issues with a short-lived feel-good agreement.

**PROBLEM SOLVING**

Similar to collaborating, problem solving involves focusing on a question and its answer. It is a more formal process than other types of collaboration, often employing organized protocol for examining a problem, investigating options, and initiating a planned solution.

Problem solving is often associated with a more scientific or systematic ap- proach. It is related to an adversarial strategy in that positions are taken and arguments are made, but they are examined cooperatively, not competitively. Problem solving is a composite of several approaches. It is both rational and collaborative.

However, problem solving may be too clinical for issues that are subjective or emotionally charged. The scientific examination of a problem will usually lead to a practical resolution, one that is just and effective, but may not satisfy passions. Successful problem solving must reflect personal perceptions. People who consider themselves strongly rational are often at odds with the highly emotional, since each is sensitive to the flaws in the others’ approach.

Imposing strict problem-solving techniques is a common mistake of inex- perienced mediators. The mediator inquires as to what each side wants, and then attempts to reach a compromised middle ground. This is an effective way to reach a settlement, but it will not usually be honored. Conflict is more complex than this approach acknowledges.

Problem solving, while clinical and emotionally removed, is an excellent tool for examining issues and gaining perspective. For those who are entan- gled in emotions or unable to view perspectives other than their own, assess- ing issues in a clinical manner can be very informative and help to dispel biases that make agreement difficult.

**COMPROMISE**

Like cooperation, compromise can be used as a way to avoid conflict and satisfy others’ needs at one’s own cost. A compromise strategy assumes that no one will get everything they desire. If both sides compromise, an accept- able middle ground can often be reached. If only one side will compromise, unfair advantage may be taken.

Compromise is very much like accommodation, but suggests that both sides have made accommodations after mutual agreement. Compromise is an integral part of most agreements. Whether the negotiations were held in a competitive, collaborative, or problem-solving manner, ultimately both sides make compromises. Even when receiving everything requested, the act of ne- gotiating often feels like a compromise, particularly if negotiations have been difficult or stressful.

Compromise is subjective. There are clear compromises, such as dividing money in half, but compromise often reflects personal perceptions. Inexperienced mediators sometimes attempt to initiate a compromise that ap- pears equal from an objective standpoint, when fair agreements from the per- spective of the parties are often based on subjective assessments of fairness. It is often the willingness to compromise that is most important to the process, not the specifics of the agreement. Movement away from rigid positions opens the door for resolution. The act of compromise can be cathartic for those who have felt constrained by disagreement.

Since compromise is such an important part of the resolution process, it is tempting to prematurely pressure the parties into compromise. However, there is little point in instigating compromise when the parties have not in- dependently reached that step in the process. A compromised agreement that is created with uncertainty will doubtfully withstand time.

**AVOIDING**

This style can be either passive or aggressive. Avoiding, as a rule, halts a process. This can stifle an opponent. Avoiding can occur as a response to in- timidation or aggressive manipulation or it may indicate a simple desire to postpone conflict until a more appropriate time.

Avoiding is a common tactic people use to deal with conflict. The prospect of dealing directly with conflict is overwhelming, so the natural response is to do nothing. This is not a bad strategy in many cases. Waiting for anger or pain to subside, for the prominence of the issue to wane, is often a sufficient cata- lyst for resolution. In some instances time simply erases the problem, but in other cases time offers only the illusion of resolve. A problem ignored may appear to be forgotten, but underlying concerns still remain. Dredging up these buried issues may be a useful exercise, but it depends on the nature of the problem, the relationship of the people, and their goals. It may, or may not, be worth the effort it takes to work through repressed feelings.

In other situations, avoiding can be a wholly inadequate and unproductive way of handling conflict. Sometimes avoidance is used to intimidate, manip- ulate, or harass. If one person actively avoids a problem, it requires significant assertion and bravery for another person to press the issue. Avoidance can also increase the magnitude of the dilemma in people’s minds. It may exag- gerate the intensity of positions and feelings. Problems often get worse when ignored.

Avoiding a confrontation also may increase rumination on a problem. When one person insists on avoiding confrontation, the other person remains trapped in their own thoughts. This is a very effective way to manipulate. It can be cruel to disregard a person when it is clear they are upset. The moti- vation for this disregard may be fear, intimidation, pain, anger, or an other- wise legitimate feeling, but the person left to wallow in a problem can feel quite trapped.

Mediation is a method of conflict resolution that is very sensitive to the consequences of avoidance. People often come to mediation after a long pe- riod of avoiding a problem. Mediation is specifically designed to be a safe and comfortable arena for addressing issues that have been avoided. Relevant is- sues rarely remain untouched in the course of mediation.

**Mediated Disputes**

Mediation is a unique and exceptional way of handling disputes. It combines the practical features of problem solving and negotiation with a focus on per- sonal concerns. While mediation serves to solve problems by developing co- herent strategies through agreements or contracts, it also aids in building better communication and addresses how people feel about their circum- stances. Mediation adds a human element to conflict resolution that is miss- ing from other formal conflict resolution. This humanistic perspective is particularly important because most other resolution processes neglect to rec- ognize the personal or emotional element in all conflicts.

Disruptions in our lives in the form of conflict affect us as people. Whether the conflict surrounds business negotiations, contract disputes, team projects at work, an argument between coworkers, or simple day-to-day frustrations, we cannot separate our personal selves from our experiences, even when those experiences involve issues entirely business-related. Mediation has proven to be overwhelmingly successful because it embraces two equally important aspects of problem solving: the need to formally resolve issues with a mutually satisfy- ing concrete plan, and the need to address the emotional aspects of conflict.

Mediation promotes agreements that address the underlying concerns that caused the conflict to occur in the first place. In addition, mediation addresses the future of the relationship. No agreement can withstand the strain of peo- ple who cannot, or will not, adhere to the agreement. If there is little profes- sional, personal, or emotional comfort with the agreement, the agreement is not worth the paper it is printed on and certainly more conflict will follow. Mediation seeks to do more than resolve the apparent conflict; it seeks to pre- vent further conflict. Its aim is to strengthen relationships, build communica- tion skills, quell feelings of fear, and teach more productive techniques for interaction in both the business and personal realms.

Mediation is a highly practical tool. It is less cumbersome and costly than other formal conflict resolution processes, and it does not require an inordi- nate amount of time or emotional commitment. Mediation is ideal for those business, workplace, or interpersonal disputes that should not be relegated to the enormously complex legal system. In fact, a great many disputes that have plodded through the legal system for years are settled by mediation in a matter of hours, saving countless dollars and enormous amounts of time and stress.

Mediation is also excellent for those business, workplace, or interpersonal disputes that affect people in emotional or personal ways, disputes that the legal system is ill equipped to handle. Work-related disputes affected by personal feelings and perceptions, not appropriate for the legal system, are also not properly addressed through counseling or therapy. Mediation is an opportunity to handle conflict in a strategic manner while respecting emo- tional undercurrents.

**GRIEVANCE PROCEDURES**

Mediation differs from the traditional grievance process in the workplace. Most grievance procedures are loosely based on the legal or adversarial sys- tem. They are highly structured and rule based. There is a finder of fact and a person, or series of people, who have the authority to make determinations based on facts and procedure. While the typical grievance procedure may serve the important function in the workplace of maintaining control, it is rarely tailored to the particular needs and circumstances of any given prob- lem. As a result, grievance procedures are widely disliked by employees and management alike.

There is frequently a sense, whether justified or unjustified, that workplace grievance procedures are unfair and burdensome. Employees feel threatened by what is perceived as a no-win situation, and management is hindered with an obligation to use punitive measures to maintain order. In a workplace, where settling disputes is essential for productive ongoing relationships, a flawed grievance process can do far more harm than good. As in the legal sys- tem, mediation is an excellent alternative in the workplace for problem solv- ing that lends itself to workable agreements that are mutually satisfying.

