1 INTRODUCTION TO MEDIATION

WHY MEDIATION?

Welcome to the world of mediation! You are about to study an activity that spans many cultures and thousands of years. Mediation, one form of **alternative dispute resolution (ADR)**, is a process in which a **third party** helps others manage their conflict—a worthwhile activity in itself. However, mediation is more than just another alternative to the court system or an offshoot of community problem solving. For many practitioners, mediation is a philosophy for life, or, as Mahatma Gandhi stated, "Peace of mind is not the absence of conflict, but the ability to cope with it." Mediators help frame conflict into something workable, making peace possible.

Individuals trained as mediators find that the skills they learn are applicable to daily communication in their personal and professional lives. People from all walks of life have become mediators—attorneys, counselors, teachers, police officers, human resource professionals, volunteers, college students, and even young children. Some who are trained have found a calling in mediation—an outlet for their lifelong goal of service. Others use mediation in their career path or integrate the skills into their existing careers. Some even consider mediation to be an art form.

What is it about mediation that appeals to so many different kinds of people and is useful in so many different contexts? Mediation is about empowering people to make their own informed choices rather than having a third party (such as a judge) make a decision for them. Mediation is grounded in the belief that conflict offers an opportunity to build stronger individuals, more satisfying relationships, and better communities. As a student of mediation, you will learn the philosophies and **theories** that underlie mediation as well as foundational skills any mediator must possess (discussed in depth in Chapter 11).

We live in a society replete with conflict and one that is very litigious. Every day we hear stories about someone being sued for serving coffee that was too hot, saying nasty things on social media, or failing to fulfill an agreement. Recently in Texas a woman

texted during a movie and annoyed her date, prompting him to sue her for the price of the movie ticket. Although litigation has a respectable and important place in society, there is no doubt the courts are overburdened and should not be the place where all disagreements are settled. Mediation offers less adversarial, cheaper, and quicker ways to resolve conflict. As we hear strange tales about neighbors who sue each other over where they put their trash on garbage collection day, we wonder, "Why didn't these neighbors just talk it out?" In a nutshell, that is what mediation offers—a chance to "talk it out" in a safe and controlled environment.

Benefits for the Disputants

The situation in Case 1.1 with Dana and the Klimes seems like a simple misunderstanding. However, each party is seeing only a limited picture of reality. In each person's view, the other is acting inappropriately. Dana has legal rights to protection from harassment

CASE 1.1
A NEIGHBORHOOD MISUNDERSTANDING

Dana moved from urban Chicago to a small town to be nearer to her grandmother. Prior to moving, Dana had lived for 27 years in an apartment with her mom in a rather rough urban neighborhood. Dana was raised to "mind your own business" and to not engage the neighbors in conflict. As she put it, "You never know who is living next to you—they could be dangerous!"

Across the street in her new neighborhood lived Tommy and Mary Klimes. The older couple was retired, with a grown son who lived elsewhere in town and an elderly Boston terrier named Button. The couple didn't have a fence, but Button didn't wander too much. Besides, all the neighbors knew Button belonged to the Klimes.

Button didn't like Dana from the first moment they saw each other, and anytime both were outside, Button would bark and run at the new neighbor. Dana felt threatened by the dog. She also was apprehensive about talking to the neighbors directly, so she called the police instead. The police came, stopping first at Dana's house to get her statement and then crossing the street to speak to the Klimes. The Klimes were not given the name of the person who had complained about the dog, but later another neighbor told them that the police had stopped at the "new neighbor lady's" house. Tommy, noticing Dana's car was in her driveway, promptly walked across the street to introduce himself and apologize for the dog. He rang the bell and knocked, but there was no answer.

Several days later, Button barked at Dana again and came into the street as she got into her car. Again, Dana summoned the police. This time, the Klimes were issued a citation. When Dana returned home from work, the Klimes' son was outside of his parents' home and yelled obscenities at her as she walked into her house. Tommy heard the comments, came outside, admonished his son, and then walked across the street to apologize to his neighbor.

However, Dana, feeling threatened, didn't answer the door. Tommy knew she was in there and peeked in the front window to see whether she just hadn't heard the bell. Finally giving up, he went home. A few minutes later, the police arrived for the second time that day. Dana had called reporting that her male neighbor was peeping in her windows.

from her neighbors and their dog. She has the right to involve the police and to press for justice. When this case appeared in court, the judge referred them to the **community mediation** program. The judge wanted to see whether these neighbors could resolve their issues together before assigning time in her already overloaded court calendar. In short, the **parties** in this case were ordered to mediation to work out their dispute, if possible. The judge also believed that the parties' **interests** would be served best in a place where they could explore not only the legal aspects of the case but also the issues surrounding how they experienced the event. In court, only the legal issues would be resolved and a neighborhood could be left in turmoil.

