Ever ask what style your mediator uses?

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Given that the vast majority of business or personal injury cases which are mediated are done so on an *ad hoc* basis, as opposed to being facilitated through a third-party dispute resolution organization, the decision of hiring a mediator tends to boil down to the following:

- Asking peers if they can recommend a good mediator for a specific kind of case; and
- Reviewing the recommended individuals' online biographies.

Very rarely is there any discussion as to whether or not the recommended mediator's approach to mediation is best suited for the nuances of the particular case. Matching the mediator's style with the needs of the dispute is one of the best ways to tilt the table in favor of settlement.

The three most common mediation approaches are facilitative, evaluative, and transformative. A facilitative mediator focuses on the feelings or emotions of the litigants, particularly in light of the perceived notion of a "fair outcome." An evaluative mediator is one who shares wisdom and guidance with the litigants, evaluating the strengths and weaknesses of respective positions. Some have even viewed evaluative mediations as being quasi-arbitrations. A transformative mediator seeks to have the litigants undergo a change in their perspective toward the dispute. Sometimes this can be viewed as attempting to change the litigants' emotional or intellectual outlook so as to remove any barriers to productive settlement negotiations.

Some mediators, particularly the good ones, do not cherry-pick from the different approaches, but are able to flow gracefully from one to the other given the dynamics of the discussions.

Generally speaking, a facilitative mediation can produce outcomes which, in the end, have little to do with the dispute at hand or the potential outcome at trial. Conversely, an evaluative mediation tends to focus on the dollars and cents at issue. Evaluative mediations are typically associated with business cases, while facilitative mediations are more common in a personal injury context. It is important to realize, however, that the particular factors at play in a particular lawsuit can reverse that statement.

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Facilitative mediations can be very useful in business disputes where the underlying issue is not simply dollars and cents but a sense of being taken advantage of, ripped off, or otherwise abused. An evaluative mediation may work well for the personal injury dispute where the facts are not really in dispute, but the parties' outlook on the ideal resolution given those facts is. A transformative mediation can work in either context, again given the nature of the litigants.

An attorney who contemplates the potential mediator's style and goes so far as to discuss that style with the mediator during the engagement process will dramatically increase the chances of resolving the dispute at hand. Because of this, merely relying on recommendations or whatever name is "top of mind" is not good enough anymore.