

# MEDIATION.

## MEASURING THE SUCCESS OF MEDIATION

Ciprian SANDU

**Abstract.** *Mediation is now an established and expanding way of dispute resolution in a growing number of practice fields: family, community, victim-offender, civil and commercial matters, environment and labour, to name but a few. The number of mediations is rising each day and so, the number of people involved in it. One of the central issues in the field of conflict resolution concerns the degree to which we can define a mediated or negotiated outcome as successful. Is this increased number of mediations successful? How do we know that the outcome of the mediation process meets the criteria of success? How can we evaluate it? This article will present the author's point of view about the factors influencing a successful mediation, concluding with a presentation of what are considered to be the most important qualities of a successful mediator.*

**Keywords:** *mediation, mediator, active listening, Transylvanian Institute of Mediation, conflict management, fairness, confidentiality, neutrality, conflict resolution.*

Ciprian SANDU  
Mediator, Transylvanian  
Institute of Mediation  
e-mail: \_\_\_\_\_

Conflict Studies Quarterly  
Issue 2, January 2013, pp. 30-39

I write this article not as a mediator, but as an apprentice of two of the most important and active mediators and trainers in the field, my fellow editors, Christian Chereji and Adrian Pop. During the past three years they were, and still are, my mentors, helping me to know and experience as much as possible in this field. I have the privilege to work with them daily, providing me useful knowledge by the power of their example, very important for me because, at the end of the day, mediation is less theory and more practice. During this time well spent around my colleagues, I have developed and found a lot of opinions and answers to some of the most common questions in mediation, but for one of them it was a little bit harder: What is a successful mediation? How can

you measure success, such an abstract concept? I had the pleasure to meet some of the most important mediators in Romania and also some foreign ones, not to mention the high number of new mediators who were trained by our association, The Transylvanian Institute for Mediation. When the discussion touched this question, how can you measure the success a mediator has, everyone had a different view: some measure success in the amount of money they gained during the mediation session, others measure it in the amount of time spent (the shorter, the better), others say they are successful because they have a high number of mediations each month or year. Both my colleagues and mentors had the same answer in separate meetings: a successful mediation is the one where the parties do not return to you or go to anyone else with the same problem. So it's about the process and the outcome? During the following pages I am going to try to present my opinion about success in mediation and about the qualities of the mediator which are considered vital for a successful mediation.

Mediation is a method of conflict management in which conflicting parties gather to seek solutions to their problems, accompanied by a mediator who facilitates discussion and the flow of information, identifies issues, develops options, considers alternatives, and develops a consensual agreement., or, to use a shorter definition, developed by Michael Leathes, mediation is consensus facilitated by a trusted neutral party. These definitions may be broad, but they can be generally and widely applied. It forces us to recognize that any mediation situation is comprised of parties in conflict, a mediator, a process of mediation and the context of mediation. All these elements are important in understanding mediation and its outcomes. We must not lose sight of them since they determine the nature, quality, and, at the end, success of the mediation. One of the things we can say about success is that it is usually defined by reference to other abstract concepts like justice or fairness. This rises some other problems for anyone who wishes to evaluate the effects of mediation. How do we know justice has been achieved? Who defines it? Blair Sheppard was one of the first theoreticians to offer a systematic discussion on the notion of mediation success. He first suggests that we should think seriously about the two aspects of any mediation situation - the process and the outcome (Sheppard, 1984). The process refers to what transpires at the mediation table, and the outcome refers to what has been achieved (or not achieved) as a result of mediation. Success in mediation is thus a quality that may be applicable to the process or the outcome of mediation. In other words, success may be achieved if the parties in conflict feel empowered, or feel that their concerns were addressed respectfully (Sheppard, 1984). There may be no successful outcome in any sense of the word, but the parties still feel they have achieved success in the process. In the same way, there may be a process of mediation marred by many procedural disagreements and dissatisfactions, but it may lead to a cessation of violence and even a formal agreement (Bercovitch, 1997). Both the process and the outcome can have at least four indices of success - fairness, efficiency, satisfaction and effectiveness. I said at least because the more experienced mediators may find or alre-

ady found other criteria (for example Lawrence Susskind speaks about two additional criteria – wisdom and stability), but for me, those are the most important.