Mediation often is better equipped than a formal court proceeding to explore the relational and emotional issues of a dispute. In addition, research indicates **disputants** in court-related mediation programs have favorable views of the mediation process, and they have settled their cases between 27 and 63 percent of the time without having to go before a judge. Moreover, people complied with their mediated agreements up to 90 percent of the time (Baksi, 2010; Wissler, 2004).

In situations where the individuals will have a continued relationship, such as in the case of the Klimes and Dana, mediation is particularly appropriate. In this case, the parties met one afternoon with a mediator. A very tense session began. The Klimes explained that they were offended by how Dana had treated them; Dana was adamant about the righteousness of her complaints. Through the process of mediation, Dana was able to express her feelings about neighbors and, subsequently, the conversation created a way for the Klimes to understand her actions. The Klimes, who had not had the opportunity in the past to apologize for the dog and for their son's behavior, were allowed to assert their desire for a friendly relationship. The result of this real-world mediation was an offer for Dana to come to the Klimes' house for coffee and to get to know Button, the dog. Dana agreed—but only if she could bring some of her famous chocolate chip cookies to share. With a mediated agreement in hand, the court case was dismissed.

Benefits for the Mediator

Mediation not only has value for society and the disputants, it also benefits the individuals who learn mediation skills. Those who become mediators express feelings of accomplishment when they help others solve thorny problems. Students of mediation claim they see a microcosm of life during fieldwork practice.

Those who study mediation accrue benefits even if they never become professional mediators. The skills useful to mediators are transferable to everyday life. Listening, reframing issues, and problem solving are trademarks of a good mediator and are characteristic of effective leaders. Mediator skills enhance individual competence and can be applied informally at home, at work, or with friends. The final chapter in this book details numerous occupations requiring mediation and conflict management skills.

A VIEW FROM THE FIELD: SMALL CLAIMS COURT MEDIATION

Roger Cockerille, a 4th District Court magistrate judge in Idaho, tells the individuals sitting in his courtroom waiting for a trial that he orders most of the contested small claims cases to mediation for two reasons: It is their last chance to work things out together before a judge makes a decision that may not please either of them, and over 70 percent of the mediations result in a settlement. Of those who settle, over 90 percent follow through and comply with the agreement they negotiated. If the court makes the judgment, people can appeal, which delays getting the settlement that was awarded.

In Idaho, the "winner" in an adjudicated case is responsible to collect on the judgment, which means the plaintiff has to find the defendant and try to garnish wages or collect through some other legal means, which is not easy (in 2016 only 37 percent of adjudicated cases were effectively collected). Many people never see a dime when they "win" in small claims court, but 93 percent of the cases mediated in 2016 *did* see their agreement met.

When people arrive at court, they are prepared for a fight. Then they are sent to mediation. While everybody who goes to mediation doesn't have the same experience, many leave transformed. We held a conversation with graduates of the Boise State University Dispute Resolution Program who served as small claims court mediators. Deanna's comment about being surprised that sometimes money wasn't the **issue** was representative of the group's experiences:

> I had a neighborhood case where the people bought a house in the winter and when summer rolled around the sprinkler system didn't work. They tried to fix it, but couldn't figure out how the previous owners had it rigged and couldn't find the other couple. They ended up bringing the former owner to court because it was the only way to find them.

During the mediation session, the disputants in this case came to an agreement that the former owner would buy all the replacement parts and train the new owner on how to work the sprinkler system—and they would get together to make the repairs. They even made plans to have dinner the next weekend. Deanna concluded, "It feels good when you help."

HOW DO PEOPLE FIND THEIR WAY TO MEDIATION?

There are many paths to mediation. Mediation can be sought by disputants, recommended by a friend or coworker, or mandated by a third party, such as the courts or a work supervisor. Counselors, agency workers, and concerned friends may suggest mediation to help solve problems. Mediation occurs throughout society in many contexts. Families, communities, businesses, courts, governments, and schools are common contexts for mediation, although it is being applied in almost every avenue of life.

Family Mediation

Divorcing parents in many states are required to mediate parenting plans for their children prior to bringing their case to a judge. Research indicates the disputants in divorce cases see the mediator's skills as critical to a successfully negotiated settlement—for example, mediators may empathize with both parties, foster a civil conversation, ask questions to clarify facts, lessen destructive communicative patterns among the couple, and shift the focus to the future rather than the past (Baitar, Buysse, Brondeel, De Mol, & Rober, 2012; Cohen, 2009).

