CHAPTER 1

"SO YOU WANT TO STUDY MEDIATION?"

An Introduction to the Processes of Mediation and the Skills of Effective Mediators

§1.1 WHAT THIS BOOK IS ABOUT, AND A WORD ON ITS PERSPECTIVE

When you think about mediation, what images does it conjure up? A couple contemplating divorce? International diplomacy? The effort to avert a strike by public employees? Neighbors arguing about backyard noise?

Mediation is a growth industry. Once confined to specialized fields such as labor relations, today mediation is a process that cuts across almost every type of conflict or transaction that one might encounter in society — from small claims cases to multimillion dollar class actions; from family, community, minor criminal, education and workplace disputes to the most complex environmental, public policy and commercial matters. Mediation services are provided by a wide variety of private providers, with differing professional backgrounds and orientations, as well as by state and federal courts and administrative agencies, employers and community-based organizations. Participation in mediation is often voluntary, but in some instances may be mandatory. Above all, mediation is a flexible process — practiced in different ways depending on who the parties are, the nature of the dispute, the background and qualifications of the mediator and the culture of the particular setting in which mediation services are offered. As a result, people involved in conflict and those seeking to help them need to understand the many ways in which mediation is practiced and how mediation fits into the broader world of dispute resolution.

In the last two decades, American education has begun to treat dispute resolution as a discrete field of study. For example, most American law schools now offer courses that introduce students to negotiation, mediation and arbitration, as well as other subsidiary and hybrid processes offering alternatives to traditional

litigation. Other graduate and undergraduate programs feature a wide array of conflict study courses. Many schools offer simulation courses in which students learn about these processes "from the inside out" rather than "from the outside in"—*by doing them*. And professional and undergraduate schools around the country now offer mediation practicums or clinics in which students are trained intensively to serve as neutrals in real disputes—in courts and administrative agencies, community mediation centers, on campuses and in other venues.

These developments are, in part, indicative of mediation's growth as a separate professional sphere in law and other professions. But mediation clinics and mediation simulation courses are also on the rise because they provide students with a sophisticated understanding of dispute resolution. Students in these courses and clinics build their arsenal of interpersonal and professional skills, confront the strategic and ethical demands of serving in a neutral capacity and become more sophisticated consumers of alternative dispute resolution (ADR) services. Much of the interest in studying mediation from the "inside" comes from analyzing in detail the communicative, strategic and ethical dimensions of specific interventions that mediators make—in the context of particular cases. And much of the interest in studying mediation from the perspective of the mediator comes from realizing just how challenging and rewarding the work is.

In this book, we place you primarily in the role of the mediator, recognizing that many of you will not in fact become professional mediators in your future careers. From time to time (in fact, starting in this chapter) we will vary the perspective of the book by asking you to consider mediation from the point of view of a disputant; or of an attorney or other advisor assisting a client at a mediation or counseling an individual or organizational client about dispute resolution options; or of a potential policy maker considering mediation from a legislative, judicial or regulatory perspective. But most of the time, we will study the psychology of conflict and the nature of conflict resolution processes from the distinctive perspective of the neutral.

Mediation is ubiquitous. Whether you are a student or team member seeking to cool down an argument between (or with) friends or colleagues; a CEO seeking to find common ground among warring departments; or the chairperson running a departmental or board meeting and having to organize an agenda, keep participants on task and search for consensus—you will find that you "mediate" often, at least in a broad sense of the term.

In other words, whether or not you want to become a "professional" mediator, this book will teach a great many transferable skills that will be valuable to you as lawyers or other helping professionals, managers or government officials. The skills taught in this book include effective interviewing and information development, agenda creation and control, persuasion and negotiation and—most important, we think—problem-solving. Good mediators must be able to understand conflict and work comfortably at the intersection of thought and feeling, helping people defuse tension and achieve solutions to difficult problems. These are not only important professional skills, they are fundamental life skills.

§1.2 WHAT IS MEDIATION?

