

MEDIATION, ITS NATURE AND ADVANTAGES

Thank you for inviting me to make the first speech in this series. Rebecca Barry, on behalf of this Association, suggested that an appropriate topic might be mediation and, because that is what I now do most days of the week, I readily agreed to her suggestion. I must admit that one of its attractions for me was that it's an easier subject to discuss than say a jurisprudential analysis of sub-prime mortgages or the likely economic consequences of Senator Barnaby Joyce's so called Birdsville amendment to s.46 of the Trade Practices Act. Of course, some may think mediation is not as interesting a subject as sub-prime mortgages or the Queensland Senator's amendments. But despite being a late convert to the advantages of mediation, I hope to persuade you that it is both a subject of interest and of prime importance in today's society.

The downside of speaking on the subject of mediation is that it is not a subject that readily lends itself to humour, the use of which Cicero and other rhetoricians suggest is one of the necessary attributes of persuading others. In almost three years of doing mediations, I have not seen any attempts at humour in joint sessions with parties and very little when I see them in private session. No doubt one reason for the lack of humour in mediations is that the participants are in conflict. They also know that, within a comparatively short time, they – and not a third party such as judge - will have to make a decision which in many cases will or may have significant effects on their future or that of their organisations. In some cases, where individuals are involved, the decision to settle or not settle a case may have life altering consequences. Contemplating making a decision that may have serious consequences for one's self is a stressful process for most people. Stress is not generally conducive to humour although its presence may relieve it. Another reason for the lack of humour in mediations is that in many mediations – particularly those arising out of litigation – the parties inevitably realise that to achieve

settlement they will have to reduce their expectations and compromise their claim or defence, a process guaranteed to make all but the most placid litigant unhappy. Hence, many - probably most - mediations subject the parties to considerable stress, a condition which is exacerbated whenever one side attacks the motives or the conduct of the other or where personal hostility has permeated the relationship of the parties. Whether it is more stressful than litigation is debateable. But, from my observations, the initial and concluding stages of a mediation are usually quite stressful for the parties..

One of the surprising things about mediation practice in Australia is the dearth of women mediators in complex disputes involving large sums of money, particularly commercial disputes. This is particularly surprising since Ruth Charlton and Micheline Dewdney are the authors of a well-regarded Australian text book – *The Mediator's Handbook – Skills and Strategies for Practitioners* and Hilary Astor and Christine Chinkin are the authors of another well regarded text – *Dispute Resolution in Australia*. In the United States, on the other hand, there is no shortage of women mediators, many of whom are regarded as leading practitioners in all fields of dispute resolution. In fact, there may be a dearth of women mediators generally in Australia. I am aware of only a handful of practising women mediators although there may be many more in fields with which I have little or no contact such as family law, tenancy and small business disputes. Despite my efforts, I have been unable to find any reliable information on just how many women are getting a steady stream of work as mediators in this State or Australia generally. The Bar Associations, Law Societies and this Association publish the names of accredited women mediators but I have not been able to ascertain to what extent this has led to mediation work for these women practitioners.

There is every reason to suppose that mediation is a skill at which women can excel, and there is no reason to suppose that female mediators cannot achieve results as good if not better than male mediators. I would encourage this Association to take steps to ensure that female mediators are involved in every field of mediation practice. The formation of a Womens' Mediator Association may be a necessary step to achieving that goal. France

seems to be the only country where such an organisation exists and even there the Association specialises in a narrow field. I hope that my discussion of mediation today will not only persuade those present that mediation has many advantages over litigation but that it will also encourage the members of this Association to practise as mediators. Experience has shown that the skills of women in particular fields become recognised and accepted only when they have developed critical mass in those fields.

Disputes exist and have existed in all ages and in all societies and, for that matter, between societies. The conflicts which give rise to disputes are not necessarily bad. In fact, conflicts can be productive and lead to beneficial change or progress. But when parties are unable to resolve their conflicting wants or desires, they must turn to another alternative. It may be force – as is often the case with international disputes between countries - or litigation or mediation. Throughout the Western world over the last 50 years, however, whatever the nature of the dispute may be – political, economic, social or legal – the disputants have increasingly turned to Mediation as the preferred way to settle the dispute.