Family mediation takes on many forms and can be referred by a variety of sources. In one example, a family was having difficulty reintegrating their son back into the home after

he had run away. A social worker recommended a mediator to help the family negotiate rules and expectations. In another example, an advocacy agency specializing in resources for the aging regularly refers families to mediation when they are negotiating elder care issues. In yet another case, a minister recommended mediation to members of her congregation who could not amicably work out the details on an estate settlement after the death of their parent.

Community Mediation

One of the early applications of mediation in the United States was in promoting community peace. Police who are called about noisy parties or wayward pets may refer the neighbors to mediation. Neighbors who do not get along well, but would like to, may attend mediation as a way to open lines of communication. On a bigger scale, mediation can address concerns citizens have with police departments, with transportation agencies, or across neighborhoods. In one example, vandalism of an Islamic mosque raised concerns throughout the wider religious community. While the perpetrators of the crime were not found, the mediation of public conversations by leaders of multiple faith traditions helped forge a sense of community and establish a message that violence against one religious group was an act of violence against all. Community mediation programs are available within many cities. Other types of mediation specialists work with faith congregations who are in conflict over management approach, personnel, or doctrinal issues.

Entities identified with the National Association for Community Mediation (NAFCM) typically are nonprofit agencies that train volunteers and serve the public regardless of a person's ability to pay (see nafcm.org). Community mediation centers may offer all types of mediation but often specialize in areas such as disputes among neighbors, disagreements between landlords and tenants, and other situations in which local citizens need assistance. If the center is partnered with a court, it may specialize in small claims, child custody, or divorce. Community mediation centers may be better positioned than any other group of mediators to respond quickly to changing needs in their surrounding areas. For example, some centers work to prevent homelessness (Charkoudian & Bilick, 2015).

Tribal councils were perhaps the original large-group conflict resolution system in the Americas and still engage in mediation today. For example, Navajo peoples may create a forum for hearing concerns and helping members resolve issues that could affect the public good ("Peacemaking Program," 2012). In discussion circles, issues may be brought to tribal elders or community leaders and addressed communally among the troubled participants, family members, workmates, or those affected by the conflict.

The value of finding ways to build dialogue in communities embroiled in conflict cannot be overstated. Indeed, "Mediation and social justice are inextricably linked insofar as each has the ability to contribute to the other" (Diener & Khan, 2016, p. 139). Mediation offers tools for building healthy communication between factions.

Victim–Offender Mediation

Victim–offender mediation (also called victim–offender dialogue and **restorative justice**) holds offenders accountable for their actions and offers a means of bringing closure to victims. Judges may refer juveniles or adults to victim–offender mediation so the affected individuals can tell their stories and negotiate a restitution plan rather than a judge

deciding the sentence for the offender—a procedure that leaves victims out of the process. The models vary and include the use of community reparative boards, sentencing circles, family group conferencing, and other types of reconciliation meetings (Gerkin, 2012). In one case, two teenage boys were responsible for vandalizing a city park. The teens were brought face-to-face with the woman responsible for the placement of one of the defaced monuments, which was commissioned as a memorial to her soldier son who had been killed in action. In the process, the teens learned the effect their actions had on this mom. A meta-analysis of relevant studies found victim–offender mediation reduces recidivism in juveniles (Bradshaw, Roseborough, & Umbreit, 2006). These sessions provide a means to help offenders by "holding them accountable in respectful ways that may develop a sense of shame and heightened empathy" (Choi, Green, & Gilbert, 2011, p. 352). It is important to note that restorative justice does not necessarily reject punitive responses, but it offers a chance for perspective taking and healing as part of the resolution.

School-Based Peer Mediation

Peer mediation is employed in many schools and has been gaining momentum in the wake of recent high-profile incidents of bullying and violence. Although school mediation may not be a panacea for all cases of bullying, it may help prevent some situations from deteriorating. In elementary schools, peer mediators trained in very basic conflict management help resolve playground conflicts on the spot without **escalation**, and they have been shown to reduce early-stage bullying behavior (Vreeman & Carroll, 2007).

Many elementary schools, high schools, and universities have instituted programs in which students are trained to mediate cases involving peers. Public school teachers refer students in conflict to a peer mediation program. Dormitory roommates may be referred to a campus mediation center to talk about competing study habits and social time issues. Students involved in group projects may seek mediation to work through issues about assignments, leadership, or work accountability.