Assisted negotiation. We begin with basic definitions. Mediation, broadly speaking, is a process of assisting the negotiations of others. A third party

(usually someone with no involvement with the dispute or any of its participants) attempts to help the disputants discuss and try to resolve the problems they face. Mediation may be selected as a dispute resolution process because it has been difficult to get direct negotiations started or because negotiations between the parties have broken down. How mediation can improve on the negotiation process and help lawyers help their clients resolve their disputes are important subjects of this book.

- **A consensual process.** Unlike a judge or arbitrator, a mediator has no power to issue a "ruling" or compel the parties to accept any particular resolution of their dispute. In certain court-connected settings or where a contract requires it, participation in mediation may be mandatory, but only in the sense that the parties are required to show up in the mediation room and give the process an initial try. Mediators may comment on the participants' settlement proposals or suggest ideas of their own for the parties to consider. But by definition, even if the parties enter into the process involuntarily, any decision to continue with mediation must be voluntary, and the only resolution that can be reached is one that is agreed to by the disputants themselves.

- **An informal process.** A well-conducted mediation is a fair and structured procedure. But it is informal in the sense that participants are generally free to discuss anything that matters to them, unconstrained by rules of evidence, procedure or even substantive law. As one mediation scholar has written, "[i]n mediation . . . the ultimate authority resides with the disputants. The conflict is seen as unique and therefore less subject to solution by application of some general principle. The case is neither to be governed by a precedent nor to set one. Thus . . . whatever a party deems relevant is relevant."[1]

- **Producing binding agreements.** Even though it is a consensual process, mediation can produce legally binding resolutions. Once an agreement is reached, it is often written up in the form of a contract and, in court-based matters, may be approved by a judge. Such agreements have the force of law: If any party breaches its terms, the contract may be enforced through court action.

- **A private process.** Unlike public trials, mediations—even in well-publicized cases—almost always take place behind closed doors, generally with the expectation that party and mediator communications, and sometimes even the terms of substantive agreements reached, will be kept secret. Mediation confidentiality may be guaranteed by law or contractually agreed to by the parties. As we will see, the privacy of the mediation process is deemed by mediation proponents to be one of the core determinants of its success. To critics, however, it is a source of some concern.

In this book, we exclude from our main coverage substantial slices of the world of mediation. For example, we do not study in any detail the mediation

1. LEONARD RISKIN, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982).

of everyday interpersonal conflicts. Nor do we focus on specialized applications of the process, such as mediation of public international disputes, the world of "managerial mediation"[2] in business organizations, "peer mediation" in elementary and secondary schools or mediation of urban planning and other public policy disputes.[3] We focus primarily on disputes, not deals and transactions. Having said this, the core of this text will generally be applicable to any setting in which mediation is practiced.

§1.3 WHERE DOES MEDIATION FIT IN THE RANGE OF DISPUTE RESOLUTION PROCESSES? WHAT ARE ITS DISTINCTIVE CHARACTERISTICS, ADVANTAGES AND DISADVANTAGES FOR POTENTIAL USERS?

We begin where the decision to mediate might be made — with two or more parties with a problem considering (perhaps with the aid of a lawyer or other advisor) possible ways to resolve it. For these individuals, a first question might be "What is the optimal process for this conflict from my vantage point?" Consider this situation:

Rosa Lopez and Texitron, Inc.

Rosa Lopez is a fifty-one-year-old Mexican American woman who works for Texitron, a major U.S. producer of petroleum products and a Fortune 500 company. She has been employed at the company for almost twenty-five years, beginning as a shipping clerk, being retrained as a computer programmer and working her way up through the position of Senior Programmer to become an Assistant Director of Information Technology in one of the company's six divisions. Until recently, the company has treated her well, recognizing and rewarding her energy, inventiveness, teamwork and commitment to the company. She is well paid, especially considering that she started with only a community college degree. But three months ago, she was passed over for an IT director position for which she felt well qualified. A thirty-five-year-old male was hired for the position — someone from outside the company with good knowledge of information systems but no knowledge of the petroleum industry. And to her great frustration and anger, when she tried to get a better understanding of why she was passed over for the promotion, she was stonewalled by the manager who had made the decision.

How might Rosa Lopez handle this problem?

