

Ethical and Legal Aspects of Mediation and the Involvement of Mediators in Conflicts Solution

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ABSTRACT

In time, efforts were made to create methods to solve the conflicts arising in human society. From this point of view, we took into account the discussion of certain new methods to solve different conflicts other than the regular ones. Mediation appeared as a reaction to the inefficiency of the inexistent methods of solving different types of conflicts. It is a well-elaborated process, within which the conflicting parties may express their opinions and interests. As well, mediation enables decision making within the involved group or by each individual. Moreover, this process requires the intervention of a mediator to facilitate the discussions of the parties. As mediation represents a matter involving various conflict aspects, its regulation was required by enacting certain norms. In these circumstances, the approach of the mediation issue implies a complex approach including both ethical and professional deontology notions for the mediators.

KEYWORDS: mediation, ethics, mediator

1. INTRODUCTION

Mediation represents an alternative method to solve certain types of conflicts. As well, it is an efficient and effective method of dispute resolution [3]. The entire approach of the mediation procedure is carried out on legal grounds by the involvement of a mediator and observing ethical principles.

Based on moral concepts, the mediation procedure enables practitioners to control both the understanding and the solution of the conflict. This is possible by means of the mediation agreement, as a result of the mediation procedure. The European Parliament and Council award to the mediation agreement the character and the power of an enforceable title [6].

According to the ethics code adopted by the Mediation Council on February 17th 2007, the mediator's conduct is stipulated by rules leading to the smooth mediation carrying out. Moreover, such rules are found in most of the national codes of the countries with experience in this field that regulate the behaviour of the mediators [6].

The mediation ethics behaviour code warrants the confidentiality of the information obtained during the mediation. Therefore, the mediator has the unconditional obligation to keep the professional secret. This one has the obligation to keep the neutrality of the information received from the point of view of an existing conflict situation. If the mediator discloses certain pieces of information without the agreement of the parties involved in the conflict, the mediator shall be legally responsible, according to the contract signed with the disputing parties;

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moreover, this undermines confidence and trust between the parties. The mediator has the obligation to avoid the debate surrounding the case, of the conflicts, of the different offers that may result of the mediation or the way the parties behaved during the conflict [4]. *

According to the moral behavior norms and aiming at observing the ethical principles, the information obtained during mediation is confidential [7]. This substantiates on the existence of documents presented by the conflicting parties. All information may be received within different separated and common sessions.

The ethical principles aimed at protecting the integrity of mediation require the involvement of the mediator. From this point of view, the mediator has the obligation to protect the clients whose interests are of utmost importance for him or her. Furthermore, the mediator has the moral and professional duty to get involved and to help the parties to communicate and understand their own truth. This matter requires the non-favouring of either of the parties involved in the interests' conflict [4].

2. MEDIATORS' ETHICS AND DEONTOLOGY CODE

2.1. General Objectives of the Mediators' Ethics and Deontology Code

The main rules according to which the mediators carry out their activity are found in the code of professional ethics and deontology of the certified mediators. It includes a set of norms and features defining the quality of the professional activity. Furthermore, it meets the moral conduit principles related to mediation and the organization of the mediator profession.

The deontology norms of the ethics code related to the quality of mediator are meant to warrant the appropriate execution of the mediator's attributions by freely accepting the mediators. This condition is indispensable for the smooth carrying out of the process of conflicts mediation, with direct implications on the societal functionality.

The code of professional ethics and deontology is mainly aimed at providing conduit guidelines for the mediators in their activity. Thus, the various orientation directions of mediation included in the ethics code contribute to defending the public interest, as mediation is a public interest activity. Moreover, the issues presented in the ethics code are involved in promoting trust in mediation as an alternative for solving conflicts.

According to this ethics code, mediation is a voluntary way to amicably solve conflicts between two or more parties by means of a third, neutral party. This person carries out the activity according to the legal stipulations in the field related to the norms of the ethics code on the mediation process and the quality of mediator.

The professionalism of the mediators is the result of observing the legally established deontological, organization and operation norms of the profession, stipulated in the organization and operation regulation, in the ethics and deontological code and in the decisions adopted by the mediation council.

2.2. Fundamental Principles Stipulated in the Mediators' Code of Professional Ethics and Deontology

All the principles referring to the quality of mediator refer to the obligations and duties of these negotiators. From this point of view, the main obligation of mediators is to provide a smooth solution and to avoid conflict.

The ethical norms stipulate the mediator's obligation to respect and support the parties' right to make free informed decisions in order to solve their disputes. The mediator has the moral duty to inform the parties from the very beginning of mediation on the way that the mediation procedure will be carried out and on the final decision, which will exclusively belong to them.

