COLLABORATIVE APPROACHES TO RESOLVING CONFLICT

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Chapter 4

Mediation

Create a space where it is safe for people to speak about what is important and meaningful. (Ellinor & Gerard, 1998, p. 180)

When problem solving or negotiations break down, disputants frequently seek the help of a third party to help them resolve their differences. In one of the earliest recorded mediations, Moses went to the top of Mount Sinai to intercede between the early Israelites and God. During the Middle Ages, the Catholic Church served as a prominent center for mediation activity in Western Europe. In early colonial American history, Puritans and Quakers used both voluntary and involuntary dispute resolution processes to manage conflict in their communities. In 1879, representatives from the Iroquois, Delaware, Cherokee, Choctaw, and Osage Indian tribes met in a ceremony called the "Medicine Wheel," in which they engaged in a process for discussing differences.

Since the 1970s, the percentage of cases going to trial has been in a steady decline, largely because of the growing number of cases settled out of court. Contributing to this decline are *Fortune* 500 companies, who currently have a formalized agreement that they will not take each other to court without first attempting mediation. Ten companies in the food industry, including General Mills, Ralston Purina, and Kellogg, have agreed to mediate any trademark, packaging, or managing disputes that occur among them. They cited corporate image and customer good will as the primary reasons behind the agreement (Singer, 1994).

In a survey of 1,500 firms, the General Accounting Office found that 90% of U.S.-based firms with 100 or more employees routinely used some form of ADR process to resolve disputes (74.2% negotiation, 47% mediation, 9.9% arbitration). In an analysis of 449 cases, distributed among contract disputes (36%), personal injury (36%), property damage (2%), environmental issues (1%), and other (13%), Brett, Bargness, and Goldberg (1996) found an overall success rate of 78% for mediations. Compared to arbitration, mediation was less expensive,

both in time and money, and was perceived as fairer by disputing parties. Many companies, including GE, Toyota, Wells Fargo, Chrysler, Citibank, and Coors, have established their own mediation systems to handle employee or customer problems.

The U.S. Environmental Protection Agency (EPA) institutionalized mediation in the late 1980s. Since 1991, the number of mediated cases has tripled. In a study of 177 cases involving environmental disputes between 1970 and 1990, University of Colorado researchers found that the companies who collaborate with the EPA come out financially ahead of companies that choose litigation ("The Price of Being Green," 1998, p. 14G).

The Civil Justice Reform Act, passed in 1990, directs all federal courts to consider the use of ADR to reduce the costs and delays of litigation. From 1990 to 1995, the Administrative Dispute Resolution Act required all federal agencies to "offer prompt, expeditious and inexpensive means of resolving disputes as an alternative to litigation in the federal courts"; provide employees with ADR training; and develop policies for the use of ADR. Currently, the U.S. Department of Labor has used mediators to resolve labor-management disputes through the Commission of Conciliation, later renamed the Federal Mediation and Conciliation Service. Currently, there are more than 20,000 trained mediators who serve in community mediation centers in 48 U.S. states. Former Harvard President Derek Bok (1983) says that the challenge of the decades ahead

> will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and discovering mechanisms which allow it to flourish, they will not be at the center of the most creative social experiment of our time. (p. 12)

Mediation Is . . .

Mediation is a process in which a third party—who is impartial, has no stake in the outcome, and has no power to impose a decision—guides disputants through a nonadversarial discussion process that has as its goal the settling of disputes. Goldberg, Sander, and Rogers (1992) point out that "mediation is usually a by-product of failure—the inability of disputants to work out their own differences. Each party typically comes to mediation locked in a position that the other(s) will not accept" (p. 105). Success of mediation depends on the disputants' willingness to accept the mediator's role as a process expert for resolving differences, as well as disputants' willingness to share information that might lead to a mutually beneficial agreement. Bush and Folger (1994) add, "The mediation process contains within it a unique potential for transforming people—engendering moral growth—by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict" (p. 2).