The first criteria we need to evaluate in a mediation situation is fairness. As I already said, fairness is an abstract and intangible concept. Everyone involved in the process will have a different definition and symbolic for fairness. However, it is generally recognized that, whatever it may be, fairness suggests to most people an evenhanded procedure and equitable outcome, that is indicative of some conception of success (Bercovitch, 2011). From here we can identify some concrete indicators, starting with two of the most important principles of mediation – neutrality and impartiality. However, while there are certain observable indices of fairness, both Sheppard and Susskind talk about the importance of „perceived fairness” in the process - indicators of fairness mean little to the parties in conflict if they themselves do not think and perceive the process is fair, sometimes the perception of fairness or unfairness being more important than the actual concrete discussion about success (Sheppard, 1984; Susskind & Cruikshank, 1997). This is mainly the reason why, from the start, the parties must be convinced that what they experience is fair and will remain fair for the whole duration of the process.

Efficiency is the second criteria of success and is primarily focused on the procedural and temporal dimension of the mediation process. Efficiency addresses issues such as the cost of mediation, resources devoted to it and duration of the process. Susskind and Cruikshank give efficiency the most weight. They suggest that “[...] fairness is not enough. A fair agreement is not acceptable if it takes an inordinately long time to achieve or if it costs several times what it should have” (Susskind & Cruikshank, 1997). I must say that I totally agree with this because if a mediation process takes a very long time and involves a high cost, what would be the difference from the judiciary system?

In some respects, participant’s satisfaction seems like a better indicator of success. If parties in mediation are satisfied with the process or outcome, they are more likely to perceive it as a success and, as Sheppard indicates, are more likely to be committed to it (Sheppard, 1984). However, same as fairness, party satisfaction is largely perceptual and has a very personal quality. Satisfaction is often an almost emotional response to the achievement of a goal or attainment of some requirement. The sorts of goals taken into an event by those involved in conflict are personal in nature and formed by the specific configuration of their personality, environment, values, expectations etc. This is why, when we gave a definition of mediation, we can say that an outcome that satisfies both parties is more likely to be stable, longer-lasting, and, thus, more successful.

Perhaps the clearest concrete indication of a mediation success is effectiveness. Effectiveness is a measure of the achieved results, change or behavioral transformation. Mediation is a process of change (Bercovitch, 2011). Above all, it is designed to change the behavior and attitudes of the parties, even in a violent interaction. Hence, for mediation to be considered successful, it must have some effects on the conflict, such as

moving from violent to non-violent behavior, signing an agreement, accepting a ceasefire or settlement, in the case of armed conflict. Effectiveness allows us to observe what has changed after a mediator has entered a conflict. The problem with all four criteria for success is that, even if separately they represent proper indicators for success, none of them can be used by itself as a total indication of success. A truly successful outcome is one that meets more than one or two criteria (Bercovitch, 2011). Satisfaction and fairness mean little if mediation has proven to be ineffective in a practical sense, likewise efficiency and effectiveness mean little if parties are not satisfied. Stability can only be achieved when the parties are satisfied and the agreement is fair. These criteria can be analyzed independently, but in reality, they are all interdependent. I'm returning now to the answer given to me by my fellow colleagues when we discussed about success in mediation. A successful mediation is the one where the parties do not return to you or anyone else with the same problem.

A different, and in some ways more practical, approach to the question of what constitutes success in mediation is based on simple analysis of agreement and outcome types and their impact on the conflict in question. Generally accepted, the most common outcomes after a mediation process are the settlement and resolution. Within conflict management literature, resolution is often presented as being inherently superior to settlement (Burton, 1987). Also, it is seen as dealing with the root causes of the conflict and negating the need for future conflict or conflict management. By comparison, settlement, often involving a simple cessation of conflict behavior (such as a ceasefire), can be seen as a potentially damaging half-measure, leaving conflict to smolder beneath the surface before erupting again (Burton, 1987), giving the impression that only the resolution implies success. The idea that resolution alone implies a successful outcome is far too restrictive in the real world. In many conflict situations, a resolution may truly prove impossible as the parties may have experienced years of violence and destruction. A transformation in attitudes and behavior will not occur overnight or even in the course of a few years. Let us take, for example, the case of the civil war in Sudan. During the past half-century there were only 11 years of peace in the area because of two settlements: the one in Addis Ababa, in 1972 and the Comprehensive Peace Agreement, in 2005. Both are not resolutions but settlements. If we look at the situation from the international community's point of view, the two settlements are not successful outcomes because they don't deal with the causes of the conflict. But what is the opinion of the population living in the area? Half a million people died over the 17 years of the first Sudanese war and other hundred thousands fled from their homes. For every person in the area, the settlement (an 11 years ceasefire) is a successful outcome because they could return back to their lives without the fear of being killed. The choice between settlement and resolution can also be informed by one's focus of concern as well. If one is primarily concerned with the destructive aspects of conflict behavior, an immediate settlement may be required to ensure the life and safety of individuals

before everything else. Where there is destruction and violence, the first and foremost task of any mediator is to stop the violence or reduce it to save lives (Bercovitch, 2011). When a conflict is primarily about a relationship between parties, a resolution may be the only way forward. The level at which a conflict management procedure occurs may also impact the means and goals of the process. Mediation in international relations, for example, is more likely to focus on political leaders and behavioral aspects of conflict, as with securing a cease-fire. Mediation at lower levels of complexity, such as an organization or family unit, may be more intent on building understanding, addressing structural problems at their roots and seeking resolution. Again, we face considerable challenges in thinking about success or evaluating mediation outcomes. Often what appears as successful to one person may be seen as unsuccessful by others.

