

# PRACTICAL ASPECTS OF MEDIATION

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## Abstract

*Today the Romanian state gives some advantages to those who use mediation. If the Romanian state would take further steps, mediation would work as in the countries with old tradition. The article refers to success and failure got in the two years of practice. The mediation can be seen in two aspects: The first aspect regarding the mediation itself can lead to a mediation agreement. The mediation agreement gives both winnings to the conflict parts and professional satisfactions to the mediator. The second part concerns the mediation contract. It is very important for the mediator who wants to practice and to gain money. The mediation will work in Romania when the mediator passes from the pro-bono stage to winnings. The article refers to the conditions of the appearance of mediation in Romania, the purpose for which it was founded, the usefulness of mediations to relieve the number of court cases and increase the efficiency of the courts, as well as the results obtained from the adoption of the mediation laws until now. The practical aspects leading to the mode in which Romanians perceive mediation and wish to participate or not in the sessions of mediation Recommendations for promoting mediation in Romania*

**Keywords:** mediation, mediator, conflict, contract, law

## 1) Introduction

Mediation is a new domain in Romania, which has bearing on legal and social matters and that gave birth to a new profession, namely the profession of the mediator.

This paper tries to answer why it is so important to know the advantages of mediation, to know the progress made by mediation but also to know the difficulties encountered and their causes.

The work of a mediator is described in a couple of words. There are also many advantages, which the Romanian state can grant to those who wish to resort to mediation and sanctions for those who do not wish to respond to an invitation to mediation to address the other side of the conflict. The article gives a concrete answer in regards the aspects that make mediation difficult. Diverse theories have appeared in specialized literature regarding mediation. This work is the result of practices in mediation by an authorized mediator and tries to be one of the first works regarding the aspects of practice in this new domain. The work proposes and indicates legislative proposals aiming to promote mediation and real functions of mediation in Romania.

## 2) The Conditions for the Emergence of Mediation

Romania had to meet certain obligations imposed by the conditions of accession in order to join the European Union.

One of these obligations was the adoption of the Law 192 / 2006 on mediation which defines mediation as “an optional way of settling disputes amicably, with the help of third party individuals specialized in mediation, in conditions of neutrality, impartiality and confidentiality and with the free consent of both parties”.<sup>1</sup> Article 1 paragraph 1 Law 192/2006

Under the authority of the European Commission to streamline the justice system, measures were initiated to identify how the European Union’s recommendations on mediation were put into practice, starting with a monitorization program of many states, among which Romania was included.

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<sup>1</sup> Article 1 paragraph 1 Law 192/2006

Under these conditions, Romania has had to adopt a series of legislative measures able to integrate mediation as a new profession that can increase efficiency and relieve the courts, improving the quality and efficiency of the justice system.

Mediation is a new profession, which with difficulty is making its place among the other known professions in Romania.

There have been many events organized to promote mediation, but the procedure is still unknown to the general public.

There exists a difference between the understanding of the word “medium” in the Romanian language and its meaning “something brought at medium level” and the understanding of the word “mediation” as an alternative dispute resolution procedure.

In legislation terms such as school mediator, health mediator worker or family mediator have appeared, but they have nothing in common with the significance of the word that denotes the new profession of mediator.

Today in Romania mediation is still perceived as a compromise.

Mediation is not a compromise, mediation is a procedure by which independent parties, with the help of a third party, come to realize the source of the conflict between them and identify possible ways to stop the conflict, and from this, through mutual agreement they choose a convenient solution.

“Mediation is based on the trust the parties have for the mediator, as a person able to facilitate negotiations between them and support them in resolving the conflict by reaching a mutual, convenient, efficient and lasting solution”<sup>2</sup> Article 1 Paragraph 2 of Law 192 / 2006.

