The Promise of Mediation

The Transformative Approach to Conflict

Revised Edition
More Praise for The Promise of Mediation

“In recent years, we have witnessed the erosion of the core values of mediation in favor of service to the forces of professionalism and legalism. The first edition of The Promise of Mediation served as a stunning reminder of the potential of mediation to empower individuals and communities in conflict. I credit Bush and Folger with reminding the field of its core values. Since the first edition, they have worked tirelessly to support the development of a practice congruent with these values. I believe that their efforts have produced a new model of mediation, one that provides a unique role for the mediator—especially the community ‘citizen mediator.’ When we use the transformative model, we’re offering a form of help that no one else in society is offering to our fellow citizens.”

—Thomas Wahlrab, member, board of directors, National Association for Community Mediation, and coordinator, Dayton (Ohio) Mediation Center

“Being human is what human beings do. Yet our approaches to conflict analysis and resolution often dehumanize conflicts, by marginalizing emotions and avoiding discussion of painful histories. In this book, Bush and Folger help us re-imagine mediation within a relational framework where emotions and painful histories are essential features of the conflict transformation process. This framework not only focuses on the connection between people, but also favors reflection on the parties’ experiences, as human beings. And by implication, mediators, as human beings, are encouraged to trust the parties in terms of their ability to move through the problems. Conflict is thus reframed as a contribution to the development of interaction, rather than a feature of life that needs ‘management.’ While this book contributes to our understanding of a model of mediation, it also humanizes conflict, and in the process, celebrates what it means to be a human being.”

—Sara Cobb, director, Institute for Conflict Analysis and Resolution, George Mason University
The Promise of Mediation
Robert A. Baruch Bush
Joseph P. Folger

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To the fellows, associates, and supporters of the Institute for the Study of Conflict Transformation, whose many contributions helped make this volume possible. And to the many mediation practitioners, program directors, scholars, and commentators whose courageous acceptance of and support for the transformative model over the past decade have increasingly made the promise of mediation a reality.
Acknowledgments

Since the publication of the first edition of *The Promise of Mediation*, we have had the good fortune of working closely with many talented and dedicated people, who have contributed enormously to the development of the transformative model of practice. In many important and central ways, this second edition is the result of their contributions to theory building, research, training design, implementation, and program development.

Much of this work was launched by two foundations that provided generous financial support to the development of transformative practice soon after the first edition of this book was written. We want to thank the Hewlett Foundation’s Conflict Resolution Program, under the administration of Steve Toben, and the Surdna Foundation’s Effective Citizenry Program, under Robert Sherman, for this pivotal support. The initial projects that were funded by these organizations created a network of people, who have contributed powerfully to developing transformative theory and linking it to mediation practice. We are also deeply grateful to Cindy Hallberlin for the opportunity she provided to use the transformative model in the REDRESS Mediation Program that she launched at the U.S. Postal Service. This program provided an invaluable opportunity to develop and implement transformative mediation in one of the largest workplace organizations in the United States.
We want to extend special thanks to Dorothy Della Noce and Sally Pope for their work with us since the beginning of these projects. They have made enormous contributions through a range of endeavors that they have initiated and led over the past ten years. We are especially indebted to them for the astute work they have done on numerous articles and publications, especially the two pieces that they coauthored with us that became the basis for Chapters Two and Six of this book. Their vision also contributed to the cofounding of the Institute for the Study of Conflict Transformation, a nonprofit organization dedicated to creating resources that support transformative conflict intervention.

We deeply appreciate the board, management team, and associates of the Institute for their work and contributions to the development of transformative practice. We owe special thanks to Judy Saul and Jim Antes for their contributions to the Training Design Consultation Project and the Practice Enrichment Initiative as well as their influential contributions as members of the Institute’s board, its management team, and its research task force. We are indebted to Andrew Thomas, Judge William Thomas, Steve Toben, and Cindy Hallberlin for their vision and direction as board members of the Institute.

We are also very grateful for the work of the Institute’s associates, many of whom have been instrumental in implementing transformative practice in their own programs and organizations and have been involved with us in a range of important projects since The Promise of Mediation was first published. These associates are Winnie Backlund, Patricia Bass, Deb Bopsie, Roger Brach, Melissa Broderick, Paul Charbonneau, Maria Cuzzo, Julie Denny, Kenneth Fox, Barbara Foxman, Deborah Gaber, William Galloway, Patricia Gonsalves, Elayne Greenberg, Cherise Hairston, Martin Harris, Donna Turner Hudson, Steve Jacobsen, Kristen Johnson, Neil Kaufman, Lou Ann Lucke, Leslyn McBean, Jody Miller, Peter Miller, Suzanne Motheral, Janet Mueller, Paula Pace, Kristine Paranica, Louise Phipps Senft, Dan Simon, Kent Swinburne, Thomas Wahlrab, Sara Jane Wellock,
and Michelle Zaremba. We also want to thank Jennifer Jorgensen for her skill and dedication in handling the administration of the Institute and building a network among its associates.

