

## **Course 9, Module 2: Mediation Process Models**

### **Lesson 1: Mediator Techniques and Approaches**

#### **A. U.S. Turns to Tireless Mediator; Appointee Eric Green Brings New Energy to Microsoft Talks**

##### **The Washington Post**

**By Jonathan Krim**

**Several years ago, Eric D. Green, who has been named the mediator in the Microsoft Corp. antitrust case, had just finished 18 hours of exhausting negotiations in a construction dispute when he stunned his mediating partner.**

**As the two men returned to their hotel around 1 a.m. "I was looking for my bed and just hoping I could find it," recalled James Ryan, a professional mediator in Boston. "And he happened to let drop that he had all these papers he had to grade [for a law school class he taught]. I couldn't conceive how someone could go off and do that."**

**Tireless is a word often associated with Green, 55, a professional mediator who also teaches at Boston University. He will try to succeed where so far there has been nothing but frustration and failure: getting government prosecutors and Microsoft to settle the long-running case out of court.**

**"After 10 or 12 or 16 hours, he's just getting his second wind," Ryan said. After that grueling day and night of mediation and then grading papers, Ryan said, Green was back at the negotiating table at 9 a.m. He led the parties to a settlement that afternoon.**

**Whatever it is that gives Green his stamina, he'll need a large supply of it for the Microsoft case. The federal judge who ordered mediation in the case has set a Nov. 2 deadline, after which the two**

sides will begin preparing for hearings on how Microsoft should be penalized for illegally abusing its monopoly power.

Reaching an agreement "will be difficult, but not impossible," said Linda Singer, a longtime professional mediator who knows Green from three decades of working to develop and hone the discipline of alternative dispute resolution.

Indeed, Microsoft and the government told Judge Colleen Kollar-Kotelly last month that, based on past failures, they did not believe mediation would be fruitful. But at the insistence of the judge, they nominated Green as the best person for the job.

"Poor soul," joked Sara Cobb, director of the Institute for Conflict Analysis and Resolution at George Mason University. "In this case, there's all this animosity and distrust between the parties."

But Cobb and others say that Green's deep experience as a professional in the field perhaps gives him an advantage over his predecessors.

The last mediator who failed, federal appeals judge Richard Posner, is an antitrust expert with no professional mediation experience.

"Eric is someone who makes a business of mediation, and he's done it exceptionally well," said Ronald Cass, dean of the Boston University law school.

Mediator Eric Van Loon, a longtime friend and former partner of Green's, said Green used to run marathons and draws some of his energy from music. A lover of opera, he once traveled into New York City to see one after a day of intense mediation in Connecticut, Van Loon said. Green also once named a dog after Bob Dylan.

Van Loon said Green is blessed with two key qualities: He has an ability to think creatively and "he genuinely has a very winning personality; year after year his students vote him best professor."

**Both will be necessary. The Microsoft case is complicated by the fact that the state and federal prosecutors on the case do not always see eye to eye on how Microsoft's anti-competitive conduct should be rectified. And the substance of the case is highly technical.**

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## **Vail Law column: The flow of mediation**

**By Rohn K. Robbins**

**I have a week of mediation coming up and so mediation is on my mind.**

**Most times before a mediation, I sit down with my client and unless she has been through a mediation before, I explain to her the process and the flow. Like many things, mediation often has a certain predictable drift and cadence to it. A mediation is like a river. And, if you know where and when to expect the eddies, vortices, and ripples, then you know when to hold on to the gunwales and when to dig in for a stroke.**

**Before we get there, though, what exactly is a mediation? And how is a mediation different than an arbitration? And, while we're at it, why would any right-thinking person want to mediate in the first place?**

**Both mediation and arbitration are devices of ADR — alternative dispute resolution. Alternatives to what, you may be asking? To the full-blown, bare-knuckled donnybrook of court. Arbitration and mediation are both less formal means than the open warfare of litigation and, although in that way, they share certain attributes, they are also distinctly different. Both, however, hold the promise of resolving a dispute out of court, ideally more efficiently, more cheaply, and more quickly.**

