

## THE RESPONSIBILITY OF THE MEDIATOR

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### Abstract

*Mediation is an alternative to the court, which brings solutions for those in conflict, without appealing to legal instruments. The legal liability therefore comes when illegal acts take place, and represents a major guarantee of complying with legal standards. In the case of breaking legal standards, the social values which such standards defend are in danger. To protect such values, a legal liability is established, when the legal standards are broken, meaning that people, in our case the mediators, producing certain actions by which legal standards are broken, need to undergo certain legal effects, namely they are likely to have legal sanctions applied.*

**Keywords:** mediator, legal liability, principles, obligations, sanctions

### Introduction

The mediation is a process to manage conflicts, allowing the prevention or the solving of conflicts due to the intervention of a third party, impartial and having no power of decision, and who guarantees the communication between partners and, implicitly, leads to re-establishing the social connection<sup>1</sup>.

The object of the mediation is the conflict between the parties. To mediate means to intervene between hostile parties and to lead them to solving a conflict. The mediator is obliged to value and analyze carefully the object of the conflict, before accepting the case, deciding if that conflict is likely to be solved via mediation.

The concept of liability or responsibility names a reaction of reprimanding coming from the society, towards a certain human action, mainly attributable to an individual. In other words, the liability is that social form, established by the state, through an illegal act, which determines undertaking the adequate consequences, by those guilty, including the use of constraint, with the aim of re-establishing the rule of law thus affected<sup>2</sup>.

The common meaning ascribed to liability, no matter the way it takes places, is that of an obligation to undergo the effects of non-compliance with the legal standards. The nature of the broken rule determines the nature of the type of liability.

In case the mediator breaks the obligation stated by the law, the standards provided by the Working Regulations or the Code of Conduct and Professional Deontology, this one are

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<sup>1</sup> Rădulescu, D.M.; Mic, E.; Mic, V. – *Medierea – metodă de combatere a discriminării (Mediation – Way to Combat Discrimination)*, vol. NEDES 2012 – Exercițarea dreptului la nediscriminare și egalitate de șanse în societatea contemporană (Exerting the Right to Non-Discrimination and Equal Opportunities in Contemporary Society), Pro Universitaria Publishing House, Bucharest, 2012, p. 82.

<sup>2</sup> Popescu, A.M. – *Drept administrativ general. Manual de studiu individual (General Administrative Law. Individual Study Coursebook)*, Pro Universitaria Publishing House, Bucharest, 2012, p. 96.

made liable. Thus, according to Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work<sup>3</sup>, the liability is disciplinary and civil.

### **Disciplinary liability**

Disciplinary liability comes when a person, in our case the mediator, produces a disciplinary infraction.

According to the Labor Code, a disciplinary infraction is an act related to work and consisting in an action or in-action executed with culpability by the employee, through which this one broke the legal standards, the internal regulations, the individual applicable contract of labor or the collective contract of labor, the legal orders and dispositions of the line managers.

In art. 38 of Law no.192 on 16 May 2006 about the mediation and organization of a mediator's work, with subsequent additions, the followings infractions are listed, for which the disciplinary liability of the mediator's appear, namely:

- a) breaking the obligation of confidentiality, impartiality and neutrality;
- b) declining the response to requests formulated by the legal authorities, in the cases provided by the law;
- c) declining the restitution of written records entrusted by the parties in conflict;
- d) the representation or assistance of one party in a legal or arbitrary procedure concerning the conflict taken for mediation;
- e) executing other actions which affect professional integrity.

One of the principles of mediation is *confidentiality*. The mediator is obliged by the law to ensure the confidentiality of information received during the mediation procedure. At the end of the mediation, he/she needs to give back all documents presented by the parties, and destroy the notes taken during mediation meetings. The obligation of confidentiality is therefore unlimited in time for the mediator.

This principle forbids the mediator to represent one of the parties in front of judicial bodies, arbitral or court one, during or after the mediation procedure.

According to the principle of confidentiality, the mediator cannot be heard as witness in connection with acts or facts about which he/she learns during the mediation. If there is a written and clear agreement of the parties, the mediator can inform the third parties about certain aspects or information part of the mediation process.

Not only the mediator is meant to keep a secret of information and documents he learned about during the mediation, but also the parties and assistants of those, except the cases when the parties decide otherwise.

