

Moving Mediation Back Toward Its Historic Roots—Suggested Changes by Joseph P. McMahon, Jr.

ADR articles are sponsored by the CBA Alternative Dispute Resolution Section. The articles printed describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.



About the Author

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This article discusses the current state of mediation. Much of the content of this article was presented at the Colorado Bar Association First Annual Statewide Alternative Dispute Resolution Conference held in Denver on September 28, 2007.

This article focuses on the following two questions: Has the field of mediation¹ reached its full potential, or is it on a plateau? Have mediators or users of mediation and facilitation accepted a status quo for mediation that is substantially less than its full potential? This article suggests that: (1) the legal community has learned to accept low-functioning mediation; and (2) changes are needed to bring commercial and environmental mediation to their full potential.

Many cases and conflicts are effectively resolved in mediation. Mediation and facilitation continue to achieve great successes. However, commercial mediation may be under-functioning.²

To improve the functioning of mediation, this article suggests that mediators and the legal community should consider doing the following:

- 1) broaden the definition and process of mediation;
- 2) take steps to fully employ party-to-party dialogue³ rather than accepting the standard of working in separate rooms with party communications relayed by a mediator; and

3) consider whether contemporary mediation processes have borrowed excessively from litigation and thereby brought into mediation the separateness that accompanies litigation.

The article further suggests that mediators:

1) should resist being defined and driven by the market and its expectations in ways that diminish mediation's full potential;

2) should avoid the temptation to dispense mediation services and, instead, move toward counseling parties about processes that fit their needs (rather than providing off-the-shelf processes); and

3) should not sell mediation as a principally cost-saving undertaking, but instead lead parties to mediation as their best option when the conditions are suitable.

The Current State of Commercial Mediation and Facilitation

After the growth of mediation during the 1980s and 1990s, several factors may have caused the use of mediation and facilitation to expand. However, at the same time, mediation may have lost sight of some of its founding principles.

Commoditized Mediation

Notwithstanding the efforts and successes of many mediators and mediation organizations, this article questions whether a substantial part of mediation services are designed to respond to a market norm. For example, in business mediation, the market norm typically is the settlement conference, which involves using confidences passed to mediators by the parties. Mediators then attempt to find the so-called ZOPA (zone of possible agreement)⁴ and encourage, or in some instances even push, parties to an agreement.

As mediation became more widely accepted in the 1990s, in part driven by court-ordered alternative dispute resolution (ADR), ADR became a business. ADR firms increased in size and number.⁵ This article suggests that, responding to the demand of the market, parties or their lawyers seemed to prefer mediation that isolates the parties, with the mediator shuttling offers and counteroffers between them. This might be because: (1) keeping the parties separate permits the parties to remain in conflict, because the conflicting parties do not need to directly address each other; (2) confrontation is minimized, because the only confrontation experienced is from a mediator who may repeat to each party the opposing party's contentions; (3) by staying separate, some illusions that support the conflict remain unchallenged; and (4) for those who tend to exaggerate, embellish, or "spin," it is easier to do so in the absence of someone with direct knowledge of the events. This article further suggests that, perhaps for expedience and docket clearing, the court-based settlement conference became the norm for mediation. Lawyers accustomed to court settlement conferences also could become comfortable with mediation processes that mimic court settlement conferences and retain the role and power of lawyers.⁶

As the settlement conference model became the market norm, mediation based on party-to-party dialogue began to diminish⁷ or, in some instances or locations, disappear. The court-fashioned settlement conference emphasizes the lawyer role. Observing this same mediation emphasis, Professor John Lande noted that "[w]hen a lawyer takes the lead, the principal [party representative] may feel reluctant to participate so as not to interfere with

the lawyer's handling of the case."⁸ Lande also noted that a norm of lawyer control in mediation may deprive some principals of meaningful opportunities to speak and decide for themselves, which many would value if offered.⁹

The mediation models used by the more economically successful ADR firms then were copied and adopted by newly emerging ADR firms.¹⁰ One expert has referred to the "burgeoning of an industry dedicated to the provision of mediation, arbitration, early neutral evaluation, and other dispute resolution services."¹¹

Dialogue among conflicting parties grew more and more infrequent.¹² As the lawyer role increases in mediation, the lawyers tend to shop for parties, and parties leave the decision of selecting a mediator to their lawyers.¹³ Consequently, it seems that a new mediator in 2008 must enter the ADR marketplace knowing that there is an expectation that he or she will follow the market custom. The existing practices in 2008 rarely are based in dialogue. When disputing parties meet face to face, debate rather than dialogue is the common form of communication.

