CHAPTER 1
THE PERIMETER

Explore Existing Mediation Practices *Before* Seeking Methods

Before proposing a mediation method, it seems important to offer an inventory of existing practices, which will give us the opportunity to explore the breadth and richness of mediation. After a brief tour of the origins of the word, this chapter will examine the multiple instances – informal, ad hoc, or institutional – which contribute to the current mediation culture. Examining numerous mediation examples, this chapter argues that a great diversity of practices can inspire us in the service of the peaceful resolution of conflicts.

The Origins of a Practice and Its Words

Ancient Sources

Historical texts enlighten us on the ancient use of mediation practices. Research (Cardinet 1997) shows that the written history of mediation started around 500 BCE. Notably, the word *mesites* written on papyrus refers to Mitra, half-god and half-man, thus creating a link between humanity and the divine. Further, in his *Constitution for Athens,* Aristotle notes that Solon is a reconciler between two camps. In the second century CE, *mesites* was translated into Latin as "mediator." Human beings, as individuals or belonging to groups of varying social organizations, needed to determine who would "intermediate" among them, and between them, God, and the universe.

This is how Christian theology offers one of the first uses of the term, with Jesus as "mediator between God and mankind" (I Timothy 2:5). In 1265, the word *mediateur* first appears in French in Jean de Meung's *Le Roman de la Rose*. In 1382, borrowed from the Latin word *immediatus,* appears the word *immédiat* meaning "direct and without intermediary"; in 1478, the word *médiat,* from the Latin *mediatus,* is used to refer to an indirect action. With the meaning of "intermediary intended to reconcile persons or parties," the French use of the word *mediateur* dates to the sixteenth century. The word *mediation* recalls Old English *midd* for "middle." In 1540, it meant "divide in two equal parts." By the middle of the seventeenth century, the meaning was "occupy a middle place or position." The "act as a mediator, intervene for the purpose of reconciliation" likely hails from 1610, while "settle by mediation, harmonize, reconcile" is probably from the mid-1500s (Online Etymology Dictionary 2020). In 1694, the term *mediation* appears in the dictionary of the French Academy. It is then used widely, even in literature such as in La Fontaine's fable "Vultures and Pigeons": *"They tried their hand at mediation / To reconcile the foes, or part*" (La Fontaine 1668, Fable VIII, 7th book).

Wicquefort or the old and difficult *"status of mediator"*

A diplomat born in Holland, Abraham de Wicquefort (1606–1682) closely observed seventeenth century diplomacy during the 1648 Congress of Westphalia. In 1680–1681, he published *The Ambassador and His Functions,* a scholarly analysis of this profession, which was then in full expansion. Illustrating how established was the practice of mediation between sovereign powers, section XI of volume 2 is entitled *"Of mediation and ambassadors-mediators."* Wicquefort already saw the difficulty of the task: *"The status of mediator is one of the most difficult for the ambassador to bear, and mediation is one of his most unpleasant tasks."*

More recently, the Convention for the Pacific Settlement of International Disputes, signed at The Hague in 1907, had for its main objective in

Part I: *"The Maintenance of General Peace."* The path to be preferred for this purpose was specified in Part II: *"Good Offices and Mediation."*

Mediation has been a research topic for a long time already. In France, research on mediation dates from the beginning of the twentieth century. A bibliography on the period 1945–1959 contains some 572 references of books and articles (Meynaud and Schroeder 1961). These writings and works relate mainly to mediation in labor relations and collective conflicts, but also in international relations.

The Meaning of a Word

Mediation, in the etymological sense, is constituted by a space, a time, an object, a language, or an intermediary person who opposes the dangers of immediacy – which might lead to overreaction and spiraling confrontation. Historically, mediation holds two distinct meanings, the second of which forms the subject of this book:

- *An intercession, or intervention in favor of another whom we represent*. This is the case, for instance, when a single real estate agency acts as the mediator between the seller of a home and potential buyers. The word retains the meaning of a "reciprocal" intercession for all parties.
- *An impartial external intervention, offered to (and/or requested by) conflicting parties, to organize exchanges with a view to building mutually acceptable solutions.*

Mediators, moderators, facilitators, neutrals, go-betweens, third parties, ombuds: there are many terms, but they refer to the same situation: the presence of an intermediary – a person or a group of people – who intervenes between two or more parties in conflict, seeking to facilitate negotiation between them with a view to arriving at a peaceful solution agreed by them. For Wicquefort, *"the word mediator fairly well expresses [the] function: it consists properly in putting oneself in the middle to bring together the parts that have moved away."* To designate the act of mediation

itself, the verb "to mediate" is commonplace in English, while the French modern equivalent – *médier* – remains seldom used.

