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Ethical Duties of an Advocate Representing a Client in Mediation (Comparative Legal Analysis of Georgian and American Models)

Mediation as a means of alternative dispute resolution is recognized by western legal systems. It has developed at an exceptionally fast pace in the United States of America, which, of course, was accompanied by discussions and reasoning in literature accumulating valuable knowledge and experience that undoubtedly must interest lawyer and non-lawyer specialists working in the field of mediation.

Creation of a legislative base necessary for the development of the field of mediation in Georgia is underway. After the adoption of amendments to the procedural legislation, the parliament of Georgia admitted for discussion a draft law on mediation, which will be voted on in near future.

The participants of a mediation process have a special status, role and function, which they must carry out in order for mediation to be successful. A special role and function is borne by the advocate representing a party, who much like in case of court or arbitration proceedings, seeks to achieve the best possible outcome for the party; however, as opposed to a classical dispute, advocates engage in communication of a different nature with the participants of the mediation process and do not act within the scope of the predetermined procedural restrictions. The representative powers of advocates are by no means unrestricted and they may be held liable for various breaches of law. The present article identifies and analyzes such provisions with the aim of their further improvement and development, and includes recommendations.

Keywords: *mediation, the process of mediation, an advocate representing a client, ethical duties of an advocate, the code of ethics, the ethics commission, primacy of client's interest.*

1. Introduction

Popularization of mediation results in increased significance and relevance of legal regulation and systemization of the ethical matters related to it. In terms of safeguarding party interests, a special role is played by the advocates representing them, who must ensure provision of qualified and *bona fide* legal services to the clients during mediation negotiations. It is therefore important to evaluate activities of the advocate representing a client in mediation from legal standpoint based on the existing legal framework and determine the ethical duties imposed on them.

In Georgia and the United States of America, putting on a statutory footing the ethical duties of advocates representing clients in mediation is topical. Opinions vary with respect to the subject matter of regulation and the applicable methods. Significant steps have been taken towards development of mediation in Georgia by introducing judicial mediation and adopting relevant amendments to the civil procedure legislation¹. Currently a draft law on mediation² is under review in the Ministry of Justice of Georgia.³

The present article aims to determine the ethical duties under the present legislation imposed on an advocate representing a client in mediation process. It is of utmost significance to determine whether the representation of a client by an advocate in mediation is deemed advocacy and whether the universal ethical duties of an advocate apply.

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¹ Civil Code of Procedure of Georgia, Legislative Herald, 14/11/1997, Chapter XXI, <<https://matsne.gov.ge/ka/-document/view/29962>>, [02.08.2019].

² Bill of Georgia on Mediation, the official website of the Parliament of Georgia, <<https://info.parliament.ge/#law-drafting/17577f>>>, [02.08.2019].

³ The official website of the Ministry of Justice, News, <<http://www.justice.gov.ge/News/Detail?newsId=-7634>>>, [02.08.2019].

The present article analyzes the legal framework of ethical duties of an advocate and its characteristics in legal systems of Georgia and the United States of America. Emphasis is placed on normative and doctrinal interpretations of the provisions of professional ethics of advocates and the possibility of their applicability to mediation.

2. General Overview and the Existing Legislation

Involvement of an advocate is undoubtedly necessary in any proceeding or process having legal significance. Mediation is no exception in this regard. A mediator bears an ethical duty to ensure that parties have a chance of self-determination.⁴ Creating appropriate circumstances for self-determination primarily implies giving a party an opportunity to be duly advised by professionals of various fields. In this regard, the role of an advocate as a state recognized specialist of law is indisputably important. An advocate shall ensure assessing all legal risks on behalf of the party involved in mediation and decide in correspondence with party interests.⁵

The existing legislation governing advocates and their activities comprises national legal acts, including Law of Georgia on Advocates, Code of Professional Ethics of Advocates, Statute of Georgian Bar Association on Disciplinary Accountability of Advocates and Disciplinary Proceedings, and international acts ratified by Georgia: Code of Conduct for Lawyers in the European Union, Recommendation of the Council of Europe Committee Ministers, and Basic Principles on the Role of Lawyers by the United Nations.⁶ It must be noted that current legislation does not include specific ethical norms applicable to and owed by an advocate representing a client who is a party to mediation.

Among scholars as well as practicing lawyers, an opinion prevails that mediators should only encourage parties to mediation to receive qualified legal advice and ensure that legal risks are evaluated by advocates representing them.⁷ Currently, a draft of Law of Georgia on Mediation is subject to discussion at the parliament of Georgia⁸ whose official text (of the draft) does not provide for special ethical norms for advocates representing clients engaged in mediation.