She could, of course, do *nothing*. The popular perception of America today is of a litigation-mad culture in which everyone sues everyone else at the drop of a hat. This perception — the belief that we are suffering a "litigation explosion" and

2. DEBORAH M. KOLB, *Labor Mediators, Managers and Ombudsmen: Roles Mediators Play in Different Contexts, in* Mediation Research 99 (Kenneth Kressel et al. eds., 1989).
3. *See* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, Breaking the Impasse: Consensual Approaches to Solving Public Disputes (1987).

that courts cannot keep up with the increase of case filings—has had a good deal to do with the growth of alternative dispute resolution. But sociologist Marc Galanter has helped us understand that many experiences perceived as injurious are not necessarily perceived as potential *grievances*—experiences susceptible to a remedy.[4] Has Ms. Lopez been treated wrongfully in a legal sense? Has she been subjected to gender discrimination, age discrimination or discrimination based on her national origin? Is there some other basis in her contractual relationship with the company for a potential claim? She may not be able to tell without a lot more digging. She may not want to do that digging. And even if investigation reveals some possible claim against the company, Ms. Lopez might, like many potential claimants, decide to "lump it,"[5] perhaps because she is conflict averse or doesn't want to burn bridges or anticipates that other opportunities for advancement will eventually present themselves at the company. Or, she might prefer to put her energies into seeking a comparable position at a different company. *Avoidance* is a common and often appropriate conflict management strategy.[6]

But let us suppose that Ms. Lopez talks to other female managers and discovers some anecdotal evidence of a "glass ceiling" at the company for employees with her background and experience. Two senior female employees complain to Ms. Lopez that they also were passed over for promotions they expected, and younger men were hired instead. In addition, Ms. Lopez recently heard some newly hired managers exchanging ethnic jokes that made her uncomfortable. The more she thinks about her situation, the angrier she becomes. She resolves to speak with someone knowledgeable about dispute resolution processes. Assume that she consults you. How would you advise Ms. Lopez regarding the choices available to her?

The primary options available to Rosa Lopez are negotiation, mediation, arbitration and adjudication. The major characteristics of these processes, as they are classically defined, are summarized in the table on the following page. Note that only one of these processes (litigation) can be triggered unilaterally by Ms. Lopez, whereas the others (mediation, negotiation and arbitration) would generally—unless compelled by a court or by a preexisting employment contract—require the assent of both Ms. Lopez and her employer. Study the table carefully and consider: Assuming Ms. Lopez has a choice, what process or combination of processes would be most advantageous to her?

After examining the table, close the book and write down on a piece of paper: What are some of the most important *criteria* that might affect how someone in Ms. Lopez's situation might choose from among these options? If you were advising her, what considerations would you want to discuss with her?

4. MARC S. GALANTER, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 13 (1983). *See also* RICHARD E. MILLER & AUSTIN SARAT, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 526-527 (1980-81).
5. GALANTER, *supra* note 4, at 14.
6. *Id.* at 14-15; R.H. KILMANN & K.W. THOMAS, *Developing a Forced-Choice Measure of Conflict-Handling Behavior: The Mode Instrument*, 37 ED. & PSYCH. MEASUREMENT 309 (1977).

"Primary" Dispute Resolution Processes[7]

Characteristics	Adjudication	Arbitration	Mediation	Negotiation
Basis of entry	Involuntary	Voluntary or compulsory	Voluntary or mandated	Voluntary
Effect of resolution	Binding; subject to appeal	Binding, subject to review on limited grounds	If agreement, enforceable as contract; sometimes agreement embodied in court decree	If agreement, enforceable as contract
Third party	Imposed, third-party, neutral decision maker, generally with no specialized expertise in dispute subject	Party-selected third-party decision maker, often with specialized subject expertise	Party-selected or appointed by a court, agency or outside provider, sometimes with specialized expertise	No third-party involved
Degree of formality	Formalized and highly structured by predetermined rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, no fixed rules	Usually informal, unstructured
Nature of proceeding	Opportunity to present proofs and arguments	Opportunity to present proofs and arguments	Unbounded discussion of evidence, arguments and interests	Unbounded discussion of evidence, arguments and interests
Outcome	Principled decision, supported by reasoned opinion	Sometimes principled decision, sometimes supported by reasoned opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Private/public	Public	Private, unless judicial review sought	Private	Private

7. This table is a slightly modified version of one that appears in GOLDBERG, SANDER, ROGERS & COLE, Dispute Resolution: Negotiation, Mediation and Other Processes 4 (5th ed. 2007). That text also identifies a number of "hybrid" dispute resolution mechanisms formed by combining elements of two or more of these "primary" processes.