Mediation is an extension of the negotiation process. It involves the intervention of an impartial, third party who assists the parties to negotiate a settlement that each finds preferable to the alternatives of curial litigation, private arbitration, force or the status quo. That Mediation is fast becoming the preferred model for settling disputes is hardly surprising. A properly conducted mediation has many advantages over the alternatives of litigation, arbitration, brute force or the status quo.

- (1) It is faster. The parties do not have to wait years for an outcome.
- (2) It is cheaper. Even the most complex mediation will finish within a few days and most mediations finish within the day – although it is often a long day. A survey of mediations undertaken in connection with The Third European Mediation Congress held in 2007 found that, after eliminating the impact of mega cases involving figures around £1 billion, the total value of ordinary cases mediated in England and

Wales in 2006 was £4.1 billion. By achieving the early resolution of cases that would otherwise have been litigated, the survey found that commercial mediations saved businesses over £1 billion in wasted management time, damaged relationships, lost productivity and legal fees. The cost of mediation fees to achieve this splendid result was only £8.2 million.

- (3) Subject to certain exceptional situations where the law requires discussions at a mediation to be revealed, everything discussed at the mediation is confidential with the result that the dispute is not the subject of publicity. The advantage of privacy and confidentiality is of great benefit to the parties in many cases – particularly commercial cases.
- (4) The parties control the outcome of the mediation. They make the decision instead of a court or arbitrator imposing a decision on them. They therefore control their own destinies.
- (5) In settling the dispute, the parties can agree on terms and conditions that go beyond any orders that a court or arbitrator can make. The only limit to the terms of their settlement agreement is the limit of human ingenuity and imagination.
- (6) In a mediation, the parties can, and ought to, look forward. In curial or arbitral litigation, the decision maker must look backward. The decision maker asks what are the facts (in the sense of what has happened) and what is the law that applies to those facts. The decision maker then gives a decision by reference to the legal consequences of those past actions. In a mediation, however, the parties can look forward. They can ask themselves what is our situation today, what changes to that situation do we want to achieve and how can we achieve those changes.
- (7) Mediations have a high success rate. A survey of mediations undertaken for The Third European Mediation Congress found that 75% of mediations succeeded on the day and another 13% shortly after the mediation concluded. The Victorian Small Business Commission which receives about 4,000 complaints each year and mediates them found that 80% of the complaints were successfully

settled at or shortly before the mediation. That figure is consistent with evidence from a number of jurisdictions which indicates that about 80% of mediations succeed. The one exception seems to be the Commercial and Technology and Construction Lists of the Supreme Court of New South Wales. A survey by Justice Bergin recently found that the success rate of cases sent to mediation from those Lists was 38%¹. Perhaps that says something about NSW lawyers. But I think that a more likely explanation is that, in a commendable attempt to save costs, some cases are sent out to mediation in New South Wales too early and before each party has had an opportunity to fully understand the evidence supporting and the strengths of the opposite party's case. Disputes are often difficult to settle when the parties are operating from a common information base. The task of settlement becomes much harder, and often impossible, when each party is operating from a different information base. A mediation has a far better chance of successfully resolving a dispute if each party is aware of all the cards in the opposite party's hand. This is supported by the fact that, of cases sent to mediation from the Commercial List at the preliminary stage, only 27% settled while 60% of those referred at an advanced stage settled². However, Justice Bergin has suggested that one reason for the 38% figure is that "the Commercial List is known as the 'fast track' of litigation and the parties who are referred to mediation know very well that even if they are unable to settle their differences at mediation they will obtain a speedy resolution of their dispute by the court."³

What then is the object of a mediation and what does it entail? The object of a mediation is to provide a process that will enable the parties to engage in fruitful discussions so as to achieve a joint solution that will meet their needs and satisfy their interests. The role of the mediator is:

¹ Justice P A Bergin, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 208.

² Justice P A Bergin, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 209.

³ Justice P A Bergin, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 209.

