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CHAPTER NINETEEN

Mediation

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Mediation is commonly defined as a process in which a third party neutral, the mediator, assists disputing parties in reaching a mutually agreeable resolution. Mediators aim to facilitate information exchange, promote understanding among the parties, and encourage the exploration of creative solutions. In other methods of dispute resolution, such as litigation or arbitration, the parties rely on a third party to make a binding determination of right or wrong. Mediation, by contrast, invites the parties to engage in a potentially creative and collaborative method of problem solving, without forcing a decision on either party.

Mediation is a flexible process, defined and re-defined by the disputants and the mediator in each case. This flexibility is one of the strengths of mediation—and it also creates considerable challenge for anyone trying to describe mediation broadly. This chapter provides a brief overview of some of the aspects of mediation that commonly cut across current variations of the process.

The chapter begins with a brief look at some of the benefits of mediation—what is it that draws disputants to this process? It then describes some of the component pieces of a typical mediation. No two mediations progress in identical ways, and yet there are some common patterns and themes in the ways that mediators conduct the process. What stages does a mediation go through? What roles might a mediator adopt? And what implications do those roles have on the practice of mediation? The chapter then highlights four current policy

issues related to mediation: neutrality, confidentiality, the processes by which disputants arrive in front of mediators, and the regulation of the practice. The chapter concludes by considering the future of mediation practice—its promise and its challenges.

WHY MEDIATE?

Mediation offers a number of potential benefits that are unavailable in traditional methods of dispute resolution. Mediation's relatively informal and flexible process allows the mediator and participants to take different approaches to creative problem solving. In providing an accelerated resolution, mediation quite often saves parties time and money. Moreover, in reaching a resolution, mediation parties can often avoid much of the emotional drain from engagement in continual conflict.

Mediation also provides a different kind of forum for communication between the parties. In many cases, parties value the degree of privacy mediation affords. Those who are uncomfortable discussing personal matters in an open courtroom may be more relaxed in a private setting. In addition, the parties are not restricted by the nature of what they may say, thereby allowing for the determination and discussion of the real matters in dispute.¹

In some circumstances, resolution may be impossible without the expression and understanding of a party's emotional needs. Mediation not only allows for the expression, understanding, and release of emotions but also can create an opportunity for relationships to be preserved. In many cases, parties involved in a conflict have a continuing relationship, whether personal or professional. Despite the dispute, continuing the relationship in one form or another may be desirable—or inevitable—for the parties.

Mediation also provides the potential for parties to exercise self-determination. In mediation, the parties are the final decision makers, whereas in adjudicative procedures, such as trial, arbitration, or administrative hearing, a third party makes the decision for them. Because of their personal involvement in the process and the resolution, the parties tend to possess a psychological ownership, making it more likely that they will comply with an agreement reached.

Finally, mediation provides an opportunity for the parties to agree to creative solutions. When disputes are resolved through court or other adjudicatory processes, the customary result is a judgment in favor of one party over another. Alternatively, through mediation parties are able to craft solutions more suitable for their particular circumstances. Mediators often encourage parties "to think outside the box" and brainstorm about potential options in order to maximize creativity.