

# Mediation Development Toolkit

Ensuring implementation of the CEPEJ Guidelines on mediation



EUROPEAN COMMISSION FOR THE EFFICIENCY OF  
JUSTICE  
(CEPEJ)

CEPEJ(2018)7

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# Background information

In 2006, the European Commission for the Efficiency of Justice (CEPEJ) set up a working group on mediation in order to promote and support the implementation of the following Recommendations of the Committee of Ministers:

- Recommendation (98) 1 on family mediation
- Recommendation (99) 19 concerning mediation in penal matters
- Recommendation (2001) 9 on alternatives to litigation between administrative authorities and private parties
- Recommendation (2002) 10 on mediation in civil matters.

During its first mandate, the CEPEJ-GT-MED had conducted a study on the impact of these Recommendations and drew up guidelines as well as specific measures to ensure effective implementation of these recommendations in Council of Europe member states.

Three Guidelines were developed:

- for a better implementation of the existing Recommendation concerning Penal mediation (CEPEJ(2007)13);
- for a better implementation of the existing recommendation concerning family and civil mediation (CEPEJ(2007)14);
- for a better implementation of the existing recommendation on alternatives to litigation between administrative authorities and private parties (CEPEJ(2007)15).

After an interruption of almost ten years, the CEPEJ working group on mediation resumed its work in 2017<sup>1</sup>. Under its new mandate, the CEPEJ-GT-MED remains entrusted to facilitate the implementation of the Recommendations of the Committee of Ministers to Member States as well as of CEPEJ Guidelines concerning mediation. During the first meeting of its second mandate on 23-24 May 2017, the CEPEJ-GT-MED decided not to amend the Guidelines, but rather to complement them with practical tools which could help member states to concretely implement and develop the use of mediation, but also to support mediation stakeholders in their daily practice.

This version of the *Mediation Development Toolkit* therefore comprises a first set of tools designed by the CEPEJ-GT-MED members. Two of the following tools have also been developed in cooperation with the International Mediation Institute (IMI) and The Council of Bars and Law Societies of Europe (CCBE).

The Mediation Development Toolkit is a dynamic set of tools: it is meant to evolve and comprise more tools in the future. In addition, all these tools are meant to provide a framework which member states and mediation stakeholders can adapt to their specific needs and situations.

The present version comprises the following tools<sup>2</sup>:

- two checklists to support national authorities in setting up and monitoring court mediation pilots;
- a document primarily aimed at judges and court clerks focusing on the judicial referral to mediation;
- a basic mediator training curriculum, developed jointly with the IMI;
- an awareness raising document for main stakeholders of mediation, in the form of Frequently Asked Questions;
- a Guide to mediation for lawyers, developed jointly with the CCBE.

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<sup>1</sup> The working group is composed of: Mr. Rimantas Simaitis (President), Lithuania; Ms. Anna Márová, Czech Republic; Ms. Maria Oliveira, Portugal; Ms. Nina Betetto, Slovenia; Mr. Jean A. Mirimanoff, Switzerland; Mr. Jeremy Tagg, United Kingdom; Mrs Violeta Belegante, Deputy member, Romania; Mr. Giancarlo Triscari, deputy member, Italy; Mr. Leonardo D'Urso, scientific expert, Italy.

<sup>2</sup> in an order that follows the CEPEJ Guidelines on mediation's structure (ie. 1. Availability; 2. Accessibility; 3. Awareness)



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**Establishing a Court Mediation Pilot: management checklist**

This tool has been developed in reference to point 1. Availability of the CEPEJ Guidelines on mediation.

### 1. Preliminary conditions

Establishing a Court Mediation Pilot requires strong support from the superior judiciary authorities as well as from the bureau of the president of the court (whenever it exists). A preliminary and full collaboration of the tribunal, the bar (if relevant the ADR committee of the bar) and mediation associations, and mediation services is essential. Broad information should be disseminated to their members with strong recommendation to participate in a constructive manner.

A sufficient number of judges and non-judge staff in courts must be trained in mediation in order for them to be able to:

- a. Identify cases appropriate for mediation;
- b. Inform the parties about the main advantages and characteristics of mediation;
- c. Encourage them to choose mediation.

Appropriate rooms should be made available inside or very near the court house.

### 2. Project Plan

Before any pilot is set up, a project plan should be drawn up, and a project team established to design and steer the pilot. The project team should involve representatives from the main groups of stakeholders, including court staff, judges, mediators, legal representatives, and user-group representatives. Involving such stakeholders in the design of the pilot will help neutralise any resistance.

The project plan should consider the following issues.

What is the aim of the pilot? This will determine to some extent the type of mediation scheme adopted.

Is the scheme to reduce backlogs in the court or reduce the court's workload, or is it mainly about providing alternatives for court users?

If it is more about reducing backlogs, the court or Member State may feel able to invest more heavily in the scheme and offer mediation for free or subsidise the overall cost.

### 3. Type of pilot

Court-annexed mediation is the most common form of pilot, where the programme is authorised, administered and operated by the court, and the mediation may be funded by the court, paid for from court fees, or subsidised by the state. Such a scheme may use assigned mediators, who have agreed to work with the court to provide mediations.

Court-annexed schemes make it easier to control the performance of the pilot and integrate it into the case management process. However, case management time limits do not allow for lengthy mediation, and the best mediators may be reluctant to serve the pilot if fees are low.

Alternatively therefore, the court may prefer the parties to access mediation by referring them to websites, in order to contact private accredited mediators who set their own fees.

#### 4. The Rules of the Pilot

These should be agreed by the project team.

Case types : is the pilot to be limited to certain types of civil cases, or claims up to a particular value? Alternatively, is the pilot to cover family cases within specific parameters?

Is the pilot geographically limited to certain courts/court houses?

When referral should occur in the case?

Should parties pay fees in addition to any court fees? Should these be paid to the court or direct to the mediators?

If not through fees, then how is the cost of mediation to be covered? Although this may be a pilot, it is still important to consider the long-term sustainability of mediation, and therefore whether the pilot can be rolled-out more widely. For example, mediators may be willing for the purposes of a short-term pilot to offer their services at a subsidised rate (or even for free), but how might that impact the long-term sustainability if the pilot was to be rolled out more widely to other geographical areas or case types?

Sole or co-mediation?

The mediators should be trained and accredited. How should they be assigned to cases (see above)?

What incentives do you plan to introduce to encourage the use of mediation? Consider possible changes to the court rules, laws and practices, and any timescales for changing them.

Is there to be a standardised form of mediation agreement (agreement to mediate)?

What is the form of mediated agreement (settlement agreement), and is it binding? Is it in the form of a contract or shall it be incorporated in the decision of the judge to be enforceable ?

How is the court to be informed that a case has gone to mediation, been settled/not settled?

Publicity: how are members of the public, court users, and legal representatives to be informed about the mediation pilot?

#### 5. Evaluation

In order to measure progress, certain data has to be collected before initiation of a pilot and during its implementation. Therefore, it is important that before a pilot even starts, plans should be put in place for its evaluation, both quantitative (numbers of referrals, number of mediations, numbers of cases settled by mediation, timing of cases from referral to settlement, case types etc.), and qualitative (parties' and other stakeholders' satisfaction, using anonymous questionnaires), in order to ensure that certain data is collected from the start of the pilot.







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### **Mediation Pilot Monitoring Checklist**

**INDICATOR ONE: AVAILABILITY**

To expand equal availability of mediation services, measures should be taken to promote and set up workable mediation schemes across as wide a geographical area as possible.

<p><b>Roles of the Judges</b></p> <p>Judges have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation and, where applicable, invite the parties to use mediation and/or refer cases to mediation</p>	<p>Is there evidence that the judges in the court where the mediation pilot is based are referring cases to mediation?</p>	<p>How are the cases being referred to mediation?</p>	<p>What does the judge say to the parties?</p>	<p>Does the judge provide the parties with any written information about mediation in general and/or details of the court-referred mediation pilot?</p>	<p>Are the parties expected to decide at the time, or are they given a deadline to report back to the court/judge?</p>
<p><b>Role of lawyers</b></p> <p>In general, the codes of conduct for lawyers should include an obligation or a recommendation to consider alternative means of dispute resolution including mediation before going to court in appropriate cases, and to give relevant information and advice to their clients.</p>	<p>Is there evidence that lawyers provide information to their clients?</p>	<p>If not, is this because the lawyers are not aware of mediation, do not know how it works, or are not aware that any mediation pilots exist?</p>	<p>If lawyers provide information on mediation, what does this look like? Is it written down by the lawyer, or do lawyers have printed material available to hand out. If so, is this about mediation in general, or the court-referred pilot in particular</p>	<p>Is there evidence that bar associations and lawyers associations are providing this sort of information to lawyers?</p>	

<p><b>Role of mediators</b></p> <p>It is essential for judges when referring parties to mediation, for lawyers when advising clients, and for the general public confidence in the mediation process that the quality of mediation is assured. Therefore mediators should receive adequate training, which meets accepted standards.</p>	<p>Have all the mediators, who are being referred cases, received adequate training and been assessed as suitable according to the accepted standards?</p>	<p>Is there a code of conduct for mediators?</p>	<p>If so, do all mediators, who are being referred cases, adhere to such a code of conduct?</p>
<p><b>The quality of mediation</b></p> <p>It is perhaps taken for granted that mediation is effective if it is conducted by properly trained mediators. However, it is important, within any mediation pilot that there are sufficient measures to evaluate quality. Certain common criteria, including both qualitative and quantitative evaluation aspects, should therefore be developed to enable the quality of mediation schemes to be evaluated.</p>	<p>Does the court obtain and record data on mediations conducted as part of the pilots to enable a quantitative evaluation to take place, including such matters as numbers of cases referred, cases mediated, cases settled by mediation, timings, case types etc?</p>	<p>Are there plans for an independent evaluation of the qualitative aspects of the pilot, including such matters as customer satisfaction?</p>	

**INDICATOR TWO: ACCESSIBILITY**

Even where mediation may be made available via court-referred mediation pilots, efforts should be taken to ensure as much as possible that parties are able to access those pilots in terms of price, distance and other general accessibility issues.