**BENEFITS OF MEDIATION**

Mediation is a simple process. In mediation an impartial third party assists the disputing people to reach a mutually acceptable resolution. The media- tor does not act as a judge or advocate. The rules of the legal system do not apply. Mediation is a creative process. The parties are free to design a solu- tion that is effective and satisfying from their perspective, rather than being judged by the perceptions of outsiders. The parties are not limited by rules of law or precedents designed for general problems, but not for this specific problem.

Mediation is a thorough process. The parties are invited to examine the is- sues that instigated the dispute. They are encouraged to consider what effect the conflict has on their professional and personal lives. The parties also ex- plore the potential outcome, designing a resolution that will resolve the neg- ative effects experienced from the conflict and thwart future negative effects. Mediation is preventive. Time is spent formulating an agreement that can re- alistically be fulfilled without further intervention. Mediation promotes long- term solutions

Mediation allows the people involved in a conflict to address each other di- rectly rather then through an advocate. By speaking openly, miscommunica- tion and misunderstandings are more likely to be revealed and dispelled. Attention may be focused on any nuance of the dispute they wish. They are not confined by bureaucratic rules. The parties may explore emotions and personal perceptions. Mediation promotes emotional healing and personal satisfaction.

Finally, mediation is accessible and cost-effective. It is less expensive and time-consuming than employing many other conflict resolution processes. Mediation is completed within hours rather then months or years. Mediation offers the average person a much needed opportunity for the timely and effi- cient resolution of disputes.

**Cost Benefits of Mediation**

Compared to litigation, mediation can save time and money. To the trepi- dation of many, conflicts often take a dramatic route and enter the morass of the legal system. Regardless of where the conflict begins, in the workplace, in the community, or in the home, conflicts that are not resolved by the peo- ple involved often become a legal action. The typical cost of a lawsuit will vary, but within the legal system an apparently minor complaint often be- comes enormously expensive and time-consuming, a common fear for every employer. Mediation can counter these costs. It is estimated that an average of 50 percent of advanced legal cases transferred to mediation are resolved in less than one day.

Workplace disputes have additional costs beyond the monetary threat of a lawsuit. Disputes on the job hamper productivity and morale. Dissatisfied workers have a higher turnover rate, thus requiring retraining and burdening experienced workers. Workplace conflict promotes destructive gossip, breed- ing fear and distrust. Without adequate ways to address the daily concerns of the workers and management, frustrations build, leading to added conflict. While mediation may not replace other formal grievance procedures, media- tion can benefit the workplace as it benefits the legal system. It offers a des- perately needed alternative that is cost-effective and time-efficient.

**ROLES OF THE MEDIATOR**

Although mediation is informed by the legal and counseling disciplines, it is neither a highly structured legalistic process nor is it emotionally draining and intrusive therapy. Mediation does incorporate the appropriate and most useful tools from each field. Mediation employs organized and deliberate problem solving while allowing a needed therapeutic outlet. Mediation ex- tends to the parties a nonthreatening and private arena to discuss issues openly without the threat of retribution. A mediator assists as a nonjudg- mental objective outsider. The mediator maintains the control and provides the structure needed to protect the parties from any chaos resulting from confrontation. Mediation can be facilitated by a professional mediator or a peer mediator. Both types of mediators can be very successful.

The mediator has two primary roles: facilitator and coordinator. As a facil- itator, the mediator assists in drawing out information from one person and fostering the understanding of that information by another person. Much of the focus of mediation is placed on the issues that caused the conflict. Through group discussion and private meetings with the mediator, the par- ties are encouraged to examine the elements that compose the conflict. This may require reflection on the work environment, interpersonal communica- tion, and work and personal stressors.

By asking questions, the mediator assists the parties to understand the nu- ances of the conflict, design a strategy for resolving this particular conflict, and prevent future conflicts. As a facilitator who has the benefit of unencum- bered insight, the mediator can offer a perspective that is new to the parties. The mediator assists the parties to move beyond the view they have of the problem and their preconceived resolutions. Creative solutions that are gen- erated by the parties, with the facilitation of the mediator, are often novel and address underlying concerns that the parties did not realize were affecting the relationship and hindering resolution.

The mediator is also a coordinator. The mediator helps to direct the flow of the session and assists the parties to set boundaries. Mediation is relatively unstructured, tolerant of open discourse and a certain degree of emotional expression. However, mediation still maintains a professional and organized framework. Mediation is not a chaotic free-for-all. In fact, one of the bene- fits of mediation is that it reins in much of the chaos that plagues ordinary efforts to communicate. Mediation escapes the rigidity of many other for- mal resolution processes, but maintains a rational and productive working environment.

**MEDIATION VERSUS THE ADVERSARIAL MODEL Adversarial Position Taking**

People involved in disputes benefit from the assistance of a mediator, as conflict commonly leads to a myopic view. During conflict, people often see only their own perspective. Frequently, a single-minded view of the issue is the problem itself, the impetus for the dispute. There are various reasons for this limited thinking. Single-mindedness may result from a lack of empathy or it may stem from a lack of opportunity to learn another perspective. Either due to anger or defensiveness, exploring all sides of the issue with an oppo- nent is difficult.

Once entrenched in a dispute, a linear approach strengthens arguments as each side attempts to persuade the other. This is the heart of the adversarial model, to first form a position and then support that position with evidence. This method tends to muddle the initial conflict. It is easy to sacrifice the original objectives or the true interests of the people involved while building an argument. The desire to win can override many of the other moral, polit- ical, and personal beliefs held dear.

Position taking and the need to prevail is a great motivator. It inspires the mental and emotional energy necessary to fight for justice. There are times when belief in a position or a cause is extremely important for building the momentum needed to fight a battle. Disputing in an adversarial manner is hard work and to justify it one must hold tightly to one’s position. There are appropriate times and places for this type of linear thinking. In most work- place disputes, and even in the average legal dispute, it is questionable whether the people involved will personally benefit from this type of battle mentality.

The battle stances that people take when they are disputing make any real communication difficult, if not impossible. Often, the most gained from hear- ing an opponent’s position is a clearer view of what must be disproved. Gaining a sense of empathy or discovering where the positions converge is difficult. When locked in battle, people are blocked from hearing what they do not wish to hear. This makes reflecting on or internalizing another point of view impossible. An alternative view is no more than a tool that can be used to strengthen a defense. These are not circumstances likely to produce satisfactory resolutions or the enhancement of relationships.

**The Effect of Mediation**

In mediation the adversarial or position-taking model of dispute is re- strained. The parties agree to come to mediation in good faith. They are re- quired to acknowledge the concerns of others; differing perspectives are genuinely considered. The mediator need not employ controlling tactics to promote this type of interaction because the parties agree to a nonadversarial approach. Through reframing, asking questions, and presenting alternatives, the mediator is able to redirect adversarial patterns and sway the parties to- ward a more cooperative approach to problem solving. If the parties are un- willing or unable to proceed with mediation on these terms, the session ceases. However, mediation is rarely thwarted because people are unwilling to participate honorably in an exploration of the issues.

In working toward a more holistic view of the conflict, perceptions fre- quently change. When confronted with new information and new perspec- tives, the parties often support notions that they once strongly opposed. In part, this stems from the fact that humans are inherently contradictory and in- consistent. People are quite adept at switching sides, and often do so with lit- tle awareness. This does not imply that people are confused or dishonest, but rather that each person plays many roles in life. This shifting of roles is the key to success.

In most disputes, if the circumstances were slightly altered, each person could easily switch places and argue the other side. This leads to the notion that history, and the way people perceive truth, reflects the stories people tell themselves. When stories change, the perception of reality changes. Understanding life, relationships, and the human experience is a process, a continuum. In mediation, the parties redefine their stories about the conflict and create a new story that is mutually satisfying.