**Usually in the first hour, the mediator welcomes the participants**

**— most times, held apart with counsel in separate rooms. The mediator first comes into one room and then the other with a hale “good morning” and the cheer that the simmering dispute may soon be laid to rest. He will explain how the process will work, that settlement presupposes compromise, and that all parties must act earnestly and in good faith if they hope to reach a resolution. He will explain too that anything said or offered in mediation is limited to the settlement venue and, if settlement is not reached, may not be used against a party if the litigation proceeds.**

**Arbitration may be defined as "pseudo litigation." What I mean by that is that although an arbitration is conducted outside of a courtroom — and may (but not always) be subject to less formal rules — at the end of the day, a decision regarding the dispute is made by a neutral third party — a "pseudo judge." In fact, most, if not all times, the pseudo judge is a real judge who has retired from the bench but who continues to privately hear disputes. The pole star of an arbitration is that someone other than the parties settles the dispute.**

**Arbitrations may be binding or non-binding on the parties, the latter of which has always seemed to me like a test balloon for litigation. While a non-binding arbitration may lead to settlement of the dispute, and certainly gives the parties a preview of what may happen in a courtroom, it's a bit like kissing your sister — pucker without passion — whereas a binding arbitration is more like a shotgun wedding.**

**Mediation's more mellow**

**In mediation, it is the parties themselves who reach their resolution. While the mediator guides, cajoles, directs, and knocks heads together, the ultimate determination of whether to resolve the dispute or not, and on what terms, lies with the disputants themselves. Whereas in arbitration, the arbiter will come to a decision, in mediation, the parties themselves must settle the matter or not.**

**If the key aspect of arbitration is that the arbiter renders a decision, then the guiding principal of mediation is compromise. Only rarely does anyone emerge from mediation without some give-and-take.**

**What, though, about the premises with which we started; the flow of mediation?**

**I often describe it as an hourglass. Think of that shape; broad shoulders, narrow waist, and broad hips as the sands slip through from the upper chamber to the lower.**

**Usually in the first hour, the mediator welcomes the participants — most times, held apart with counsel in separate rooms. The mediator first comes into one room and then the other with a hale "good morning" and the cheer that the simmering dispute may soon be laid to rest. He will explain how the process will work, that settlement presupposes compromise, and that all parties must act earnestly and in good faith if they hope to reach a resolution. He will explain too that anything said or offered in mediation is limited to the settlement venue and, if settlement is not reached, may not be used against a party if the litigation proceeds. Say, for example, an offer of settlement is made and rejected, the rejecting party may not take the offer to court as proof that the offeror knew his case was worth less than what he is asking for. The mediator will also most times share that he is a facilitator and cannot be called as a witness if the matter fails to settle.**

**The preliminaries over, the next phase is where the mediator digs in. He will usually sit with one party, then the other, and pick over the strengths and weaknesses of each party's position. A good mediator will bring to bear his years of expertise, insight and experience and apply them to the case. "Have you considered this?" "What about that?" "Isn't this a weakness?" "Is that a supportable position?"**

**This phase of the interaction often takes a couple of hours and as the mediation rounds towards late morning, the mediator will ask one party or the other to make a first offer of settlement. This is where the shoulder of the hour glass begins to bend towards the narrow waist. Both sides may feel, until now, that they have been making progress; there is good cheer and the mediator "gets" them. With the first offer, there is hope for resolution.**

**As stomachs grumble toward a lunch break, often the first offer is replied to and the sense of kumbaya sometimes begins to crumble. A counter-offer is made and may not be warmly received. The parties regroup and break for lunch.**

**As the sands slip through the narrow waist, there is often a feeling of "what if?" It seems the parties were getting closer and now the dispute is widening towards the hips. Several hours may go by without a sense of progress being made.**

**But then the magic happens. Just as the parties are nearing exhaustion — late afternoon — and asking why they spent the time and money trying to resolve this damn dispute, there comes a little crack.**

**And, as the slender spear of hope shines through, the parties seize on it. They will begin to shape what may be acceptable to both and, most times, resolution — if it comes at all — comes late. Usually, more progress is made after 3:30 or 4 p.m. than seems to have been made in the hours, days and months before.**

Many times, I have seen settlement reached long after business hours have tucked themselves in for the night. There is a flow and process. And weariness, it seems, is most times a key element for resolution.