Mediators: An Overview of Current Practices

As a starting point, let us list key variables for the diversity of mediation practices:

- *Time:* Mediation can be preventive, post-conflict, or even post-litigation (for example, to support the implementation of the judge's decision in family or criminal matters – also called post-sentencing).
- *Areas:* This refers to areas where the existence of mediation is identified and named, from family to schools, from neighborhood to work, from corporate to environmental or international.
- *Objectives:* Relational, facilitative, restorative, and curative. There are even decision-making objectives that move away from the creation of agreements by the parties themselves, in order, above all, to reach a decision: evaluative mediation (with the objective of evaluation in the light of the law; Fruchter 2019) and mediation-arbitration, or "Med-Arb" (Baril and Dickey 2014; Bickerman 2018), where it is expected that mediators will become arbitrators or pass the case to arbitrators, thus ensuring a certainty of settlement, accepted in advance by the parties.
- *Number of actors:* Personal or collective (team, large group, country).

  Without claiming to be exhaustive, this section will review *who* may be involved in mediating, as well as *where* and *how* these mediators operate. Three main categories stand out: informal, ad hoc, and institutional mediators.

Informal Mediators

These mediators may not call themselves mediators, but do engage in mediation or an activity very close to it. They could be anyone who, in everyday life, helps parties to listen and understand each other and co-create a solution to which everyone agrees. Here is a glimpse of the variety of these informal mediators:

- *A student:* Between classmates.
- *A teacher:* Between students, colleagues, parents and teachers, teachers and students.
- *An office colleague, boss, union official, or staff representative:* Between people at work, with customers or suppliers.
- *An agent, broker, or representative:* Stepping in at a given moment as an objective facilitator, and not as a defender of a particular cause.
- *A solicitor:* Between the parties in conflict.
- *A local elected representative:* Between their constituents, between the latter and economic actors or the government.
- *A governor:* Between local and federal public authorities, or between two local authorities, or in their relations with economic actors.
- *A policeman or policewoman:* Between two conflicting spouses, between squatters and owners of the premises, between protesters from opposite sides (Cooper 2003).
- *A member of the military during a peacekeeping mission, or a humanitarian in crisis:* Between belligerents, between the latter and the civilian population.

This list highlights numerous roles, functions, and professions that involve informal moments of mediation. According to a strict definition of mediation, only people outside and independent of the parties are considered

as mediators. But in reality, mediation is employed by a range of people (as above) and occupies a much larger role as a method to pacify relationships or solve a particular problem. Rather than being in a position of authority or adviser or negotiator in their own name with their own motivations, informal mediators do not intervene for their own interests or to favor one side over the other. However, there is always a slight risk of sliding into other forms of intervention, such as arbitration. This is why mediation, as elaborated in this book, calls for professionalism, principles, ethics – methods, even though it is sometimes legitimate and useful that everyone can, on occasion and without formality, serve as a mediator.

The concerned parties need to accept the mediator as such, as well as the mediator's approach to mediation. In informal mediation, most often, the mediator intervenes without formal acceptance for their role: mediation remains implicit, taking place even without the parties being aware of it. In cases where the process is more explicit, if an informal mediator presents themselves with a sincere desire to settle a problem which is not theirs and which has weighed on the parties for some time, and if the parties trust the mediator to understand both sides, the mediator will be welcomed and appreciated. Thus, if informal mediators have acquired the know-how, they can sincerely and efficiently leverage the potential of mediation. But it is not enough for mediators to show their good will: the parties need to also accept them, at least implicitly, in this role. Sometimes the parties may prefer to receive advice or obtain a decision ruled by an authority, or may not want anyone to interfere in a conflict that they prefer to settle themselves.

Let us now explore two major models of "formal" mediators, which are designated and considered as such by the parties involved.

Ad Hoc Mediators

On particular occasions, an external third party is responsible for helping the parties find a solution to the specific conflict between them.

Who will be in charge of the price of raw materials?