This does not suggest that people must sacrifice their beliefs in order to compromise and reach mutual resolutions. Instead, they merely have to be willing to accept that another point of view exists. Once another point of view is acknowledged, position taking, being absolutely right, is no longer the goal. Absolute rightness and wrongness are much more difficult beliefs to maintain than notions that accept a grey area. When people are freed from the battle, they genuinely desire a meeting of the minds. They understand and embrace the notion that to settle a dispute, there must be some compromise. Even when a sense of rightness remains, the desire to resolve conflict overpowers the need to be vindicated. And in many cases, when other perspectives come to light, each opponent realizes that neither side is completely in the right.

Working toward understanding alternative perspectives, cooperation, and compromise is particularly valuable when the parties in dispute have an on- going relationship. When there is no risk of future confrontation, position taking is easier to maintain. But when further communication is required, the parties often wish to salvage and even improve the relationship. Few people enjoy conflict. Generally, the parties wish to prevent further strife. The work- place is an excellent example of an arena in which this mode of conflict reso- lution is far superior to adversarial position taking.

**MEDIATION IN THE WORKPLACE**

In the workplace, if a conflict is not resolved amicably, it never ends. Even if a resolution is reached, if it is not mutually satisfying and neglects to address hidden issues, the continuing burden corrupts the relationship. In the work- place, people are profoundly motivated to fully and finally resolve conflict, though they may not have the opportunity or the skills. A mediation program with an established track record will very likely draw voluntarily participation.

The success of mediation is demonstrated by the many schools with peer mediation programs in which students take great pride in their accomplish- ments. A move toward mediation also can be seen in the court systems na- tionwide. Lawyers, judges, and litigants are accepting and embracing mediation at an astounding rate. Every state in the country has implemented mediation to some degree and in many states mediation is an integral part of the system.

Of course a mediation program that is new to the workplace will require time and patience. Moving from a grievance culture to a mediation culture is gradual. For most employees, mediation is not part of common experience and participation may be necessary for acceptance. With diligence and a sin- cere desire, employers and workers can have great success in helping each other to resolve disputes, making the workplace more productive, more satis- fying, and generally more pleasant.

**Threats to the Mediation Process**

Mediation is a remarkably effective and flexible tool for resolving conflict and strengthening relationships. The mediation model is malleable and useful in diverse situations. But it is important to see mediation for what it is—a set of principles and a structural outline. Conceptually, it is a very simple process. It does not have the complex and embedded set of rules that the legal system does. Simplicity and flexibility are part of what makes mediation useful in so many different situations. It is a sound framework for problem solving.

The fact that mediation is so dynamic raises several issues. The first of which may be simply the question, what is mediation? From that, what are the rules that govern the process, what are the boundaries of the structure? When is an interaction mediation and when is it something else? Does simply labeling something mediation make that classification correct? Perhaps these are philosophical questions to be tackled by academics. Or perhaps the nature of mediation is merely a matter of procedure, to be determined by applying rules. On the other hand, perhaps a strict definition of mediation isn’t neces- sary; permission to be flexible is at the heart of the process.

There are certain concepts that define mediation, specific characteristics of a mediator, tools that are regularly used, and procedures that are followed. Although mediation is a distinct process that can be defined, it is not a process that is necessarily constrained by rules. Much of what occurs in medi- ation is a function of the particular mediator’s practice choices and the cir- cumstances of the dispute. Practice theories are now starting to emerge that seek to define the mediation process. Practice theories center around a par- ticular philosophy of problem solving. The mediator’s actions are restricted by this philosophy. There are sound arguments for and against adopting a strict mediation protocol. As related disciplines have progressed, more specific practice theories have been created, many of which contradict each other.

In current mediation practice most mediators do not subscribe to a rigid and formalized practice theory. Mediators are more inclined to develop a body of techniques though diverse training and personal experience. Mediators tend to be quite competent at adapting to unique and varied situ- ations. Some issues, however, are of concern to all mediators. Some of these issues involve the interpersonal dynamics between the mediator and the par- ties. Other concerns relate more to the nature of the process itself; they are more structural matters. Finally, there are philosophical and ideological issues to examine. Because mediation is a relatively young field, the philosophical and ideological underpinnings are only beginning to generate debate.

**ISSUES FOR EXAMINATION**

There are many situations that occur during mediation that should direct a mediator to review his or her actions. The mediator is constantly making judg- ments about what is appropriate and effective. Before, during, and after the process, questions arise about why certain interventions work or don’t work. A mediator, while impartial, does have influence over the process. The reality of interpersonal dynamics is that when people interact, they have influence over each other. A mediator comes to mediation with an agenda, an idea of the role the players take on and what the process should accomplish. One of the funda- mental rules of mediation is that the participants are permitted to make their own choices. But even given this self-determination, the mediator sets limits.

**Balance of Power**

One concern that impacts a mediator’s level of control over the process is the balance of power between the parties. An imbalance of power will make fair and evenhanded negotiations impossible. For instance, in divorce mediation, if one of the parties has been abused, that person may be intim- idated into an unfair compromise. Intimidation may manifest itself in vari- ous forms. The most obvious way is that the person is simply afraid to be candid for fear of future violence. But a person may respond to intimidation in more subtle ways. Intimidation and fear are not limited to domestic abuse situations and similar responses may occur in any mediation scenario, in- cluding the workplace.

While an abusive familial relationship is an obvious example of an imbal- ance of power, it is possible to identify some imbalance of power in almost every relationship in conflict. An imbalance of power may be obvious or sub- tle. An imbalance may stem from the dynamics of the personal relationship— some people are simply more assertive than others, for instance. Imbalance may result from business or monetary concerns—for instance, an insurance company may have a great deal of power over a person filing a claim.

Imbalance may be generated from a host of external factors. One example would be a case in which the parties expect to end up in court even though they are attempting mediation. The likelihood of winning or losing a court case can influence the balance of power during negotiations, since winning or losing may not reflect fairness or the wishes of the parties, but instead is dic- tated by the law.

An imbalance of power inherent in a relationship might contribute to a con- flict. Conflicts of all types stem from imbalance of power; here, the conflict derives from pressures of the imbalance. The feelings associated with being dominated by an outside force may generate distrust and hostility, which leads to a battle. The details surrounding the conflict may have nothing to do with the initial cause of the imbalance of power, yet conflict has arisen so the players have something concrete to dispute over, rather than the more intangible sense of “control.” This type of power imbalance often occurs between subordinate workers and closely ranked supervisors. It may also be common among cowork- ers who are vying for attention from supervisors.

**Power in the Workplace**

The workplace is one of the few arenas where an imbalance of power is in- trinsic to the success of the system. In virtually every work situation there are subordinates and superiors. This relationship itself is the catalyst for conflict. There is tremendous pressure in both roles to maintain or gain power. Few work situations exist in which power, image, and control don’t affect relationships.

The fact that the workplace is designed to support power imbalances and power struggles should not be construed negatively. It is arguably necessary to the daily function and growth of an organization to maintain a hierarchy of power. Some potential benefits of this structure include:

1. Clear delineation of responsibility and authority.
2. Internal competition that supports personal growth and the desire for success.
3. Vertical movement that positively impacts motivation.
4. The formation of personal and professional alliances through team challenges.
5. Strong alliances and familiarity with competitive environments that support orga- nizational growth through success over rivals.

However, the fact that hierarchy of power and power imbalances are inher-

ent, necessary, and potentially positive in the workplace does not mean this system is without flaws. Even assuming that a rigid organizational structure and the opportunity for growth through competition is largely positive for the workplace, some discontent will arise when relationships are maintained in a less than ideal fashion. The following are some troublesome manifesta- tions of discontent:

1. Upward mobility gained through disabling others, backstabbing. 2. The use of intimidation to gain power.  
3. Misplacing blame to save face.  
4. Calculated destructive gossip used to weaken competition.