What Does Ms. Lopez Want Exactly? How Much Does She Want It? Where Can She Get It? What Could Happen If She Tries? In the fascinating, frustrating 1993 film, *The Story of Qiu Ju*, a peasant woman from rural mainland China tries to achieve justice for her husband after an altercation in which he is kicked in the groin by the village chief. Unable to resolve her problem informally, she begins a tortuous journey through various court processes newly established by the People's Republic of China. The court system fails her utterly, despite awarding her monetary damages, because it will not give her the only thing she ever really wanted as vindication for the humiliation her husband suffered—an apology. Moreover, her resort to the courts may actually have made things worse: As the film ends, she appears to be visibly pained on learning that her claim has resulted in the perpetrator's arrest—something she did not want or intend.

Our popular culture depicts dispute resolution almost exclusively in terms of the litigation process. So does the case method of instruction, used in the formative first year of every law school in America. Law schools teach students to fit facts into appropriate legal categories and to convert disputes into lawsuit-worthy claims. As a result, many lawyers and their clients are socialized early on to see litigation as the default "process of choice" for all potential legal problems. And if Ms. Lopez's primary objective is a job promotion and/or an award of damages, pursuing a civil rights lawsuit is an option she may want to (or have to) consider.

But maybe all she really wants, or what she mostly wants (because people rarely have just one motive for anything they do), is the dignity of a face-to-face meeting with the company manager who passed her over for a promotion. Or maybe she would like the opportunity to sit down with company officials and try to work out an entirely new relationship within the organization—something that a court could never compel. And could there be unintended consequences of suing? Might she be branded a troublemaker? Might her coworkers abandon her? These variables might influence her decision making.

The importance of the issues to Ms. Lopez—the *intensity* of her feelings about what has happened to her—will also be an important factor in any process choice she makes. For example, she may feel angry enough to want to try to negotiate some kind of informal resolution to her situation (either with or without representation) but not angry enough to "make a federal case out of it." Or, to the contrary, she may feel so furious that she will never agree voluntarily to sit down with "*that S.O.B.*" To make matters more complicated, her objectives and the intensity of her feelings about what has happened to her may shift as her dispute is processed. Which process is more likely to harden (or soften) her resolve to fight to the end? On what might this depend?

How Long Will This Take? How Much Will It Cost? How Involved Does Ms. Lopez Want to Be in the Resolution of Her Dispute? Although for some disputants, delays are perceived as advantageous and cost is no object, most people are concerned about the efficiency—in both time and money—of the dispute resolution alternatives available to them.[8] Some processes tend to be more time-consuming and expensive than others.

8. JOSEPH B. STULBERG & LELA P. LOVE, Community Dispute Resolution and Training Manual 19 (Mich. Sup. Ct. 1991).

Litigation—at least if it reaches the formal court system that lawyers inhabit—is generally at the slow and costly end of the spectrum. But the fact that litigation may take a long time does not necessarily mean that it will take a lot of the litigant's time. A friend who is a very successful plaintiff's personal injury lawyer begins his relationship with new clients by telling them, "*If this case goes to trial, it will take [x] years to get there. I'll call you when I need you.*" For some clients, to have a possible trial—or even protracted discovery, settlement preparation and negotiation—hanging over them for years might be an excruciating experience. For others, so long as the principal burden is delegated to others (i.e., to their lawyer), that will be just fine.

One of the distinctive characteristics of mediation, compared to other processes, is that it tends to involve disputants directly in the resolution of their own conflicts. The growth of community mediation in the United States in the 1970s and 1980s reflected the ideal of democratizing justice and removing community problems from the exclusive control of courts, lawyers and other "experts."[9] In most forms of mediation, disputants sit at the negotiation table, with or without lawyers, and participate fully in crafting their own solutions to their own problems. For some people, this is one of mediation's most attractive features. For others, the prospect of facing an opponent at close range across the bargaining table is just too daunting; they prefer to have matters handled by a lawyer or other agent. Still others may prefer to cede control to a judge or arbitrator to decide their case, rather than having to engage in the hard work of trying to hash out a solution themselves or having to live with the tough compromises that "settling" may require.