A long-term contract guarantees the prices at which a multinational company supplies certain raw materials to another company. The contract covers the quantities and prices – around one billion dollars over five years. The price of these raw materials soars on the markets, to exceed by more than 30% the price set in the original contract. The producing company requests that the selling price be reassessed accordingly. The buyer refuses, relying on the long-term commitment made in the initial contract: proposing an increase of only 4%. The disagreement lasts several months. On both sides, lawyers prepare for trials; everyone believes they can convince the judge. However, mediation is finally accepted. A few sessions, over a two-week period, lead to an intermediate price reassessment, the setting of minimum purchase quantities, and a revision clause for periodic price increases or decreases, depending on the market conditions. Mediation has allowed each company to continue their commercial relationship without market fluctuations becoming a burden.

It is better for the parties to spontaneously agree on the profile and name of a third party, but sometimes an external authority – the public administration, a judge, a common hierarchical superior – designates a mediator with the parties accepting, *nolens volens*, this choice. The main characteristic of ad hoc mediators is that they halt their operations at the end of their mission.

Mediators: Doomed to Disappear … or to Serve as Scapegoats

Boutros Boutros-Ghali, then Secretary-General of the United Nations, commented on his experience as a mediator in international conflicts: *"If your mediation succeeds, you must disappear because the [conflicting]*

> *States will say that they have been able to solve their problems alone; and if your mediation fails, you must agree in advance to serve as a scapegoat. I am used to it. I have done this all my life …"* (Boutros-Ghali 1995).

There are many areas where ad hoc mediators intervene, on a private basis, on behalf of a principal or within the framework of mediation centers, from global issues to the most modest disputes (Bensimon and Lempereur 2007).

- *International relations:* During a political crisis or armed conflict, a special envoy is appointed by the United Nations, or a regional organization (African Union, Arab League, European Union) in order to promote reconciliation (Mitchell and Webb 1988; Faget 2010; Colson and Lempereur 2011).
- *Relations between companies:* Via independent and specialized mediators, or through corporate mediation centers (Salzer, Fefeu, and Saubesty 2013).
- *Industrial relations* and labor disputes, or interpersonal conflicts between fellow employees (Colson, Elgoibar, and Marchi 2015; Euwema 2019).
- *Between the police and the community:* In the United States, for example, a number of police departments have partnered with mediation organizations to offer this service and improve the relationship between law enforcement officers and the communities within which they live and work (Walker, Archbold, and Herbst 2002). Research also investigates the role of mediation in police work (Cooper 2003).
- *Between neighbors:* Small conflicts can be mediated thanks to local mediation associations and to strengthen local democracy (Faget 2010; Susskind and Lempereur 2017).
- *At school:* School mediators (adults or students trained for this purpose; Cardinet 1997).
- *Within the family:* Family mediators (Parkinson 2014).

These official, but ad hoc, mediators are generally experienced people, recognized for their wisdom or impartiality, or accepted as such and trained in mediation. They are sometimes retired professionals (Lempereur 1998b) or freelance consultants. Another approach is to involve several mediators – the co-mediation model – as illustrated in the following example.

A college of mediators in New Caledonia

By 1988, and for several years prior, the French overseas territory of New Caledonia had been shaken by a series of clashes between supporters and opponents of independence. On April 22, the crisis culminated in the hostage taking of 27 police officers (*gendarmes*), detained on the island of Ouvea by independence activists. On May 5, a special commando unit of the National Gendarmerie engaged in an assault, releasing the hostages, but at the cost of 21 casualties. New Caledonia was on the brink of civil war. Prime Minister Michel Rocard dispatched a team of mediators to the area, coordinated by Christian Blanc. This team was composed of different mediators with complementary profiles (legal, administrative, spiritual leaders). They engaged and listened carefully to representatives from the different ethnic groups of New Caledonia. They succeeded in bringing the parties together and convening a negotiation which successfully ended with the Matignon Agreement on 26 June 1988.

Whatever the outcome, these official yet ad hoc mediators halt their mission once the problem has been resolved, or the stalemate has been confirmed.

Institutional Mediators

Here, mediators are part of a mediation organization, which guarantees continuity. The mediators are formally employed by an organization (public body, company, etc.) and its external partners (consumer, user, customer, supplier, etc.) seeking to rectify a complaint that they find justified in law

or in equity. In addition, large organizations have appointed mediators in charge of managing internal disputes among their stakeholders.

We owe the invention of institutional mediators to the Swedes, who created the *ombudsman* in 1809: a *man* in charge of a mission (*ombuds*), in this case the search for justice between the State and its citizens. A similar function has developed in neighboring Nordic countries, such as Finland in 1953, then in the United Kingdom and the United States in the 1960s. In 1973, France created the Mediator of the Republic to facilitate disputes between the government and its citizens. Many universities have created ombuds services.