- to help the parties identify problems or issues that they want to or ought to talk about,
- to assist them to develop a problem-solving process and options that will enable them to reach a settlement,
- and generally to help them to achieve a settlement that each party will find acceptable.

Reaching a mutually satisfactory settlement of any dispute inevitably requires each party to try, as much as is humanly possible, to understand the interests of the opposing party and the reasons why that party has adopted the position that it has. One of the functions of the mediator is to get the parties and their advisers to approach the mediation in that spirit.

In the course of the mediation, parties will often strike obstacles that frustrate or even depresses them. But as experienced mediators know, in most cases the parties get through these obstacles and reach an agreement that they find satisfactory. It is not uncommon to find one or both parties wanting to terminate the mediation yet reaching an agreement within an hour or two of that occurring. Persistence on the part of the parties and especially the mediator is a necessary element of most successful mediations. This year a survey by the American Bar Association Task Force on Improving Mediation Quality found, after two years of research, that 98% of mediation “users thought persistence to be an important, very important or essential quality in a mediator”. Somewhat surprisingly, 82% of users also “thought ‘exerting some pressure’ was an important trait, very important or essential for a mediator to be effective.”

However, a mediation is unlikely to be successful - in the long run at least - unless it has three elements:

- (1) the parties have confidence in the integrity of all participants in the mediation, so that there is no suspicion of trickiness or unreliability as to what is said at the mediation

- (2) the parties have confidence in the integrity of the mediation process itself, that is, they must believe that it is being conducted in a way that ensures that each party is being treated fairly and
- (3) the parties have an expectation that the opposite party will act in good faith and genuinely seek a solution that will best accommodate the interests of all parties.

Parties should see the mediation as a co-operative exercise in which they are jointly trying in good faith to reach a settlement that each party will find satisfies his or her interests better than the alternative of continuing their dispute by means of litigation. That means that instead of seeing the other party as an adversary, they should regard themselves as allies seeking a solution to what is their joint problem. They are more likely to achieve that solution if they can agree on some general principle or standard or procedure that most people would regard as producing a fair and just settlement of the dispute. In most cases, that requirement can be met by agreeing that they should try to find the answer to this question, **what is a fair settlement of this dispute, given our respective needs and interests?** If they think in terms of fairness and the needs and interests of all parties rather than the positions that they have taken to date, they maximise their chance of achieving an agreement that each party will find satisfactory. The chance of a satisfactory agreement being reached is enhanced when both parties fully understand the reasons for the position adopted by the other party.

There are three frequently used styles of mediation. Some mediators will use only one of them; others may use all three. Historically, the most widely used has been the Facilitative model. Until the 1980s, it seems to have been the only mediation style. It is the style that is taught in most mediation courses. Under the Facilitative model, the mediator is simply concerned to ensure that the best available process is put in place to enable the parties to reach agreement. Under that model, the mediator is not concerned to assist the parties to evaluate the substantive issues involved in the dispute. The mediator does not recommend outcomes or offer or give advice. However, assisting the parties in private sessions to reality check proposed offers

seems acceptable to practitioners of this model. The mediator's role is to assist the parties to reach a mutually satisfactory resolution of the dispute by helping them search for the interests, needs and concerns that underlie their respective positions. The mediator will also assist the parties in formulating settlement options that will best accommodate their respective needs and interests.

The facilitative model follows a traditional structure. Before the mediation begins, legally represented parties will frequently have exchanged Position Papers outlining the positions they take in respect of the dispute. Many facilitative mediators deplore the use of Position Papers, but in commercial mediations I think they are essential. The mediation itself begins with a joint session of the parties, their lawyers and the mediator and sometimes other persons, such as experts. Usually, the mediator will make an opening statement that explains the process that will be followed at the mediation and seek agreement as to the ground rules for conducting the mediation (although preferably that should be done before the mediation commences). In the opening statement, the mediator will invite the parties to describe the conflict or situation as they see it, the issues that they would like to discuss and their interests or needs, the meeting of which is a necessary condition of reaching an agreement. The mediator will also encourage the parties to seek solutions that will satisfy their respective needs and interests so that the mediation ends in a win-win result for the parties. Hence, the Facilitative model is a co-operative rather than a competitive model.

