

# JUDGES IN MEDIATION IN GERMANY. HOW WOULD A JUDGE BECOME AN EXCELLENT MEDIATOR?

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## *1. Judicial Mediation in Germany*

### 1.1 Development of judges in mediation in Germany

Court mediation done by judges has been exercised in some German federal states since 2002, in Berlin, where I work at the District Court (Landgericht), since 2006. These projects, initiated by judges and promoted by the respective ministries of justice, were motivated by the idea that a conflict can best be solved by the conflict parties themselves even after the conflict had been brought before the court. There was no explicit law allowing judges to act as mediators in court proceedings at that time. It was a kind of revolutionary act of judges to offer a settlement proceeding in court that was not provided by law.

Judges in this early stage organized and paid for their own training. This shows they were highly motivated to invest time and money in order to promote an idea they were convinced of: modernizing justice in court proceedings by offering mediation. They had to convince their colleagues to give cases into court mediation and the parties and their lawyers to agree to a mediation process. They had been quite successful within a short period of time. Expert evaluations by Auditors General's Departments in some states stated that overall, judge mediation was highly successful with a success rate of about 70% and that it is effective in lowering the case burden of the courts. They established proof that mediation in courts was effective, saving financial and personal resources.

### 1.2 Mediation Act (Mediationsgesetz)

In 26 July 2012 the Mediation Act (MediationsG) entered into force in Germany fulfilling the Directive of the European Union 2008/52/EG on mediation.

This law making process was quite unusual and heavily controversial for almost two years. The original draft of the government, which was submitted in July 2010, was designed to regulate mediation in general – in or outside of court proceedings. At the end of 2011 this draft was turned upside down. The Mediation Act as it reads now only governs extra-judicial mediation, whereas judicial mediation is defined and regulated in the Code of Civil Procedure.

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The background of this controversy is to be seen in the competition between mediators outside of court proceedings, especially attorneys specializing on mediation, and the rather successful projects on court mediation offered by judges. As I mentioned before, in some federal states within Germany like Niedersachsen, Schleswig-Holstein and Berlin had been offering mediation within special courts for several years and they were quite successful. About 70 % of the cases mediated by these judge mediators were successfully solved. On the other hand extra-judicial mediators in the law making process asked for subsidies and financial aid systems in order to enable them to implement mediation on a broader scale.

This conflict is not solved, but by now there are laws that regulate mediation.

The Mediation Act applies to all mediation procedures. In section 1 it defines Mediation as a confidential and structured process in which the parties voluntarily and autonomously strive to achieve an amicable resolution of their conflict with the assistance of one or more mediators. In section 2 the process and the tasks of the mediator is described. Disclosure obligations are defined in section 3, the duty of confidentiality in section 4 and initial and further training of certified mediators in section 5.

According to section 6 a certification system should be installed in order to assure the quality of the extra-judicial mediators which shall include the following requirements in order to keep transparency of the market: a minimum of 120 hours of training and either an academic degree or a job-qualification and a two years job experience.

There is a dispute whether there should be an officially authorized admission system or a private certification offered by the mediation associations in Germany (BM or BafM).

In 2017 the Mediation Act will be evaluated and examined.

Extra judicial mediation is well known in family matters, school mediation and between big businesses in economic affairs. However, the statistical evidence on these matters is scarce.

### 1.3 The governing law on judge mediation in Germany

After the controversy about the Mediation Act of 2012 judges may offer mediation and other alternative methods of conflict resolution in court, but judges doing so are called *Güterichter (conciliation judges)* – not mediators. This difference in notion shall imply that there is a substantial difference between a mediator and a judge-mediator.

Policy-makers enacted a law for court mediators in *the Code of Civil Procedure Section 278, Paragraph 5: Amicable resolution of the dispute; conciliation hearing; settlement:*

*Court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute to a judge delegated for this purpose, who is not authorized to take a decision*

*(Güterichter/conciliation judge). The conciliation judge may avail himself of all methods of conflict solution, including mediation.*

So since 1 August 2013 court mediators have been called Güterichter (conciliation judges) even if they apply the mediation procedures as now governed by the Mediation Act. Conciliation judges according to this law may also apply other methods of conflict solution like arbitration, moderation, etc. They are allowed to give legal evaluation on the case, even though they are not authorized to make a decision.

