**Evaluative Mediation—An Overview.**

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This paper will give a brief overview of the following topics;

- What is evaluative mediation?
- Who cares about a name?
- The quest for "successful" dispute resolution processes.
- Why the apparent interest in Evaluative Mediation (EM)?
- What are the types of EM? Eg Process; Medrec; SIMSLILC.
- Core description of "advice"
- What are the *common types* of advice?—7 types suggested.
- Advantages of EM
- Disadvantages of EM
- Consent to advice; Advice to whom? Timing? Tone? Words and images.
- Some standard hurdles during EM
- Conclusion

**What is "evaluative mediation"? (EM).**

What is evaluative, or advice-giving mediation (EM)? This is a challenging exercise at least because English phrases have different meanings in different parts of the world (notably, "conciliation" and "mediation"); and there are many variations of process within every "type" of dispute resolution process---including litigation and arbitration.

For example, there are currently over 400 different schools or processes of "therapy" or "counselling"; over 20 different typologies of mediation process; and over 20 different "types" of "arbitration". All of these numbers can be multiplied by adding variations to standard, or not-so-standard, process.

To repeat the question--what is EM or "advisory" mediation? A working description is that EM is a process whereby disputants, with the assistance of a skilled supervisor, define topics, and create a range of options and solutions for each topic, and attempt to negotiate acceptable solutions, which may be prompted by ideas, challenges and advice from the skilled supervisor (sometimes known as an "evaluative mediator").

Before I comment on EM more particularly, there are important preliminaries to any categorisation commentary.

**Who cares about a name?** Does it matter that that there are so many variables in dispute resolution processes (whatever each might be called) on the market? Arguably, a name does not matter, but knowing what process is hidden behind a name is important, at least for the following reasons:

- Diagnostically, a client, lawyer, or referral agency should try to match the disputants with the "right" skilled helper. Mismatches are expensive and embarrassing.
- Almost all skilled helpers use a name to market and describe themselves—such as mediator, problem solver, evaluator, arbitrator, chairperson, negotiation coach, life coach etc. However, what each actually does may not match what the client is expecting. Thus it is essential for skilled helpers to demonstrate constantly what process they use "normally", in order to market themselves effectively behind the confusion of labels.
- What each skilled helper "normally" does matters more than the name. This is also because most skilled helpers cannot easily change their normal and comfortable customs and habits. Therefore clients, lawyers and referral agencies should ask a lot of questions about the common practices of each skilled helper, regardless of their label.
- Most jurisdictions have laws which confer special rights and duties upon particular dispute resolution labels—for example, duties of confidentiality, or not; requirement to accredit practitioners, or not; rights to enforce outcomes, or not. The laws falsely assume that the labels have common, clear and accepted meanings.

**The quest for "successful" dispute resolution processes.**

Disputants, lawyers, referral agencies, skilled helpers, tribes, and governments all want dispute resolution processes which have a high rate of "successful" settlement. This has led to a worldwide stream of new dispute resolution processes which market themselves as "successful"---with little systematic evidence to support the marketing enthusiasm.

However, it should be emphasised (what may be obvious) that the "right" process is only one leg of the chair of success. Rushing around searching for the "right" process may overlook the other three legs of "success". These are three cumulative personal attributes of the successful and sought after skilled helper. These require years of development, discipline, practice and feedback:

- **Core skills**, perhaps summarised by the acronym—LARSQ. These are the innate or learned skills of Listening, Acknowledging emotion, Reframing, Summarising, and Questioning. Many wannabe and process rich dispute resolution practitioners do not have LARSQ in their reflexive repetoires.
- **Care and compassion**. This is the real (or on exhausting days, acted out) concern about the well being of clients and their representatives. A strong desire that clients make wise life decisions in the face of uncertainty; or conversely, that they do not irreversibly mess up their lives and businesses and families.
- **Integrity**. This is a package of ethical attributes and habits including honesty, confidentiality, respect for others, courage in the face of intimidation, avoidance of any actual or apparent conflict of interest. The reader may have additional values and practices embraced by the word "integrity".

To repeat—success has at least four legs. Concentration on finding the right process leg, without including the other more demanding three personal attributes, is a recipe for failure.