Discussions on mediation as an alternative dispute resolution mechanism and the role of an advocate in this process have been underway in the United States of America since the 50's of the XX century.⁹ Pursuant to the preamble of the "Model Rules" by the American Bar Association, an advocate owes a number of duties to the client including but not limited to zealous assertion of the client's position under the rules of the legal system, and as a negotiator, to seek a result advantageous to the client.¹⁰ This provision implies various forms of legal services. Pursuant to the preamble of the "Model Rules", with the aim of resolving a dispute, an advocate may render to the client services related to representation, as well as those, which require acting as an impartial third person. It is thus considered that the provisions of the "Model Rules" may

⁴ *Tsulaia O.*, Self-determination as an Underlying Value of Mediation Process in Ethical Codes and Legal Scholarship: Tensions between Disputant Autonomy and Substantive Fairness, Journ. "Alternative Dispute Resolution – Yearbook", Special ed., TSU Publishing House, 2017, 255, (In Georgian).

⁵ Ibid, 256.

⁶ The official website of Georgian Bar Association, list of legislative sources, <<https://gba.ge/ka/%E1%83%A9%E1%83%95%E1%83%94%E1%83%9C%E1%83%A1-%E1%83%A8%E1%83%94%E1%83%A1%E1%83-90%E1%83%AE%E1%83%94%E1%83%91/%E1%83%A1%E1%83%90%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%9A%E1%83%94%E1%83%91%E1%83%9A%E1%83%98%E1%83%95%E1%83%98-%E1%83%90%E1%83%A5%E1%83%A2%E1%83%94%E1%83%91%E1%83%98>>, [02.08.2019].

⁷ *Chitashvili N.*, Framework for Regulation of Mediation Ethics and Targets of Ethical Binding, "Journal of Law", №1, TSU Publishing House, 2016, 26-27, (In Georgian).

⁸ Bill of Georgia on Mediation, the official website of the Parliament of Georgia, <<https://info-parliament.ge/#law-drafting/17577f>>>, [02.08.2019].

⁹ *Strong G. E.*, Role of the Lawyer in Arbitration, Mediation and Conciliation, 1956, 1.

¹⁰ Model Rules of Professional Conduct, American Bar Association, 2004, <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html>, [02.08.2019].

apply to other legal relationships between an advocate and a client such as mediation proceedings. Despite the fact that the official text of the “Model Rules” does not refer to the involvement of an advocate in mediation proceedings and the applicability of ethical duties provided for by the “Model Rules”, it must be interpreted that ethical duties of an advocate would apply.¹¹ In literature, emphasis is placed on preparing for and determining perspectives of a dispute as a type of legal services, which is particularly important in mediation and implies duty of zealousness.¹²

American Bar Association represents the main American professional union whose functions entail accreditation of law schools’ (faculties’ of law) programs, development and interpretation of the “Model Rules of Professional Conduct”. It must be noted that American Bar Association is not in any way connected to issuing bar licenses, which falls within the scope of the authority of each state.¹³

The analogue of Georgian Code of Professional Ethics in the United States of America is the “Model Rules of Professional Conduct” (hereinafter referred to as the “Model Rules”)¹⁴, which determines ethical standards for professional conduct of the members of the American Bar Association.

American Bar Association adopted “The Ethical Guidelines for Settlement Negotiations” (hereinafter referred to as the “Guideline”).¹⁵ The “Guideline” is a legal document of recommendatory nature, which determines the ethical norms applicable to lawyers who represent private parties in settlement negotiations in civil cases. The preamble refers to the promotion of fair resolution of the matter between the parties to negotiations.¹⁶ Employing the provisions under the “Guideline” is recommended during court proceedings as well as in case of alternate dispute resolution, including mediation and private arbitration proceedings.

3. Mediation and Advocacy

Pursuant to article 2 of the Law of Georgia on Advocates, advocacy includes: provision of legal advice by an advocate to the person (client) who referred to them for assistance, representation of a client with respect to a constitutional dispute or a criminal, civil or administrative law case in court, arbitration, detention and investigation bodies, preparation of legal documentation with respect to third persons and submission of any documentation on behalf of the client, provision of legal assistance, which is not in connection with the representation before third persons.¹⁷ The present provision represents and lists the types of legal services, which an advocate shall render to a client. Literal interpretation, its content and mandatory nature does not leave a leeway to consider participation of an advocate representing a party to mediation as advocacy.

In interpreting article 2 of the Law of Georgia on Advocates, one may resort to teleological interpretation method provided under the legal methods. A teleological interpretation implies determining the objective purpose of the clause. It aims to evaluate enforceability of the clause. Namely, to what extent the intentions of the legislature at the time of adoption of the clause correspond to the present day decisions, which make use of these clauses. A teleological interpretation concerns the relationship of a clause with principles of legal security, equality and reasonability.¹⁸

¹¹ *Sherrill J. A.*, Ethics for Lawyers Representing Clients in Mediations, 2012, 2.

