

2002

Substituting Mediation for Arbitration: the Growing Market for Evaluative Mediation, and What it Means for the ADR Field

Robert A. Baruch Bush

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Robert A. Baruch Bush, *Substituting Mediation for Arbitration: the Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 Pepp. Disp. Resol. L.J. 111 (2002)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/164

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field

Robert A. Baruch Bush*

The past decade has seen significant expansion in the acceptance and use of mediation as a process for handling disputes. That expansion has been particularly marked in the legal and business sectors. Indeed, old hands in the ADR field observe that mediation has begun to replace arbitration as the “process of choice” in the ADR (Alternative Dispute Resolution) “market,” including institutional users like courts and major private consumers of ADR like businesses.¹ All this is seen by some as part of the “mainstreaming” of mediation discussed by Joseph Folger’s lead article in this Symposium.² The primary question examined in this essay is: How do we best understand and interpret this development in the ADR field? That is, what is the most convincing account of what this “mediation expansion” phenomenon represents? As postmodernism tells us, there can be many different interpretations of any phenomenon — whether literary, historical, social, or otherwise — and the same applies to developments in ADR.³ This es-

* Rains Distinguished Professor of ADR Law, Hofstra University School of Law; Fellow, Institute for the Study of Conflict Transformation.

1. See, e.g., Ellen Joan Pollack, *Arbitrator Finds Role Dwindling as Rivals Grow*, WALL ST. J., April 28, 1993, at B1; Deborah R. Hensler, *In Search of “Good” Mediation*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231 (Joseph Sanders & V. Lee Hamilton, eds., 2001), at note 5 and accompanying text [citing E. Plapinger & D. Stienstra, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1996), and D. Stienstra et al., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997)(reporting growth in court-connected mediation programs and decline in court-annexed arbitration programs) and T. Donzhue & B. Deinhardt, *Survey: ADR Use Increasing*, 15 ALTERNATIVES TO HIGH COST LITIG. 66 (1997)(reporting survey results showing 87% of corporations used mediation in a three-year period in comparison to 78% using arbitration over the same period)].

2. See Joseph P. Folger, *Mainstreaming Mediation*, 3 PEPP. DISP. RESOL. L.J. (forthcoming 2003).

3. See, e.g., Dorothy J. Della Noce, *Ideologically Based Patterns in the Discourse of Mediators: A Comparison of Problem-Solving and Transformative Practice* 78-79 & nn. 7-9

say will construct an account of the current expansion in mediation suggesting the phenomenon has little to do with mediation at all and more to do with another, more traditionally accepted process, namely, arbitration.

The structure of the discussion below is that, after describing the largely agreed-upon nature of the current "expansion" in the use of mediation, I will present two different interpretations or accounts of what the phenomenon represents.⁴ In each case, one question is whether the account given squares with what we know about other developments in and beyond the larger ADR system or market. An even more important question is what implications each account carries for policies about mediation.

(2002) (unpublished dissertation) (on file with author) (summarizing the elements of postmodernism, comparing it to modernism, and noting critiques of postmodernism). See also, Kenneth J. Gergen, *Constructionist Dialogues and the Vicissitudes of the Political*, in *THE POLITICS OF SOCIAL CONSTRUCTION* (I. Velody ed., 1998) (available at <http://swarthmore.edu/SocSci/kgergen.1/text7.html>) (summarizing the major sources and streams of postmodernist thinking in literary studies, social sciences, and law).

4. I do not pretend to be neutral regarding the developments discussed herein. First, I am interested in mediation much more than other ADR processes. Second, I am a strong advocate of what my colleagues and I call "transformative mediation." In the transformative model of mediation, the mediator's role is *entirely* facilitative, meaning that a mediator's job is to *facilitate a conversation* without a predetermined end, not to facilitate the resolution of a dispute per se. Therefore, the mediator offers no advice or substantive direction, as to either content *or* process; the focus is not on settlement per se, but on support for party deliberation and perspective-taking. Settlement takes care of itself if the mediator supports party decision-making and inter-party communication. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994); Robert A. Baruch Bush and Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. (forthcoming 2003). There are clearly major differences between the transformative model of mediation and "evaluative mediation" as described and discussed in this article. See *infra* notes 7-9 and accompanying text. While they are not always as clearly recognized or understood, there are also significant differences between the transformative model and what is often called "facilitative mediation." See, e.g., Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). Two of the most important differences are: (1) in the facilitative model, the objective of "facilitation" is specifically a resolution or settlement of the dispute; and (2) in order to attain that goal, the facilitative mediator routinely offers both advice and substantive direction on matters of process. See, e.g., Della Noce, *supra* note 3, at 248-50. However, for purposes of this article, the assumption is that the transformative and facilitative models, despite their distinctions, are both essentially different from evaluative mediation, in that they both maintain the mediator should have no role in influencing the ultimate substantive outcome of the process. See, e.g., Riskin, *supra*. Compare Della Noce, *supra* note 3, with Stacy Burns, *The Name of the Game is Movement*, 15 MEDIATION Q. 359 (1998).

WHAT EVERYONE AGREES ON

Whatever may be said of the early growth of the "modern mediation movement," there is wide consensus that the current "expansion" is due to a marked increase in the use of what is commonly referred to as "evaluative mediation."⁵ This proposition applies both to the growth of mediation use in new domains (such as commercial, administrative, and workplace conflicts) and to a shift in older areas of mediation practice (such as family and community conflicts) to a more openly evaluative form of practice.⁶

In each area of practice, there is evidence of a rising level of "market demand" for a form of mediation in which the mediator provides expert case evaluation (assessing strengths and weaknesses of each party's case), substantive settlement recommendations (based on predictions of court outcomes, for example), and strong pressures to accept those recommendations, in addition to tightly managing the discussion process.⁷ Recently, in two independent publications, Professors Nancy Welsh and Deborah Hensler each summarized numerous studies documenting the extent to which mediation practice increasingly follows this kind of evaluative model in response to "market demand".⁸ The market referred to here includes both private and institutional consumers, especially courts (and similar agencies) and lawyers, and cases of all kinds,

5. See *infra* notes 7-9 and accompanying text.

6. See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 23-27 (2001). See also Hensler, *supra* note 1, at 239-245. This expanded use of an evaluative model of mediation has generated a good deal of controversy and opposition, especially among those who hold that mediation is by definition a facilitative rather than evaluative process. See *infra* notes 7 & 9. See also, Kimberlee Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, ALTERNATIVES TO HIGH COST LITIG., Mar. 1996, at 31; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997). For a summary of the ensuing debate, see, e.g., Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEG. L. REV. 145, 146-54 (2001); Welsh, *supra*, at 27-30.

