

# Mediation in the Case of Appropriating a Found Good or Mistakenly Taken by the Offender

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## Abstract

*The right to a mediator is a fundamental right in the new criminal legislation, being expressly mentioned in articles 81 and 83 from the New Criminal Procedure Code, as a personal right – but shared by both the victim and the defendant. Mediation cannot even take place without the involvement of both parties and only if it is possible for both of them.*

*By incriminating these actions, the Romanian legislator sought to create a protection for the patrimony of every person or legal entity, establishing to this effect an obligation to surrender the found goods or to not unlawfully dispose of them.*

**Key words:** *Mediation, Procedure, Crime, Goods, Offender*

## Introduction

The mediation of penal conflicts has been defined within the Romanian criminal doctrine (Mateuț, 2007) as “a means of communication, based on exchanges and acknowledging one another, in a dialogue developed in connection to the existing institutions, in order to find a solution by the parties involved and estimated as satisfactory by both parts and in the presence of a third party”.

In case of crime of appropriating a found good or mistakenly taken by the offender, article 243 of the Romanian Penal Code establishes the following:

- (1) The action of not delivering a found good within 10 days to the authorities or to the person that lost it or to dispose of the good as if it was his, is punishable by imprisonment from 1 to 3 months or by fine.
- (2) The same punishment is applied for the unlawful appropriation of a mobile good that belongs to another, mistakenly or by accident taken by the offender, or not delivering it within 10 days from the moment he knew the item did not belong to him.
- (3) Reconciliation removes criminal responsibility.

The term *found good* refers to an item that was involuntarily taken from the possession of, or detention of a person, which is subsequently found by a different person who does not know the person who lost the item in question. If the person that finds the lost item knows the one who lost it, it is now considered theft.

The *lost good* is the item that involuntarily got taken from the possession of its owner.

The *forgotten good* is the item that was involuntarily and momentarily left in another place without being considered out of the possession of the owner. An unsupervised good that is considered to be under the ownership of a person does not constitute a forgotten good.

An abandoned good does not constitute the object of theft but it is also not the object of appropriating a found good or mistakenly taken by the offender.

The notion of found good, lost, forgotten or abandoned is considered in accordance with the conscience of the offender and not the victim. When the victim forgets a good in a train, for example, and no one claims its possession, it is obviously a found good which constitutes the object of the crime analyzed in this paper. If the offender notices the moment when the victim loses an item, the action constitutes theft.

In the assimilated version in paragraph (2), the material object is the good that was mistakenly taken, such as the mobile good mistakenly surrendered to a third party, who receives it thinking it is meant for him or accidentally placed in the possession of the offender, such as the item that arrives in the possession of the offender through an unforeseen circumstance (Cristiean, 2017).

### **Procedure of mediation**

The 286/2009 Law concerning the New Penal Code mentions as circumstance to remove criminal responsibility in article 159, the *reconciliation* of the parties involved.

Reconciliation takes place between the primary procedural subjects as they are established by article 33 from the Romanian Criminal Procedure Code, specifically the suspect and the victim. Thus, reconciliation cannot take place between the offender and other people that were not harmed by his actions.

Reconciliation can take place during the prosecution, which leads to classifying the criminal case in regards to the parties involved and the specific criminal offence, but can also take place during the trial in front of a judge until the reading of the prosecution act, according to article 374 paragraph (1) from the Romanian Criminal Procedure Code.

If the reconciliation takes place during the preliminary chambers it does not operate in terms of a criminal trial because that part of the criminal procedure, after the prosecution is over, is not public, and the preliminary chamber judge cannot recognize the act of reconciliation, because the purpose of this procedure is specifically established by article 342 of the Romanian Criminal Procedure Code and that is to verify the legality of the court notification, the legality of evidence administration and procedures undertaken by the criminal prosecution body.

Once the criminal case is out of the preliminary chambers, the court will take note of the reconciliation and will decide the termination of the criminal proceedings by applying article 16 letter g) from the Romanian Criminal Procedure Code in reference to article 159 from the Romanian Penal Code.

The reconciliation of the parties is a bilateral act that necessarily involves the agreement of both the injured party and the defendant.

According to the September 6<sup>th</sup> 2006 Ruling 27 by the High Court of Cassation and Justice of Romania in solving the appeal in the interest of law (published in Romanian Official Gazette, Part I, no 190 from 20.03.2007), it was decided that termination of the criminal proceedings in the case of crimes that allow the removal of criminal responsibility through reconciliation (in

our case the crime of appropriating a found good or mistakenly taken by the offender) can be decided by the court only when it is made aware directly of the agreement between the defendant and the injured party to reconcile completely, unconditionally and definitively, expressed by the parties during the court hearing, personally or through special mandates validated by authenticated acts.

According to article 32 of the Romanian Criminal Procedure Code, the *parties* are procedural subjects that undertake a judicial action or against whom a judicial action is undertaken, meaning the *defendant, the civil party and the responsible party in the civil lawsuit*.

The *procedural subjects* are divided in primary subjects, *the suspect and the victim*, and other procedural subjects, meaning the *witness, the expert, the interpreter, the procedural agent, the special ascertainment body, any other person or body according to the law*, with certain rights, obligations or powers within the penal judicial procedures – article 34, of the Criminal Procedure Code.