**POWER IMBALANCES**

In power relationships it is common to interpret an imbalance of power as a show of aggression. One response to dealing with an aggressive relationship is to feel silenced, subservient, or otherwise oppressed. Over time this expe- rience may serve to repress the natural inclination to be open and, when nec-

essary, assertive. It may be difficult for this person to distinguish between safety and danger and make realistic judgements about what the repercussions of their actions might be. In this pattern, a person may find the safest and most comfortable way to behave is to share as little as possible. A person in this position will rarely advocate for his or her needs and wishes.

Expression of needs and wishes is central to the mediation process. This is not to say that open expression will always come easily for the parties, even when there is no seriously destructive relationship between them. One purpose of me- diation is for the parties to examine their situation and gain understanding in order to better express their concerns. The extent to which people express themselves will vary greatly according to the personalities of the parties, their re- lationship, and the nature of the dispute. Different mediations will call for more, or less, intimate expression. Not all mediations are centered around feel- ings, although feelings always play some part in a conflict. However, there are some situations in which one or both of the parties are so disengaged from their feelings that they are simply unable to express themselves openly. For instance, relationships in which fear and denial result from physical or emotional abuse.

**Abuse**

Abuse that leads to an imbalance of power can take many forms: physical violence, verbal threats, or intimidation. Conflict by its very nature breeds competition and power, and for those who have the tendency to overwhelm an opponent in order to gain the upper hand, the result may be abuse. Abuse—generally, the use of power to gain control to the detriment of oth- ers—occurs in many types of relationships.

The most common form of abuse posing a threat to mediation is domestic violence in divorce cases. Many divorce mediators screen out domestic vio- lence cases and do not permit them to be mediated. Domestic violence is, for the most part, limited to intimate relationships. But it is possible that other types of relationships manifest what might be considered abusive interactions. For instance, sexual harassment or racism in the workplace may be abuse. A domineering boss may be perceived as abusive.

At this time in our culture, the notion of abuse has been expanded to in- clude many forms of undesirable action. With our greater insight into the consequences of emotionally destructive relationships, and the saturation of pop psychology, abusive behaviors have been broadened to include many in- teractions that do not give rise to physical violence.

What does or does not constitute abuse is generally not for the mediator to decide. Divorce mediators use outside evaluators to determine if there has been abuse. A person who is judging a potential abuse situation lacks the level of neutrality that is required of a mediator. If abuse is determined through an independent screening, some mediators believe the imbalance of power is too great and do not permit these cases to be mediated.

Although the mediator must to some degree protect the parties from un- balanced mediations, granting the mediator the authority to screen out cases causes a variety of problems. First, this affords the mediator great power over other people’s problems. One of the fundamental principles of mediation is that the parties are free to make their own decisions. According to mediation philosophy, the mediator is prohibited from deciding which issues should and should not be mediated.

Additionally, screening out any case for mediation may be shortsighted. For instance, some divorce mediators argue that the empowering effects of medi- ation can shift the power balance. These mediators believe that mediation can be highly effective in situations in which abuse has been present. In mediation the abused party is in a safe environment where they are not only permitted, but required, to demonstrate autonomy, self-determination, and assertiveness. This is an opportunity that is new to the abused partner and will, at least the- oretically, change the dynamics in such a way that strength and power shift.

The subject of whether or not mediation is appropriate for relationships in which domestic violence has occurred is instructive. There are some media- tors who believe that an imbalance of power resulting from dysfunctional re- lationships does not preclude productive mediation. In fact, mediation may be a unique opportunity for a disempowered person to assert him or herself in a safe and respectful environment. In mediation the participants are re- quired to listen and respond in a respectful and thoughtful manner. The rules of mediation, in essence, require a balance of power. Therefore, voluntary participation presupposes all abuse will cease.

If it is true that mediation can be an opportunity for the disempowered to interact on a more level playing field, it seems that denying this opportunity would be only a further injustice. The problem is, it is difficult to know who will respond positively and who will not, and, in general, mediators should avoid experimenting at the risk of the parties.

Mediation is a young and growing field and relatively little formalized re- search has been conducted surrounding these issues. Consequently, there will be dramatically diverse thinking on what constitutes appropriate and effective intervention. Further, opinions are based primarily on theory and anecdotal experience. At this point, individual mediators have the responsibility to de- cide where to draw lines. The fact that mediation is client-driven will aid the mediator in making distinctions. Mediation is voluntary, participants are never required to engage in any discussion, and mediators are required to re- spect the participants’ wishes.

**Manipulation**

Imbalance of power may result from behavior more subtle than abuse. Imbalance of power may result when a person behaves in a manipulative fash- ion, using emotional trickery as a mechanism to obtain what they desire.

Manipulation is a difficult concept to define and may be even more difficult to identify. Manipulation can take many forms. It looks and feels different to different people. It may be fair to say that all behavior is in some way manip- ulative, even if that manipulation is intended to bring about positive results. For the purpose of this discussion, manipulation has the negative connotation of an action that is intended to bring gain to one at the expense of another.

Because manipulation is such a broad concept and encompasses so many different possible behaviors, accurately and fairly identifying manipulation may be very difficult. An outsider may not be well enough acquainted with the character of a person to recognize manipulation. And an emotionally in- volved person may misinterpret the intentions of an opponent and identify manipulation where none was intended. It also may be difficult to fairly char- acterize what is bad or intentional manipulation and what is merely an honest coping mechanism.

From this perspective, it is useful to distinguish manipulation from abuse, and expressions of emotion from manipulation. This can lead to confusion: When is a person displaying honest and healthy emotion, and when is a per- son attempting to manipulate by using emotion in a calculated fashion? To at- tempt to answer these questions one must examine emotion and the various ways emotion is expressed and used to maneuver.

**EMOTIONAL EXPRESSION IN MEDIATION**

Unlike many other organized conflict resolution processes, mediation ac- cepts the notion that emotion is a component in all disputes. Because of this, people may be more freely expressive during mediation than in other meetings where problems are discussed. Genuine displays of emotion are to be expected during mediation. People will show anger, fear, sadness, frustration, hostility, and a host of other feelings that reflect their personal dilemma. Sometimes par- ticipants will cry or shout; at times they may swear to highlight a point.

Although mediation is meant to be an opportunity to explore the emo- tional underpinnings of a problem, it is still a much more formal environment than the home or a therapist’s office. While mediation is certainly more casual than a business meeting or courtroom, mediation is not an intimate setting. The mediation process stresses respect and understanding for others’ per- spectives. It views emotions as a real and important component of problems, but attempts to put these emotions in a rational context.

Venting emotion is perfectly acceptable during mediation. It is both a re- lease and a useful way to share information. When another person witnesses an emotional expression, it is an invaluable clue into what is feeding the dis- agreement and often reflects issues that have not been previously discussed. At the same time, mediation is not group therapy. Participants are not at lib- erty to express emotion in such a dramatic way that there is a negative cost to the process or other participants. Mediation is designed to be an informal, yet professional, meeting. Because mediation supports a meeting of the minds, but does not advocate unrestrained freedom of expression, emotional expressions are usually displayed in a controlled manner.

Mediation can be therapeutic, but it is not therapy. And in many cases the people involved in the dispute are not intimate friends. In most circumstances the parties will not think it is appropriate to display their heightened emotions in a way that will make them vulnerable and make others uncomfortable. While it is common to see some tears or hear a raised voice, it is not common for a person to break down sobbing or for a violent shouting match to occur. Although some conflicts are more emotionally charged than others, and ex- pressions of feeling will vary, for the most part, the participants in mediation display what might be considered socially appropriate behavior.

**Mediator Responses to Emotion**

Although it is not the mediator’s role to control the emotional expressions of the parties, the mediator does play a part in the direction that the mediation takes. From this perspective, the mediator might encourage expression of emotion though prompts that indicate showing feeling is acceptable. The me- diator might demonstrate empathy if a person begins to cry; a mediator should feel free to show concern for the participants’ feelings. While demonstrating concern, a mediator can still remain impartial, appreciating how a person feels does not constitute agreeing with their position. It is important for a mediator to clearly identify that empathy is not tantamount to taking sides.