After the mediator's opening statement, the parties will describe the conflict or situation as they see it and the issues that they would like to discuss. Their lawyers will usually state the facts from their clients' point of view; in some cases they will discuss the law that applies to the facts. Unless the dispute is solely concerned with technical legal issues, I believe it is important for the parties themselves to tell their story as to how they see the situation that has led to the dispute. Mediations should not be dominated by the lawyers. It is the parties' mediation, and the more they participate in it both by talking about their interests, needs and concerns and by attentively

listening to the statements of the other side, the better is the chance of resolving the dispute.

Under the Facilitative model, the parties control the outcome, the mediator controls the process. The facilitative mediator will use a variety of techniques to assist the parties to communicate about the substantive issues. If the parties are unable to agree on an agenda as to the issues to be discussed, the mediator may have to suggest a procedure for formulating an agenda such as easier items first or ranking items in terms of importance or on the basis of principles that will determine or guide the settlement. When the agenda is settled, the mediator will probably have to take steps to improve the content of the discussion of issues. Those steps may include open ended questioning to encourage a party to develop a point or to clarify what a party is saying, summarizing the message of a speaker and separating issues into more manageable sub-issues for discussion. To enable the parties to communicate effectively, the mediator often has to take steps to ensure that the mediation proceeds on rational lines with a minimum of hostility and emotional outpourings. Thus, the mediator may need to lower the emotional temperature by reframing in neutral language what a party has said, particularly where the party has made a statement that the other party will resent or find offensive. The mediator may also have to intervene to prevent a party making verbal attacks or to prevent the conflict escalating. There are a number of ways this can be done. One is to remind the parties of the behavioural guidelines to which they have agreed. Another is to encourage them to focus on the problem, not the people. The facilitative mediator will also guide the parties to finding solutions to the dispute. At some stage of the mediation, the mediator will also have private sessions with the parties which are confidential. Private sessions have a number of advantages including giving the parties the opportunity to say things to the mediator which they do not wish to say in joint session.

In my view, the Facilitative model with its emphasis on finding co-operative solutions to the concerns, interests and needs of the parties is the best of the mediation models. Unfortunately, the conduct of the parties or the

circumstances of the dispute preclude its application in many situations, particularly where the payment of money or its equivalent is the sole or principal subject of dispute. The Facilitative model works best when the parties will have a future relationship or when the resources available for distribution between the parties are sufficiently large or can be made sufficiently large to meet most of the respective needs of the parties. Hence, the facilitative model works best when the parties have a number of bargaining chips which they can trade. It is highly appropriate and beneficial in cases of disputes concerning partnerships, family law matters, ongoing commercial relationships, employment, educational and industrial relationships and public disputes such as those concerned with the environment. As one commentator has said, it works well in any dispute where parties have "multi-faceted and interdependent interests founded on the need to re-establish ongoing relationships without which everybody loses⁴."

Mediations which arise out of litigation do not always lend themselves to the facilitative model. In many mediations arising out of a litigious context, the parties either have had no relationship or the relationship has permanently ended. Frequently, the payment of money or its equivalent is the only issue in dispute, and, once payment is made, the parties have no further contact with each other. In such cases, there is little opportunity to expand the resources available for division between the parties in a way that will meet their respective interest, needs or concerns. Occasionally, the parties may be able to bargain over the terms on which moneys are to be paid or for the provision of some substitute for the payment of money, such as an exchange or transfer of some form of property. But more often than not where money is the sole or principal issue between the parties, each side is not interested in the needs, concerns or interests of the opposing party. What they are respectively interested in is receiving the greatest or paying the smallest sum of money that they can. The result is that one party's success is the other party's loss. The plaintiffs in the vast majority of personal injury actions, for example, are

⁴ <http://www.mediate.com/articles/annisP.cfm> at 2.