As from 1 January 2013 in almost all civil courts and also in specialized courts like social courts and administrative courts conciliation judges have been installed. There are no profound regulations on mediation done by judges except for section 278, paragraph 5 of the Code of Civil procedure. Therefore there are no common rules on the training of judges, on the methods of handling mediation in court proceedings etc. within the federal state of Germany. The way mediation judges are installed and trained varies from state to state.

Generally speaking these common factors:

- Conciliation Judges are specially trained in the method of mediation.
- They will not take any decision in the case they mediate.
- They can draft an enforceable settlement agreement for the parties.
- Third parties that are not parties in the court proceedings can join the mediation process.
- In mediations in Court the parties are always accompanied by their lawyers (this differs in some federal states).
- The proceedings are confidential, voluntary and are non-public.
- Mediations can be governed by other languages, e.g. in English.
- The systems differ in the way the consent of the parties is obtained as for example by the deciding judge or by the conciliation judge.
- There are no extra fees in court for the mediation done by judges.

A very crucial problem is that according to the law conciliation judges can offer all kinds of conflict solution. Even non-binding judgements on the case are allowed and practised in some federal states.

In Berlin the “Güterichter” gathered at the end of 2012 and decided to offer only pure mediation proceedings in our courts, giving no legal advice to the case. This judicial self-restraint, however, is not binding for independent judges. As far as I know, “Güterichter” in Berlin work that way. In our opinion, it is important to define a clear offer of dispute settlement where the parties, their lawyers and also our colleagues would exactly know what we are doing.

There is no exclusive list of cases that are appropriate for mediation. In Berlin at the court of appeals, one third of our cases deal with construction and work compensation matters. Also, heritage cases are often brought to mediation with consent of the parties.

But also cases involving public authorities are prominent examples of court mediation. The parties can suggest themselves to go through a judicial mediation and they can even choose a conciliation judge from the court where the case is pending. Often, mediation in court takes place at a very early stage of the case, but there are also cases that come to mediation after many years of court proceedings.

In Berlin there are about 600-700 cases in all civil courts (11 lower courts, 1 court of appeal, 1 Kammergericht) that are dealt with in mediation proceedings, 500 of those at the court of appeals. The court of appeals success rate has been approximately constant at 70% since 2009. This is about 3- 5% of all cases at the Landgericht Berlin.

Judicial mediation is a story of success, but will only be accepted on a rather small basis of all cases, brought to court. It should be supported as an offer of courts to give alternative ways of solving a conflict.

## *2. How would a judge become an excellent mediator?*

### 2.1. Training: Basics, supervision, hospitation

A prerequisite for a judge to become a good, and even excellent mediator is a good training in the areas of the psychological aspects of conflicts, of communication theories and practise and of the tools of mediation (looping, reframing,...).

Some universities offer a two year course in mediation, master programmes (University Viadrina, Frankfurt/Oder, Fernuniversität Hagen). In Berlin and in other cities and states in Germany, judges are trained in a short programme of 6 days training offered by mediators, psychologists and judges. These programmes are offered by the state with no costs for the judges. In addition to this rather brief training it is compulsory in Berlin to attend as a hospitant in several court mediations. Subsequent to your work as a judge mediator at least in Berlin you should join a group of supervision.

The connection of a comparatively short training together with an early exercise in your own cases and the subsequent supervision, where you present your cases in front of a group of judge mediators, is at least to my opinion the best way, to enhance the skills of a judge mediator.

The supervision groups are lead mostly by psychologists, who have expertise and knowledge in court based mediations. They are funded by the state, the participants pay a small amount in addition by themselves. Theses groups work very effective since they usually meet every six to eight weeks. The atmosphere is confidential, so even judge mediators dare to present cases in which they failed to find a solution together with the parties.

I myself join a supervision group since 2006 and I am still learning new and different ways of approaching specific cases in mediation. Since two years I started to

train judges as mediators, together with a two other trainers, one of whom is a psychologist and mediator. I also started to run a supervision group with judges from the highest civil court of Berlin, the court of social matters and administrative court.

The combination of a short training in conflict affairs and psychologists, the early exercise in cases, subsequent supervision, regular hospitation and continuous training by other mediators is to my opinion the best way to become a good mediator for judges. But that is not enough to become excellent!

