Article

Selecting a Mediator

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1 Introduction

Parties considering the use of mediation will want to know who to engage as a mediator; who qualifies best to help them find a solution in the particular situation at hand; what makes a good mediator; and how to select the right mediator for the job.

At the end of a course about mediation for a group of students from all over the globe in a summer programme of the University of Leiden in the Netherlands, one of the students raised his hand and said, *That is what is being done in my village since 400 years*. In his village mediation was customary and it was never a question as to who to turn to in case of the need to have an issue to be mediated. The village elders acted as mediators or, as in other places, the priest, the rabbi, brahman or some other vexed person or council with undisputed authority. In modern secular societies it is not equally simple knowing whom to engage to help parties to reach a constructive dialogue. Absent knowledge of the skills of mediators, parties nowadays often look at subject matter expertise for guidance. This has been referred to as the substitution factor. Knowledge of e.g. the law has thus functioned as a substitution for a basis for trusting the person of the mediator, whereas without that reference there was not much to navigate on before one has seen the mediator in action.

Jarrett[1] captures this eloquently as follows:

> In traditional, intimate social contexts, mediators were often respected community members, including village elders, who were known to the parties through kinship or close social networks. In fact, in these communities, parties would deliberately choose a mediator precisely because they were intimately acquainted with that person. The socially connected mediator commands the respect and trust of the parties through his interrelations with other members of his community. Because people in these villages were related both socially and/or genetically, cooperating with the direction of the elders provided significant gains for all. In this environment, mediator 'impartiality' or 'neutrality' would actually be inimical to effective dispute resolution because the more distant the mediator was from the parties, the less social capital and consequent influence he could command. [...], contrast this traditional, intimate context with modern social realities where individuals live and work in relatively anonymous environments. In such environments, mediators often come to the parties as unknown third-party interveners. Relationships may develop thereafter, but to gain initial entrée, mediators must have a marketable substitute for the 'connectedness' that they otherwise lack. Practice ethics of the legal field emerge to fill the void, providing an alternative, albeit professional, source of authority. In the modern context, clients have come to rely on legal norms, such as the prohibition on 'partiality' and 'bias', to solve their disputes. Moreover, clients expect their mediators, to respect and adopt these same norms. In other words, in the disputing context, espoused legal norms have become preferred substitutes for social capital traditionally engendered by

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1 Jarrett, B. (2009). The Future of Mediation: A Sociological Perspective. *Journal of Dispute Resolution, 2009*, 62-63.

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social interconnection. 'Impartiality', as a legal ethic, has become a proxy for fairness in the modern dispute resolution environment.

The number of mediations a mediator claims to have done, or his or her published success rate, does not give the full picture of what to expect when engaging the mediator. This is even more so as long as there has not been an intake conversation, and the parties have not yet met the mediator or seen him or her at work. Now that the profession of mediator is not characterised by clear contours, subject matter expertise has gained momentum as a comfort that at least the mediator will understand what is being said – and notice what is not being said – about the topic on which the parties differ of opinion. It even goes so far that it can be maintained that only mediators without any other recognised education than mediation will *not* be associated with their background as lawyer, psychologist, engineer or other. Weight may also be contributed to evident specialisation of a mediator in a certain field or a certain working method. In this article the considerations involved in selecting a mediator will be discussed in greater detail, with special attention for specialisation, subject matter expertise and culture. None of what follows is in denial of the fact that in principle mediation ought not to depend on subject matter expertise on the part of the mediator. Facilitating a constructive dialogue between parties in recognition of their autonomy and abstracted even from the nature of the issue which keeps the parties divided can certainly be seen as mediation, perhaps even as its purest of forms.

2 Mediation Skills and Regulation

Equally as not every attorney at law is a good trial lawyer or an expert in family law not a M&A specialist and a podiatrist not a dentist – even though both of them are doctors – one mediator is not the same as the other. Although the degree of specialisation among mediators has not taken an equal flight as in many other professions, the degree to which emphasis will turn more to specialisation and subject matter expertise of mediators is likely to increase. The abstract nature of what qualifies as quality of mediation and of a mediator will continue to invite this. Attempts by regulators to encapsulate mediation and mediators in laws and regulations may set certain standards for training and permanent education of mediators, but regulating skills is only possible to a very limited extent, if at all.

