

# Article

## What Is a Good Mediator?

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When the time comes to select a mediator, the judge, the lawyers, the parties or the mediation centre will want to find a good one. This raises two questions: what is a good mediator and how to find one?

The answer to the first question seems rather simple: a good mediator is one that the parties are happy with. This raises another set of questions: if the parties were happy with a mediator in one case, would they be happy with the same person in another case? Would other parties be happy with this mediator as well? If the answers are not a yes without reservation to both of those questions, then the question becomes: who would be a good mediator for this case between these parties?

### 1 Which Mediator for Which Case?

Should the mediator be a doctor to mediate a medical liability case? Should the mediator be a computer engineer to mediate a computer system malfunction dispute? These questions call for negative answers. The role of the mediator is not to understand the technical aspect of case to finally make a decision but to ensure that the parties understand each other. His/her understanding of the technical problem does not matter much because the problem is rarely technical. If the problem were technical, it would have been solved technically either by the parties or by an expert. If there is a technical misunderstanding between the parties, the ignorant mediator can help by making sure that they understand each

other. This will unveil their misunderstanding and bring them to resolve it. It may also reveal ignorance on both sides and invite them to consult with an expert. Actually the real or fake ignorance of the mediator can be helpful: it compels the parties to explain their own understanding, which will bring them to discover their misunderstandings or ignorance and overcome them.

I mediated a significant number of cases where I had no understanding of the technical aspects (MRI, cancer prevention by acting on chromosomes, corrosion in industrial installations, dismantlement of the same, etc.). Agreements were found in all of them and I felt those were the cases where I had been the most efficient. The type of matter should nevertheless play a role in the selection of the mediator. The mediator should understand the culture in which the parties may evolve. For instance, the mediator does not have to be a doctor but should be familiar with the doctors' culture to mediate a dispute between MD partners, and similarly for lawyers and other professions. But this will not be necessary to mediate a malpractice case, for instance, as it opposes a doctor to a lay person.

The potential mediator should also feel comfortable with the type of matter. Not everybody likes to mediate family or work place disputes. A social worker may not like to mediate commercial or financial disputes. In such cases and many more, a mediator would be able to serve but would certainly not be performing to the best of his/her abilities because the issue at stake would rank low in his/her scale of values. (S)he must feel that the stakes do deserve his/her hard work and energy.

In the selection process, I believe that the parties and their counsels should pay attention to the mediator's cultural background but not to his/her technical expertise. This implies that the parties and their counsels carefully reflect on the kind of service they need: expertise or mediation.

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## 2 How to Select a Good Mediator?

Previous experiences may provide information as to the mediator's abilities. But failing such experiences, what can be done?

Referring the case to a mediation centre with a roster of mediators may help. But how does the centre select its mediators? As an attorney, I have had contrasting experiences of the quality of centre appointed mediators. I would recommend that the parties ask the centre to suggest several names among which they would make their selection.

Whether the names are selected by a centre, from a list of any kind or just by recommendations, what are the criteria to make the final selection? And which information is actually available?

The information one usually receives relates to the mediator's career, training and number of previous mediations.

The mediators' career is interesting as far as it gives an indication of her/his culture. A career as a banker may not be enticing for a family dispute and, vice versa, a career as a social worker would not qualify the mediator for an industrial dispute.

The training is also interesting. Some people need very little training to be good mediators whereas others will always remain bad mediators, even with extensive training. A good 40 to 60 hours of training is sufficient to make a good mediator of someone genuinely interested in and caring for people. In other words, the training should be: no less than 40 hours, but it should be a 'good' one. This raises another question: what is a good training?

A training may be well-known and not be good. I taught master classes for mediators trained by some of the best-known centres of Europe and realised that they had never heard of principled negotiation and of the difference between positions and interests and of other similarly basic concepts!

Unfortunately, determining which educational programmes are appropriate to make a good mediator is just impossible for a normal law firm, a judge or party. This can only be decided by experienced mediation specialists.

Determining if a person has a type of personality to become a good mediator can only result from experience: from seeing this person mediate a case either in reality or in a mock mediation. This again cannot be done by a lawyer, a judge or a party. Lawyers and legal departments of large companies, who participated in numerous mediations, may have favourite mediators and a black list. Because of confidentiality, judges will rarely receive sufficient information to make an opinion. They will evaluate the agreement rate, but everyone knows that the outcome only partially depends on the mediator: a very good mediator will usually be sought for very difficult cases and have a success rate below

what a poor mediator would have with easy cases. Actually, mediation centres encounter the same difficulty to know how well the mediator is doing, unless they have someone attending their mediations, but I am not aware that any of them has.

## 3 The Personal Qualities of a Good Mediator

A good mediator should of course be ethical. But anybody can be ethical, even when it requires an effort.

A mediator should be a good listener and take time to let people fully express themselves. The mediator should be mindful and thoughtful to be able to understand them and possibly beyond what they say without inferring.

A good mediator should care for people. If the mediator cannot understand people's preoccupations, be empathetic, he will not put enough energy in his mission. The mediator is there to help and for no other purpose. This is the German MMMM-rule: *Man muss die Menschen mögen* (One should like the people).