With your approval I want to discuss a little bit about some factors that influence the success in mediation. They are personal factors, situational factors, interactional factors and motivational factors.

Personal factors are very important for success in mediation because they refer to the identity of the parties. According to the title of the article I am going to discuss later on about those qualities of a mediator which can contribute to success in mediation, but for now it is enough to say that the mediator and the parties have their own interests, perceptions, and resources which influence their behavior, that ranges from the very passive to the highly active, the last being more related to a successful process and outcome.

Situational factors that determine success include factors such as the physical, social, reputational and power relations between the parties. Each of these may affect the achievement of success. For example, a neutral environment is far more conducive to success than mediation in one's own territory or power parity between parties in conflict create more chances for a more effective mediation (while an imbalance of power reduces motivation to engage in mediation or accept any outcome).

Interactional factors which can have an influence on the success or failure of mediation refer to the overall nature of the relationship and the extent to which it is competitive and based on either a zero-sum understanding of the conflict or a co-operative understanding where each party recognizes that gains may be made by all. Many other aspects come into force here, the most important being the previous history of the parties; where they had a good relation in the past, they are likely to get over their current difficulties and conclude a successful agreement.

Motivational factors affecting success or failure in mediation include the parties' genuine desire to submit, and commit, to mediation. A joint request for mediation is indicative of a high motivation and desire to settle a conflict. When only one party requests mediation, the chances of success are pretty slim. Adversaries in conflict have

a number of motives for desiring mediation: mediation may actually help them reduce the risks of an escalating conflict and get them closer to a settlement, each party may embrace mediation in the expectation that the mediator will influence the other party, the outcome or even the mediator to take much of the blame if their efforts fail. When they both share the same set of motivations, a successful outcome is more likely to result.

All of these factors influence the way mediation is undertaken, performed and terminated. They affect the success or failure of any mediation event, but I think we can't conclude our discussion about success in mediation without taking into consideration the fact that mediation is more complex than that. During my experience as a case-manager for different mediations, I found out that the success or failure of a mediation are also directly related with the following:

**Appropriateness of the mediator** - Selecting an appropriate mediator for the type of dispute is essential to providing disputants with the highest probability of a successful mediation. Even though mediation is essentially a parties-driven process, a mediator's knowledge, experience and skill has a significant impact on the outcome of the mediation (Marcil&Thorton, 2008). While some mediators may believe that they can mediate any dispute, most try to mediate disputes in areas in which they have a considerable amount of knowledge, experience and contacts.

**Failure to properly prepare for mediation** - The failure to properly prepare for mediation is a pitfall that seems very basic. However, lack of preparation before a mediation is a significant and recurring problem. On occasion, disputants will fail to bring key documents with them or their attorneys complain that they have not had a chance to prepare because the mediation is scheduled too early in the matter. Regardless of the excuse, the failure to prepare for the mediation will most certainly result in slowing the mediation process, so valuable time is wasted (Marcil&Thorton, 2008). In essence, the disputants and the attorneys should prepare for the mediation as if it were on the eve of trial and should bring with them all of the documents and information necessary to prove their case.

**Insufficient settlement authority** - This is a big problem, especially when one of the parties is a public institution or a company. Untill now, I often had the chance to be case-manager for this types of situations. Insufficient settlement authority is one of the largest obstacles to a successful mediation. When a disputant or attorney does not have the authority to close a deal or settle the matter, the mediation grinds to a halt. The attorney or disputant representative is usually given an opportunity to consult with the ultimate decision-maker, but this sort of consultation is inherently difficult during the mediation process, and, I may say, even rude. To prevent the insufficient settlement authority issue from arising, the mediator should inquire into who has the ultimate settlement authority, before the mediation. After determining who possesses the ultimate settlement authority, the mediator and the disputants should make every

effort to ensure that the ultimate decision-maker is physically present in the mediation room (Marcil&Thorton, 2008).