<p><b>Cost of mediation</b></p> <p>The cost of mediation for the users should be reasonable and proportionate to the issue at stake.</p>	<p>Are users aware of the cost of mediation in advance or at the time that they are referred to mediation?</p>	<p>Is there a single set fee for the mediation, or a series of set fees related to the value of the case?</p>	<p>If mediators charge different fees, are parties able to choose between mediators?</p>	<p>Can parties obtain legal aid for mediation?</p>	<p>Regarding legal aid</p> <p>-If so, how are they made aware of this?</p> <p>-If not, are steps being taken to address this?</p>
<p><b>Timing of mediation</b></p> <p>One of the key benefits of mediation is that parties can obtain resolution quicker than going through the normal court process. For this to happen, parties need to be made aware of mediation as early as possible, and once chosen, the court needs to be able to refer parties to mediation, and the mediation needs to take place as soon as possible.</p>	<p>Is the timing of mediation measurable?</p>		<p>Is the court therefore able to determine the time of mediated cases, and be able to compare it with an equivalent case in the court system?</p>		

<p><b>Suspension of limitation terms</b></p> <p>Parties should not be prevented from using mediation by the risk of expiry of limitation terms.</p>	<p>Does the member state provide for suspension of limitation terms when referring cases to mediation?</p>	<p>If not, does the member state plan to implement provisions for the suspension of limitation terms?</p>		
<p><b>Place of mediation</b></p> <p>Parties should not be disadvantaged by having further to travel to obtain mediation than they might when resolving a case through the normal court process.</p>	<p>Where does the mediation in the court-referred pilot take place?</p>	<p>If it is outside the court building, is there more than one location for the pilot mediation?</p>	<p>If the latter, do parties have any choice of location?</p>	<p>In general, does the mediation take place at roughly the same distance as the court, or nearer, or further away?</p>
<p><b>Disability/ethnicity issues</b></p> <p>Parties with a physical disability or those where their first language is not the member state's main language should not be disadvantaged in terms of their access to mediation.</p>	<p>Is information about mediation able to be provided in alternative formats (such as Braille or large print), or in other languages?</p>	<p>Are reasonable adjustments available to enable those with a disability to be able to take part in mediation?</p>	<p>Are adjustments able to be made if parties are unable to speak the member state's main language? For example, can alternative mediators be made available?</p>	

<p><b>Other general accessibility issues</b></p> <p>For mediation to work best, the process needs to work as seamlessly as possible. For example, the court could employ someone to act as a mediation officer, to be able to manage the case from judicial referral to the mediation itself. They can take the referral from the judge, liaise with the parties and the mediator, arrange the mediation appointment and even the logistics of room layout, refreshments etc.</p>	<p>Does the mediation pilot employ a mediation officer or similar person, and how is it integrated into the proceedings?</p>	<p>How does the process from mediation referral to mediation work in practice?</p>	<p>How quickly can a mediation be arranged from start to finish?</p>
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### INDICATOR THREE: AWARENESS

Even if mediation is available and accessible to all, not everyone is aware of mediation. Lack of awareness among judiciary, legal professionals, users of the justice system and the general public is one of the main obstacles to the advancement of mediation. Member states and mediation stakeholders should keep in mind that it is hard to break society's reliance on the traditional court process, as the principal way of resolving disputes.

<p><b>Awareness of court users</b></p> <p>Members of the judiciary, prosecutors, lawyers and other legal professionals as well as other bodies involved in dispute resolution should provide early information and advice on mediation specific to the parties in their dispute.</p> <p>It may therefore be necessary for the duration of any pilot to make changes to local court forms, so that they make clear that mediation is not just an option in the court, but that the judiciary are keen to promote mediation. Parties could be asked to tick a box on the form to indicate that they would like to try mediation, or alternatively, if they do not consider mediation is appropriate, to indicate on the form, why that is the case.</p>	<p>Have changes been made to court forms to encourage parties to use mediation?</p>	<p>Are leaflets and posters available at the court?</p>	<p>Is information about mediation sent to parties when they first enter the court process/apply to court?</p>	<p>If there is a mediation centre/mediation information point within the court, is it clearly signposted?</p>	<p>Does the court engage in any other promotional activity, such as open evenings or open days on mediation? If so, what is included? If not, is anything planned?</p>
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<p><b>Awareness of the judiciary</b></p> <p>Judges play a crucial role in fostering a culture of amicable dispute resolution. It is essential therefore that they have a full knowledge and understanding of the process and benefits of mediation. This may be achieved through information sessions as well as initial and in-service training programmes.</p>	<p>Have the judiciary in the pilot been provided with training. Or have they attended mediation information meetings?</p>	<p>Does information about mediation form part of the general in-service training for the judiciary?</p>	<p>Have seminars been arranged with other judges in the court building, or with judges from local court buildings, setting out details of the pilot and answering questions?</p>	<p>Have the judiciary in the pilot met with the mediators to whom they are referring cases?</p>
<p><b>Awareness of lawyers</b></p> <p>For mediation to be effective and accessed by parties, their lawyers need to be aware of mediation. Bar associations and lawyers associations should therefore provide information on mediation to their members.</p> <p>In addition the court should encourage lawyers to actively consider mediation for their clients. To this end, court forms could, for example, require legal representatives to indicate that they have explained about mediation to their clients, and that if they do not consider mediation to be appropriate they could be asked to explain why on the form.</p>	<p>Do bar associations and lawyer associations inform their members about mediation?</p>	<p>Does the court require lawyers to explain about mediation to their clients and indicate why mediation might not be appropriate?</p>	<p>Have seminars been arranged within the court between the judiciary and local lawyers, setting out details of the pilot, answering questions and allaying any fears?</p>	

<p><b>Awareness of the general public</b></p> <p>Although creating awareness of mediation among the general public goes beyond an individual mediation pilot, there is much that an individual court can do to raise awareness of mediation more generally by means of open evenings or open days on mediation.</p>	<p>Has the court engaged in promotional activity to the general public, such as open evenings or open days on mediation?</p>	<p>If not, is anything planned?</p>
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### Guide to the Judicial Referral to Mediation

The court often informs parties about mediation in writing, by sending them a form which is enclosed to the invitation letter to the parties. Evidence from court-annexed mediation schemes in member states, however, show that a key factor in the success of any scheme is the encouragement by the judge.

Judges and non-judge court staff must evaluate the possibility of mediation of the court case reviewing the case carefully, starting from the preparatory phase. In addition, the vast majority of litigants, and many legal professionals – even if they know the term ‘mediation’ – probably know relatively little about the potential of mediation in settling disputes. There is therefore a clear need for good information about mediation– both on what mediation is, as well as its potential for settling specific cases. This information should, wherever possible, be made available to the parties themselves. The judges should be able to:

- decide issue of suitability for mediation
- answer the parties questions about the process
- talk about the benefits it could bring to the disputants
- counter any objections raised to mediation by the parties or their lawyers.

Policymakers and court presidents should develop incentives for judges to refer cases to mediation, for example, the assessment of individual judges should not be reduced if a he or she refers a case to mediation and a settlement is reached.

These specific procedures and indicators may be adapted for use by other professionals and persons referring to mediation.

This tool has been developed in reference to point 1. Availability of the CEPEJ Guidelines on mediation.

## 1. The Timing of Mediation Encouragement

Although the timing of a referral to mediation may vary depending upon the type of case involved and the needs of the particular case, in principle, referral should be made at the earliest possible time that parties are able to make an informed choice about participation in mediation.

Within the limits set by the legislation and by the applicable Code of Civil Procedure, it will be sometimes preferable to wait for the parties to have vented their hostility before proposing them to go to mediation: this can even, at a later stage (including enforcement and insolvency proceedings), increase their readiness to settle. Therefore, if parties do not consent to mediate in the preparatory phase it is suggested that the court provides opportunity on a continuing basis for both the parties and the judge to determine the timing of a referral to mediation at a later stage of litigation.

## 2. Which Case Types are Eligible for Referral to Mediation?

The judge who will refer the case to mediation should make sure that the relevant case is eligible for mediation. There are a few situations where mediation is not allowed by law. When the dispute or part of the dispute concerns public order (mandatory law), matters or inalienable rights mediation can make sense depending on the context. However, the settlement agreement must respect the mandatory law or inalienable rights. Besides the public order criterion, disputes in which only a court ruling on legal grounds can provide a solution or demand by law a specific judicial procedure to solve certain legal issues are also excluded

There are other criteria concerning the success of mediation. Although there are no uniform criteria for referrals to mediation, there are some that could generally be termed as "referral indicators". Experienced mediators agree that it is not the type of case that determines the chances of successful mediation, but the attitudes and insights of the parties themselves. They have to be prepared for and capable of discussing a solution to their conflicts while also being able to develop an

eye for their mutual interests. However, good mediators can frequently overcome unwillingness to help parties in problem-solving and risk assessment of their case, even if parties are initially reluctant to get around a table.

The following indicators for making referrals to mediation might be relevant:

- Parties' interests fall outside the legal framework of the dispute
- long-term relationships (neighbours, business, family...)
- more parties involved in the conflict than just the party in the proceedings
- more pending proceedings involving the same parties
- quick resolution of the dispute desirable
- disproportionate litigation cost in relation to the value of the dispute
- one of the parties have little resources to dedicate to the litigation process
- "legal proceedings fatigue"
- high probability that the case will be complicated to rule upon
- likely that the judgment will be difficult to enforce
- outcome of the court decision uncertain
- mutual future interest
- highly emotional case
- need for privacy and of confidential treatment of parties (caucuses)
- control of timing and organisation of the process important

The following counter-indicators induce that the litigation may be more appropriate:

- Failed recent mediation attempt precedent desired
- public decision desired
- great imbalance of power, undue pressure, or previous use of violence between the parties that cannot be managed by the mediator and/or can lead to a major defect of free and informed consent by one of the parties
- likelihood that the decision will be unfair for at least one of the involved parties
- lack of full and general power to negotiate of parties and lawyers
- proven parental alienation

### 3. Elements of a Referral Interview

#### **Conflict diagnosis**

*Objective:* The judge who will refer the case to mediation should open discussion on the appropriate type of dispute resolution.

#### **Intervention plan**

By asking questions the judge should be able to present a choice between various dispute resolution methods. In this process it should also be revealed whether a decision by the court might satisfy all the interests of the parties.

#### **Exploring willingness to negotiate and enhancing it**

*Objective:* judge who will refer the case to mediation should test aspects of willingness to negotiate:

- level of escalation
- willingness to negotiate

## Level of escalation

The judge should ask questions to explore the degree of escalation between the parties and be alert to any signs of severe escalation, such as threatening to use force or constant and personal on the opposing party. Mediation can no longer be used when conflict has reached the stage, in which the parties are no longer willing or able to work on a joint solution.

## Willingness to negotiate

Questions aimed at establishing the combination of the following motives might point to the willingness to negotiate:

- a quick solution
- control of the organisation and timing of the decisional process
- a tailored solution falling outside the legal framework of the dispute
- an economical solution
- preservation or restoration of the relationship

## Information on mediation

It is important that the parties know what mediation involves and what it means to them in the process. The judge should create realistic expectations of the parties. The information should be given to the extent necessary in a specific case, so it is advisable to start the process by asking the parties what they already know about mediation. Furthermore, the judge should be able to counter any objections raised to mediation by the parties or their lawyers, not by arguing with them but by exploring the background of their resistance.