“ Mediation is completely voluntary and any resolution must be acceptable and agreed upon by all the parties to the mediation. Mediation offers the advantage of informality, with reduced time , as well as minimizing workplace disruption. All discussions are held in the strictest confidence, no records or files are maintained by the Alternative Dispute Resolution Office. All notes taken by the mediator or the parties to mediation are destroyed at the conclusion of the mediation and prior to departing the location of the mediation. Sometimes it may be helpful to share information with the other party in order to facilitate resolution of a matter. However, this will not be done without the party’s express permission to do so. Mediations are usually conducted in the conference room at the Alternative Dispute Resolution Office in order to promote the neutrality and confidentiality of the process.

The process occurs in a very private and informal setting. Typically the parties as well as the neutral sit around a table. The mediator makes an opening statement including the establishment of ground rules regarding the process and conduct to be followed by the parties. Then each party will have an uninterrupted opportunity to present the issue from their point of view. Once the issues have been defined, the parties generate settlement or resolution options. The mediator may ask clarifying questions or meet with the parties jointly or separately, in what is called a caucus, in order to help them explore settlement possibilities. If resolution is attained, the agreement is formalized in a written Resolution Agreement, which is a binding agreement.

The mediator does not have the authority to impose a settlement or resolution on the parties but will attempt to help them reach a mutually satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties. The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.”<sup>3</sup>

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<sup>2</sup> Article 1 Paragraph 2 of Law 192 / 2006.

<sup>3</sup> Mediation Preparation- <http://www.cdc.gov/od/adr/medprep.htm>

### 3) Two aspects that can be regarded as mediation

Mediation, as a process, can be viewed from two viewpoints

#### 4) The first aspect—The activity of the mediator during the procedure of mediation

The first refers to the activity of the mediator that takes place in the presence the parties engaged in conflict. Activity that aims to end the conflict and concludes in an agreement, while the second refers to the completion of the mediation contract between the mediator and the parties in the conflict as the primary and essential element of mediation, without this mediation would not be able to exist.

The professional mediator represents a neutral, impartial, third party, professionally trained to help the parties solve the conflict, maintaining confidentiality of the information discovered out during the mediation activity.

Whatever the nature of conflict, mediation implies the following five steps:

- 1) Process Overview
- 2) Identifying problems
- 3) Exploration of interests
- 4) The parties generate options and identify possible solutions
- 5) Conclusion and Agreement

This can be done in one session of mediation, or more, depending on the complexity of the matter and the ability of the parties to hold a constructive dialogue.

A mediation session may last up to 3-4 hours.

Although we are inclined to believe that a decision would be the logical consequence of thought, it is clear that emotions influence decision-making during mediation.

The mediator is actively listening to the story of the conflict, showing empathy for both sides, he will help them understand the boundary between the emotions and anger with which they came and their interests which should be followed.

The mediator is a peacemaker that diffuses conflict step by step.

The mediator plays the role of a psychologist and a real questionnaire is given to the parties in order to understand the motivation of their actions.

He follows the interests of the parties to find a solution to a painful problem, a solution that does not come into conflict with the interests of other parties.

Forced to defuse the situation, the mediator will use his entire life experience to build a positive, affective atmosphere. He will use any method of encouraging positive behavior.

The mediator will hold plenary meetings with the parties but very often he will talk confidentially with both parties, helping them to understand the favorable aspects; and when necessary breaks will be taken.

During the entire procedure, and particularly when the agreement is made, the mediator must be particularly attentive to the legal language used, especially if the agreement serves as a transaction that will be approved by a court.

The agreement must be designed in legal language to fit the legal documents of a court decision.

But aside from the specialized professional knowledge, the mediator must prove above all, a moral character and the inclinations of the profession.

Perhaps more than other professions, the mediator's mood affects the result of the mediation itself.

It was found that a good-humored mediator succeeds to induce cooperative behavior in the disputants.

The mediator must be available to be able to help the parties when they have reached a certain level of finding a solution; the agreement could fail just because of the mediator's lack of time to draft an agreement.

