

# The Ingredients For A Justified And Successful Referral To Mediation: Balance And Trust.

Kluwer Mediation Blog  
October 9, 2011

Machteld Pel (Pel Mediation)

Please refer to this post as: Machteld Pel, 'The Ingredients For A Justified And Successful Referral To Mediation: Balance And Trust.', *Kluwer Mediation Blog*, October 9 2011, <http://mediationblog.kluwerarbitration.com/2011/10/09/the-ingredients-for-a-justified-and-successful-referral-to-mediation-balance-and-trust/>

Yesterday night, sitting in the theatre and looking at a very sophisticated balance-act of two chinese dancers, I thought of a mediation session this week. I saw myself balancing while walking a tightrope between the parties in the room looking for possibilities if and how this tightrope walking could change into a red carpet welcome to a better understanding of each other, to renewing their trust in each other and from there on to a mutual agreement.

This balance act- in a metaphorical way, I wouldn't dare or be able to do this act for real in a thousand years - has been my work for the last twelve years when I became - as a former judge involved in starting and supervising the court-connected mediation project in the Netherlands and later on implementing the referral to mediation system in the Netherlands judiciary. And I continue the act in being a mediator, trainer and arbitrator since having resigned from the Bench last year.

After having been a judge for 20 years (see my website for more detailed information [www.pelmediation.nl](http://www.pelmediation.nl)) I was asked to start a research-project on court connected mediation in the Netherlands. I was curious about the outcomes as I knew from my experience as a judge that judicial decisions do not always solve the conflict at hand. The question for the pilots to come was whether court-connected mediation could be an effective and efficient addition to adjudication and court-supervised settlement agreements. The answer turned - after several years of intensive work and a lot of research - out to be a straightforward 'yes'. Since 2005 a system of court-connected mediation has been implemented in all courts in The Netherlands. Read more: Customized conflict resolution: Court connected Mediation in The Netherlands 1999 - 2009, The Judiciary Quarterly, Machteld Pel, and Lia Combrink, 2011, p 25 - 53, Netherlands Council for the Judiciary. (downloadable from my website) and Referral to Mediation, a practical guide for an effective mediation proposal, Machteld Pel april 2008, SDU The Hague(amazon.com)

I remember sitting at my empty desk before an empty bookcase in September 1999 with plenty of ideas and not knowing how many obstacles we would met on our way and what would or could happen as a result of the pilots to come.

Not surprisingly, resistance had to be overcome. Many judges, lawyers and other professionals who are not familiar with mediation seem occasionally to see a proposal to opt for mediation as an attack to their professional pride. Thus many educational and information efforts were to be made - and still are necessary - to inform about the real challenges and possibilities of mediation. A process of trial and error and systemized education, inspiration and evaluation have proven to be key to the acceptance of court-connected mediation. The results of five pilot projects were very promising and referral to mediation, once fully implemented in the Netherlands judiciary proved to be a success. Testament to the accomplishments of the courts is not only the number of referrals but also a tangible shift in attitudes of judges with regard to dispute resolution. The concept of 'customized conflict resolution', in which tailor-made solutions are sought to address the underlying issues of legal disputes, has been embraced by many. So in the end, the launch of court-connected mediation has had a far greater effect than the introduction of the referral services as such, it has led to new thinking about the role and tasks of judges in court procedures. The concepts of procedural justice and "conflict diagnosis" have become more and more a normal part of the judicial work. To safeguard the future quality of the referral services and to promote 'customized conflict resolution' the referrer's course and the course 'conflict diagnosis' have been included in the program offered by the Netherlands Centre for Education of Judges (SSR) from 2010 onwards. Part of these training courses are insights and principles based on literature and own research. The interest of interests and knowledge of the principles of mediation is of course crucial as well as training of skills to make a good referral or mediation possible. Here follows one aspect of this training course about the essence of mediation.

The essence of mediation can in my opinion be summarized in two crucial characteristics:

- the participants enter into dialogue and determine the solution for themselves;
- the participants discuss with each other the interests that motivate them and seek out a solution that serves their mutual interests as far as this is possible.

And here we are back to the importance of trust and balance, with adding another very important ingredient for sustainable outcomes of mediation: autonomy or selfdetermination of the parties. These aspect are as important to the parties as to the referror to mediation or the mediator.

The background to the first mediation principle is that self-selected solutions tend to be more sustainable than an imposed decision that is not supported by one or both parties. This needs the encouragement of all people at the mediation table to let them take back their autonomy as soon as possible by supporting the parties in their dialogue.

The background to the second mediation principle is that positions or the question of who is right usually do nothing to help achieve a solution in conflicts that have escalated to some extent. A position is actually a self-selected solution (which is translated in the legal proceedings into a claim and a defence) to an underlying problem. Since parties usually stop listening to each other in the course of a conflict, and are unwilling to accept each other's points of view, reiterating or arguing the position adopted can no longer help in finding a joint solution. The maxime here is: Positions in a conflict situation are self-devised solutions that do not work, because if they did, the problem would have already been solved....

The task of mediators and of people who make referrals to mediation is in the first place to talk about effective and success predicting choice drivers for mediation. Research on these choice drivers has learnt us to make a division between interests that are served by simply terminating or resolving the conflict or problem and the interests addressed by the details of the solution. The first category includes mostly the next issues: ending the stress, preserving the relationship, clarifying the future, reclaiming time and energy for more constructive matters and limiting the costs of terminating the conflict.

My experience over the years is that it is really necessary to first go deep into these type of interests. These interests constitute the incentives to work on terminating the conflict. If these incentives are not clear on the table and the flipover the balancing act of coming from the end of the tightrope to a solid pavement to solution will not succeed. Taking a calm pace in the beginning helps the parties to come to a solid basis of trust and to solution. I wish you all the fun of perfect balancing, where trust is the basis of the balance act. As an old English saying that I read long ago goes - and I hope I remember it well - : fear knocked at the door, trust went to open it, ... and no one was there.