

## Features of mediation in cases of domestic violence

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***Abstract:** To mediate disputes or domestic violence on other family relationships damaged, the mediator should be a connoisseur of this type of relationship, a good psychologist and have age-specific pedagogical knowledge when concerned are involved - directly or indirectly - minors, knowing that a mediation attempt in the family has some additional difficulties due to diurnal relationships between people living together, the special relationship between them, affinities or resentment accumulated over time etc.*

***Keywords:** mediation; features; domestic violence; mediator.*

### Introduction

Mediation is an alternative to the judicial process in which the parties can arrive amicably to fair agreement, following negotiations they have. The Law no. 192/2006 on mediation and the mediator profession features the obligation of the mediator - who assists the parties in the mediation procedure, serving to facilitate communication between them and maintain a favorable resolution of the dispute - to be impartial and ensure the confidentiality throughout the mediation process.

*Occupational standard* [1] of the profession of mediator refers to the mediation as the activity whereby two or more parties to the conflict are assisted by a third party, called a mediator, *neutral and impartial* - for the parties and the content of the conflict - and no decision-making power regarding the solutions adopted by the parties to resolve the conflict on their common interests.

First, mediation as a voluntary process involves identifying the type of conflict and the causes of the occurrence of problems.

Mediator carries out documentation, organization and planning activities, as well as specific activities, which is to facilitate communication between the parties, analysis of information, facilitation agreement resolving the conflict. He is intended to help the parties reach a settlement through good management of the mediation process and adapt it to the type of problem solving deducted. The mediator is a third party, a person who is not directly involved in the dispute, which is a key factor in managing and resolving conflict as a neutral participation enables the parties to have another perspective on the issues discussed [2].

Given the flexibility of the procedure, mediation can take many forms and can take varying time periods, depending on the nature of the dispute, the social context, personality of parties, procedural alternatives and, not least, the person of the mediator.

### 1. Features of mediation in disputes concerning family violence

a) *Voluntary nature of mediation.* According to this feature, the parties may resort to mediation voluntarily, so they have the right to accept or refuse mediation, in accordance with Law no. 192/2006, the parties - individuals or businesses - can use mediation voluntarily, their consent to transfer their case to mediation being consecrated by signing the mediation contract. Mediation is a voluntary way of resolving disputes, so that no one can be forced to accept against his will, and no one may be compelled to agree with the other party. Thus, as set out in art. 67, para. 2 of the law on mediation in criminal cases, neither the victim nor the offender should be convinced by unfair means to accept mediation - procedure applies to cases of domestic violence, although in most cases, resolving disputes of this nature would be amicably in favor of maintaining the family and would contribute to a favorable climate for normal development of children.

b) *Confidentiality of mediation.* This principle is enshrined in art.1, para.1 of Law no. 192/2006 on mediation and the mediation profession. Under the confidentiality agreement signed under art. 53 of the Act by the participants in mediation, the parties and other persons present don't have the right to disclose data that have become known in the mediation process. However, the mediator has the same obligation on data from debate or the documents submitted by the parties. In disputes concerning domestic violence, the mediator shall maintain confidentiality in the mediation process, the more that some information may relate to family life, privacy of members, matters that are protected by guaranteeing the fundamental right of privacy of personal and family life, enshrined in international conventional instruments and in the Constitution or other laws of the Romanian state.

c) *Professionalism.* The mediator is a person with higher education, which has usually knowledge in mediation and is able to provide effective service. Mediator Professionalism requires the simultaneous presence of vast theoretical and practical knowledge (in the legal field, the subject matter in dispute), and professional ethics. Thus, persons who intend to become mediators must attend the initial training and to promote examination of knowledge, and then be certified by the Board of Mediation, after which they are entered on the Table of mediators.

d) *Impartiality and neutrality of the mediator.* According to art. 30, para. 2 of Law no. 192/2006, the mediator shall conduct mediation in a neutral way, demonstrating impartiality. He does not defend and does not judge sides, his purpose being to help them find common negotiating points an optimal way of resolving the conflict. If during mediation appear causes questioning his impartiality or neutrality, the mediator may give up further mediation proceedings (art. 54 par. 2 of Law no. 192/2006) or to proceed in accordance with Art. 31 and 54, para. 1 of the law, bringing this fact to the parties, who will decide on the continuation or termination of the mediation contract. To ensure impartiality, it cannot be accepted as a mediator in criminal cases including domestic violence: criminal investigator, prosecutor, judge, lawyer of one of the parties and persons incompatible under special laws. Specific for mediation cases dealing with the violence in the family, we believe that in addition to adopting a position of neutrality and impartiality in the agreement of adults, mediator must consider the legal interests on child protection, watching (we could say "by default" as state judicial bodies) that by agreement of the parents are not affected rights of minors, their protection options.