His/her empathy goes along with extreme humility, which does not mean modesty. The mediator should be humble as far as (s)he is only there to serve the parties but (s)he may be proud of previous achievements, for instance.

The way the mediator dresses or behaves must be simple and acceptable to all parties. It must show respect and not be distinctive of any social group. It should neither draw people's attention nor be repulsive to anyone.

A good mediator should have the ability to think out of the box or "go to the balcony", in other words, (s)he must have the ability to see things in another way than the way in which they are presented to him/her.

A good mediator should not be afraid of emotions. (S)he must understand the energy contained in these emotions and be able and happy to direct this energy toward mutual understanding. In order to do so a mediator should have some natural authority. Authority will come from two sources. The first source is the total mastering of the mediation techniques and the ability to make it appear in the gentlest way at the very beginning of the process. The second source of authority will come from the fact that the mediator's personal problems will not interfere with the performance of her/his mission. As a result of that, the mediator will be able to listen carefully and to speak clearly and simply. The mediator must not be trying to prove his knowledge, his achievements, all the nuances of his thoughts, his action should not be hindered by shyness nor turn to pressure because of self-assurance. His expression must remain controlled in length and tone and not be excessive in the use of language nor in the way it is expressed. He should not be afraid of the people in the room or of his/her responsibilities.

## 4 The Need for Certification

Because the crucial information to evaluate a mediator is not available to the users and the referring institutions, the quality of mediators must be ascertained by experienced people through a certification process. The word 'certification' is unfortunately often used inappropriately. Differences must be made between a diploma, an accreditation and a certification.

A diploma acknowledges that the person did learn what was taught in an educational program. It is delivered by the training institution. It only evaluates the degree of knowledge the potential mediator acquired, not his/her personality. Even when the exam includes a mock mediation, it is too limited and too early in the mediator's career to evaluate how (s)he will perform in the longer run. Many new mediators tend to quickly forget what they learned in their initial training and return to their purely distributive habits. Also, such training institutions are happy to grant diplomas because happy clients bring new clients. The value of a diploma is not strong enough to ascertain the quality of the mediator. A number of well-known institutions call their diplomas 'certification'. This is a misuse of the word and a voluntary misleading one for the potential mediators as well as for the users.

An accreditation means that someone is on the roster of a mediation service provider. It implies that this provider considered this mediator to be good enough to be used by them. As we saw, the information the provider has is limited. Furthermore, a mediation centre may have other reasons to list the mediator than his/her mediating skills: foreign languages, technical knowledge, being a celebrity in some field etc. This explains why I had those contrasting experiences with mediation centre appointed mediators. Being on such a roster, has some more value when the list is published because it shows that the provider is willing to associate its own name with the mediator's. When the list is not public, the value is very low, and many people are on rosters of many providers and never get any business from them. Certification only refers to a public statement by an independent body that a person is able to perform good mediation services. The certifying institution should verify that:

- the candidate did receive the training he claims;
- this training covers all the major points needed to act as a mediator;
- the mediator remembers and understands what was taught;
- and that (s)he does deliver a good service (a mock mediation will allow the evaluation of the mediator's real skills).

The test should not take place right after the mediator was trained. It would not have much more value than a diploma. Certification should only be considered once the mediator has gained some experience. In addition, the opinions of the parties and the lawyers involved in

his/her mediations will be of great value to understand what can be expected of this mediator.

An objection to this system may arise: what about mediators who have not yet mediated a sufficient number of cases? Furthermore, as far as certification should bring business to certified mediators, beginners would have a hard time to be appointed in a sufficient number of cases to apply for certification. There would be a risk that certification would end up reserving the market to a limited number of 'old-timers'. To avoid this risk, the creation of a category of 'pre-certified' mediators, who would fulfil all requirements except the experience, seems to be the solution.

I believe that the certification authority should only consider trainings with a verified content or require the candidates to have read some fundamental books. To my knowledge, very few independent certification authorities exist.

In the international field, the International Mediation Institute (IMI) is unavoidable. Unfortunately, it is represented in a limited number of countries and it can almost only certify mediators from these jurisdictions. The IMI local certifying organisations (QAP – quality assessment programs), as the French *Institut français de certification des médiateurs*, for instance, can and do certify local mediators who do not wish to be active on the international market and will not ask to be listed by the IMI.

In France, the *Institut français de certification des médiateurs* ([www.ifcm.cc](http://www.ifcm.cc)) and in the Netherlands the *Mediatorsfederatie Nederland* (<https://mfregister.nl>) are good examples of what can be done. Not too surprisingly they are both QAPs for IMI.

## 5 Conclusion

Mediation is a wonderful way of resolving disputes. But when improperly performed, it can be dangerous. Not only will a bad mediator fail to resolve the dispute, cost time and money but it may even worsen the situation and turn a simple case into an inextricable conflict. We have seen parties and/or lawyers who had such bad mediation experiences that they do not want to hear about it anymore.

The quality of mediation services is a major issue for the development of amicable resolution techniques. I believe that all stakeholders in this field (judges, mediation centres, lawyers, major companies, government, international organisations etc.) should actively promote certification mechanisms by encouraging the creation and development of certification programs and preferring certified mediators for their cases.