There is a limitless array of application for mediation, varying from community aid and aid to victims of crime by bringing together perpetrators and victims to international investment disputes between multinational corporations and countries and peace negotiations in war-torn parts of the world.[2] Mediation may be used for more than handling conflicts, e.g. for negotiating contracts or preparing decision making by governments. In these and other areas where people come together to achieve things, they may benefit from the help of mediators. Mediation often exists alongside facilitation, good offices and dialogue efforts. Mediation, however, has its own logic and approach, aspects of which may be relevant to the approach of other challenges in a social context. An effective mediation process will respond to the specificity of the situation. It takes into account the causes and dynamics of the situation, the positions, interests and coherence of the parties, sometimes also the needs of the broader society, as well as regional or even international environments. The premise of mediation is that in the right environment, conflict parties can improve their relationships and move towards cooperation. In all the relevant fields, a special sensitivity and skill set may be required. Regulation of the profession will only be able to provide for general standards of quality. Skill sets for mediators in different fields of deployment of mediation will differ. There is a noticeable trend towards specialisation, which is gaining momentum over the traditional view that mediation can be performed by a mediator irrespective of the nature of the conflict, even though that in itself may remain to be true. The generic education and training requirements – either or not regulated by governments – expressed in the membership of a mediator of a professional organisation or mentioning in a recognised register may provide certain assurances that the mediator has met at least an elementary level of schooling, permanent education and will be subject to disciplinary supervision, but cannot say much about the personality and actual skills of a mediator. As said, there are good lawyers and bad lawyers, good doctors and bad doctors, and good mediators and bad mediators, even though all of them tick all the boxes of the demands set by regulators and professional organisations. The substitution argument mentioned earlier will also claim a role in this respect. Chaykin observed that the dispute resolution industry was changing rapidly. Courts have become heavily involved in mediation processes and ADR services and provide an array of mediation choices. He notes that with more mediation opportunities, parties need to develop an understanding of the factors that should be considered in mediator selection. Mediation is a very personal service and the success of the mediation and the ultimate outcome of the conflict depend heavily on matching the optimal mediator to the particular dispute.[3]

2 See, e.g. the United Nations Guidance for Effective Mediation, which was issued as an annex to the report of the Secretary-General on Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution (A/66/811, 25 June 2012) and Koopman, S.M.G. (2018). *Negotiating Peace: A Guide to the Practice, Politics, and Law of International Mediation*. Oxford: Oxford University Press.

3 Chaykin, A.A. (1994). Selecting the Right Mediator. *Dispute Resolution Journal, 49*, 58.

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Parties in want of a mediator suited for their particular need will have to look beyond memberships, formal registers or internet recommendations in order to obtain a feel for the right horse for their course.

As will be elaborated hereinafter, first-hand recommendations from one's own network and the degree of experience and specialisation will have to provide parameters for finding the mediator with the chemistry to provide hope for a successful cooperation. In the end – as research has shown – much will depend on the personality of the mediator in question.
It has been found that the personality of the mediator is an important factor – also referred to as 'the P factor' – when measuring what most determined the successful outcome of a mediation.[4] It goes without saying that this factor is not something that can be captured in regulation or legislation.

3 Specialisation

If there is a need to at one point obtain an evaluation of a legal position with regard to the possible outcome of litigation, parties may opt for a lawyer with experience in litigation about similar topics as a mediator. If the objective is to reach an agreement about a future business cooperation they will rather want a mediator with experience in the formation of alliances and commercial contracting or experience as an entrepreneur. Where an assessment of damages or costs is involved, the parties may want to engage a mediator with knowledge in the field of the technology it concerns. When more emotional aspects are dominant, than yet again another type of mediator may be more suited, and a different type of mediator may be suited where it concerns issues with local or national government bodies. However, when determining the preference for a certain type of mediator, the parties may equally decide to let the accent be more on the mediation skills of a mediator rather than specialisation or subject matter expertise. Riskin believes that in almost any mediation, the neutral must at least be able to quickly acquire a minimum level of familiarity with technical matters in order to facilitate discussions or propose areas of inquiry. To the extent that other participants have this expertise, the need for the mediator to possess it diminishes. In fact – so he proffers – too much subject matter expertise could incline some mediators towards a more evaluative role, thereby interfering with the development of creative solutions.[5] In the reverse, parties choosing a mediator especially because of his or her subject matter expertise may entail a hint at – at least at the moment of choosing the mediator – a preoccupation of the parties with obtaining a legal or material response in the matter that keeps them divided. Thus, under the pretext of opting for mediation, the real intention of the parties may be to obtain a third-party opinion on the topic of their dispute, which is something entirely different than seeking a solution in a joint journey by means of open communication.