In principle the following topics should be discussed:

- voluntariness and equality of the parties
- confidentiality of the process
- non-admissibility of statements and evidence in court proceedings
- due diligence and impartiality of the mediator
- role of the mediator
- role of lawyers
- postponement of court proceedings
- mediator's fee
- agreement of the parties
- what should be done to get the mediation started

## 4. How to Refer – Dos and Don'ts of Judicial Referral to Mediation

Directing to the mediation process requires maintaining a delicate balance; on the one hand, a “push” from a judge in the form of a referral can be a relief because none of the parties wants to suggest mediation for fear they will lose face. On the other hand, it can lead to unwilling parties. The art is to conduct the referral in a way that maximizes the parties' motivation to pursue the dispute resolution through mediation. It should be noted that the same principles apply where parties are required by the applicable Civil Procedure Code rules to take part at a mandatory referral meeting before having their cases heard in court. Finally, interactive collaboration between judges and lawyers can contribute to the efficiency of referral to mediation.

Every judge should follow his/her own style, yet there are certain skills that may be of help. The judge should choose his/her referral style between “persuading and enticing”;

<sup>3</sup> in the first case, he/she recommends mediation or even prevails upon the parties that this is the best option in a given case or, in the second case, he/she merely suggests mediation. Notwithstanding the style the judge chooses it should be borne in mind that parties have the right to access to court, which also implies a decision by the court. Therefore, the judge should not make an impression that he or she wants to get rid of a case.

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3 Machteld Pel, Referral to mediation: A practical guide for an effective mediation proposal, Hague 2008, p. 181.



## Dos and don'ts of "persuading" referral:

- ✓ Do well prepare for the referral hearing and study the file and the arguments of both sides.
- ✓ Do explain what mediation involves.
- ✓ Do explain the advantages of mediation.
- ✓ Do express your personal opinion about why mediation is the best method in a given case.
- ✓ Do listen.
- ✓ Do try to understand parties' underlying needs.
- ✓ Do show interest in parties' interests, needs and problems.
- ✓ Do make parties' understand that they have the final word as to whether mediation is the appropriate method to resolve their conflict.
- ✓ Do make clear that rejecting the proposal for mediation will have no bearing on parties' legal position in the proceedings.

- ✓ Do not provide too much information at once.
- ✓ Do not threaten.
- ✓ Do not lecture.
- ✓ Do not tell parties what to do.
- ✓ Do not take sides.
- ✓ Do not try to blame someone.

## Dos and don'ts of "enticing" referral:

<ul style="list-style-type: none"><li>✓ Do well prepare for the referral hearing and study the file and the arguments of both sides.</li><li>✓ Do explain what mediation involves.</li><li>✓ Do explain the advantages of mediation.</li><li>✓ Do listen.</li><li>✓ Do show interest in parties' interests, needs and problems.</li><li>✓ Do try to understand parties' underlying needs.</li><li>✓ Do ask questions to uncover parties' interests and motives.</li><li>✓ Do maintain balance when exploring the interests of each party.</li><li>✓ Do ask how each party feels.</li><li>✓ Do ask open-ended questions if possible.</li><li>✓ Do ask hypothetical and reflective questions (what if..., what do you think about...).</li><li>✓ Do make clear that rejecting the proposal for mediation will have no bearing on parties' legal position in the proceedings.</li></ul>	<ul style="list-style-type: none"><li>✓ Do not provide too much information at once.</li><li>✓ Do not ask too many focused questions (who, what, where, when...).</li><li>✓ Do not take sides.</li><li>✓ Do not try to blame someone.</li><li>✓ Do not ask "Why did you do it?"</li></ul>
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### Basic Mediator Training Curriculum

*Document elaborated jointly with the International Mediation Institute*



International Mediation Institute

It has been acknowledged that there are a wide range of different mediation teaching and mediation practices within the Council of Europe Member States. A basic training curriculum for mediators has been identified as a key mediation tool, because:

- It allows identifying the topics for mediator training as a baseline standard,
- It could be used as a common teaching guideline in different jurisdictions creating a common standard for mediators' knowledge and professional skills and therefore facilitates co-mediation practices, namely in cross-border conflicts where two or more mediators are involved in different jurisdictions,
- It will encourage the writing of handbooks and the research in the field.

Given its expertise in developing global, professional standards for mediators, advocates and others involved in collaborative dispute resolution and negotiation processes, this tool has been elaborated jointly with the International Mediation Institute (IMI). IMI also convenes stakeholders, promotes understanding and disseminates skills, all in a non-service provider capacity<sup>1</sup>.

This tool has been developed in reference to point 1. Availability of the CEPEJ Guidelines on mediation.

## 1. Mediator training curriculum principles

The training curriculum should be outlined in the training plan and should be organised in such a way to allow for development of the knowledge and mediation skills and techniques required by an effective mediator.

The content of the training and training methodology shall take into consideration background, initial level of knowledge and practical expertise of the trainees.

The Mediator training curriculum should address, reveal and encourage good practice in the field.

Quality control and independent monitoring measures should be in place to ensure sufficient contents and provision of the training. It is strongly recommended that provision of the practical parts of the training should be led by active mediators, with experience as trainers.

## 2. Knowledge development

The training curricula should cover at least these main domains of knowledge development:

### 2.1 Conflict theory

### 2.2 Traditional settlement of disputes and mediation,

### 2.3 Basics of mediation:

#### 2.3.1 Basic principles of mediation:

- a. Voluntariness
- b. Confidentiality
- c. Independence, impartiality and neutrality of the mediator
- d. Parties self-determination and control over the process
- e. Equality of the parties
- f. Creativity and sustainability
- g. Flexibility
- h. Cost-effectiveness

#### 2.3.2 Aims of mediation

#### 2.3.3 Indications and counter-indications of mediation in assessment for suitability of cases,

### 2.4 The main attributes of a mediator:

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<sup>1</sup> <http://www.imimmediation.org/>

- a. Attitude and role of the mediator
- b. Credibility
- c. Basic skills and techniques
- d. Attributes related to professional ethics
- e. Professional requisites and practice

2.5 Roles of the parties, their counsel and the other participants in mediation

2.6 Styles of mediation

2.7 Stages of mediation<sup>2</sup>:

- a. Preparation
- b. Opening
- c. Exploration
- d. Negotiation
- e. Agreement

2.8 Legal framework of mediation and legislation related to mediation, including review of legal framework for mandatory and opt-out mediation if available

2.9 Interaction between mediators, judges, lawyers, mediation users and other mediation stakeholders

2.10 Main characteristics and differences of mediation in civil, family, penal and administrative matters

### 3. Practical skills training

In terms of skills development, the essential skills topics that should be covered, demonstrated and practiced in any training programme are:

- a. Forms of listening skills and communication strategies
- b. Mediation process management skills and techniques including but not limited to the use of joint and private meetings
- c. Negotiation strategies and skills to manage the content of the dispute
- d. Ways of responding to the diverse behaviors of the parties
- e. Problem solving and decision making skills
- f. Conflict analysis and management skills, including reasonable selection of dispute resolution strategy and methods
- g. Co-mediation skills

Trainers may include other skills-based topics including but not limited to management of emotions, dealing with difficult people, responding to impasse, neuro-linguistic programming, etc.

Mediator Skills training courses should be participatory, interactive and learner focused. To ensure this, a variety of teaching methodologies should be used, including lecturing, videos, interactive exercises, individual work, group discussion, talking in pairs, and role-playing. As a guideline, for the practical part of any course, that is designed to teach the process and skills to be an effective mediator, a substantial part should be devoted to role-playing, coaching and feedback, as well as discussions and exercises.

### 4. Peculiarities of specialised mediation training

Additional topics and skills development exercises should be covered in the specialised mediation training programs.

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<sup>2</sup> There are many different phase models for the mediation process and the model below is provided for illustrative purposes only.

For mediation training in family matters:

- a. Core principles of family mediation
- b. Sufficient knowledge of family law
- c. Models of family mediation
- d. Skills of the family mediator
- e. Limits of the principle of confidentiality
- f. Child focused mediation and the best interest of the child
- g. Participation of children
- h. Assessment meetings (pre-mediation stage)
- i. Domestic abuse
- j. Power imbalances
- k. International legal framework

For mediation training in civil matters:

- a. Sufficient knowledge of provisions of public order and social protection law in the areas in which they practice in particular:
  - i. in leases and rents disputes
  - ii. in the field of labour law
  - iii. in consumer law
- b. Power imbalances
- c. Models of civil mediation
- d. International legal framework

For mediation training in penal matters:

- a. Sufficient knowledge of criminal justice system
- b. Various methods of restorative justice
- c. The relationship between criminal justice and mediation
- d. Skills and techniques of communication and of work with victims, offenders and others engaged in the mediation process, including basic knowledge on reactions of victims and offenders
- e. Specialist skills for mediation in cases of serious offences and offences involving minors

For mediation training in administrative matters:

- a. Core principles of mediation in administrative matters
- b. Sufficient knowledge of constitutional and administrative law
- c. Balance of principles of the confidentiality of mediation and of the transparency of administrative activity
- d. The boundaries of the public interest
- e. The role of the mediator – particularities of the principles of independence and impartiality
- f. Assessment/evaluation meetings (pre-mediation stage)
- g. Code of Ethics of the mediator in the administrative field

## 5. Duration

For a course to cover adequately the necessary content using appropriate methodologies, courses should have a substantial number of training hours being not less than 40 hours<sup>3</sup> personal attendance in class.

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<sup>3</sup> This does not include pre-course preparation, lunch and breaks.

## 6. Group size

Quality mediation training shall apply interactive and participatory training methodology, therefore size of group shall be limited to maximum 30 trainees with ideally a trainer-trainees ratio of 1 trainer to 10 trainees/15 trainees maximum.

## 7. Assessment

Training assessment shall include evaluation of knowledge (theoretical part) and skills (practical part) of the trainees corresponding to the training curricula and training plan. Role plays evaluated by practicing mediators shall be employed for assessment of mediator's performance in using of professional skills.

## 8. Follow-up

It is strongly recommended that the mediation training should be followed by supervision, mentoring and continuing professional development, affixing, improving and refreshing the mediator's knowledge and professional skills, and educating on new developments in the field.







27 June 2018

CEPEJ(2018)7

**EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE  
(CEPEJ)**

**Mediation Development Toolkit  
Ensuring implementation of the CEPEJ Guidelines on mediation**

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***Frequently Asked Questions (FAQ) on Mediation: A Guide for judges, non-judge staff of courts, mediators, mediation services, legal and other professionals and mediation stakeholders and users of mediation***

It is two decades since the Council of Europe adopted several legal instruments aimed at developing mediation and other forms of alternative dispute resolution (ADR) in civil, family, penal and administrative matters<sup>1</sup>, and one decade since Guidelines<sup>2</sup> were introduced.

It is almost two decades since most Member States introduced into their national legislations, provisions aimed at developing referral to mediation in civil matters. It can therefore now be affirmed that referral to mediation is one of the key roles of a civil judge.