The mediation session provides a setting that alters how outcomes are achieved. First, the mediation setting serves as a *safe context* for sharing information that might not otherwise be shared. Disputants feel protected as the mediator minimizes threatening behavior, regulates the length of time people talk, and specifies the manner in which disputants treat each other. Second, the mediation context *changes the focus of discussion* from positional statements to interest statements that express needs, concerns, and fears. Discussions based on merits of choices have a greater potential for creating durable and long-lasting solutions than do discussions characterized by defensive positions and blaming. Additionally, the focus changes as each party expresses commitment to engage in assisted negotiation. Agreement to participate in mediation symbolically communicates to other parties a willingness to resolve differences.

Third, the mediation context provides a setting in which a neutral party who is emotionally uninvolved with the dispute is able to *identify and clarify the central or underlying issues* of a complex situation. The thinking of quarreling parties often becomes distorted by their emotional involvement. They become overwhelmed by the complexity of the situation, and this prevents them from seeing ways out of a stalemate. As an impartial third party, the mediator provides an objective, outsider's look at what is keeping parties stuck in destructive, unproductive patterns of conflict. A fourth factor is the absence of a leader who might impose a solution on the disputants. Guided by a process expert, the disputants have an *opportunity to assume greater responsibility* for finding ways to resolve differences. Because disputants make significant contributions to potential solutions, there is greater possibility that they will suspend hostilities or implement an agreement to which they contributed.

Donahue (1991) describes four phases that occur in third-party interventions in which agreements are likely to occur. Mediators begin with a period of *orientation* in which parties learn about the process, the ground rules, and the role of the mediator. From orientation, parties move to *sharing background information.* In this phase, parties tell their stories and state their goals for the process. This is followed by the *processing of issues,* in which parties respond to points of difference, provide reasoning about why they favor particular options, and clarify underlying issues that may have been overlooked earlier in the discussion. The final phase involves *proposal development,* in which disputants actively negotiate differences, engage in trade-offs, compromise, and accommodate.

Mediation Goals

Interviews with mediators reveal a variety of goals. Cupach and Canary (1997) point out, "While there is agreement concerning the basic principles that define mediation, the goal of the process is a matter of some dispute" (p. 207). Mediator styles range from very *directive,* when the goal is reaching an agreement, to *nondirective,* which emphasizes dialogue, relationship, and organizational

change. Of importance is awareness that the mediator's choice of goals has concrete effects on techniques chosen.

The most common goal of mediators is reaching an agreement that will *resolve differences* or end conflict. Mediators from a wide range of disciplines view problem solving as the ideal orientation for managing conflict. Scholars emphasize the importance of this orientation in business management (Blake & Mouton, 1964; Pruitt & Lewis, 1977), psychology (Likert & Likert, 1976; Pruitt & Rubin, 1986), communication (Borisoff & Victor, 1989; Putnam & Poole, 1987), and law (Fisher & Ury, 1981). Mediators focus on problem-solving work in contexts such as families, labor unions, businesses, governmental groups, and churches. Through assisted negotiation, parties resolve differences and form agreements about specific, well-defined problems. The goal is an efficiently produced *agreement, either in principle or formally written,* that will be both durable and beneficial to disputants. Table 4.1 summarizes the range of goals frequently chosen by mediators.

In a review of literature about successful mediations, Folger et al. (1993) found that mediators often play a major role in *breaking attack/defend communication cycles* that create stalemates. The task here is to manage the discussion between disputants in a way that minimizes threats and fears. Among the ways that mediators accomplish this task are (a) emphasizing their impartial role, (b) equalizing the parties' communication by performing in a referee-like role, and (c) reframing disputants' hostile or blaming language (Tracy & Spradlin, 1994). The assumption is that if the destructive cycle can be broken, the parties possess sufficient skill to resolve conflict. Mediator Brian Muldoon (1996) describes this task as one of dynamic containment, where hostilities between disputants are stabilized so that basic dynamics that fuel the conflict can be changed. He argues that this is accomplished by changing the conflict into a dispute and then turning the dispute into negotiating a deal.

