
Psychology and Family Law

By Mark Baer, Esq.



The three basic styles of mediation are transformative, facilitative, and evaluative. For mediation to be most effective, the needs of the particular case must first be determined in order to select a mediator whose style(s) best suits those needs. Many mediators are able to utilize all three styles of mediation,

depending upon the needs of the particular situation, and can actually shift from one style to another with ease. Sometimes, the parties retain two mediators who work jointly in mediating the case and whose style(s) and backgrounds differ such that they are able to complement each other.

Facilitative mediation is the original form of mediation. It was once the only style of mediation used. In a previous article of mine, I mentioned that mediation “enables the parties to delve into the underlying reasons they desire certain results and thereby allows for more creative resolutions that might accomplish those needs through means that are more palatable to the other party.” I was referring to the use of facilitative mediation when I made that statement. This style of mediation is most appropriate in situations in which the parties are unable to effectively communicate with each other and/or a concern exists that one or both parties have hidden agendas. This form of mediation requires that the mediator asks questions in order to uncover the underlying reasons behind each party’s position on a particular issue, and assists the parties in reaching creative resolutions to those concerns. Although a facilitative mediator does not recommend solutions, such a mediator may offer advice and opinions regarding the potential outcome. It is also the job of a facilitative mediator to help the parties to communicate with each other in a productive manner.

Transformative mediation is most appropriate in situations where it is important to improve the parties’ relationship with each other because they have minor children together and need to learn to co-parent or for some other reason the relationship is important in the future. This type of mediation focuses on helping the parties learn to communicate and work together for a common goal. It requires the parties to explore their differences as if they were in therapy.

In evaluative mediation, the mediator assists the parties in resolving their disputes by pointing out the strengths and weaknesses of each party’s positions. As a result, the mediator’s focus is on each of the parties’ rights under the law, and not on the particular needs and interests of the parties. The mediator helps the parties in evaluating the case and analyzing the costs and benefits of a mediated versus a legal resolution of the matter. This style of mediation clearly requires the mediator to be much more involved in the outcome. It is most appropriate when the parties need or want the mediator to break deadlocks. In order for the mediator to be effective in this type of mediation, both parties (and their respective counsel, if represented) must perceive the mediator as having a great deal of knowledge and understanding of the law involved in their particular case. Thus, most evaluative mediators are attorneys or retired judges or commissioners.

I must admit that one of the most difficult things for me to do as a mediator is to hold my tongue and not evaluate the issues involved because of my legal training. While I have been trained to act as a mediator in all three styles of mediation, I would consider my style to be a blend of evaluative and facilitative mediation. Some facilitative mediators prefer not to be evaluative. However, if the parties reach an agreement and I perceive that problems will arise because they have not addressed certain intricacies, I will ask them if they want my input. When I am volunteering as a mediator at the Court, I tend to be more evaluative because I have at least three cases to resolve in three hours and therefore do not have the time to be more facilitative.

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