For this reason it is important that the mediator be only a mediator and nothing more.  
I personally still have not met mediators who can maintain the profession.  
The mediator from his own funds often subsidizes maintaining the costs of an office.

**5) The second aspect**—the closing of the contract of mediation as a vital condition for the existence of government-employed mediators in Romania.

The pecuniary aspect of the mediation process is connected to the second stage of mediation, which refers to an essential and vital element for the development of mediation, and I refer to the closing of the contract between the mediator and the involved parties.

Mediation, as a procedure, is non-existent in the absence of mediation agreements.

Mediation will never exercise its role in the view in which it was adopted, to relieve and to increase the efficiency of the justice system and thus reduce budgetary expenditures relating to the justice system, so long as no one will close the contracts for mediation.

**6) Some of the reasons why Romanians do not resort to mediation**

- 1) because they do not know what mediation is and they perceive it as a compromise and not as an alternative way of resolving the conflict
- 2) because it is not mandatory
- 3) because they are too tired of the failed negotiations before the introduction of the action in court
- 4) because they do not see another mode of resolution than what they have already foreshadowed mentally
- 5) because they do not want to show any sign of weakness in front of the opposite Party.
- 6) because often they are not aware of their framing of the problem as having a false impression that they will win
- 7) because mediation costs more compared to criminal courts that are completely free and to civil courts where many cases suitable for mediation are taxed at low judicial stamp value.
- 8) because the agreement does not have the value of authentic document

**7) What advantages does the Romanian state give the litigants?**

- a) Free local information services offered by the mediator, the mediator does not charge a fee for a briefing as a result of the obligation imposed by Article 614 Code of Civil Procedure
- b) Pecuniary benefits available for all litigants provided by **Law 192 / 2006**.

“At the request of parties who have resorted to mediation proceedings shall be suspended in civil cases by the courts or arbitration under the conditions stipulated in article 242 paragraph 1 section 1 of the Code of Civil Procedure and if the mediation agreement is not achieved, the application for reinstatement for the judicial duty stamp is free”.<sup>4</sup>

“If the dispute is settled through mediation, the court will rule on the request of the parties, a decision according to art. 271 of the Code of Civil Procedure”<sup>5</sup>

“With the ruling the court shall order, at the request of the interested parties, a refund of the tax paid for this investment”<sup>6</sup>

- c) Pecuniary benefits stipulated by **GEO 51/2008** on public legal aid for legal services are granted to those who meet the conditions for public legal aid.

<sup>4</sup> Article 62 Law 192/ 2006

<sup>5</sup> Article 63 paragraph 1 Law 192/ 2006

<sup>6</sup> Article 63 paragraph 2 Law 192/ 2006

Public legal aid is granted to litigants who earn less than 200 euros a month per family member.

Art 20” If the person meets the requirements for obtaining public legal aid proving that, before the beginning of the process he went through the process of mediation for the dispute, he also benefits through the reimbursement of fees paid to the mediator.”<sup>7</sup>

“The same legal benefits are given to a person who meets the provided conditions for receiving public legal aid if they solicit mediation after the beginning of the process, but before the first day of appearance.”<sup>8</sup>

### **8) What happens if one party declines the offer of mediation by the other party?**

In this case the judiciary public support may be denied.

### **9) Results obtained**

Following mediation, agreements were concluded in 70-80 % of mediated cases.

The biggest problem is the participation of both parties.

### **10) Constructive solutions to promote and increase the efficiency of mediation**

**a)** Mandatory participation of both parties involved in the briefings for cases of family law, civil law, commercial litigation and administrative law

**b)** Recognition of mediation as a public activity not only scripting (Article 4 paragraph 1 of Law 192/ 2006) <sup>9</sup>and also paying the mediator for the sessions from the same fund from which the legal system functions.