Indicators of ADR Commoditization

This article suggests that the following factors may have contributed to a commoditization of mediation and ADR processes:

> There is pressure for new mediators or those seeking to expand their practice to conform rather than adopt new styles.

> Lawyers have expectations and desires to use processes with which they are familiar and comfortable.

> There are more and larger ADR firms competing for the same engagements; for governmental users of mediation, requests for proposal or fixed-term ADR contracts have become quite common.

> Prospective mediation clients inquire about billing rate, success rate, and availability, rather than on the mediation process and how it can address their case. What often is lacking in the mediator interview are questions such as:

- o Why do you mediate?
- o What got you into this?
- o How are cases like this best addressed?
- o What is your idea about conflict?
- o How should we approach this case?
- o What do you expect from me and my client?
- o What do you do with impasse?
- o What causes impasse and how do you try to get around it?

When mediation became a business, mediation training also became a business. Mediators no longer served part-time to work out particularly challenging matters and bring to the business world some of the successes of family law mediation. Instead, mediation became a marketed commodity.¹⁴

At the same time, business development became a focus. Larger firms needed development coordinators and persons to seek and respond to ADR requests for proposals. Potential clients considered mediation a "service" that was purchased from businesses—for example, federal agencies became purchasers of mediation services.

These trends are a natural part of growth and are not negative *per se*. However, it is important to consider their effects on the practice of mediation. It also is important to consider whether, as mediation has grown, direct party-to-party dialogue has lost its value and been replaced by law-centered approaches to mediation.

Possible Effects of Commoditized Mediation

The law-centered approach to mediation is characterized by processes that make or impose substantial changes in the original (less law-oriented) approaches to mediation. The law-centered approach supports:

- separation of parties—for example, in litigation, plaintiffs and defendants are on opposite sides of the courtroom; in law-centered mediation, the parties are in separate rooms
- party positions are focused primarily on legal rights rather than on needs or interests
- demands or complaints replace the parties' personal stories
- as is now common in the courtroom, the emphasis is on documents rather than persons
- conflict becomes monetized
- law is the key external reference
- increased power is held by the mediator as an external reference point—for example, the mediator often is asked to provide a reality check on case outcomes
- lawyers have a greater role and greater responsibilities, thereby decreasing the role of the parties themselves.

Settlement Conferences

Although "mediation" has a broad meaning, in the business sector it tends to refer to a settlement conference conducted by a mediator who holds confidences and acts as a communication agent for each party. In this role, the mediating agent gives and receives communications as an agent.

Proponents of such a shuttle with confidences maintain that this approach, where the mediator obtains confidences and then shuttles, produces a higher level of disclosure than when parties are in the same room.¹⁵ However, Howard Raiffa's negotiation text, *Lectures on Negotiation Analysis*,¹⁶ suggests that, to the contrary,¹⁷ interest-based and party-centered agreements produce more efficient results (and provide a better value for all parties).

Dialogue-Based and Separation-Based Processes

Perhaps it was error to frame the mediation debate of the 1990s as "facilitative" versus "evaluative."¹⁸ Instead, the debate should focus on "dialogue-based" versus "separation-based" processes.

It is important to consider why mediation may have diminished or even abandoned dialogue among conflicting parties. Doing so may have happened in response to market demand or in an effort to promote efficiency.

In some types of mediation, conflicting parties are separated and engage in little or no dialogue. That suggests the efforts and interventions of the mediator or facilitator must replace what would have been accomplished by dialogue. This places enormous power in the hands of the mediator.

If denial and avoidance are thought to be the most universal responses to conflict,¹⁹ it is important to consider whether separation-based mediation merely plays into and enables such a response to conflict. If so, it is time to evaluate whether mediation and facilitation were really intended to provide support for such denial.