In countries where mediation is rather well developed there is a clear trend towards specialisation. This has – as among others in the United States, England and Wales and the Netherlands – been stimulated by the courts, which started to distinguish different fields, i.e. administrative, civil and employment, family and criminal and referred mediation cases to mediators specialising in the relevant field of law. There are also specialised mediation providers such as experts in IT and data conflict management. A significant number of organisations of specialised mediators exist (in construction, insurance, education, health care, financial markets and more), some with their own profiles, governance via professional rules and education programmes. It cannot be excluded that various schools of approach to mediation will occur instigated by national or international organisations as has happened in the field of arbitration (compare, e.g. ICC, UNCITRAL, ICSID) with their own take on mediation (compare evaluative, transformative and what not more) with their own custom-designed standards and by-laws. In any event, the movement towards specialisation is evident. When users of mediation become more acquainted with the process and obtain a better understanding of its possibilities, it will become less relevant whether mediators themselves feel that availing over mediation skills suffices to be able to function as mediator in every thinkable sort of dispute solution. It will become more relevant still how buyers of mediation products appreciate subject matter expertise.

The above intended trend demonstrates an increasingly intensified relation between mediation skills (mediation expertise) and expertise in certain branches of industry or science, health care, personal relations, government or other (subject matter expertise). This will very likely increase the demand for more tailor-made combinations of what can be expressed as 'horses for courses'. Selecting a mediator will be based on choice for a specialist with assumed subject matter expertise or, on the other end of the spectrum, consciously for a 'general practitioner'. In certain fields the parties may insist that the mediator be an expert in the relevant field. This was confirmed, e.g. in the work of the Global Corporate Governance Forum and the International Finance Corporation. The Global Corporate Governance Forum was co-founded by the World Bank and the Organisation for Economic Cooperation and Development and supports the development of *corporate governance* in developing countries and emerging economies. In a report pub-

4 Goldberg, S.B. (2005). The Secrets of Successful Mediators. *Negotiation Journal*, *21*(3), 365; Goldberg, S.B. & Shaw, M.L. (2007). The Secrets of Successful (And Unsuccessful) Mediators Continued: Studies Two and Three. *Negotiation Journal*, *23*(4), 393.

5 Riskin, L.L (1996). Understanding Mediator's Orientations, Strategies and Techniques: A Grid for the Perplexed. *Harvard Negotiation Law Review*, *1*(7), 35-36, 90-91.

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lished in 2007, *Mediating Corporate Governance Conflicts and Disputes* (OECD, Focus 2007, 4), written by Runesson and Guy,[6] the qualities which need to be availed over, according to these authors in order to be able to help solve *corporate governance* disputes, are described. In addition to mediation skills, the qualities in order to be asked to help solve a *corporate governance dispute* (a dispute involving the management and supervision within organisations) are:

> Experience with corporate governance disputes; Conceptual understanding of corporate governance; Understanding of corporate governance issues and knowledge of corporate legal framework.

It is acknowledged that it may be difficult to find a mediator who will meet all these requirements, so the authors continue

> so the board or parties to the dispute will have to decide on the skills that matter most when jointly selecting and agreeing on a mediator. Co-mediation, or a mediator with an assistant who has corporate governance experience, may constitute the best solution.

Susskind is of the opinion that a mediator who is involved in handling disputes in the sphere of environmental issues will have the awareness and will (have to) take account of all sorts of related interests (such as those of other parties involved in the same environment, power differences and the effect of precedents of solutions found), and therefore in order to be effective, an environmental mediator will need to be knowledgeable about the substance of disputes and intricacies of the regulatory context within which decisions are embedded.[7] This awareness according to Stulberg does not mean that for that reason an environmental mediator ought to become more involved with the content of a potential solution and strongly influence the parties, because otherwise '…the environmental mediator is simply a person who uses his entry into the dispute to become a social conscience, environmental policeman, or social critic'. A mediator who would act as if he or she is a policeman or social critic may not say to be mediating, according to this author.[8] Nevertheless a proper understanding of public and administrative rules and best practices may contribute to a better understanding of what it is that keeps the parties divided and what options – not just from a legal perspective – may be available for finding a solution. Stulberg suggests to aim for a competent mediator with the experience, skills, knowledge and cultural sensitivity for the specific conflict situation. The mediator should be considered objective, impartial and authoritative and be a person of integrity. The mediator needs a level of seniority and gravitas commensurate to the conflict context and must be acceptable to the parties. Some disputes require discreet engagement, whereas others need more high-profile initiatives.