The Institute’s work has been generously supported, for the past four years, by grants from the Hewlett Foundation’s Conflict Resolution Program, and we express our profound thanks to the foundation and to program officers Steve Toben and Terry Amsler for their confidence in the importance of the Institute’s contributions to the field.

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Special thanks go to the administration of Hofstra Law School, for offering early and continuing logistical support for the projects mentioned previously and for the Institute for the Study of Conflict Transformation.

We feel an extra measure of gratitude for the many mediation programs that have adopted and implemented the transformative model, including, among others, the U.S. Postal Service REDRESS Program, as mentioned previously; the Community Dispute Resolution Center (Ithaca, New York); the Dayton (Ohio) Mediation Center; the Montgomery County (Pennsylvania) Mediation Center; the University of North Dakota (Grand Forks) Conflict Resolution Center;
the Greenwich (United Kingdom) Mediation Centre; the Dutchess County (New York) Mediation Center; the Baltimore (Maryland) Mediation Center. The work done by both professionals and volunteers in programs like these has been instrumental in establishing the transformative model as a viable approach to practice. We also give our special thanks to those who, together with Cindy Hallberlin, have contributed to the development and implementation of the U.S. Postal Service REDRESS Mediation Program, including Anthony Vegliante, Mary Elcano, Karen Intrater, Traci Gann, Kim Brown, Kevin Hagan, Geoff Drucker, Lisa Sharp, Andrew Colsky, Pat Richter, Pat Boylan, Trisch Bass, Laree Martin, Richard Reyes, and their many wonderful colleagues. In addition, we are indebted to Lisa Bingham for her work in conducting and publishing extensive research on the REDRESS program in all stages of its development and implementation.

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We also want to thank our families for their support over the years. Their generosity has given us ample, guilt-free time to devote to this work, and their confidence in our enterprise has encouraged us at every step. Special thanks to Shulamis Bush for editorial help.

Finally, we want to express our appreciation to the professional staff at Jossey-Bass, especially Alan Rinzler and Seth Schwartz, for their careful editorial guidance in the development of this new and revised edition. And we will always be grateful to those who supported the publication of the first edition, particularly Cedric Crocker at Jossey-Bass, the late Jeff Rubin at Tufts University, and Linda Putnam at Texas A&M University.

The Institute for the Study of Conflict Transformation, mentioned here and in Chapter Four, is an excellent source of further resources on the transformative model of conflict practice, including
other publications on transformative mediation as well as the med-iation videotape on which Chapters Four and Five are based (and we thank the actors who played the parties in the videotape: Julia Denny, Bernice Joland, and Elizabeth Van Dyke). The Institute can be accessed on the Web at www.transformativemediation.org.

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The Promise of Mediation
Ten years ago, we wrote The Promise of Mediation to call our colleagues' attention to a disturbing state of affairs in the mediation field. In our view, the potential that mediation offered to foster and support positive human interaction within conflict was being squandered. Instead mediation was being used to shore up institutional processes that operate to control, contain, and settle conflict, because of a prevailing view that conflict interaction is a fundamentally negative social force. We argued for an alternative approach to mediation, now known as transformative mediation, basing our argument on a theory of the larger political and social values implicit in different conflict intervention approaches.

Part of the reason for linking our model to certain underlying values was our conviction that those values—referred to in the first edition as constituting a relational worldview—are the soundest basis for constructing social institutions. However, the emphasis on underlying values was also part of the wake-up call that we intended our book to carry: we wanted to suggest that mediation practice in general is not “value-free” but is based on ideological or value premises, no matter what model is being used. Indeed, in the Foreword to the first edition, series editor and Harvard scholar Jeff Rubin noted, “The fact that Bush and Folger are so frankly ideological and value driven in their analysis will also disturb those readers who wish for a value-neutral appraisal of the mediation industry.” Rubin foresaw that—in
large part due to its explicitly value-based approach—*The Promise of Mediation* would garner both ardent support and strong criticism. And he was right on both counts. Many have found the book’s clarification of value premises helpful in giving them a more stable place to stand: a value center that they sensed but could not easily find on the then-existing map of the field. It helped people align their practices with the implicit values, the core ideology, that ultimately made practice meaningful and coherent. But others found the book’s message unsettling, because it challenged the presumption of value neutrality that allowed them to practice without articulating any core premises to explain and justify their enterprise.