**Why the apparent interest in Evaluative Mediation?**

Of course, there are many well documented reasons for the high incidence of settlement or abandonment of disputes—litigotiation involves loss of out-of-pocket costs, delay, uncertainty, adverse publicity, loss of control, escalation of conflict, lost opportunity costs, oceans of new rules, loss of judicial expertise, distrust of the skills and independence of judges and arbitrators, and decline of the incidence of full blown trials. This has led to interest in all types of mediation which are used to settle a small proportion of the stream of conflicts. Why the apparent interest in one type of mediation, namely *evaluative* mediation? Probable reasons include:

1. Steady streams of research and anecdote which suggest that some successful and regularly employed mediators give subtle gradations of advice; and that clients and/or representatives usually appreciate advice being given in the right form and at the right time.
2. Research and anecdote suggesting that some clients and/or their representatives are not capable of engaging in self reflection, analysis and the problem solving skills which are required for therapy or facilitative mediation. That is, *diagnostically*, a proportion of the population by nature, culture or nurture need advice; or at least, apparently cannot analytically problem solve.
3. Wise decision making requires some basic information and direction about normal behaviour, guessed judicial outcomes, market rates, forms of power. Many poor and middle class disputants can only afford *one stop shopping* both financially and emotionally—clear process, respect, core skills of listening, a chairperson, a process referee, a drafter of documents, *and* information and advice.
4. Of the many people who have trained as facilitative mediators, only a small proportion have found steady employment in that role. "Don't give up your daytime job." A mediation career requires a long apprenticeship, convincing marketing, and luck in finding an appreciative market niche. The disappointed trainees may be hoping that there is a niche via a more advice-giving model?
5. Government funders of dispute resolution services tend to keep impressive statistics of "settlement rates." If a certain model of mediation or negotiation achieves say 71% settlement rate, then predictably the funders want another dispute resolution "product" to fix the other 29%. Some kind of evaluative stream is a popular option with these budget conscious services. Moreover, private users of mediation services keep few statistics, but have equivalent anecdotes about "some clients need to be pushed".
6. In the pioneering days of mediation in some western countries, there was constant concern that the new profession would step on the turf of another profession, especially the turf of lawyers. So the fiction developed that mediators do not, and should not give legal or life or any

"advice". This fiction was supported by some important therapeutic models of counselling. However, research, anecdote and time have revealed that all mediators give advice, and that almost none of this qualifies as "legal" advice. Moreover, anecdotally, all professions, including lawyers, give a range of advice on topics about which we have only amateur or popular knowledge ---eg money, psychology, valuations, investment, patterns of negotiation and conflict, parenting, suffering and the meaning of life etc. Threats of legal liability for advice-giving mediators have turned out to be sound and fury signifying nothing around the world for at least the last 60 years.

7. Research and anecdote increasingly suggest that human beings (including lawyers) are error prone when we are giving advice and making decisions. We readily fall into group think, and decision traps. Experts and authority figures are generally perceived to be error prone rather than infallible. Therefore, EM may offer a second opinion, and a chance to modify our own delusional certainties.

**What are the "types" or varieties of Evaluative Mediation**

As mentioned above, there are many types of EM, and here are three which have become common in certain cultures:

1. **Facilitative or problem solving mediation.** For interesting historical and turf reasons, facilitative mediators (including the writer) sometimes pretend that we do not give "advice", rather give "information". Yet any observer or researcher notes that we give subtle or strong advice with varieties of tone and timing. For example:
    - *Process*, such as "you should speak first—"; neither of you should interrupt---"; "we must define the issues before we search for solutions"; "it is time for a break"; " I would like your accountant to attend---" etc. This constant *process advice* clearly affects *substantive* outcomes.
    - Facilitative mediators also give strong advice based on clients' revealed *life goals and risks*. (See Wade, "Risk Analysis" paper below). "You have told me that this is important to you, therefore why---?"
    - Additionally, by the form of *questions* used, give indirect advice – "How would that idea work?" "What if the machinery is not delivered?" "What are the standard clauses used in such settlements? etc.

**2. Mediation-recommendation. (Medrec).** This is a classic problem solving mediation process with a mediator's "recommendation" or "proposal" added at the end if the parties have not reached settlement by then. The recommendation add-on is either requested by the disputants, or required by legislation. It is hoped that the carefully worded recommendation may trigger a settlement immediately, or sometime in the future. Normally, the recommendation is not legally binding; and cannot be produced in court or to guide other authority figures. (In some countries, there are some legislative exceptions to this embargo).