Although specialisation is not a prerequisite to be able to act as a mediator, nevertheless, there are benefits because a mediator who is well established in the field in which the dispute has occurred will quickly understand what is flawed in the manner at which the parties look at the issue that keeps them divided and so be able to better tailor his or her questioning.
Also speaking the language of the parties may be of help. Only think of the notion 'bogey' as an example. Customarily this notion will be associated with golf sport. A score of one stroke above the course (the benchmark score on a golf course) is called a bogey. However, 'a bogey' can also mean a sample taken from a batch of products to probe whether the relevant product contains certain qualities or in the world of engineering a standard which will be strived at in comparison to others. Depending on the context the notion can have even more meanings, e.g. a set of two wheels under a train carriage, a scary object or something picked from one's nose. A mediator who in the differing contexts will immediately grasp what is intended will render the parties the reassurance that he or she is familiar with their world. This does not mean to say that this will have to lead to interventions on the part of the mediator. Research undertaken by Wheeler did render indications that parties behave differently vis-à-vis someone who they think has subject matter expertise than when they do not have that impression.[9]

4 Subject Matter Expertise

In many cases a mediator is selected on the basis of his or her subject matter expertise. A warning against disappointment is in order when a mediator is selected on this basis. Dependent on the agreement concluded at the start of the mediation, a mediator will not deploy subject matter expertise:

> The job of a neutral expert, arbiter, lawyer or counselor is strikingly different from that of a mediator, and many reasons argue for not mixing roles.[10]

Hoffman[11] also points this out:

> One of the most frustrating paradoxes for mediation clients is that they look for mediators who are knowl-

6 Runesson, E.M. & Guy, M.L. (2007). *Focus: Mediating Corporate Governance Conflicts and Disputes*. OECD, documents.worldbank.org.
7 Susskind, L. (1981), Environmental Mediation and the Accountability Problem. *Vermont Law Review, 1*, 6-8, 18, 42 and 46-47.
8 Stulberg, J.B. (1981). The Theory and Practice of Mediation: A Reply To Professor Susskind. *Vermont Law Review, 85*, 85-88,108-109 and 112-115.
9 Wheeler, S. (1991). Lawyer Involvement in Commercial Disputes. *Journal of Law and Society, 18*(2), 241-253, 244.
10 Stulberg, J. & Love, L.P. (2009). *The Middle Voice, Mediating Conflict Successfully*. Durham: Carolina Academic Press, p. 147.
11 Hoffman, D. (2003). Paradoxes in mediation. In Bowling, D. & Hoffman, D. (Eds.), *Bringing Peace into the Room (How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution)*. San Francisco: Jossey-Bass.

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> edgeable, only to find that mediators are often reluctant to share with them what they know.

Hoffman speaks of a paradox because mediators do not bring their expertise – which more often than not will involve legal expertise – to the mediation table but will refer the parties to their legal counsel for advice while also the parties will have opted for mediation in order to move away from legal argumentation. So a lot can be gained by communication and clarity about specific roles. When parties will know better what to expect of a mediator upon engaging a mediator, less disappointments may occur. Disappointment is an element of expectation.

In the reverse, a mediator who is not selected especially with an eye on his or her subject matter expertise, but who does avail over subject matter expertise may be tempted 'to supplant their own judgement of what is appropriate for that of the parties'.[12] This may also lead to disappointments. It is therefore important that a mediator will upfront provide transparency about his or her working methods and views on the execution of the assignment:

> The background qualifications and experience can enhance the value of mediation provided the professionals are able to distinguish between their normal roles and those of mediators.