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*The Mediation Process: Practical Strategies for Resolving Conflict*

by **Christopher Moore**

Summary written by Tanya Glaser, Conflict Research Consortium

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**Citation:** Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd., (San Francisco: Jossey-Bass Publishers, 2004).

<[http://books.google.com/books/about/The\\_Mediation\\_Process.html?id=8hKfQgAACAAJ](http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ)>.

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Moore reviews the history of mediation, its contemporary practice and potential future applications.

### **Mediation and Dispute Resolution**

There are a number of ways to approach conflict management and resolution, which range from least to most coercive. Conflicts may be avoided, talked out, negotiated, arbitrated, adjudicated, resolved by legislation, by political action, or by violent force.

Moore is concerned primarily with the mediated approach to conflict management. Parties who cannot negotiate together effectively may bring a mediator to facilitate the negotiation process. Mediation is defined as "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved

parties in voluntarily reaching a mutually acceptable settlement of issues in dispute." [p. 15] Within this definition mediators may play a number of different roles, and may enter conflicts at a variety of different levels of development or intensity. Moore reviews the history of mediation and its contemporary practice. He describes very briefly how mediation has been practiced in various non-Western cultures.

Moore describes three general mediator roles: social network mediators, authoritative mediators, and independent mediators. Social network mediators are usually respected members of the community who have existing relationships with the parties. While not neutral, they are perceived as being fair. Social network mediators are generally concerned with maintaining stable long-term social relations. Generally they remain involved with the parties after the negotiations, and will participate in implementing agreements. They are able to draw on social or peer pressure to enforce agreements. Authoritative mediators are individuals who are in some position of authority over the parties, such as a manager or director. There are a number of differences among authoritative mediators. They may be neutral as to the outcome, or may have vested interests in achieving a particular settlement. Such mediators are generally able to use their authority to enforce agreements. Independent mediators are best defined by their neutrality and impartiality. Generally they have no prior relationship to the parties, and are hired by the joint decision of the parties. Independent mediators seek to help the parties develop voluntary, mutually acceptable solutions. The independent mediator model is most commonly used in western countries, however it is increasingly being used by other cultures as well.

Mediators of all types draw upon two broad classes of tactics: general tactics and contingent tactics. General tactics are kinds of interventions that mediators use in almost all conflicts. They include

tactics for entering the dispute, analyzing the conflict, planning the mediation, identifying parties' interests, facilitating parties' negotiations and helping them generate proposals, drafting agreements and developing implementation plans. A key mediator activity is to identify the causes of the conflict, and to build a hypothesis as to how the conflict might be resolved. Contingent tactics are those used to handle the special problems which can arise during negotiations. Contingent tactics may be used to address such problems as value clashes, power imbalances, destructive patterns of interaction, communication problems, strong emotions, misinformation and differing analyses.

There are a number of factors which influence choice of mediation strategies. They include the stage of the conflict and the parties' abilities to resolve their dispute, the balance of power between the parties, which negotiation procedures are being used, how complex the issues are, and what the parties expect from the mediator. In crafting a mediation strategy the mediator must decide on the level, target and focus of intervention. The mediator decides whether to concentrate on the level of general problem-solving, or on a specific issue. She decides who she should be directing her activities toward. She also decides whether to focus on psychological, procedural, or substantive aspects of the conflict.

