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Tamta Margvelashvili*

Mediation as a Profession: Ethical Models, Principles and Challenges

The paper discusses idea and importance of mediation, its professional assignment and value, discusses in more details main issues of mediation ethics, its established models which are still developing and needs perfecting by combining practice and theory. In addition, based on legislative regulations of different countries, discussing mediation codes of ethics and their comparison in the paper, we shall define the basic principles of mediation, main ethical challenges of mediator's activities which need reaction on time on national and international level. As a result, by analyzing problems existing in mediation ethics sphere, ethical challenges will be differentiated and it will be possible to talk about their solution. This will be the step forward for developing mediation practice and theory.

Key words: mediation ethics, profession of mediator, legislative regulation of ethics, ethical principles and models, ethics codes, ethical challenges, solving ethical challenges.

1. Introduction

Mediation, as a profession, is becoming more and more popular considering its essence, effectiveness and simplicity creating the basis to talk about ethical challenges. Mediation institute became the basis for alternative dispute resolution making it possible to analyze the issue without the court with the help of neutral party (mediator). As mediation, as institution and profession, unlike other means to control the conflict is new for society, it is important to agree on regulations and practical challenges in order to reach perfect form of dispute resolution and free mediation from the status of experiment.

The present paper shall discuss essence and importance of mediation, its place in science and mediation as a profession. Also will be discussed in

* BA Student at Ivane Javakhishvili Tbilisi State University.

details basic principles of ethics by comparing ethical codes of mediation, main ethical challenges of mediators' activity. By analyzing established models of mediation, we will get the answer to the question: does practice bring us to perfection in mediation process? Besides, we will pay attention to not only theoretical grounds of ethics, but by discussing legislative regulations of different countries, codes of ethics of mediators, we will be able to differentiate ethical challenges and look for the solution ways.

2. Mediation: Interdisciplinary Field and Profession

2.1. Essence of Mediation and Its Importance in Dispute Resolution Process

- I understand you. I understand you very well...
- We may think what caused this situation?
- Let's look for reason of your dissatisfaction and think how to eradicate it...

These rhetorical questions and phrases reflect well what a person needs in mediation process: support, condolence and equality. I think that these three principles collaborated by me determine effective and efficient relationships typical not only to dispute resolution but also represents the basic for arts and gives us the feeling of safety. However, it is disputable and often is an unanswered question – where is the limit between these three principles and equity, justice and equity.

Unlike classical legal institutes, mediation offers dispute resolution process based on relationships, communication where mediator has unconditional freedom to look for justice – support creating just mediation agreement with procedural justice. It represents the negotiation process where the neutral person helps the opposing parties and/or their representatives to finish the dispute with mutually beneficial agreement. Therefore, the main assignment of mediation is to restore and keep social relationships between the parties which is easy to reach by negotiations as eradicating different views of the people can be reached by negotiations.¹

¹ Fisher R., William U., *Getting to YES, Negotiating Agreement Without Giving In*, Second Edition, Harvard Negotiation Project, Penguin Books, New-York, 1991, Introduction, 7.

Mediation is often discussed as “preparatory”, the beginning stage before court or arbitration proceeding.² It is support and help to negotiations.³ Therefore, mediation has big importance in order to maintain stability of civil rotation as by structured negotiation process, with the help of neutral third person and undertaking responsibility the parties try to find result eradicating the conflict mutually beneficial for both parties and by focusing on interests, determine future perspectives of the relationship.

2.2. Place of Mediation in Science

Mediation, as the form it has today, originated in order to resolve easy conflicts in the spheres of residency and cohabitation and to escape court proceedings.⁴ While mediation was developing as useful, informal, voluntary and cooperative dispute resolution process for the customer, raise of social challenges, existence of different forms of relationship, made it necessary to analyze it in scientific field and introducing some legal frameworks.⁵

In scientific field in order to determine the place of mediation, firstly conflicts shall be psychologically analyzed. There is no uniform definition of conflict, however, everybody agrees that it represents opposition between two or more people caused by contradiction due to their views, interests. During the conflict, two positions merge, mutual interests of the parties by integral agreement and compliance are defined.⁶ Therefore, it represents the social science category, one of the basic points of psychological study which is the inseparable part of the society. However, in case of conflict escalation, when it cannot be controlled science of jurisprudence enters trying to resolve

² *Guillemin J.F.*, Reasons for Choosing Alternative Dispute Resolution, ADR in Business-Practice and Issues across Countries and Cultures, Vol. 2, Kluwer Law International BV, The Netherlands, 2011, 35.