We think that the disciplinary liability does not eliminate the commitment of the penal liability as well in the case of breaking the obligation of confidentiality, in conditions provided by art. 196 in the Penal Code – Disclosure of professional secrecy.

The principle of impartiality consists of the equidistance which the mediator needs to take to the parties and their claims. The mediator has to be, during the whole mediation process, impartial and perform duties without favors, prejudices or subjectivism. He/she also needs to act tactfully and in such a manner that has a permanent balance between the parties

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<sup>3</sup> Published in Official Gazette no. 441 on 22 May 2006, with subsequent additions (Law no. 370/2009 to add and complement Law no. 192/2006 about mediation and the organisation of a mediator's work; Government Ordinance no. 13/2010 to change and complement legal acts in the area of justice in order to apply Directive 2006/123/EC of the European Parliament and the Council on 12 December 2006 about services part of the internal market; Law no. 202/2010 about some measures to accelerate the solutions to trials; Law no. 76/2012 to apply Law no. 134/2010 concerning the Civil Code; Law no. 115/2012 to change and complement Law no. 192/2006 about mediation and the organisation of a mediator's work; Government Emergency Ordinance (GEO) no. 44/2012 to change art. 81 in Law no. 76/2012 to apply Law no. 134/2010 about the Civil Code; GEO no. 90/2012 to change and complement Law no. 192/2006 about mediation and the organisation of a mediator's work; GEO no. 4/2013 to change Law no. 76/2012 to apply Law no. 134/2010 about the Civil Code, as well a to change and complement some attached legal documents).

of the conflict.

In case the mediator notices that he/she cannot be impartial, he/she needs to decline undertaking the case. If he/she notices this during the mediation process, he/she needs to give up the case.

Based on the principle of *neutrality*, the mediator has to stay outside the conflict and outside the interests of the parties. Through his/her neutrality, the mediator offers credibility and trust to parties. The neutrality of the mediator excludes any subjectivism of him/her, the tendency to get involved affectively in the conflict of the parties, the tendency to agree with, judge or blame one party.

We think that the disciplinary liability does not eliminate further the commitment of the penal liability in the case of breaking the obligation of confidentiality, in conditions provided by art. 196 Penal Code – Disclosure of professional secrecy.

*The refusal of responding the requests formulated by the judicial authorities, in cases provided by the law* are about the refusal of the mediator to cooperate with authorities in the case of judicial mediation. In this case, the disciplinary liability may join the administrative liability, through sentencing the mediator to pay a judicial fine for declining the cooperation.

The mediator cannot be accused by the non-compliance of the obligation to cooperate with the court when he/she refused the request of the court which would affect the obligation of confidentiality or to testify about the conflict.

*The refusal to return the documents entrusted by the parties in conflict.* As I mentioned earlier, at the end of the mediation, the mediator is to return all documents presented by the parties and destroy the notes taken during the mediation meetings. His/her refusal will affect the trust in the activity of mediation, but also in the profession of a mediator.

*Representing or assisting one party in a judicial or arbitral procedure concerning the conflict subject to mediation.* Based on the principle of confidentiality, the mediator is forbidden to represent one party in front of judicial, arbitral or court bodies, during or after the mediation.

The execution of other actions affecting the professional integrity is about, for instance, the simultaneous exercise of a profession incompatible with that of a mediator, or working as a mediator in other ways than those provided. Other acts which may affect professional integrity may be the breach of the obligation to inform the parties about the mediation, an abusive behavior to parties or to other mediators etc.

According to art. 39 (para 1) in Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work, disciplinary sanctions apply in relation with the seriousness of the breach and consist of:

- a) written observation;
- b) fine, from 50 to 500 lei (the limits of the fine are regularly updated by the Mediation Council, according to the rate of inflation);
- c) suspending the quality of a mediator from one to six months;
- d) terminating the activity of a mediator.

Art. 40 of the same law in para (1) provides that an interested person may notify the Mediation Council, in writing and with a signature, about a breach from one of those provided by art. 38.

The investigation of the breach will take place in maximum 60 days from the registration date of the request, by a disciplinary commission made of a member of the Mediation Council and 2 representatives of the mediators, appointed by drawing lots from the Table of mediators. The members of the disciplinary commission are appointed by a decision of the Mediation Council. The invitation of the respective one for a hearing is compulsory. The investigated mediator has the right to learn about the content of the file and to formulate his/her defense. In case of absence, a minute signed by the members of the commission will be written, stating that the mediator was invited and did not come in due time (art. 40, para 2).