How Strong Is Ms. Lopez's Case? Is There Enough Information to Predict The Outcome? How Risk Averse Is She? Initiating litigation might make sense for Rosa Lopez if she has a strong legal claim, but might be too expensive and time-consuming judged against the potential payoff if she doesn't. Making an informed cost-benefit decision is often difficult when deciding whether to initiate court action, because important information about what has occurred may be lacking.

Note also that depending on the nature of their fee arrangement, lawyers and their prospective clients are likely to have different tolerances for risk when proceeding in the face of information gaps. An arrangement that makes the payment of fees and expenses contingent on a successful outcome will encourage more people to choose to litigate than one that requires an immediate and ongoing outlay of money. But the corollary is also true: Few lawyers will be willing to represent Ms. Lopez on a contingent fee basis unless her claim is deemed strong and her damages are substantial.

How Important Is Establishing a Precedent? How Does Ms. Lopez Feel About Publicity Versus Privacy? Formality Versus Informality? If Rosa Lopez is concerned about publicly vindicating her position, or establishing a principle that will be applied to others, or combining forces with others who

9. Sally Merry & Neil Milner, The Possibility of Popular Justice: A Case Study of Community Mediation in the United States 10 (1993).

have experienced similar treatment, then she will most likely prefer litigation over other dispute resolution options. To the extent that she values the privacy of a mediation or arbitration setting and outcome or prefers the informality of mediation over the formality of a court or arbitration proceeding, those factors may loom large in her choice of process.

Will This Process Be Fair? Will Using It Lead To a Just and Durable Outcome? This is the bottom line, of course. No one in Ms. Lopez's situation would deliberately choose a process that is unfair. Studies consistently demonstrate that mediation leads to high participant satisfaction and high rates of compliance with settlement terms.[10] But not all people have the verbal, intellectual and bargaining skills, or the ideal conflict management style, to use mediation effectively. Some individuals have overly accommodating bargaining styles that make it difficult for them to assert and protect themselves and who, even when they have lawyers present to protect them, may "give away the store." For such individuals, choosing mediation could be a risky option.

§1.4 VIEWS FROM THE "OUTSIDE": WHY ARE PEOPLE, COURTS AND OTHER INSTITUTIONS INCREASINGLY USING MEDIATION? WHAT CONCERNS MIGHT THIS RAISE?

The foregoing discussion should demonstrate that mediation is not a panacea for all individuals or all disputes; that there remains an important place for traditional adjudication in the resolution of disputes; and that selecting an appropriate dispute resolution process is a complex, sensitive and highly individualized task. There can be no doubt, however, that in the last twenty to thirty years, the use of mediation and other alternative forms of dispute resolution has risen substantially. (Some are fond of saying that these days the "A" in "ADR" stands for "appropriate," not "alternative," given the explosion in its use.[11]) With that rise in use, however, has come substantial criticism from scholars and practitioners.

Does Mediation Really Save Time and Money? The perception that mediation is a faster, cheaper, more efficient process than litigation for resolving disputes is probably the most important reason for its explosive growth in legal matters. In his often-cited 1982 Report on the State of the Judiciary, U.S. Supreme Court Chief Justice Warren Burger attributed to Abraham Lincoln the following quotation: "Discourage litigation. Persuade your neighbors to compromise wherever they can. Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time."[12]

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10. *See, e.g.*, ROSELLE L. WISSLER, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RES. Q. 55, 65-68 (2004) (review of empirical literature).
11. *See, e.g.*, CARRIE MENKEL-MEADOW, *Ethics in ADR: The Many "C's" of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2001).
12. WARREN BURGER, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982). Empirical research on court-based mediation programs is far from conclusive as to whether they are effective in cutting down on litigants' costs or litigation delays. *See, e.g.* JAMES S. KAKALIK et al., An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act (1996).