A Strategy for Change

There are five concepts and perspectives that could bring about changes to mediation and facilitation. These changes would help re-align mediation with its historic roots.

Assess Before Intervening

Before scheduling and undertaking the mediation, parties and mediators should spend some time considering the parties' conflicting goals, the attitudes present, and the behaviors that may make resolution difficult. Although a great deal has been written about how to conduct a conflict assessment, its usage in commercial mediation is relatively rare. Alternatively, conflict assessments, often written and distributed to the stakeholders, is a rather common practice.

One method for premediation assessment is to conduct an hour-long conference call with the mediator and counsel, to discuss key issues from a nonadversarial perspective. This is an alternative to the confidential mediation statement.

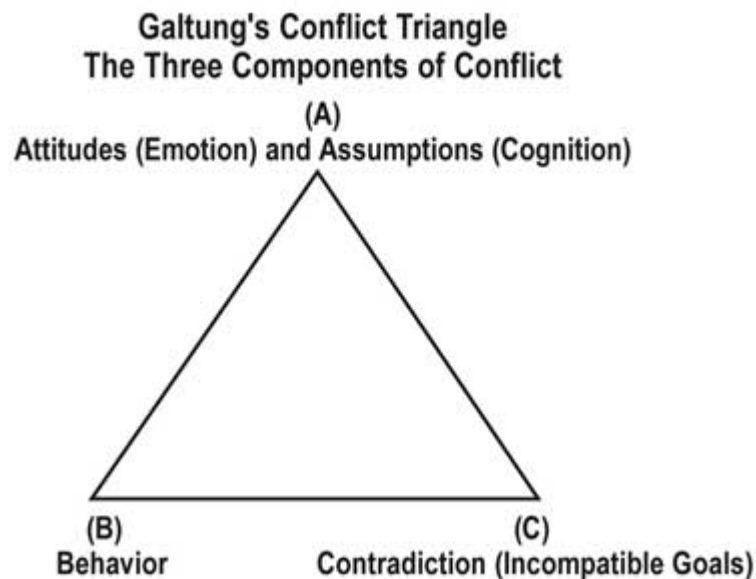
The following questions could be addressed during the conversation:

- > What is the background to the conflict?
- > What were the triggers?
- > What are the key elements of the conflict?
- > Who are the best parties to participate in the mediation?
- > What information exchange before mediation would help the mediator and parties?
- > What is the status of any adjudicatory matters?
- > What are the varying views of the best scope for the mediation process?
- > What must be addressed? What other matters could help us find resolution?

Such discussion can help legal counsel and the mediator plan and prepare for the session. It may help them determine the most fruitful approaches and sequencing of issues. The intent is dialogue, rather than the passing of information through the confidential mediation statement.

Another or a supplemental approach to assessing conflict is the use of the Galtung Conflict Triangle. (See accompanying sidebar entitled "Galtung's Conflict Triangle.") As a pioneer in conflict study, Johan Galtung developed a simple method of using a conflict triangle to help understand conflict. Galtung's teachings suggest that, for work in legal conflict, having a theory of conflict is indispensable.²⁰

Under Galtung's approach, three components are necessary elements of conflict: (1) attitudes/assumptions; (2) behaviors; and (3) contradiction in goal. From this perspective, all three elements are required to have a real conflict. Galtung warns that focusing on only one of the three elements in an assessment will result in an incomplete understanding of the real conflict.



The mediator should look at the triangle from the perspective of each actor. To consider possible interventions to transform the conflict, the mediator should inquire as follows:

- > What are the behaviors that have triggered or may trigger the conflict?
- > Are there attitudes that, without adjustment, make resolution impossible?
- > What are the real contradictions in goals? Do the parties understand them? Why are they incompatible?

According to Galtung, "each conflict has its own life cycle" that is almost organic.²¹ Frustration over contradicting goals may lead to negative attitudes (distrust, anger, apathy) and behaviors (threats, demands) that then lead to new contradictions in goals. Thus, "a conflict may almost get eternal life, vexing and waning, disappearing and reappearing."²²

Although mediation seeks to address (C), the apex of the triangle, very often the attitudes (A) and behaviors (B) make doing so difficult or impossible. A mediation or other process may need to be planned to address the As and Bs of the conflict.