**3. SIMSLILC mediation.** This clumsy acronym is an attempt to describe some features of a type of mediation which is common in narrow legal cultures in different countries. It is also a repetitively criticised process, as it allegedly systemically undermines the other three key legs of "success" mentioned above? (core skills of LARSQ; perceived care for client; and integrity). The acronym describes---*Single Issue Monetised Shuttling with Limited Intake and Lawyer Controlled*. In this stereotypical process, lawyers do the talking, clients are silenced, the lawyers have defined the issues as "legal" topics (usually monetised topics), and the mediator shuttles from room to room attempting to create doubt in each team about their confidence in their preferred solution; and carrying offers from room to room. The mediator uses his/her "legal" experience to create doubt by statistics, stories, insider knowledge about the delay, expense and uncertainty of court operations and of the "law" in action.

To repeat yet again, many mediations contain elements of all three of the above version of EM. Model purity is rare.

**Advice, opinion, recommendation, evaluation, proposal, information and challenges.**

- Core Description of advice?
- Types of advice?
- Consent to advice?
- To whom?
- Specific words and visuals?
- Tone?
- Timing of advice?

**Core Description of Advice?**

A working description of "advice" is: communication to another person with the purpose of changing the hearer's emotions, beliefs and/or behaviours. Ongoing strained attempts are sometimes made to distinguish between "advice" and "information" ---as though the latter communication about alleged "facts" does not have the intent or effect of persuading the hearer. This is a strained distinction because all factual input has the potential to persuade---and information is often simplistic, as it provides a selective glimpse of complexity. As information becomes more detailed and accurate, it also becomes more incomprehensible to any hearer ---except to communicate that life is complicated and unpredictable.

**Types of Advice**

Attempting some categorization of "advice" is not just an interesting exercise. It is necessary in order to:

- Reduce the possibilities of wandering into areas of advice monopoly—such as held by licensed financial, psychological, legal, electrical, medical and other professionals.

- Know some of the boundaries between many "advice monopolies" thereby assisting to avoid offence to colleagues; discipline by mediation societies; denial of insurance coverage, and threats of professional liability.
- Assist clients and their tribes to identify which kinds of advice are likely to be most helpful to them and to members of their culture—eg as bankers, engineers, lawyers, car salespeople, French doctors, indigenous builders etc.
- Assist mediators and other skilled professionals to make decisions about what type of advice to give and what to avoid---thereby attempting to leave the major responsibility for life decisions in the hands of the client.

Here is one attempted categorisation of "advice types". These typologies beg various questions including—which type do you use most often? In what situations? Which type do you want others and mediators to use? When should each category of advice be given gently or on a spectrum, more insistently?

1. Procedural advice
2. Revealed or guessed life and business goals
3. Statistical patterns
4. Systems---"in my experience".
5. Information/common options.
6. Stories
7. Guessed court events and judicial behaviour based on assumed facts, evidence, rules, arguments and range of predicted outcomes.

**1. Procedural advice**

All mediators of whatever stripe or type give procedural advice. That is one of the reasons a mediator is hired as the disputants, representatives and tribes need procedural structure so that substantive options can be discovered, and so that one or more of the parties gain a sense of "procedural justice". It is clear that change of procedure leads to change of emotions and of substantive outcomes. That is one reason why some disputants fight vigorously against certain procedural options, or procedural "orders" by a mediator. Examples of procedural advice by mediators include:

- "There is no point having the meeting unless the dueling experts; the accountant; the children; the spouse; the uncle; this friend --are present in some way; or are kept at a distance."
- "There will be no meeting unless the mediator receives from each party within the next 14 days NO MORE than 3 page summaries containing the list of *issues;* the *history of offers* with dates; the three best *submissions* on each issue; the predicted *delays* (expressed as a good day/bad day *range*) before a final judicial judgement is available; the predicted range of *legal costs*; the guessed/predicted *range* of judicial *outcomes* at a trial level on each issue (good day/ bad day range again)."
- " All offers will be made in writing, with time of day indicated, initialed by all offerors; and will only be made in the offers room as supervised by the mediator."