³ *Stitt, Allan J.*, Mediation: a Practical Guide, Cavendish Publishing, London, 2004, 1.

⁴ *Astor H., Chinkin Ch.*, Dispute Resolution in Australia, Butterworths, 2nd ed., 2002, 14.

⁵ *Harman J.*, From Alternative to Primary Dispute Resolution: The Pivotal Role of Mediation in (and in Avoiding) litigation, Speech delivered at National Mediation Conference, Melbourne, Australia, 2014, 7.

⁶ *Fisher R., William U.*, Getting to YES, Negotiating Agreement Without Giving In, 2nd ed., Harvard Negotiation Project, Penguin Books, New-York, 1991, 10.

conflicting situation with established norms.⁷ As conflict includes all spheres of cohabitation, it equally refers to other sciences: business, politics, medicine and etc.

Due to abovementioned, it is undisputable that mediation is interdisciplinary field as its action's basic point refers to controlling conflicting situation. Social or humanitarian sciences, business or economics, politics – each of them is closely linked to mediation. However, mediation is mostly connected to research legal sciences as mediation originated from its basis and mediation agreement requires structural procedures which shall comply with law and order.

2.3 Mediator: Profession, Experimental Activity or Additional Income

Mediation process is moderate negotiation conducted by neutral, impartial third party – the mediator. It shall be noted that negotiation does not always mean mediation, with its essence this latter is always connected to the first one. It is known that from very old times, mediation was used in order to settle international, ethnical and different types of disputes, however, with different names: “mediating”, “interceding”, “offering settling services”.

Development of mediation institute gave different shade to the term mediation and its definition only according to the Latin term – “middleman” – was not enough. Hence, there is an attempt to generalize professional initials of mediation and to remove characteristics typical to experimental activity.

Even though many researches have been made regarding conducting mediation process,⁸ mediator's style,⁹ skills,¹⁰ for modelling integration of

⁷ *Khubua G.*, Legal Theory, Meridiani, Tbilisi, 2012, 24, (in Georgian).

⁸ *Moore Ch.W.*, The Mediation Process: Practical Strategies for Resolving Conflict, 4th ed., 2003, 17.

⁹ *Kressel K.*, Mediation research, 2007, 12, *Della Noce D.J.*, Seeing Theory in Practice: An Analysis of Empathy in Mediation, 2009, 43.

¹⁰ *Hedeen T., Raines S., Barton A.B.*, Best Practices for mediation training and regulation: preliminary findings, Association of Family and Conciliation Courts, 2011, 112.

theory and practice,¹¹ we can rarely find materials connected to mediator's profession in legal circles.¹² *Mosten (2001)* and *Lenski (2008)*, both write how to create career in mediation, however none of them state about empirical researches regarding mediation profession.

While discussing professional basics of mediation, it is important to analyze *U.S. News and World Report* regarding established requirements for executing mediation practice,¹³ appealing 30-40 hours training courses. After finishing this course, the person becomes the professional mediator and is given the license to execute mediation practice. Due to structure of the program, readiness of the person, potential improper skills to conduct mediation, inadequate reputation of the person, lack of competition are stayed beyond attention and mediation becomes alike experimental activity. In fact, such regulation risks mediation profession as two main factors, experience and reputation of the mediator, will not be decided according to the training courses and lack of qualification requirements regulation in this sphere, temptation of additional compensation represents mediation profession attractive to everybody.¹⁴

Besides, it is important to discuss academic qualification of professional mediators in order to conclude, is mediation auxiliary and not main profession which is one of ethical challenges of mediation. Research conducted in USA¹⁵ stated that most employees of mediation are lawyers, next are representatives of humanitarian and social sciences, psychologists and social workers are at the last place with employees of business. Therefore, mediation, as an independent profession, is still developing and with its universal character it will be hard to link its profession to only one field.