Isolating the parties in separate rooms during a mediation is not a means of addressing the challenges but serves merely as an avoidance mechanism. Conflict avoidance comes at a cost, and in mediation, the cost is difficult to assess because it is impossible to determine the outcome had the conflict been more directly and authentically approached. However, avoidance is a common response to conflict; hence, the widespread popularity of the settlement conference form of dispute resolution.

Use Mediation Processes Based on Consultations With Parties

Building on his prior work, Edgar Schein has produced an important text on how to provide consultation to parties in need (presumably mediation parties are in need of consultation). The text, *Process Consultation Revisited*,²³ describes three models of providing consultation.

The expert model. In the expert model, parties seeking advice purchase services from an expert. Success in the expert model depends fully on whether: (1) the users of the advice correctly diagnosed their own needs; (2) the users correctly communicated their needs to the consultant/mediator; and (3) the users correctly assessed and selected the consultant. There is frequent dissatisfaction by users and low rates of implementation due to errors in the three assumptions listed above. Another danger in this model is that the consultant (here, the mediator) tends to sell what he or she knows rather than what the users (mediation parties) need.²⁴ Mediation relying on the expert model is risky. However, it is almost impossible to know when a mediation has failed, because the mediator and parties generally only mediate once; what could have happened had parties interacted differently therefore is unknown.

The doctor-patient model. In the doctor-patient model,²⁵ the consultant (mediator) is brought in to complete a diagnosis and recommend a prescriptive measure. This model puts even more power in the hand of the consultant/mediator, who is charged with diagnosing, prescribing, and administering.²⁶ This model can be appealing to consultants/mediators, because they retain control. Schein notes that, despite widespread popularity, this model is fraught with difficulties and risks.²⁷ A key assumption is that the mediator can make an accurate diagnosis, which is particularly challenging when parties (patients) may hide, distort, or exaggerate information. Parties may resist the advice given or decline to make the changes that are recommended. As with the expert model, detection of failure is difficult or impossible.

The process consultation model. The third and recommended model for consulting parties is that of "process consultation." Under the process consultation model, the approach is one of collective diagnosis of the problem and best solutions. This model assumes that parties need help in diagnosis, but not a wholly external diagnosis of their conflict and appropriate solutions.²⁸ However, this model assumes that parties often are not sure about what they need, and therefore a quick diagnosis—such as a one-day mediation—may be erroneous.

If this model is applied to mediation, it could include the following:

- a period of joint diagnosis by the mediator and all parties about the reality of the conflict
- beginning mediation with an open mind and without a clear mission, goal, or defined problem
- the assumption that there is a willingness among the parties to design processes that will make the conflict resolution processes more effective
- a goal is to help the parties make the diagnosis
- the mediator and the clients share the responsibility for insights and action planned
- the mediator and the clients share power
- the conflict and problem belong to the clients and are theirs to solve
- the danger in the immediate solution is recognized.²⁹

Mediators should work diligently to understand the three forms of consultation—the expert model; the doctor-patient model; and process consultation—and to provide process consultation as much as possible and certainly when appropriate. Process consultation is what parties most commonly need in conflict to get durable solutions and make changes to reduce future conflict.

Promote Real Dialogue

Support for the market model of mediation ("the market knows what it needs and what it needs is the settlement conference") is claimed in the high settlement rates in commercial settlement conferences. However, a high percentage of civil cases always have settled, even long before mediation was in vogue. Increasing litigation costs (actual and opportunity costs) over recent decades make litigation prohibitive for many parties, and that may be causing increased settlement rates.

Although litigation is founded on separateness, it is not necessarily appropriate to use ADR processes that are founded on separateness, such as keeping the parties physically separated, using excessively legalistic procedure, and having the mediator function like an arbitrator. As an alternative to litigation, mediation need not mechanically follow the concepts of separateness.