However, taking all Member States into account, progress on the take-up of mediation is low, with the number of files referred to mediation being almost unnoticeable at between 0.1 % and 1 % of all civil court cases.

The main losers from this situation are the parties faced with judicial proceedings, in particular those people and corporations, for whom mediation is most likely to benefit. In most cases, they have no access to mediation as an alternative to a court hearing simply because mediation is not mentioned, presented and recommended to them by a judge during the various steps of judicial proceedings. There is also a similar silence about mediation from their lawyers.

The efficient development of judicial mediation in civil matters requires all those concerned in its implementation to adopt a holistic, systemic and pragmatic approach. This approach follows the very concrete recommendations contained in CEPEJ Guidelines. But Member States will only make real progress in this area once they have the political will to promote the development of judicial mediation.

This Guide can be used in this context as a possible support to judges and non-judge staff of courts, and as a complement to both initial as well as continuous awareness and training for judicial referral to mediation and in process of acting as court mediators. In order for mediation to become an effective process, such training should be obligatory. The same should apply to other legal professionals. This Guide can also be used to help all parties engaged in the necessary collaboration between the Judiciary, Bars, other legal professional societies, mediation associations and mediation services, when implementing pilot mediation practices in Courthouses (such as mediation information centres). Such pilot practices can form an important role in strengthening the follow-up of a referral to mediation by judges and non-judge staff of courts.

This Guide follows the main areas of the above-mentioned Council of Europe legal instruments, but with a particular emphasis on civil and family disputes. The Frequently Asked Questions (FAQs) are therefore limited, but as a model, it can be further developed by individual Member States and adapted as applicable in line with national specifics, for instance in matters of costs and legal aid (FAQ 9) or in matters of official registers or lists of certified mediators (FAQ 10).

This Guide has been developed in reference to point 3. Awareness of the CEPEJ Guidelines on mediation.

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<sup>1</sup> Recommendation (98) 1 on family mediation, Recommendation (99) 19 concerning mediation in penal matters, Recommendation (2001) 9 on alternatives to litigation between administrative authorities and private parties, and Recommendation (2002) 10 on mediation in civil matters.

<sup>2</sup> CEPEJ Guidelines on penal mediation (CEPEJ(2007)13), on family and civil mediation (CEPEJ(2007)14), and on alternatives to litigation between administrative authorities and private parties (CEPEJ(2007)15).

## 1. What is Mediation?

Mediation is primarily a state of mind. It is a way of thinking and behaving differently, with a humanistic regard towards a dispute. Disputes are a regular occurrence of life, and may have good or bad consequences depending on how they are dealt with.

On a more technical level, mediation is a way of resolving or even preventing disputes of every kind. The third party – or mediator – has two main objectives: on the one hand to restore, maintain and improve the dialogue between the parties, and on the other hand to help the parties find their own solution, based on their own interests.

Although there are definitions of mediation contained in the legal instruments referred to in the Introduction, the following fuller, and more helpful definition, is taken from the European Union's Mediation Directive<sup>3</sup>:

“Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.”

The *main objectives* of mediation are to help the parties (a) establishing dialogue between themselves and (b) finding by themselves a solution based on their common interests.

## 2. What are the Advantages of Mediation?

### For the parties to a judicial dispute

- The holistic (global) approach of mediation enables it to encompass all aspects of a conflict – both the judicial elements (the subject matter of the lawsuit), as well as the non-judicial or non-legal elements, such as the emotions, needs, values and interests of the parties;
- The empowerment of the parties in mediation allows them to develop their own solution to the dispute based on their own particular interests and needs (a customized approach);
- The win-win strategy of mediation removes the desire of the defeated party after a judgment to seek some sort of reprisal through an appeal, new proceedings or other measures;
- The liberty of the parties gives them the freedom to be able to choose the process (the means of resolution, its approach, the third party, etc.) as well as the content of the resolution, according to their interests;
- The possibility of taking the future into account in the settlement process allows the parties to develop imaginative solutions to prevent further conflicts from developing;
- The possibility of limiting or interrupting the process allows the parties, where necessary, to manage their time and costs;
- The peaceful process of mediation, and the use of creative solutions allows the parties not to lose face, and to maintain a constructive working relationships (both in family and commercial matters);
- The flexibility, efficiency and creativity of the process are possible because the parties are free to negotiate on the process and content of mediation (as opposed to legal

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<sup>3</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

proceedings where the rules are fixed by law and therefore unalterable, and where neither the judge nor the parties can go beyond the subject matter of the lawsuit).

- Particularly, with reference to disputes in separation, divorce and other private law family matters, mediation assists the parties to reach agreements that give priority to the needs and best interests of any children involved.
- Family mediation can help sort out the options available, namely, in arrangements for children, child maintenance payments and how to divide property and money, including savings, joint debts, pensions and mortgages.

### **For the judges**

- The opportunity of referring appropriate cases to mediation can improve the overall efficiency of the court system, since as more cases are resolved through mediation, more time will be released for the judiciary to be able to manage and judge the remaining cases;
- Referral to mediation will put an end to the dispute as a whole (which removes the temptation of the losing party to seek some sort of reprisal through appeal or by introducing other lawsuits);
- Referral to mediation allows the judge to make time for his other files, since a high proportion of mediations may be successful;
- Even for the remaining cases, mediation will to some extent have narrowed the differences and appeased the parties, so that the following proceedings may be significantly reduced;
- Referral to mediation provides for the parties a timely and effective resolution to their disputes, thereby contributing a positive image of the justice system.

### **For the lawyers**

- The high rate of success of the mediation process enhances the credibility and the fame of the law firm;
- The quickness of the process gives to the law firm more time for other business;
- The rate of success obtained by the law firm contributes to enhance customer loyalty;
- This all helps the profitability of the law firm, taking into account the quickness for getting the settlement, the client's satisfaction with the settlement result, and the client's spare time.

### **3. Which Situations are Most Appropriate for Mediation?**

Mediation is possible in most civil, commercial, family and social matters, subject to the cases mentioned in FAQ4.

The following criteria, other than the legal field of application which governs the file, should be taken into consideration:

- Where the parties have a legal relationship (such as in family disputes, lease conflicts, co-ownership problems, partnerships, shareholders, exclusive representation, franchising and other commercial contracts, etc.), or some other sort of a longstanding relationship (for example, family, employment, neighbours, colleagues, members of an association, etc.).
- A lawsuit would only settle part of the dispute, because it may be hiding a more significant underlying dispute or problem.
- The dispute contains strong emotional issues.
- Where there are converging or complementary economic interests, enabling the parties to redefine their relationship and activities, or establish a new cooperation between them.
- A quick settlement rather than protracted jurisdictional or arbitral proceedings are in the interest of both parties; the cost and the duration of the lawsuit are out of proportion with the interests at issue.

- The problems are of an extremely complex nature. They concern several claims or several persons or entities (several persons are liable, insurance, other company of a group, partner, licensee, etc.).
- The dispute touches on several countries.
- The parties wish confidentiality.

#### 4. When Mediation may be Inappropriate?

- When the parties are already negotiating in a satisfactory way, and the presence of a third person is not necessary;
- When a legal precedent is needed for the jurisprudence;
- When a judicial conciliation is feasible, at reasonable cost and quickly, and when the value is minimal;
- When the facts are not contested and thus it is possible to obtaining a court decision or an arbitral sentence quickly or at a reasonable cost;
- When all the parties want to fight through litigation;
- In case of individual need for any specific party to obtain statutory protection;
- In certain cases where there is a serious imbalance of power between the parties;
- In case of denial of violence or reiterated violence;
- In case of abusive procedures by one of the parties (established bad faith) or domestic violence, in some circumstances;
- In case of legal incapacity of one party (except if he/she has a legal guardian who represents him/her in the process).
- In family disputes, for children's protection purposes when appropriate.

#### 5. What Guarantee Does Mediation Offer?

Mediation offers to the parties, to their counsels and to the judge guarantees on several levels:

Concerning the person of the mediator: the officially registered, sworn-in mediator or the accredited mediator (certified by an umbrella organization) or other well-trained professional persons allowed by law to act as mediators, has been selected on the basis of their professional qualifications, experiences, specialization, education in conflict management and compliance with the rules on ethics.

Concerning the process, mediation is regulated by fundamental principles, which are usually reflected in national legislation, statutes of the associations, or in codes of conduct.

They are often mentioned in the initial mediation agreement:

- Humanity: the human being is at the heart of mediation, which has a goal to reinstate dialogue and an effect to diminish or alleviate all sorts of suffering and all sorts of waste caused by the dispute;
- Multipartiality and empathy of the mediator: the latter undertakes to serve the parties in an equitable manner, without making any unfavourable distinctions between them; he or she is responsible for the smooth guidance of the process;
- Freedom and autonomy: the parties are free to accept or refuse to join the process, which they can leave at any time; the mediator is free to start, to continue, to suspend the process or to terminate it, where necessary;
- Responsibility: the parties have a duty to enter the process in good faith, to behave respectfully and in a transparent manner as well as to respect confidentiality. The mediator is responsible for the good conduct of the process; he or she has a duty to verify that the parties have understood the characteristics of the process as well as their part and his own; the mediator must ensure that the parties come to their final agreement with a free and fully informed consent. If necessary, the mediator can invite them to consult a lawyer;

he or she is under a duty to terminate the process if the proposed solution cannot be fulfilled or if it is against the law;

- Independence: the mediator is independent. He or she must tell the parties about any circumstances which, objectively or subjectively, could compromise his or her independence;
- Neutrality: the mediator refrains from participating in the controversy and from making statements regarding the substance of the dispute;
- Humility or absence of power: the mediator has no decision-making authority whatsoever;
- Confidentiality: the parties and the mediator shall refrain from informing third parties about any statements, opinions or proposals made during the process, and from producing documents in later proceedings referring to the above. The parties shall refrain from having the mediator cited as a witness. The mediator shall furthermore keep the existence of the process and the names of the parties confidential. However, there are exceptions in some situations (school mediation, or discovery of a criminal wrongdoing during the mediation process). In family cases, confidentiality can only be waived with the consent of both parties or where there is an over-riding obligation in law. This will be the case when a statement made in mediation indicates a safeguarding risk or discloses a criminal offence.

## 6. What is the Role of the Mediator?

The mediator, an independent, neutral and impartial third party, is responsible for conducting the process from its preparatory stage until its termination. During the preparatory meetings, he or she starts by ensuring that the parties come of their own will and after having been fully informed, completing this information if needed. He or she then prepares a draft initial agreement which the law or the statutes of his or her association provides, or when the parties require it. Confidentiality is mentioned in this document.

He or she facilitates the communication between the parties in creating an atmosphere of respect. He or she helps them to find their own solutions in order to resolve their dispute by themselves.

The mediator applies several specific tools: active listening and principled negotiation.

The parties or the mediator can also choose to proceed with another co-mediator when the number of participants is high, when it is appropriate to have as third party a man and a woman, or when it may be necessary to have mediators of different educations or experiences (a lawyer, an engineer, etc.) who would be more efficient.