¹² *Nolan-Haley J. M.*, Lawyers, Clients, and Mediation, Notre Dame Law Review, Fordham, 1998, 7.

¹³ *Khurtsidze N., Matiashvili M., Moliterno J., Zambakhidze T., Tsiskadze M., Jokhadze G.*, Ethical Aspects of Legal Professionals, American Bar Association, Publication of Rule of Law Initiative: Educational Materials, Tbilisi, 2009, 18, (In Georgian).

¹⁴ Model Rules of Professional Conduct, American Bar Association, Preface, 2004, <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>, [02.08.2019].

¹⁵ The Ethical Guidelines for Settlement Negotiations, American Bar Association, Official Website, 2002, 1, <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf>, [02.08.2019].

¹⁶ Ibid, 1.

¹⁷ Law of Georgia on Advocates, Legislative Herald, 20/06/2001, Article 2, <<https://matsne.gov.ge/ka/document/view/15472>>>, [02.08.2019].

¹⁸ *Totladze L., Gabrichidze G., Tumanishvili G., Turava P., Chachanidze E.*, Explanatory Legal Dictionary, Tbilisi, 2012, 244 (In Georgian).

Broadly speaking, one of the methods of interpretation is expansion of legal norms in cases where the legislature did not, intentionally or otherwise, regulate a matter as well as events caused by a change in circumstances (teleological expansion). An expansive interpretation of law is a prerogative of the judiciary who must apply the law by analogue to the cases identical from the legal standpoint.¹⁹

Pursuant to paragraph 1 of article 6 of the Law of Georgia on Advocates, *an advocate shall have the right to resort to any measure, which is not prohibited by law or norms of professional ethics, to safeguard client's interests.*²⁰

The preamble of LEPL Georgian Bar Association Code of Professional Ethics (the “Code of Ethics”) declares its aim to determine the code of conduct of advocates before the society and the client. The Code of Ethics, based on the professional and moral obligations owed to the society, aims to determine the professional code of conduct and uphold advocate’s duty to maintain professional integrity, pay respect to its profession and ensure high degree of trust towards the profession of an advocate.²¹

Article 1 of the “Code of Ethics” sets out the basic principles of the professional code of conduct of an advocate. Namely, the advocate in providing professional services must be guided by the following principles: independence, confidence, confidentiality, primacy of client’s interest, preclusion of conflict of interests, collegiality.²²

Pursuant to the principles of the UN, the duties of an advocate towards their clients include assisting clients in every appropriate way, taking legal action to protect their interests,²³ and loyally respecting the interests of their clients.²⁴ Based on the said principles, in serving the client’s interests, advocates must advise and assist their clients in line with law and recognized professional standards and ethics.²⁵

It is widely acknowledged that advocacy requires involvement of a client. In order for an activity to be deemed advocacy, certain criteria have to be satisfied such as “legal assessment” test whereby for advocacy, the person is required to have specialized legal education and skills. This activity implies usage of legal principles, provision of advice and other means of assistance to satisfy the other party’s needs. “This definition as well as skills obtained through legal education imply use of legal norms and philosophical principles in the context of the specific problem the client is facing in order to resolve such issue.”²⁶

One of the important aspects of client-advocate relationship is client’s interests, which is a key point for advocate’s professional activities. While determining the function of the advocate in the society, the Code of Conduct for European Lawyers states that “the advocate must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s cause but to be the client’s adviser”. Respect for the client’s interests is an obligation of an advocate.²⁷ In line with the principles determined under the laws of Georgia and international law,

¹⁹ Totladze L., Gabrichidze G., Tumanishvili G., Turava P., Chachanidze E., Explanatory Legal Dictionary, Tbilisi, 2012, 245 (In Georgian).

²⁰ Law of Georgia on Advocates, Legislative Herald, 20/06/2001, Article 6, <<https://matsne.gov.ge/ka/document/view/15472>>, [02.08.2019].

²¹ Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, preamble, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>, [02.08.2019].

²² Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, article 1, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>, [02.08.2019].

²³ Basic Principles on the Role of Lawyers by the United Nations, 1990, Art. 13, <<http://gba.ge/%22/new-admin/editor/uploads/files/regulaciebi/gaeros%20ZiriTadi%20principebi%20advokatTa%20rolis%20Sesaxeb.pdf/%22>>, [02.08.2019].

²⁴ Basic Principles on the Role of Lawyers by the United Nations, 1990, Art. 15, <<http://gba.ge/%22/new-admin/editor/uploads/files/regulaciebi/gaeros%20ZiriTadi%20principebi%20advokatTa%20rolis%20Sesaxeb.pdf/%22>>, [02.08.2019].