7. The evaluative model of mediation, and its key elements, was first identified as such by Professor Riskin, although it bears clear resemblance to directive forms of practice identified earlier outside of the legal arena. See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, ALTERNATIVES TO HIGH COST LITIG. Sept. 1994, at 7; Riskin, *supra* note 4. See also Della Noce, *supra* note 3, at 52-58; Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, note 5 and accompanying text (1996) (referencing earlier discussions of "directive" forms of mediation practice and the general view that mediation practice follows distinct and different "models").

8. See Hensler, *supra* note 1, at 239-45; Welsh, *supra* note 6, at 23-27.

from commercial and business to family and divorce matters. In all these areas, mediation has increasingly become an evaluative and directive process — “directive” meaning the mediator not only offers judgments but exerts substantial pressure on the parties to accept them.⁹ This is justified, however, as a necessary and desirable response to a strong demand from mediation consumers for just this kind of process.¹⁰

Though “anecdotal evidence” is less reliable than that in research studies, “stories” can still help to enliven the dry report of the above evidence that evaluative mediation is becoming the model of choice. Consider a few recent experiences reported by colleagues. At a conference in Seattle, a retired judge now working as a mediator said (to paraphrase): “I don’t worry about the definition of mediation. When parties come to my office I know what they want; they want me to tell them my opinion about how to settle the case, and that’s what I do.” She says she has plenty of work. Another example: At a statewide conference on mediation in Texas, one workshop presented a panel of top lawyers answering the question, “What do lawyers want from mediators?” The answer, according to all the panelists (again, to paraphrase): “We want someone to bang heads, to knock some sense into our clients and get them to settle.”

Another story, from the other side of the world, where things seem to be moving along similar lines: At a workshop my colleague Joe Folger and I conducted for mediators in Australia, focusing on the transformative model, several participants told us: “We’re commercial mediators, and we are strongly interested in using the transformative approach, or at least a facilitative model. But it’s the judges who send cases to mediation: they tell the lawyers to find a mediator, and the lawyers all want *George*!” Who is George? George attended an evening session during the workshop, and put forth his view pretty clearly: “What’s wrong with pressure? The parties come to me because they want to be out of there with a settlement by 6:00 PM. I give it to them. And if it takes a little advice-giving and even arm-twisting, so be

9. For example, in light of what she perceives as the increasingly coercive character of evaluative mediation, Professor Welsh has analogized its practices to those of judicial settlement conferences. See Welsh, *supra* note 6, at 25-27, 59-78. She has even suggested the need for a “cooling-off” period after mediated agreements to protect parties from the “high pressure sales tactics” of some evaluative mediators which she compares to those of a “pitchman” in a home solicitation sale.” *Id.*, at 89-90.

10. See, e.g., Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949, 982-83 (1997); Robert Moberly, *Mediator Gag Rules: Is it Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 675 (1997); Donald Weckstein, *In Praise of Party Empowerment - and Mediator Activism*, 33 WILLAMETTE L. REV. 501, 511 (1997). These authors all stress the value evaluative mediator practices have for the parties to mediation.

it." Both George and the others agreed on one thing: George has a full appointment book and a waiting list while the would-be transformative or facilitative mediators have a lot of spare time on their hands.

One may reasonably ask: Why is there such an increased demand *now* for this kind of directive, "arm-twisting" mediation process? The view that predominated until recently, in the mediation field, was that mediation's attraction was due precisely to the fact that it offered a non-impositional, consensual, *facilitative* alternative to more binding third-party processes, including both adjudication and arbitration.¹¹ Indeed, the central value and watchword of mediation, echoed in the scholarly and practitioner literature, in "policy papers" of professional mediator organizations, and even in statutory provisions on mediation, was "self-determination."¹² That is, according to its core principle, mediation was defined as a process in which the parties themselves identified issues, developed options for settlement, and decided freely whether and on what terms to settle, without pressure or even substantive advice from outside experts. The mediator's role was to guide and facilitate the process, but certainly not to determine or even influence the outcome. It was argued or assumed that this opportunity for self-determination in handling disputes was precisely the feature that made mediation an attractive "alternative" to ADR consumers.¹³

Against this background, the growth in use of evaluative mediation represents a significant shift, and indeed, it has generated considerable controversy.¹⁴ And yet, the evidence strongly suggests that, to the extent the use of mediation has increased in recent years, the mediation involved is largely evaluative in nature.¹⁵ In short, the "mediation expansion" referred to above is really an "evaluative mediation expansion." This raises an important question: If the premise is true, that mediation's facilitative character is what orig-

11. See, e.g., Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989); BUSH & FOLGER, *supra* note 4, at 1-22.

12. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, § I (1994) (describing self-determination as "the fundamental principle of mediation"). See also Welsh, *supra* note 6, at 3-4, 15-21.

13. See Welsh, *supra* note 6, at 15-21. See also JAY P. FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING DISPUTES WITHOUT LITIGATION* 4-7 (1984); Riskin, *supra* note 11; Bush *supra* note 11.

14. See *supra* note 6.

15. See *supra* notes 7-10 and accompanying text.

inally made it appealing, why has evaluative mediation been the “growth center” of the mediation industry in recent years?

Here is where the discussion must shift from facts to interpretation. In other words, the facts regarding this phenomenon, the “shift” toward the use of an evaluative model of practice mainly in response to market demand, are not really in dispute. However, different accounts or interpretations are possible regarding what this phenomenon represents and why it is occurring just now. Two such accounts follow, each telling a different “story” about what the expansion of evaluative mediation means for the ADR field.