Mediators should consider using and recommending ADR processes that are based in dialogue. This article suggests that the barriers to dialogue are based on four factors. In preparing for mediation, each of these four factors could be discussed, although not always to agreement. (See the accompanying sidebar entitled "Why is dialogue feared or resisted? Consider these four factors.")

Why is dialogue feared or resisted? Consider these four factors:

1. Denial and avoidance of the conflict or its underlying actions, or the person's ego or self-identity. Examples:

- "I don't deal with people like that."
- "I won't talk with people who accuse me of [taking money, breaching an agreement, lying, etc]."
- "My presence [their presence] will make things worse. It's better for us to be separated."
- "I am tired of them; just go away."
- "I don't have to justify my offer or my views to them."

2. Confusion about what is needed to participate in dialogue, or lack of any experience in real dialogue. This occurs when a person does not understand that it is possible to engage in dialogue while remaining steadfast to key interests. Parties might have a feeling that even meeting with the opposing party is an admission of wrongdoing or in some way will weaken their position.

- "If I do so, I will be pressured to give up a key interest."
- "If I do so, I will appear weak, or not as steadfast as I really am."
- "I don't want to be talked out of my position."

3. Desire to "spin" or "game" the mediation process. It often is perceived to be easier to spin or game the process when not in the presence of the other party. This is particularly true of a party who makes "sham" offers.* There may be a desire for some anonymity in making very self-centered proposals for settlement, relying on the mediator to convey the offer.

4. Real fear for safety and physical security for self or others, due to prior events or threats. This is rather rare in commercial matters but not wholly out of the question; it is more common in harassment and victim-offender matters.

* The term "sham offers" in this context means offers made with no expectation that they would be accepted, that likely are far from the opposing party's bona fide needs, and that are meant to convey that the offering party feels strongly about his or her position..

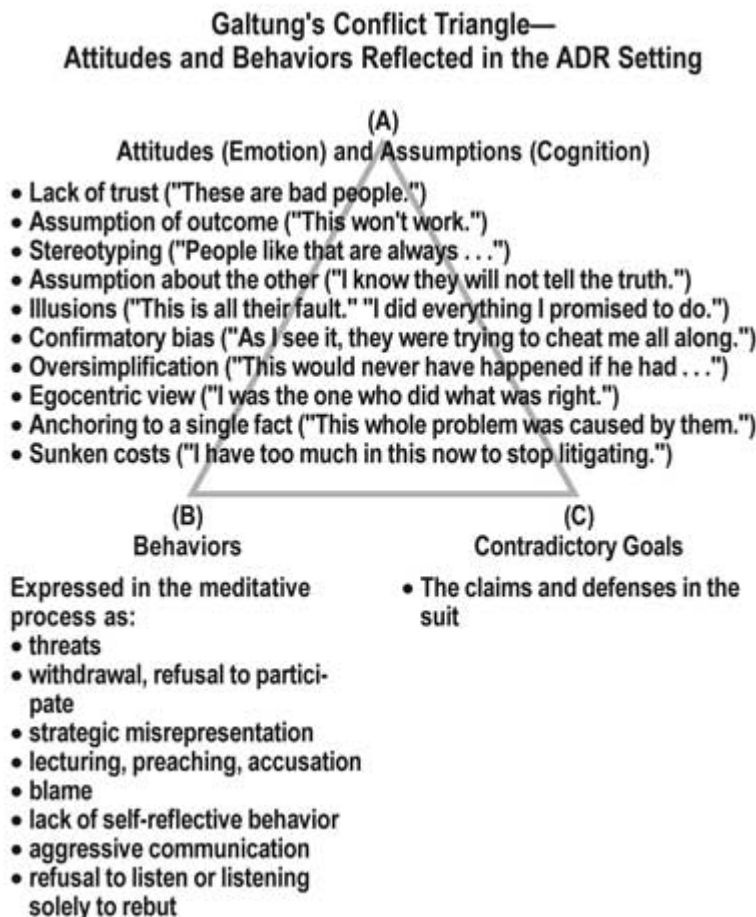
Use Mediation Processes That Address the Conflict

As discussed above, the assessment of the conflict and the process used to address the conflict should consider the parties' conflicting goals, as well as their attitudes and behaviors. Without all three, there is no conflict.