²⁵ Basic Principles on the Role of Lawyers by the United Nations, Art. 25, <<http://gba.ge/%22/new-admin/editor/uploads/files/regulaciebi/gaeros%20ZiriTadi%20principebi%20advokatTa%20rolis%20Sesaxeb.pdf/%22>>, [02.08.2019].

²⁶ Chitashvili N., Specificity of Some Ethical Duties of Lawyer Mediator and Necessity of Regulation, “Journal of Law”, №2, TSU Publishing House, 2016, 32–33 (In Georgian).

²⁷ Kvatchadze M., Gasitashvili E., Botchorishvili K., Kordzakhia I., Commentaries to the Code of Professional Ethics of Advocates Based on the Case Law of Ethics Committee, Tbilisi, 2011, 14 (In Georgian).

representing a client by an advocate in mediation proceedings is advocacy as the function of the advocate entails legal analysis of the existing legal issue, determining the indispensable interest and position of the client. Thus, carry out legal actions, which will best serve the interests of the client.

4. Applicability of Ethical Duties of an Advocate Representing Clients in Mediation

4.1. Georgian Model

While defining the concept and the scope of advocacy activities, it is important to establish the conditions and the moment when the ethical obligations start to apply for the mediation processes. Notably, the existing Georgian legislation does not formally provide special ethical obligations for an advocate representing a client involved in mediation. The existing legal acts do not impose general ethical obligations on advocates within the scope of the service of representing clients in mediation. Article 11 of the Code of Ethics is of particular importance stating that the Code of Ethics applies to advocates. An advocate is accountable for the ethical behavior of all persons that act based on the instructions provided by an advocate or on his/her behalf, save for the cases where an advocate has taken all reasonable measures towards ensuring that the behavior of these persons be in line with the requirements of the Code of Ethics.²⁸

For a better understanding of the matter in question, it is important to analyze the definitions provided in the legal acts used in practices. The above-mentioned definition and the scope of the ethical obligations that apply to an advocate representing a client, as to the person holding the status of an advocate, are noted in the disciplinary and judicial practice discussed below.

Analysis of article 11 of the Code of Ethics, the legal practice of the Supreme Court and the Georgian Bar Association Ethics Committee demonstrate that an advocate bears general ethical duties of an advocate since the moment he/she acquires a status of an advocate and such applicable ethical norms are not limited to the advocate's activities related to a specific case. In its decision dated 16 June 2014,²⁹ Georgian Bar Association Ethics Committee, in line with the above, made a decision that has been further upheld by the Disciplinary Chamber of the Supreme Court.

LEPL Georgian Bar Association Ethics Committee established the following circumstances: upon the conclusion of the court hearing, a verbal conflict ensued in the courtroom between an advocate and an applicant, which escalated to a minor physical contact, namely, the applicant was waving written records, while the advocate during the verbal dispute swung his leg in the air. The Ethics Committee concluded that the advocate had violated paragraph "c" of article 5 of the "Law on Advocates", according to which "an advocate shall not infringe on the rights of the court or other participants in proceedings". Additionally, article 9.1 of the Code of Ethics was violated which states that "an advocate appearing before a Georgian or foreign court or tribunal shall comply with and respect the rules of conduct applied in that court/tribunal".³⁰

Ethics Committee determined that an advocate is obliged to maintain professional integrity, display patience and remain respectful towards his/her profession under any circumstances. An advocate must try to avoid any acts or expressions that is not compatible with the high role that an advocate holds in the society and those that undermine the trust of the society in the profession of an advocate. Ethics Committee has noted that professional duties and responsibilities do not allow an advocate to make any subjective, unreasonable or insulting statements in a way that would jeopardize the trustworthiness and ethicality of an entire institution of advocates.³¹

According to the Ethics Committee, the fact that the advocate was a respondent in a civil dispute does not alter the factual circumstances according to which the advocate insulted the participants of the

²⁸ Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, Article 11, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>.

²⁹ LEPL Ethics Committee of the Georgian Bar Association Decision dated 16th June 2014, 5.

³⁰ Ibid.

³¹ Ibid.

court proceedings.³² The advocate appealed the decision within the prescribed time limit to the Disciplinary Chamber of the Supreme Court and requested annulment of the Ethics Committee decision.

