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ASPECTS OF THE DIFFICULTIES OF WORKING AS A MEDIATOR WITHOUT HAVING A LEGAL BACKGROUND

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ASPECTS OF THE DIFFICULTIES OF WORKING AS A MEDIATOR WITHOUT HAVING A LEGAL BACKGROUND[1]

Andreea Elena MATIC[2]

Abstract

Mediation was introduced in the Romanian legal system by the Law on mediation no. 192/2006 subsequently amended and completed with the clear purpose to ensure the possibility of the amicable settlement of conflicts and the decrease of the workload in courts.

The present article involves ethical and organizational aspects in the mediator's activity through art . 7 in Law no. 192/2006, according to which the profession of mediator may be taken up by any individual who is mentally unimpaired, has a degree in higher education, 3-year seniority, is medically fit, enjoys a good reputation, has not been sentenced for an intentional crime causing harm to the profession, has graduated the necessary courses, and is accredited as a mediator under statute.

None of these requirements imposes specialized legal studies, which, in our view, is a huge minus. Mediation in a divorce case - for instance - requires knowledge of the civil law. In our opinion, a mere specialization course cannot provide the future mediator with the necessary legal knowledge to conclude a valid agreement and he/she should be required to hire a lawyer or a legal adviser (this fact will increase the costs of mediaton) not only to have the possility to hire one. The present paper deals with the deficiencies and inherent problems occurring when the mediator is not a jurist, with the necessary legal background.

Moreover, the ethical and deontological oligation of the mediator, established by Law no. 192/2006 and especially by The Code of Ethics *and professional deontology* of the Mediator can not be fulfilled in the absecence of legal studies or legal counseling. In the present paper we rephered to the following oligations:and ethical/deontological duties of the mediator: competence, *the relationship of trust between* the mediator and the *parties (which envolves the mediator's ability to actually solve the conflict based on his/her legal knowledge) – provided by Article 2.4 of* The Code of Ethics *and professional deontology* of the Mediator, honesty, best dilligence, moral integrity, confidentiality, etc.

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1. Introduction

We will not begin with the benefits or advantages of mediation, in relation to which it has already been written hugely. When we talk about mediation, it is primarily about a conflict occurred among two or more people. Mediation involves settling the conflict in a manner satisfactory to both parties. None wins or loses, and if mediation succeeds, both parties go home happy. It is said about mediation that is a less expensive, faster and more personalized way to settle a litigation.

The profession of mediator is relatively recent both in Romania and in Europe. On this line, the first documents at European level have been a series of proposals related to the settlement of litigations concerning the consumer rights: *Commission Recommendation 98/257/EC dated 30 March 1998 on the principles applicable to the bodies responsible for the extrajudicial settlement of litigations related to consumption, Commission Recommendation 2001/310/EC of 4 April 2001 regarding the activity principles of the bodies outside the courts involved in the amicable settlement of consumer litigations,* including the minimum requirements that should be complied with by the extrajudicial courts empowered with the consensual solving of consumer litigations.

Directive 2008/52/EC of the European Parliament and of the Council dated 21 May 2008 regarding certain aspects of mediation in civil and commercial matters defines mediation in Article 3 as "*a structured process, regardless of the manner in which it is named or referred to, where two or several parties in a litigation try, on their own initiative, to reach an agreement on the settlement of their litigation, with the assistance of a* ***mediator***."

The only limitation concerning the person who leads mediation is found in paragraph 2 of Article 3 of the Directive: it also falls under this Directive the mediation carried out by a judge who has no involvement in any judicial proceedings relating to the dispute in question. Both the definition of mediation and the provision on who can have the capacity of mediator have been criticized by specialists as it lacks clarity and details too many aspects that contradict the conditions that should be satisfied by an adequate definition.

Also in Article 3, the mediator is defined as "*any third party called to lead the process of mediation in an effective, impartial and competent manner, regardless of*

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the third party's name or profession in the Member State concerned and the way in which the third party has been appointed or asked to carry out the mediation". It can be noted that this definition is very wide, exactly to cover the domestic legislative provisions of the Member States in the matter.

The Directive requires that the Member States encourage mediation, ensure a continuous and adequate training of mediators so that they prove competence and impartiality, monitor the manner in which the mediations are actually performed, etc..