Furthermore, we mention the possibility of the parties' to withdraw during the mediation procedure. The mediator may advise the parties on the alternatives of independent or specialized legal assistance. Yet, the mediator cannot provide legal or specialized advice to the parties. The mediators are obliged to offer assistance only if they have the necessary qualification in relation to a specific issue raised by the conflicting parties.

In a society based on justice and respect within a rule of law, the mediator has the duty of trying to amicably solve various types of conflicts, observing the ethical principles of neutrality, impartiality and confidentiality, as well as practicing non discrimination [1].

The quality of mediator is based upon these aforementioned various aspects, in addition to subscribing to the ethics norms in the field.

One of the fundamental ethical principles related to the quality of mediator is the neutrality to the conflict between the parties and the impartiality in leading the mediation procedure. Given the circumstances, mediators must be completely independent from various aspects interfering with the causes of the conflict between the parties. The mediator's independence is meant to warrant the neutrality, impartiality and equidistance to the cause, its results and the parties involved in the dispute. To observe the professional ethics norms, the mediator shall try to avoid the creation of situations limiting the independence of the conflicting parties.

The relationship between the mediator and the conflicting parties relies on ethical principles. Taking this idea into consideration, the relation between the mediator and the parties must be based on trust, must be substantiated on ethical principles, observing honesty, sincerity, probity and the spirit of justice.

The mediator has the moral and ethical obligation to observe the professional secret. Confidentiality is acknowledged both as a right and as an absolute duty of the mediator. Keeping the confidentiality of any piece of information that arises within the mediation activity is not time limited but it represents a strictly necessary feature for the good execution of the mediation process. The idea is supported by the obligation of the mediator related to the refusal to take over cases of conflict of interests if he/she is not informed on the causes. This way the goal is to avoid circumstances that may determine deviations in the activity of the mediator from the point of view of neutrality and impartiality.

The ethics of the mediation approach also refers to the aspects related to the communication of the parties in conflict. From this perspective, the disputing parties shall be notified on the conflicts of interests and on the cause that generated the conflict. Without the agreement of the parties, the mediator must drop out the participation in the solution of the conflict of interests.

The mediators' code of professional ethics and deontology stipulates the civil, disciplinary and criminal responsibility of the mediator if the mediator is in breach of the professional obligations and according to the legal provisions set by the mediation council.

The consequences of breaching the ethical norms are the legal norms of sanctioning the mediator because of the reflection on his/ her professional probity.

The quality of exerting the profession of the mediator relies on mutual respect, equal chances, professional and procedural correctness. This idea is supported by the observance of ethical principles according to which the mediator must adopt an appropriate conduct. This is required to elevate the direct professional reputation, avoiding certain appreciation that may affect the interests of other mediation practitioners. This approach represents one of the most important ethical principles of mediation and it is applied to maintain the amiability and mutual respect between mediators [6].

2.3. Disciplinary Responsibility of Mediators

The mediators' code of professional ethics and deontology stipulates issues from the total features and norms defining the quality of their professional activity. The deviations refer to the disciplinary responsibility and they have implications on the mandatory conduct of mediators. In the same time, they aim at facilitating competent and responsible activity according to the ethics of the profession.

The deviations belonging to the disciplinary responsibility of the mediators have various orientations.

The ethical principles that can be breached refer to aspects of confidentiality, impartiality and neutrality. As well, according to the ethical principles, we must take into account the refusal of the authorities' requests of conflict mediation and the refusal to return documents submitted by the conflicting parties.

Mediation ethics includes the assistance or representation of one of the parties in conflict for a certain type of procedure whose object is the mediated conflict.

According to the principles of the mediators' code of professional ethics and deontology, if the mediator fails to observe the professional and moral obligations, measures are applied entailing disciplinary responsibility according to the severity of the deed and the circumstances of its commission. This is materialized by the legal application of sanctions whose purpose is the suspension or the termination of the mediator from further mediation activities.

2.4. Regulation of Mediation and of the Mediators' Activity

The aspects referring to the regulation of mediation and the mediators' activity also require the contribution of the enforceable laws. Together with the ethical principles of mediation, they represent a set of legal, morally substantiated regulations [7].

For the smooth function of the mediator profession, certain ethical rules and principles must be observed. From this point of view, the mediator profession includes issues referring to the carrying out of the mediation activity, the form of exerting this profession, as well as the professional office intended for carrying out this type of activity.