Therefore, only the parties and the primary procedural subjects can be involved in the mediation procedure, not other procedural subjects such as witnesses, experts, interpreters, procedural agents and special ascertainment bodies. Thus, there shouldn't be any confusion between the notion of *parties* in the mediation and that of *parties* in the criminal trial. In consequence, when referring to the mediation procedure we will use the terminology victim-offender, or *parties*, but not in the procedural sense.

Penal mediation can be undertaken only by an authorized mediator according to the 192/2006 Law concerning mediation and the organization of the mediation profession (published in Romanian Official Gazette, Part I, no 441 from 22 May 2006, with subsequent modifications). This can take place only within a professional procedure which begins by demanding mediation through the preparation of a mediation contract, sending an invitation to the mediation, discussing about mediation with all the people involved in the penal conflict, signing a mediation contract, writing a record of closure for the mediation and subsequently, if an agreement is reached, writing a mediation agreement. Only an authorized and active mediator can undertake a mediation with all its stages.

In the case of this crime, the judicial bodies are obligated to inform the parties involved about the possibility and the advantages of using mediation and to guide them to use this method of resolving their conflicts.

Mediation usually takes place in the office of the mediator. If it is necessary, the mediation can also take place in other places agreed upon by the mediator and the involved parties.

Penal mediation can take place only by respecting the rights of the people involved. The right to legal assistance or to an interpreter is guaranteed by the law, even for the cases where it is mandatory but wasn't discussed and the mediation took place without the attendance of the lawyer – in cases where legal assistance is mandatory, this causes the mediation to become void and implicitly, all the mediation acts written by the mediator. Thus, before beginning mediation, the mediator has the obligation to inform the parties that they have the right to an attorney or an interpreter, if need be. The parties may expressly give up these rights and demand to continue with the mediation without legal counsel and without an interpreter.

Victim-offender mediation or penal mediation – implies that the victim and the offender meet face to face, in the presence of a third party that is neutral and impartial, called a

mediator. The mediation procedure begins with the victim describing the experience and the effect it had on her life. The offender describes his own experience and provides explanations concerning his reasons for doing so and may also answer the victim's questions. When both the victim and the offender are finished saying everything they wanted to, the mediator supports them in finding ways to make things right.

Most times, this meeting of the two parties is prepared ahead of time by the mediator through private discussions with each of the parties. The purpose of preparing the meeting is to not make the victim feel as if she is victimized again and the offender to be truthful in assuming responsibility for his actions.

Both the victim and the offender may be accompanied by a significant person at the meeting with the mediator, but they cannot take part in the discussions.

The main requirement for a successful mediation is the acceptance of responsibility by the offender, the consent of both parties to participate and the feeling of security throughout the meeting.

Penal mediation can be finalized by reaching an agreement, by unilateral denunciation of the contract or by failure.

When an agreement is reached, it is then redacted in written form it is redacted in the name of the parties involved and contains all the clauses specified by them. It is then signed by the parties and the mediator. The agreement has the value of a contract under private signature.

The mediation agreement represents in fact a civil understanding between the injured party and the suspect. According to the 255 Law of July 19<sup>th</sup> 2013 for the application of Law 135/2010 concerning the Criminal Procedure Code and the modification and completion of laws which contain criminal procedure provisions, modifications to the Mediation Law in the chapter with penal provisions consist of replacing the word *reconciliation* with *understanding*. Therefore, there can no longer be reconciliation between the parties involved in the penal conflict the act of reconciliation does not take place anymore, but an *understanding*, an amenable solution to the conflict. The mediation agreement is a civil contract between the parties, a contract that causes the termination of the criminal proceedings, but is not subjected to any validity conditions as reconciliation is according to article 159 of the Romanian Criminal Procedure Code. The penal mediation agreement is an alternative to withdrawing the criminal complaint or penal reconciliation. Through the mediation agreement, people do not withdraw their complaint and they do not reconcile, instead they reach an understanding and this understanding between them produces the same penal procedure effects as does withdrawing the complaint or penal reconciliation.

The penal effects of the mediation agreement result in termination of the criminal proceedings and take place by law, not through the willingness of the prosecutor or the judge. Therefore, the mediation agreement terminates the criminal trial by law, when the prosecutor and judge are made aware of it and is not left at the discretion of the prosecutor or judge to decide whether or not the trial is terminated, when the mediation agreement is added to the criminal file.

No matter how the mediation process ends, the mediator must redact the mediation closing record, where it will state how the mediation ended.

The mediation agreement and mediation closing record will then be redacted in as many original copies as there are parties involved, and two more – one for the archive of the mediator’s office and one to be filed with the judicial bodies where the criminal file was located.

#### **4. Conclusions**

The mediation in terms of criminal law is a technique of resolving conflicts which takes place in a constructive manner, both for the offender and the victim. However, this shows a new way of thinking in terms of criminal justice which has to deal with difficulties in terms of efficiency and managing the high volume of trials. Therefore, mediation solves the conflict and allows the judicial bodies to solve complex cases and also cases that are much more difficult. According to the mediation law, it is expressly stated that the purpose of penal mediation is not the reconciliation of the parties and the mediation agreement is not reconciliation in a penal sense, but is a private amenable understanding to a particular conflict. The mediator facilitates the understanding between the people involved and not reconciliation.

#### **References**

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