The mediator is: neither a judge nor an arbitrator, as they do not render a legal decision; nor a conciliator as they do not give a legal opinion or advice; nor an ombudsman as they do not make investigations, take depositions or make recommendations; nor an expert as they do not give a technical opinion or advice; nor a social assistant as they do not help people in their demands.

## 7. What is the Role of the Lawyer?

When the client consults him or her, the lawyer now has a duty to consider if the dispute is appropriate for being mediated, and to inform the client in such a manner that they should be able to choose freely on the appropriate manner to solve his problem without being pushed unduly in any particular direction. It is a lawyer's professional duty to provide a client with complete and accurate information on mediation and assist her/him in taking an informed decision.

If the parties choose mediation, it is then for the parties to decide whether and to what extent they want the presence of their lawyer at the mediation, and if needed, in which meetings and steps of the mediation process.

The role of the lawyer differs from the usual adversarial and litigious approach and is defined by mutual consent. In mediation, the general approach is that the client expresses him/herself,

advised by his/her lawyer, who participates with him/her in looking towards a mutually beneficial solution.

His/her presence is important, *inter alia* when the parties elaborate options. He or she helps the client to consider the options available, by giving a comparison with how the legal issue might be resolved through adjudicative processes, particularly taking into account the client's best interests. The final agreement is then drafted by the lawyer, or under his control.

After the settlement the lawyer examines and assists in its implementation.

## 8. What Process? Which Steps? What Duration?

All these points will be examined during the preparatory sessions and decided upon by the parties and the mediator, and will be mentioned in the initial mediation session. The parties, assisted or not by their lawyers, can influence respectively the choice of the approach of the mediator, the number and the type of meetings (joint sessions, with or without caucus, shuttle, etc.) and the process duration, with - if it is required - deadlines, if these are not already expressed in national legislation.

Depending on the situation, the mediation process can be completed in a few hours, or might exceptionally last several months.

## 9. How much does Mediation Cost? What Are the Economic Advantages? Can Legal Aid Be Granted?

### **Cost of mediation**

The costs of a mediation process may include the fees of the mediator and of his possible expenses, such as costs of translation, hiring of rooms, case management costs, etc. In the preparatory phase, the parties and the mediator begin by agreeing on the financial terms. The fees of the mediator are usually split evenly between the parties, but they may also be differentiated, in order to take into account, for instance, differences of financial status between the parties.

The setting of the fees shall, *inter alia*, take into account the financial situation of the parties, the value of the case, the number of parties to be present, the nature and the complexity of the dispute, etc. Most frequently, the rates are known from the outset, because they are regulated in the rules of the mediation institutions. Parties can also agree about a fixed rate with the mediator.

### **Financial advantages**

Frequently, and especially in commercial matters, mediation is oriented towards maintaining or transforming the relationship between the parties. By contrast, civil or arbitral proceedings often cause a break in relationships through a legal battle, which, in turn, will increase hidden costs that are not included in the costs of the proceedings *per se*. Indeed, each party may have to invest time, money and energy in order to find a new commercial partner, a new commercial product, new services, new patents, trademarks or industrial designs, new associates, new financing, new office space, new markets, etc. All these important costs can be avoided or drastically reduced, when mediation is chosen as the method of dispute resolution.

### **Legal aid and public funding (to be adapted according to the country system)**

Member States of the Council of Europe will set out in their legislation, the conditions for granting legal aid, and whether, and in what measure, the costs of the mediation process, including the fees



of the mediators are covered by legal aid. Certain legislations stipulate that when the parties arrive at an amicable settlement, legal /judicial costs may be refunded. Other public funding may be available to cover the costs of mediation.

## 10. How to Start Mediation? When? Who? With Whom?

### **When?**

Mediation may be undertaken at any time. Before a dispute even arises, the parties can - as a preventive measure - insert a mediation clause in a contract.

Parties can have recourse to mediation at the stage of provisional measures, or following an attempt at conciliation. Also, when judicial (or arbitration) proceedings begin, it is still possible to refer to mediation at any stage, in first or second instance.

The attendance of an information and/or assessment meeting conducted by a mediator is, in some jurisdictions, a condition to initiate a court proceeding in family cases.

### **Who?**

The mediation process is basically put in motion by the judge, by the parties, or by their lawyers. However, even during the preparation of the hearing, the judge will be looking to see if there are particular elements in the file that could lead him or her to propose mediation. The judge should be able to give the parties appropriate information on the mediation process, together with the likely advantages of using mediation in the case.

The position and awareness of judges provides them with the ideal opportunity to follow the three steps associated with court-referred mediation: to recognize the files appropriate to mediation (see FAQs 3 & 4 above), to explain about mediation to the parties and, to invite the parties to resort to mediation.

### **With whom? (to be adapted according to the country)**

Some States and entities, keep and update lists of mediators, with their qualifications, experiences, specialisations, etc. These registers are public and parties can thus choose the person of mediator, with the advice of their lawyers and, in case of need, of the judge.

In some jurisdictions only qualified family mediators who are specialists in all aspects of divorce and separation, should be used for pre-proceedings or court referred mediation.

Furthermore, in several Member States, mediation associations prescribe in their status or regulations that their members should pass a certification process, with similar conditions. These lists are also available on their websites, communicated to jurisdictions, or otherwise published.

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## EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)

### Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation

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#### Guide to Mediation for Lawyers

*Document elaborated jointly with the Council of Bars and Law Societies of Europe (CCBE)*

*The present paper was adopted by the Council of Bars and Law Societies of Europe (CCBE) on 23 March 2018. During the first meeting of the CEPEJ Working Group on Mediation (CEPEJ-GT-MED) in May 2017, the CCBE was requested to help developing a guide to mediation for lawyers, within the context of promoting a better implementation of mediation in the member states of the Council of Europe. The objective was to present a final joint CCBE/CEPEJ paper for approval to the CEPEJ Plenary meeting in June 2018. To this end, the present Guide has been developed by the CCBE in consultation with the CEPEJ-GT-MED.*



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## **Chapter 1 - Introduction**

### **1. Purpose and subject matter**

The main purpose of this guide is to raise awareness amongst lawyers with respect to mediation and demonstrate various professional challenges, opportunities and incentives for lawyers that stem from the use of mediation, as well as benefits for clients. This guide has been developed in reference to point 3. Awareness of the CEPEJ Guidelines on mediation.

The importance of engagement of practising lawyers in conflict management techniques and their active participation in alternative dispute resolution processes, such as mediation, is widely recognised and duly reflected in various codes of conduct.

Within this guide, the term “*mediation*” means a voluntary non-binding, confidential dispute resolution process in which a neutral and independent person(s) assists the parties in facilitating the communication between the parties in order to help them resolve their difficulties and reach an agreement. It exists in civil, family, administrative and penal matters. Furthermore, the term “*mediator*” means a person, nominated by a court, or any other authority and/or appointed jointly by parties to a dispute, to assist such parties to reach a mutually acceptable agreement to resolve the dispute.

Although this guide does provide for some practical suggestions, materials or tools for lawyers representing clients in mediation and for lawyers acting as mediators, it does not seek to replace the great abundance of training material that exists on mediation as well as training courses. Rather, the objective of this guide is to demonstrate why mediation could be an important and useful process for lawyers and their clients, and how mediation could be used to remedy certain problems occurring in lawyers’ everyday practice, for example, those connected with identifying and understanding the client’s interest.

Taking into account lawyers’ duty to act in the best interests of the client, this guide starts from the premises that lawyers must always review all options when it comes to advising their clients on the choice of the most appropriate dispute resolution process. Lawyers’ approach to mediation and any other dispute resolution process must therefore be conceptually neutral and the selection of the preferred option must be merit-based and considered from an analytical and objective point of view.

In that regard, and within the context of promoting a better uptake and implementation of mediation, it needs to be emphasised that awareness and training of lawyers in mediation is indispensable.

### **2. Mediation as an alternative to adjudication**

Mediation is a very practical and flexible method for resolving disputes. It may in some cases be faster, more effective and cheaper than adjudicative processes.

Due to their specific and collaborative nature, mediation techniques can produce high value solutions to a conflict that may not even be available through the judicial process. A third actor which is alien to and remote from the parties, such as a court, and acts within procedural restraints that typically exist in any judicial process, might not be in a position to elaborate on more creative or complex solutions. These limitations are compounded by the fact that parties proceed as adversaries in the judicial process, so their communication tends to be more tactical and co-operation more difficult and impeded. This should by no means be taken as a critique of courts or the judicial system, but these are possible consequences of the adopted process and procedure.

As a matter of fact, courts' or arbitrators' role is adjudicative; i.e. they are expected to decide on "*who is right and who is wrong*". Such moralistic or legalistic approach makes perfect sense, and often may even be necessary, but certainly this is not the only conceivable technique.

Finally, it is also worth noting another limitation of adjudicative processes – namely, that they not always take account of the parties' needs and interests. Sometimes, litigated claims are not really the crux of a matter and the parties are unable to exit such a dead end. Moreover, a "*question of right or wrong*" may be irrelevant or even unanswerable; sometimes it does not even have to be answered to resolve a dispute, or such a search for an answer may become destructive for the parties' relationship.

Mediation is a process of self-determination in which parties act within the freedom of contract paradigm and with full autonomy, which might be more conducive to resolving complex managerial problems. Also, in mediation, only the process is controlled by the mediator. The parties retain control of the outcome and so quite naturally they have more options and space for manoeuvre than those in an adjudicative process. This is an inherent feature of any consensual decision-making process which is more co-operative and free from many conceptual or procedural limitations.

### **3. Mediation as a means of access to justice**

In several documents the Council of Europe and the European Commission for the Efficiency of Justice (CEPEJ) have recognised that measures encouraging the use of mediation may facilitate access to justice.

The CCBE is an international non-profit association which has been, since its creation, at the forefront of advancing the views of European lawyers and defending the legal principles upon which democracy and the rule of law are based. These values and principles should be shared by all lawyers. They also include the right of access to justice, as well as protection of clients through promoting the core values of the profession.

Justice is a fundamental value of utmost importance in the life of every citizen. Each person should have access to justice, but justice does not always originate from the court. Therefore, the legal profession should display advanced reflection and in-depth knowledge of all dispute resolution processes available across a broad spectrum, including mediation. Mediation is clearly one of the possible methods for the realisation of justice and, as such, clients should be made aware of the opportunities offered by mediation, which is of course a voluntary process of self-determination for parties who may be advised that their interests may be best served by electing mediation as a means of resolving their dispute.

The fundamental role of independent common courts in justice-making processes is greatly appreciated but at the same time access to institutional justice may remain limited and, in some cases, even defective. Furthermore, no justice system can be perfect. The functioning of the justice system is and should be subject to constant reflection and improvement, but its deficiencies and limitations are bound to exist, which sometimes causes frustration or harm.