¹¹ *Zariski A.*, A Theory Matrix for Mediators, 2010, 20.

¹² *Raines S.S., Pokhrel S.K., Poitras J.*, Mediation as a Profession: Challenges That Professional Mediators Face, *Conflict Resolution Quarterly*, Vol. 31, 1, 2013, 79.

¹³ *US News & World Report* says mediator one of the top jobs for 2008 but the problem is that there are more mediators than there are mediation jobs.

¹⁴ *Raines S.S., Poitras J.*, Mediation as a Profession: Challenges That Professional Mediators Face, *Conflict Resolution Quarterly*, Vol. 31, 1, 2013, 81.

¹⁵ *Ibid*, 84.

3. Mediation Ethics

3.1 Definition of Mediation Ethics

Ethics (Greek – Èthikē) as an established definition constitutes the philosophical doctrine regarding norms of morality, ethics, behavior of representatives of several classes, social circles, professions. Hence, it is easy to conclude that mediation ethics considering legal initials, studies existing moral, ethics and legal limits of the sphere of conflict control. Therefore, many countries have adopted codes of conducts for mediators.¹⁶ While analyzing these codes, we can see several basic principles: competence, neutrality, self-express, quality, confidentiality, advertising the services and compensation.¹⁷ Even though the legal researchers agree with these basic principles, preambles of almost every code of conduct state that it is personal a responsibility of each mediator, how to conduct the process and gives opportunity to settle the mediation activity with internal regulations. Hence, there are not many practical guidelines for legally regulating ethical issues. In this regard, the book “Mediation Ethics: Cases and Commentaries” of Ellen Waldman is interesting.¹⁸ It begins with philosophy of mediation (values, models and codes) and every new chapter represents new case and attached commentaries. According to Waldman, mediation ethics has three bases: autonomy, procedural justice and “fruitful” exit.¹⁹ Autonomy has the biggest place among these three and it is full with ethical dilemmas such as: balancing emotions, strength, information and self-determination from the parties and while debate of the parties, the mediator has the dilemma of good faith, justice and disclosing relevant information

¹⁶ *Leynseele P.V., Dolezalova M.*, Ethics in Mediation, 2012, 1.

¹⁷ *Burns R.P.*, Some Ethical Issues Surrounding Mediation, Fordham Law Review, Vol. 70, Issue 3, 2001, 695.

¹⁸ *Waldman E.*, Mediation Ethics: Cases And Commentaries, San Francisco, Jossey-Bass, 2011.

¹⁹ *Waldman E.*, Mediation Ethics: Cases And Commentaries, Chapter 1, Values, Models, and Codes, San Francisco, Jossey-Bass, 2011, 16.

3.2 Established Models of Mediation Ethics

Aristoteles linked ethics with the question: what shall we do to separate justice and injustice? Two models of mediation ethics have been inculcated in legal literature: regulatory and practical.²⁰ According to the regulatory model, higher professional society create general standards of conduct rules which are mandatory for everybody. Critics of this model, David Luban, William Simon and Christine Parker²¹ state that this model leaves real relationships and obligations of the parties carelessly. Its formal and less practical character creates illusion of compulsion and does not deal with the challenges we will discuss. Therefore, practical model was created which creates mandatory rules for mediators' conduct considering the specific "scenario". In this case, general conceptions are repulsed and attention is given to precedents that may be used in any other similar circumstances. Supporters of this model, who also are lawyers of Anglo-American law countries, consider that the main advantage is that such precedents are created inside itself legal society and is not regulated by any higher professional society. Therefore, it is more relying on the relationship, dynamic and flexible unlike hierarchical, formal regulatory model.

Attractiveness of the practical model in mediation process is supported by the following arguments: mediation is a process based on certain relationships and does not need traditional approaches typical to regulatory models; mediation is considered as the dispute resolution tool not having the united structure, its non-structural character does not refuse to the existence of united model of ethical regulations; mediation is the process based on the interests and needs highly qualified flexibility.

