

Quality standards for the mediator?

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Quality standards for the mediator?

What conditions are needed for the successful outcome of a mediation? Without parties' commitment to really resolve the conflict and settle the case, no success is possible. So commitment of the parties is a sine qua non.

Still, we must also look at the mediator, who may be essential for helping the parties and their lawyers overcome roadblocks and resistance so they can resolve their conflict or dispute. So perhaps we must state that - for parties who were unable to resolve their conflicts before mediation - the quality of the mediator is crucial in getting them to talk with each other and in getting a mediated result that suits both parties as much as possible. The first critical quality for mediators is leading the process in a way that helps parties move in their ideas about possibilities for resolving and settling their dispute. If the mediator can achieve a shift in the parties' thinking, then the next step is to identify, together with parties and lawyers, interests and possible solutions in a way that the responsibility for the outcome lies totally with the parties.

What, then, determines the quality of the mediator? As in any profession, quality in mediation is determined by skills, attitude, and knowledge. These attributes constitute the competency of a mediator. Apart from that general competency, parties also seek in the mediator a personal suitability to the specific case. And for good reason! In my experience, once competency has been established, mediations succeed mostly due to a "click" between parties, lawyers, and mediator (see: Machteld Pel, Referral to mediation, on competency and suitability, p 131; www.pelmediation.nl).

In this piece, I want to focus on the role of regulations in ensuring competence, not on training or other methods by which one might gain competence. In many professions, standards for quality are set by the professional group itself or by regulation of the State or both. Lawyers, psychologists, doctors, and accountants all have their professional standards. Potential clients can, therefore, rely on the quality of individuals who meet professional standards and then can choose a specific doctor, lawyer, accountant, etc. on the basis of specialized personal skills-if known, for instance, by word of mouth.

For mediation, such nationally or internationally accepted standards are yet to become the norm. Not many countries have standardised requirements for mediator quality, certified training institutes that guarantee a minimum quality, or a reliable register of mediators who are well trained, experienced, and periodically required to refresh their skills. In the Netherlands, we are lucky to have the Netherlands Mediation Institute, which has set uniform standards for quality since 1995. The NMI has a register that counts 2500 mediators who are complying with the standards of the NMI concerning education, experience, and on-going education (see www.nmi-mediation.nl/english for detailed information). The Dutch parliament has announced a plan to regulate the NMI standards in the sense that minimum standards and the institute that can set those standards will be regulated by law. To a certain extent such regulations could be very useful—for example, to help clients find a reliable mediator who meets general requirements, so the parties can then focus on the mediator's suitability for their specific problem.

The power of mediation, however, lies in its ability to deliver made-to-measure work. Detailed regulations for procedure, method, quality standards, and costs will not contribute to that core feature of mediation. The fact that people do not find it easy to choose mediation of their own free will not, for example, be changed through legal regulations on the quality of mediation (except, perhaps, indirectly if regulations give referring bodies more confidence in mediator quality).

A comparison between arbitration and mediation is instructive. There are no legal regulations for the quality of arbitrators in the Netherlands. Apparently, the parliament, which has in fact in many countries regulated arbitration procedure, assumes that the parties who choose arbitration can determine whether the arbiter they invite meets the quality standards the parties require, specifically the arbiter's knowledge of the substantive content of the dispute and of arbitration as a method of adjudication. It seems that arbitration concerns in particular the arbiter's skills as an adjudicator and his or her knowledge of the substantive content of the dispute.

To what extent is it different when parties are choosing a mediator? There is a big difference. Mediation puts more emphasis on method and process; knowledge of substantive content is not a decisive factor, as it must be in arbitration (although there is a growing body of opinion that argues for selection of mediators with knowledge of content, particularly for evaluative mediation). And mediation involves the personal qualities of the mediator more than arbitration does. It is not the mediator's knowledge of a dispute's substantive content that determines mediation's success, but rather the mediator's approach and method, and these are a fruit of personality, personal experience, ability to make connection with specific parties, etc.

Do these features of mediation mean there should be no quality standards or regulation of mediation? I do not think so. Particularly because mediation is a new profession, it is important that there be clarity about what the qualities of a mediator should be. That is why I consider uniform quality standards and an official register for mediators of paramount importance. These steps enhance confidence in mediation. On the other hand, I consider regulations of the very procedure, other than via regulation of the professional group itself, too limiting for the free interpretation of the mediation process. In addition, regulations that are too limiting risk litigation and legalization, which we should not invite. And, in the end, it is the personal match between mediator and parties that determines whether the parties have confidence in the procedure, trust in the mediator, and confidence to reach a good result. Neither that match, nor the personal qualities of the mediator, can be regulated.