### **Before Negotiations Begin**

Mediators may enter disputes at the request of the parties, or by being appointed by an authoritative third-party. The mediator has four main tasks at this stage. First, she must build credibility with the disputants. The parties must have confidence in the mediator personally, the mediator's parent organization, and in the mediation process itself. Second, the mediator must create a relatively close, comfortable relationship with the parties. Third, the parties must be educated about the mediation process, since it is ultimately the

**parties themselves who must resolve their dispute. This education also helps build confidence in the mediation process. Finally, after these steps have been taken, the mediator must secure the parties' commitment to mediation. This commitment may range from an informal oral agreement to a formal written contract, depending upon the situation.**

**Mediators may initiate contact with the parties in person or by phone or letter. Where there is some barrier to contacting parties it may be helpful to have a secondary party introduce the mediator. The timing of a mediator's entry depends upon what type of intervention they plan to make. Interventions to collect data on the conflict can be undertaken at almost any time. The proper timing of problem solving interventions is disputed. Late intervention may allow the issues to develop more fully, and the disputants to have exhausted their desire and ability to continue the conflict. Early intervention may produce more cooperative, less coercive settlements and better relationships.**

**After the mediator has entered the dispute, the mediator and the parties must work together to decide what mediation strategy is best suited to their situation. Moore identifies six ways in which the mediator may assist the parties in choosing a mediation strategy. First, the mediator can help the parties to identify the interests at stake in the conflict, and to clarify their respective goals. Second they can help the parties explore the range of possible, probable and acceptable outcomes. Outcomes may benefit both parties, cost both parties, or benefit one at the other's expense. Third, the mediator should describe the basic types of strategies for resolving disputes. The basic strategies are competition, avoidance, accommodation, negotiated compromise, and interest-based negotiation. Fourth, the mediator can help the parties to clarify the criteria that will guide their choice of strategies. Parties' choice of strategies will be shaped by time constraints, the nature of their current or desired**

relationship with the other party, their power, and by the parties' internal dynamics. Fifth, the mediator can assist the parties in weighing their options and reaching a decision. Finally, mediators can help the parties coordinate their strategies into a coherent, consistent approach to the dispute. Usually mediators and parties work together to analyze the conflict. Conflict analysis begins with data collection directed by the mediator. Moore identifies six mediator activities with contribute to effective data collection. First, the mediator supplies a basic framework for understanding conflicts. Second, the mediator decides which data collection methods to use. Data collection methods available include direct observations, consultations with secondary sources such as maps or financial records, and interviews with the involved parties. Third, the mediator may delegate the actual data collection work. Interviews, in particular, will be more informative if the party identifies with the interviewer. Fourth, these data collection activities should be coordinated within a larger data collection strategy. This strategy should include an approach to identifying all the relevant parties to the conflict, a plan for the order and timing of the interviews, and a plan for building rapport with the parties. Fifth, the mediator should choose an interview approach. Interviews may be focused or unfocused, structured or non- structured, individual or joint. And finally the mediator must decide what sort of questions to ask in the interviews, and must exercise good listening skills during the interviews.

After the conflict data has been collected, it must be used to develop an interpretation of the dispute. "The mediator's central task during this stage is to integrate and understand the elements of the dispute: people, dynamics, issues, and interests." [p. 132] Timelines and case studies are two ways of integrating the data. Discrepant data must be discreetly verified. Mediators can begin to develop an interpretation of the conflict by separating unrealistic causes of the conflict from realistic causes. Unrealistic causes include stereotypes,

**miscommunication, confusion over the facts, and inappropriate competitive behavior. Realistic causes include competing interests, differing values, structural constraints, and disagreement over the collection or importance of data. In complex disputes the mediator may choose to share her analysis with the parties.**