Organizational Mediation

Mediation can be included as part of the standard conflict management processes in an organization. Bosses refer employees who cannot work well together to the human resources department for mediation or, if trained, conduct a mediation intervention themselves (a specialization called **supervisor mediation**). A business threatened with a lawsuit by a dissatisfied customer may suggest mediation rather than going directly to court. When a real estate purchase falls through, the buyer and seller can elect to mediate a fair distribution of the earnest money deposit. Many contracts require mediation of any disagreements between customers and the business provider. Domestic and international commercial mediation is edging out arbitration and litigation as the most frequent means to resolve disputes ("Mediation of Investor-State Conflicts," 2014). As litigation can be costly and time consuming, mediating business disputes provides expediency and closure. Even negotiations with trade unions can be addressed through mediation, and the usefulness of mediation is discussed in the publications of many science-based professions, such as engineering (Howarth, 2012). Some organizations have conflict managers on retainer in case a potentially volatile workplace conflict should

arise. Any type of organization can be affected by perceptions of a lack of support for workers (Wu, Lee, Hu, & Yang, 2014), workplace bullying (Mao, 2013; Oliveira & Scherbaum, 2015), changing demographics (Gundelach, 2014), and economic challenges (James, 2014), all of which can exacerbate tensions and create conditions ripe for mediation.

Government and Court-Annexed Mediation

Some situations involve several stakeholder groups that share a common dilemma. For example, regional planning for urban design and conflicts over roadway construction often have cities turning to mediated public input sessions (Forester, 2013). How to manage the declining population of a particular species of animal on public lands is another issue that has been negotiated using facilitated group processes. The Department of the Interior uses mediation to involve the public in decision-making processes (Ruell, Burkardt, & Clark, 2010). The Department of Agriculture participates in mediation with farmers who have violated environmental rules or have past due loans. Government officials negotiate the creation and enforcement of rules in a process called **negotiated rule-making** (neg-reg), a common method for involving stakeholders in decision making (Pitt, 2017). In some cases, federal regulations require the states to oversee mediation processes, as is the case with special education law where states must provide mediation to aid parents and school districts in resolving disputes (Burke & Goldman, 2015).

Many types of civil and criminal cases are referred to mediation by courts—for example, eviction courts encourage landlords and tenants to create an amicable plan for departure from a rental unit (rather than having the sheriff force an eviction). Foreclosure mediation has emerged as a means of keeping families in their homes (Khader, 2010). State taxation entities and the Internal Revenue Service (IRS) use mediators when negotiating past due taxes (Meyercord, 2010). The **REDRESS ©** program has been adopted by the U.S. Postal Services to mediate Equal Employment Opportunity Commission (EEOC) conflicts. Internationally, mediators meet with cultural and political rivals to negotiate innumerable issues, including matters of war and peace.

In sum, people find their way to mediation because it offers a relatively speedy and efficient way to resolve disputes. Instead of filing a case in the courts or attempting to strong-arm an opponent into compliance, mediation brings the parties together to consider their mutual options. Mediation can be considered an alternative to systems that focus primarily on the rights of individuals and rely on **power** to determine outcomes.

POWER, RIGHTS, AND INTERESTS

Ury, Brett, and Goldberg (1988) proposed that conflict management could be viewed from three perspectives. These perspectives are power, rights, and interests.

Resolving through Power

Power-based approaches to conflict can be summed up with the following adage: "Might makes right." Power is the ability to influence another person. In the scenario earlier in this

chapter, Dana could kick the dog and thus exert her superior physical power to put the dog in his place. However, other affected parties also could exert their power. The couple's son might be stronger than Dana and have a physical power advantage. Conversely, Dana's grandmother might be quite wealthy, giving Dana monetary power to obtain a better attorney than the Klimes could afford. If Mary Klimes was the former prosecuting attorney for the city, her power resources could trump those of Dana's as networking and influence are very potent resources.

The power approach to conflict resolution is widely used. War, violence, and revenge are extreme examples of the power system. The consequences of the use of power may be highly detrimental to relationships (between individuals, businesses, or countries). The reliance on power to "win" can lead to distrust and what Galtung (1969) calls **negative peace**: peace resulting from forced submission rather than from a change of heart. As illustrated in international conflicts, such negative peace rarely lasts long. There is some evidence that people who "lose" in disputes may resort to retaliation, seeking **retributive justice** (Okimota, Wenzel, & Feather. 2012). In Chapter 7 we will discuss how power comes into play during a mediation session and what a mediator can do to "balance" power for the disputants.

Power, however, can be appropriate in some circumstances. As a parent, it may be necessary to use physical power to control a two-year-old running toward a busy street (i.e., grabbing the child and removing her from danger). When there are two employees vying for the same vacation days, a manager may find it necessary to make a unilateral decision—an act of power. However, reliance on power as the sole source for resolving conflicts would create a tumultuous society, one with people of low power being trampled by those with high power. Fortunately, humans have created other alternatives.