THE “BETTER INFORMED CONSUMER” STORY

Some commentators see the growth in evaluative mediation as a positive development, brought about by better understanding among clients of what they want from mediators. This account suggests that, as mediation has become more widely used and more familiar, consumers of the process have come to realize the value of, and therefore demand, more substantive involvement from the mediator. Especially in cases that are headed for, or are already in the legal system (where the parties generally, but not always, have lawyers), mediation clients have become frustrated and dissatisfied with mediators who refuse to offer substantive information, outcome predictions, and advice — all in the name of “preserving party self-determination.” In fact, it is argued, most clients *want* such evaluative services, up to and including the exertion of pressure by the evaluator to close a deal, and performing these services honors rather than impedes client self-determination in the broad sense.¹⁶ It should be noted that the “mediation clients” who express this preference for evaluation may well be lawyers for contending parties, rather than the parties themselves, because it is the lawyers who are generally the direct consumers of mediators’ services. Nevertheless, within the practically defined “market” for mediation services, the demand for evaluative practices is quite real.

This view is consistent with the fact, also widely documented, that the large majority of the mediation conducted in the U.S. is connected in some way with the court system and has been for many years.¹⁷ Personal injury and

16. See Stemple, *supra* note 10; Moberly, *supra* note 10; Weckstein, *supra* note 10; James Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66-71 (1991); Barbara McAadoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL’Y 376, 390 (1997); Thomas Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 144-45 (1997).

17. See Welsh, *supra* note 6, at 23-27; Dorothy J. Della Noce, *Mediation Theory and Pol-*

commercial mediations, divorce and family mediations, and even mediation of community disputes, begin in most cases with a referral from a court or some other authoritative public agency, whether to a private mediator or a mediation program. Therefore, most parties who come to mediation are already operating "in the shadow" of legal or other regulatory agencies, and they are very often represented (or at least advised) by lawyers.¹⁸ Given that this is so, it makes sense that they want a mediator who will provide expert information, advice, and even a strong push if needed, so their "self-determined" decisions make sense in relation to the body whose shadow is a substantial presence in the case. The fact that mediation ultimately allows parties to accept or reject an agreement, no matter how strong the mediator's hand, adds to the appeal of the process, since it eliminates (or at least vastly reduces) the risk of an adverse result by third-party decision.

Thus, the current expansion in mediation represents a growth in demand for mediation as a "low-risk" evaluation/settlement conference process, taking place mostly "in the shadow of the law" in court-related venues, with the demand fueled primarily by courts, other public agencies, and lawyers (or parties who expect to be engaged with them). This growth is the result of a more educated consumer, who better understands what mediation has to offer, after decades of exposure to the process, and is prepared to take advantage of it when presented with a form of practice that is genuinely helpful.¹⁹

icy: *The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 547 (2002).

18. See Welsh, *supra* note 6, at 23-27.

19. A somewhat less sanguine variant of this "informed consumer" story is offered by other commentators. The variant account agrees the growth of evaluative mediation is tied to increased demand, but stresses that this demand was itself created by the increasing domination of mediation by lawyers and the legal system. As lawyers and courts engaged the mediation field in large numbers, both as consumers and as mediators, they have simply changed the process into their own image, making it more like the adversarial and directive forum they are accustomed to. See, e.g., Dorothy J. Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. (forthcoming 2003). See also Welsh, *supra* note 6, at 23-27. Usually, this view of the evaluative mediation phenomenon goes with a critical view of its impact on the mediation field; nevertheless, for some, the greater use of mediation in legal settings provides an even stronger justification for the use of evaluative practices. See, e.g., Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 96-99 (2002). Moreover, even if lawyer mediators are disposed by training and inclination to use evaluative practices when they mediate, the demand for, and satisfaction with their services, suggests those practices have real value for consumers (even if a large number of those consumers are themselves lawyers). See Guthrie, *supra* note 6. In short, the demand for evaluative mediation cannot be downplayed by

In sum, according to the “informed consumer” story, it is indeed the shift to evaluative mediation that has fueled the expansion of mediation use, and the explanation of this phenomenon is that with this shift, mediation has found its “niche,” its true place of utility to consumers in the overall ADR market. Moreover, this represents an advance for the ADR field as a whole, because the market for ADR will continue to be bolstered by the expanding market for evaluative mediation.

THE “GOODBYE ARBITRATION, HELLO MEDIATION” STORY

The second account of the mediation expansion phenomenon does not take issue with the above view of the present state of affairs in the mediation field, so far as the basic facts are concerned. It accepts the evidence that it is the rise in the use of evaluative mediation that accounts for the expansion of use of mediation overall.²⁰ It also accepts the fact that most mediation takes place (and in the modern era, always has) in the shadow of the courts and related institutions, and that lawyers play an increasing role as both mediators and mediation clients.²¹ However, this second story begins with the observation that while the basic facts given earlier are valid, they are not the only relevant facts. More specifically, the changes in the mediation market in recent years have been taking place in the larger context of the general market for ADR processes. Additional facts, about the changes taking place in other parts of the ADR market, shed interesting light on the mediation expansion phenomenon.

It is generally accepted that until the 1980s, the most widely used ADR process was arbitration, both private and court-ordered. From the time the Federal Arbitration Act was adopted in 1925, the use of private arbitration had grown steadily, especially since the 1960s, and especially in the commercial sector; moreover, court-ordered arbitration became widespread beginning in the mid 1960’s and through the 1970s.²² In several important cases, the

saying that no matter what parties want, the increasing numbers of lawyer-mediators are going to provide an evaluative process simply because that is the kind of process they are comfortable with. The demand seems to be real, whatever its motivating forces or its consequent impact on the mediation field.