Mediators should use processes that address all three elements of conflict (conflicting goals, attitudes, and behaviors) and that employ interest-based negotiation. The Galtung conflict triangle described above is a useful approach to this task.

The lawsuit that brings the parties to the mediation is merely symbol of the conflict, not the conflict itself. The litigation documents—such as the complaint, answer, and discovery—describe some of the conflicting goals, but are not the actual conflict. The mediator and the parties must determine what the real conflict is.

When an ADR process or mediation seeks to jump directly to resolution of the conflicting goals, danger lurks. The attitudes, when not discussed, tend to play out in many ways and can block potential resolutions. Similarly, negative behaviors can shut down communication. (See "Galtung's Conflict Triangle—Attitudes and Behaviors Reflected in the ADR Setting," *below*.)



Although the above attitudes and behaviors are understandable and common, they block meaningful dialogue and effective resolutions. The question is how to design and undertake a meaningful conflict process to minimize the adverse effects.

Moving beyond avoidance through separation, the best approach to dealing with negative behavior and attitudes can include the following:

> Having a candid discussion of what has happened in the past and what behaviors and attitudes are present or likely present. The mediator should engage counsel and the parties

to identify behaviors and attitudes and discuss how counsel may coach and advise the clients to better participate.

> Beginning the mediation with a discussion of the various barriers to working together as expressed in past and present attitudes and behaviors that have been negative.

> Establishing needed ground rules to minimize negative behaviors and attitudes. Of course, behaviors are more easily controlled than attitudes, and counsel play a key role in helping to positively adjust attitudes.

> Sequencing the meditative process to attempt to build at least minimal levels of trust. For example, the parties may work to make progress on some less-divisive matters before moving on to the more challenging issues.

> Using a mediation process in which the parties periodically and as needed: (1) reassess the process using agreed-on success standards, such as the agreed-on guidelines; and (2) be self-reflective about the role they are playing in the difficulties.

> Asking the neutral to offer a situation assessment: How are we doing? What is getting in the way?

Use Mediation Processes That Seek Clarity and Rebuild Relationships

Mediation can be more than a way to exchange offers and counteroffers aimed at the eventual execution of a settlement agreement. That execution may be necessary but not sufficient to help a client reduce future conflict, with this same party in an ongoing relationship or in other relationships. Thus, the mediator should consider shaping mediations so that they not only seek to end the conflict that is presented but also equip the parties to build new perspectives or relationships. If the parties are "one-off players" who have no continuing relationship, they may use the principles of conflict transformation³⁰ to avoid future but separate conflicts.

Within the phrase "conflict resolution" lie some assumptions. A key assumption is that some form of final, terminal resolution is available. However, some conflict theorists say the conflict really never is resolved; instead, the conflict merely continues in a different form, perhaps positive or perhaps negative.³¹

It is important for the mediator to consider whether conflict resolution adequately meets the client's needs. Perhaps "resolution" suggests that problem solving, from a static perspective, is the preferred approach.

An alternative is to consider conflict as a complex of factors—including the attitudes, behaviors, and contradictions—that need to be transformed. The transformation sought includes the following:

- moving destructive conflict to constructive conflict
- moving nonnegotiable to negotiable
- moving unproductive to productive

Transformation brings with it an end to the undesirable and also creates a new relationship or new perspective that reduces conflict.

Questions for Mediators

The concepts addressed in this article may raise some questions for mediators. These questions could include:

- > Are you fully satisfied with the quality of dialogue among conflicting parties in the mediations in which you participate?
- > Do you find that mediation processes tend to be mediator-centered rather than party-centered?
- > In what ways do the mediations you encounter fail to reach their full potential? Why? Was it more than just problems with the opposing side of the suit?
- > In what ways does my institution or law firm need to change to have greater clarity about conflict and approaches to conflict?
- > In what ways does my institution contribute (directly or indirectly) to some of these problems (such as conflict avoidance) and what steps could mitigate the effects?

These are important questions, which to some extent go unasked. Considering these question may bring about beneficial changes in a mediator's approach to conflict.