Facilitating dialogue is a third goal expressed by mediators. Mediators with this focus describe their work as facilitated negotiation. The task is to help disputants figure out for themselves what the problem is, what they want to do about it, and how they might prevent the problem from recurring. In addition, the task is to reframe communication from "either-or" to "both-and" and from "me" to "we." Mediation changes the way people relate to each other. These mediators emphasize process, communication, and the importance of relationship. Kolb and Associates (1994) report that

> They see themselves as behind-the-scenes catalysts or orchestrators of the parties' own coping and problem solving skills . . . [who] foster in the parties a more immediate sense of ownership and a better foundation for dealing with each other in the future. (p. 477)

The most far-reaching of the goals expressed by mediators is *facilitating organizational change.* This is a difficult, complex, and hard-to-measure goal. Kolb and Associates (1994) describe these mediators as facilitators of change who es-

Table 4.1 The Range of Mediation Goals

Facilitate organizational change	Create process for dialogue	Break destructive cycles	Agreement in principle	Formal written agreement

pouse transformational vision. These mediators work in settings such as community groups, international relations, and large organizations. The goal is to create fundamental changes in people or processes so that conflict is managed more effectively.

Mediators will often have primary and secondary goals. For some, reaching an agreement is primary, although they hope that they can create dialogue that prevents future problems. Other mediators downplay achievement of specific agreements and speak of the importance of creating dialogue for building relationships and trust. But these same mediators may list as a secondary goal the breaking of destructive cycles or an agreement about how decisions will be made or conflict resolved. Context often directs the choice of primary or secondary goals. For example, in the case of violence, an agreement to suspend hostility must be first but may be followed by an emphasis on dialogue or altering the interaction patterns. In environmental mediation, a primary goal may be to establish dialogue between parties, with a secondary goal of progress toward an agreement in principle.

Conditions Necessary for Mediation

There are many variables that influence the mediator's ability to successfully mediate a conflict. Among them are the skills and past experience of the mediator. But there is also a set of conditions that brings the disputants to mediation, and this can influence the success of the process. The following list summarizes a few of the factors that must be present for mediation to have a high potential for success.

- The parties have reached a stalemate or crisis and are willing to allow a third party to help them resolve the dispute.
- The parties express a willingness to engage in collaborative discussion about the issues.
- The interests or goals of the parties are interdependent so that they can help themselves by helping each other.
- Participation is voluntary, and parties have the power to create a mutually agreeable settlement.
- Disputants are willing to suspend hostilities, threats, and intimidation during the mediation process.

- All parties who contribute to the dynamics of the conflict will be included in the discussions.
- The mediator is regarded as acceptable to all parties.

Sander and Goldberg (1994) propose that mediation will be most successful when disputants want to minimize financial costs that may be incurred with legal remedies, prefer a speedy settlement, favor a private and confidential setting, and want to maintain a relationship with the other party. The mediation process gives disputants greater control over the options and outcomes than might otherwise be available. Parties are less likely to settle when fundamental issues of principle are involved, when there are differing interpretations of facts or laws, when the dispute is linked to other disputes, or when there is the prospect of a large payoff (Sander & Goldberg, 1994).

Political science professor Douglas Amy (1987) proposes that in larger mediations involving many parties or in public disputes, successful mediations are more likely to occur in situations where

- Disputants begin with common values or interests
- There exists a relative balance of power between parties
- The dispute is confined to a small geographic area with a well-defined group of participants
- The dispute is not confined to either-or choices
- Disputants genuinely want to reach an agreement.

Although Amy's criteria are targeted at large groups, the conditions may apply to many of the other settings where mediation occurs as well.

Core Values or Principles

There are a number of principles that guide successful mediators. The following list summarizes studies that looked at values most common to the best mediators.

Impartiality—Inevitably, mediators bring their own biases and predispositions, but these beliefs need not unduly influence the course of a mediation. Mediators may not be neutral, but they can be perceived as impartial. Disputants will demonstrate more guarded communication with mediators whom they regard with suspicion. Susskind and Cruikshank (1987) conclude that "the mediator must submerge his or her sense of what is best and focus instead on the disputing parties' own measure of success" (p. 163).

Empathy—Parties who feel judged will become defensive, which is a barrier to achieving integrative solutions. The best mediators display empathy at appropriate points to let parties know that their concerns matter. When parties feel heard, there is a greater chance that they will be candid with their contributions and more confident about the process. Goldberg et al. (1992) suggest, "An empathic media-

tor conveys respect to the parties, doesn't register approval or disapproval of what is being said, refrains from providing unsolicited advice and does not interrupt" (p. 106). In an analysis of labor mediators, Honeyman (1988) concluded that each of the mediators in his study took steps to establish empathy with disputants and displayed a willingness to hear parties talk about matters of concern, both related to and not related to the case at hand.