Why appoint institutional mediators? The intention is to establish a human link between an individual and an organization, which at first glance looks like a bureaucratic machine. Even in organizations that strive to respect rights, an individual might feel lost or powerless, when faced with decisions that seem unfair or seem to impinge on their rights. In these cases, mediators can help to exercise, between a person and an organization, an *ex post* review of the quality of the decisions. Even if the organization appoints and remunerates the mediators, it needs to guarantee their independence of judgments and actions, for them to seek fair solutions between the organization and the applicant. In fact, taking into account the current craze for mediation, such services will only serve the long-term image of an organization, if they also benefit from real resources and skills (Lempereur 1998b). Many leaders of organizations sincerely appreciate that "their" institutional mediators exercise critical functions and contribute to conflict reduction and to stakeholders' improved satisfaction.

Whichever organization hosts them, institutional mediators generally employ a method characterized by the following:

- Written mediation, carried out on the basis of a complaint reported by one stakeholder (for example, the employee or the user on one side, the department concerned on the other).
- A compliance review of contractual rules or established law.
- A fairness test that mediators perform.

- An opinion of the mediator (or of the mediation commission), which makes suggestions that the parties remain free to follow or not. This advice sometimes paves the way for a new negotiation.

An additional advantage of institutional mediators lies in their ability to recommend, within their organization, the implementation of the solution advocated at the end of the mediation they just conducted. There is thus a coherence between the problem posed, the proposed solution, and the people or organizations involved in the implementation of this solution.

Institutional mediation also aims to propose generalizable solutions, fully integrating the possibility that they constitute precedents that can be referred to later. Because of their role, institutional mediators inevitably reveal patterns in the interpretation of, and solutions to, some recurrent conflicts; as a result, they create some predictability of outcome. In addition, they derive recommendations from their activity, which they communicate where appropriate within their organization, or even make public in annual reports. These recommendations often help to revamp organizational structures and procedures.

Finally, in general, it is the institutional mediator (and not the parties) who proposes solutions in the form of opinions or recommendations. Institutional mediators thus fit into the "mediator as adviser" model that we will develop next. As evidenced, this typology of mediators – informal, ad hoc, institutional – echoes a diversity of mediation practices.

A Variety of Mediations

The above categories illustrate a diversity of mediation *models* (Lempereur 1999a), with various *methods*, and translate into multiple *practices*.

Models, Methods, and Practices

What do we mean by these three expressions?

Models – By "models" we do not mean examples to follow, but rather broad types of mediation approaches, featuring the characteristics representative of most mediators (Lempereur, 1999a). We can distinguish, for example, *mediators as advisers* or *as facilitators*.

- *Mediators as advisers* try and find solutions for the parties. Such mediators, also called *evaluative,* provide, after listening to the parties, suggestions which they find relevant, balanced, and fair. Parties remain free to follow or not to follow this advice, to modify or adjust it.
- *Mediators as facilitators* help the parties find their own solutions. Such mediators, also called *facilitative* (Brown 2002), do not offer any solutions, but try to make solutions emerge from the dialogue between parties. They invite parties to explain their views and hopefully acknowledge each other. Like midwifes, they make them ready for, or facilitate, a joyful birth at the ripe time. They consider that parties always understand their problems better than a mediator so that they can deliver their own best possible solutions themselves.
- *At the crossroads of the two models* are the *evocative mediators,* who are *providers of ideas* – but not givers of lessons. Based on their own personal experience, mediators add to the ideas of the parties, if the parties did not get them by themselves. This is done not as "advice" but as a "gift of ideas," without prejudging whether the parties will perceive these solutions as suitable or not. In short, these mediators wonder aloud about the adequacy of this or that solution. Knowing that they are not a party to the conflict, they offer without advising, insisting, pressing, or pretending in any way to alone hold the keys to the just or fair solution.

Depending on whether they claim to be an *adviser* or a *facilitator,* mediators do not use the same resources. According to a classical typology (French and Raven 1959), mediators can leverage different power resources vis-à-vis the parties: they can demonstrate *expertise* that the parties trust; their status may grant them special *legitimacy;* the parties can *value their relationship* with them; they may have *crucial information* which they can make available to the parties; or they can *reward or exert pressure* on the parties.