As we can see, there are plenty of factors which can influence a successful mediation. The ones being presented here are just a few, based on my day-by-day experience, mostly as a case-manager, so anyone can have a different view of the subject, but all were empirically observed during the past three years, and from the discussions with my colleagues.

All the discussion, until now, was about success in the mediation process and the factors which influence it. The central figure in all of what we've discussed earlier is the mediator, as a facilitator of the communication between disputants. In his role, the mediator must have some personal qualities in order to control and facilitate the communication. Some of them are developed over years of training and experience but most of them are directly related with the character and personality of the mediator. A good friend of ours and also a fellow mediator, Constantin-Adi Gavrilă, identified at one moment 122 qualities for a good and successful mediator. They sometimes come from how one looks at the mediation or the kind of mediation a person is involved in. Here we don't have the time and space to discuss all of them so, again based on my personal experiences, I've selected some of which I consider to be key in our discussion about success:

**Listening** – Listening skills are just as important in mediation as knowledge and experience. No matter how knowledgeable a mediator is, if he or she does not listen and understand the viewpoints of each side, it is difficult to move the parties together. The mediator must also be able to read between the lines and observe not only the parties' viewpoints, but also the mood and the motivations that underlie those opinions and feelings. Listening is different from hearing. Listening is active, while hearing is more passive. Effective mediation requires listening to what is being communicated by your opponent. The skill of listening does not mean you must agree with your opponent, but it does mean you must be at least temporarily patient and nonjudgmental in taking in what the opponent is communicating (Diaz, 2007). Simply listening to the opponent will help not only the listener to have a better understanding of the issue, but it will also serve as a catharsis for the speaker. If a party truly senses they have been listened to during the mediation, they will often be more inclined to yield in their position and be more inclined to resolve their dispute. When the parties walk into mediation they carry a lot of emotional baggage. They look for an opportunity to offload that from their chest. They look for an opportunity to be heard. Most of the time courts do not have the time to hear the parties, nor the inclination to hear what is not an issue. Courts look for solutions in terms of law, not emotions. It is also true that it is the lawyers who are heard by the court not the parties to the dispute. Mediation offers them this opportunity. Once a party goes with a feeling that he has been heard to his satisfaction then a mediator may consider he has won half of the battle.

**Confidentiality** – This is one of the mandatory principles of mediation. One of the reasons why the parties opt for mediation is that they do not either want to wash their dirty laundry in public. The parties in the dispute approach the mediator with the hope that what ever would come to the knowledge of mediator during the proceedings will remain with him only. There are two levels of confidentiality inherent to the mediation process: First, there is confidentiality of communication that occurs at the mediation session; these mediation-related communications are inadmissible in evidence and may not be raised in court (Romanian Mediation Law, 2006); nor should they be discussed with parties who are not directly related to the mediation or the law suit. This confidentiality protects not only the statements made at mediation but also any settlement offers conveyed during the session. Second, there is yet another level of confidentiality that covers anything told privately to the mediator during individual caucuses, which are separate sessions conducted with the mediator, but outside the presence of the opposing party or their attorney. These private communications with the mediator may not be disclosed to the opposing party, unless the mediator is specifically authorized (Romanian Mediation Law, 2006).

**Neutrality** - A mediator should never give the impression that he is leaning in favor of any of the parties. His conduct should reflect that he is paying equal respect to both parties; he is paying equal attention to both the parties; he is not extraordinarily respectful to one of the parties; he is not extraordinarily chatty with one of the parties and so on. This neutrality should be reflected not just inside the mediation room, but also outside. The faith reposed by the parties in the mediator at the time of his appointment needs to be maintained not only till the entire proceeding is over, but also there after.

**Trust** - A close related quality of a mediator, derived mostly because of the latter, confidentiality and neutrality, is trust. A mediator is nothing but a neutral third party whose office is used by the two parties in a dispute to resolve their dispute. One can work as a mediator so long as he or she enjoys the trust of the parties. Parties have no choice in choosing their judge, appointment of arbitrators can be fixed by an agreement between the parties, but the parties can pick a mediator only when they have trust in the mediator or they have a reason to believe that they can trust him. The reason for it is simple. Although more often than not, a mediator follows a structured process for resolving the disputes, but he or she does not maintain any formal record of what transpires in the proceedings. A party may never come to know what goes through the mind of a mediator. In a court proceeding or even in arbitration proceedings both the parties know what is being done in the proceedings. There are no closed door one-to-one meetings by either the arbitrator or a judge with the parties. In the case of a mediator, these closed door one-to-one meetings are his most important tool to discover the real interest of the parties. The parties communicate to the mediator in confidence that their secrets will not be revealed to others, unless he or she himself or herself so



desires. All this is possible only when they completely trust that the mediator will not act in anyone's favor particularly, but will work in the best interest of both the parties. A mediator must be acceptable to both sides. Parties want neutrality. To talk openly, parties must believe that the mediator will keep confidences and use information in a constructive way that advances the process.