20. See *supra* notes 5-15 and accompanying text.

21. See *supra* notes 16-18 and accompanying text.

22. See LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* (1990); Robert A. Baruch Bush, *Dispute Resolution—The Domestic Arena: A Survey of Methods, Applications and Critical Issues*, in *BEYOND CONFRONTATION: LEARNING CONFLICT RESOLUTION IN THE POST-COLD WAR ERA* 9 (John A. Vasquez et al. eds., 1995); Hensler, *supra* note 1; Deborah Hensler, *Court-Annexed ADR*, in *DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK* 352 (John H. Wilkinson ed., 1990); Frank E.A. Sander,

courts strongly endorsed the use of arbitration in the securities industry, both for consumer disputes (including fraud claims) and for employment disputes between brokers and firms (including discrimination claims).²³ This court endorsement led to expanded use of arbitration in other industries for both consumer and employment disputes.²⁴ At the same time, the courts approved the use of arbitration in business matters previously considered beyond its reach, such as antitrust claims.²⁵ Led by the U.S. Supreme Court, courts across the board upheld and encouraged the use of the arbitration process as an alternative to lawsuits.

Then, in the late 1980s and early 1990s, a shift began to occur. The practice of compelling investors to arbitrate fraud claims, and employees to arbitrate discrimination claims, evoked powerful and sustained criticism, from advocates, scholars and policymakers. Lawsuits against arbitration agreements were filed and articles lambasting "mandatory binding arbitration" filled the literature, despite the courts' continued endorsement of arbitration.²⁶ In addi-

Alternative Methods of Dispute Resolution: An Overview, 37 FLA. L. REV. 1 (1985).

23. See *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987)(upholding agreement to arbitrate an investor's RICO and 1934 Exchange Act fraud claims); *Rodriguez De Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1987)(upholding agreement to arbitrate an investor's 1933 Securities Act fraud claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)(upholding agreement to arbitrate a financial services employee's age discrimination claim).

24. See, e.g., Christine Dugas, *Arbitration Might Be the Only Choice*, USA TODAY, August 27, 1999, at <http://www.usatoday.com/money/wealth/consumer/mcw053.htm> (noting an increased use of arbitration agreements in consumer contracts with banks, credit card companies, and home-improvement lenders, among others); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997)(upholding agreement to arbitrate a security guard's race discrimination claim).

25. See *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

26. See, e.g., Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 U. DENV. L. REV. 1017 (1996). See also Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445 (1999); Katherine Eddy, Note, *To Every Remedy a Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts*, 52 HASTINGS L.J. 771 (2001). The term "mandatory binding arbitration" is itself somewhat ironic, because binding arbitration is by its legal nature contractually based and thus voluntary, and it is only court-ordered arbitration that is really mandatory. By the "mandatory arbitration" usage, the critics mean to suggest that in the employment (and often the consumer) context, the employee (or consumer) is effectively forced into arbitration by a more powerful party. With few exceptions, however, the courts have refused to overturn such agreements on the grounds of adhesion or unconscionability, rejecting the notion that employees/consumers have no alternatives to accepting them.

tion, some courts began suggesting that, while arbitration agreements would be enforced, the arbitration procedure itself needed to become more protective of parties' rights.²⁷ Reading the handwriting on the wall, the ADR and business communities began to "retool" the arbitration process to stave off the critics.

Beginning first in securities arbitration, and spreading to other areas, a variety of protective elements were added to the arbitration process. What had been an almost completely informal and non-reviewable process—and therefore relatively speedy, inexpensive, easy to use, and final—was modified to include more formal elements, including: greater provision for discovery; submission of written briefs; requirements that decisions conform to legal principles (making legal argumentation more important) and be embodied in written opinions; and greater court scrutiny of arbitrator decisions on appeal.²⁸ Some of these modifications of the arbitration process were demanded by courts in certain jurisdictions.²⁹ Others were adopted as a matter of self-regulation by arbitration agencies (or brokers) and by the business community, even where no court decision required them.³⁰ The seeming reason was the fear that increasing public scrutiny and negative publicity in major cases would weaken public confidence in the arbitration process, killing the goose that laid the golden egg.

Perhaps ironically, the move toward a more protective process may have accomplished precisely what it was intended to avoid. Making the arbitration process more protective automatically and inevitably makes it more formal, cumbersome, expensive, and contingent. In other words, it makes arbitration more like the judicial process itself. Nor were the effects of these "reforms"

27. See, e.g., *Cole*, *supra* note 24 (court upheld arbitration only after finding the arbitration process would permit significant discovery, require a written award, and be subject to meaningful judicial review); *Halligan v. Piper Jaffrey*, 148 F.3d 197 (1998) (court overturned arbitration award after careful review of evidence presented during arbitration, because arbitrators ignored strong evidence of discrimination and failed to explain their award).

28. See, e.g., Edward Brunet, *A Decade After McMahon: Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1460-92 (1996); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 425-32 (2000); Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 766-67, 775-80 (2001).

29. See *supra* note 27 and accompanying text.

30. See, e.g., *Cole*, *supra* note 28, at 775-80. Professor Cole discusses the "Due Process Protocol," a set of principles adopted by two major arbitration providers, the American Arbitration Association and JAMS/Endispute, which "attempts to transform the traditional arbitral hearing into a process more closely mirroring the procedural and substantive protections the litigation process offers," for employment disputes involving statutory claims. *Id.* at 776. See also, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 91 DAILY LAB. REP. (BNA), May 11, 1995, at A-8, E-11.

limited to certain kinds of cases; the reformist impulse, coupled with the increasing involvement of lawyers as advocates in arbitration, began to change the shape of arbitration practice generally.³¹ The result was a movement towards a "judicialized" form of arbitration, resembling adjudication itself more than the original arbitration process.³²

The response of the ADR market to these developments was predictable. Arbitration had begun to lose the very features that made it attractive and popular in the first place — its speed and low cost, simplicity and finality. Consumers are not stupid. If the product no longer meets the need for which it was originally sought, it loses its appeal. The reform of arbitration began to produce a decline in its popularity, beginning in the late 1980s.³³ This is where the new set of facts, concerning developments in arbitration practice and use, intersects with the set of facts laid out earlier, concerning developments in mediation practice and use.