Methods – Within these three overarching models, mediators make method choices. That is to say, they select reasoned approaches to achieve their goals. This is flexibility within the framework. There are many method choices, and we will come back to them. For example, is there, at the opening, an oral agreement or a written contract on the rules of the mediation process? Do we communicate in writing or orally, face to face, by videoconference or by phone? How is the time dedicated to analyzing the past allocated in relation to that spent exploring possible avenues for the future? Is the final agreement drawn up by the parties, their lawyers, or the mediators themselves under the supervision of the parties?

Practices – At a more detailed level, within the choices of methods, each mediator brings their own personal "way of proceeding." Mediation style may also vary in the same person, depending on the situations encountered. Mediation styles will crystallize in the details of the choice of words, the ways of welcoming, the handling of space and time, the questions asked, the use of silence, the transition from oral ideas to putting the solution in writing, and other various initiatives of mediators.

Some Variables

The extraordinary diversity of mediation practices is due in particular to the large number of possible choices regarding the methods. To illustrate this diversity, the following tables present the main variables, which offer endless combinations. As of now, some light will be shed on the key choices.

The question of the free acceptance of mediation – or, on the contrary, when it is imposed – deserves to be raised immediately (before being further examined in Chapter 4). What happens, depending on whether the parties hear a suggestion ("*How about going to mediation?*") or receive an injunction ("*You must go first to mediation!*")? In fact, when the judge says to the parties: *"I strongly suggest that you go to mediation,"* they are more or less forced to do so, even if the judge adds: *"Do you agree?"* In mediation sessions, we have frequently heard expressions such as *"we did not want to displease the judge."*

TABLE 1.1

Before the mediation takes place	
Named as such – The upcoming process is explicitly labeled: "a mediation."	*Not named as such* – We proceed the same way, but without specifically calling it "mediation."
With much prior information on mediation given to the parties – The parties have received more or less lengthy information on the principles, procedure, objectives, and rules of mediation.	*With little prior information on mediation given to the parties* – The parties engage in mediation with little or no information on how mediation works.
With formal acceptance of the mediation – The parties say "yes," orally or in writing, for the initiation of a mediation process, after a more or less lengthy reflection.	*With superficial acceptance of mediation, without any deep understanding of what mediation is* – The parties experiment with mediation, "to see," without prior in-depth reflection, or because the judge or another authority has invited them to do so.
With contractual or legal obligation – Due to the law or a mediation clause in a contract, the parties are required to attempt mediation before they engage in legal proceedings (depending on the country, such clauses may apply in bankruptcy, labor disputes, or divorces).	*With acceptance not linked to a contractual or legal clause requiring mediation* – Once a conflict has arisen, the parties decide by mutual agreement to engage in a mediation without having previously committed to it.

A hypothesis often put forward is that only mediation that is genuinely accepted at the outset leads to an agreement. However, the probability of an agreement is fairly close in both cases. If there is an obligation to mediate, whether the parties wish it or not, they need to at least try a mediation process. When a mediation is well conducted, the parties feel recognized, realize that there is a shared purpose to understand each other – and eventually reach an agreement, more often than expected.

TABLE 1.2

From whom? And with whom?	
Internally – Mediation concerns internal relations within a group (family) or an organization (company, public body).	*Externally* – Mediation concerns the external partners of a group or an organization: customers, suppliers, users.
With official institutional mediators, mediation bodies, or mediation centers.	*With informal mediators, or independent mediators on ad hoc missions*.
With a single mediator.	*With a team of mediators* (co-mediators).
In the presence of the parties – The parties involved are present in person.	*In the absence of the parties* – Only their representatives attend (lawyers, elected representatives, agents, etc.).
In the presence of all parties concerned.	*In the presence of only some of the parties concerned* – Only the main ones, as involving all of them would complicate the process.

When the parties are not there in person and are represented (by a friend, a spouse, a lawyer, etc.), it is necessary for mediators to find out, at the start of mediation, the representatives' decision-making power. They will thus know, when the discussion turns toward the search for solutions and then the approval stage, if the agreement will still have to receive external approval, or if an agreement can be reached here and now, with the agent being empowered to decide for the principal.

The presence, or absence, of many actors involved (multi-party mediation) poses particular difficulties:

Sometimes, the stakeholders are numerous

- *Divorce* – Father and mother … but also children? Or a grandparent who could help with child custody?