**Optimism** - We claim that mediation proceeds on the realistic assessment of the situations. It looks for realistic solutions. Then a mediator should be a realist, not an optimist. In the general sense of the word optimism would mean giving hope for a solution, even where the chances of its success are very limited. That is not being real. Then what exactly does optimism mean when it comes to mediation proceedings? Optimism for a mediator is not something which comes from any thought process devoid of reality. His optimism is not a result of any religious belief that ultimately faith in God will prevail and everything will turn out to be well. His optimism is a reflection of his attitude that in the given facts of the case he will be able to find creative solutions acceptable to both the parties to the dispute. It shows up as a self-belief in his skills that he will ultimately make the parties see as to where is their benefit. It is a part of his selfconfidence portrayed in his communication skills by which he can continue to make parties focus on the positive aspects of deliberations and overlook the negative ones. An optimism of this nature promotes rational thinking in the overall environment of the mediation proceedings and leads to positive results.

**The look of the mediator-** This one I've learend it entirely from my menthors. We have the old-saying „Clothes do not make the person“, but here, when we talk about mediation, things are different. It is the appearance of the mediator, which conveys the first impression to the parties. If the conduct of the mediator is not dignified, he is not likely to earn the respect of the parties. It is the respect for the mediator which builds the trust of the parties in the mediation. Yet it is important he should not sit with a stiff neck or with a detached look, so as to convey that he is indifferent to what is going around him. Dressing up is yet another aspect of looking dignified. One, however, needs to be careful that he is not overdressed as overdressing itself creates barriers of its own in the effective flow of information between the mediator and the parties.

**Modesty** - The firs thing I've asked my mentors when I was brought up in the association was „As a mediator, how many cases have you settled over the years?“ They responded, „None.“ Knowing very well the conditions to become a trainer, and also their experience, I've asked again, and the answer was the same. In that day I've learned my first thing about mediation. The parties settle the case. The mediator is a facilitator of the process. He just assists them by using persuasion. If the mediator thinks he or she is supposed to be the one settling the case, there is a risk that the parties won't participate as fully as they should. A mediator may be the chief architect of the final settlement between the parties but still he should not take all the credit for it. Also, there is another point

of view concerning the modesty of a mediator. Conceptually, a mediator only mediates to help the parties to reach a negotiated settlement, therefore he should give credit to the parties to have settled the dispute to get the best deal. Sometimes parties desire to bring in outsiders into the mediation proceedings, it is not necessary to declare their presence undesirable. Most of the time, in the family disputes, they bring their relative along. Some of them show a great deal of commitment in resolving the dispute between the parties. If they can be of help in reaching the settlement, they can be welcomed.

As a conclusion, for me, as a young apprentice, the qualities needed are first a deep understanding and appreciation of the rich variety of human personalities and a gratitude for the different social and cultural contexts in which we are all fashioned and developed. The second one is the ability to listen attentively, with care and compassion, to those with whom we are working. There is, I think, a great need to have an ability to continually learn, for me to consider that each case is unique, each individual is unique and to be able to come to each person and each situation and each relationship and to learn from that, and to integrate the new learning with what one has learnt in the past. Mediation is so special because it offers the opportunity for continually learning from people and about people.

Can a case settle at mediation without all of these factors present? The answer is “maybe”; but an awareness of these keys and the consistent application of them during mediation will greatly increase the likelihood of resolving the case, and maybe future articles will find out more factors which influence the quality and success in the mediation process.

## References

- Bercovitch, Jacob (1997), *Mediation in International Conflict: An Overview of Theory - A Review of Practice*, U.S.I.P. Press
- Bercovitch, Jacob (2011), *Theory and Practice in International Mediation: Selected Essays*, New York, Routledge
- Burton, W. John (1987), *Resolving deep-rooted conflict: A handbook*, Lanham, MD: University Press of America
- Diaz, Rene (2007), *Ten Keys to succesful mediation*, [www.diazmediation.com](http://www.diazmediation.com) site
- Sheppard, Blair (1984), *Third Party Conflict Intervention: A Procedural Framework*, *Research in Organizational Behavior*, Vol. 6
- Susskind, Lawrence & Cruikshank, Jeffrey (1989), *Breaking The Impasse: Consensual Approaches To Resolving Public Disputes*, New York: Basic Books