According to the Supreme Court, Disciplinary Chamber notes that the Code of Professional Ethics for Advocates defines the norms of professional ethics and rules of conduct that are associated with advocacy. “Disciplinary Chamber believes that applicability of professional requirements to advocates is not limited by the list prescribed under article 2 of the Law on Advocates, rather they apply to the relationships between advocates as well. Even though the advocate was a party to this particular civil dispute, an advocate has to adhere to the professional rules of conduct not only when acting in professional capacity but in case of being a party in a dispute before court as well. Relationships between the members of the advocate corps are not limited to a courtroom. An advocate has been engaged in advocacy since 2006. The fact that he/she was a party to the court proceedings rather than an advocate representing a client does not release him from adhering to the professional means of conduct. The Code of Ethics contains various norms that relate not only to advocacy activities but also to the general standards of an advocate’s behavior. For example, pursuant to article 7 of the Code of Professional Ethics for Advocates “an advocate shall treat his/her colleagues respectfully, not abuse their dignity and shall protect professional values”; as per article 9, “an advocate appearing before a Georgian or foreign court or tribunal shall comply with and respect the rules of conduct applied in that court/tribunal; under article 10, “an advocate shall maintain due respect to his/her colleagues”. The above-mentioned illustrates that these norms of conduct apply to the relationship between advocates outside courts, and advocates are more so obliged to adhere to these norms when appearing in the courtroom when their professional status is known to everyone, then his/ her actions are being perceived as those of an advocate’s rather than of a natural person’s. Disciplinary Chamber thus shares the opinion of the Ethics Committee that the advocate due to his/her actions, by verbally abusing the applicant, had disregarded professional prestige, did not display patience and had thus shown indifference towards the rules of professional conduct. The behavior of the advocate shall be compatible with the role he/she holds in the society as an advocate and any conduct of an advocate in the courtroom must correspond to the professional integrity and ethics standards that apply. Adherence to these standards is mandatory whether he/she was representing a client before court or was a party himself/herself.³³

The above-mentioned reasoning provided by the Supreme Court makes it clear that advocate’s ethical duties are tethered to his/her status and are not limited to the legal activities that the advocate carries out within the framework of a particular case. In line with the foregoing, we may also conclude that an advocate who represents a party to a mediation process is subject to the established ethical norms and is obliged to adhere to those in his/her relationship with the client or other participants of the mediation process.

4.2. American Model

The analogue of Georgian Professional Code of Ethics for Advocates in the United States of America is the “Model Rules of Professional Conduct” (hereinafter referred to as the “Model Rules”).³⁴ American Bar Association adopted “The Ethical Guidelines for Settlement Negotiations” (hereinafter referred to as the “Guideline”).³⁵ The Guideline is a legal document of recommendatory nature, which determines the ethical norms applicable to lawyers who represent private parties in settlement negotiations in civil cases. The preamble refers to promotion of fair resolution of the matter between the parties to

³² LEPL Ethics Committee of the Georgian Bar Association Decision dated 16th June, 2014, 6.

³³ Disciplinary Chamber of the Supreme Court of Georgia, Decision №DS-S/5-15 6 May 2015, 4-5.

³⁴ Model Rules of Professional Conduct, American Bar Association, 2004, <https://www.americanbar.org/groups/professional_responsibility/publications/modelrules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>, [02.08.2019].

³⁵ The Ethical Guidelines for Settlement Negotiations, American Bar Association, Official Website, 2002, 1, <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.athcheckdam.pdf>, [02.08.2019].

negotiations.³⁶ Employing the provisions under the “Guidelines” is recommended during court proceedings as well as in case of alternate dispute resolution, including mediation and private arbitration proceedings. Notably, the regulations determined under the “Guidelines” impose on an advocate representing a client party to mediation a number of ethical duties, which coincide with ethical the norms under the “Model Rules”.

5. Ethical Duties of an Advocate under the Code of Ethics of Georgian Bar Association and the “Model Rules”

5.1. Georgian Model

The Code of Ethics by LEPL Georgian Bar Association determines professional norms of ethics and conduct.³⁷ Article 1 (Chapter I) of the “Code of Ethics” determines the basic principles of professional conduct – confidence, confidentiality, primacy of client’s interest, preclusion of conflict of interests, collegiality.³⁸

Chapter II of the Code of Ethics determines the ethical duties of an advocate, which it owes to other persons and institutions.

- Client-advocate relationship

An advocate commences a relationship with a client on the basis of a mutual agreement with the client. A mutual agreement is deemed to exist where an advocate could have construed that they were entering into an agreement with an authorized representative of a client being in a relationship with such client, except for the case of compulsory (forced) defense.

- Protecting client interests

An advocate shall have a right to resort to any measure, which is not prohibited by law or norms of professional ethics, to safeguard client’s interests.

- An advocate is obliged to timely provide to a client all information and clarify all possible financial obligations related to the proceedings of their case.³⁹

Professional secrecy

1. An advocate is obliged to:

a) keep a professional secret in confidence regardless of the time elapsed;

b) refrain from disclosing the information obtained during the provision of services received from the client without their consent.

Pursuant to the Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, an advocate shall submit a reporting form on a transaction subject to monitoring if the submission of the reporting form is not in circumvention of the principle of protection of professional secrets determined by the legislation regulating their activities.