**Having secured the parties commitment and performed the conflict analysis, the mediator's next task is to develop a detailed mediation plan. "A mediation plan is a sequence of procedural steps initiated by the intervenor that will assist negotiators in exploring and reaching an agreement." [p. 141] In most cases the mediator and the parties cooperate in developing a plan. A mediation plan should specify who will participate in the negotiations, whether outside-parties may be present, where negotiations will be held, and the physical arrangements of the negotiation space. The plan will also anticipate whether positional or interest-based negotiation procedures will be used, what interests and issues are most important to the parties, what the parties' psychological conditions are, what deadlocks might arise and how they could be dealt with. The plan will establish ground rules for appropriate behavior in negotiations and should include a tentative agenda for the first meeting. Finally, the mediation plan includes a plan for educating the parties about mediation and negotiation processes.**

**Throughout the negotiation process, mediators work to build trust and foster cooperation. This activity is called conciliation.**

**"Conciliation is essentially an applied psychological tactic aimed at correcting perceptions, reducing unreasonable fears, and improving communication to an extent that permits reasonable discussion to take place and, in fact, makes rational bargaining possible." [p. 161] Moore describes five basic problems and the conciliation tactics which address those problems. Strong emotions can block agreements and inhibit the development of positive relationships. Usually mediators will allow the parties to vent their emotions in a**

**controlled, safe setting. Venting may be inappropriate in conflicts with a history of violence or emotional escalation. In such cases mediators structure the negotiations to suppress emotions, and may even resort to a kind of shuttle diplomacy. Stereotypes and misperceptions can be addressed by a four-step process. The mediator identifies the parties' perceptions, assesses their accuracy, assesses whether they help or hinder negotiations, and then helps the parties revise their inaccurate or negative perceptions.**

**Parties may question the legitimacy of other negotiators, of issues or of emotions. The legitimacy of negotiators may be established by revising misperceptions, and by explaining or revising how the negotiator was chosen to participate. Issues may be recast in more general or specific terms, may be redefined, or may be appealed to an independent authority. Challenges to the legitimacy of the other side's feelings can be addressed by exploring the reasons for those feelings, and pointing out that understanding another's feelings does not entail agreeing with them. When the parties' trust in each other is low, the mediator must suggest ways for the parties to build confidence in each other. Mediators encourage the parties to be clear and consistent, to follow through promptly on their promises, to expose small vulnerabilities to the other side, to accept penalties for breaches of faith and to refrain from making threats. Parties may also be given joint tasks to perform. Communication problems are common. Problems may occur with what, when, where, how, by whom or to whom a message is communicated. The mediator must determine where the problem is occurring, and then act to change the content, timing, setting, manner, or agent of communication as appropriate. Mediators must also be attentive to nonverbal forms of communication and miscommunication.**

## **The Mediation Process**

**Mediators generally follow a common plan for the first mediation session. The session begins with an opening statement by the mediator. The mediator's opening statement introduces the mediator and the parties, defines the mediator's role, describes the mediation procedures including mediator neutrality, confidentiality, and the use of private caucuses, describes the meeting format, and suggests behavioral guidelines for the sessions. The mediator may then answer questions from the parties. Next, the parties each make an opening statement. Parties make a variety of different kinds of opening statements. They typically focus either on substantive interests and issues, on a combination of history, needs and positions, on the need for change, or on some non-negotiable position. Occasionally they will focus on procedural concerns, or more rarely on psychological conditions.**

**Moore notes that "the most critical task for disputants at this stage is to maximize accurate information exchange." [p. 209] Mediators facilitate this exchange by using a number of communication tools. These tools include active listening, paraphrasing and restatement, summarization, and probing or clarifying questions. The mediator helps the parties to expand upon their messages, to structure their thoughts, to group and order similar ideas, and to separate complex issues' component issues. A positive emotional climate contributes to efficient communication. Mediators act to maintain a positive emotional climate by controlling or diffusing negative emotions or attacks, enforcing behavioral ground rules, and keeping parties focused on the issues.**

**Cultural differences may play a significant role in how negotiations begin. In cultures which rely primarily on social network mediators, the opening stage may involve much more informal conversation, and perhaps even food and drink. Authoritative mediators tend toward more formal arrangements. This formality is a necessary way of showing respect in more hierarchical cultures. High context,**

