CEPEJ(2018)7

27 June 2018

EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)

Mediation Development Toolkit
Ensuring implementation of the CEPEJ Guidelines on mediation

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";[1] 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.

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 threat. ✓ 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:

✓ 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 listen. ✓ Do show interest in parties' interests, needs and problems. ✓ Do try to understand parties' underlying needs. ✓ Do ask questions to uncover parties' interests and motives. ✓ Do maintain balance when exploring the interests of each party. ✓ Do ask how each party feels. ✓ Do ask open-ended questions if possible. ✓ Do ask hypothetical and reflective questions (what if…, what do you think about…). ✓ 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 ask too many focused questions (who, what, where, when…). ✓ Do not take sides. ✓ Do not try to blame someone. ✓ Do not ask "Why did you do it?'

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