Resolving through Rights

The second major approach to conflict resolution is derived from the science of rights, a finely tuned system developed throughout European history and adapted into the U.S. legal system. In this approach, the rights of individuals (as laid forth in the law) are the keys to fair and just resolution to conflict. In the U.S. system of justice, the rights of individuals are outlined in the Constitution, delineated by lawmakers, and interpreted by judges. The legal system offers a highly ritualized process for resolving issues that have legal merit (and for dismissing those that do not). In theory, the legal system provides equal access to justice for everyone. All who appear before a judge are governed by the same rules of evidence and legal criteria regardless of race, creed, or social status. The legal system promises disputants a structured means of resolving their disputes.

However, few would argue that power is not wielded in the halls of justice. Money buys better legal representation. Those who are lacking in resources may find going to court not worth the effort, time, or expense. In one case, a low-income couple divorced and then reconciled a few months later and resumed their married life (without the formality of remarrying). For six years, they lived together, sharing all expenses. They separated again and created a custody agreement without the courts. Five years after their second separation, the ex-wife sued for back child support from the date of the original divorce 11 years earlier. The amount of money in dispute was $17,000. The cost to each party for attorneys was approximately

$8,000. The case was heard over a year later. The ex-husband prevailed, the ex-wife didn't receive any additional support, and $16,000 was paid for attorney fees. Litigation was an expensive way to resolve this dispute for two single parents living under the poverty level.

Some disputes are inappropriate for the courts because they lack legal merit. For example, a courtroom is not the place to settle hurt feelings. When these cases somehow are framed in legal terms and taken to court, relationships may suffer as a result of the adversarial nature of the **rights-based** process. In addition, the **anger**, frustration, and hurt that brought the disputants to court likely would be found not relevant to the findings of legal facts.

Consider the relationship of Dana and the Klimes. In the rights-based system, each would take an adversarial **position** and attempt to convince a judge or jury to rule in her or his favor. While individuals may represent themselves in some courts, more often attorneys speak on behalf of the client, further removing those involved in the conflict from the decision-making process. One side would "win" while the other would "lose," leaving at least one person feeling unsatisfied with the outcome. At worst, the individuals will grow more angry while waiting for their day in court, spend considerable money on attorneys and fees, and still lack a guarantee the judge will make a ruling that satisfies either party. Their future relationship could be marred by the escalation of the scenario to the courts and tainted by mistrust and anger. Possible consequences in Case 1.1 include other neighbors choosing sides and continued unpleasant confrontations.

Resolving through Interests

The third approach to conflict provides a forum for issues that do not require resolution in a legal setting. **Interest-based** resolution was popularized by Fisher and Ury from the Harvard Negotiation Project in their book, *Getting to Yes: Interest-Based Conflict Management* (2011). An interest-based approach encompasses any process that focuses on the underlying needs of the parties and permits their feelings, concerns, and needs to gain a foothold in the negotiations. The interests of the parties may include issues of power or rights but also the less tangible issues of respect, esteem, and feelings. An interest-based process might be the best choice for disputants who have engaged in a power struggle or who have positioned themselves into inescapable corners. In other words, "Those who start negotiation with an unyielding position find compromising or thinking creatively difficult. Changing one's mind is perceived as backing down, creating a loss of face" (McCorkle & Reese, 2018, p. 34). An interest-based mediation process can unlock positions and make more creative thinking possible.

Moore (2014) divides needs into substantive, procedural, and psychological interests. **Substantive interests** relate to tangible or measurable things, such as time, specific goods, behaviors, money, or other resources. Two substantive issues for Dana from the case study are trespassing and the dog running loose. **Procedural interests** arise from stylistic differences about how to communicate with each other, organize tasks, complete work, or structure rules and settlements. The Klimes wanted to meet informally with Dana and talk out the situation. However, Dana felt threatened by their process of trying to meet her, and an informal interaction was not acceptable to her. Dana pursued legal means to resolve the dispute, but the judge had other procedural interests and sent the case to mediation.

Psychological interests underlie all of the emotions and feelings that disputants bring to a session. The confusion the Klimes felt over Dana's behavior, the Klimes' need to be seen as good and nonthreatening neighbors, Dana's feelings of intimidation and her discomfort with the dog, and the desire of all parties to have a peaceful existence are psychological interests. While there are no guarantees that relationships will be improved through interest-based resolution, engaging in a process that explores the motivations of disputants may be less damaging than adversarial approaches.

Kritek in *Negotiating at an Uneven Table* (2002) discusses how interest-based approaches may seem counterintuitive to cultures that rely on "being right" to maintain their power. Humans, however, see the world from many vantage points and have different views of what is "right." Each individual's interests stem from a highly personal perspective on reality.