In our internal laws, mediation is regulated by the **Mediation Law no. 192/2006 as subsequently amended and supplemented**. Throughout the time there have been made several amendments, both to this law and to other regulations (Code of Civil Procedure, Criminal Code, etc.) all for the purpose of a better enforcement of the mediation procedure and in order to be avoided legal disputes as much as possible.

In the following we will undertake an analysis of the conditions that should be met for a person to be mediator and to be successful and effective in that profession.

2. The Legislative Framework Regulating Who Can Have the Capacity of Mediator

From the perspective of our internal legislation, mediation is "a manner of solving conflicts amicably with the help of a third person specialized as a mediator, under conditions of neutrality, impartiality, confidentiality and having the parties' free consent" (Article 1 of the Mediation Law no. 192/2006 as subsequently amended and supplemented).

Mediation Law no. 192/2006 as subsequently amended and supplemented does not include a definition of the mediator. It appears in the Code of Ethics and Professional Deontology of the Mediator, within paragraph 2 of Article 1.1 Definitions, according to which the mediator is "a neutral, impartial and qualified person, able to facilitate negotiations among the parties being in conflict for the purpose of obtaining a mutually convenient, efficient and sustainable solution".

Article 21 paragraph (1) and article 227 paragraph (2) of The New Code of Civil Procedure raises the attempt to reconcile the parties "to the status of a fundamental principle" (I. Leş (2015): 41)." The Mediation and amiably settling of the case may constitute important means of decongesting the Justice system, materialized in the possibility of completing the trial without any special administration of further evidence". (I. Leş (2010): 683). From the legal provisions mentioned above, results the judge's obligation to

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recommend that the parties amicably settle the conflict (article 21 of the Code of Civil Procedure) "at any stage of judgment" if it is "deemed necessary taking into account the circumstances of the case" (article 227 paragraph (2) of the Code of Civil Procedure). Considering that the reconciliation or reaching an agreement "implies, in its essence, the consent of the parties, the judge hasn't an obligation of result, but only one of means" (M. Tăbârcă (2013): 212). Regarding the attitude of the parties toward mediation, in specialized literature is considered that "the absence of the parties convened by the judge, may be considered as a refusal of reconciliation, for which the parties can not be punished, given that they can not be forced to reconcile, but are only advised to"(G. Boroi; M. Stancu (2015): 378-379).

The mediator is vested by the parties intuitu personae, based on the recommendations or the confidence that they give to it. This profession is independent and liberal and involves a high degree of moral probity and impartiality. From this point of view, a mediator's activity looks like that of a judge who, objectively and impartially, under circumstances of legality, within a formal framework, ensures the accomplishment of the mission of justice. The difference consists in the fact that, while the judge is vested based on certain impersonal rules, the mediator is chosen by the parties (who take into account its capacities of reconcilling a conflict and of solving amicably a litigation).

Pursuant to Article 7 from the Mediation Law no. 192/2006 as subsequently amended and supplemented, the cumulative conditions that a person must satisfy in order to become mediator are:

a) full capacity to exercise;
b) higher education;
c) to have a seniority of at least 3 years;
d) to be able, from the medical viewpoint, to carry on this activity;
e) to enjoy a good reputation and should not have been finally sentenced for committing a deliberate crime, likely to prejudice the profession reputation;
f) to have graduated the courses for mediator training, in accordance with the law, or a master degree postgraduate program in the field, authorised according to the law and approved by the Mediation Council.
g) to be authorized as mediator, according to this law.

Article 8 par (2) of the same law provides that a person who has acquired the capacity of mediator in a Member State will be able to carry on this profession in Romania, after documents recognizing by the Mediation Council.

A person who cumulatively meets all the conditions listed above can carry out legally in Romania the activity of mediator. From our point of view

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this permissiveness of domestic law leads the way to inefficient settlements of conflicts and ensures the continuity as concerns the society's scepticism towards the possibility to solve the conflicts in this manner. Through mediation, the parties avoid proceedings before a court, the time and expense incurred by this. But a mediator without juridical studies, in our view, can not perform this activity properly and successfully, in a deontological manner. Even if the mediation agreement is lodged to the file having as object that dispute and its legality is checked by a competent judge, all is inappropriate and ineffective as mediation is not conducted by a law graduate/Bachelor of laws.