In both of these kinds of response, appreciative and critical, the first edition of our book has fulfilled the purpose we had in mind. That purpose, stated most generally, was to wake up the field from its inattention to the link between core values and practices and to shift it toward a greater attention to those values, especially *relational values*, and the practices they engender. We believe that this shift has begun to take place. There is greater and more critical attention today to the value implications of particular forms of mediation practice, and there is greater acknowledgment that there are indeed distinct “models” of practice being used. We see the disagreement that has unfolded about these various models as a healthy sign, a sign that the field is moving through its awkward adolescence. Equally important to us, there is greater acceptance that the transformative model of mediation is not only appealing and coherent at the value level but also workable and sustainable at the level of actual practice. Transformative mediation has become a well-defined choice, as the ideological foundations of this model have been more fully articulated, and as the nature of transformative training and practice has been developed. Our experience with implementing transformative mediation in numerous organizational, governmental, and private practice arenas has strengthened our sense of the appropriateness and viability of this model of practice in all contexts where mediation is practiced.
In keeping with the shifts we see in the field, our intentions in this new and revised edition are different than they were ten years ago. Our goals in this book are to explain why this form of practice is important and needed, to illustrate how mediators actually work within this framework, to clarify the impact that this practice has on parties’ conflict interaction, and to suggest how it can be implemented in the present institutional context of mediation practice. We describe the ways in which the field has shifted—in discourse, conceptualization, and practice—toward recognizing both the value dimensions of mediation and the viability of alternative models of practice, and the transformative model in particular. At the same time, we address the fact that there is still resistance to transformative values and practices, stemming most of all from the pressures and demands of institutional users and stakeholders in certain arenas with historical importance to the field. And we propose ways of understanding and dealing with these sources of resistance.

Chapter One offers some further context for discussion of the transformative model, by describing several different views of the mediation process that are often heard in the field, and situating the transformative model among those views.

Chapter Two sets forth a full picture of the premises, goals, and benefits of the transformative model of mediation, grounded in theory and research on human conflict and accompanied by concrete illustrations. The definition of mediation as supporting conflict transformation is explained, as is the nature of the mediator’s role. This chapter also clarifies certain ambiguities in our articulation of the values and practices of the transformative model in the first edition that led to difficulty for some in grasping the aims and methods of the model. In particular, we clarify our use of the term moral growth and its relation to the transformative model and the process of changing conflict interaction. We also make a clearer distinction between the private and public benefits of transformative mediation and focus more on the benefits of the model to disputing parties themselves.
This chapter draws in part from a chapter coauthored by Baruch Bush and Sally Pope for another volume (Bush and Pope, 2004).

Chapter Three documents how the transformative model has influenced the field and has gained a solid foothold within it in the decade since the publication of the first edition of *The Promise of Mediation*. First, the chapter shows that the concerns we raised in the first edition, about the field's undue emphasis on the goal of settlement, have come to be shared much more widely. Second, the chapter describes how the rhetoric of “good practice” has shifted to give more attention to values and practices similar to those of the transformative model. Finally, the chapter documents the growth in the explicit use of the transformative model in many organizations and contexts, as well as the substantial advances in the “technology” of transformative practice that have been achieved by trainers and practitioners using the model.

Chapters Four and Five present, in two parts, an entirely new case study to illustrate the use of the transformative model. The case—a difficult contract dispute between a homeowner in an upscale development and the development’s homeowner association—is taken from a videotaped mediation simulation, based on a real case but using professional actors as parties. The case is presented in full, in script form, with commentary by the authors that includes considerable material on the essential skills of transformative mediation practice. The videotape itself is available from the Institute for the Study of Conflict Transformation, mentioned previously in the Acknowledgments.

Chapter Six offers a review of some of the most common misconceptions about the transformative model of mediation, as well as clarifications that address and correct these misconceptions.

