

Referral to mediation

History

In the period of the *court-connected mediation* project (March 2000 – April 2005) a pilot project involving referral to mediation was carried out in a number of appeal courts and district courts by the administrative sector, the commercial/civil sector (including interim injunction proceedings) and the subdistrict sector. The parties and their lawyers opted for mediation in a statistically relevant number of cases. The average success rate of the cases referred to mediation (approximately 3,000) was over 60% at the end of the project period. On the basis of the results the House of Representatives decided, at the proposal of the Minister of Justice made after consultation with the Council for the Judiciary and the meeting of presidents of the district courts, to introduce referral to mediation as a permanent instrument for the solution of disputes at the stage of legal proceedings. These plans were approved by the House of Representatives in January 2005. The instrument of referral to mediation is being phased in gradually within the appeal courts and district courts, and two specialised administrative courts. The first courts introduced it on 1 April 2005 and the process will be completed by the end of 2007. All sectors, with the exception of the criminal sector and the immigration law chamber, are taking part.

Organisation of the referral instrument

Each appeal court and district court has a central mediation office or a mediation office for each sector. The mediation office consists of a judge, a mediation officer (plus deputy) and a mediation secretary. The judge is responsible for ensuring support among the judges.

The mediation officer (senior judicial clerk) has a hub function. He/she is in charge of the office. In the event of a written referral he/she screens the cases in consultation with the sector chairman or a judge from the sector. In addition, the officer discusses the procedure and organisation of the mediation with the parties after referral. This includes consideration of the text of the mediation agreement, the choice of mediator and the arrangement for costs. The mediation officer also arranges the first appointment. Besides the referral course the mediation officer takes a complete mediation training course.

The mediation secretary is responsible for the clerical aspects of the mediation process. The court registry is responsible for the clerical work in connection with the case, including sending letters of invitation, updating the referral file and monitoring the outcome.

Manner of referral

Referral can take place both prior to a hearing (i.e. in writing) and during a hearing. The parties themselves may also request mediation. The basic principle is that the offer of referral may not result in a serious delay in the handling of cases. In the case of a written referral a (short) period is therefore specified within which it must be apparent whether the parties wish to make use of the offer. In the Netherlands, settlement conferences are very common and highly successful. This implies the need to discern between mediation by a mediator and settlement before the judge. The choice between settlement and mediation is a relevant topic and will be the subject of further research in the coming years.

Recording of agreements reached in mediation

The parties conclude a (standard) mediation agreement at the start of the mediation procedure. The completion of the successful mediation is recorded in a mediation outcome agreement. This agreement is signed by the parties. If desired, this agreement can be included in an enforceable document. If the mediation is not successful, the case is returned to the courts.

Costs of the mediators

In the project period the mediators were paid from the project funds made available by the Minister of Justice. Since 1 April 2005 the first 2.5 hours with the mediator have been free of charge. Thereafter the parties jointly bear the fee of the mediator. The rates are shown on the list of mediators. The parties can

make an agreement about the division of the costs. The mediator receives a contribution of EUR 200 from the Ministry of Justice for the first 2.5 hours (this is known as the 'temporary incentive contribution'). The mediation instrument is therefore subject to a cost-benefit assessment. A short lead time is therefore important for all concerned.

Every person entitled to legal aid can also obtain legal aid for mediation. Anyone who has already received legal aid for his lawyer need not pay a contribution for the mediation since the parties are required to make an own contribution only once. If the legal aid application for mediation has not been preceded by the granting of legal aid for court proceedings, a special legal aid rate applies.

Monitoring system

A system is in place to monitor all referrals and the outcome of all court-referred mediations. This will be the basis for the further development of best practices in the court-connected referral faculty.

Costs of the referral faculty in the courts

The costs of the referrals are borne by the courts. In terms of court funding, a successful mediation is treated as a judgment. The benefit to the court is therefore the time saved by judges and support staff. This time can be used for other pending cases. What percentage of cases can be disposed of by mediation will be decided in the next few years. A rate of 5% is currently projected.