In reality, however, the most appropriate benchmark for evaluating the efficiency of mediation is not really adjudication; it is unassisted negotiation. Well over 90 percent of all cases filed in courts each year end before trial, sometimes by abandonment or court ruling on a dispositive motion, but most often by means of negotiation. Many thousands of additional disputes are settled each year by negotiation before they ever ripen into "cases." So the more relevant question is whether mediation is faster, cheaper and more efficient than direct negotiation between the parties. As it turns out, the empirical evidence on this question is inconclusive.

Does Mediation Produce Better Justice? Many mediation proponents believe that mediation produces outcomes that are substantively superior to those that courts—in their "limited remedial imagination"[13]—can dispense. Because mediation can explore the participants' real concerns and priorities, advocates argue, it stands a better chance of yielding satisfying solutions. By contrast, adjudication's exclusive focus on legal norms and legal rights tends to restrict most court judgments to binary, win-lose decisions based on a limited set of "legally relevant" claims and defenses.

Critics of mediation argue that it produces second-class justice.[14] Lacking the procedural and substantive protections afforded by adversary trials and meeting in secret behind closed doors, participants with less power—especially poor people, women and persons of color—are routinely disadvantaged by the mediation process, critics contend. They argue further that mediation cannot produce just outcomes if the parties lack equal bargaining power.

Is Mediation More Humane? Regardless of the outcome, advocates argue that mediation is a gentler, more humane process that reduces the emotional toll of protracted litigation and has the capacity to produce genuine catharsis. Empirical studies consistently demonstrate that participants in mediation are satisfied with the process when it is used appropriately and skillfully.[15]

Mediation critics worry that, as practiced in many settings, mediation can unduly dampen conflict, discourage participants from freely expressing their anger and deter them from vindicating important legal rights. Some critics believe that when disputants are urged to use mediation, they may be encouraged to sacrifice justice for peace. Anthropologist Laura Nader calls this "the ideology

13. Carrie Menkel-Meadow, *Toward Another View of Legal Mediation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 791 (1984).
14. *See, e.g.*, Richard L. Abel, *The Contradictions of Informal Justice, in* 1 The Politics of Informal Justice 270-295 (1982); Richard Delgado, *ADR and the Dispossessed: Recent Books about the Deformalization Movement*, 13 Law & Soc. Inquiry 145 (1988); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359, 1375-1378 (1985) (claiming that psychodynamic, social-psychological and economic factors contribute to prejudice in alternative dispute resolution); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1590 (1991) ("The very intimacy that renders mediation such a potentially constructive process may facilitate the mediator's projection of her own conflicts onto the parties, and the possibilities and dangers of transference and countertransference."); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. on Disp. Resol. 1, 12 (1993) ("Mandatory mediation abridges American Freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view.").
15. *See* Wissler, *supra* note 10, at 661, n.79 (summarizing studies).

of coercive harmony."[16] And recent studies are beginning to raise questions about how much people actually value "humane informality" in the resolution of their disputes.[17]

How Voluntary Is Mediation, Really? Many of the claims made on behalf of mediation by its supporters—that it is more democratic, more creative, more humane—presuppose that individuals come to the mediation process voluntarily, that they choose it because it is "a better way." And there is no doubt that many people do freely choose mediation over other dispute resolution options available to them.

But increasingly, mediation and other forms of private dispute resolution are being forced upon disputants. For example, in Rosa Lopez's situation, she might have previously been required to sign, as a condition of employment, a pre-dispute mediation or arbitration clause that either waives her right to litigate claims against the company or conditions that right on first making a settlement effort. Such agreements have generally been upheld by the courts, but they have proved controversial.[18]

In a growing trend, courts, administrative agencies and other institutions with the power to resolve conflict have gotten on the mandatory ADR bandwagon by requiring that litigants attempt some form of alternative process before they are permitted to proceed to a hearing. Mediation advocates worry that, as mediation has been adopted in this way, it has been co-opted by these institutions and has become routinized and "lawyerized," more and more resembling the processes it was designed to replace.[19]