It is within the mediator’s responsibility to have a heightened awareness of the dynamics between the parties and the individual behavior of each person. This includes being sensitive to emotions, both those overtly displayed and more subtle. While most of the time people will be hesitant to show dramatic emotional responses, this does not minimize the power that even more subtle expressions of emotions have on other people. Particularly in a context in which emotionality is not expected, emotional displays cannot be disregarded.

**Extreme Emotion**

Most people have some awareness that behaving in an emotional way can be a very useful tool that has a strong impact on other people. This is not to suggest that people commonly resort to false emotion with the explicit intent to manipulate. But even genuine heartfelt emotion can be used as a tool to in- fluence, and this influence may or may not be calculated.

It is certainly conceivable that rather than restraining emotions during me- diation, a person might exaggerate their emotions as a way to get attention and sympathy. This may be an intentional ploy to manipulate, or an innocent and unconscious response to a stressful situation. Either way, intense emotion can be a stumbling block to mediation. Although expressing emotion is en-couraged during mediation, extremely intense emotional outbursts can be distracting to all the people involved.

It is very difficult to focus on anything else when a person is highly agitated. When someone is upset, the conversation naturally turns to that person. The focus is placed on the cause of those feelings and what can be done to soothe the pain. Although this may be a necessary and very useful experience during mediation, it can be highly distracting to the process when these feelings be- come the primary topic of conversation. Focusing on extreme emotion re- quires complete attention. Everyone present is expected to demonstrate concern for the emotionally injured person. In this circumstance the non-emo- tional party is thwarted from sharing his or her own thoughts, it may appear callous to assert contradictory feelings or a different perspective.

***Role of the Mediator*.** Extreme emotion also presents a number of prob- lems for the mediator, who as a coordinator helps to direct the conversation. After an initial expression of empathy by the mediator and an attempt to dis- cuss and clarify the feelings being expressed, it is incumbent on the mediator to redirect the discussion away from the emotional issue. This can be a risky undertaking and requires a great deal of sensitivity and skill. The mediator does not want to appear rude and insensitive; when a person is in a highly emotional state, craving attention, he or she may not be in a position to ap- preciate the predicament of the mediator. If by redirecting the focus away from the emotional person, the mediator seems to negate the significance of the emotions being expressed, trust in the mediator may be reduced.

**Genuine Emotion**

If a person is expressing a genuine outburst of emotion, this expression is an important and often very productive process; people can learn a great deal from their own and other people’s emotional responses. In this case, the me- diator may not wish to redirect the discussion away from the emotion, and in- stead focus on the emotion in an attempt to learn from it. This should not become therapy, but rather a focused exploration of how these feelings are impacting on the problem. With genuine emotion, in whatever form—anger, sadness, or frustration—the intense response escalates and then de-escalates to the point at which a person is then able to reflect. The mediator and the parties should then reach a point where more rational, or at least calm, dis- cussion is possible. Most emotion expressed during mediation reflects pent- up frustration rather than deep trauma.

**Calculated Emotion**

A problem may arise if an emotional display is more calculated than spon- taneous, or underlying the expression reflects a need to create drama in or- der to gain sympathy and attention. It is more difficult to adequately respond to emotion that is calculated or put on. One reason for this is that there is no natural progression of the behavior. With a dramatic emotion, a natural de- escalation does not always occur. Emotion of this type may be employed to manipulate. It is more a calculated aggressive response, and it is difficult to predict the progression of these emotional displays.

Another difficulty for the mediator is that calculated emotion serves a pur- pose different from more genuine feelings. Heartfelt emotion is a release, and often shows an insight into a problem. It is informative for both sides and can lead to a productive discussion and a greater sense of empathy and under- standing. Calculated emotion serves a separate purpose. Although it also gen- erates sympathy, it draws attention to the emotional person in a way that may be distracting to the discussion. Since the feelings expressed are not a real re- fection of elements that feed into the problem, there can be no insight into how to resolve the problem. At most, there will be insight into how that per- son responds to conflict. This display will be a clue as to what to expect from that person throughout the resolution process and into the future.

An added concern is that very often calculated emotion is not really a de- liberate ploy, but rather an unconscious pattern of behavior common to that person’s experience. For whatever reason, that person uses emotion as a tool to get what they want and need. And frankly, most people do this to some de- gree in their lives, precisely because it is so effective. Because of this, it may be very difficult to distinguish between true and calculated emotion, even for the person expressing it.

***Lack of Expression.*** To complicate matters, calculated emotion may take the form of no expression of emotion at all. There is immense power in re- fusing, or being unable, to express feelings. It is blinding to those trying to communicate with the nonemotive person. Working under the assumption that all conflict has an emotional element, a lack of emotional expression cre- ates a void in understanding the conflict. Rather than sympathy, there is a lack of a connectedness that alienates others. Without a personal connection, which is often found through a mutual understanding of feelings, it is diffi- cult to come to some meeting of the minds on a problem, particularly if one person is openly emotional and one is closed.

This is a common, even stereotypical, dilemma between women and men, and causes a great deal of confusion in relationships. As a generalization, men are sometimes overwhelmed by a woman’s dramatic expression of emotion, and women are equally overwhelmed by a man’s lack of expression. This makes connection difficult. Of course this predicament is not only confined to men and women, but it is a recognizable scenario in many relationships.

**In-House Workplace Mediation**

It is undeniable that work conflict can be a serious and confounding problem. With this realization, most organizations have procedures that attempt to ad- dress employee conflict or grievances. Less serious problems are usually dealt with in an informal manner, through immediate supervisors. But dealing with conflict, even in an informal setting, can be quite intimidating.

For most people, their job represents more than a livelihood, and issues of self-worth and pride are involved. For this reason, when conflict arises, and job performance or work behavior is scrutinized, people sense a threat to their professional and personal status. Even if the threat is not serious, de- fenses flair. But conflict affects others in a work circle as well. A complaint against one person may impact the superiors and subordinates of that person. It also affects the person who made the complaint. In many work environ- ments lodging a complaint against a fellow worker is taboo and people will avoid expressing their concerns until the situation reaches a crisis level. Conflict on the job forces people to address the frightening unknown and disrupts equilibrium in work relationships.

**THE GRIEVANCE PROCESS**

Formal grievance processes, the typical method for handling work conflict, are usually designed to handle problems that have reached a critical stage. Grievance processes are generally structured to promote the organization’s needs rather than the worker’s individual or personal needs. Grievance proce- dures can be cumbersome, confusing, inflexible, and intimidating. They also may be designed to discourage participation. This is logical from the traditional perspective that holds that interpersonal conflict is a private matter. Grievance processes are traditionally designed to handle strictly work-related matters rather than interpersonal conflict, which is thought to only incidentally affect work.

Most organizations do not want employees to use the grievance process unless absolutely necessary. To do so distracts all the workers who are in- volved in the dispute. Working through a grievance requires time, effort, and funds that could be employed otherwise. To discourage its use, the grievance process is often made difficult, thus employees are thwarted and refrain from filing formal complaints. Perhaps also to deter participation, or because the processes are rarely used, many formal grievance procedures are poorly orga- nized and are not efficient at dispensing just results. Neglecting to address the flaws in grievance procedures is shortsighted since an inefficient process can actually serve to increase job strife.

**EMPLOYEE RELATIONSHIPS**

Employee dissatisfaction on the job is often progressive, escalating over time. Frequently, annoyances or frustrations are overlooked when they occur, but they are not forgotten. Problems, both big and small, are kept hidden if employees feel uncomfortable or unjustified when disclosing their concerns. The workplace does not tend to be an environment in which people look fa- vorably on open dialogue about interpersonal matters, or issues that are per- ceived as minor. In our society there is an unspoken, yet clear, distinction between appropriate home behavior and work behavior. Open expression is seen as healthy with friends and family, while at work, people are bombarded with messages about teamwork, which implies disregarding annoyances. This perception of appropriate work behavior makes expressing disapproval on the job seem childish, unprofessional, and disruptive.