TABLE 1.1 ■ Three Perspectives on Resolving Disputes

Approach	Benefits	Disadvantages
Power	• Clear winner and loser • Often expedient • Power resources usually easy to identify	• Retaliation may occur • Lack of satisfaction by one party • May lead to violence • Little room for positive expression of concerns • Power is tenuous and may be lost • People with low power resources use what power resources they do have to be heard
Rights	• Clear rules for engagement • Specific requirements for evidence • The law is the same for everyone • People can be represented by attorneys • Process may be open to public scrutiny • Precedents are set	• Emotional issues and interests are not allowed • Usually expensive • Usually very time consuming • Quality of legal representation may affect the outcome • Decisions are made by judges or juries • Laws may prohibit creative solutions
Interests	• Open to exploring feelings • Solutions can be unique to the parties • Not limited to precedence or conventional approaches • Structurally flexible as decision making stays with the parties • May be more expedient than litigation • May be less costly than litigation	• May have little or no public scrutiny • Private justice instead of public, therefore open to bias and malpractice by mediators • Some may not be able to negotiate effectively and may be better served by representation • Lack of consistency in outcome • May deter the establishment of important precedents

Through interest-based negotiations and the assistance of a mediator, each disputant has the opportunity to view the world as others see it.

When the neighborhood misunderstanding case was referred to mediation, an interest-based process ensued. Through the promptings and guidance of a mediator in a safe context, Dana shared her personal background, feelings of distrust, and genuine fear of the dog and strangers. The Klimes were able to have their apology heard, state their views of what it means to be good neighbors, and express their frustration that Dana would not talk to them when the conflict first occurred. Through interest-based negotiations, each party began to see the other as a partner in fixing the problem. The mediator was able to assist the neighbors in resolving the conflict, and they worked out a plan for Dana to choose other alternatives than police involvement when dealing with the dog.

The three approaches to conflict—power, rights, and interests—all have their place in society. While the interest-based approach sometimes is lauded as the ideal choice for resolving all disputes, each of the three approaches offers risks and advantages. No one approach can be considered appropriate for all cases. Table 1.1 presents some advantages and disadvantages of each approach. The needs of the individuals, the issues involved, the power resources of each side, and the concerns for legal precedent should be considered in the determination of the most appropriate approach to conflict management.

The need to explore differences in safe environments while working together toward resolution is underscored by increasing diversity and globalization. In fact, parts of the modern mediation movement were born in communities dealing with inner-city racial and social tensions during the turbulent 1960s. As neighborhoods and businesses become more diverse in ethnicity, gender, nationality, age, and lifestyle, it is imperative to develop channels of communication to manage the predictable clashes of **values**, **style**, and goals that will accompany this diversity.

THE DISPUTE RESOLUTION CONTINUUM

Litigation

Litigation, also referred to as **adjudication**, is the process of resolving disputes through a formal court or justice system. In litigation, disputants (either represented by attorneys or representing themselves) appear before a judge or jury to present their case. The case is evaluated based on legal merit and subjected to analysis via the well-defined science of rights. Litigation is a public forum (given the litigants are of legal age), and each case is weighed against existing precedent, constitutional rights, and interpretation of the law. In a jury trial, the case is presented and a judge instructs the jury of the applicable law(s) and the jury's options in making decisions. The jury returns a decision and the judge rules regarding the outcome. In the United States, disputants have the right to appeal the decision to a higher court and continue to appeal to even higher courts through several levels, finally culminating at the Supreme Court of the United States. The other approaches of dispute resolution discussed in this section are considered alternatives to the adjudicative process.

Arbitration

In arbitration an expert third party knowledgeable about the context of the dispute is empowered to make a decision for the disputing parties. The American Arbitration Association (2017) defines **arbitration** as "the out-of-court resolution of a dispute between parties to a contract, decided by an impartial third party (the arbitrator)." The parties can determine in advance of entering into arbitration which issues will be resolved, the type of outcome, and other procedural aspects. Not unlike the judicial process where the judge and jury hold the decision-making authority, **impartial** arbitrators offer the final solution for the dispute. An **arbitrator** is **neutral** and yet informed enough about the specific issues to conduct investigations and to make an informed decision. Arbitrators typically are experts in their area of practice (such as real estate, labor, contracts, or wages). Arbitration usually is less expensive and more expedient than a trial and typically offers more flexibility in decision making than litigation. Problems may arise from the lack of public disclosure allowed in some arbitration, however.

Binding arbitration is a process in which the decision rendered by the arbitrator is contractual—the parties agree in advance to accept the arbitrator's ruling. If you read the small print on consumer or loan contracts, you may discover that you have agreed to binding arbitration and occasionally the waiver of the right to use other processes.