Is Private Justice Good for the Public? Finally, there is the important question of whether the increasing privatization of justice is good social policy. Critics argue that private justice is antinormative: When disputants settle their claims privately, the public is deprived of the opportunity to learn about important social problems, and courts and other institutions are deprived of the opportunity to enunciate and enforce important public values.[20] Rosa Lopez's problem provides a case in point: If Ms. Lopez resolves her dispute informally, an opportunity may have been lost to expose and eradicate systemic discrimination at a large corporation. Mediation scholar Carrie Menkel-Meadow asks in response, "Whose dispute is it anyway?" and suggests that this debate pits those "who care more about the people actually engaged in disputes" against "those who care more about institutional and structural arrangements."[21]

16. NADER, *supra* note 14, at 7.
17. *See, e.g.*, DEBORAH HENSLER, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (2002) (arguing, based on twenty-five years of procedural justice studies, that many litigants prefer the formality of trials).
18. *Compare Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Fisher v. G.E. Medical Systems*, 276 F. Supp. 2d 891 (M.D. Tenn. 2003), *with* KATHERINE STONE, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).
19. NANCY WELSH, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?* 79 WASH. U. L.Q. 787, 845 (2001).
20. OWEN FISS, *Against Settlement*, 93 YALE L.J. 1073 (1984). *See also* DAVID LUBAN, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).
21. CARRIE MENKEL-MEADOW, *Whose Dispute Is It Anyway? A Philosophic and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995).

§1.5 THE MEDIATOR'S ROLE AND FUNCTION: AN INTRODUCTION

Assume that, after a period of unsuccessful negotiation but before any legal action is initiated, Rosa Lopez and Texitron both retain lawyers and agree to attempt mediation. Consider the following questions, all of which are debated in the mediation field and which this book will explore:

- **What qualifications and experience should their mediator possess?** Should the mediator be an attorney? A person with knowledge of potentially relevant civil rights laws? Someone with knowledge of information technology or the petroleum industry? How important is *substantive law* or *industry knowledge* compared to *process competence* as a mediator? What about using two co-mediators with differing expertise or (as this is a gender-discrimination case) genders?
- **What are the goals of the mediation?** Should the mediator's primary goal be to end this dispute on whatever terms the parties will accept? To improve communication and repair relationships? To help the parties make well-considered decisions for themselves, regardless of whether there is a settlement? How broadly or narrowly should the mediator define what can be discussed and resolved? Or is that a decision that the participants should make?
- **What are the roles of representatives in the mediation?** In community settings and some forms of legal mediation (in such areas as small claims and family disputes), parties commonly appear without attorneys. Here, Ms. Lopez and the company will each be represented by counsel. Should the mediator look primarily to the lawyers or to their clients when it comes time to speak? Who decides this? Should the mediator try to encourage the participants to talk directly to one another or primarily to her? In what ways might the presence of lawyers pose challenges for the mediator? Are there ways in which their presence might be an asset?
- **What is the place of feelings, as opposed to facts, in mediation?** How much anger and hurtful talk should the mediator permit during the course of the mediation? How might the expression of strong emotions help or hurt the process?
- **Is mediation about cooperative problem-solving or competitive bargaining?** If a resolution to the dispute is what the parties seek, is it the mediator's job to help the disputants bargain in a collaborative mode to reach a solution that can satisfy the needs of all? Or is it to help them engage (perhaps more effectively than they could do themselves) in competitive bargaining until a deal is struck? Is it important that mediators be good negotiators themselves?
- **Should the mediator hold joint or separate meetings?** Should mediation be conducted with everyone present at all times? Or should the mediator meet privately with the parties if that might make the task easier? When and why might separate meetings be useful or problematic?

- **How directive or persuasive should the mediator be?** How much, if at all, should a mediator try to influence the shape and subject matter of the discussions? How active should he or she be in pointing out problems with each side's perspective or in urging disputants to change their stance? Should the mediator insist that all proposals for how to resolve the dispute come from the parties themselves, or should the mediator suggest possible ideas?
- **Should the mediator provide legal or other evaluative feedback?** In a potential legal matter like the Rosa Lopez case, should a mediator express his or her views about the strengths and weaknesses of each side's position if this case were to go forward? Make a prediction about what might happen in an administrative hearing or trial? To what extent, if at all, should legal rules and legal norms guide the discussion?
- **Is the mediator responsible for the fairness of the outcome?** What should a mediator do if the parties reach a solution that seems unjust or unwise?