Finally, Chapter Seven addresses, at a deeper ideological level, the reasons why many in the mediation field are increasingly moving away from certain forms of prevailing practice that are viewed as troublesome and toward transformative practice. We show how understanding this shift rests on a clear view of the values and worldviews on which fundamentally different forms of practice are built.
In summary, these are the main benefits that readers can expect to get from this new and revised edition of *The Promise of Mediation*:

- A broad picture of how the field has shifted in the last decade and how that shift has resulted in more acceptance of the transformative model

- A significantly clearer articulation of the values, theory, and practices of the transformative model, including the clarification of ambiguities that may have caused difficulty in accurately understanding the model

- A rich new case study, based on a videotaped mediation session, that offers a vivid picture of the model in practice and a substantial amount of new information about how to be an effective practitioner

- A vision for the future that shows how the model can coexist with other approaches to mediation, as well as where the market for transformative mediation specifically is emerging and developing
Roughly thirty-five years ago, in a variety of places around the United States, many groups and individuals became interested in a process of dispute resolution called mediation. Although mediation had long been used in labor disputes, the new surge of interest extended to many other contexts, including community, family, and interpersonal conflict. The use of mediation has grown over the last three decades or so. Prior to 1965, mediation outside the labor relations arena was practically unheard of. Then, in the late 1960s, attention was focused on mediation from two very different directions: civic leaders and justice system officials saw in mediation a potential for responding to urban conflict and its flash points; and community organizations and legal reformers saw in mediation a potential for building community resources alongside the formal justice system. Though the motives and approaches were quite different, the combined effect was to make the idea of mediation of neighborhood or community disputes a widely accepted and legitimate concept.

In practical terms, this meant the expansion of the community mediation field from a few isolated programs in 1970 to nearly two hundred by the early 1980s and to more than double that number today. Moreover, as a result of its acceptance in this field, mediation was used in an increasingly broad range of nonlabor disputes: divorce, environmental, housing, institutional (including prisons,
schools, and hospitals), small-claims, personal injury and insurance, and general business disputes, as well as claims involving governmental agencies (Singer, 1990). In recent years, this trend has continued. Private businesses and even lawyers are finding mediation attractive, spurring the start-up and expansion of for-profit mediation services. The use of volunteer and professional mediators has been institutionalized in many court programs, so much so that courts often cannot imagine how caseloads could be handled without the use of these mediation programs. In many instances, the increasing reliance on mediation within the courts has been due to the courts’ proclivity to require mediation, not only in divorce and small-claims cases but in civil litigation generally.

Across the mediation field, mediation is generally understood as an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement. This common formulation captures some of the major features of the process, especially its informality and consensuality. It also reflects the view that the most significant effect of the process is the production of a voluntary settlement of the dispute. Settlement is often seen as the primary or even sole value of mediation in institutional settings like the courts, where disposition of cases is the main motivation for using mediation.

There is nevertheless an extraordinary divergence of opinion about how to understand the growth of the mediation field and how to characterize the mediation enterprise itself. This divergence is so marked that there is no one accepted account of how the mediation field evolved or what it represents. Instead the literature of the field reveals several very different accounts or “stories,” told by different authors and stressing different dimensions of the mediation process and its private and public benefits. Thus mediation is portrayed by some as a tool to reduce court congestion and provide “higher-quality” justice in individual cases, by others as a vehicle for organizing people and communities to obtain fairer treatment, and by still others as a covert means of social control and oppres-
sion. And some (including us) picture mediation as a way to foster a qualitative transformation of human interaction. Indeed these are the four main accounts that run through the literature on mediation. We call them, respectively, the Satisfaction Story of the field, the Social Justice Story, the Oppression Story, and the Transformation Story.

Four Stories of the Mediation Process

The fact that there are four distinct and divergent stories of the mediation field suggests two important points. On one level, it suggests that the field is not monolithic but pluralistic—that there are in fact different approaches to mediation practice, with varied impacts. The stories represent these different approaches. On a deeper level, the existence of divergent stories suggests that although everyone sees mediation as a means for achieving important private and public goals, people differ over what goals are most important. So the stories also represent and support different goals, some of which are seen by some people as more important than others for the process to fulfill.

Recounting the different stories of the field is therefore a good way both to illustrate the diversity of mediation practice and to identify the value choices implicit in varying approaches to practice. The following summary of the four stories presents each one as it might be told by its authors and adherents.

The Satisfaction Story

According to this story, “The mediation process is a powerful tool for satisfying human needs and reducing suffering for parties to individual disputes. Because of its flexibility, informality, and consensual nature, mediation can open up the full dimensions of the problem facing the parties. Not limited by legal categories or rules, it can help reframe a contentious dispute as a mutual problem. In addition, because of mediators’ skills in dealing with power imbalances,
mediation can reduce strategic maneuvering and overreaching. As a result of these different features, mediation can facilitate collaborative, integrative problem solving rather than adversarial, distributive bargaining. It can thereby produce creative, ‘win-win’ outcomes that reach beyond formal rights to solve problems and satisfy parties’ needs in a particular situation or, alternatively, remedy parties’ difficulties. The mediation field has employed these capabilities of the process to produce superior quality solutions for private disputants in cases of all kinds—that is, solutions that best satisfy the parties’ needs and remedy their difficulties.