This view overlooks the reality that work relationships are intimate and per- sonal. People spend a great deal of time with each other at the workplace. Bonds and friendships are formed. Hostilities and frustrations grow. To add to this mix, there are both clear-cut and hidden power relationships at work, as there often are at home. At home or at work, people bring with them their individual personalities, their private troubles, and their interpersonal strengths and weaknesses. It is naive and potentially destructive to disregard the complexities of work relationships. Complications and conflict will in- evitably arise when people work together. It is more productive to understand these issues and address them forthrightly, rather than to disregard them un- til problems escalate.

It is not necessarily any easier to calm and settle disputes at a work setting than in other areas of life. Many people will avoid conflict until they feel there are no productive alternatives. Conflict is confusing, disruptive, frightening, and can be emotionally and professionally destructive. However, one of the benefits of the workplace setting for resolving conflict is that a formal process can be instituted whereby people are encouraged to deal with conflict before it becomes overwhelmingly disruptive. With forethought and planning, the employer can do for the workplace what many cannot do for their homes— design a concrete conflict resolution approach that is clear, functional, and ac- cessible. The employer can also create an environment in which people trust the process and want to participate, where people recognize that there is more satisfaction in resolving disputes early, rather than waiting until the problem escalates and becomes overwhelming.

**IMPACT OF A GRIEVANCE**

Workplace disputes can be very difficult to resolve amicably. To bring forth a grievance is risky in many respects. First, it may put another’s reputation, or even their job, in jeopardy. Whether real or only perceived, the threat of a grievance is a serious emotional blow. A grievance carries an implication that the supervisor has managed ineffectively. Because this superior is in a position of authority, a grievance is a threat to that authority. Finally, a certain amount of culpability may be attributed to the employer, who is ultimately responsi- ble for a stable work environment. Even if the employer is not directly re- sponsible for the conflict, failure to maintain a stable work environment through adequate policies and supervision suggests a flaw in management.

Since filing a grievance has serious implications, many employees may only feel free to complain about work problems in an informal manner. Generally, an employee does not make a formal complaint until a problem appears over- whelming or out of control. At that point, from the employee’s perspective, the protections set up by the employer have failed. As a result, a sense of dis- trust has developed. That distrust is frequently transferred to the dispute res- olution process itself, making the process more difficult and reducing the likelihood of satisfactory long-term resolution.

To a supervisor, grievances often appear frivolous, unfounded, or moti- vated by some hidden agenda. Since it is the supervisor’s responsibility to oversee immediate subordinates, to be cognizant of the work environment and the dynamics of interpersonal interaction, a supervisor will often be aware of brewing trouble. When a grievance is filed, it suggests that the supervisor has disregarded the problem or did not intervene effectively. Whether the su- pervisor was aware of the problem and did not act, or was simply unaware of the problem, when subordinates notify the employer of a problem and re- quest outside assistance, the supervisor is held responsible. Partly in self- defense, supervisors may attribute a grievance to overreaction.

As a defensive measure, the supervisor will respond with some explanation for their own inaction. This explanation may or may not be justified. There certainly may be legitimate reasons that the supervisor did not know, failed to act, or failed to finally resolve a conflict. But from both the subordinate em- ployee’s perspective, and the employer’s perspective, the supervisor has failed. Whether justified or unjustified, the supervisor must vindicate himself, which further taints the dispute resolution process, making trust and open commu- nication more difficult.

As a result of the grievance, the employer is apt to question both the com- plaining employee and the supervisor. The highest concern is that the orga- nization is run smoothly and productively. Any conflict, particularly a formal grievance, causes discord that is potentially disruptive to the entire workforce. Serious complaints are rarely heard in a vacuum. Other employees will know and discuss the issues freely.

A formal grievance is always a threat. There is the real potential of dis- rupted productivity and morale, the escalation of conflict that spurs other workers to complain, terminations, and possible legal action. Employers will often take dramatic steps to prevent widespread disruption, even if that action is not justified. Employer overreaction hinders productive short-term and long-term conflict resolution. Where there is fear about a process, there is lit- tle faith or trust in the process.

In sum, assumptions are made about any worker who files a formal griev- ance. Grievances are seen as either justified or frivolous. Both assumptions have serious ramifications. Grievances follow dissatisfaction with work or per- sonal behavior. These complaints are invariably taken as a personal affront, which results in damaged egos and devastated relationships. Dissatisfaction has a tendency to escalate with time. For example, disapproval that is first di- rected at a worker becomes a grievance filed against a supervisor; frustration and disappointment finally lead to a termination and then a lawsuit filed against the organization.

**OUTLETS FOR CONFLICT**

We live in a society in which we enjoy personal freedoms, independence, and inalienable rights. Perhaps because of our many entitlements, feelings of worth and personal satisfaction seem to be essential to maintain a productive workforce. In other words, happy workers make better workers. Happy work- ers make consistent workers who stay on the job, curtailing constant retrain- ing. Happy workers are also more likely to accept the flaws in the organization, such as low wages and long working hours. In short, happy workers don’t quit their jobs, don’t employ labor union processes, and don’t file lawsuits. Without a working outlet for grievances workers cannot be happy. Serious consequences follow.

This may appear to be a simplistic summary of such complex subjects as worker motivation, job satisfaction, and interpersonal conflict. And frankly it is. If the goal is to understand exactly why people behave in a certain way, the foregoing explanations will not suffice. But in examining the primary issue at hand—how to resolve conflict in efficient and satisfying ways—the funda- mental truths are as follows:

1. Conflict exists in the workplace.

2. Conflict is destructive on a personal and economic level.

3. Employers must implement strategies to address conflict that are practical, effec- tive, efficient, and trustworthy.

The people responsible for a workplace mediation program are generally not interested in spending enormous amounts of time studying complex is- sues. All people acknowledge that disputes exist. For the most part, both workers and employers would prefer amicable solutions that do not end in the loss of jobs or lawsuits. Employers and employees are on a continuing quest, not necessarily to find absolute answers, but to find tools that work. So the question remains: what works?

**Lawsuits**

Since all disputes at work have the potential to lead to formal grievances with serious consequences, grievances that are not settled amicably and in a timely fashion do often lead to lawsuits. It is possible to divide workplace dis- putes into two general categories. First are the scenarios in which a serious vi- olation occurred. Examples of this might be drug use on the job, violence causing physical harm, or grievous sexual harassment. In these cases, filing a lawsuit may be a rational and even necessary step to assure a just result.

The second category includes more common offenses that occur in the workplace. Examples of these might be interpersonal conflict, disagreements about work assignments, pay and benefit issues, and job performance con- cerns. These types of issues often begin with small frustrations, but, over time, when not properly addressed, can become all-consuming.

Not only does work suffer when employees experience an overwhelming frustration, the gravity of the problem seems to mushroom. These conflicts often take on an importance disproportionate to the nature of the problem, which could be easily solved if appropriate steps were taken. It is these cases that end up at a lawyer’s door and become a huge burden to employees and employers alike.

Sometimes issues such as these become lawsuits, brought merely as a threat. The motivation for such a drastic measure depends greatly on the person and the circumstances. One common rationale for initiating a threat- ening lawsuit is the sense that a lawsuit is the only way to be heard. A typi- cal reason employees take drastic measures against employers is simply to make a point. When a person feels disregarded, unimportant, belittled, or marginalized, a lawsuit is a proactive way to be taken seriously. Unfor- tunately, in the effort to make a point, all the people involved are forced to expend tremendous amounts of money, time, and emotional energy. Even the winner of such a lawsuit pays dearly, financially, professionally, and personally.

**Labor Unions**

The organized labor movement has attempted to rectify problems by bringing in third party advocates, as well as insisting on extensive rules for worker protection. Whether or not one agrees with labor union philosophy, several things are clear. First, organized labor has made great strides for worker protection and dramatically changed the way our society perceives worker rights and employer responsibilities. Yet even with these strides, few workers have real employment security. And, second, at this time, the ma- jority of workers and employers do not wish to engage in the organized la- bor process.