Effectiveness as a Questioner—Successful mediators are adept at asking probing and clarifying questions. They ask insightful questions that uncover concerns and interests that underlie positional statements. Questions are used to teach rather than lecture (Susskind & Cruikshank, 1987), expose inconsistency rather than openly confront, and demonstrate understanding rather than argue.

Valued Reputation—Two related attributes of the best mediators are good reputations and demonstrated records of success. Once a mediator loses a reputation for being fair, honest, genuinely concerned, and impartial, it takes a lot of work to rebuild it. For selecting a qualified mediator, Susskind and Cruikshank (1987) list as criteria background, affiliation, record, and reputation.

Confidentiality—The ability to function effectively heavily relies on the ability to honor the confidentiality of information shared by disputants. This includes information shared privately in a caucus and information shared with others in the community after the mediation is completed. A mediator serves as a safe listener and one with whom parties can share information that they would not otherwise share publicly. Exceptions to this principle occur in situations where child abuse is revealed or laws have been broken.

Process Skills—Because the level of conflict is high when parties come to mediation, disputing parties expect the mediator to use processes that manage tension and destructive conflict behaviors. Haynes (1994) explains, "The more coherent and organized the process, the easier it is for participants to arrive at solutions that are mutually appropriate for them" (p. 1). Yarborough and Wilmot (1995) extend this point further to conclude, "How well the mediator conducts the process helps determine whether or not the parties reach agreement, the durability of the agreement and the satisfaction of the disputing parties" (p. 8).

In a study that involved characteristics of mediators in labor disputes, Landsberger (1956) found that successful mediators also possessed

- An appropriate sense of humor
- The ability to act unobtrusively in conflict
- The ability to create the perception of "being with" disputing parties and being concerned about their well-being
- Persistence and patience
- Specific knowledge about the subject area in which they are mediating.

Mediators demonstrate a wide range of skills for helping people resolve their conflict. But lest mediators believe that success depends entirely on how well they do, they must be aware of an additional factor. Rubin and Brown (1975) point out that the mere presence of a third party who is independent of parties in a dispute serves as a significant factor in the settling of disputes. Often, the role of a third party is to get parties talking *constructively*, and then get out of the way while *they* resolve their differences.

There has been a great deal of research about the roles of a mediator. The types of intervention and needs of disputing parties often guide which roles take precedence. Some of the most important roles served by mediators include the following:

- Legitimizer who encourages parties to recognize the right of others to be involved in negotiations
- Agent of reality who helps build a reasonable and implementable settlement and who questions and challenges parties who have unrealistic goals
- Process facilitator who structures and guides the mediation session
- Catalyst who stimulates discussion and who encourages parties to see problems from a variety of viewpoints
- Trainer who educates parties about the processes
- Resource expander who links parties to outside experts and resources that might aid the process (based on roles suggested by the American Arbitration Association).

In addition, a mediator frequently serves as a *motivator* who encourages parties to keep negotiating or who identifies incentives to preserve momentum. There is a variety of opinion about how far mediators should go in order to motivate. Some remind parties of the cost of no settlement. Others orchestrate small concessions or pressure parties to look more closely at particular alternatives. Mediators who are more settlement-oriented may feel a need to intervene more than mediators who see their task as promoting dialogue.

As a *communication bridge*, the mediator serves as a conduit for the safe passage of information between disputants. At times, this means reframing emotionally charged, toxic language that might further polarize disputing parties. At other times, this might mean shuttling between parties as a messenger. Moore (1996) recommends that mediators reduce adversarial language by "referring to conflicts as problems, positions as viewpoints, parties as your group, and negotiations as discussions in order to depolarize and neutralize value-laden and conflict-oriented terminology" (p. 181). In addition, complaints can be reframed as requests and "my interests" can be reframed to "our interests." Goldberg et al. (1992) recommends encouraging parties to understand each other's views and clarifying differences of perceptions about interests and goals. The ability to manage the communication process may be the single most important skill that determines mediator effectiveness.