- "This is the procedure we will follow today etc."
- "No one will interrupt while another is speaking. This rule does not apply to the mediator."
- " We will discuss the topics/issues in this order."
- " All of you are talking about 'justice' and "fairness" too often. You will not find a solution until you find alternative words."
- " Assuming that we can find a solution to that question, we will now move onto the next topic"
- etc

**2. Revealed or guessed life and business goals/risks**

In theory, and sometimes in practice, some mediators are trusted sufficiently that one or more disputants reveal in confidence their key life and business goals and risks. These goals and risks are almost entirely different to the various "legal" risks of litigation. For example, key client goals may be speed, minimal publicity, reduction of stress, opening a new business, keeping tax evasion, illness, business plans, romance or criminal activity secret. Each of these goals have reverse risks.

In confidence, a mediator can (and the writer often did), use a written list of these revealed goals to strongly "advise" a client---"you have achieved seven of your written goals and now you want to lose all of them for the sake of $100,000?" " So correct me if I am wrong, but you seemed to be willing to pay a considerable premium to achieve the key goals we listed earlier? Have you changed your mind?"

If a client does not trust a mediator, or if the client has little self insight into personal life goals, then a mediator can try a shotgun approach by listing, or handing out a list of the life goals and risks of "similar" clients. Then follows the casual comment that "some of my clients are willing to take a discount or pay a premium in order to avoid one or more of these standard risks. Do any of these ring a bell for you?"

**3. Statistical Patterns**

In the writer's experience, use of statistics is one of the most persuasive forms of advice which can be given to clients and legal representatives. (Is this statistical advice "legal advice?"---no). Most clients like to be statistically "normal", and most are now accustomed to receive medical advice with risk, side effect and success statistics attached. Obviously, this requires some humility, constant research, and simple expressions to be effective, and to sustain respect for the mediator. For example:

- "More than 96% of cases filed in this court settle before a judge gives a final decision. I see no reason why you are in the 4% of survivors."
- " More than 60% of the 4% of plaintiffs who eventually reach a judicial decision, get a worse judicial result than the last offer of defendants---so consider the defendant's offers very carefully, even if they initially seem disappointing."

- "Several research projects have demonstrated that over 90% of the 4% of litigants who actually obtain a judicial decision, are deeply disappointed with the litigation process, whether they win or lose."
- "One major research project found that litigants respect their own lawyers until a final court hearing occurs—then crash---over 50% of the litigants strongly criticize their own lawyers."
- "Over 80% of small businesses close within 5 years of opening. So what you are going through is more than normal. "
- "Studies in this country have shown repetitively that just over 20% of lawyers, doctors and dentists are chronically depressed".
- On average, plaintiffs recover in court about one fifth of their initial claims.
- Other?

**4. Systems---"In My Experience."**

There is very little statistical research in existence about the behaviour of judges. Accordingly, experienced lawyers and mediators tend to generalize about their many individual experiences with court systems. Statisticians are aghast at such over-confidence in subjective observations of historic events. Nevertheless, as lawyers and mediators we have little else available to use in our attempts to prophesy about the future behaviour of judicial officers. For example, we offer "truth generalizations" such as:

- Judges tend to find a solution between the claims and counter claims
- Judges are influenced by the reputations of lawyers
- Each judge has a favourite topic (hobbyhorse) and it is a matter of chance which judge will decide this case
- Most judges will try to persuade us to settle the case on the day of the hearing. That way the judge cannot be wrong, or be appealed, be inconvenienced by having to write a long judgement; and can quickly get rid of a case in the queque of waiting cases.
- Litigation is a lottery and requires an expensive lottery ticket
- Judges do not like people who produce complex arguments and piles of paperwork.
- We lawyers like to think that we can predict the outcome of litigation ("read the judges' minds"), but in reality, we are guessing and are wrong in the majority of cases.
- Judges do not "find facts" like lost dogs; they reconstruct a story which you will not like and may or may not even recognize.
- Litigation pleadings are never what the dispute is really about.
- Insurance companies initially make very low offers until close to the door of the court, when their offers gradually increase.
- The poor and middle class cannot afford to litigate.
- Etc

**5. Information—common options**

Any skilled helper can be helpful by giving a menu to a client about what procedures; what common negotiations steps; what range of solutions; what common hurdles (in the limited experience of the mediator) are available. Such lists of options are allegedly not directive "advice", but rather neutral expansion of the list of choices. These expansive lists are usually well received, as they restore an element of choice for a cornered negotiator, and offer the balm of "normalcy". For example---a mediator can suggest (and add—"as no doubt your lawyers may have told you already"):