only interested in what money they can get. They have no interest in the needs or concerns of the defendant. Indeed in the vast majority of cases where the defendant is insured, the actual defendant has no relevant needs, concerns or interests. Sometimes, of course, even though insured, the defendant has a vested interest in protecting his, her or its reputation. That is usually the case in medical negligence or malicious prosecution cases and in many defamation cases where the reputation of the journalist or media outlet may be affected by the outcome of the dispute. In cases falling into these and similar categories, the parties may be able to negotiate a settlement that takes account of reputational or similar interests. In all but a small percentage of motor car or industrial accident cases, however, the actual defendant not only has no relevant interest or concern in settling the dispute but does not even attend the mediation. Because insurers naturally enough are only interested in resolving disputes by the payment of the smallest sum of money that they can achieve, their presence makes an interest based mediation in its proper sense almost impossible to achieve. Rare is the case where an insurer has the slightest interest in the concerns, needs or interests of a plaintiff. Moreover, the increasing presence of litigation funders supporting class actions or liquidator plaintiffs is a further factor why the facilitative model of interest based mediation is often unsuitable to a mediation arising out of court proceedings. Litigation funders, like insurers, are only interested in the division of a money sum and wish to obtain the largest sum that they can.

The result is that many cases - probably the majority of cases that come before the civil courts concerned with actions for damages - involve positional bargaining on the part of the parties. The atmosphere is competitive, not co-operative, because the parties see that the resources - almost always a money sum - are limited. Each side's goal is to maximise or minimise its share of that money sum depending on whether one is the plaintiff or the defendant. In these cases, the tactics of distributive bargaining are what mediations are about. Each side comes to the mediation with a position. The plaintiff will be bargaining for a result as close as possible to that party's target point, which is the maximum amount or result that it thinks is reasonably achievable. In contrast, the defendant will be bargaining for a

result as close as possible to its target point, which is the minimum amount or result that it thinks that it can reasonably achieve. Each party will also have, or ought to have, a walk-away figure or result. Unless one or both parties change their walk-away figure or result, settlement is only possible if the defendant's walk-away figure is above the plaintiff's walk-away figure. In other words, as a last resort, the defendant must be willing to pay as much as or more than the plaintiff will accept as a last resort. It is this overlap between these two resistance points which creates the bargaining zone between the parties although of course neither party knows what is the other side's walk-away or resistance point.

In positional bargaining concerning a litigious claim, effectively, the claimant is selling its claim against the respondent and the respondent is buying that claim. So in a mediation involving positional bargaining, the parties usually negotiate in the same way that they would negotiate the sale of any other property. Each party will form an opinion as to what is a fair price for the claim after considering its nature and its quality. Does the claim have any problems or potential problems that affect its value? What is the likely result if the litigation option is pursued? What are the risks involved? What are the chances that the court will not give a party what that party wants? What are the costs and consequences of pursuing the litigation option? It is the strengths and weaknesses of the other party's claim or defence, not both parties' interests or concerns, which are the focus of this class of mediation. Each side takes up a position and, for as long as it can, resists the attempts of the opposing party to change that position.

It is not a state of affairs that suits the traditional Facilitative model, concerned as it is with uncovering the parties' interests, needs and concerns and encouraging them to act co-operatively to seek a solution that will result in a win-win outcome. As a result, a second style of mediation, known as the Evaluative Model – which involves input from the mediator concerning the substantive issues in dispute - has become increasingly popular, particularly in the United States. In a recent mediation held in New York, which arose out of an action by the liquidator of HIH, the defendants who were United States-

based corporations agreed to mediate the dispute but insisted on the mediation being conducted by two evaluative mediators, which it was.

Evaluative mediation only works well if the Mediator is fully briefed on the issues. That usually means that the mediator has to be briefed with the pleadings, particulars, affidavits or witness statements, expert reports and relevant documents. Zena Zumeta, an experienced United States mediator, has said that evaluative mediation emerged in court mandated or court-referred mediation with the assumption that the mediator has substantive expertise or legal expertise in the substantive area of the dispute. She has described⁵ the evaluative model as follows:

“Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. Evaluative mediators meet most often in separate meetings with the parties and their attorneys, practising 'shuttle diplomacy'. They help the parties and attorneys evaluate their legal position and the costs vs the benefits of pursuing a legal resolution rather than settling in mediation. The evaluative mediator structures the process, and directly influences the outcome of mediation.”