Mediation involves a series of discussions within which parties negotiate an end to disputes or satisfaction of their interests. Within this discussion process, a mediator may serve in the role of *procedural marshal* (Karambayya & Brett, 1989). As marshal, the mediator maintains boundaries between disputants so that threats and power imbalances are discouraged. Davis and Salem (1984) propose that it is the mediator's responsibility to interrupt intimidating behaviors that

Table 4.2 Mediation Process

1. Introductions
   —Explain mediation and mediator's role
   —Introduce parties
   —Establish ground rules
   —Agree on an agenda
2. Share information
   —Review context of problem
   —Hear parties tell their stories
   —Share and clarify interests
3. Generate options
   —Engage in negotiations and trade-offs
   —Select best option
4. Draft agreement
5. Decide on how agreement shall be implemented
6. Make plans for later evaluation after implementation

might inhibit constructive discussion. Table 4.2 describes the typical phases of a mediation process.

Mediation Process

Introductions

In the first phase of a mediation, the mediator builds confidence and encourages commitment to the mediation process. This is accomplished by explaining the goals and expectations of a collaborative process, the role of the mediator, and the ground rules that will guide discussions. Two of the strengths of the mediator's role are the mediator's impartiality and the confidentiality of discussions. These factors should be emphasized in the opening statement. Typical ground rules for a mediation might be the following:

- Only one person speaks at a time.
- No interruptions while someone else is speaking.
- No personal attacks will be allowed.
- Information shared during the mediation session will be treated as confidential.

When deemed necessary by mediator or parties, a private caucus may be requested. The ground rules offer predictability and safety for discussions. After the mediator shares them, they should be followed with two questions: "Are there any further rules that you would like to add?" and "Will you agree to abide by these principles during our session together?"

During the opening statements, the mediator will also emphasize the informal nature of discussions. There are no tape recorders or formal minutes. Discussions are expected to be honest, open, and problem solving.

The mediator will ask participants to agree on an agenda. There are at least four ways that a mediator might establish an agenda:

1. Following a list of concerns that were presented to him or her by the parties prior to mediating the session
2. Discussing concerns one at a time, as they are identified, during the problem-solving phase
3. After all interests are identified, having parties rank them in terms of importance, to be discussed in an order closest to shared priorities
4. Having parties alternate presentation of issues of highest priority

To get buy-in for the process, it is essential for mediators to involve parties in establishing the agenda. Yarborough and Wilmot (1995) state, "It has been our experience that framing and ordering the agenda set the stage for transforming negative conflict into a productive experience. Agreeing on priorities begins the process of cooperation that disputes have undermined" (p. 120).

Information Sharing

Discussing a problem in terms of fears, concerns, and interests is certainly the center of a mediation. This phase (described by many as the storytelling phase) offers the mediator the opportunity to model active listening for parties and encourage constructive negotiation about the issues. It is during this time that the mediator will attempt to expose underlying interests that parties, until now, have been reluctant to disclose.

Occasionally, the problem-solving phase includes the venting of emotions. One case involved a board of vice presidents that had resisted working together. There was such an emotional wall that it was difficult to identify the problems that prevented them from working together effectively. After several hours of little progress, the intermediary offered, "We've gone round and round these issues, and we don't seem to be making any progress. What's really going on here?" (This is a tagging response; see Chapter 2). One of the vice presidents spoke of her anger toward another. Then another talked about frustration with the lack of cooperation. During 30 minutes of venting, it sounded as if they needed a therapist, not a mediator. But when the venting was over, they engaged in constructive communication and began to function as a team. Venting addresses a need identified by Folger and Poole (1984) of unearthing the historical roots of a problem. In the case of the vice presidents, a past event contaminated present discussions.

Interests that are shared in discussion may fall into one of four domains: procedural, substantive, relational, or philosophical. Occasionally, a roadblock may occur if the mediator or parties do not recognize these different needs. Procedural concerns involve beliefs about the way things should be done, and some

parties will not engage in talk about substance interests until they trust that the process will meet their expectations. Substantive interests involve tangible items such as money, the placement of a fence, cessation of a behavior, or changes to an existing agreement. Frequently, there are intangible interests that fall within a third domain of interests, relationship. A party may be seeking respect, a sign that he or she is being heard, or a belief that he or she will have greater power in the relationship.