3. Disadvantages of Practicing the Profession of Mediator by a Person without Juridical Studies

Compared to the legal provisions in the matter, the juridical and judicial landscape of litigations in Romania, the low degree of confidence of the population in our legislation, we bring to discussion the main arguments based on which we do not consider that a person who has no juridical studies cannot carry out effectively the activity of mediator:

I. Pursuant to the Mediation Law no. 192/2006 as subsequently amended and supplemented, through mediation may be extinguished the following categories of litigations: conflicts in the matter of consumer protection (abusive clauses, defective products or services, etc.), family litigations (Article 64 of Law 192/2006 - divorce, common assets separation, establishting the parental authority, minors residence, the amount of alimony, etc.), conflicts in the criminal matter, both on civil side (moral and material damages) and on criminal side (in the cases where it is permitted withdrawal of the complaint or the parties' reconcilement), labor litigation springing from the conclusion, performance or termination of individual employment contracts, professional malpractice (for professional liability), litigation regarding possession, neighborly relations, etc. There can not be subject to mediation, according to Article 2 paragraph (4) of Law no. 192/2006, strictly personal rights (relating to the status of the person) and "any other rights with regard to which the parties cannot decide by agreement or by any other way accepted by law".

From those described above it arises clearly the strong legal implications of the matters that can be subject to mediation. No matter the good will and diligence a mediator could prove, still will not be able to make up the lack of juridical knowledge necessary for legally understanding and overcoming these conflict situations.

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A mediator without juridical studies is in an impossibility to explain and clarify the conflict nature and provide legal solutions for its overcoming.

II. The mediator, in his work, accomplishes a mission similar to that of a judge. How could a judge do justice without a basis of legal studies? He could not. It would be impossible. By allowing a person without juridical studies to mediate and help solve a litigation with legal implications, it is led the way to infrigements of the rights of those involved (most often out of negligence or lack of knowledge).

III. The requirement of objectivity and impartiality which is imposed on the mediator in its activity pursuant to the provisions of Articles 29-36 of Law No. 192/2006 is correct, but not enough.

As concerns the obligation provided by Article 29 par. (1) of Law No. 192/2006 which provides that "*the mediator has an obligation to give the parties any explanation on the mediation, so that they could understand the purpose, limitations and effects of mediation, particularly on the relations constituting the subject of conflict*", we believe that a mediator without juridical studies can not perform this objectively and correctly. It simply lacks the necessary knowledge. Certainly it could hire a jurist within his mediation office, but the lawmaker, in Article 22 paragraph (2) of Law no. 192/2006 provides this only as a possibility left to the discretion of the mediator, not as an obligation.

IV. All difficulties presented above remain without subject if the parties appear to the mediation assisted by attorneys. In this situation it is just that all participants in the conflict benefit from all legal information necessary for the full exercise of their rights. However, such a situation may involve substantial costs with an effect on the main reason for which the litigants are invited to mediation: the low cost of this procedure compared to settling the litigation through the court.

According to the laws in force, the lawyer may also be a mediator itself (after having graduated the training courses and having obtained the certificate and having been entered on the Table of Mediators) but in this situation will not be able to represent the interests of one of the parties, but will have to prove objectivity and impartiality, to ensure that all parties involved in the conflict benefit by mediation equitably, as expressly specify the provisions of Article 2.3. Mediator's Independence, Neutrality and Impartiality from the Code of Ethics and Professional Deontology of the Mediator.

V. Mediation Law no. 192/2006 as subsequently amended and supplemented, regulates within Chapter VI, entitled "Special Provisions on Conflicts Mediation", IInd section "Special Provisions on Mediation in Criminal Cases" (Article 67-70), mediation in criminal matters.

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According to Article 23 of the Code of Criminal Procedure, during the criminal trial, the defendant, plaintiff and responsible party in the civil lawsuit can conclude a mediation agreement or a transaction regarding civil claims.

On the criminal side, the current Criminal Code, through its provisions, has much extended the scope of mediation as it has increased the number of offenses for which a criminal action is initiated on the prior complaint of the injured party or is possible the parties' reconciliation. Thus, now it is possible to also reconcile the parties as concerns theft in its basic form and in some qualified forms (Article 231 of the Criminal Code), fraud (Article 244 par. (3) of the Criminal Code), trespassing in the aggravated form (Article 224 par. (3) of the Criminal Code), aggravated form of fraudulent management (Article 242 par. (3) of the Criminal Code), etc.