The decline of arbitration's usefulness for its original purposes may have reduced the ADR market's taste for arbitration, but by no means did it decrease the market's taste for a cheap, fast, simple and final process. It simply meant ADR consumers had to look elsewhere for such a process; and look elsewhere they did. I recall a conversation I had around that time with a regional director of the American Arbitration Association, probably the largest private provider (or broker) of arbitration services. He told me (with some surprise) that the greatest growth in caseload in his office was now in commercial *mediation*. As arbitration went down in popularity, mediation went up.³⁴ The correlation was by no means a coincidence, according to this second account of the mediation expansion phenomenon.

Consider an analogy: Beginning some years ago, the government raised fuel efficiency standards for automobiles, with the result that the large, heavy cars and station wagons so popular in the 1960s and '70s could no longer meet those standards. Cars inevitably started to shrink and shed their heavy metal casing for plastic and other lighter materials.³⁵ It turned out, however,

31. See *Cole*, *supra* note 28, at 777-80 (discussing the Revised Uniform Arbitration Act, a new model arbitration law, drafted as a model for regulation of arbitration in general which would "provid[e] judicialization of all arbitration." *Id.* at 777.

32. *Id.* See also *Green*, *supra* note 28, at 400-02; *Brunet*, *supra* note 28, at 1460-92.

33. See *Hensler*, *supra* note 1 (documenting the contemporaneous decline of arbitration use and increase of mediation use, in both the court-connected and private ADR sectors).

34. *Id.*

35. See Sam Kazman, *Large Vehicles are the Solution, Not the Problem*, WALL ST. J.,

that many consumers preferred big vehicles not just because of a taste for tail fins, but because of a desire for comfort and, more important, protection from injury. With demand for size and solidity still strong, producers realized that, with a little adjustment here and there, *trucks* could become, in effect, big cars; and the regulations permitted less fuel efficiency in trucks. The rest is history: the emergence of a kind of “luxury truck”, the “sports utility vehicle,” the new version of a big, heavy car.³⁶ Consumers substituted a new product for one that no longer met their needs.

With this analogy, and against the context of the arbitration developments recounted above, the rapid growth of interest in evaluative mediation among courts and lawyers can be interpreted quite differently than in the “informed consumer” story. According to the “goodbye arbitration” story, use of evaluative mediation has grown, not because consumers who were originally offered a facilitative process came to understand they needed a more directive one, but because consumers accustomed to using a cheap, simple and directive process could no longer obtain it in its original form. In short, evaluative mediation has expanded not because it is a preferred alternative to facilitative mediation, but because *it is a substitute for the arbitration process as that process used to operate.*

The market saw that arbitration was being rendered obsolete and dysfunctional, but some sort of informal, settlement-producing process was still needed and desired. That process was “found” in evaluative mediation. From the late-1980’s and onward, the use of evaluative mediation grew in order to replace the increasingly “judicialized” arbitration process with another process that would avoid formality, cost and delay, but preserve finality and settlement, under the strong, controlling hand of substantive experts. Of course, evaluative mediation is not a perfect substitute for old-style arbitration; it is not “final and binding” in a strict legal sense, mediation agreements do not have the legal status of arbitration awards, and so on. Neither can an SUV, even the fanciest one, match the grand luxury of an old-style Cadillac. But, given the regulatory constraints in each case, the “new” product is a fairly good substitute for the original one, which is unavailable in any case.

March 12, 1998, at <http://www.cei.org/gencon/019,0235.cfm> (discussing how the federal Corporate Average Fuel Economy (CAFE) standards induced “downsizing” and weight reduction for cars by automakers).

36. See Julie DeFalco, *We Luv Our Suvs*, COMPETITIVE ENTERPRISE INST. UPDATES, February 1, 1998, at <http://www.cei.org/gencon/005,01282.cfm> (noting SUV’s and minivans make up about 40% of new motor vehicle purchases because since automakers stopped making large station wagons, due to the high CAFE standards for cars, consumers “gravitated towards light trucks, which provide them with the space, power and comfort they need” and do not violate the lower CAFE standards for trucks).

The most important implications of this account also parallel those of the SUV analogy. The SUV era has not meant an overall increase in motor vehicle sales; it has meant a shift away from cars to, in effect, trucks. Similarly, the growth in the use and practice of evaluative mediation probably does not constitute an expansion of ADR *generally*; it is simply a shift by longtime users of ADR from an obsolescent "product line" to a viable substitute. To recall my earlier anecdote from Australia, it's true that George is getting all the business, rather than the would-be facilitative mediators. But it is not *new* business. It is not even, strictly speaking, mediation business. It is old arbitration business, now redirected to "mediators" providing the same old service under a new name. Nor is the mediation being provided a new or unique product; it is a reconstituted version of the old one, a substitute for an arbitration process that has become unusable for its desired purpose.

With some differences in the details, the same account explains why court-ordered arbitration has increasingly given way to court-ordered mediation.³⁷ The aim of the consumer, in this case the court system, has not changed. It is the cheap and speedy disposition of cases in order to decongest court dockets. Court-ordered arbitration, which unlike private arbitration was never final and binding, was essentially a verdict-prediction process designed to promote settlement, and it was quite successful in doing so in some jurisdictions. However, evaluative mediation, in which mediators not only predict verdicts but also pressure parties to accept settlements on the basis of their predictions, is arguably even a better settlement production process. In effect, it is a kind of judicial settlement conference conducted by an adjunct judge, who is called an evaluative mediator.³⁸ The shift from arbitration to evaluative mediation in court-ordered ADR programs therefore makes perfect sense from the institutional consumer's viewpoint.

37. See, e.g., Hensler, *supra* note 1, at note 5 and accompanying text (citing E. Plapinger & D. Stienstra, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES (1996)).

38. In fact, commentators have noted that evaluative mediation, particularly in the court-annexed context, closely resembles the process of a judicial settlement conference. See, e.g., Welsh, *supra* note 6, at 25-27; Burns, *supra* note 4, at 368-70 (Commentary by Sharon Press). Professor Welsh, in particular, ties her analysis of the evolving meaning of "self-determination" in court-connected mediation and the best method of protecting this value, to the analogy between evaluative mediation and judicial settlement conferences. See Welsh, *supra* note 6, at 57-78.