Philosophical interests occur when people believe they have to prove a point before they will listen to anything further. They want other parties to demonstrate respect for a principle or value before they are willing to go on with discussions. For example, a husband in a marital dispute responded to a request for more sharing of the housework with, "I just want you to understand what it means for me as a male." This may be a difficult request for the wife, but her respect for the principle might increase his willingness to listen to discussion about division of the housework. In an environmental mediation, an environmentalist may require that other parties acknowledge his or her value for regarding the land as sacred before moving on to discussion about how to use the land.

Occasionally, when philosophical discussion gets in the way of dealing with concrete issues, the mediator will have to redirect the discussion. At times, philosophical discussion might even serve as a stalling tactic to prevent discussion of more immediate issues.

Yarborough and Wilmot (1995) propose questions that might be useful for mediators in probing for interests:

- What will it take for you to cooperate?
- How would you like to be treated?
- What problem(s) are we trying to solve?
- What concerns you most?
- What are two other ways you can get what you want?
- Before this conflict started, what did you want?
- What would help you feel good? (p. 129)

Ideally, mediators would like all interests presented before moving to the next phase of mediation. In most mediations, parties will propose options well before the mediator is ready. Rarely do phases go exactly the way they are presented in books. If solutions come too soon, they should be saved by charting them on a flip chart or white board. This affirms the contribution but prevents diversion from the initial agenda.

interests. In the initial phase of this segment, the mediator must explain the difference between developing options and selecting the best options—two distinct steps in the process.

The group has a significant, strategic choice about how it wants to develop a set of options that might meet its current needs. Among the choices are the following:

1. As a group, brainstorm options. Build on the synergy already achieved.
2. Each of the parties, individually, develops a list of possibilities and brings them to the next meeting for consideration.
3. Divide the problem and delegate parts to task forces who will return to the next session with sets of options that address interests of the group.
4. Look to outside experts who can provide sound advice.
5. A member of the group researches and returns with a set of options.

For complex issues and technical issues, Options 3-5 provide information that the group needs to make an informed decision. For less complex issues, or in groups that already possess sufficient expertise about the problems, Option 1 or 2 might be the best choice for developing options.

After all options have been generated, the parties will need to consider how they wish to discuss the issues. The strategic choices parallel the agenda-setting phase. Disputants may evaluate options one at a time or withhold discussion until all possibilities have been suggested.

Selection of the best option will involve choosing criteria with which to evaluate the choices. The criteria may be, "Is this option fair for both of us?" "Is the proposal cost-effective, legally feasible, or financially in our best interest?" "Can I live with this settlement long term, or is short term good enough?" Occasionally in corporate or public disputes, the options involve many complex choices and need to be organized for parties. For example, in an environmental mediation, task forces were asked to bring back lists of options that included discussion of advantages and disadvantages. The mediator then took the lists and created a matrix that evaluated each option based on the criteria proposed by the group. The matrix enabled the group to visually see and weigh the options. The matrix resembled Table 4.3.

During this phase, parties may engage in *logrolling*, in which they trade factors of differing importance (Pruitt & Lewis, 1977). In the above dispute, one party may agree that it could live with the negative impacts on animal habitats but wants the final option to be one with positive impacts on water quality and agriculture. *Bridging* occurs when parties create a totally new option out of the information, interests, and goals presented. For example, in the above example, parties may see a way to prevent soil erosion and protect animal habitats by using innovative business technologies to mine gravel from the river.

Reaching an acceptable package of solutions may require synthesizing parts of several options, establishing limits on some options, or dropping others all together. Moore (1996) describes this phase as *incremental convergence*, where "par-

Table 4.3 Illustration of Matrix of Options in a Mediation: Russian River Enhancement Plan

Option	*Long-Term Benefits*	*Short-Term Benefits*	*Agricultural Impacts*	*Soil Erosion*	*Animal Habitat Impacts*	*Water Quality Effects*
One	No	Yes	min	min	+	+
Two	No	Yes	min	+	min	+
Three	No	Yes	+	+	min	min
Four	No	No	+	min	+	+
Five	Yes	No	min	+	+	min
Six	Yes	Yes	+	min	+	+

ties make gradual concessions within the bargaining range until they reach a mutually satisfying compromise position" (p. 281).