- *Succession* – All heirs? The main ones? A distant cousin? The loyal housekeeper who receives a symbolic share?
- *A co-ownership* – All co-owners of the condominium? Only co-owners most concerned by the work proposed in the garden?
- *An infrastructure project* – The mayor, any neighbor, or some of their representatives? What about environmental groups and business owners? Do we need to bring a state official or representative? Maybe one from the construction company? (De Carlo and Lempereur 1998; De Carlo 2005; Matsuura and Schenk 2016)
- *A major policy change* – What if we need to redefine political districts, or a state or federal policy? (Lempereur 1998c)

Various criteria influence the choice of the number of people to solicit. The concern of facilitating the exchanges can favor, at least initially, a small number of actors. It is also important to involve the main protagonists likely to influence the decision. Conversely, in the spirit of inclusion, some mediators favor the idea that the participation of a maximum of actors, even "the least" important, will contribute to the legitimacy of the final result and, therefore, to its smooth implementation. Age, state of health, legal capacity, or availability are also criteria. In the most complex multi-party mediations, it is preferable to sequence meetings over time: the first meetings, conducted with the key players, will reveal who else needs to be involved to obtain their reaction – and possibly their agreement.

The question of the number of people around the table is all the more important as participants do not share the same information, or in the same way, if they are being observed by other parties (Colson 2004, 2007). During mediation, even if one of the parties wants to express themselves spontaneously, it is important to be as inclusive as possible – the other party or parties, their counsel, mediators themselves? Any presence is a filter to information sharing. Admittedly, the hypothesis is that mediators, by definition, are benevolent toward everyone, have little influence on what is said and what

is not said. For example, fearing retribution, some parties may hold back on expressing themselves: *"What will my lawyer think? And the other lawyer, could she hold against me what I intend to say?"* As a result, mediators may turn to the "caucus method," which we will further discuss in the book: caucuses (probably stemming from an Algonquian word *caucauasu*; Online Etymology Dictionary 2020) are private meetings with a given party, to allow for a free flow of information.

If the temptation exists to restrict the circle of the parties present at mediation, it needs to avoid creating the opposite risk involved in the absence of certain parties, who could disavow an agreement obtained without them, and consequently hinder its implementation. Two types of absences should be noted:

- *The absence of decision-makers*. It is not surprising that they do not accept the agreement reached, without them, by the other parties. An agreement is only binding on those who build and then sign it. Hence the importance, at a given moment, of the presence of all the actors concerned.

Litigation between a real estate developer and a co-owner

The developer of a housing complex is in litigation with a new co-owner, about leakage from roof terraces. Responsibility could be attributed as much to the developer (waterproofing qualities of the products used) as to the co-owner, who may have damaged the terrace by installing a chimney, which was not originally planned. Never mind, the developer is covered by insurance: co-owner and developer agree on behalf of the insurer. However, if the latter is absent during the mediation and does not sign the agreement, its implementation is unlikely.

- *The absence of decision influencers*. Certain essential actors do not appear at first sight: without being directly involved, it is nevertheless they who, behind the scenes, are pulling the strings. Decision influencers are not always easy to detect, but when they have been uncovered, it is useful, with the agreement of the parties, to invite them to mediation.

TABLE 1.3

From whom? And with whom? (continued)	
In the presence of parties alone – Parties are not accompanied by anyone who could offer advice.	*In the presence of supporting parties* – Other people are present to provide informal (friend, family, ally) or formal (expert, lawyer) advice.

Child custody

When mediating a divorce, one of the spouses seems to agree with the other but opposes a solution that seems reasonable and corresponds to their interests. They repeatedly reject the agreement. They end up revealing that their opposition reflects the pressure they are under from their own parents. Rather than going around in circles, it is better to initiate an in-depth discussion with the grandparents – the hidden interlocutors – and identify their concerns. Their involvement will help to find an agreement that integrates, if possible, the needs of the children, the mother, the father, and the grandparents.

Lawyers' presence or absence deserves special attention, as opinions differ: "Lawyers are welcome all the time," or "at certain times during mediation," or "above all, no lawyers present during mediation!"

- Some mediators are convinced that only the parties should be present, because it is their own story: the challenge is to restore their power, without outside interference. The parties will always be able to consult their lawyers outside the sessions.
- For other mediators, when the parties have already taken on lawyers, it is useful for the latter to be present at the sessions, so that they too know and understand what is experienced and said in the relationship between their client and the other party. Indeed, often, lawyers do not have access

to "the other party," but only to their own client or the other's lawyer. They are therefore far from knowing everything that takes place in this relationship. If they are present, they will better understand what comes out of the process and thus better advise their client.