Mediators

The quality criteria for mediators have been adopted in consultation between the Netherlands Mediation Institute (NMI), the Council for the Judiciary and the Legal Aid Boards. The mediator must be NMI-certified, have demonstrable mediation experience and possess, among other things, proven legal skills. His rates must be public and he may only charge for hours in which he is in contact with the parties and hours spent drawing up the mediation outcome agreement. Quality is monitored by means of evaluation. Mediators are obliged to cooperate in the monitoring system. Only mediators who fulfil the quality criteria can apply to be put on a list of mediators at each court. This is supervised by an assessment committee. Instructions about applying are provided to mediators in various ways, for example on the website www.mediationnaastrechtspraak.nl.

Support

The organisation is familiarised with mediation by courses for judges and judicial clerks, for clerical staff, staff of the central court registry and for ushers. Judges who have taken the referral course before are offered the opportunity of a refresher course. In addition, the use of all kinds of internal and external communication instruments at various times during the implementation and immediately after implementation creates the necessary support among the various target groups.

Ultimate aim

The ultimate aim is to expand what is offered by the courts to provide effective tailor-made dispute resolution in the interests of parties by providing a choice between settlement, mediation and decision. Reducing the workload is of secondary importance.

More information

More information can be found at www.mediationnaastrechtspraak.nl

Mediation referral course

History and structure of the course

A referral course was developed specially for judges and judicial clerks from the courts taking part in the court-connected mediation project. The course was established in order to train judges and judicial clerks as referrers. The course is expressly not intended to train the participants as mediators.

The course has been designed in such a way that judges can use the skills they are taught in their ordinary case work and in reaching creative settlements, and are able in the process to distinguish properly between settlement and mediation.

The course was taken by over 800 judges and judicial clerks in the period since 2000. More will follow in the coming years. The experience gained with referrals and the evaluations of the course itself have had a great influence on the course programme, which has been radically revised on various occasions.

The referral instrument will shortly be introduced on a permanent basis at all courts. It is necessary for judges, judicial clerks and other referrers in all district courts to be able to refer effectively to mediation. For this purpose it is important for them to be able select cases and parties who are eligible for referral and then approach the parties adequately. It is also important for them to be acquainted with the most recent data on successful referrals.

Ever better methods of referral have been developed in the project period and in the implementation stage. Information about the most successful methods is provided in the course both orally and in writing. The course is continuously updated for this purpose.

The course for judges takes two days and that for judicial clerks takes one day.

Since last year the course has become an “export product”. At the request of the judiciary in a number of countries, the course has been introduced and taught to members of their judiciary by experts from the Netherlands.

Course material

All course participants receive the book ‘Making referrals to mediation’ by Machteld Pel, and a loose-leaf handbook for referrers containing practical information.

Aim of the course

After the course, course participants:

1. have a good idea of the role of the judge in effective dispute resolution
2. can advise parties on how to choose the most effective form of dispute termination
3. can make effective referrals
4. have an inside knowledge of mediation
5. have adequate information about making referrals
6. can convey information (answer FAQs)
7. can assess and, if possible, increase the willingness to negotiate
8. can deal with resistance by parties

An important side-effect of the course is that after completing it the judges and judicial clerks:

- have a deeper understanding of dispute development and management
- have exercised skills which are useful in their own work, in particular dealing with various kinds of questions (relational, linear, reflective and dispute-related questions) and other interventions (e.g. meta communication and relabelling)
- have an understanding of the similarities and the dissimilarities between negotiating, settling and mediation

- have an understanding of the dynamics between lawyers and between lawyers and clients which can cause escalation and de-escalation

Procedure during the course

Brief theoretical talks are interspersed with a range of very practical exercises, sometimes supported by video fragments. A lot of specific course material has been developed. There are always two trainers present, including one judge. Many situations that occur in hearings are practised, with particular emphasis on effective referral at the various types of hearing and on the structure of the hearing.

Preparation of the course

In preparation for the course the participants complete a questionnaire about their approach to a hearing and to an attempt at settlement and set out their wishes for the course. This information is intended to ensure that the course meets their practical needs as far as possible. It also has the additional benefit that prior to the course the participants can reflect on their own actions at a hearing and their approach to settlements. This often leads them to formulate specific wishes for the course, which they can then pass on to the organisers.