- Breach by an advocate of professional secrecy results in accountability as determined under this law and code of ethics of advocates⁴⁰

Duty of confidentiality applies to advocates representing clients under law in any representative capacity but in case of mediation proceedings confidentiality relates to bringing the parties closer and

³⁶ The Ethical Guidelines for Settlement Negotiations, American Bar Association, Official Website, 2002, 1, <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.athcheckdam.pdf>, [02.08.2019].

³⁷ Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>, [02.08.2019].

³⁸ Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, Article 1, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>, [02.08.2019].

³⁹ Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, Article 8, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>, [02.08.2019].

⁴⁰ Ibid, Article 7.

facilitating successful completion of mediation. Confidentiality enhances trust between the parties, their representatives as well as mediators, and trust in impartiality of the mediators.⁴¹ In case of common litigation, civil proceedings take place in line with the principle of openness, which allows third persons who are not involved in the case to be acquainted with the personal data of the parties.⁴² Despite the fact that the judiciary may close a hearing, this is still connected to certain procedures and inner belief of the judge,⁴³ which does not guarantee confidentiality. The existing mediation environment creates a special feeling of safety and promotes successful completion of mediation.⁴⁴

- Conflict of interests

- An advocate is obliged to refrain from carrying out any act or engaging in any relationship, which would undermine client's interest, advocate's professional activities or independence.

- An advocate may not act in professional capacity if on the same case they have already rendered services as an advocate in favor of the other party.

3. An advocate is restricted from acting in professional capacity with respect to the case in relation to which it has already acted as a judge, prosecutor, investigator, inquirer, secretary of a court session, interpreter, attendant, witness, expert, specialist, public servant or notary and other obligations provided for under the procedural legislation.⁴⁵

- Principle of primacy of client's interest

An advocate must always act in the best interest of the client and put client's interests before his/her own or other persons' interests. However, advocate's actions in protecting his/her client's interests, must be commensurate with the legislation and the Code of Professional Ethics for Advocates.

- Principle of preclusion of conflict of interests

An advocate may not advise or represent two or more clients in the same or related matter if there is a conflict of interests between the interests of those clients or there is a significant risk that such conflict will occur.

- Relationship of an advocate with court

An advocate appearing before a Georgian or a foreign court or tribunal shall comply with the legal acts and regulations on the profession of an advocate and respect rules of conduct applicable to such court or tribunal.⁴⁶

- Principle of collegiality

An advocate is obliged to respect their colleagues and refrain from undermining their integrity, and safeguard professional values.⁴⁷

An advocate is obliged to respect their colleague. The corporate notion of this profession demands that advocates have a relationship based on trust and cooperation for the benefit of their clients as well as in order to prevent any action to the detriment of the client. At the same time, professional interests shall not prevail over the client's interests.⁴⁸

⁴¹ Beradze S., Specificity of Confidentiality Protection in Mediation Process, "Alternative Dispute Resolution – Yearbook", TSU Publishing House, Special Edition, Tbilisi, 2017, 51(In Georgian).

⁴² See the definition of personal data, Law of Georgia on Personal Data Protection, Legislative Herald of Georgia, 28/12/2011, Article 2, paragraph 1, <<https://matsne.gov.ge/ka/document/view/1561437?publication=19>>, [02.08.2019].

⁴³ Civil Code of Procedure of Georgia, Legislative Herald, 14/11/1997, Article 9, Paragraph 1-4, <<https://matsne.gov.ge/ka/document/view/29962>>, [02.08.2019].

⁴⁴ Beradze S., Specificity of Confidentiality Protection in Mediation Process, "Alternative Dispute Resolution – Yearbook", TSU Publishing House, 2017, 52 (In Georgian).

⁴⁵ Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, Article 8, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>, [02.08.2019].

⁴⁶ Code of Professional Ethics for Advocates, LEPL Georgian Bar Association, Tbilisi, 2012, Article 9, <http://gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf>, [02.08.2019].

⁴⁷ Ibid, article 7.

⁴⁸ Kvatchadze M., Gasitashvili E., Botchorishvili K., Kordzakhia I., Commentaries to the Code of Professional Ethics of Advocates Based on the Case Law of Ethics Committee, Tbilisi, 2011, 11 (In Georgian).

5.2. American Model

Prior to the adoption of the “Model Rules” in the United States of America, an independent act imposing ethical duties on advocates participating in arbitration and mediation – a field of alternative dispute resolution, was being considered. The act was to provide a list of ethical duties and the respective definitions.⁴⁹

The analogue of Georgian Code of Professional Ethics in the United States of America is the “Model Rules of Professional Conduct” (hereinafter referred to as the “Model Rules”)⁵⁰, which determines ethical standards for professional conduct of the members of American Bar Association.