**relatively homogenous cultures will spend less time explicitly specifying the process that negotiations will follow. Low context or heterogeneous parties will need to be more explicit. Communication styles also vary across cultures. Moore observes that "what for one culture appears to be rudeness, interruption, and poor listening will be acceptable overlapping discussion in another." [p. 212]**

**The next task is to set the negotiation agenda. The parties will need to identify the broad topic areas of their concerns, identify specific issues of contention, and decide on the order in which those issues will be discussed. Conflicts differ in the complexity and ambiguity of their issues. Generally conflicts are either interest-based or value-based. Value-based conflicts are less amenable to compromise and integration, and so mediators should avoid describing disputes in terms of value differences when possible. The activity of defining the issues is called framing or reframing. Mediators help the parties to frame the issues in ways which will enable effective problem-solving. Interest-based disputes can be reframed by either broadening or focusing the issues. Values-based disputes can be reframed either by reinterpreting the issues as interests, avoiding the value elements, or by appealing to broader shared values. Mediators tend to avoid using adversarial language, and instead use neutral terminology in describing issues and disputes.**

**Having identified the issues, the parties must now develop an agenda. Moore suggests a number of techniques for developing the agenda. Parties may address issues one at a time, in an ad hoc manner. The parties may alternate choosing issues to discuss. They may work from most to least important issues, or from easiest to more difficult issues. They may start by identifying which issues are key, and which issues are contingent on other agreements. They may package issues together to enable balanced trade-offs. Mediators are familiar with the advantages and draw-backs of these different approaches, and can advise the parties in agenda development.**

**Cultural differences can affect agenda development. Some aboriginal cultures prefer a storytelling approach to presenting the conflict's history and issues. Many cultures avoid direct confrontation, and will describe conflicts in indirect, oblique terms, or even in third-person terms. Such indirect cultures may prefer to begin by addressing areas of agreement, and by reinforcing existing relationships between the parties. Direct-dealing cultures prefer explicit enumeration of the issues.**

**Parties are very rarely able to give a clear or complete statement of their interests. Hence one of the mediator's important tasks is to uncover and clarify the parties' hidden interests. Parties may be unclear on their interests for a number of reasons. External factors such as advice from friends or traditional explanations may cause parties to misperceive their interests. Parties may intentionally hide their interests in an attempt to gain a negotiating advantage. Parties also tend to confuse their positions with their interests. Often parties are not used to thinking in terms of underlying interests. Mediators should help to cultivate a positive attitude toward interest discovery in the parties.**

**There are two types of procedures for discovering interests: indirect and direct. Indirect procedures include testing, and hypothetical modeling. Mediators test for interests by listening to a party's statements, tentatively identifying the interest expressed, and then expressing that interest back to the party for further feedback. In hypothetical modeling the party ranks a number of hypothetical settlements in terms of satisfaction. Direct methods include questioning the parties, and brainstorming. Parties may try to bluff, or misrepresent their interests. Mediators must be alert for such bluffs, and try to call them. Mediators may use persuasion or rationalization to induce a party to abandon their bluff and present a more accurate picture of their interests. The mediator must also encourage each side in the dispute to acknowledge the other side's**

interests, even if they do not agree with those interests. Finally the mediator should incorporate both parties interests into a joint problem statement. A joint problem statement "enables negotiators to commit to work on a common problem because they believe that their needs will be respected, if not met by, the solutions that will be developed." [p. 243]

The parties are now ready to begin generating settlement options. Often the parties must be convinced of the need to generate a range of different settlement options. For instance, a party may believe that they already have the best solution, and merely need to persuade the other side to accept it. Settlement options may address either specific issues or general principles. There are two basic procedures for generating options: positional bargaining and interest-based bargaining. Interest-based bargaining is more likely to produce integrated, or win- win, outcomes, and so it is the preferred approach. Here again however, cultural differences are significant. Chinese negotiators, for example, often prefer positional bargaining.