The consistent and—for those seeking a simple model—frustrating answer to virtually all these questions is: *it depends*. At least that is our answer. It is not everyone's. There are some mediation theorists and practitioners who hew to a single vision of the way in which "good" mediation should be practiced.

But mediations today are conducted in so many different settings, in so many different kinds of disputes, with so many different kinds of participants, by so many different types of mediators, that it is difficult to make any universal statements about the way it is or should be practiced. For example, the mediation of a collective bargaining contract dispute by an experienced labor mediator might have little in common with a victim-juvenile offender conference conducted by a pair of volunteer community mediators. Or a court-ordered, single-session mediation of an automobile accident case involving experienced trial counsel and an insurance adjuster might not be best handled the same way as a private, multiple-session, parties-only divorce mediation that is conducted over a period of months.

The hallmark of mediation's power and potential lies in its flexibility—the fact that it can take different forms, depending on the needs and objectives of the parties, the mediator's background, the characteristics of the dispute and the setting in which the mediation is held. Many supporters of mediation celebrate the fact that it is eclectic. To critics, who see mediation as vague, amorphous and lacking standards, this flexibility is a source of concern. Commentators and performance evaluators sometimes disagree about the specific skills that constitute mediator competence.[22] Some even doubt that mediation can be reduced to a definable set of behaviors.[23] What implications does this have for you as you embark on the study of mediation?

22. *See* Society of Professionals in Dispute Resolution (SPIDR), *Ensuring Competence and Quality in Dispute Resolution Practice*, Report No. 2 of the SPIDR Commission on Qualifications (April 1995); ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, Final Report (2008); STEPHEN B. GOLDBERG & MARGARET L. SHAW, *Further Investigation into the Secrets of Successful and Unsuccessful Mediators*, 26 ALT. HIGH COST LITIG. 149 (September 2008).
23. *See* SARA COBB & JANET RIFKIN, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991).

§1.6 THE SKILLS OF EFFECTIVE MEDIATORS: AN INTRODUCTION

Based on our experience as teachers and trainers, we strongly believe that mediation skills can be taught and learned. We do have preferred approaches, which we will advance and explain. But there is no doubt that embracing the flexibility and variability of the mediation process complicates the task of skills training. Being a good mediator is not like preparing your favorite lasagna over and over again. There is no single recipe that you can follow in all cases. If you want to be an effective mediator, you will need to adapt your approach, if not your basic orientation and style, to the specific situation with which you are presented. In this book we will try to help you do that, by identifying the *factors* that may make one approach more appropriate to use than another in concrete settings and situations.

Nevertheless, we do believe that there are certain foundational skills that are at the core of all good mediation. Here are four of the most important skills themes we will explore in this book:

- **Effective mediators possess good communication skills.** This includes the ability to listen, question, explain and facilitate the communication of others. It means being able to leave participants feeling "heard" and treated with dignity. No matter what the style of mediation or the setting in which the process is conducted, effective communication is the foundation of good practice.

- **Effective mediators are skilled diagnosticians.** As information is presented, effective mediators are able to analyze the characteristics of the dispute and the disputants in order to determine whether mediation is an appropriate process for the case and what kind of mediation approach is needed. They are also adept at diagnosing the causes of the dispute and at perceiving or intuiting psychological and negotiating stumbling blocks that may impede its resolution.

- **Effective mediators are able to establish a climate conducive to constructive negotiation.** This includes a number of skills: helping the parties determine their true interests and priorities; helping structure the participants' discussions; assisting the parties in developing creative, realistic resolution options; helping them assess these potential solutions; helping parties make and frame principled offers; managing reactions to offers in ways that enhance the chances of continued progress; and helping participants maintain a sense of optimism and cooperation in the face of potential impasse.

- **Effective mediators are persuasive.** As we define this (somewhat controversial) term, it includes conditioning the parties to be open to changing their perspectives and to seeking a solution, encouraging them to question their stance and, when appropriate, providing feedback and evaluation in a way that can be received constructively.