This statement describes what is probably the most extreme form of the evaluative model, implying as it does that the role of the evaluative mediator is not unlike that of a judge or detached legal adviser. However, many evaluative mediators stop short of making recommendations to the parties as to the outcome of the issues. Instead, they adopt an analytical approach, playing the role of the devil's advocate. They find that the best way to bridge the gap between the parties is to assist them to evaluate the risks

⁵ <http://www.mediate.com/articles/zumeta.cfm> at 2.

involved in pursuing the litigation option. That is almost always done in the confidential private session. In these sessions, the evaluative mediator will engage in a negative analysis of each party's case. The mediator will illuminate and review the risks that each party faces if the matter should proceed to trial. Without expressing any opinion one way or the other, the mediator will review the factual and legal issues in the case by utilising the Socratic method. The mediator will ask the party or that person's lawyer a series of questions that seek answers as to how that party can reconcile its position on particular issues with undisputed or the other side's version of the facts or with statutory commands or legal precedents. In that way, the evaluative mediator adds value to the process by forcing the parties to face the risks of pursuing the litigation option. Not only do many evaluative mediators avoid expressing opinions on particular factual and legal issues, they also avoid making predictions as to the outcome of the litigation. However, while avoiding making predictions, some evaluative mediators will tell a party that its assessment of its case may not adequately reflect the risks that it faces.

Deciding when to commence the evaluative exercise requires sound judgment. Unless the parties have asked for or expect the evaluative process to begin at the commencement of the mediation, it is best to postpone the evaluative exercise until it appears that the parties' negotiations cannot bridge the gap between them. If the evaluative exercise is commenced too early in the mediation, the parties' expectations as to what they will achieve at the mediation may constitute an impenetrable barrier to the reception of a risk analysis. Parties frequently come to mediations with unrealistic expectations as to what they can achieve. In most mediations, those expectations must be lowered before settlement can be achieved. This can often be a slow process, but in my experience the cut and thrust of negotiation between the parties itself has the effect of reducing each side's expectations and makes them more receptive to a risk analysis. Nothing lowers a party's expectations as quickly as the realisation that the other side is not going to meet those expectations.

I have found that, without exception, parties or at all events their lawyers expect me as a mediator to engage in an evaluative exercise in private sessions. However, I almost invariably confine my interventions in the substantive process to the analysis of the risks that the party faces in pursuing the litigation option. I prefer not to offer opinions as to the likely outcome of the case or on particular issues. In discussing issues in private session, I tend to put forward various factual and legal scenarios that emphasise weaknesses in the party's case and invite the party and its lawyer to comment on those scenarios. In discussing damages, for example, I might refer to the evidence that the other party relies on in respect of a particular head of damage and ask a series of probing questions as to the justification for the lawyer thinking that the court will accept his or her argument in preference to the other party's evidence and arguments. Quite often this technique reveals, or at least I think it reveals, that this is the first time that that party has understood or at least faced up to the problems in its case. However, I tell the parties that it is not my function to give them advice and that they must rely on their lawyers for advice as to whether they should accept any offers that are made.

Initially at a mediation, many parties think in terms of what they will get if they are 100% successful in the litigation and not what is the probability of success. In risk analysis, probabilities are fundamental. To combat these usually unrealistic expectations, I will sometimes ask a party to estimate the percentage chance of success for establishing each of the legal elements involved such as duty, breach, causation and damages and so on. More usually, I will ask the party to consider the possible ranges of outcomes on various issues. Most lawyers and their clients are more comfortable in thinking in terms of ranges rather than specific outcomes and probabilities. Unsurprisingly, when pressed, few parties will maintain that they have a 100% chance of success on the various elements and issues. At the very least, they will recognise that there is a range of possible outcomes and that the bottom of the range is below – sometimes significantly below - what they regard as their maximum result. This immediately tends to lower a party's initial expectations as to what they can achieve at the mediation. After a probability or range of outcomes analysis, a party who has been thinking in terms of

receiving \$2 million may suddenly perceive that an offer of \$1.4million is reasonable, given the risks involved. In any event, as Jessica Notini, the President of Northern California Mediation Association, has written⁶, comparing possible alternative outcomes “helps mediators to ground parties in reality and prevent impasse by focussing them on actual possibilities rather than unformulated dreams.”