Several means of communication are used in mediation, which contributes to the diversity of mediation practices. Let us recall the main ones.

- *Writing* – The vast majority of institutional mediators deal with written documents. Parties and mediators exchange letters and memos. Although registered mail with acknowledgment of receipt remains advisable to keep a record of documents exchanged, documents sent as e-mail attachments have increasingly become the norm. If, from beginning to end, exchanges of information go only through e-mails, this "cyber-mediation" might miss the root causes of the conflict and fail to analyze the behavior of each party, given the lack of direct interaction.
- *Telephone* – Of course, telephone calls can routinely help to rapidly clarify a given item. Sometimes, given the urgency, mediation can only be done by phone, the necessary documents or proposed agreements being sent by e-mails in parallel. For example, disputes over the purchase or sale of securities have to be settled quickly. In other disputes, it may happen that a phone call from a mediator is sufficient to help overcome the reluctance of a given party to join the mediation meeting.

Defective household appliance

Unhappy with a valuable appliance that the store refuses to repair, a customer turns to a mediator. A phone call from the mediator to the store manager was enough for the customer to be welcomed there the same day in order to find a solution, without the mediator needing to further intervene.

TABLE 1.4

What is the compensation framework?	
Self-funded – The parties assume the cost of mediation.	*Subsidized* – All or part of the cost of mediation is covered by the institution.
Paid – Mediators receive a fee for their services.	*Volunteer* – Mediators do not receive any monetary compensation.
With what means of communication, and what meeting formats?	
Written – By exchange of letters, in paper, or electronic format.	*Oral* – Face-to-face, by videoconference, or by telephone.
With individual meetings at the start – Mediators first receive each of the parties privately.	*With a joint meeting at the start* – Mediators first receive all the parties together.
Along the way, individual meetings alternate with joint meetings.	*Throughout the mediation, the same type of meeting continues* – either individual or joint.

- *Videoconference* – Enhanced systems of videoconferencing (Zoom or otherwise) have now bridged the gap between e-mail exchanges and face-to-face meetings. At the same time, parties and mediators can hear and watch each other, while also showing and even editing documents shared on the screen. This fairly new medium, which became "the new normal" in 2020 because of the COVID-19 confinement in many countries, has proved an effective way to save time and carbon emissions, as parties can meet while being in different parts of the country – or on different continents altogether.

- *Face-to-face meetings* – Nevertheless, this mediation mode remains the favored mode of interaction between parties and mediators, as they optimize the exchange of information and allow participants to grasp "the mood in the room" – the unsaid elements that help sense whether the mediation is heading in the right direction. These meetings take several forms between the beginning and the end – individual with each party, in sub-groups, bringing together all the parties – each with its advantages and disadvantages. These different types of meetings will be elaborated on in Chapter 5.

TABLE 1.5

What about the time factor?	
A unique encounter.	*Several successive meetings*.
Brevity of meeting – For example, 1.5 to 4 hours in criminal or family mediation.	*"Marathon" meeting* – Mediation proceeds continuously over a weekend, a few days, or even weeks. For example, a dispute between banks in different countries – brought to court for two years – was resolved within a week by intensive mediation.
Short in total – Mediation focuses on a meeting of a few hours.	*Long-lasting in total* – Mediation spans several days, even months or even years.
Where?	
In a "neutral" space – A place equidistant between the parties, the premises of a mediation center or a town hall.	*At the place of the dispute, or on the premises of one party with the agreement of the other* – For example, on the construction site where the damage occurred.
Agreement and post-mediation	
With suggestions for solutions from the parties.	*With suggestions for solutions from mediators*.
With a final written agreement – Written by the parties themselves, or their lawyers, or mediators, or a combination of the above. This written agreement can be approved by a court to ensure enforceability.	*With a final oral agreement*.
With the existence of a follow-up – Verification with mediators of the next steps of implementation and completion of the agreement.	*Without follow-up* – Follow-up is left to the parties themselves.

(*continued*)

TABLE 1.5

Agreement and post-mediation	
With post-mediation debrief – The mediation, once completed, is the subject of an analysis of practices, and of exchange between mediators.	*Without post-mediation debrief* – Without organized exchanges of reflection between peers on past mediations.