Considering the aforementioned ethical principles, the mechanisms for exerting the profession are individualized by their name according to the mediation procedure and to the organization and operation regulations of the Mediation Council. From this point of view, the mediation activity may be exclusively carried out according to the principles of the mediators' Code of Professional Ethics and deontology. Furthermore, the common patrimony must be exclusively meant for carrying out the professional activity, having the regime of professional service patrimony.

The ethical norms of mediation also stipulate issues related to disciplinary deviations within this vast activity.

The disciplinary deviations within mediation may be notified by any concerned party. This is possible by the involvement of the mediation council. As well, the disciplinary deviations are investigated by the disciplinary committee within the mediation council.

By the decision of the Council, the Disciplinary Committee appoints three members. It is made up of an especially assigned member of the mediation council and by two other representatives of the mediators who are randomly assigned.

The Mediation Council represents the authority keeping the records of the forms of exerting the profession, according to the mediation council organization and operation regulation.

The mediation office represents a different manner of exerting the mediator profession stipulated by law. The establishment of the mediator office shall be made according to an

incorporation deed that will be submitted to the mediation council. It may be made up of one or several associated mediators.

According to the constitutional law of free association, stipulated by the Romanian Constitution, mediators may incorporate or may adhere to local or national associations with the purpose of promoting the professional interests but also for mediating and protecting the statute of moderator.

Furthermore, according to the association right, mediators may adhere to non-governmental organizations, in the field of mediation and also to international professional associations, keeping and observing the legal norms related to mediation.

The non-governmental organizations may carry out activities in the mediation field, observing the legal provisions.

The authorization of exerting the mediator profession as well as the premises where the profession shall be carried out are legally regulated.

In addition to being the associated mediators, the mediators may also be collaborating mediators. This represents the mediators' civil professional association and it is legally regulated. Both the articles of incorporation and the memorandum of association of the professional civil association are concluded in writing between the co-associates and the previous communication with the mediation council is mandatory.

The authorized mediator, irrespective of the manner of exerting the profession, has the obligation to archive the documents and to strictly keep the books thereof. When deviations related to the smooth carrying out of the mediation procedures are found, entailing the application of disciplinary sanctions, we must take into account the existent of a precedent related to disciplinary deviations. The authorization of the mediator profession as well as of the premises he/she shall carry out the profession are legally regulated.

CONCLUSIONS

Mediation represents an alternative, efficient and effective method to solve litigations and conflicts

Due to the importance of mediation from the social standpoint, the mediators' code of professional ethics and deontology stipulates the observance of mediation and of the mediation profession exertion principles.

The mediator has the diligence and prudence obligation, without assuming an outcome obligation. From this standpoint, the solution of any conflict exclusively depends on the parties' agreement. In these circumstances, the mediator's duty is to show his ability in bringing the parties to common grounds. By his or her mission, although holding the secret of the conflicting parties, the mediator must carry out the mediation procedure by confidential communications [6].

On the grounds of the European Convention of Human Rights, the high number of conflicts to be solved in Romania compared to the stiff and troublesome procedures and to the reason of delay, is likely to affect the ability of the competent authorities to solve the case in due time and, as such, mediation represents a modern and efficient alternative [10].

Mediation is featured by simplified, quick and inexpensive procedures. Hence, in order to facilitate or support the parties' conciliation or to determine the amiable of the conflicts measures are imposed. This must be applied before starting or during a mediation approach [8].

Additionally, mediation contributes to the reduction of the economic and social costs incurred by the classic litigation the parties are involved in, taking part in the same time in the reduction of the necessary time for the conflict solution [2].

According to the ethical norms, mediation requires the approach of the equity principle, thus contribution to secrecy keeping to a large extent.

As an authorized person, the mediator has the obligation to publicly inform, while observing the ethical norms, the issues related to the provided services and the need to adopt their publicity rules set by the norms applicable to the profession [5].

The ethical principles of the mediation require accurate, real information, based on the confidentiality principle, maintaining professional impartiality, honor and probity.

The implications of mediation in social life reflect in its effects on various aspects.

The ethical issues focusing on social responsibility prevail in the debates within the Bioethics Committees of UNESCO – CIB and CIGB (the Intergovernmental Committee of Bioethics) [1].

Considering this idea, family mediation ethics is of utmost importance. Using certain approaches in the mediation process, communication between family members may be improved by decreasing the ampleness of the conflict between the parties. Solving family conflicts by mediation also represents a way that contributes to ensuring the continuity of intra-family connections [9]. The contribution of mediation to keeping the family and the integrity if the intra-family and interfamily relations are a major issue related to mediation and its social implications.

Acknowledgements

These authors contributed equally to this work

Conflict of Interest

We report no conflict of interest.

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