I have heard many solicitors express criticism of mediators who make no attempt to intervene in the substantive process. Perhaps these criticisms reflect the commercial or litigation based nature of most of the mediations that I do. But in the survey by the American Bar Association Task Force, 80% of the survey participants believed that some analytical input by a mediator is appropriate. 95% of users regarded the making of suggestions as important, very important or essential, and 70% of users thought that the giving of opinions by the mediator were important, very important or essential. However, the Task Force also found that nearly half of the users indicated there are times when it is not appropriate for a mediator to give an assessment of strengths and weaknesses and nearly half also indicated that is sometimes not appropriate to recommend a specific settlement. The Task Force said that “[u]sers had a wide disparity of opinions as to how various factors might affect their view of whether it was appropriate for a mediator to provide an assessment of strengths and weaknesses." They included whether assessment was explicitly requested, the extent of the mediator's knowledge and expertise, whether assessment was given in joint or private session and how early or late in the process the assessment was given. The Task Force indicated that there was an interesting contrast between the responses of users and mediators about recommending a specific settlement. 84% of users thought it would be helpful in half of all cases and 75% thought it to be helpful in most or almost all cases. However, only 18% of mediators thought it would be helpful in most or almost all cases and only 38% of mediators thought it would be helpful in half or more cases.

⁶ <http://www.mediate.com/articles/notini1.cfm> at 3

After discussion of the likely issues at a preliminary conference, I always inform the parties that that I will commence with the traditional facilitative model but at some stage I may use the evaluative model in private session. This gives the parties an opportunity to object to the use of the evaluative model. So far, no party has objected to the use of that model in my mediations. Furthermore, as I have indicated, it is not my practice to recommend a specific settlement although on occasions I might say to an indecisive, legally represented party who asks me, "This is an offer which you must seriously consider. It is not one that can be lightly rejected. You really have to take into account the following risks you run if you do not settle this matter." I will then summarise those risks. But whatever I might say about an offer, I always emphasise that the party must rely on his or her lawyer's advice as to whether or not to accept or reject the offer.

The third style of mediation used by mediators is Transformative Mediation which came to prominence as a result of the publication by Folger and Bush in 1994 of their book, *THE PROMISE OF MEDIATION*. I need say little about that style of mediation. It is an extension of the traditional facilitative model. Transformative mediation seeks to empower the parties and bring about a recognition by each of them of the other party's "needs, interests, values and points of view." In many cases, one of its goals is forgiveness and reconciliation between the parties. Transformative mediators want to extend the facilitative model "by allowing and supporting the parties in mediation to determine the direction of their own process." Zena Zumeta has written⁷ that in "transformative mediation, the parties structure both the process and the outcome of mediation, and the mediator follows their lead." Critics of transformative mediation argue that it takes too long and too often ends without agreement. It is not a style of mediation that I think is suitable for most commercial disputes or litigious disputes where the principal issue concerns the payment of a money sum. Seldom are the executives or business persons with whom I deal interested in forgiveness or empowerment. Particularly in the United States, however, transformative

⁷ <http://www.mediate.com/articles/zumeta.cfm> at 3.

mediation has many enthusiastic supporters. There is no reason to think that it is not applicable in any case where the facilitative model is suitable. Indeed in some disputes, such as those concerned with land rights, family law matters and consumer claims, it is probably superior to the facilitative model. Interestingly, the United States Postal Service uses the transformative model to mediate disputes involving that Service.

I thank this Association for the privilege of addressing its members on what I now consider, after a lifetime of litigation experience, to be the best method of resolving disputes. I will be more than satisfied if this address assists in persuading the Association's members not only to use mediation more often as a dispute resolution method but also encourages them to become mediators.