Drafting an Agreement

After agreeing to the best course of action for resolving the dispute or achieving goals, the parties may draft a *memorandum of understanding* that summarizes their agreements. This final document should include the following:

1. Identify people by full names.
2. Be specific about who will do what, when, how, and where.
3. Reduce ambiguity of implementation by listing each key provision in separately numbered paragraphs.
4. Identify specific steps and times for implementing the agreement.
5. Establish a monitoring system for measuring successful compliance.
6. Omit any mention of blame, failure, or guilt.
7. Explain penalties for failure to fulfill terms of the agreement.
8. Establish provisions to accommodate future changes.

The Sunny Hills Memorandum of Understanding (mythical school name), illustrated in Box 4.1, demonstrates a settlement agreement that was created following a series of discussions about inconsistencies in enforcing school rules for student discipline. Differences of opinion about rules escalated into a discussion about how decisions are made and clarity about roles for enforcing proper behavior.

Drafting the agreement in a form that serves as a legally binding document does not guarantee compliance. The strength of the document will rest in how well the agreement meets the interests of the disputing parties. The goal is to have parties leave the process thinking that it is in their best interests to fulfill the terms of this agreement.

BOX 4.1

Illustration of a School Memorandum of Agreement:
The Sunny Hills Faculty-Administration Agreement

1. On August 8th at 9:00 a.m., all staff will meet with an outside trainer to discuss student discipline options. The school counselor is tasked with arranging for the facilitator. The faculty discipline committee will monitor the selection of this candidate and the agenda for the meeting. The senior administrator shall make schedule and room arrangements and notify all faculty about plans.

2. On September 1, at 1 p.m., all staff will receive training in decision making. The human resource director for the school district has agreed to provide information about processes that successful schools are using. The goal is to implement an effective system by the end of fall semester. The senior administrator is tasked with scheduling her for that date. The backup date for this program will be October 8.

3. To monitor the response and effectiveness of these first two programs, the school counselors will distribute a survey during the first week of November. A task force of faculty, administration, and staff will compose questions for the survey. Results will be distributed to all employees. Specific problems that require further action will be the subject of January's faculty meeting.

4. As a symbolic gesture to demonstrate support for colleagues and help with break or noon discipline problems, all staff during fall semester commit themselves to be more visible in the halls during these high peak times. Teams from the different grade levels will monitor the responses of their members to this commitment.

5. Because dispersal of information is a continuing concern for faculty and staff, senior administration will make sure that every employee has an e-mail account and that all relevant information is regularly disseminated. The chair of the faculty will monitor compliance and report monthly about progress on this issue.

6. Failure to cooperate with group agreements for handling discipline problems, managing staff conflict, or contributing to decision-making processes will be reflected in annual performance evaluations. The school district staff has agreed to monitor the school administration's compliance.

The Caucus

Occasionally, problems develop in a mediation that create barriers. For example, despite reminders about the ground rules, one party continues to interrupt, threaten, or intimidate others. In such a case, any party or the mediator may request a private, confidential meeting (a caucus) to discuss the problem. In this private session, the mediator may ask the offending member to stop the behavior or ask for information about why the behavior persists. In addition to breaking destructive cycles such as this, a caucus can be used to do the following:

- Reduce tension that might be building up during the mediation
- Move parties away from positional orientations and toward problem-solving orientations
- Weigh the acceptability of options
- Clarify interests or goals that change during discussion
- Explain the costs of no settlement and identify the benefits of cooperation
- Interrupt a stalemate
- Allow venting of emotions that might be destructive if done in the session

Providing that the mediator included an explanation about the purpose and principles of caucusing during the opening statements, a caucus may be initiated at any time by any of the parties. Although there is no general rule as to how long a caucus should be,

> common practice and courtesy dictate that if a caucus is to take more than an hour, a formal break should be called in negotiations so that the party with whom the caucus is not being held is not kept waiting. (Moore, 1996, p. 323)

During the caucus, the mediator may need to discuss with a party how to explain to the other parties the purpose and results of the caucus.

To demonstrate impartiality and reduce distrust, the mediator should check in with the noncaucusing party prior to reconvening the session. No information uncovered during the caucus should be revealed unless the parties who shared the information grant permission.