Moore lists a number of specific procedures for generating settlement options. Where the parties have an established relationship, they may proceed by ratifying the status quo, that is, by specifying which elements of their current relationship they would like to continue in the future. Parties may set boundaries for acceptable options by developing objective standards. The parties may generate options by open discussion, either in small groups or all together, or may use the more structured brainstorming procedure. Small groups may be asked to develop hypothetical settlement scenarios. The parties may consider settlement agreements from other similar disputes. They may identify linked issues, and explore possible trade-offs. Or they may consider various comprehensive package settlements. They may proceed by drafting and redrafting a single settlement proposal. Rather than consider

**substantive settlements, the parties may seek an agreement on a procedure for making decisions. Bringing in outside experts or other resources may help to broaden the parties' perspectives on the dispute and on the range of possible solutions. Research has found that stronger agreements tend to be substantive, comprehensive, permanent, detailed, non-conditional and binding. Agreements which are procedural, partial, provisional, abstract, contingent or non-binding tend to be weaker.**

### **Reaching a Settlement**

**Having generated a range of settlement options, the parties must next evaluate those options. Moore describes two evaluative tools: the settlement range and the best alternative to a negotiated agreement (BATNA). A party's settlement range is defined by the range from target point to resistance point. The target point is their optimal outcome. The resistance point is set by those outcomes which are too costly or not beneficial enough to accept, that is, below the party's BATNA. When the parties' settlement ranges overlap there is a range of possible mutually acceptable settlements available to the parties. Interest-based bargainers will seek the solution which provides maximum mutual benefits. When the parties' settlement ranges have no overlap, there are no mutually acceptable settlement options. In such cases the parties may be encouraged to shift their target or resistance points, or the issues available for trade-off may be expanded. Mediators can help the parties to identify and understand their settlement ranges, and can deflate the parties' inflated expectations. Assisting the parties' in identifying their BATNAs can also help to close any gap between the parties settlement ranges.**

**After evaluating the options the parties enter the final bargaining stage, where they negotiate to reach an agreement. Occasionally an agreement will have emerged directly out of the evaluation stage.**

Usually however there is still a range of potential agreements, some areas of disagreement, and a number of details to be worked out after the evaluation stage. Moore identifies four basic strategies mediators use during the final bargaining stage. In the incremental convergence strategy the parties each make small concessions until they reach a mutually acceptable compromise. When positional bargainers use this strategy the mediator's main task is to make the parties comfortable with making concessions. In the leap-to-agreement the parties engage in some preliminary bargaining, but then leap directly to accepting a comprehensive proposal. In the agreement-in-principle strategy the parties first seek agreement on general principles, and then seek to apply those principles to the situation at hand. This strategy is particularly helpful in preventing negotiation deadlocks. When the parties cannot reach a substantive agreement, they may use a procedural strategy. "Procedural solutions are process decisions that parties make to resolve disputes without directly deciding the issue. Generally, the process determines a substantive answer." [p. 288]

Deadlines can play an important role in bringing the final bargaining to a close. Deadlines may be internally or externally imposed, actual or artificial, rigid or flexible, with or without consequences, explicit or vague. Mediators can help make the parties aware of existing deadlines, or help parties establish deadlines as needed. Mediators can also help the parties avoid harmful uses of deadlines, such as using deadlines as threats or allowing deadlines to generate false agreement motivation. Cultural attitudes toward time affect the use of deadlines. Some cultures view time as a valuable and limited resource, while others have a much more leisurely attitude toward time.