²⁰ *Crowe J.*, Mediation Ethics and the Challenge of Professionalization, *Bond Law Review*, Vol. 29, Issue 1, 2017, 6.

²¹ *Parker Ch., Evans A.*, *Inside Lawyers' Ethics*, Cambridge University Press, 2nd ed., 2014, 3; *Hodson C., Sullivan N.*, 266–8; *Luban D.*, *Lawyers and Justice: An Ethical Study*, Princeton University Press, 1988; *Simon W.*, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998); *Parker Ch.*, *Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness*, 2002, 25 *University of New South Wales Law Journal*, 676.

3.3 Comparative Analysis of Principle of Mediation Ethics and Codes

Mediators often have the dilemma, which important principle to use from ethical guidelines. The mentioned principles are general for almost all active ethical codes. However, countries and mediation centers create different approaches due to their social conditions and development specificity. The authors of the codes including association of alternative dispute resolution, family mediation academy, professional mediators of American Bar Association indicate ten general principles:²²

1. **Conflict of interests** includes directly personal, professional, financial interests or outcomes of mediators subject to recusing the case. Such obligation becomes even more complex when it comes to indirect interests (for example, mediator works in the company interested by the outcome of the case). In such case volume of non-straightforwardness of the interest is decisive which determines chance of the mediator to stay in the case. This issue is addressed by the paper of Prof. Frank Sander “Headline Test”²³ connected to the feelings of the mediator when he/she is shown on the first page of the newspaper in negative context; 2. **Competence/qualification** – every mediator knows his/her competence area. Therefore, they shall try to recuse the cases connected to risks and need special knowledge. Mandatory licensing and qualifying trainings derive from this principle as well; 3. **Impartiality** shall be accompanying the mediator during the whole process. The mediator shall be able to control the words, feelings and dependence, influence, manner and even body language. Hence, the mediator shall use so called “even-handed approach”; 4. **Voluntariness**: even though mandatory court mediation exists, mediation is voluntary meaning the free will of the participation, action, settlement or continuing the dispute by the parties; 5. **Confidentiality**, includes two aspects: protecting the secrecy of the process while communicating with third parties by the mediator; not disclosing information gained at the private meeting with the parties. Besides, mediator shall

²² Hoffman D.A., Ten Principles of Mediation Ethics, Boston Law Collaborative Journal, 2005, 56.

²³ Sander F., Headline Test. Dispute Resolution Magazine, Vol. 19, 2012, 14.

inform the parties regarding appropriate limits in mediation process.²⁴ ²⁵ **6. Do not harm** principle derives from Hippocratic oath obliging the mediator to improve individual approach in every different situation. In this case, attention is paid to person having special, psychological needs (which do not cause limited legal capacity). Mediator shall try to avoid adding fuel to the fire and control his/her and parties' emotions.²⁶ **7. Self-determination principle** is connected to gaining maximum information from the parties and determining interests which also requires the mediator to avoid dominative condition of either party;²⁷ **8. Informed consent** means participating in voluntary mediation and also terms of mediation agreement. The mediator shall inform the parties about institute, process and outcomes of mediation; 9. Obligations to third parties – third parties shall be protected from the damage caused by the mediation agreement. Therefore, mediator shall discuss influence of the agreement on third parties;²⁸ **10. Good faith** in mediation process includes obligation of the mediator to clearly inform the parties about his/her qualification and experience and also depending on the issues from the private meetings which substantially affect the declaration of intent and establish reasonable fee for services.²⁹

Comparative analysis of mediation ethical codes indicate that even though basic categories of the principles exist, keeping independence and impartiality and principles to avoid conflict of interests are defining mediation ethics as the abovementioned derives from these principles. They give

²⁴ *UIA Forum of Mediation Centres*, Practice Guideline 1: Confidentiality in Mediation, Good Practices in Confidentiality adopted in Dublin, 7-10 September, 2007, 1.

²⁵ *Greenberg E.*, Confidentiality: The Illusion and the Reality—Affirmative Steps for Lawyers and Mediators to Help Safeguard Their Mediation Communications, Vol. 6, NYSBA, 2013, 10.

