

**IT'S ALL IN THE STYLE**  
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### **What Kind of Mediator Do You Need?**

A mediator friend of mine recently told me he had been retained to handle a very exciting mediation after a thorough interview by each of the parties. He stated that as he arrived for his interview with “Mr. Smith”, CEO for the defendant, another interviewee was just leaving. My friend knew that this mediator was not only well-known and respected, but was also very enthusiastic about the mediation process and the possibility of transforming the parties’ relationships with good communication. My friend decided to approach the interview pragmatically with a simple message: mediation can save the parties time and money. To his delight he got the engagement. My friend later inquired why he had been chosen over the well-known mediator. Mr. Smith’s response was immediate “I don’t want a relationship with someone who’s suing me.”

While Mr. Smith’s approach might have been a bit simplistic, he was at least aware that he needed a mediator with a compatible style. But what should an ADR consumer look for in a mediator? Of course you need one with training and experience. You also need one who is acceptable to your opposing counsel. You may or may not need your mediator to have expertise in the specific subject matter of the dispute, and of course reasonable fees are a plus. Beyond these requirements, one of most important things to decide is what approach you want the mediator to use.

While observers of mediation have arrived at a number of categories to describe mediation styles, most of these describe ends of a spectrum of processes with increasing degrees of intervention by the mediator. One popular approach is to define principle mediation process as evaluative or facilitative. In addition to process models, mediators may use a narrow or broad content model. Each mediator’s style will utilize his or her own combination of process and content models. Each approach has its strengths and weaknesses and the appropriate style for you will depend upon the personalities, as well as the goals of the parties involved in the mediation. With that in mind, how do these process and content models work?

### **The Process Models**

**Evaluative:** An evaluative mediator is highly interventionist. He or she offers opinions about the case, about your clients and maybe about you. Generally the initial joint session will be short and most of the day will be spent in caucus, with the mediator speaking confidentially with one side at a time. During the caucus, the mediator will point out what she or he perceives as weaknesses in your case. The mediator will opine on the value of the evidence, the credibility of witnesses, the likelihood of success at trial, the reasonable terms of settlement and so forth. An evaluative mediator may handle the mediation somewhat like a settlement conference. With many years of experience in driving the parties to settlement in order to clear the court’s calendar, retired judges frequently are most comfortable with an evaluative process model when acting as a mediator. In the labor negotiation context, mediators who employ this process are sometimes called “dealmakers”. Among community mediators, this style is referred to as “bargaining” and in custody mediation it is called “settlement-oriented” mediating.

An evaluative mediator may be a good bet if you believe the other side is unrealistic about the value of the case. This process model may work well where there are significant unresolved

legal issues and you have chosen an evaluative mediator with strong credentials in that area of law. Although the parties in any mediation still control the outcome, an evaluative mediator may put considerable pressure on the parties to resolve their dispute. You should consider how your client will “hold up” under that pressure. If your client has been unrealistic about the case, that pressure may be welcome.

**Facilitative:** A facilitative mediator on the other hand will not offer opinions on the subject matter of the dispute. In a facilitative mediation, the neutral simply directs the conversation between the parties and/or their counsel. The mediator’s guidance may take the form of summarizing the parties’ positions, asking questions to clarify points, black-boarding issues, requesting that one party repeat back the comments of the other party and so forth. Some facilitative mediators are as communicative as Freudian psychotherapists. In describing the style of one such mediator, a colleague commented “The parties talk and periodically he asks them if they would like tea.” Facilitative mediators operate on the presumption that the parties can best resolve their dispute by communicating directly with each other. The mediation begins and continues in a joint session and caucusing is rarely utilized. A facilitative approach will be more client-centered. Some facilitative mediators do not allow counsel to participate, but only to observe the joint session, and be available to consult confidentially with the parties as “experts”. This model of mediation is sometimes referred to as “pure mediation” in the context of litigated disputes. Labor mediators using this style are referred to as “orchestrators”.

When there has been good communication or mutual respect between counsel for the parties, a facilitative mediator may be the best choice. If both counsel are specialists in the subject matter of the dispute, and are looking for guidance in approaching a solution, facilitative mediation may be preferable.

A subset of facilitative mediation is transformative mediation. Like facilitative mediation, the focus of the process is communication. In transformative mediation the goal is to improve communication and understanding between the parties so that their relationship will be altered for the better. Of course, the mediation also seeks to resolve the specific dispute between the parties. Transformative mediation is most valuable where the parties have an ongoing relationship such as business, employment or parenting. In these situations underlying problems with the relationship have frequently created the dispute at hand. A transformative approach will frequently involve significant “venting” and emotional responses by the parties. Attorneys trained to deal with facts rather than emotions may find this experience uncomfortable, but effective nonetheless.

## **The Content Models**

Simply put, mediators may approach the mediation task with a broad or narrow approach to the dispute. Settlement conferences exemplify a narrow approach. The parties discuss the damages and negotiate to arrive at a monetary figure that each believes is reasonable in light of the monetary exposure of continuing through judgment. Most, but not all highly evaluative mediators will use a narrow content model.

Mediators utilizing a broad content approach will not only allow, but encourage the parties to bring to the table any and all issues between them, and any and all solutions. Parties seeking to resolve a race harassment suit may also look for ways the employer can assure that employees have a more confidential means of filing a complaint in the future. A wrongful death plaintiff may agree to settle for a monetary sum as well as a contribution by the defendant to a charity in the

deceased's name. The parties to a contract dispute may decide to clarify the terms of the contract and discuss further business opportunities. In environmental cases plaintiffs may obtain concessions as to size and location of developments they could otherwise only delay.

Mediator style is a combination of the process and content models they utilize. Not surprisingly, most mediators follow a combination of these models depending upon the nature of the dispute and the parties involved. When preparing to interview prospective mediators, think about your goals in resolving your client's dispute. Be prepared to tell the mediator briefly about those goals and ask what approach they would use. Facilitative or evaluative, broad or narrow, you should hire the mediation professional most compatible with you, your client and the nature of the dispute.