Mediation could be viewed as one of the remedies to the above situation. Mediation as well as other alternative dispute resolution processes could be perceived as another pillar of the justice system, which can support the judicial system and improve the overall access to justice. This is also a matter of adequacy and effectiveness – the judicial system should deal with matters that really require adjudication but there are situations where other dispute resolution techniques would be more appropriate.

Deficiencies in the functioning of justice systems or typical (financial or institutional) barriers to the access to justice are not, however, the only reasons why mediation should be considered as an attractive dispute resolution process. When formal/institutional justice is not available or

inadequate due to the nature of a matter or specific interests of clients, mediation as well as other alternative dispute resolution processes might be a suitable alternative. There are situations when certain interests of clients, though fully justifiable and legal, cannot be effectively pursued within the framework of the judicial system. For example: due to the conceptual limitations of law, formal expiration or inaccessibility of legal claims, lack of the relevant case law or practice, lack of formal or qualifying evidence, or various procedural complications. As one can imagine, the above constraints might not be relevant in mediation and other alternative dispute resolution processes as long as the “question of right or wrong” does not need a legally based answer.

## ***Chapter 2 – Lawyer’s Role in Mediation***

Lawyers certainly do and should play an important role in the conflict management processes and thereby may have a major impact on how conflict situations are actually being dealt with for the clients. Therefore, it is of utmost importance that lawyers can demonstrate a deep awareness and appropriate technical skills that are necessary in order to effectively support clients in all types of dispute resolution procedures, both adjudicative and amicable, including also mediation. The legal profession should not, by any means and for whatever reasons (for example, due to the lack of relevant understanding or knowledge, or shortcomings in their practical skills) be or be perceived as a barrier to mediation, as this might potentially have an adverse effect on lawyers’ reputation. For the above reasons, theoretical and practical training in mediation should be included in syllabuses of law faculties and continuous education courses provided by lawyers’ bars and law societies.

### ***1. Lawyer supported mediation***

In lawyer supported mediation, one or more parties are assisted in preparation and/or accompanied at mediation sessions by their own lawyers who will inform and advise them throughout the mediation process. One aspect of the mediation process that makes it so effective is the opportunity it presents for disputing parties to speak directly to each other and to be heard by the other(s). Lawyer supported mediation can be enormously beneficial because it ensures that both parties have quality independent legal advice, are confident to enter into an informed dialogue and helps to redress any power imbalance between parties. In particular, lawyers may be able to facilitate the mediation process and support the mediator in reaching a good result.

It needs to be born in mind that mediation as such is based on an entirely different paradigm than adjudication – historical facts, reasons, rights and arguments of parties are not ignored but they are of less significance, as in mediation they are not determined, judicially or otherwise, and in fact, are usually irreconcilable. A proper understanding of this paradigm is absolutely crucial to constructive participation of lawyers in the mediation and effective supporting their clients in this process. In mediation the focus is firmly on the parties’ future needs and interests. The parties also work in an interactive and cooperative mode, so that they have a good chance to understand each other and understand the conflict in its complexity. On this basis, they jointly elaborate on a solution that might be acceptable to both parties and might take into account their mutual needs and interests. This occurs in a structured but informal process that is managed and facilitated by an independent and neutral mediator.

Because of the abovementioned reasons, functions and tasks of lawyers supporting clients’ participation in mediation is different from acting in an adversarial manner as the client’s lawyer in adjudicative processes. Lawyers applying a more cooperative and constructive approach in mediation, can help mediators in effectively guiding the parties to a settlement, thus ensuring that their clients achieve a solution to their disputes which better reflects their real interests and needs. There are many ways of looking at or understanding mediation but one of them is viewing mediation as an effective procedure allowing better identifying and interpreting of the client’s interest. From the lawyer’s perspective, mediation might be then a very useful tool. After all, lawyers are ethically and professionally committed to protect and realise the client’s best interest which from the lawyer’s perspective may in many cases be quite unclear or hard to define. In other



words, mediation could be a remedy to various methodological, conceptual, communicational or relational problems which typically occur in the process of identifying and interpreting the client's best interest. Surely, in mediation the client's interest becomes much clearer and understandable for all participants and more importantly, it becomes more reasonably and realistically defined by a client.

It needs to be emphasised that successful mediation usually ends with a settlement; i.e. a consensual agreement. Such an end-result must be accepted by both parties and is usually performed by them voluntarily and very rarely questioned. Then, as opposed to litigation, mediation indeed puts to an end a conflict – it is hard to deny that such a state of affairs is often desired by many clients. Unquestionably, a bilaterally accepted settlement is often a great value. Additionally, a written settlement drawn up in front of a mediator is a legally binding and enforceable contract, and in some jurisdictions even an instrument permitting legal enforcement that is equivalent to a court's judgement, subject to the satisfaction of certain formal requirements.

## **2. What does a mediator do precisely?**

A mediator is a professional specialist of mediation theory and practice, of which negotiation is a key element. He/she offers professional services to conflicting parties. The mediator is a negotiation mechanic. When the negotiation engine splutters or stalls, the mediator with his or her mediation experience and toolkit of techniques, makes it run again and – typical for mediation – makes it run optimally. All mediation carries in itself the desire to find an optimal solution.

The mediator is a service provider who dispenses his or her professional services against payment<sup>1</sup>. The mediation agreement between the mediator and the parties contains the contractual clauses, against which this service agreement is to be performed. In the performance of these services to the parties, the mediator does three things simultaneously: structures the conflict resolution conversation; facilitates the communication between the parties to ensure that they listen and understand each other; and helps them to avoid a deadlock in the negotiation and applies the correct techniques to break deadlock when necessary.

One of these techniques is that the mediator may engage with parties separately to examine confidentially with that party what prevents him/her from proceeding constructively in the negotiation and to find together with that party a solution to the deadlock. The contents of this conversation are confidential, also towards the other parties.

## **3. Main characteristics of mediation**

It is well known that mediation is a voluntary process; i.e. it does not start without the client's clearly expressed consent and the client may withdraw from mediation at any point and without adverse consequences in any other process then required to resolve the dispute. Of course, there are some situations, where valid reasons may exist to commence or continue litigation e.g. where a pre-emptive judicial remedy is required. Moreover, the voluntary nature of mediation also means that it keeps all other options open to a client, as opposed to many other dispute resolution methods which may be a one-way route, either for formal or practical reasons.

Simply put, not only can a client enter into and exit from mediation but also, after exiting a mediation he/she retains the same number of options. Mediation is then an option which can be characterised as being 'fair' to other options – it usually does not close, limit or complicate the client's access to other conflict strategies, techniques or procedures, i.e. a way back to court proceedings. Generally, mediation does not adversely affect the client's room for manoeuvre, nor

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<sup>1</sup> This payment might be collected from parties, legal aid or other funding entities, or the mediator may act on a *pro bono* basis.

does it deprive him/her of any claims or rights. In fact, it is quite the opposite; i.e. mediation often opens doors to new options that were hitherto closed or even not realised by a client.

There is often a frequent misconception that mediation is just an easy, friendly, but ineffective process. It is true that mediation is non-confrontational in its nature but simultaneously, it is intellectually demanding as it is more than merely creating one's own narrations and theories and then finding supporting argumentation.

Mediation is not about persuasion on who is right or wrong, as conflicts cannot really be effectively resolved in this manner. Usually, none of the parties have sufficiently persuasive argumentation or power to change the other party's will or vision. In reality, being convinced of the correctness of one's view that totally contradicts the other's, is frequently a major part of the problem, and therefore in itself does not necessarily constitute a valid ground for refusing mediation as parties' may be very well mistaken about their actual position, which is something that could be revealed through mediation.

Mediation is about identifying valid issues and finding the keys to resolve them. This task involves breaking certain thinking scripts (which are usually useless or destructive) and a creative reinterpretation of the entire conflict situation, so that it works to the benefit of both parties. One could then say that mediation is about understanding and creativity. This is by most people considered to be a part of due management, which usually also pays off.

It appears from the above that mediation should be viewed as one of the many valid options that are available to deal with any conflict situation. However, if a client's right of free choice is to be realised, all such options should also be made available to a client. The client must then know about mediation, its benefits and truly understand this process. To this effect, the client should be duly and objectively informed about all available process options, including mediation. Only then clients will be truly able to make a well-informed decision in their best interest. Undoubtedly, it is a lawyer's professional duty to provide a client with complete and accurate information on mediation and assist him or her in taking an informed decision.

#### ***4. The role of lawyers in mediation***

##### ***a. Selecting a dispute resolution method as an inherent part of case analysis***

While analysing a case or handling a dispute for a client, lawyers should always adopt a merit-based approach rather than acting on the basis of any prejudices, biases or pre-conceptions. Particularly when it comes to the choice of available processes for resolving a conflict situation, it is important that lawyers approach the matter from an analytical and objective point of view. Such a professional attitude should be the starting point in any case analysis. This of course also involves taking into account characteristics of clients, their specific needs and preferences as well as the attitude and actions of the other party.

In order to enable the client to make the right choice, practising lawyers should be well informed about all available dispute resolution processes, their specifics and recommendable institutions and service providers, so that they are able to efficiently propose such methods to a client; and then, professionally support the client through the chosen process.

It should be noted that any failure to adhere to the methodology outlined above is likely to have consequences for the client that may go much further than just choosing an inadequate dispute resolution process. Selecting the appropriate dispute resolution process is crucial also in the sense that it may significantly affect the client's position; i.e. in advance pre-determine or reduce the number of potential end-results and thereby, unnecessarily narrow the range of options that would normally be available to the client. For this reason, lawyers should not skip or neglect a discussion

with the client on various pros and cons connected with the use of different dispute resolution processes. This is a methodological error, which could potentially qualify as a lawyer's negligence or even professional misconduct.

The client's selection of the most appropriate dispute resolution process should therefore always be enabled by the lawyer advising carefully on this key consideration, as this is an integral part of any thorough and duly conducted case analysis. It should always be borne in mind that the client's interest comprises both substantive and procedural aspects, which are equally important to a client, and, as a result, both should be duly taken into consideration by the lawyer. It follows then that those performing legal analyses should always, from the very outset, consider all possible options for handling a conflict situation and in this context, assess the position of a matter.

It should also be noted that the choice of appropriate dispute resolution methods may be affected earlier on and much before a conflict arises; i.e. at the contractual stage. Therefore, every time a lawyer is drafting a contract, he or she should always consider whether mediation might be of assistance to contracting parties or be of particular relevance in certain situations, for example, due to the nature or type of contractual relationships. And if so, it should be born in mind that a mediation clause may be included in the contract. This is in fact the most appropriate moment to introduce a notion of mediation; i.e. when the contracting parties have good prospects together and still view each other as partners.