²⁶ *Hoffman D.A.*, Ten Principles of Mediation Ethics, Boston Law Collaborative Journal, 2005, 58.

²⁷ *Nolan-Haley J.*, Self-determination in International Mediation: Some Preliminary Reflections, Fordham University School of Law, 2007, 3-4.

²⁸ *Armengol V.A.*, The Principles of Mediation and the Role of Third Parties in Peace Processes, Norwegian Peacebuilding Resource Centre Report, September 2013, 5.

²⁹ *Jr. Burns R.J.*, Mediation Techniques and Why Honesty is Always the Best Policy, Perry Damp Dispute Solutions Report, 2014, 7.

the parties the feeling of protection and reliability. For example, in *Preamble of Code of Ethics for Belgium of Accredited Mediators*³⁰ it is specifically stated that mediator cannot exercise mediation practice if impartial, independent character of the activity will not be guaranteed taking into consideration personal, material or moral interests. Substantially similar approach is in *France CMAP*³¹ requires the supervising committee to control limiting mediators with these principles; *Ethical Guidelines for mediators in Australia*³² additionally sets principle of transparency obliging the mediator to give the parties information necessary for evaluation and conclusion. In addition, the mediator has the right to terminate the process in case the named legal ground exist, extends confidentiality obligation in order to limit communication with media; regulations of *Czech* includes only principle of impartiality, other guidelines regulate different centers from international practice;³³ and with respect to *USA*, as federal law allows to regulate different sphere by the states, the best principle and limiting instrument for mediators is

3.4 Ethical Challenges: Practical Dilemmas in Mediation Process

Improvisation for mediator is the biggest weapon as conducting the process by the mediator needs different approaches. Using one specific model in mediation activity is excluded which itself is one of ethical challenges.³⁴ Despite existence of general conception in mediation ethics, every other instance may create need of using new models.

The researches³⁵ have revealed that in mediation practice not only looking for an appropriate model is the challenge for the mediators. There also

³⁰ Belgian Code of Ethics for Accredited Mediators by Federal mediation Commission, 2007.

³¹ The Centre for Mediation and Arbitration of Paris.

³² Ethical Guidelines for Mediators in Australia by The Law Council of Australia.

³³ Code of Ethics for Lawyers-Mediators by Czech Bar Association .

³⁴ *Crowe J.*, Mediation Ethics and the Challenge of Professionalisation, *Bond Law Review*, Vol. 29, Issue 1, 2017, 8.

³⁵ *O'Brien R.A.*, Amending the Model Rules to Include the Role of Lawyer as Mediator: The Latest in the Debate, *Georgetown Journal of Legal Ethics*, 1998, 107-108.

are bigger challenges for mediators morally and ethically: 1. Skills required for the process are often beyond the limits of mediators' readiness (for example, determining volume of violence, effective see of the party); 2. Impartiality of the mediator when arguments of one party is more convincing, has sympathy or contrary antipathy for the parties; 3. Protection of confidentiality during unjust and unfair mediation settlement; 4. Settlement when track of physical or physical violence is apparent; caused by mental discord or lack of information; 5. Struggle between impartiality and correct decision, desire of controlling process for just decision; 6. Struggle between neutrality and needed legal or therapies help; 7. Potential damage to the parties in case they do not reach the decision or the decision will not solve the problem; 8. Use of mediation process by the parties in order to get information, gain time and blackmailing the other party; 9. Conflict between the interests of the mediator and valuable process of the parties (for example, when the court forces the mediator to finish the case fast, using personal contacts by the advocates).³⁶

Dividing into categories is factual and, in most cases, contradict each other; however, several important conclusions may be made by differentiating such dilemmas: 1. Categorization helps the mediator to define different situational approaches; 2. It is essential to create practical guidelines and determine strategies to control the process; 3. Most of dilemmas are linked to self-determination which threatens the impartiality and neutrality of the mediator.³⁷ The latter may be illustrated by the court mediation. Nowadays, the disputants without the representatives more rarely engage in court mediation process. Therefore, it is important for the representative to "trade" and settle and not to get close and analyze the problem radically. In addition, we rarely see creative decisions in court mediation caused by the "desire" of the advocates and mediators to transfer everything to financial and legal rails. Therefore, mediation becomes more evaluative, process oriented than

³⁶ *Robert A., Bush B.*, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications. A report on a Study for The National Institute For Dispute Resolution, NIDR, 1992, 36.