In the stage of criminal prosecution, according to the new Code of Criminal Procedure, it is possible, pursuant to the provisions of Articles 478-488, to be concluded an agreement of guilt between the defendant and prosecutor, with the effect of reducing the limits of punishment. According to Article 478 paragraph (6) of the Criminal Procedure Code, the juvenile defendants are forbidden to conclude agreement of guilt. Although for the legal entities there is no such express prohibition, it "is implicit in the entire regulatory agency[...] accountability of the legal entity formes the subject of a special procedure expressly stipulated in article 489-503 of the Code of Criminal Procedure. [...] A special rule can not be cumulated with another special rule, the only compatibility, functionally possible is allowed between the special rule and the general rule can sometimes complete the first." (A. Zarafiu (2015): 506).

The court having the competence to rule on it, will establish whether the parties have entered into a mediation agreement on the civil side and will take into account this agreement, through sentence (Articles 483 par (3) and 484 of the Code of Criminal Procedure), which thus, has the force of res judicata also on the civil side. On the other hand, "if during the prosecution, pending the conclusion of the agreement of guilt, the defendant recognized the civil claims, but did not conclude a settlement in this regard, the court is bound to leave unresolved the civil action". (A. Zarafiu (2015): 506).

Specific to mediation in criminal matters, for ensuring legality, it is compulsory that, during mediation, the parties should be guaranteed the right to legal assistance and, if the situation requires this, the services of an interpreter. Where the parties do not benefit by legal assistance from a lawyer during mediation, in the record drawn up on the occasion of mediation it should be expressly mentioned that the parties have expressly waived this right. Therefore, as a consequence, in fact, mediation can be

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performed by a mediator who has no legal studies without a lawyer being present.

As regards the mediation in cases with minors, Article 68 para. (2) of the Mediation Law no. 192/2006 provides that there should be observed "*the guarantees provided by law for criminal proceedings*" specific to minors, the law to which reference is made being mainly the Criminal Code and the Code of Criminal Procedure.

From the contents of these legal stipulations we can conclude that the Romanian lawmaker has understood the importance of exercising the right of defense, but only in criminal matters. Even so, the fact that a person expressly waives the right to be assisted by a lawyer during the mediation process does not guarantee that it made this decision with full knowledge of the facts. A mediator without juridical studies does not have the professional capacity to understand all the implications of criminal law and, in the absence of a lawyer, abuses may arise. It is true that if this mediation agreement is checked by a judge from the legality point of view, any possible abusive or unlawful clauses will be removed from its contents, but the mere existence of some mediation agreements with such clauses, made by a mediator without juridical studies may result in a loss of confidence in the mediation proceedings, and the very purpose for which this law was established will not be achieved.

4. Conclusion

As a conclusion, from our point of view, even though the law permits to any person with higher education, who also meets the other conditions provided by Article 7 of Law no. 192/2006 as subsequently amended and supplemented, to carry on the profession of mediator, in a practical and ethical issues such a question raises either expensive, or insurmountable problems.

The very purpose for which mediation has been introduced into our legislation and its use is promoted for relieving the courts and improving the relations among the members of society (by finding fast and advantageous solutions for all those involved) is hindered to take place in this manner.

The deontology and professional ethics of the mediator require a certain behavior, honesty to customers and provision of competent advice and answers. A person who lacks juridical studies will soon encounter these aspects. Then it will either have to hire a lawyer, or will not to have in the mediation but clients with lawyers, otherwise being exposed to some serious

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professional errors, which will affect both its individual professional prestige and the confidence of people in the mediation proceedings.

According to Article 1.2 Mediator's Mission. par (2) of the Code of Ethics and Professional Deontology of the Mediator, it must make "*all efforts that is capable and the knowledge to support the parties so as to reach an agreement*." In our opinion, such a mission is impossible to be accomplished in the absence of specialized legal studies.

The mediator activity is governed, among other things, by the relation of trust among the mediator and the parties "*based on the honesty, probity, spirit of justice and sincerety of the mediator"* (Article 2.4 of the Code of Ethics and Professional Deontology of the Mediator) and these also involve confidence in the professional competence of the person called to perform the mediation. Lack of legal knowledge necessary for carrying out mediation is likely to lead to the violation of this fundamental principle of the mediator's professional activity.

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