This is a very different view of evaluative mediation's expansion than that of the "informed consumer story." This story tells us that evaluative mediation has expanded *not* as an alternative to non-evaluative forms of mediation, but rather as a substitute for arbitration. However, considering the totality of the relevant facts, I submit that it is the more plausible interpretation of the evaluative mediation phenomenon.

IMPLICATIONS FOR THE ADR MARKET: NOT EXPANSION, BUT QUALITY CONTROL

There are a number of corollaries that follow if the "goodbye arbitration" story is accepted as the more persuasive explanation of evaluative mediation's expansion. The first corollary, which should be somewhat sobering for ADR promoters and providers, is that growth in consumption of a substitute product does not mean an expanded market overall. The field is simply holding old customers, not making new ones. The expansion of evaluative mediation probably does not indicate a significant new interest in ADR; rather, it represents a shift in consumption from arbitration to evaluative mediation, implying a relatively static field without much new market growth. In a field that has seen itself as a "growth industry" for several decades, this account of the evaluative mediation phenomenon may not be welcome. Nevertheless, accepting it can at least help bring clarity to current discussions about what policies are appropriate for the field; and this can help solidify and strengthen the quality of programs, practices, and public confidence.

For example, assuming evaluative mediation is here to stay as a desirable and workable substitute for arbitration, its practitioners should be held to standards appropriate for their role as expert case evaluators and settlement promoters.³⁹ For mediators working in court-connected or law-related contexts, this may well mean that only lawyers should qualify to practice in that setting. That is, if the process is an arbitration substitute, then similar qualifications for practice should apply. Court-ordered arbitration programs almost

39. Some commentators have suggested this view implicitly, whether as regards mediator qualifications, training, ethics, or competency. *See, e.g.,* Welsh, *supra* note 6, at 34-59, 82-86 (analyzing efforts in mediator ethics codes to protect against party coercion in evaluative practices); Hensler, *supra* note 19, at 97-99 (discussing functions that should be included and excluded in evaluative mediation practice); Marjorie Corman Aaron, *The Highwire Art of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62 (1996), and Marjorie Corman Aaron & David P. Hoffer, *Decision Analysis as a Method of Evaluating the Trial Alternative*, in *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (D. Golann, ed., 1997) (describing key skills needed for effective evaluative practice). *See also infra* note 42 and accompanying text.

always require arbitrators to be lawyers.⁴⁰ Why should court-ordered mediation programs do differently, given the evaluative aims and nature of the process being used? Even private arbitration in arenas with important legal dimensions, like securities and employment arbitration, has grown increasingly legalistic and, therefore, tended to require legal expertise for arbitrators.⁴¹ In the evaluative mediation of such cases, should less be required of the mediators? In short, the arbitration-substitute account strongly suggests an answer to the question of whether mediation should be considered the practice of law.⁴² If evaluative mediation is being used, and arbitration in a similar case would probably have required a lawyer-arbitrator, then the same should be true of mediation.

Furthermore, the realization that evaluative mediation is an arbitration substitute makes clear that it is simply inappropriate to regulate evaluative and facilitative (or other non-evaluative) mediation practitioners by the same standards, whether as to qualifications, training, competency or ethics. Holding both facilitative and evaluative mediators to the same standards is, in effect, like holding mediators and arbitrators to the same standards; neither policy would make any sense.⁴³ Instead, policymakers should acknowledge the

40. See Hensler, *supra* note 19.

41. See *supra* notes 26-32 and accompanying text.

42. See, e.g., Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, NAT'L INST. DISP. RESOL. NEWS, March/April, 1996. See also Dorothy J. Della Noce, *Mediation Could Be the Practice of Law, But It Doesn't Have To Be*, NAT'L INST. DISP. RESOL. FORUM, June, 1997, at 16; Burns, *supra* note 4, at 369-70 (commentary of Sharon Press). The question mentioned here and discussed by the cited authors, though it is often described in these terms, has two distinct dimensions. The first concerns the broad question of qualifications for practice, i.e., whether only lawyers are qualified to mediate. The second concerns the narrower issue of whether even lawyers, when mediating, are engaged in the practice of law. The point made in the text concerns the first of these two dimensions. That is, when evaluative mediation is understood as an arbitration substitute, it is clear that wherever the case would demand a lawyer as arbitrator, it would equally demand a lawyer as mediator.

43. Interestingly, the earliest set of "practitioner standards" drafted to cover mediators indeed attempted to address all forms of third party practice at once. See SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, CODE OF PRACTICE FOR NEUTRALS (1985). It was quickly recognized that such a global framework for quality assurance was simply unworkable given the great differences between the processes and practices involved. Thereafter, ethical standards for mediators were addressed in separate codes designed to address the mediation process on its own terms. See, e.g., Bush, *supra* note 11 (discussing several examples of codes of practice formulated specifically for mediators). See also Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 (1994) (including a proposed code of practice for mediators).

differences between evaluative mediation and other, less directive, models of practice, and establish distinct sets of standards for the genuinely different processes involved. To give one particularly salient example, the continuing controversy over the establishment of uniform mediator competency standards can, and should, be informed and guided by this understanding. Diversity of practice models should be accounted for through diversity in professional regulatory policies.⁴⁴

Finally, another corollary of the arbitration-substitute account is to clarify that the expansion of evaluative mediation has not come at the expense of, and in fact may have little to do with, the market for facilitative or transformative mediation, because the latter are very different products likely to attract different consumers. That is, although evaluative mediation seems to have competed successfully for former consumers of arbitration, it has probably left many other consumers largely unimpressed. Those are the consumers, assuming there are some, whose potential interest in mediation arises from a desire for the benefits originally claimed for the process: better quality solutions; preservation and improvement of relationships; restoration of a sense of control or self-determination; and so on.⁴⁵ The expansion of evaluative mediation has certainly not provided these benefits any more than the use of arbi-