The investigation file with a proposal for sanction or non-application of a disciplinary sanction will be submitted to the Mediation Council, which decides, in 30 days, about the disciplinary liability of the mediator (art. 40, para 3).

Art. 41 para (1) in Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work, with subsequent additions, provides that the Decision of the Mediation Council to apply the sanctions stated by art. 39 para (1) can be attacked at the competent administrative court, in 15 days since it was communicated.

### **Civil liability**

As provided by Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work, with subsequent additions, the liability of the mediator can also be a civil one.

Thus, art. 42 states that the civil liability of the mediator can be committed, under the conditions of the civil law, for causing prejudices, through the breach of his/her professional obligations.

In the mediation article, one can also include potential ways to settle the prejudice, namely: a moral reparation, a reparation in kind and a reparation through equivalent<sup>4</sup>.

A moral reparation consists in the doer acknowledging the caused evil, and assuming the liability for the caused damage and a sincere manifestation of the regret for doing that act.

A reparation of the prejudice in kind, if possible at the moment of signing the agreement, and if following the wish and the interest of the parties. The ways to repair a prejudice in kind, according to art. 14 para (1) in the Penal Code are:

The restitution of work, the restoration of the previous situation before the infringement and through a total or partial annulment of a written document. These are listed in the code as examples.

The reparation of prejudice through equivalent consists in reimbursing an amount. Parties can agree on paying an amount as a way to repair the moral prejudice, non-patrimonial, caused to the affected party.

The professional obligations of the mediator are stated by art. 29-37 of the Law no. 192 on 16 May 2006 about mediation and the organization of a mediator's work, with subsequent additions, as follows:

- providing any explanation to parties about the work of mediation;
- ensuring the completion of mediation with the respect of freedom, dignity and privacy of parties;
- to take all efforts for parties to reach a mutual convenient agreement, in a reasonable time;
- to lead the process of mediation in an unbiased way, and to ensure a permanent balance between parties;
- to decline taking a case if he/she knows about any circumstance which would hinder him/her to stay neutral and impartial;
- to decline taking a case in which he/she notices that the rights under discussion cannot be the object of mediation;
- to keep the confidentiality of information he/she learns about during the work of mediation;
- to keep the confidentiality for the documents produced or those handed by the parties during the mediation, even after his position stopped;
- to comply with the ethical standards and to respond to requests formulated by judicial authorities, while complying the conditions of confidentiality;
- to communicate any change about his/her person to the Mediation Council, about concerning the Table of mediators;

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<sup>4</sup>For further details, see Dragne, L.; Trancă, A.M. – *Medierea în materie penală (Mediation in Penal Matters)*, Universul Juridic Publishing House, Bucharest, 2011, p. 142.

- to improve permanently the theoretical knowledge and the techniques of mediation, attending to this end continuous trainings, in the conditions decided by the Mediation Council;

- to return the written documents entrusted by the parties during the mediation procedure;

- not to represent or assist one party in a judicial procedure or an arbitral one, having the subject of the conflict taken for mediation;

- to testify as a witness in the penal cases, only if he/she has a written acceptance for that, expressed and written of the parties and other interested persons, depending on the case.

The mediator can be made liable only for the way the mediation procedure took place, but not for the content of the agreement reached by the parties, the agreement representing the will of the parties only.

At the same time, the mediator is not liable for the consultancy provided by the specialists assisting the parties or invited to express their point of view about controversial issues.

### **Conclusions**

It is important for the evolution of a society to have multiple alternatives to solve conflictual situations, and people are aware of them. Mediation is one of the alternative ways to sort out conflicts.

If the mediator notices that the object of mediation is not suitable to be solved via mediation, this one needs to decline the mediation of the case. Also, the mediator is obliged to check the restrictions about his/her person or of the parties. The restrictions about the mediator are those in which he/she was or is party in conflict, assisted or represented one party. Or the mediator has an economic or a different interest in that conflict or has business connections with one party. In what concerns the restrictions to the parties, those are in which one party is a relative or a friend with the mediator or this concludes that there is violence or major differences between parties in what concerns their intellectual ability or their level of maturity.

Therefore, in case the mediators break the obligations stated by the law, the standards of the Working Regulations or the Code of Conduct and Professional Deontology, he/she will be made liable.

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