Rome[13] issues a warning pertaining to a flip side of subject matter expertise in case of mediators who avail overmore subject matter expertise than the parties themselves:

> Unfortunately, some business people want the mediator to have very specialized knowledge, such as expertise in supply contracts, brand name licensing or like area. In my view, this is rarely helpful and substantially reduces the pool of qualified mediators available to serve. It is an approach to mediator selection that I discourage, except in highly technical areas. Caveat: There are some instances in which having a mediator with substantive expertise can be undesirable or even a hindrance. For example, a mediator with technical or legal knowledge superior to that of the parties could place a higher value on that expertise than on the business needs of the parties or be 'overly proactive' in seeking the 'right' result without regard to the parties' objectives.

In the event a mediator is selected on the basis of his or her subject matter expertise, this does not always have to lead to a disappointment.

> Often the parties look for an expert in the substance of the disputed matter and ignore the ability of the mediator as a process designer and process administrator who knows how to overcome impasse. Erroneously, parties and more likely their attorneys, believe that a good mediator is someone who will favorably evaluate their claims and that will cause the parties to move from the intractable positions that preceded the mediation to one favoring their client. These 'issue familiarities' may be important in developing initial trust among the parties with the mediator. […] Good mediators know how to educate the parties as to strengths, weakness and probabilities of outcomes without stepping over the line of being overly evaluative.[14]

Mackie[15] remarks:

> if you have someone who specializes in [the] sector and is a good mediator, this will often be more effective – specialists tend to have a quicker grasp of the various negotiating options that already exist in a field … there is a danger that their expertise may get in the way of their mediation role, but if they allow that to happen they are by definition unlikely to be excellent mediators in the first place.

An essential element in selecting a mediator who is a specialist in a certain field and avails over subject matter expertise is that the person involved will have been trained as a mediator, because otherwise – think of diplomats, judges, negotiators or other professionals – they will (continue to) do what they are used to do, which is not necessarily mediation.

In terms of selecting a mediator it may be helpful to have a clear picture of what subject matter expertise entails.
Honeyman,[16] who in the United States led the *Test Design Project*, a project team that made an attempt to formulate quality standards for mediators and drafted *Interim Guidelines for Selecting Mediators*, observes about subject matter expertise (*substantive knowledge*):

> We concluded that a … mediator needs enough knowledge of the type of parties and the type of dispute to be able to facilitate communication; develop options; empathize; and alert parties (particularly pro se parties) to the existence of legal information relevant to their decision to settle.

Subject matter expertise according to Riskin[17] can be described as follows:

> Subject-matter expertise means substantial understanding of the legal or administrative procedures,

12 Boulle, L. & Nesic, M. (2001). *Mediation, Principles Process Practices*. London: Butterworths 3, pp. 114-115.

13 Rome, D.L. (2010). Resolving business disputes: Fact finding and impasse. In *A Handbook on Mediation* (2nd ed.). New York: American Arbitration Association, p. 639.

14 Lurie, P.M. (2010). What to look for in a mediator. In Barclay, P. (Ed.), *Mediation Techniques*. London: IBA eBook, p. 37.

15 Mackie, K. (2001). Expert Mediators – Not Experts as Mediators: CEDR Replies. *Resolutions*, (Issue 16), 5.

16 Honeyman, C. (1993). A Consensus on Mediators' Qualifications. *Negotiation Journal, 9*(4), 306.

17 Riskin (1996), 46.

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customary practices, or technology associated with the dispute.

The relevance of subject matter expertise on the part of the mediator increases in case the parties may have a wish for evaluation. It is not possible for a mediator to responsibly engage in evaluation without availing over subject matter expertise. Riskin positions subject matter expertise fully within the context of an evaluative working method,[18] yet already before any method is being applied, it may be a factor in selecting a mediator. Subject matter expertise may also add value without evaluation taking place, but as said helps the mediator to a better understanding or more options for asking relevant questions. Riskin does note that subject matter expertise may be less relevant in the event the parties have more confidence in their own potential to find solutions or do realise that technical or other expertise can be flown in during the mediation if the need for input of such expertise does occur. He estimates that the degree of complexity and the relevance of technical aspects will determine the degree to which a need will be felt of a mediator with subject matter expertise:

> In almost any mediation, the neutral must at least be able quickly to acquire a minimal level of familiarity with technical matters in order to facilitate discussions or propose areas of inquiry. But to the extent that other participants have this expertise, the need for the mediator to possess it diminishes. In fact, too much subject-matter expertise could incline some mediators toward a more evaluative role, thereby interfering with the development of creative solutions.