**Grievance Processes**

Most workplace grievance procedures use one of three typical designs. A common design for smaller or traditional employers is a grievance procedure that permits people to present their complaint at several supervision levels, moving up the ranks through the hierarchy of supervision. The grievance ul- timately ends with a high-level administrator making a final determination.

Another type of grievance procedure, often used interdepartmentally within large or public organizations, involves a panel of decision makers. The panel is composed of members who hold various positions within the hierar- chy of the organization, to promote objective decision making.

A third and less common grievance procedure is utilized by some govern- ment-funded organizations. This procedure offers statutory remedies through a “grievance board.” Here, determinations are made after a formal hearing by an objective outsider, such as an administrative law judge.

The actual and perceived objectivity of each of these procedures is limited. It may be difficult for a decision maker to maintain total objectivity when he or she is employed by one of the disputing sides. Alternatively, a disputant may believe the decision maker is not objective, thus hindering progress. Any time decisions are made within a community it must be assumed that there are risks to participation. Prejudice comes in many forms, sometimes as sub- jectivity resulting from conscious decision making and other times as unin- tended consequence of a system.

Each of the above grievance procedures has another potentially destruc- tive common element. The underlying premise is adversarial. One side at- tempts to prove that an error occurred; the other side attempts to prove that it did not. It is inherent in the process that each side take a position and ad- vocate zealously. Any concession is perceived as an admission of weakness. Even if a concession does not destroy one’s case altogether, it may foster the impression that the case is weaker than claimed.

**Mediation**

Mediation is not based on the adversarial model. It is structured to resolve the dispute according to the specific needs and desires of the people involved. Mediation is about collaboration and compromise. Mediation permits the disputing parties to make their own evaluations and determinations. The im- partial third party mediator has no authority to judge. Mediation is an op- portunity for the participants to analyze conflict. During the mediation, patterns of behavior are examined. As a result, the participants gain an un- derstanding of the cause and effect of disputes. Decisions made during medi- ation are accepted as the best solution to the problem.

It is essential to realize that although mediation is about fairness, it is not necessarily about justice. If the underlying motivation for a grievance is the principle, mediation may not be appropriate. Mediation cannot change laws, in a legal sense it cannot punish, and it is not a substitute for legal protection when behavior has crossed into the realm of immoral, unethical, or criminal. Mediation can be used in-house at a workplace as part of a grievance pro- cedure or conflict resolution process. Mediation has proven to be an effective alternative to the legal dispute resolution system for many years and is grow- ing dramatically in use and acceptance. It is certainly possible to adopt the philosophy and process of mediation for in-house employment disputes. However, some creativity and flexibility are necessary to avoid repeating the

common pitfalls of other grievance procedures.  
***Requirements.*** An employer must be committed to the success of a medi-

ation process. The mediation process must be designed with integrity and ob- jectivity. Any notion that mediation is merely a seemingly fair way to reprimand must be totally dismissed. Many employers feel very strongly about maintaining power over their workers. If this is the case, mediation is not the appropriate dispute resolution tool. If a sham mediation system is im- plemented, one in which the autonomy of the participants is illusory, the re- sulting distrust will likely destroy relationships rather than bolster them.

The employer and the participants must accept that all mediation discus- sions are private and confidential; notes taken during mediation will never be included in a personnel file. It is imperative that the participants feel free to speak openly without any fear of embarrassment or reprimand. The employer must ensure that there will be absolutely no retribution for using the media- tion process; this is accomplished through a comprehensive set of rules and procedures that are strictly enforced.

In addition to the employer’s commitment, the employees must be equally willing to participate openly and honorably; this requires a sincere desire for fair resolution and trust in the employer. It also requires putting anger aside and dismissing any notions of revenge. Mediation cannot be used to under- mine or disrupt the workplace, punish coworkers, or avoid responsibilities.

***Challenges.*** At the outset of any in-house mediation program there is one immense battle to tackle. For many complicated reasons, some of which are in- herent in hierarchical relationships and some of which are specific to an indi- vidual workplace, there is often a serious lack of trust pervasive in the work environment. Perhaps management doesn’t trust the staff and at the same time the staff doesn’t trust management. This leads to hostility and an overactive grapevine. Lack of trust can be pervasive and take many destructive forms.

Mediation is one very useful tool for building trust in an organization, while at the same time mediation is not very effective without the existence of trust. There is no easy escape from this dilemma. Mediation is one tool avail- able to build trust and make a workplace happier. Any change requires exam- ination, dedication, proaction, and time. Often, the first step toward making change has the biggest impact. When employees are aware of management’s willingness to change, an immediate and complete transformation is not nec- essary to make the work environment less conflictual and more satisfying.

**Professional versus Peer Mediation**

When any workplace designs a mediation program, it will be faced with the question of whether to hire outside professional mediators or to use staff as peer mediators. It is difficult to predict which type of mediation program will be more effective for any given institution. But peer mediation and profes- sional mediation programs offer very different benefits and also have varying costs in terms of time and money. An organization should consider the pros and cons of both options before committing time and resources.

**PROFESSIONAL MEDIATORS**

The obvious benefit of hiring professional mediators is their expertise. If the goal is to settle a small number of serious cases as efficiently as possible, and the employer is willing to pay a premium for services, a professional mediator may be most appropriate. Professional mediators will also be effective in assist- ing organizations with more general goals, such as strengthening communi- cation and decreasing hostility in the workplace. A downside of hiring professionals is the cost. Professional mediators usually charge by the hour. However, although their fees can be high, a few hours of mediation is certainly less expensive than a complicated lawsuit. Mediation also saves money lost to downtime that can result from a continuing dispute. Many organizations hire professional mediators on a consultant basis with great success.

Because there is no fee regulation for professional workplace mediators, prices will vary. As rule of thumb, an organization should expect to pay the going rate for that mediator’s base profession. For example, if the mediator is licensed as a lawyer, expect to pay the hourly rate of a lawyer; the same would hold for social workers, psychologists, and so on. If the organization does not foresee using mediation on a regular basis, or the primary interest is in taking an aggressive step toward preventing lawsuits, hiring a professional mediator might ultimately be less expensive than training staff as peer mediators, who will not be highly skilled immediately.

**PEER MEDIATORS**

Alternatively, implementing a peer mediation program may benefit an or- ganization in ways that hiring outside mediators could not. If the goal is partly to change the climate of an organization, teach better interpersonal skills, and support the notion that the employees can help themselves, peer mediation has great potential. In the past, peer mediation has most often been used in schools or in communities, where the goals are broader than those of settling arguments and preventing lawsuits.

With young people, peer mediation is used to enhance overall conflict res- olution skills and critical thinking, and to strengthen long-term relationships. Peers in the schools or the workplace have a personal and intimate under- standing of underlying attitudes, systematic problems, cultural norms, and so- cial expectations of their own communities. Peers are already familiar with the types of problems that typically arise and may have great insight into why they occur. This connection leads to a potentially strong trust relationship between the mediator and the parties.

The same circumstance would be true in communities in which friends and neighbors are helping each other with a shared goal. Community mediation has also proven very successful, despite the fact that the mediators are not professionally trained. The unity of coming together to work though long- standing issues can be powerful. To coin a phrase, the participants “take own- ership” of the problem. When people work as a group and acknowledge the harm that conflict can cause, resolving problems independently fosters pride and satisfaction. People become empowered as they learn to take control of issues that once seemed out of control. This is as true in the workplace as in the neighborhood.

**CHOOSING**

Despite the substantive arguments for using one form of mediation over another, decisions are always impacted by financial considerations. Many or- ganizations simply cannot afford to pay hundreds of dollars to settle a small dispute. If the purpose of implementing a workplace mediation program is in part to resolve small problems before they escalate, than virtually every prob- lem is a candidate for mediation. If this is the case, hiring a mediator to work through issues that initially appear inconsequential may seem absurd. But en- listing peers to help dissipate that same argument before it becomes highly disruptive makes a great deal of sense.