## 2.2. Learning by doing

Judges have experience in handling cases even with difficult parties. They know how to negotiate. And, what is even more important with respect to mediation, they get cases from their colleagues to mediate und to gain experience.

This differs in extra-judicial mediation where the trainees often have difficulties to obtain a chance to exercise their abilities in actual cases. To my experience, those judges, who start mediation in court after their training and who do a lot of mediation afterwards, accompanied by supervision and hospitation an extra training, are the most successful mediators in my court.

Those who scarcely mediate and don't gain expertise by supervision often give up mediation after a while.

## 2. 3. Qualities of an excellent judge mediator

Generally speaking not all judges, who have gone through the training as a mediator, will become excellent mediators. Even though people trust in the neutrality and confidence of judges, judges are not per se the best mediators. The main reason is that judges are used and trained to take decisions on the case. Good training is not enough. It takes more to be or become an excellent mediator.

There a certain qualities a judge must have or gain, to become a good mediator:

### 1. *Ability to change roles*

To change from the position as a deciding judge to the role of a mediator is the most difficult challenge for a judge.

Having worked as a judge one is tempted to know the best and most just solution to settle the case. This is the way judges deal with the parties and their layers during settlement negotiations : they suggest a proposal of settlement solution that is founded on legal assumptions by the judge.

The role of a good mediator is totally different. Acting as a mediator in a case the judge should not suggest any proposal or number, that in his opinion might settle the

case. He or she should also not be tempted to solve the case in legal terms before the mediation, because he or she might lose his or her neutrality towards the parties. Having an own legal solution in mind might restrain the judge mediator from working with the conflict parties in an understanding and interests based way of mediation.

The parties might readily cede their power to the neutral judge as a way to relinquish responsibility for finding their own meeting ground.

This change of role is not easy and must be trained. Some judges are not able to leave their professional role as a deciding authority that is responsible for the content of the meeting agreement of the parties. It is important to realize this at an early stage.

## 2. *Attitude*

The mediator, who is working on an understanding- based method of mediation, tries to achieve a sense of *positive neutrality*. This means trying to be equally subjective with each party and equally close. The mediator doesn't try to achieve objectivity on the case or distance from both parties. He rather tries to understand and feel what the dispute feels like to each, to empathize, and to ensure that each party feels understood by the mediator.

## 3. *Authenticity*

The parties taking part in a mediation process feel whether the judge is convinced by the method of mediation to solve a conflict or not. So Authenticity is very important. Some of my trainers say that there are born mediators – you can't really learn it.

## 4. *Self reflection*

This quality is necessary because each mediation case is different. The mediator has his repertoire of tools, but he might not be satisfied with his way of handling the case at the end. That is the reason why it is so important to present your cases in supervisions. Here you need to be self reflected to reach good results for yourself.

## 5. *Empathy, Interest in development of conflicts, Psychological interest and knowledge*

Studying law did not until recently imply any education in mediation. This has changed in Germany in a slight way. There are special courses offered at some universities in mediation. But in general a law student doesn't have any knowledge in communication theories, in psychology and conflict structures.

Judges working as mediators must have at least some knowledge in these areas and need to consistently train their knowledge in order to apply it in practice. To my opinion judges need continuous training on the field of mediation.

## 6. *Perseverance, Patience, Curiosity and Courage*

These are some of the main qualities that help judges to become excellent mediators.

Perseverance is important. The parties and especially their lawyers after having worked hard in the mediation process tend to give up in the very end. They turn back to their usual habits in negotiations and try to force the other party to agree on a very last proposal that is submitted. Otherwise they would leave the room. Staying calm and patient in this situation is the first rule for a mediator.

The second rule is to call the parties back into the room and give it another chance. Nobody really wants to leave after long hard working hours in mediation. Now it's the task of the mediator to convince the parties without coercion to go on and to arrange a good atmosphere. A mediator has to be curious in people and their conflict and he has to present his curiosity in a genuine way to the conflict parties.

And last not least a judge mediator should be courageous. He or she should not fear doing something wrong, trying new tools and ways of approaching even a long lasting conflict. Judges having been trained in mediation tools and proceedings enter a completely new field of practice when solving conflicts by the method of mediation. This affords courage.

**BÍRÁK A MEDIÁCIÓBAN NÉMETORSZÁGBAN. HOGYAN VÁLHAT EGY BÍRÓ KIVÁLÓ  
MEDIÁTORRÁ?**

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