A situation that led to binding arbitration occurred when a real estate agent met a new client who had pictures of a house she wanted to see. The agent showed her the home. An offer on the house was made and accepted by the seller that day. The problem was that another agent had been working for months with this client, and the pictures of the home came from the original agent. Which agent should get the commission from the sale—the agent who had worked with the client the longest or the new one who closed the deal? The case was brought before a realtors' association arbitration panel. The panel, in a very formal setting, heard from each realtor, asked questions, weighed the evidence, and decided that the agent who first showed the home would receive the commission. Once the panel had made its decision, the parties were required to abide by it. The only recourse was through appeal, and then an appeals board within the association would hear the case.

Forced binding arbitration has become common in commercial contracts. An individual who wants to receive a mortgage, rent a car, lease an apartment, or engage in other business transactions frequently must sign a contract that forces binding arbitration as the only recourse in disputes. In other words, the contract does not allow litigation or mediation, only binding arbitration. There is spirited debate on whether forced binding arbitration gives large corporations too much power and functions to chill dissent from individual consumers (Aschen, 2017).

Another approach is **nonbinding arbitration**. The parties may decide in advance to use the ruling as a suggestion rather than be bound by the arbitrator's decision. In a farming dispute, the pilot of a crop-duster plane inadvertently sprayed the wrong fields and killed a crop worth $500,000. Given the size of this case, the attorneys representing each side engaged in nonbinding arbitration. Hiring a retired judge, they each presented their case and asked him to make an informal decision on the legal merits of the case. This process enabled each

side to weigh the strengths and weaknesses of its case and make a more informed decision about how to proceed. The judge sided with the farmer who lost the crops. The result was an offer of settlement by the crop-dusting company to the farmer. The nonbinding arbitration succeeded in keeping the case out of a lengthy and expensive court hearing.

Med-Arb

Med-arb (mediation-arbitration) is a hybrid process wherein parties come together to mediate their dispute. However, they agree in advance that if they do not reach an agreement, the third party will move into an arbitrator's role and render a decision (either binding or nonbinding). Med-arb is defined as a process in which disputants initially have control of the decision, but they consent to an arbitrated settlement if an agreement is not reached by a preset deadline. In a community resolution program designed to improve relations between the community and the police department, cases are brought to a mediator who represents neither the city nor the community. The mediator may hear a complaint by a citizen alleging a police officer did not follow proper procedure in arresting her juvenile son. In a med-arb situation, the mediator brings in the parties to see whether a joint resolution can be reached. If the parties cannot come to agreement, the mediator then becomes an arbitrator who investigates the case and renders a decision. The right to appeal is part of the process. As with most processes, the quality and type of experience offered to the disputing parties depends on the competence and approach of the mediator. While British Columbia has standards of conduct for med-arb, in the United States it is largely unregulated and has no professional association to give guidance on its standards of practice (Barsky, 2013; British Columbia Arbitration and Mediation Institute, 2017). Figure 1.1 illustrates who decides during arbitration and mediation.

Mediation

For the purpose of this book, we define **mediation** as a process in which a mutually acceptable third party, who is neutral and impartial, facilitates an interest-based communicative process, enabling disputing parties to explore concerns and to create outcomes. In the purest form of interest-based mediation, the following standards will be met:

Mutually acceptable: The mediator must be someone whom both parties agree is appropriate for the mediator role.

FIGURE 1.1 ■ Locus of Control Changes with Method of Resolution

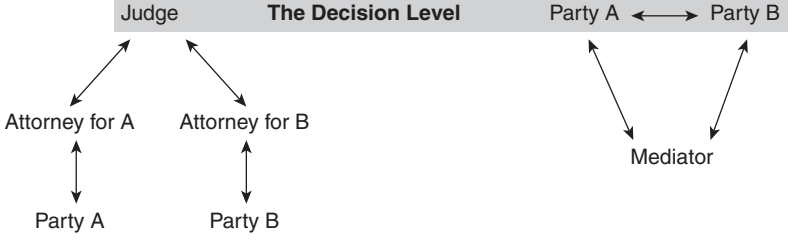

FIGURE 1.2 ■ Dispute Resolution Options

Neutral: The mediator must be someone who is respectful of the interests of both parties but who does not have a preference or affinity for one party over the other.

Impartial: The mediator has no stake in the outcome of the mediation and will not be affected by the decision. The mediator is free from preference toward any possible outcome.

Interest based: The mediator assists disputants in identifying concerns that affect them and in exploring the specific needs that must be addressed in any outcome.

Communicative process: The mediator facilitates the discussion so parties may understand one another, explore ideas in a safe environment, and approach their problem solving as empowered participants. The mediator strategically applies skills to keep the communication process balanced, fair, and productive.

Parties create the outcome: The mediator does not suggest, lead, or persuade parties to select specific outcomes. Ideas for possible solutions arise from the disputants. The mediator helps them examine the workability and appropriateness of their suggestions.