After final bargaining the rough agreement must be formalized and an implementation and monitoring plan developed. To be effective the agreement must be put into action, and so a well-designed

**implementation plan is crucial. Immediate, self-executing agreements are easier to implement. However, many settlements will require parties to act over an extended period of time.**

**Implementation plans will be more successful when they include criteria for measuring performance, methods for measuring and enforcing compliance, general and specific implementation steps, and procedures for managing future changes or conflicts. Some cultures incorporate implementation plans into the settlement itself, while others approach implementation as a separate set of issues.**

**Agreement formalization provides an important symbolic end to the conflict and increases the parties' commitment to the agreement. Formalization may take the form of verbal promises or written agreements, and may be public or private. When the parties' voluntary compliance is not sufficient, structural factors and external authority may be used to enforce compliance. For example, the settlement may be made legally binding and subject to judicial oversight, or the parties may be required to post performance bonds.**

**Moore concludes this section by discussing five common types of contingent mediator tactics used for dealing with special situations. These include caucusing, mediator pressure, power-relation management, negotiation teams, and constituency management. Caucusing allows the mediator to communicate with one party privately and separately from the other parties. The mediators may use caucuses for a number of purposes, including to discuss confidential information, to interrupt negative emotional dynamics between the parties, to identify the party's settlement range, or to discuss the party's negotiation strategy. Mediators are able to influence negotiations by means of their control over the process, setting and timing of negotiations, by their involvement in the parties' communication and relationships, and by their access to both the parties information and their ability to bring in outside**

**experts. Generally mediators exercise their power in order to move the parties toward a solution, while remaining neutral regarding the content of the solution.**

**Mediation is most effective when the parties have symmetrical power relations. When the parties have unequal power the mediator may need to balance their powers. In balancing the parties' power "the mediator provides the necessary power underpinnings to the weaker negotiator: information, advice, friendship, she may reduce those of the stronger." [p. 337] Complex, multiparty disputes may involve the use of negotiation teams, rather individual negotiators. When negotiation teams are present, mediators will need to pay attention to the interpersonal dynamics within as well as between the parties. Mediators may seek to influence the choice of negotiation team members and the teams' decision-making strategies. In some cases, the negotiated agreement must finally be ratified by the negotiators' constituencies. In such cases the mediator will need to assist the negotiators in communicating with their constituents and in organizing constituent support for any agreement. The mediator may intervene directly with the constituency groups to educate them regarding the negotiation process, and to reassure them that their negotiation representatives have worked hard to achieve the best solution possible.**

## **Conclusions**

**Mediation is a broad and rapidly growing field. There are now many professional mediation associations, focusing on areas ranging from divorce mediation to public policy mediation. These associations generally seek to develop and improve the practice of mediation by developing ethical standards, by offering mediation training, and by promoting the use of mediation. Moore reviews a number of such mediation associations and their activities. Generally, mediation codes of ethics require the mediator to be neutral and impartial, to**

**avoid conflicts of interest, to obtain informed consent for their involvement from the parties, to maintain confidentiality, to reject cases which are beyond their expertise, and to be truthful in advertising their services and fees. The various associations' codes vary in their specifics. Research into mediation theory and practice has led to a proliferation of high-quality mediation training programs. Moore describes some of the basic elements of mediator training programs, including applicant screening procedures, training formats and methodologies, instructor qualifications, and criteria to guide the would-be mediator in selecting a program.**

**As the mediation field has developed, there has been an increasing trend in the public and judicial spheres toward using mediated negotiation as an alternative to more traditional means of dispute resolution. Legislation has been passed at the federal and state levels encouraging the use of mediation and executive orders have also mandated the development of alternative dispute resolution procedures in U. S. government agencies where appropriate.**

**Finally, Moore sketches five developments which must occur if mediation is to become even more widely utilized, and seven areas where the practice of mediation itself may be further developed. In order for mediation to be more widely used the public must be better educated about it, more research into mediation needs to be done, mediation must be more fully institutionalized, mediation services must be more fully funded, and new applications for mediation must be discovered. Moore suggests seven such new areas of application: ethnic conflicts, intractable conflicts, violent conflicts, education for the development of nonviolent cultures, dispute systems design, public governance, and global environmental issues.**