I do believe that to an extent the above quote ignores the relevance of subject matter expertise as an element of the substitution aspect in the process of selecting a mediator and as said also the value it may bring to the process when the mediator avails over subject matter expertise. Availing over subject matter expertise does not automatically mean that the relevant knowledge will be deployed by the mediator in the form of advising the parties or becoming engaged in evaluation. Demonstration of subject matter expertise by speaking the language of the parties may be helpful to facilitate the communication during the process and build affinity with the parties.

Where it concerns subject matter expertise Moore[19] observes:

> There is a spectrum along which mediators place themselves in defining their degree of involvement in the procedure, substance, and relationships involved in negotiations. At one end are those who advocate mostly procedural interventions; at the other are advocates of substantive involvement by the mediator that may include actually forging the decision. Between them are mediators who pursue a role with mixed involvement in process and substance.

Stulberg and Love[20] wonder what subject matters expertise consist of and conclude:

> To understand and execute the basic elements … requires an analytical understanding of such concepts as conflict, power, trust, representation, approaches to bargaining, as well as an appreciation of motivation, psychological barriers to settlement and communication theory. To that she must add an understanding to the various dimensions of the subject matter in dispute. But it is not reasonable to expect one individual to be conversant in all matters that bear upon the subject matter in dispute; one dispute – for instance, between tobacco industry representatives and government health officials – might require expertise in such diverse areas as political theory and operations, law, economics, psychology, accounting, advertising, chemistry, biology, computer science, and history. No one can be an expert in all these matters, nor is such expertise necessary in order to mediate effectively. Being knowledgeable in some of these areas, however, is essential for being an effective mediator; the areas of expertise that are most useful should be left to the parties to decide when they select their mediator.

This last quote confirms that although Love[21] is an avid opponent of an evaluative working method, Stulberg and Love do see added value when a mediator avails over certain subject matter expertise ('Being knowledgeable in some of these areas, however, is essential for being an effective mediator.'). I do agree with them. They do not elaborate on what it is that makes subject matter expertise *essential for being an effective mediator*.

Subject matter expertise certainly is also a marketing and sales tool. There is a danger when too much emphasis is put on subject matter expertise. In an ideal free-market system, a reasonably diligent buyer has enough information to be able to tell the outstanding product or service from the terrible. Yet in the real world, consumers are rarely given so obvious a choice. More likely the problem is telling the 'pretty good' from the 'pretty bad'. Because the criteria are in doubt, or not clearly defined, it is not easy for the consumer to measure the quality of a mediator. This explains why parties tend to give so much – often too much – weight to prospective mediator's credentials in law or subject matter expertise of the particular field which seems closest to the dispute. Such credentials are prized because they are relatively standardised, and thus easy for the parties to

18 About Evaluative mediation, see Brink, M. (2021). Evaluative Mediation (Part I), An Analysis. *Corporate Mediation Journal*, (1), 12-20 and Brink, M. (2021), Evaluative Mediation (Part II), Deployment – How to Deploy Evaluative Mediation?, *Corporate Mediation Journal*, (2), 31-39.

19 Moore, C.W. (2003). *The Mediation Process, Practical Strategies for Resolving Conflict* (3rd ed.), San Francisco: Jossey-Bass, p. 79.

20 Stulberg & Love (2009), pp. 145-147.

21 Love, L.P. (1997). Top Ten Reasons Why Mediators Should Not Evaluate. *Florida State University Law Review*, *24*, 937.

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recognise. Therefore, it can be expected that legal and subject matter expertise will more and more be used to fill the gap.

5 Culture

The image and identity of a mediator in the eyes of parties considering mediation is not only relevant in terms of selecting the right mediator in a specific case, but also for trust in the mediator at the beginning of the mediation. Confirmation of the impression the parties had of the mediator when selecting him or her, in the initial phase of the mediation, is important because that impression is the credit which the mediator will have to build upon. This is even more poignant when there have not been intake conversations.