Conclusion

Now that mediation has been a relatively common process for more than twenty years, this may be an opportune time to question and assess some approaches to mediation. By broadly considering conflict and mediation, it may be possible not only to enhance mediation and facilitation processes but also to move these processes back toward their historic roots—that being processes based on parties telling their stories in face-to-face dialogue aided by a mediator who can guide them to more effective communications.

Notes

1. This article uses the term "mediation" to encompass mediation and facilitation. Both terms have broad meanings. The intent is to address litigation-focused ADR processes that aim for lawsuit settlement or simplification.
2. This article suggests that mediation is under-functioning and in need of change. The null hypothesis is that mediation and facilitation processes are functioning effectively and no systemic change is needed. Of course, there is little statistical data to prove or disprove the hypothesis. Arguably, the economic success of mediation and ADR firms suggests the hypothesis is false.
3. The term "dialogue" refers to direct party-to-party dialogue, rather than attorney-to-attorney or party-to-mediator-to-party exchanges.

4. See "What is ZOPA and why does it matter?" available at www.beyondintractability.org/essay/zopa.

5. It can be argued that the mediator who most broadly services the market demand can build the broadest practice—one responsive to "market demands." See Stulberg, "Facilitation Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock," 24 *Fla. State U. L.Rev.* 992 (1997), available at www.law.fsu.edu/journals/lawreview/downloads/244/stulberg.pdf.

6. See Lande, "Lawyers' Routine Participation Directs Shape of 'Liti-Mediation,'" 16 *Alternatives to the High Cost of Litigation* 53 (1998).

7. See Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation* (Sept. 2000), available at www.mediate.com/articles/zumeta.cfm.

8. Lande, *supra* note 6 at 3.

9. *Id.*

10. Professor John Lande has referred to the marriage of litigation and mediation as "liti-mediation"—where mediation has become an institutionalized part of litigation. *Id.* at 1.

11. Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,'" 1 *J. of Empirical Legal Studies* 843, 869 (Nov. 2004), available at www.iamed.org/pdf/Final%20Vanishing%20Trial%20Article%20TJS.pdf.

12. Lande, *supra* note 6 at 2:

Routine lawyer participation in liti-mediation is likely to result in increasing (1) dependence of principals on lawyers for managing a mediation strategy, (2) dependence of mediators on lawyers for continuing referrals, and (3) control by lawyers of the mediation process. As a result, relationships between mediators and lawyers are likely to develop that may overshadow their respective relationships with the principals.

13. *Id.* at 3:

As lawyers become repeat-users of mediation services, mediators may well see the lawyers as the mediators' clients, rather than the principals, with whom the mediators are much less likely to have repeat business. This is especially likely where the lawyers, rather than the principals, shop for mediators.

14. See Stipanowich, *supra* note 11 at 869.

15. Spangler, "Caucus," *Beyond Intractability* (June 2003), available at www.beyondintractability.org/essay/caucus ("[s]eparating the parties allows more open communication between the party in caucus and the mediator"). See also Brahm and Burgess, "Shuttle Diplomacy," *Beyond Intractability* (Nov. 2003), available at www.beyondintractability.org/essay/shuttle_diplomacy.

16. Raiffa, *Lectures on Negotiation Analysis, Harvard Program on Negotiation* 10-22 (1996).

17. Raiffa, *Art and Science of Negotiation* (Harvard Univ. Press, 1982).
18. See Stulberg, *supra* note 5 (discussion of these models).
19. Augsberger, *Mediating Conflict Across Cultures* 234-35 (Westminster/John Knox Press, 1992).
20. Galtung, *Peace by Peaceful Means* (Sage Publications, 1996).
21. See Galtung, *Conflict Transformation, Transcend, Trainers' Manual 5* (1997) (manual prepared for the United Nations Disaster Management Training Program).
22. *Id.*
23. Schein, *Process Consultation Revisited* (Addison Wesley, 1999).
24. *Id.* at 7-11.
25. *Id.* at 11-15.
26. *Id.* at 12.
27. *Id.* at 13.
28. *Id.* at 18.
29. *Id.*
30. Lederach, *The Little Book of Conflict Transformation* (Good Books, 2003).
31. See *id.* at 3-6.