**c)** The introduction of mediation as a mandatory step after the introduction of the notary application for divorce at the court or city hall, the stage in which the mediator will be able to fulfill one of the activity’s objectives which is misunderstanding between spouses regarding continued marriage<sup>10</sup> If after attending the mediation procedure and deadline of three months, the two were not reconciled, then the decision to divorce through the simplified procedures provided by the law

In this way, mediation will be making its contribution to fulfilling the promise held by the statute of Romanian state *"In Romania, the state shall protect marriage and family, he supports, by economic and social development and family strengthening."*<sup>11</sup>

### **11) The social implications that can make the procedure of mediation mandatory in the following cases of divorce.**

The proposal made in 10 paragraph c is also especially beneficial to Romanian society also in cases of marriage where children that are minors exist. These innocent children suffer from the misunderstanding between their parents who with ease can dissolve their marriage often leaving no place for the children. Outside of a lack of material necessities, which leave an imprint on the physical and psychological development on the children. These children can become violent or in time they can lose faith in the institution of marriage and not take part in family life leaving the birth rate to decline alarmingly. In this way all Romanian society as a whole has something to lose.

To quote a colleague that is a mediator as well as a family counselor<sup>12</sup>

<sup>7</sup> Article 20 paragraph 1 GEO 51/ 2008

<sup>8</sup> Article 20 paragraph 2 GEO 51 / 2008

<sup>9</sup>Article 4 paragraph 1 of Law 192/ 2006)

<sup>10</sup> Article 64 paragraph 1 law 192 / 2006

<sup>11</sup>Article 1 Family Code

<sup>12</sup> Gheorghe Surtea - mediator Email to the author 18 02 2011 The easy way in which the couples get the divorce mediator@googlegroups.com mediatorautorizati@googlegroups.com

“ Unfortunately families with the civil registrar, many of them realized in front of an altar stating “till death do us part” can not always be maintained, proving once again that life is very complex or that people are too weak, proud, too ambitious or too unforgiving toward their spouse to whom they swore eternal love. This is when divorce appears. Sometimes it can seem inevitable, but in many cases with preventative help it can be avoided, or the two individuals can continue to have a nice life. When I say this, I say it from my experience as a family counselor. From this position I have helped to reconcile many families and to avoid divorce, even in families where divorce had already been announced. Well, the measures taken by Law 202/2010 in regards to divorce do not appear to me to protect marriage and family. The ease with which a marriage can be dissolved, whether in front of a public notary or by administrative action, seems to me to be more of a stimulant for the dissolution of marriage and a motive for less responsibility and seriousness when founding a marriage. The foundation of a family was always regarded as a serious business and that those who do not want a clear responsibility preferred cohabitation. Now, on the contrary people prefer to marry for their own advantages, however if it doesn't work out, with a modest tax or even for free in some municipalities one can have a divorce certificate in one's pocket in 45 days. These legal provisions in their actual form are a big hit to families, if not also for society as a whole. Once again, I don't believe that the phenomenon of divorce will ever disappear and I am also not a supporter of divorce with scandal in the courts. Here's what I think is missing from the new provisions contained in Law 202/2010, **the absence of mediation and the mediator**. Not in the sense that the mediator would decide the divorce. Frankly, personally I would not have wanted something like that. But lacking the mediator, as an attempt to mediate and reconcile the parties before the divorce, even possibly on amicable terms”

## Conclusions

Relieving the courts is a necessity for improvement of the justice system, both in terms of accuracy and attention given to cases brought to the legal system and in terms of reducing budgetary expenditures.

The lost cases of the Romanian State at the court in Strasbourg put heavy burdens on the shoulders of Romanian citizens, supplementing the already excessive budget for maintenance and operation of the legal system. Romania has fulfilled the requirements of mediation for which it was adopted to become a member of the EU, but if mediation is to move past being a checked measure on paper the conditions for its existence must be assured

## References

- Mediation Preparation- <http://www.cdc.gov/od/adr/medprep.htm>
- Law 192 / 2006.
- GEO 51 / 2008