#### ***b. Advising the client on the proper conflict resolution method***

To be able to advise the client in the choice of the dispute resolution process, the lawyer needs to acquaint him or herself sufficiently with the matter in question and carry out a thorough cost-benefit-analysis of the available process options. This step should never be skipped or neglected, and lawyers should always be able to demonstrate to their clients that this professional task has actually been duly performed. Especially, before engaging in litigation and arbitration, it is important that the client understands how long the process may take, how much it may cost, what can be the risks involved and what is the likelihood of achieving the desired outcome, including possible risks related to the enforcement stage.

It is therefore necessary that the lawyer carries out a risk assessment of the case, setting forth the best and worst scenarios and a realistic target level, against which the client may evaluate available process options. Such a risk assessment may need to be revised and updated as the case evolves (e.g. as more information and evidence is gathered on the case during the course of chosen process). A front-loaded inquiry into the case and a documented case assessment helps the client to better evaluate the available options and set realistic expectations.

Unless weighty reasons such as urgency require otherwise, the client should initiate litigation or arbitration only after having explored all available resolution process options, including mediation and other alternative dispute resolution processes. Mediation may be a particularly suitable process if any of the following circumstances exist:

- the client expresses a preference for mediation;
- the client expresses a wish to avoid litigation and arbitration;
- the client is contractually bound to mediate before litigating or referring to arbitration;
- the client cannot afford to litigate;
- applicable law / jurisdictional issues arise that make mediation more appropriate;
- none of the issues in dispute is legally complex or novel, requiring judicial or arbitral determination;
- the parties have common business or personal interests that may be jeopardised by the dispute (e.g. an on-going business or family relationship);
- it is important to have a swift resolution to the dispute, in particular, court litigation could have other (internal or external) adverse effects for the client or its business;

- a court ruling would not adequately deal with the underlying concerns, or, for any other reasons, subjecting the dispute to a decision of an external third party (such as a state or arbitration court) would not be appropriate or desirable;
- a lawsuit may only resolve part of the dispute;
- there is a risk that a court judgement would not be effectively enforced;
- conducting litigation is in conflict with other vital interests of a client;
- the subject matter of the dispute is predominantly of a managerial nature;
- the costs of a lawsuit are out of proportion with the interests at stake;
- the dispute may be due to miscommunications, such as, data discrepancies, personal conflict, or cultural differences; or
- it is important for the client to keep the dispute strictly confidential.

Other dispute resolution processes include expert determination, early neutral evaluation, adjudication, review boards etc. Such adjudicative methods may be appropriate e.g. when the dispute is about a clear-cut technical or contractual disagreement.

Any dispute not resolved in a non-adjudicative dispute resolution process may ultimately be resolved by litigation or arbitration.

### ***c. Assisting the client at and/or outside of the mediation table***

There are various ways in which a lawyer can be involved in the mediation process:

1. the lawyer can prepare his or her client for the mediation and then leave the client to go to the mediation process alone,
2. the lawyer is present throughout the mediation process with his or her client; this is obviously the optimal situation from the lawyer's perspective because he/she can best assist his/her client in all of the critical stages of the process, including;
  - a) helping client to fully understand the process and answering questions;
  - b) decision to select the process and refer dispute to mediation;
  - c) making the offer to / accepting the offer of mediation from another party;
  - d) identification, selection & appointment of a suitable mediator;
  - e) finalising the agreement to mediate / rules of engagement, if any;
  - f) briefing the mediator;
  - g) attending pre-mediation meetings, if any, between client and mediator;
  - h) selection, appointment and briefing Experts, as may be required;
  - i) giving client legal advice / opinion on legal issues, rights & obligations, if any, arising in the dispute;
  - j) assessing the strengths and weaknesses of the client's case;
  - k) assessing the strengths and weaknesses of the other parties' cases;
  - l) scheduling costs (including legal costs) incurred to date by the client in the dispute;
  - m) estimating costs (including legal costs) to be incurred if not resolved in mediation;
  - n) assist client with preparation of negotiation strategy for the mediation / settlement range in monetary cases;
  - o) assist client to identify their needs and interests in having dispute resolved in the mediation;
  - p) engage in alternative scenario-checking with client and generally managing client expectations by reference to what might reasonably be achievable in litigation or arbitration;
  - q) assist client in drafting a mediation summary or position statement for any joint mediation meetings;
  - r) assist client in deciding who will attend mediation meetings as part of team representing the client party at the meetings;
  - s) assist client to identify and / or suggest possible alternative options for resolution and settlement;

- t) assisting the client generally in preparing for the mediation, knowing that in mediation as in all other processes, failure to prepare usually equates to preparation for failure in the mediation;
  - u) advising the client when the mediated settlement agreement is being drafted;
  - v) assisting the mediator as may be appropriate or as requested.
3. the client is alone at the beginning of the mediation and his or her lawyer enters the process in the final part – he or she assists in the process of reaching the conclusion from different options and helps during the preparation of a final (settlement or other) agreement, or
  4. the lawyer represents the client in the process when the client is not personally present at the mediation,

In the process of mediation, the presence of the client is usually required, or at least recommended by mediators. The mediator will insist that each party in the mediation, whether natural or corporate, is represented by one person who is fully authorised to settle the dispute and to execute a binding settlement agreement on that party's behalf. Where limitations exist on a party's representative's full authority to bind that party in a settlement agreement, the mediator has a duty identify such limitations and to inform all other parties of both the existence and extent of such limitations. The presence of the parties themselves (e.g., the CEO or other authorised representative of a corporate party) allows for new solutions to be more easily explored. The full authority to make settlement decisions is essential for successful mediation.

**Example 1.** Only in case if the problem of the client relates to an error in communication or the main problem is associated with emotion and not with legal issues, the presence of a lawyer at the mediation meeting may not be necessary. In this case the lawyer should be open to the possibility that the client may not need to communicate with the other party with professional legal support., since no legal issues will be dealt with. The mediator can ensure favourable conditions for an open debate whilst respecting the rights of the client. It is nevertheless of utmost importance that the lawyer checks the mediation agreement before it is signed by the client (this may depend on the subject matter of the dispute).

Preparing the clients in this case consists in briefing him/her about the rights and duties which a client has in mediation. Mediators should ensure that the parties understand the process and their rights and obligations in it. In this respect, the following information can be provided by lawyers to their clients:

- the voluntary nature of mediation,
- documents which must be signed at the beginning of the mediation (depending on the legislation of the relevant countries),
- confidentiality,
- fees of the mediator,
- duration of the mediation, process
- the effects of limitation and prescription periods,
- the validity of the mediation agreement and,
- recognition and enforcement of agreements resulting from mediation (depending on the legal system in different countries or differences in international matters).

Preparing the client on the substance of the discussions (e.g.: which facts the client should raise and what information should not necessarily be revealed in the common mediation meeting) depends on the nature of mediation in different jurisdictions, but also on the individual system of work of each lawyer and on negotiation strategy, which must be discussed beforehand.

**Example 2:** If the lawyer accompanies the client from the beginning to the end, the role of the lawyer depends on the extent to which the lawyer has been asked to assist in the mediation process. Lawyers in any case do serve as consultants in legal questions.

If a lawyer represents one side, the mediator may request that the other party should be assisted by a lawyer as well. If it is not possible to have both parties represented by lawyers during the mediation, the mediator cannot continue with the mediation if the party that is not represented by a lawyer objects to the other party's lawyer's presence. Furthermore, mediators should conduct their own evaluation of the balance of power between the parties in order to determine if it is acceptable that only one of the parties is assisted by a lawyer.

**Example 3.** At the beginning of the mediation, the mediator will usually consider the attitude of parties, assess all the issues and then together with the parties define the issues that need to be resolved. This stage can take for example one hour in an "easy" case but in complex cases it can take more than two meetings depending on the methodology of the mediator and the mediation model. Only after this stage, parties should start searching for specific solutions. At the conclusion of that stage in the mediation, a variety of options are discussed to find a final agreement. When reached, it will usually be in written form. If a lawyer wants to be present for a part of the mediation but does not want to be present during the entire process, he or she should enter the mediation process in the phase before the drafting of the agreement to help selecting the appropriate solutions and to advise if necessary.

**Example 4.** If a lawyer represents a client without his or her presence (which in general is not recommendable and in some member states not even possible), the lawyer should have as much information as possible and be fully acquainted with the wishes, needs and preferences of the client. The mediator (depending on the legal system) may ask for a written power-of-attorney with specific directives for the mediation process.

#### *d. Drafting the settlement agreement*

*When is the agreement to be signed?*

An agreement arrived at during the mediation must withstand the passage of time. If the agreement is good today, it should also be good tomorrow and three months from now.

In that line of thinking, signing the agreement immediately at the end of the mediation session is not an absolute "must". It will, however, frequently happen or even be requested by the parties who may fear a change of mind by the other side.

If the agreement is "simple" (e.g. it involves a single, one off, payment and full settlement of pending disputes), signing the agreement immediately may be the preferable option.

If the agreement is more complex and involves performance in different stages or is dependent on certain conditions, drafting the contract immediately may not be the better option. In order for the contract to be well thought out and cover all issues raised by the arrangements, drafting may require more time than is available at the end of a (frequently long or tiring) mediation session. The mediator should then organize, with the parties and their lawyer, the drafting process and the timing thereof, which the parties can accept.

*Who writes the agreement?*

As a rule of thumb, if lawyers to the parties have participated in the mediation process, the drafting process should be left to them. It is part of their job: they have been hired by their clients to cooperate in finding a solution and to put in writing the agreement arrived at during the mediation. Drafting an agreement involves more than putting in writing the general and main principles that have emerged. The mediator should not (attempt to) deprive the lawyers of that part of their duties. It may also have implications for any lawsuits pending at that time, which the lawyers will have to take care of. It should also be noted that very often mediators are not qualified lawyers and therefore, are not allowed to provide legal advice.



The input by the lawyers of the parties may also be important in view of the organisation or supervision of the performance of the agreement (e.g., the lawyer of the creditor in a situation where the full settlement payment is not made at the time of signing). This may involve issues to be considered such as: obtaining an execution order from the court, notary or other authority, organisation of security interests agreed to in order to secure payments, etc.

Contract drafting goes beyond the main points that will generally have been agreed upon during the mediation. It will also focus on details or issues that may not have been discussed in detail (whether by oversight, because their importance did not initially appear and only emerged during the drafting process, or for any other reason – which might even include (in)voluntary withholding of information until the drafting process. These items may appear to be problematic and lead to new, unforeseen, difficulties.

If the parties were not assisted by a lawyer during the mediation, in some jurisdictions, they can request the mediator to draft the agreement him or herself. If the matter is straightforward and subject to the reservations outlined above, this may be acceptable. However, the mediator will be well advised to liaise with the lawyers of the parties, if any. Best practice may require that the mediator suggests that the parties' lawyers take over the drafting process, using a summary of the details of the agreement arrived at prepared by the mediator.