An example of a situation in which the first meeting with the mediator in person delivered a pleasant surprise is found in an article by Honeyman et al.:[22]

> The New South Wales Department of Community Services (DoCS) contacted Kelly to conduct a mediation between DoCS representatives and an Aboriginal family in relation to a child protection matter involving an Aboriginal family. DoCS had previously appointed a non-Aboriginal mediator, and the mediation was unsuccessful.
>
> The particular mediation service which convened this case does not usually offer a pre-mediation session unless it involves children or complex matters. Alfred had only spoken to a non-Aboriginal intake officer, and had evidently assumed that it was a mainstream mediation service, because when I greeted him, Alfred said "I thought this was a white service!" I replied that the service tries to appoint Aboriginal mediators where at least one of the parties is Aboriginal, to which he replied, "Oh, that's good – I feel better already, my sister!"

That this example is not one of a kind was confirmed in a survey in 2010, among participants in mediation as carried out by Charkoudian and Wayne:[23]

> The results show that failing to match disputants and mediators by gender has negative effects on mediation satisfaction measures and that those effects increase when the mediator's gender also matches that of the other participant. In contrast, failure to match by racial or ethnic group has little effect, but when an unmatched participant faces both an opposing participant and a mediator who share a racial or ethnic identification, mediation satisfaction decreases in several respects.

Butler[24] has a simple answer to the question whether the topic of race, gender or culture of the mediator matters:

> When the parties believe that the consideration of the race, gender, or culture of the mediator would help to resolve the dispute, then it is important.

One other, at first sight, insignificant aspect of culture is dress code. There is no direct relationship to the skills or expertise of the mediator, but it may help to make parties feel comfortable when the mediator is either dressed in a comparable manner as the parties or better dressed. In the latter case, there may initially be less spontaneous affinity than in the former case. A study published in the Dutch Tijdschrift voor Geneeskunde (*Magazine for Medical Science*) found that the dress code has significant impact on the degree to which patients trust elder and younger general practitioners and younger female general practitioners. It showed that generally business in formal attire generated more trust among patients.[25] The study was a sequel to a study that found that a doctor wearing a white coat enjoyed more trust on the part of patients.

It can be imagined that a mediator who is sensitive to the dress code of the sub-culture to which parties in a mediation belong and takes that into consideration in his or her own way of dressing may contribute to the lowering of the threshold at the first encounter.

6 To Conclude

When selecting a mediator attention may be given to specialisation of a mediator in a certain field or subject matter expertise. Demonstrable mediation skills will have to be present, so pay attention to the education of the mediator, track record (internet), certification by a professional association of good standing, which will have demands for permanent education, peer review and disciplinary supervision on the observance of its articles and by-laws. Attention may also be given to the person of the mediator in connection with his or her working method(s), facilitative, directive, transformative, evaluative or other. Do the parties want a very laid back or very active mediator? Is there a sensitivity where it regards culture, gender or race (in addition to the fact that sensitivity where these aspects are concerned might be seen as a unifying factor in every mediation)? As observed earlier, an emphasis on specialisation or subject matter expertise does not suffice to tell the

22 Honeyman, C., Goh, B.C. & Kelly, L. (2004). Skill Is Not Enough: Seeking Connectedness and Authority in Mediation. *Negotiation Journal, 20*(4), 489.

23 Charkoudian, L. & Wayne, E.K. (2010). Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation. *Conflict Resolution Quarterly, 28*(1), 23-52.

24 Butler, F.D. (2010). The Question of Race, Gender and Culture in Mediator Selection. In *AAA Handbook on Mediation* (2nd ed.), New York: American Arbitration Association, p. 241.

25 Kocks, J.W.H., Lisman-van Leeuwen, Y. & Berkelmans, P.G.J. (2010). De kleren maken de dokter, Meer vertrouwen in netter geklede huisarts. *Nederlands Tijdschrift voor Geneeskunde, 154*(A2898), 2358.