Informal Conflict Management

Individuals may attempt to resolve disputes directly with the other party. The success of these efforts is dependent on many factors, including the skill levels of the parties, the investment in the relationship, the urgency in finding an outcome, and the styles the parties employ to resolve the dispute.

Interpersonal conflict management, individual negotiation strategies, and other personal responses to conflict make up the broad realm of informal conflict management. Informal strategies for conflict management are presented in workshops and classes with titles such as Conflict Management, Negotiation, Interpersonal Conflict, Relational Dynamics, and Dealing with Difficult People. Classes and textbooks devoted to an overview of conflict management theories and practices are widely available (for example, see McCorkle & Reese, 2018). Numerous opportunities are available to broaden skills and knowledge in this fast-growing and ever-evolving field.

A DISCLAIMER ABOUT MEDIATION TRAINING

The saying "a little knowledge is a dangerous thing" applies to mediation. This book presents the basic theory and foundational skills essential for any competent mediator. However, no single publication or training program can provide all of the information, skills, and

practical experience needed to be a competent practitioner. Most states or territories have standards of practice for mediators, and the information in this book covers only one portion of those standards. We encourage readers to explore the standards of practice in their home state or territory and to engage in supervised practice before venturing out as mediators.

SUMMARY

The process of mediation is not new. In fact, many cultures dating back thousands of years have used some form of mediation in maintaining the health of their societies. Mediation offers disputants interest-based opportunities to play an active part in the resolution of conflict instead of relying on a third party to make a decision for them. Other approaches to resolving disputes exist, such as rights-based approaches and power-based approaches. There are benefits and disadvantages to each type of resolution process, and all have an important role in society. People from all walks of life practice mediation, either as a career or as part of another vocation.

Disputants come to mediation from many divergent paths. Some are referred, some are mandated to attend, and some find mediation on their own. All disputants are looking for satisfaction of their needs, which are categorized into substantive, procedural, and psychological interests.

Litigation, or the adjudication process, is a rights-based approach to resolving conflict. Alternative dispute resolution (ADR) offers paths other than litigation. ADR approaches include arbitration (binding and nonbinding), med-arb, mediation, and personal conflict management. Each method differs in where the locus of control lies for decision making.

Most cultural traditions have some type of ADR process for handling conflicts. In the United States, the ADR movement was influenced by the needs of business and government as well as by cultural and religious traditions. Subsequently, there are many different approaches to mediation—leading to much confusion about what mediation entails. This text covers a pure, interest-based mediation approach with roots in the European American traditions of neutrality and impartiality. People who are beginning the study of mediation should be aware of the standards of practice in their state or territory. Becoming a practicing mediator requires much more than just taking a class or reading a book.

CHAPTER RESOURCES

Discussion Questions

1. What issues in Case 1.1 fall outside the scope of the legal system? What would happen to these issues if the neighborhood misunderstanding case were to be settled in court?
2. What are the benefits of resolving disputes with power? What are the possible harms? What might be the consequence of the power approach in the neighborhood misunderstanding case?
3. Why does society require a rights-based approach to resolving legal conflicts? What kind of conflicts would be best served through a rights-based approach? What type of cases would not be served well through a rights-based approach?

4. Cicero wrote, "*Summum ius. Summa iniuria*" (meaning the strictest adherence to law can lead to the greatest injustice). Discuss the concept of justice and how litigation and mediation may further and/or hinder justice.
5. What types of disputes would be inappropriate for interest-based resolution? What are the risks to the parties in this approach? What should individuals consider before engaging in an interest-based negotiation?
6. Each standard or element contained within the definition of *mediation* is necessary to create the mediation process. What would happen to the mediation if one standard was missing or changed? For each of the standards, explain how removing it would change the nature of mediation.

PORTFOLIO ASSIGNMENTS

Portfolio Assignment 1.1: Starting Your Mediator Portfolio

The mediator portfolio contains information, tools, and worksheets. The "Portfolio" assignments will help you build a personal toolkit to use during a mediation session. These materials will be kept in a three-ring binder with removable pages. Bring the mediator portfolio with you each day you attend training or class.

The first task is to secure a three-ring binder and tabs to create sections within the binder. Label the first few tabs as follows: Opening Statement, Forms, Mediation Techniques, Profession Information, and Personal Reflections. Future portfolio assignments will direct you in the content that should be placed in each section.

Portfolio Assignment 1.2: Personal Reflections

Your first portfolio entry is to answer the following questions (to be placed in the Personal Reflections section):

1. What is the value of conflict? What are the risks of poorly managed disputes?
2. What skills do you already possess that may be transferable to being a mediator?
3. How do you see yourself using mediation in your current and future personal and professional lives?