- There are three common methods to open any negotiation
- There are at least six different ways to manage the differing opinions of dueling experts—would you like to hear about these?
- There are four popular ways to value small businesses.
- You may feel frustrated, but there are 5 different ways other negotiators commonly use to cross the last gap.
- Teenage children frequently use one of the following three methods to make changes to custodial arrangements.
- There are currently six different ways which families like yours use to pay contingent and uncertain debts. Shall I write these options on the board for you to record and consider?

Of course, information is never neutral. Any list of options is always incomplete, and is sometimes wrong, as some options are dated by legislation, case law or custom; and the manner of expression usually favours certain options over others.

Information may also be given as a generalized alleged "truths" about life and *applied* to a client—such as:

- It seems to me that you are each at different stages of grieving about the loss of your business.
- Insurance companies do not respond well to threats of publicity; or to confused documentation. Their employees are also so busy that they do not focus until the door of the court.

Such generalized propositions (or information) may be true or not in particular cases.

### 6. Stories

Skilled helpers can give advice by telling anonymised stories of disaster or success. " I once had a client who-----". Statisticians are again aghast at the random selection of single instance stories to suggest "likely" repetition. Nevertheless, dramatic stories may be remembered for far longer than advice by other means? Of course, a single instance story can of course be rebutted by another story. However the story told first may leave the simplest and strongest impression.

### 7.Guessed Future Court Events---legal advice?

It is difficult to describe when advice given crosses a line into the monopolies held by the "legal", "financial" or "psychological" professions. Most advice or opinion "about" legal process, negotiation and range of outcomes, is clearly not legal advice about a particular dispute—for example see categories of advice 1-6 above. Perhaps a mediator's comments cross the line into legal advice when the following cumulative elements are present?

- *Facts*. "Assuming that this version of facts is more preferred by a judge--;
- *Evidence*. "And assuming that this version of facts is preferred because a judge decides that this evidence----is more persuasive.
- *Rules*. "And assuming that a judge interprets this rule in the following fashion-----".
- *Arguments.* "And assuming that the following arguments are more persuasive to a particular judge than the alternative arguments---."
- *Outcome*. "Then it is more likely (70% more likely?) that the result will fall in the following range----than in another suggested range."
- *Humility!* "However, if my predictions are wrong, and I have often been wrong before, and every judge differs in their views, and assuming that a judge chooses a different version of the facts, evidence, rules or arguments, then the result will or may fall in another range, such as----.

Some evaluative mediators give helpful advice in the form of suggested doubts about a disputant's overconfidence in their preferred version of the facts, evidence, rules, arguments and range of outcomes on the spectrum of possible outcomes. Speculative doubts ("what if"; "assuming that"; "why would--") may slide towards being categorized as "legal" advice when expressed in more confident language? ("A judge will not"; "probably will not"; a judge has a 50% chance of---"; "the rule is clear" etc). If doubts and risks are helpfully communicated, then a client has a renewed opportunity to either "buy out" of the risks, or gamble that the risks may not occur in the unknown future.

**Advantages of Evaluative Mediation?**

Evaluative mediation (and hybrids thereof):

1. Provide a short form of mini-trial unencumbered by the many procedural rules attached to a full court process. Thereby there is often helpful clarification of alleged facts, evidence, rules, arguments and monetary ranges, which have previously been blurred by noise and tactics. This advantage raises the disadvantage that an EM (or any negotiation) is "only" a "fishing expedition" to enable more thorough preparation for litigation/war.
2. Provide a fresh insight into how an outsider, in a role play as a judge, may view certain aspects of the dispute. Yet mediation also enables a disputant to "back-out" if (s)he does not agree with the mediator's opinion.
3. The disputants can choose a specialized expert who knows more about a particular area of law and conflict, than a generalist judge. A frequently

employed specialist also knows more about "settlement law" and rules of thumb, than an isolated trial judge.
4. Provide a helpful second opinion when one or more of the disputants are not listening to their "first" expert.
5. Appear to provide relatively fast and cheap production-line settlement of thousands of negotiations between personal injury claimants and insurers.
6. Give justification for middle managers to settle disputes with the seal of approval of an expert. ("The mediator confirmed that the outcome is in the normal range"). This protection is especially important in businesses or cultures where individual disputants are fearful of making difficult decisions, and need someone like an evaluative mediator to "blame".
7. Provide a comfortable environment for lawyers who are experienced with handling discussions about alleged facts, evidence, rules, arguments and counter arguments, monetary ranges, advice-giving officials, and shuttle negotiations.
8. Are the only models of mediation experienced by many lawyers and give the lawyers "control" of both content and process. Therefore any other models are usually resisted.

