

M E D I A T I O N M A T T E R S

By Margaret Crowley,

"To Evaluate or Facilitate: That is the Question" "Though this be madness, yet there is method in it."

William Shakespeare, Hamlet, Act 2, Scene 2

If you asked a group of mediators how best to mediate a case, things could get so heated that, well, you might just need a mediator. Most mediators feel passionately that their method of practice is superior. Perhaps it seems as if mediators just throw folks in a room and make them talk to each other. There is, however, a method to that mediation madness. While most people can agree on the purpose of mediation, it is the manner in which the mediator conducts it that can create confusion, misunderstanding and sometimes, heated debate.

There are various recognized styles of mediation, the most common being evaluative, facilitative and transformative. This article will examine the two most widely used methods, evaluative and facilitative. Nationally known mediator Zena Zumeta has defined these two approaches 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, practicing "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.

In facilitative mediation, the mediator structures a process to assist the parties in reaching a mutually agreeable resolution. The mediator asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome.¹

When mediation first came into use in the United States in the 1960's and 70's, all mediators employed the facilitative style. Evaluative mediation came into being in the 1980's due to the increase in court based cases. Most of the mediations that take place in the legal world are evaluative. Attorneys have come to expect a certain process: perhaps a short joint session with all parties and then adjournment to separate rooms with the mediator shuttling back and forth. The mediator generally analyzes the strengths and weaknesses of the case and shares observations, such as what might happen if it goes to trial.

A facilitative mediation, on the other hand, feels very different. Generally, all parties meet in the same room for a majority, if not all, of the session. Rather than the merits of the legal case, the focus is on what drives the underlying conflict. Is it a desire for vengeance, a failed relationship, a need to be heard? Parties may hear questions like, "What is most important to you about this problem?" or "What do you think is really going on here?"

Why should these different mediation techniques matter? The point of this article is not to argue that one approach is superior to the other (although I'll admit a strong bias towards facilitative mediation). Instead, the goal is to promote understanding of the variety of mediation styles out there. Mediation is not a one size fits all proposition. It's quite common for mediators to borrow tools from all the different mediation styles as the need arises. Thus, a good practice is to try to choose a mediator whose approach best fits your client's case. It may be that for one case, evaluative mediation is most appropriate. It is often used for monetary disputes or cases where parties need a strong reality check regarding the law. Facilitative mediation might work well when the parties have an ongoing relationship (such as family, business, employment) or you sense that the conflict isn't really about the legal battle, but about something else instead.

So the next time you have a case you believe is appropriate for mediation, take some time to consider which mediation approach would best suit. A little time invested in this on the front end may increase the chances of your client reaping the many rewards of resolution. The method does matter.

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¹ Zumeta, Zena, "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation" September 2000, Mediate.com

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