³⁷ *Heidi N., Burgess G., Glaser T., Yevsyukova M.*, Transformative Approaches to Conflict. University of Colorado Conflict Research Consortium Transformative Approaches to Conflict, 1996, 34.

facilitative.³⁸

Abstractive character of code of ethics only define the mediation and in real restricts the parties and the mediator. Hence, synthesis of procedural and just mediation is doubted.³⁹ For this reason, it would be better to throw away inspirational and grandiloquent language and focus more on practical initials by the authors. If the mediation ethics code is created for mediators and the parties, it is important to comply with practical challenges.

However, everything is not as easy as it seems and reforming ethics codes may not be solving other dilemmas. One more ethical challenge is connected to the first professional activity of the mediator. As stated above, mediating in most cases is the additional activity causing conflict in the spheres of time, involvement and differentiating the interests.⁴⁰ Hence, law firms or private mediators cannot any more be representatives due to their participation in mediation. In small number societies, where big part of society may know the mediator, establishing such limits may hinder improvement of mediation practice.⁴¹ Can the arbitrator be the mediator in the same case or contrary, mediator the arbitrator?! – this question is still not answered. For this reason, it is better to limit the rights of mediator by legislation – be involved in the proceedings in court or the arbitration, as the advocate in mediation process for protecting one party's interests.

4. Conclusion

For mediation, as a developing institute, it is important to make more fundamental changes with respect to professionalism and in order to overcome ethical challenges. Less qualification requirements for mediators

³⁸ *Fuller Lon L.*, Mediation-Its Forms and Functions, 44 S, California Law Rev., 1971, 305.

³⁹ *Robert A., Bush B.*, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications, A report on a Study for The National Institute For Dispute Resolution, NIDR, 1992, 36.

⁴⁰ *Raines S. S., Pokhrel S.K., Poitras J.*, Mediation as a Profession: Challenges That Professional Mediators Face, Conflict Resolution Quarterly, Vol. 31, 2013, 94.

⁴¹ *Gutman J., Grant J.*, Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities, La Trobe Law and Justice Research Paper Series, 2017, 105.

for attractiveness of this activity risk professionalization and makes it an additional source of income which may become one of the hindering factors. Besides, more research is required in order to perfect ethical models and discuss challenges by merging theory and practice considering the specific territorial and social areas. Such need is clear according to the analysis of codes under the present paper and basic principles category leaving many questions in ethical sphere without answer. Reformation of ethical codes, introducing additional guidelines and throwing off inspirative and grandiloquent language, supervising development of mediation will be the step forward regarding professionalization.

For future of mediation, it is necessary to fully focus on cooperation by the practitioners and policy creators. Practical challenges of the researches presented in the paper make it clear that while introducing regulations, more attention shall be paid to interests of practising mediators. Lack of limits and nonobligatory character of conduct standards may misguide the mediator while conducting practical activities. Even though improvisation has the biggest role in mediation process, while analyzing ethical challenges, necessity of standardization and structuring is clear in order to support mediation activities with less ethical dilemmas.

And lastly, “I understand you”. In real how can the mediator listen and condole? What limits the mediator? Can the personal motives influence the mediators? Can the divorced mediator or co-author of the car accident participate in such case as the mediator? These are the questions that cannot be regulated by legal acts.

“The most powerful weapon I use with my clients is that I tell them: I am listening to you with attention and I understand you” – states one American mediator Joy S. Rosenthal.⁴² “I am listening” and “I understand” are what the parties demand. Support and condolence in the process, structured trainings and minimal standards – offered ways to solve ethical dilemmas need attention from the practitioners and theorists.

⁴² *Rosenthal J.*, I Hear You, Joy Rosenthal’s blog, 2017.

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