e) *Fundamental procedural safeguards.* The parties involved in the mediation process are guaranteed an equitable, objective and fair process. In criminal proceedings the mediator shall provide the parties to the right to counsel, stating in the final minutes that were assisted by a lawyer or if they had expressly waived in accordance with art. 68, para. 1 of Law no. 192/2006. Fundamental procedural safeguards must be observed and at mediation on domestic violence disputes taking appropriate measures according to the law, when the direct or indirect victims are minors. In this respect, it is shown that the mediator to know the rules on representation and assistance of minor less than 14 years and between 14 and 18 years, and the fact that the criminal proceedings for offenses committed against minors may move on its own, without being possible that other people to waive certain rights in their name.

## **2. Participants in the mediation in causes on domestic violence**

In accordance with art. 68, para.1 of Section II (Special Provisions on mediation in criminal cases) of Chapter 6, criminal, *participants in the mediation procedure are the mediator and the parties*, the latter having the right to be assisted by lawyers or interpreters.

If conflict mediation on domestic violence involving - as damaged parties or perpetrators – juvenile, mediator will ensure that the guarantees provided by the law for criminal proceedings are observed. Thus, the rules designed to protect the interests of the minor shall also apply in cases of domestic violence, the mediator ensuring that he is represented by law to ensure protection of his legitimate interests.

Establishing a special procedure in cases with juvenile offenders has been determined by the fact that the individual in a state of minority is considered underdeveloped psycho-physical aspect, being in a period when the some features of his personality are formed [3].

All these rules believe that should apply in the mediation process also.

From the above it can be concluded that *on the mediation process may be involved parties and other participants.*

a) *Parties.* Parties are those who initiate mediation procedure by selecting and contacting the mediator, who is notified of the dispute on the subject of mediation. In criminal cases where are included those on domestic violence also, the parties to the mediation are, in principle, the injured person and the perpetrator. If crime that produced injuries to several persons or were committed by several perpetrators together - as authors, co-authors or accomplices - mediation procedure would be necessary to include as parties all persons injured and all perpetrators. In this way a full repair of the injured could be provided and the mediation agreement would be apt to extinguish the conflict entirely. People without legal capacity - those under 14 years and those banned - will participate in mediation through their legal representatives, and persons with limited exercise capacity (such as minors who are aged over 14 years) will personally attend mediation, assisted by legal representatives. From the perspective of the injured party, the main purpose of this procedure is most often to communicate to the perpetrator his sufferings and feelings after the crime, how it affected his existence and understanding of motive, purpose or earlier conjuncture, which led the perpetrator to act in that way.

b) *Other participants.* According to art. 52, para.1 of Law no. 192/2006, the parties have the right to be assisted by other persons, under agreed. These persons may be relatives, acquaintances or professional person whose attendance he considers necessary (such as experts, interpreters, psychologists, officers of welfare organs etc.).

Parties may participate in the mediation by *representatives*, their representation being legal or conventional. Conventional representation may occur in terms of art. 52 of Law no. 192/2006 on mediation and the mediation profession, which states that in the course of the mediation the parties may be represented by another person that can make available documents under the law. Available documents signed by representatives assume an express mandate from the represented person.

Representation in mediation on criminal matters, especially in cases of domestic violence may be particularly important in terms of safety and physical comfort of the victim, who often in direct confrontation with the perpetrator is forced to relive the traumatic moments during assault. Thus, a relative, a friend (having full legal capacity) or an attorney may represent the interests of the victim in the mediation process.

According to art. 52, para. 1 of the Law on Mediation, the parties to the conflict have the right to be assisted by a lawyer or other persons under the conditions agreed. As a result, mediation in criminal cases must be conducted so that each party is guaranteed the right to legal assistance and, if necessary, an interpreter, as required by art. 68, para. 1 of the same law.

The lawyer's role in the mediation procedure is to protect the interests of his client and advise him constructively, helpfully and to assist him in obtaining a reasonable agreement. Law no. 192/2006 provides, as noted, the principle of confidentiality, which requires other persons participating in the mediation procedure to comply with it, duty on which the mediator must draw attention.