'pretty good' from the 'pretty bad'. It is important to learn as much as possible about the style and working method of a mediator to be selected:

> When selecting a mediator, it is important to understand the type of mediator you want, and this may depend on the type of dispute you are in and the current impediments to resolution. Where the mediator is expected to "weigh in" with evaluations, substantive expertise is more important; where the mediator is expected to be more of a facilitator, a process expert is critical. Regardless of the background and expertise of a mediator, you must make every effort to ensure that the mediator possesses the key personal qualities of honesty, integrity, courage and persistence. A mediator lacking those basic qualities could become a liability regardless of training, background or expertise.[26]

For the parties it is important to know what they want when they set out to select a mediator:

> You must define the qualities desired in a mediation in the light of what is to be accomplished. Some mediators will not give an opinion or an evaluation, but an effective mediator is not a 'potted plant', who simply carries messages back and forth. The mediator should have a reputation for neutrality, judgment, fairness, balance and creativity. Credibility is the key. If the parties respect the mediator, a large barrier to effective negotiation is removed. Most parties who are serious about resolving the dispute will choose a mediator who can give a strong credible and objective evaluation of the legal and factual issues in the case. A good mediator is a blend of apsychotherapist, judge and negotiator who can recognize the motivations of the parties (Is it only money, or is it something else?). An effective mediator is not "Mr. Rogers". Most parties who truly desire a negotiated resolution of the dispute will choose a mediator who can give a strong, objective evaluation of the case and who can 'close' the negotiations. Experience and effectiveness in mediation is a primary consideration in choosing a mediator.[27]

Partly based on the recommendations in the mentioned work of Chaykin and in consideration of all the above, a number of approaches to selecting a mediator can be considered:

i. Unless the handling of the dispute requires special skill and expertise, in simple matters a local mediator may well be suited. The fee in that case need not be high. This mediator may be found through public sources such as the internet, public registers or organisations of mediators. Most of the time it will be possible to find a mediator locally.
ii. Where it concerns family issues, most attorneys or other aid workers, courts, health care centres or other institutions or organisations will be able to recommend a mediator specialised in the field.
iii. In different cases, the handling of which may put special demands on the mediator, e.g. availing over subject matter expertise, the recommendation is not just to consult referral lists of courts, but also to consult institutions and organisations which specialise in conflict handling, e.g. arbitration and mediation institutions. Checking the internet may help to provide information for a first orientation.

Once there is a short list of say three potential mediators, there is no better way to find out more about the expertise of the mediator than to speak with parties who have had experience with a mediator on that list. In this respect the system developed by IMI[28] may be helpful. In the curriculum of the mediators in the register of that institute names and contact data are mentioned of parties who had experience with the mediator and have consented to be consulted as a source of reference. Absent such a source and helpful contacts in one's own network, the mediators can be asked for references. In the event references are not given with an appeal on confidentiality agreements, the mediator can be asked to list membership of associations and for names of prominent people within those organisations to give references.

It is recommended that before appointing a mediator an interview will take place, by telephone, virtual or in person, to get acquainted. Mostly one of the parties will see to it that a first contact takes place with a mediator, whereupon the parties or the mediator will have to agree as to how to organise an interview, one-on-one or with both parties present.
In such a conversation it is important that each party will develop a feel for the person of the mediator and for things like the level of education of the mediator and his or her approach. Which people and experiences have initiated his or her view on mediation? What is the proposed way forward and the way the mediator sees his or her role where content is concerned or making proposals during the mediation? Another question may be what the mediator has experienced in similar cases and if these did not reach a solution why not. The various options for an approach in the subject case may also be addressed, be it without already communicating details of that particular case, unless both parties participate in the orientation call or meeting or have beforehand consented to a more material one-on-one conversation with the potential mediator. Unless individual intake conversations take place with the consent of both parties, these initial contacts ought to be about the person of the mediator, his or her experience and approach to mediation in general and to the particular case in question in terms of working method, logistics, e.g. whether

26 Chaykin (1994). 58.
27 Ralston, R.H. (1994), Effective Advocacy and Mediation. In *ADR for the Defence: Alternative Dispute Resolution*. Chicago: Defense Research Institute, Inc., pp. H-1, H-3.
28 International Mediation Institute at The Hague, The Netherlands.

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a party (or the mediator) wants a file to be submitted and be studied before the start of the mediation. Other comparable issues to address are independency (neutrality) of the mediator, availability, confidentiality, representation of the parties, costs (fee, travel and other expenses) and where the mediator or the parties want the mediation to take place (location).
When it is felt that subject matter expertise is relevant, information asked from the potential mediator will also pertain to his or her background in the relevant field or branch of industry or services.

As mentioned herein above the overriding factor when selecting a mediator – on the basis of all the information to be gathered about a mediator – is finding someone who one feels one can trust.

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