If, nevertheless, the parties and/or their lawyers request the mediator to propose a draft of the agreement, it should be written in consultation with and approved by professional lawyers; i.e. the mediator should send the draft to the lawyers and to the parties for them to review, asking for their comments and input, and liaise with them to discuss possible areas of tension.

If no lawyer was involved, the mediator should provide his or her draft to the parties and eventually suggest that they consult a lawyer to review the agreement independently. In order to avoid any misunderstandings, the mediator should suggest that the parties invite their lawyer to contact him or her so that the logic and reasons of the arrangements can be explained. Indeed, a lawyer who did not attend the mediation might be surprised by some of the element of the solution found because he or she does not understand all parameters or reasons for the arrangements.

#### ***e. Enforcement of the settlement agreement***

Article 6 of the 2008 Mediation Directive provides that Member States shall ensure the enforceability of agreements resulting from mediation. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.

The content of such agreement shall be made enforceable unless, in the case at hand, either the content of that agreement is contrary to the law of the Member State where the request is made, or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

The way in which the enforcement of mediated agreements may be requested from the court depends on the national law applicable in the state where the enforcement is requested (*locus regit actum*).

## ***5. Mediator selection and appointment***

One of the most important tasks lawyers have in the mediation process is to assist their clients in their selection and appointment of the mediator. A mediation may be the client's best if not only opportunity to resolve a dispute by agreement without litigation and lawyers have an onerous responsibility to ensure that the mediation has the greatest possible chance to succeed. Mediator selection is a critical factor in achieving this goal.

There are competing views on the value of sector expertise. So, in a construction dispute for example, should the mediator be an engineer, a project manager or construction lawyer? The mediator's experience and expertise as mediator is of primary importance; then, if one of a number of possible appointees with broadly similar mediator experience, has a sector-specific profession of origin, then perhaps that person may be preferred. Again, the client needs the mediator's experience and expertise as mediator; it is not an expert determination or early neutral evaluation process.

Parties may consider that a mediator with a specific professional or personal background is better suited to a particular appointment. A mediator who is also a human resources professional may, for example be a better choice than a lawyer-mediator for a workplace dispute or a dispute that has a significant workplace conflict dimension. Also, sometimes a mediators' understanding of specific terms and terminology may be a timesaving advantage. However, the overriding consideration for the parties should always be the nominee's skill and experience as a mediator, not his/her professional background.

Parties may sometimes prefer to appoint a lawyer-mediator where a particular dispute has a significant legal dimension or where the dispute is concerned with the interpretation of contractual, statutory or other legal rights and obligations. However, a mediator's legal expertise should always be of secondary importance to his/her experience and expertise as a mediator, because a mediator has no role in determining or reconciling competing legal rights and obligations. Parties in mediation must rely on their respective lawyers to make the best assessment they can of their legal position before entering into negotiations in the mediation.

When assisting a client to appoint a mediator, it is recommended to always insist on evidence of the following details, if available:

- Profession of origin;
- Code of conduct;
- Professional indemnity insurance;
- Mediator training and accreditation;
- Mediator Continuous Professional Development;
- Experience (i.e. mediator case log);
- Recommendations.

Once a mediator is appointed, lawyers should be satisfied that the following steps are taken:

- The mediator makes him/herself available to the parties as required and as mutually agreed. Mediators must be prepared to give the appointment the priority the parties require.
- The mediator enters into a binding mediation agreement with the parties to confirm his/her appointment as mediator and to provide for the rules as to confidentiality, timeframe, venue, exchange of documents, fees, termination etc by which the parties and the mediator agree to be bound.
- The mediator confirms that he/she will abide by the European Code of Conduct for Mediators or equivalent, and that he/she holds appropriate professional indemnity insurance to act as a mediator (if available).



- The mediator withdraws or otherwise brings the process to an end at any stage if, for any reason, he/she forms an opinion that one or more parties is delaying or obstructing the process or is no longer acting in good faith in working towards a settlement or is acting otherwise than in accordance with the terms of the mediation agreement.
- Any co-mediator or proposed assistant mediator or observer mediator is also an accredited mediator or a trainee mediator or is also equally independent, neutral and suitable for appointment in that capacity.

## ***6. How to find a mediator***

How do lawyers identify the best mediator? Where should they go to find one? There are several options.

In certain jurisdictions all mediators are accredited and their lists indicating qualifications of particular mediators are freely and easily accessible. In many cases such lists are accessible on-line.

Bars or Law Societies may have a register of experienced lawyer-mediators available locally.

There may be an international mediators' institute that maintains a register of its members. (e.g. CIArb, CEDR, REUNITE, etc).

Lists of mediators are normally kept and made public within various mediation schemes. Administrators of such schemes usually offer guidance and assistance on choice of the most suitable mediator for a particular case.

Lawyers may write to another party's lawyer suggesting alternative names or clients may receive such a letter from another party's lawyer.

## ***7. Lawyers acting as mediator***

A completely different mindset and approach are required from lawyers when they act as mediators themselves, instead of being the clients' lawyer during the proceedings.

In this specific role, as opposed to acting in the interest of any of the parties, lawyers need to comply with all the requirements applicable to a mediator and seek a solution which will allow the parties to reach an agreement.

While many mediators work in the legal profession, many do not and come from various professional and technical backgrounds. Nevertheless, although the mediator is not required to be a lawyer, there are many skills lawyers possess that may help them to become effective mediators.

Some of the skills of the lawyer that may be advantageous to the lawyer-mediator are:

- Communication;
- Listening;
- Negotiation;
- Analysis;
- Understanding complex issues;
- Understanding legal concepts, including good faith, confidentiality, privacy, privilege, without prejudice, contract, enforceable, binding, authority, voluntary, self-determination, independence, neutrality, conflict of interest, ethics, professional misconduct, etc.
- Understanding conflicting legal arguments;
- Cost-benefit analysis;
- Risk assessment;

- Drafting;
- Standing in the community;
- Professional standing;
- Experience and hazards of litigation

On the other hand, not all lawyers' skills translate automatically to those of mediator and depending on the system of the relevant country, there may also be specific training and accreditation requirements which need to be fulfilled to become a mediator. Some further important skills mediators need are:

- Active and reflective listening;
- Empathy to understand each party's point of view and underlying emotions;
- Ability to summarise and set out the main points of controversy;
- Impartial and facilitative attitude: a mediator must not take sides or be seen to be acting unfairly.
- Trust-building: successful mediation requires the mediator to establish the trust and confidence of each party from the outset and maintain it throughout the process.

Therefore, when acting as mediator, lawyers should be mindful not to overstress legal knowledge and skills, focus too much on clarifying the facts at the expense of the relationship and communication with the parties, and avoid applying an adversarial and litigious approach. As mentioned above, mediation is not about creating arguments or solutions that merely conform with any set of principles or norms, but about understanding and then matching various needs and interests of the parties.

## **Conclusion**

As outlined above, mediation is an effective learning process which helps the parties to understand their mutual interests and positions. The mediation process is usually very transformative for both parties. It helps the parties to think more realistically about their claims and interests and encourages them to act more reasonably vis-à-vis the other side. This in turn usually changes the parties' relationships, restores some forms of communication and co-operation, and helps to rearrange the entire situation and resolve their conflict. As such, mediation can be perceived by clients as a good and positive experience preferable to litigation with its sometimes unpredictable results.

Lawyer supported mediation can be enormously beneficial because it ensures that both parties have quality independent legal advice, are confident to enter into an informed dialogue and helps to redress any power imbalance between parties. Obviously, it is a professional mediator's task to make sure that parties and their lawyers can capitalize on such newly acquired data and understanding, so that this stimulates constructive processes among the parties and allows their relationship to evolve. Once this is done, the mediator assists the parties in the finding and further elaborating of a final solution that is, firstly, adjusted to the parties' interest and their specific situation, and, secondly, truly acceptable to both parties, i.e. a mediation settlement agreement.

A solution with the above characteristics allows a peaceful end of the conflict and it is a true resolution. It may be a win-win solution, thus giving a lot of comfort to both parties. Undoubtedly, in clients' eyes this is a desirable situation and therefore a mediated settlement is usually seen by clients as a success. This is how it should also be understood by lawyers. More importantly, lawyers should take a part in this success.

For the above reasons, it is recommended that lawyers – whenever appropriate – actively participate and act in mediation in such a manner that they are perceived by clients as creative and constructive contributors to this process. Mediation gives lawyers another opportunity to demonstrate their legal, analytical and managerial skills whilst presenting themselves as true interpreters and representatives of clients' interests and co-authors of their success.

### ***Chapter 3 – Role of Bars and Law Societies in Helping to Create a Mediation-Friendly Environment***

In this part, various suggestions are made of measures Bars and Law Societies could take to help create a favourable environment for the uptake of mediation. This involves collaborating with courts, as well as raising awareness about mediation and providing training courses to enable lawyers to become mediators or to assist their clients in mediation procedures.

In this regard, reference is also made to the main conclusions and recommendations of the European Parliament resolution of 12 September 2017 on the transposition of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, as well as the European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a Better Implementation of Mediation in the Member States of the Council of Europe. These texts also offer Bars and Law Societies some interesting ideas for reflection.

In order to create an environment equally open to litigation and all alternative dispute resolution processes, Bars and Law Societies might consider undertaking some or all of the following activities so far as relevant to the circumstances of their respective jurisdictions:

- Organise information meetings for lawyers and parties. These information meetings should be developed in conjunction with representatives of the courts, mediation associations, mediation services, etc.
- Develop and introduce into professional trainings for lawyers topics and skills needed in the management of conflict (case assessment; risk analysis; cost-benefit analysis etc.).
- Coordinate the communication of information on mediation with courts.
- Create joint information meetings for lawyers and judges.
- Expand the conclusion of protocols with the courts defining the initiation of mediation, the mediation process, and the role and place of the accompanying lawyer.
- Collaborate with courts and other authorities in the development of lists of mediators with the inclusion of lawyers accredited as mediators.
- Participate in the development of statistics that illustrate the usefulness of mediation and the public knowledge of its effectiveness.
- Contribute to the development of standard information for clients on the possibilities of mediation, model mediation clauses, model mediation agreements between parties and mediators.
- Exchange good practices on mediation (among lawyers and across different jurisdictions).
- Establish lists of lawyers who act as mediator, as well as lists of lawyers who can assist clients in mediation proceedings.
- Conclude protocols with Faculties of Law to promote mediation at university level and research.
- Include in lawyers' codes of conduct an obligation or a recommendation to consider alternative means of dispute resolution including mediation before going to court in appropriate cases, and to give relevant information and advice to their clients.
- Integrate modules on the use of mediation in their practice into the basic training of lawyers.
- Introduce mediation in continuous education programmes, the content of which could ideally be coordinated Europe-wide.
- Initiate joint training courses on mediation with all the actors in the judicial world.
- Collect and publish information on existing mediation training courses.
- Encourage lawyers to include a mediation clause when drawing up contracts for their clients.