**Disadvantages of Evaluative Mediation** include:

1. Some disputes, especially those involving ongoing relationships, are unhelpfully referred by habit to evaluative mediation ("misdiagnosis").
2. Many lawyers have not been exposed to different models of mediation, and are not motivated to have such experiences with unknown risks to clients (chicken and egg). They do not have a stable of mediation "types".
3. Once at an evaluative mediation, the mediator by habit may do minimal preparation, and allow the negotiation to continue on the lines of alleged facts, evidence, rules and monetary ranges. This habit fails to systematically analyse other causes, risks and goals, appropriate interventions, and other than monetary solutions.
4. The tendency to favour shuttle negotiations and lawyer control. Thereby key information exchange and brainstorming between the disputants in joint meetings does not take place.
5. These first four disadvantages have led many (important?) clients to label their experience of mediation as " isolating", "lawyer dominated", "unhelpful", "a waste of time", "too focussed on money", and worst of all for any service industry—"not –to-be-repeated". As lawyers "lost" the businesses of tax advice and litigation, will they also gradually "lose" the mediation sector of the market to more diverse and client-oriented providers?
6. Importantly, evaluative mediators move between the negotiating groups or tribes carrying messages, offers and persuasion to "move". Therefore,

by strategy and habit, each group lies to the mediator about alleged facts, evidence, rules and monetary ranges on each "line" of the negotiation. Then the mediator routinely carries lies and deception. (S)he is deceived by the sender; and distrusted by the receiver. Accordingly, the mediator usually rewords or softens each message in ways unknown to the sender—"This is their first offer"; " Their current view is---". Thereby the usefulness of the mediator as a trusted adviser decreases; and each party carefully hides any life or business goals from the mediator, fearing that (s)he will "leak" in his/her role as persuader in the other room. *Standardly lawyers ask the mediator to "leave the room", so that they can have the allegedly "real" and confidential conversations with their clients about their actual goals and risks, before resuming the deceptive role play when the mediator returns!*

7. Evaluative mediators who rely predominantly on their substantive expertise become unemployable outside that narrow specialised area. This is not a problem where there is a steady flow of work in that area. Anecdotally, the most employed evaluative mediators also appear to be highly competent in "process" and "people" skills. If this last sentence is more than anecdotally correct, there is yet another overlap between the "types" of mediation, and the behaviour of all regularly hired skilled helpers.

**Consent to advice, Advice to whom? Timing? Tone, Words and Images.**

A series of other topics arise when any skilled helper considers whether to give "advice". Some short comments on these include:

- **Consent.** Should an EM obtain written consent to give advice to any or all parties in the mediation contract? Yes. Should the mediator also foreshadow orally that advice or impression may be provided at some time? Yes. Clarity and self defence are important.
- **Advice to whom?** Should an EM ever elect to give confidential advice to one party, one lawyer, and not to others? Yes. This choice is sometimes risky it should be assumed that whatever is told to one party in confidence will leak eventually in an inaccurate form. However, sometimes it is essential to cast doubt confidentially on wild claims and ideas, so that the proponent has the opportunity to modify tactfully.
- **Timing.** Apart from procedural advice, the majority of advice should normally be given later rather than earlier. Any skilled helper gains respect and information by the core skills of listening (LARSQ) before giving direction.
- **Tone.** Advice can be given on a spectrum ranging from silence; to gentle and quizzical questions, to bumbling Columbo feigned or actual confusion, to the classical " Correct me if I am wrong" and "assuming that—"; to "my first impressions are---"; to "of course, no-one knows what some judge will actually do, but they might think this way---"; to loud swearing and

confident assertions that imprisonment, death or bankruptcy are likely or certain. One friend who works as a renowned mediator with violent and drug addicted males standardly uses tone, threats and language which are not taught in mediation courses—and cause grateful lawyers to cringe.