44. The issue of regulatory diversity applies not only to mediator ethical standards, but also to qualifications, training protocols, and quality assurance (skills competency). In fact, the last of these areas has seen the most explicit discussion of the uniformity v. diversity question. From the late 1980s to the present time, much effort has been focused on articulating the "common core" of mediation practice and constructing universal "performance tests" by which any mediator's competency could be measured. See, e.g., Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOTIATION J. 149 (1988); Christopher Honeyman, *The Common Core of Mediation*, 8 MEDIATION Q. 73 (1990); TEST DESIGN PROJECT, INTERIM GUIDELINES FOR SELECTING MEDIATORS (1993); MEDIATOR SKILLS PROJECT, AN INTERIM REPORT OF THE MEDIATOR SKILLS PROJECT: ASSESSING AND SUPPORTING EFFECTIVE MEDIATION (1998); Linda C. Neilson & Peggy English, *The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience*, 18 MEDIATION Q. 221 (2001). On the other hand, because of the persistent perception that major differences exist between different models of mediation practice, other commentators have argued that no single skills "test" can usefully or fairly be applied to all mediators. See, e.g., Robert A. Baruch Bush, *Mixed Messages in the Interim Guidelines*, 9 NEGOTIATION J. 341 (1993); Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 271, 294-97 (1999) [hereinafter Della Noce, *Empathy*]; Dorothy J. Della Noce, *Mediation Policy: Theory Matters*, 18 MEDIATION NEWS 19 (1999); Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. (forthcoming 2003). Interestingly, as arbitration has changed in recent years, becoming more formal and "judicialized" in many arenas, a parallel debate has arisen regarding whether a single regulatory framework can adequately accommodate different "models" of arbitration. See Cole, *supra* note 28, *passim*.

45. See, e.g., Riskin, *supra* note 11; BUSH & FOLGER, *supra* note 4, at 15-22.

tration did previously.⁴⁶

What this means is that there is indeed still a potential for overall expansion, not just product substitution, in the ADR market; and that potential lies, as some of us have always argued, with the mediation process in its non-evaluative forms. The reality of this potential for expansion is even more evident if we widen our consideration to yet another set of facts relating to an even larger context, beyond mediation and beyond ADR generally, which is very significant for the mediation field.

FURTHER IMPLICATIONS FOR THE ADR MARKET: THE REAL POTENTIAL FOR EXPANSION

The ADR market, and the market for legal services to which it is partly connected, is only one corner of a more general market for professional services. The final set of facts that should be considered in interpreting what the expansion of evaluative mediation means, and by extension does not mean, relates to rather striking developments in that larger market. In particular, due largely to new information technology, we are for the first time actually entering a world without gatekeepers, a world where centralized professional hierarchies are giving way to decentralized consumer networks. While this may have been merely an utopian dream only decades ago, it is fast becoming a practical reality, especially in sectors where professional control has been a function of informational expertise. With the increase of common access to previously closed stores of knowledge and expertise, the importance and power of professional "guides" of all kinds has decreased. The consequences are visible everywhere, and it would be surprising if the ADR market were not affected.

46. Indeed, it is possible that evaluative mediation's wider use has not only failed to provide these benefits, but also discouraged many potential consumers from using mediation altogether. Precisely because it does not provide the kind of benefits that have been publicly claimed for mediation, evaluative mediation may actually confuse and turn away many consumers who are potential users of non-evaluative forms of the process. That is, when consumers who value and expect these benefits find the mediation they actually encounter provides something quite different, they may assume that all mediation is evaluative, choose to avoid it in the future, and advise others to do the same. The effect may be to artificially limit the real market for mediation, rather than expand it. Commentators have suggested precisely this kind of market-destroying impact from evaluative mediation's expansion. *See, e.g.*, Burns, *supra* note 4, at 370 (commentary of Sharon Press); Hensler, *supra* note 1, at 259-60.

Not long ago, in major daily newspapers, a multi-page advertisement announced the launch of a new on-line trading service by Merrill Lynch in which investors could become, in effect, their own brokers.⁴⁷ One advertisement trumpeted: "Announcing the biggest merger in Wall Street history: Merrill Lynch and you." Suddenly, thousands of professional knowledge-specialists and gatekeepers began wondering about job security. Elsewhere in the marketplace, Amazon.com has created a revolution in book selling without bookstores. Healthweb.org and similar on-line services have begun to "democratize" knowledge about medicines and treatment modalities, so that patients now enter their doctors' offices with printouts of breakthrough studies of their conditions.⁴⁸ The doctor-patient relationship will never be the same again. In every field, the impact is the same: increased participation and control by clients in delivery of services, with passive reliance on gatekeepers and experts decreasing as never before.

For the ADR field, this means the real potential now exists both to reach dispute resolution consumers by channels other than the courts and the legal profession, and to interest them in services that offer a different kind of relationship between mediator and client. Indeed, it creates the opportunity to reach a different type of client altogether. That is, the market is no longer limited to the kind of process courts and lawyers want; a market can emerge *for the kind of process disputing parties themselves want* from third-party interveners. As noted earlier, in the expanded market for evaluative mediation, mediators' primary clients have been courts and lawyers.⁴⁹ Now, however, it may be possible for mediators to market their services directly to parties in conflict, and in that more direct and open market, non-evaluative mediators may actually have an advantage.

The widespread interest in e-commerce, with its participatory nature, is echoed by the consistent finding of research on party (as distinct from lawyer) preferences among dispute resolution processes — parties do *not* prefer top-down, impositional processes controlled by third-party experts. Parties prefer bottom-up processes that allow them the greatest degree of participation, learning, communication and decision-making, with *support from but not*

47. See Leah Spiro, *Merrill's E-Battle*, BUS. WK., November 15, 1999, at <http://www.businessweek.com>; Nancy Weil, *UPDATE: Merrill Lynch to Offer Online Trading*, IDG NEWS SERVICE, June 1, 1999, at <http://www.idg.net/idgns/1999/6/01/UPDATE>. The service began in 1999 by offering investors the opportunity to do their own trades online for \$29.95 per transaction, directly competing with other online services. Since then, the service has expanded to include online advice from "financial consultants" at Merrill, as well as other services.

48. See <http://www.healthweb.org>.

49. See *supra* notes 16-19 and accompanying text.

control by third-parties.⁵⁰ This is not a description of either arbitration or evaluative mediation. It is a description of the kind of process offered by *genuinely* non-evaluative models of mediation.