“Furthermore, in comparison with more formal or adversarial processes, mediation is characterized by an informality and mutuality that can reduce both the economic and emotional costs of dispute settlement. The use of mediation has thus produced great private savings for disputants, in economic and psychic terms. In addition, by providing mediation in many cases that would otherwise have gone to court, the mediation field has also saved public expense. It has freed up the courts for other disputants who need them, easing the problem of delayed access to justice. In sum, the use of mediation has led to more efficient use of limited private and public dispute resolution resources, which in turn means greater overall satisfaction for individual ‘consumers’ of the justice system.

“This holds true for all the various contexts in which mediation has been used. Child custody mediation, for example, has produced better-quality results for both children and parents than litigated rulings. Small-claims mediation has resulted in higher party satisfaction with both process and outcome, and higher rates of compliance than litigation. Environmental and public policy mediation have produced creative and highly praised resolutions, while avoiding the years of delay and enormous expense that court action would have entailed. Moreover mediation in these areas has reduced court case-loads and backlogs, facilitating speedier disposition of those cases that cannot be resolved without trial in court. In these and other
kinds of disputes, mediation has produced more satisfaction for disputing parties than could have been provided otherwise.”

The Satisfaction Story is widely told by a number of authors. Many are themselves mediators, either publicly employed or private practitioners or “entrepreneurs” (Williams, 1997; Hoffman, 1999; Moore, 2003). Some are academics. Some who are both practitioners and scholars have been very influential in supporting this story of the movement (Stemple, 1997; Golann, 1996; Susskind and Field, 1996; Menkel-Meadow, 1995; Mnookin and Ross, 1995; Fisher and Brown, 1989; Susskind and Cruikshank, 1987; Folberg and Taylor, 1984; Fisher and Ury, 1981). Also quite influential are the many judges and other justice system officials who tell this story, including former Chief Justice Warren Burger (1982) and many other judicial leaders (see Galanter, 1985).

The next two interpretations of the mediation field, the Social Justice Story and the Transformation Story, differ somewhat from the Satisfaction Story. The Satisfaction Story claims to depict what has generally occurred in the use of mediation thus far, whereas the other two describe something that has admittedly occurred only in part thus far. In effect, these are “minority” stories of the field, but each is still seen by its adherents as representing mediation’s most important potential.

The Social Justice Story

According to this story, “Mediation offers an effective means of organizing individuals around common interests and thereby building stronger community ties and structures. This is important because unaffiliated individuals are especially subject to exploitation in this society and because more effective community organization can limit such exploitation and create more social justice. Mediation can support community organization in several ways.
Because of its capacity for reframing issues and focusing on common interests, mediation can help individuals who think they are adversaries perceive a larger context in which they face a common enemy. As a result, mediation can strengthen the weak by helping establish alliances among them.

“In addition, mediation reduces dependency on distant agencies and encourages self-help, including the formation of effective grassroots community structures. Finally, mediation treats legal rules as only one of a variety of bases by which to frame issues and evaluate possible solutions to disputes. Mediation can therefore give groups more leverage to argue for their interests than they might have in formal legal processes. The mediation field has used these capacities of the process, to some extent at least, to facilitate the organization of relatively powerless individuals into communities of interest. As a result, those common interests have been pursued more successfully, helping ensure greater social justice, and the individuals involved have gained a new sense of participation in civic life.

“This picture applies to many, if not all, of the contexts in which mediation is used. Interpersonal neighborhood mediation has encouraged co-tenants or block residents, for example, to realize their common adversaries, such as landlords and city agencies, and to take joint action to pursue their common interests. Environmental mediation has facilitated the assertion of novel (and not strictly legal) claims by groups that have succeeded in redressing imbalances of power favoring land developers. Even mediation of consumer disputes has helped strengthen consumers’ confidence in their ability to get complaints addressed, which has led to other forms of consumer self-help and has increased consumer power. In short, mediation has helped organize individuals and strengthen communities of interest in many different contexts—and could be used more widely for this purpose.”

The Social Justice Story of the mediation field has been told for a long time, though by a relatively small number of authors, usually