### **3. Stages of the mediation on domestic violence cases**

In order to reach to an agreement on domestic violence disputes, the mediator organizes mediation in several stages using certain techniques to facilitate communication and mutual understanding of the parties.

a) *Pre-trial mediation.* Before starting the actual mediation, occurs information of parties about the benefits of mediation and the conditions under which this procedure can be done to resolve the dispute amicably (art. 53 of Law no. 192/2006). If the parties accept mediation, the chosen mediator will conclude with them a written contract which states: the identity of parties, the subject of the conflict, parties' statements that they had been informed of the mediation effects and rules, confidentiality clause, the parties' commitment to follow the rules of mediation, fee and the parties' commitment to pay and the language of the mediation proceedings (art. 45 of Law no. 192/2006). In the mediation agreement other clauses may be introduced, however, under penalty of nullity, they must not be contrary to the law. In complex cases, this step prior to the mediation session may include - where appropriate - discussions with the parties and their lawyers for the mediator to understand the critical issues before the actual mediation session [4].

b) *Stage of the mediation process itself.* Depending on the complexity of the dispute subject to mediation, the mediation process can last from several hours to over a week; the latter procedure is divided in several meetings. During mediation, the limitation period for prescription of criminal liability or the introduction of prior complaint (if not notified prior judicial bodies) is suspended. This step is carried out based on the following algorithm:

- *Opening Session.* Mediation usually begins with an overview of the mediator on the procedure that is to be conducted, associated with an introductory statement. Further, mediation can be conducted in joint session or in separate sessions, depending on the specific situation and the desire of the parties in each case. In cases concerning domestic violence are indicated generally separate sessions - from the beginning of the mediation process until it makes a détente between aggressor and victim, who are members of the same family.

- *Identify problems and interests.* Mediator and the parties aim at this stage is to analyze - together with the parties - information received in order to identify particular issues to be resolved. This involves identifying relevant factors in terms of material, moral and social, which the parties shall consider in determining problems. Each party has the opportunity to present its view of the case and arguments on which it is based. In this phase of the mediation the mediator may ask questions for clarification. In mediation proceedings on domestic violence crime, we consider that the problem of monetary compensation should be subsidiary, in most cases it may be missing; important is the understanding by the offender, of the harmfulness of the offense committed, the acquisition of complete representations on the consequences that action has produced in the existence of the injured person, so to achieve liability and sincere expression of regret.

- *Analysis of the conflict.* The main objective is to explore and establish relevant aspects of the case and the interests that define the position of the parties, in particular with regard to coexistence in the future. At this stage, the parties must meet and assess each respective motivations and aspirations. Negotiation should be considered as a way of solving problems, and those involved should be considered as partners in resolving disputes. Also in this stage, the mediator shall assist the parties to communicate effectively by using techniques of open questions and other methods adapted to each case, seeking to bring to the forefront of communication family interests at the expense of mental stress accumulated over time.

- *Assessment of options.* Once the parties have failed to communicate and clarified issues that generated the conflict, identifying specific positions and interests, the mediator should help in establishing and evaluating options, without accepting one party to impose the solution of the other, as the only one possible, especially if it is at the expense of other family members (and especially the minor). In the process of generating options there are four key aspects to be considered, namely: *identification of several solutions to a problem, seeking those solutions that benefit all parties and other family members; inventory of circumstances based on the choice of solutions, analyzing options on the adoption of a decision.*

- *The final phase.* After identifying the needs and interests of each party in the mediation, proceed to negotiate options to reach a fair agreement for all parties involved in the dispute. But there is the possibility that the parties cannot reach an agreement, which will determine the circumstances in the record, in the report prepared by the mediator. The goal of mediation is not to reach an agreement at any cost, but to arrive at a sensible solution.

If the parties, after considering the merits of the case, they conclude that none of the proposed solutions do not serve their interests, this choice will be recorded as representing the will of those concerned.

There is also the possibility of signing a partial agreement covering only certain problems, which implies that the partial mediation had a favorable outcome for all parties involved [5].

## **Conclusions**

Mediation in cases involving domestic violence is a voluntary process, without constraints, where the warring parties look over the negotiations, together with a mediator to find common points of agreement allowing full or partial resolution of conflict inferred to mediation. It carries a clear and transparent process. Mediation is generally carried out in these cases, in a neutral space, at the

mediator's office in the presence of conflicting parties and with the help of the mediator which either in joint session or in individual sessions takes the necessary steps to solve the dispute amicably.

Such mediation has many features, so that the mediator and the parties to the dispute, advocates and other persons involved must be informed of this, so the mediation process to be carried out in good condition, creating the necessary environment to reach an agreement. Participants in mediation must consider that the facts fall within the process of domestic violence present some peculiarities.

Also, the mediator should be aware of specific legislation on the protection of minors (and women, if applicable) and what steps can be taken for their protection, so that the final agreement should include legal clauses favorable to minors (or abused women) but especially to resolve contentious issues in depth in meaning of removing tension and identifying ways to appropriate behavior, providing a favorable climate of civilized life relations, ensuring the harmonious development of children, which may be direct or collateral victims of inferred dispute to medicalization.

The aim of mediation is to reach a lasting, efficient agreement which is based on the free will of the parties.

In this sense, the agreement must be based on objective criteria on which the parties have been reported, removing emotions and stress to choose a mutually satisfactory solution, based on logic and reason.

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