A special emphasis must be placed on “The Ethical Guidelines for Settlement Negotiations” (hereinafter referred to as the “Guideline”) adopted by American Bar Association.⁵¹ The “Guideline” is a legal document of recommendatory nature, which determines the ethical norms applicable to lawyers who represent private parties in settlement negotiations in civil cases. The preamble refers to the promotion of fair resolution of the matter between the parties to negotiations.⁵² Employing the provisions under the “Guideline” is recommended during court proceedings as well as in case of alternate dispute resolution, including mediation and private arbitration proceedings.

Pursuant to the American “Guideline”, an opinion prevails that an advocate representing a client in mediation proceedings, contrary to the “Model Rules” must bear ethical duties not only towards his/her client but to each party to the mediation proceedings, which will aim to reach a settlement fair for every party.⁵³ Such “general” ethical duties entail knowledge, ethical duty of competence, confidentiality.

At the same time, the “Guideline” determines special ethical duties applicable specifically to advocates representing a client and owed by the former to the latter.

Much like with the Georgian “Code of Ethics”, the “Model Rules” by American Bar Association provide for general principles of competence, confidentiality, conflict of interests, and independence. Moreover, they determine the duties owed to “third persons”, which, as in Georgian legislation, refer to other participants of mediation proceedings. These, primarily, imply the client who is being represented, the mediator, the advocate of the opposing party, and other participants of the mediation proceedings.⁵⁴

- Duty of competence

Duty of competence in the “Guideline” derives from the “Model Rules” by American Bar Association. Pursuant to article 1.1, “an advocate is obliged to provide competent representation to a client”, which implies necessary knowledge of the advocate representing the client, that will allow the advocate to determine legality and enforceability of the claim. An advocate must be capable of determining in advance the consequences to a legal act, and carrying out best possible legal act within the scope of their authority and in the interest of the client. Notably, since the provisions of the “Guideline” concern all persons party to negotiations, legal acts carried out by the advocate representing a party must aim safeguarding interests of each party to the greatest extent possible. For example, determining the best route for each participant of the mediation process to resolve tax-related issues.

- Duty of good faith

An advocate must carry out legal acts in good faith and in an honorable manner.

⁴⁹ *Menkel-Meadow C.*, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities, Georgetown University Law Center, 1997, 45-46 (In Georgian).

⁵⁰ Model Rules of Professional Conduct, American Bar Association, Preface, 2004, <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>, [02.08.2019].

⁵¹ The Ethical Guidelines for Settlement Negotiations, American Bar Association, Official Website, 2002, 1, <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf>, [02.08.2019].

⁵² *Ibid.*, 1.

⁵³ *Sherrill. J. A.*, Ethics for Lawyers Representing Clients in Mediations, 2012, 3.

⁵⁴ *Ibid.*, 5.

Despite the fact that the “Model Rules” of American Bar Association, formally speaking, do not provide a provision on duty of good faith, the “Guideline” makes a reference to the need for compliance with this ethical norm in line with the general principle of good faith under law and in line with the content of the “Guidelines”. An advocate must seek laudable and fair decision-making. Article 2.1. of the “Model Rules” affirms the need for advocates representing clients to take into consideration moral factors when dealing with disputes.⁵⁵ The content of the provision of the “Guideline” also implies duty of collegiality among advocates engaged in client representation.

- Duty of confidentiality

“In case of client’s consent, the advocate engaged in representation may disclose to the third persons or keep secret the information made available within the scope of the dispute except for the cases where law, special rule, court order or local custom prohibits information disclosure or the advocate engaged in representation does not agree with such disclosure.

This provision is based on the substance of articles 1.6, 1.8 and 1.9 of the “Model Rules”, which safeguard confidentiality by an advocate.

This provision establishes the scope of applicability of duty of confidentiality to an advocate engaged in representation, which implies a right to disclose information in certain circumstances. The right to disclose mainly depends on the consent of the client but even in case of such consent, this right may be limited pursuant to law, special rule, court order or local custom. This provision therefore determines a different standard for confidentiality and the right to disclosure. Unlike the Georgian regulation, the “Model Rules” allow disclosure of case-related information if the prerequisite of party consent is met.⁵⁶

- Preclusion of conflict of interests

The “Model Rules” by American Bar Association determine general as well as specific norms related to conflict of interests. The Code also regulates a matter related to conflict of interests due to multiplicity of clients. The latest amendment with respect to conflict of interests was made in February 2002, which determines advocate’s duties to a prospective client.⁵⁷

- Principle of independence

Since majority of conflicts expose client interests to a risk, independence of and decision-making by the client is a respectable virtue, the client is authorized to prevent majority of conflicts of interest. If the client nevertheless decides to engage such an advocate, at least a well thought out consent of a client is needed.