It is also important to consider other factors in predicting the cost of a me- diation program. For most organizations mediation will be new and unfamil- iar; the philosophy of mediation is quite different from that of traditional grievance processes. Any large-scale procedural change in an organization, particularly one that claims to change a cultural environment, requires time and effort before it is wholly accepted. The workforce requires education about the process; trust must be built between workers and management.

The most logical way to begin an education process is with training sessions coupled with public relations efforts. And whether the mediation program employs professional mediators or peer mediators, these educational efforts are necessary. Education will serve even those workers who will never act as mediators. All people benefit from training in the philosophy and techniques

of mediation. For a workplace that plans to shift from a grievance culture to a mediation culture, using either professional or peer mediators, an under- standing of the process is essential for acceptance. These initial trainings are also a useful way to identify those people who would make competent, thoughtful, and interested peer mediators. Those selected then go on to more comprehensive training if a peer mediation program is to be imple- mented. Even if an organization plans to hire professional mediators, some time and money should be invested in educating the workforce.

One of the primary benefits of mediation over other grievance procedures is its effectiveness for resolving low-level disputes prior to the critical stage. For this reason it may be most productive to design a program in which me- diation is available for any conflict, regardless of whether the issues appear in- consequential to outsiders. Professional mediation may be impractical for this sort of program. Mediation is also excellent for heightening productive com- munication, building conflict resolution skills, and strengthening interper- sonal relationships. The availability of mediation to the workforce impacts the extent to which these additional rewards are reaped.

In a cost/benefit analysis an organization might find that the most pro- ductive and cost-effective measure is to implement a peer mediation program. The option of hiring a professional if a particular case mandates is always open. In a situation in which the dispute is so dire or complex that a profes- sional is required, the money allotted to professional mediation will be well spent. In dramatic circumstances, the cost of hiring a mediator will still be far less than investing in a lawsuit. In the long run, whichever mediation pro- gram is implemented, the benefits of mediation far outweigh the costs.

**The Legal System**

Although this book is not primarily concerned with mediation in the legal system, it is useful to explore the use of mediation in this arena. Mediation is actively employed in court systems around the country. Nationwide, there is a good deal of mediation occurring in the family court system to resolve di- vorce and child custody issues. Many civil courts also sponsor mediation to unburden the court dockets and offer an alternative to the adversarial system. Lawyers, judges, therapists, social workers, and other professionals affiliated with the legal system are becoming convinced that mediation is a productive, affordable, and humane way to resolve disputes.

The legal system is certainly not the only area in which mediation is be- coming popular, but it is an arena in which practitioners have a good deal of experience and knowledge to share. Most law schools now offer courses in mediation and alternative dispute resolution, and other departments at col- leges and universities are following suit. There are many reasons why the le- gal system is among the most active in promoting the progression of mediation. There is money available for experimental programs in the legal system. But, more significantly, the legal system is the most complex and ad- vanced formal bureaucracy solely relegated to resolving conflict.

Although therapists, counselors, teachers, and other helping professionals do assist people in resolving their disputes, conflict resolution is just one of the goals of these practitioners. The legal system is therefore a logical and im- portant proving ground for mediation programs and should be referenced when discussing other mediation applications, particularly if there is any pos- sibility that disputes will be referred to the courts.

**LEGAL SETTLEMENT**

Many people believe that virtually every legal case that is filed, or every law- suit, progresses to litigation. The truth is that almost all legal cases never reach a courtroom. They are settled by the parties in conjunction with their lawyers well before a trial is held. In fact, it is assumed in legal circles that ap- proximately 95 percent of all law cases are settled without ever going to court. The process of legal settlement occurs when lawyers from opposing sides engage in negotiations that involve bargaining for acceptable losses. Settlement is a compromise. Mediation is to some degree an outgrowth of le- gal bargaining and negotiation. Much can be learned about mediation from examining legal settlement.

The fact that most cases settle before a trial is instructive for a mediator. Legal settlement suggests the following concepts:

1. Infilingalegalclaim,peopledonotexpecttoultimatelygeteverythingtheywant. They understand that there will be compromise.
2. In settling a claim, people will accept less than they really want. People are willing to compromise.
3. In coming to a compromise, people expect to receive less then they initially re- quest. They understand that a compromise requires accepting less than initially asked for.
4. In filing a claim it can be assumed that most people request more than they ac- tually want or believe they are entitled to. In anticipating compromise, people exaggerate their demands. In this regard, the process of bargaining involves a certain amount of dishonesty, or at least misrepresentation. Disdainfully referred to as posturing, the positions taken when filing lawsuits are not entirely true rep- resentations of what people expect and are willing to receive. It can be extrapo- lated from this that, when filing claims, people sometimes ask for more than they deser ve.

**THE NATURE OF NEGOTIATIONS**

Although these observations are linked to filing legal claims, similar posi-

tions are also taken when attempting to resolve disputes outside the legal sys- tem. Bargaining, negotiation, and compromise are a common feature of most of our lives. People bargain with employers, coworkers, spouses, family, and children. A fundamental part of all relationships is bargaining and compro- mise. Although legal bargaining and mediation are more formal or structured forms of bargaining, many of the same tools and strategies are used when en- gaging in a business negotiation or an interpersonal negotiation.

The art of legal negotiations may seem complex, but the process of legal bargaining can be compared to a haggling process, such as negotiating at a flea market. A buyer sees something that he wants and asks the seller the price. Negotiations begin. The seller asks $5.00 for the item. The buyer says, “I won’t pay a penny more than $2.00.” The seller asks for $4.50. The buyer comes back with $2.50, and so on. While this is a simplification of any legal negotiation, the fundamental interaction is the same.

Both sides begin negotiations from exaggerated positions. Both are per- ceived positions of power. The seller knows the buyer wants to buy—that gives the seller power. The buyer knows the seller wants to sell—that gives the buyer power. Negotiations continue until the power balance is just slightly uneven. Either the seller concedes at the point he thinks the buyer will walk away or the buyer concedes at the point where she fears the seller will sell to someone else. Both sides know the bargaining is dishonest and no one knows exactly when the balance point will be reached. In secret, both sides have a bottom line. For instance, the buyer will never spend more than $3.00 and the seller will never take less than $3.00. If negotiations continue and bottom lines are met, a successful negotiation transpires.

**BOUNDARIES OF THE LAW**

While the basic structure of negotiation is similar regardless of the subject matter, there are elements that make legal negotiations unique and far more complex. The differences of legal negotiations highlight circumstances in which resolving issues through legal channels is more appropriate than medi- ation. The legal system consists of a complex set of formal rules and proce- dures that does not exist anywhere else in society. There are times when the nature of the dispute requires that precedents and strict guidelines for behav- ior be applied to assure fair play and justice. There are situations in which in- dividuals cannot or should not manage their own dispute.

In the legal system, while all issues are subject to debate and critique, the law creates clear and strong boundaries. The boundaries the law sets establish limited starting and ending points for every problem. The law predetermines fairness and in doing so regulates the steps that are required to reach a final resolution. Because of this structure, participants in the legal system can make well-informed predictions about the potential outcome of the dispute before becoming deeply entrenched in the process. The law also establishes prede- termined power relationships in an attempt to thwart the abuse of power, ap- plied in an arbitrary manner.

For success in planning the course of a lawsuit and accurately predicting the outcome, attorneys are used by the disputants. The primary reason people seek the assistance of legal counsel is so they can be guided and informed. Lawyers design and initiate the resolution process and make calculated deci- sions based on the results they wish to achieve. Unlike other forms of dispute resolution, including mediation, the law structures problem solving so that the process can be preplanned with an organized strategy. Law aims to filter out the unpredictable and uncontrollable nature of disputes, namely the emo- tional element.

**Reference**

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