Of course, a given mediation can simultaneously combine a set of elements taken from both columns of the tables above. This diversity is further increased if we look at the variety of mediation sequences, an aspect covered in greater detail in Chapters 5 to 7. This sequence varies, depending on the number of parties, the habits and training of the mediators, the technical nature of the case, the refusal of one of the parties to physically meet the other, the tensions between the parties, etc. Finally, this variety also contributes to the irreducible diversity of personalities: no mediator is like another, depending on their training, their specialization in this or that sector, their past experiences, their personal qualities, openness and attentiveness, authority, or objectivity. Mediation is a deeply human process with many variations (Fiutak 2009).

Conclusion: An Overflow of Methods or a Lack Thereof?

Mediation illustrates the 2000 European Union motto: "United in Diversity" *(In Varietate Concordia)*. Behind a constant – the desire to contribute to the peaceful resolution of conflicts between parties, based on their acceptance of an approach characterized by its dynamism and plasticity – appears the variability of practices. However, this mediation effervescence should not obscure several risks.

The first risk is the trivialization of mediation, of its use in any situation, leading to some *mediation mania*. It is useful to identify precisely when and why to engage in a mediation process, or otherwise rely on other intervention mechanisms. This refers to the relevance of mediation, and its application criteria, which is treated in Chapter 2.

Aboard an airplane, a pointless mediation

The use of micro-mediation can reflect the growing difficulty of fellow human beings to communicate directly with each other in order to settle small disputes. On planes, when a passenger was annoyed by a neighbor (conventionally, the knee kick in the seat, or the backrest too tilted during a meal), the matter would be settled directly with the fellow traveler. Airline companies have noted the increasing propensity of passengers to ask for help from flight attendants, rather than attempt a direct resolution of their conflict by relying on the elementary rules of civil request by conversation.

A corollary to the previous one, *the second risk is the absence of methods:* whether they may be ignorant of the existence of methods, or, on the contrary, disturbed by the apparent relativism that draws from a diversity of possible methods, would-be mediators might rely on their own instincts only. This risk concerns each of us when we are called upon to take on the role of informal mediators. But the other models – institutional mediators and ad hoc mediators – are not immune to this pitfall either.

Moreover, *a third risk is unsuitable methods;* i.e. mediators apply patterns and reflexes inherited from their previous professional experience in other functions. This is the case, in particular, of the institutional and ad hoc mediators, who find themselves minutely supervised when planning the mediation but in the end are left fairly on their own during the actual mediation process.

Even mediation professionals may lack methods

- Criminal mediators, sometimes chosen from among former judges or police commissioners, might see mediation as a subset of a criminal lawsuit, without necessarily reaping all the potential of a more methodical approach including gaining a mutual understanding of the causes that led to a criminal offense.

- Some mediators, who are often efficient in the search for solutions, seem less focused on the reconciliation between people. In this case, it is a question of working, also, if necessary, on the relationship on top of the concrete problem at stake.

A mediation process entails its own methodological requirements. To ignore them, or to apply inadequate ones that are fundamentally foreign to it, is to risk the failure of mediation, or in any case to deprive oneself of assets in favor of the resolution of the conflict.

Hence this book: it is not about proposing *the* method – as if only one method exists – but rather about synthesizing *methods,* drawing from enough sources and tempered by enough experiences to be applied flexibly to most contexts. It is not a question here of limiting oneself to a single model, but of being inspired by several, to unfold an approach that allows each mediator to find their own ways of engaging in mediation. In doing so, we will try to bring as much to experienced mediators – who are sometimes so comfortable employing *a single method* that they end up ignoring others that may be useful – as to beginners – who venture in this delicate path with, depending on their personalities, either the misleading feeling of knowing it all or the paralyzing impression of not knowing anything.

To structure this method, mediators and parties in conflict can rely on what we call the Seven Pillars of Mediation, which we will develop in the following chapters.

The Seven Pillars of Mediation

1. *Solicit the Parties* permanently so that they take ownership of the resolution mechanism, by mobilizing active communication between them and seeking progressively some mutual recognition.
2. *Secure Principles*, that is to say the "rules of engagement," which will allow everyone to stay on course with problem-solving.
3. *Sequence Phases* in this process, with various stages, from the establishment of mediation to, if possible, an agreement.
4. *Seize the Problem,* and its various data, by an in-depth analysis of its dimensions.
5. *Seek Paths* to solutions, so that parties discover what might work for them.
6. *Surmount the Pitfalls* that arise and hinder a resolution throughout the process.
7. *Seal the Points of agreement (or disagreement),* with the aim of gradually bringing to light a peaceful and realistic solution, to be implemented by all parties.