The principle of client independence generally does not apply when the conflict is so grave that any client, in case of refusal to recuse will be under suspicion. The principle of client independence does not generally apply when by client consent to the conflict not only the client’s interest but also the interests of the judicial system are undermined.⁵⁸

- Ethical duties of an advocate owed to third persons

The “Model Rules” of American Bar Association determine general as well as specific norms related to conflict of interests.⁵⁹ The Code also regulates a matter related to conflict of interests due to multiplicity of clients. The latest amendment with respect to conflict of interests was made in February 2002, which determines advocates duties to a prospective client.⁶⁰

⁵⁵ *Sherrill J. A.*, Ethics for Lawyers Representing Clients in Mediations, 2012, 5.

⁵⁶ *Oberman S.*, Confidentiality in Mediation: An Application of the Right to Privacy, Ohio State Journal on Dispute Resolution, Vol 27:3, 2012, 13.

⁵⁷ *Khurtsidze N., Matiashvili M., Moliterno J., Zambakhidze T., Tsiskadze M., Jokhadze G.*, Ethical Aspects of Legal Professionals, American Bar Association, Publication of Rule of Law Initiative: Educational Materials, Tbilisi, 2009, 66 (In Georgian).

⁵⁸ *Ibid*, 77.

⁵⁹ The Ethical Guidelines for Settlement Negotiations, American Bar Association Publisher, 2002, 1 <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.athcheckdam.pdf>, [02.08.2019].

⁶⁰ *Khurtsidze N., Matiashvili M., Moliterno J., Zambakhidze T., Tsiskadze M., Jokhadze G.*, Ethical Aspects of Legal Professionals, American Bar Association, Publication of Rule of Law Initiative: Educational Materials, Tbilisi, 2009, 77 (In Georgian).

American advocates are not restricted from establishing a relationship with persons engaged in the client's case who do not have a representative. In this case, however, the framework, which they must comply with, is determined. First and foremost, an advocate is obliged to refrain from direct or indirect statements. An advocate is obliged to declare that they are not interested in the matter with respect to which they are being notified. In the United States of America, intentional provision of incorrect information to a person who does not have a representative results in disciplinary accountability. Moreover, if the advocate suspects that the person who does not have a representative incorrectly perceives advocate's interests in the case, they must provide such person with a clear explanation with respect to the role of an advocate.

Notably, American advocates may not provide persons who have no representatives with legal advice if they will inevitably have to establish contact with them. The sole exception from this rule concerns provision of advice on engaging a representative (an advocate).

Advocates may gather information from the persons who do not have a representative. Otherwise, it would be hard to imagine how American judicial system would function.⁶¹

American legal literature also describes individual cases where advocates involved in mediation breached ethical duties. Such cases include "bluffing" and exceeding the claim amount without authority. It does not come as a surprise that in order to better serve the interests of the party to mediation, an advocate may keep secret certain material and important circumstances, exaggerate the rights and the claims of the principal, attempt to reach the best possible outcome.⁶² In line with the principle of good faith under the "Model Rules", the above-mentioned breaches in mediation are viewed as gross breaches of the principle of good faith.

6. Conclusion

Considering the high professional and moral obligations that an advocate owes to the society and by relying on the teleological interpretation of the principle of primacy of the client's interest provided under law, we may deem that an advocate representing a client in mediation as a representative of this profession is subject to the appropriate ethical standards as determined under the national legal acts and international law.

The systematic and teleological interpretation of the existing legal norms in Georgia, including the Law of Georgia on Advocates and the Code of Professional Ethics for Advocates by the Georgian Bar Association extend uniform ethical duties on advocates in each field of advocacy, including at the time of representing a client who is a party to mediation.

The existing legislative framework and interpretations in the literature affirm the idea of deeming the activities of an advocate representing a party in mediation process as advocacy and, thus, applying the regulation of the "Model Rules" in full capacity.

It is important that a high standard legal framework be developed regarding determining the engagement of an advocate as a representative in mediation process and the applicability of general ethical duties to them. It is recommended that an amendment be made to 2001 Law of Georgia on Advocates whereby it would determine that the involvement of an advocate as a representative in mediation amounts to advocacy. It is also recommended that LEPL Georgian Bar Association issue a single systematized act regulating the ethical duties of advocates involved in mediation. The above-mentioned amendments would facilitate uniform practice of disciplinary and court proceedings, and avoid disagreement with respect to this matter.

⁶¹ *Khurtsidze N., Matiashvili M., Moliterno J., Zambakhidze T., Tsiskadze M., Jokhadze G.*, Ethical Aspects of Legal Professionals, American Bar Association, Publication of Rule of Law Initiative: Educational Materials, Tbilisi, 2009, 80 (In Georgian).

⁶² *Roth B.J.*, Ethical Considerations for Advocates in Mediation, Massachusetts Lawyer's Weekly, 2005, 2.

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