- **Words and images**. Closely related to tone, different cultures are comfortable with different words, metaphors, lists and diagrams. In each culture, there is a repertoire of problem solving words, phrases and diagrams worth memorizing and practicing. For example:

*"I'm confused"

* "Have I understood you correctly—"

* "How will you prove that --?"

*" What if your boss/judge/doctor disagrees with that statement?"

* "Which of the experts is wrong? At least one of them must be."

* "Am I correct—there are three arguments each way?"

* What are the current good day/bad day predictions/ranges?

* "That is a novel argument."

* "Your employer/ uncle/ spouse will have to give evidence"

* "Can I tell you what is the normal pattern in these kinds of disputes?"

* " Do you know the current statistics on how these disputes turn out?"

* " Tell me if I am wrong, but I can forsee four problems for your business if this dispute continues."

* "There are 3 popular methods at present to value businesses."

* " On my maths, your costs exceed the probable returns"

* "Please rank what you think are your two best arguments."

* Are you willing to pay a *premium*/ take a *discount*, in order to avoid those risks?

* " As an outsider, (only) one of your arguments has impressed me so far."

* "What are the precedents for that kind of outcome."

* " Why would a judge make that kind of order?"

* " I think that you are very optimistic."

* " That suggestion does not have a snowball's chance in hell—" etc

**Standard hurdles of EM.** In all forms of mediation, arbitration and litigation, there are standard hurdles which occur. Foreknowledge assists to identify these hurdles in advance, and to consider preventive options; and to have some responses when the hurdles suddenly arise. Particular hurdles for the evaluative elements of EM include:

- parties hide information from the EM
- parties fail to prepare as required by the EM
- parties lie to the EM
- lawyers fall into posturing before EM in an attempt to influence his/her forthcoming "opinion" (Brazil).
- Many mediators put parties in separate rooms and then carry information and offers from room to room. This encourages some lawyers to posture and reveal minimal information to the mediator, as they know that the mediator will "leak".
- parties try to ambush others with "new" information or reports
- one or more of the parties are disorganised in presenting facts, evidence, rules, range of remedies, their own personal and business goals etc
- the EM requires a long and expensive education about complex areas of business, life and rules of law (Wade 1998a)
- the egos of duelling experts ( Wade 2006e)
- missing information which prompts expensive adjournment of meetings
- self represented clients
- EMs who try to market only to rich clients with competent lawyers. Where are the market niches?
- EMs who quickly lose market credibility as their basic advice is "split the difference".
- The various challenges of private meetings with EMs. These challenges are well documented for arbitrators and for judges. The challenges include lies, theatre and whispers from one party seeking to influence the EM; opposing parties having no knowledge of or right of reply; EMs leaking such confidentialities in an attempt to pressure a settlement.
- EMs being asked for legal advice and preparation assistance by one of the parties.
- EMs being perceived to be biased due to repeated employment by one client—eg an insurer, or a union.
- EMs being asked to draft settlements (with inevitable loopholes); or EMs giving legal advice which turns out to be clearly wrong (notably, recommended numbers fail to include tax deductions; or "final" agreements are not so final as suggested)
- EMs not being trusted with confidential information, therefore key interests are not disclosed and opportunities for packaged settlements are lost.
- How to manage the apparently common advice given by lawyers to clients before an EM?; " The EM will try to go back and forth between us, and cast doubt on the effectiveness of our arguments.

Ignore the mediator, that is his job, say nothing, and only listen to me".

**Conclusion?**

This paper has attempted to do what has been done often in relation to the work of skilled helpers, particularly in the fields of therapy and dispute resolution. That is, on the topic of "evaluative mediation", the paper has explored conceptually what are possible working descriptions, typologies, variations, language used, diagnosis and suitability, advantages and disadvantages, and common hurdles. Like most of the writing on mediation, the paper is based on stories, anecdotes and systems developed from such. As with other dispute resolution processes, there is an ongoing need for statistical research on the big questions such as---What types of EM are in use in what cultures in what fields of conflict? Why is each type of EM used by clients, representatives, referral agencies, funding bodies? What is considered and measured as "success"? By whom? How successful is EM compared to other dispute resolution interventions?

**References.**

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