Thus, there is a real potential for expansion of the ADR market that has not been captured, or even touched, by the expanded use of evaluative mediation. Indeed, the focus on evaluative mediation has been *diverting* attention from this real potential, while actually leaving the field in an essentially static state.⁵¹ If instead the field can put evaluative mediation in its proper perspective as a useful, but hardly novel replacement for an ossified arbitration process, then attention and energy can be placed where the potential for market expansion, not just product substitution, really lies. That potential lies with a form of ADR that offers highly participatory, interactive, and party-driven dispute resolution, a fairly good description of mediation in its non-evaluative forms.⁵² If those in the ADR field want to reach a larger market of consumers as yet untapped by providers offering evaluative and directive processes, they should refocus their attention on the mediation process as practiced, by

50. See Bush, *supra* note 7, at 18-21, 26-36 (citing, *inter alia*, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 3-5, 94-106, 206-17 (1988)). The "procedural justice" literature, including many studies conducted over several decades, documents consistent party preferences for the kind of dispute resolution processes mentioned in the text. Recent commentary by Professor Deborah Hensler offers a different interpretation of the procedural justice studies. See Hensler, *supra* note 19, at 85-95. But Professor Hensler's claim that the studies actually suggest a preference for adjudicatory processes is an unusual, if not a strained, reading of the procedural justice literature. See, e.g., Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. PUB. PERSONNEL ADMIN. 20 (1997); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 402-03 (2001) (describing research on transformative mediation based on procedural justice theory).

51. See *supra* note 46. The effect may have been not only to divert attention but even to drive consumers away from non-evaluative mediation by creating the impression that all mediation is evaluative. See, e.g., Nina Meierding, *We Are All Evaluative Mediators*, FAMILY MEDIATION NEWS, Winter 2002, at 10. Moreover, evidence suggests that another effect of the evaluation expansion has been to legitimize more evaluative practices by self-professed "facilitative" mediators. See, e.g., Hensler, *supra* note 1, at 239-57 (Professor Hensler's research can be read as evidencing a tendency for even nominally facilitative mediators to use evaluative practices). In short, for non-evaluative models of mediation, the effect of the evaluative expansion has been not only diversionary but destructive.

52. See *supra* note 4 and accompanying text. It has been noted that there are significant differences between the facilitative and transformative models of practice. See, e.g., Della Noce, *supra* note 3. Given those differences, it seems likely the transformative model responds more closely to the kind of process preferences described in the text. See Bush, *supra* note 7, at 26-36.

some at least, since it began to attract attention in the 1970s and '80s.⁵³

This redirection of effort would require work on a number of fronts. First, individual mediators skilled in non-evaluative models must resist the temptation to jump on the bandwagon of evaluative mediation in their own practices in order to get a share of the "easy" business, the arbitration-substitute market.⁵⁴ Taking that path means getting a share of an established but static market and has no long-term growth potential. Instead, they should reinvigorate their own non-evaluative practice skills with better training and more networking with colleagues to engage in reflective self-critique and co-mentoring.⁵⁵

Furthermore, mediators of this sort should unite in the wider field, to resist the continuing pressure to adopt uniform policies governing mediation practice that will, almost certainly, favor the evaluative model.⁵⁶ Instead those mediators should argue, as suggested above, that it is nonsensical to regulate evaluative and non-evaluative mediation models by the same standards, and therefore they should lobby for separate standards. Indeed, they might even consider forming a separate professional organization allowing them to work more effectively to promote the use of non-evaluative processes.

53. See, e.g., Bush, *supra* note 11, at 266-73; Susan Beal & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, in *DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK* 9 (Joseph P. Folger & Robert A. Baruch Bush, eds., 2001).

54. It can hardly be doubted that the pressure to move towards an evaluative model affects many mediators who prefer a non-evaluative model. Given the kind of expansion in evaluative practice documented by Professor Hensler, mediators seeking to earn a living through their practice must feel great pressure to move to an evaluative model in order to get paying business, especially from institutional clients like the courts. See Hensler, *supra* note 1.

55. See Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 *MEDIATION Q.* 287 (1996); Della Noce, *Empathy*, *supra* note 44 (for two good examples of the development of better practice skills, in a transformative model of mediation, through self-critique and mentoring).

56. See *supra* note 44. See also Hensler, *supra* note 1, at 232 ("standard setting and certification . . . have the consequence of excluding some from the practice of mediation, while privileging others"). Professor Hensler's study of mediation practice suggests that as evaluative mediation becomes more pervasive, the standards that are set will privilege that model and disfavor more non-evaluative forms of practice. See also Della Noce et al., *supra* note 44. It is ironic that commentators who base their arguments for accepting evaluative practice within the field on the grounds of "pluralism" do not extend their "pluralist" philosophy to an argument against unitary standards of practice, probably because they know that unitary standards will favor their preferred model, which is usually evaluative mediation. See, e.g., Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 *J. DISP. RESOL.* 247; Stempel, *supra* note 8; John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 *FLA. ST. U. L. REV.* 839 (1997).

Finally, there is one more crucial avenue of work needed. Those interested in reaching the untapped market for mediation must learn how to connect with that market through new channels of commerce, especially e-commerce channels. This does not mean offering to conduct mediation over the Internet, but rather using the Internet, and other information technologies, to more effectively inform and communicate with consumers about how mediation works and why they may want to use it. Until now, mediators have not challenged themselves to find ways of marketing their product directly to users, preferring to rely on gatekeepers and institutional clients, mostly within or surrounding the legal system. The result has been a self-limiting market that has probably reached the boundaries of its potential.

It is time to break those boundaries by “making a market” for mediation as a bottom-up, communication-oriented, party-driven process — a true “alternative,” not a substitute for other third-party processes.⁵⁷ It is time for mediation’s proponents to resist the clear trend to make it into an arbitration substitute and to take up the challenge of making it a product that succeeds, or fails, on its own.

57. See, e.g., Folger, *supra* note 2. See also Della Noce, et al., *supra* note 19; Bush, *supra* note 11, at 259-73.

