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Advocate Role in the Mediation Process of Civil Legal Disputes

The issues, related to the representational authorities of lawyers in the process of mediation of civil law disputes in Georgian law are considered in the article. In the paper, significant place is given to the assessment of expedience of lawyer's participation in mediation process; the issue of initiation by lawyer of mediation, as alternative form of dispute resolution, is also considered; the methodology of development of the lawyer's own action strategy and tactics as a result of investigation by lawyer of the best interests of the client is determined; the procedures to be implemented by the lawyer for preparation of the case and the client are also considered in the paper. Finally, legislative recommendations are formulated as a result of judgment.

Key words: Mediation, lawyer, legislative regulation, ethics.

1. Introduction

Mediation is one of the informal means of dispute resolution. "It is a procedure based on a free will of parties, during which a mediator, who does not have the right to settle the dispute finally systematically supports communication between the parties in order to reach an agreement based on responsibilities of".¹ International mediation has a longer history, than theoretical.² In 70-80s of the XX century this institute developed fast in such countries, as the USA, Australia, Canada, England and Wales.³

Mediation in Georgia was established as a result of legislative changes. The Civil Procedures Code of Georgia (hereinafter – CPCG) defines disputes to be examined by compulsory court mediation, though in case of the existence of an agreement court mediation will examine any private legal dispute.⁴

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¹ Hopt K.J., Steffek F., Mediation: Rechtsvergleich, Regelungsmodelle, Grundsatzprobleme, in: Hopt K.J., Steffek F., Mediation, Rechtstatsachen. Rechtsvergleich, Regelungen, Mohr Siebeck, Tübingen, 2008, 12. Cited: Tser-tsvadze G., Mediation as an Alternative Form of Dispute Resolution (General Review), Scientific-Research Institute of Alternative Methods of Dispute Resolution, Tbilisi, 2010, 37, <http://d252441.u-telcom.net/books/Full_Version/sajaro/mediacia.pdf>.

² Kleiboer M., Understanding Success and Failure of International Mediation, Journal of Conflict Resolution, Vol. 40, № 2, 1996, 360, <<http://www.engagingconflict.it/ec/wp-content/uploads/2012/06/Kleiboer-understanding-Success-and-Failure-of-International-Mediation.pdf>>.

³ Alexander N.M., Global Trends in Mediation: Riding the Third Wave, Centrale für Mediation, Otto Schmidt Verlag DE, 2003, 7.

⁴ Here should be noted that by Part I of Article 187³ of Civil Procedure Code of Georgia the competence of court mediation is confined and it is determined that within the scopes of court mediation can be examined disputes arising from family law, with the exception of adoption of child, invalidation of adoption of child, restriction and forfeiture of parent's right. Court mediation is entitled to examine disputes arising from neighbor law, hereditary law and any other dispute in case of agreement of the parties. Legislative Herald of Georgia (hereinafter GLH), № 1106-Is, 14.11.1997, [Amendment: GLH, №5550-rs, 20.12.2011]; CPCG 187³ Article, GLH, № 1106-Is, 14.11.1997, [Amendment: GLH, № 5550-rs, 20.12.2011]; A legislator also envisages other kinds of mediation, such as notary, medical, tax and others. A subject of dispute in individual cases is defined separately. Litigations under notary mediation are stated by Part I of Article 38¹ of Georgian Law on Notaries. In this case notary mediation is more limited and by this mediation is not examined the dispute, on which a special rule of mediation is established. GLH, 04.12.2009, №2283-Is [Amendment: GLH, № 5851-Is, 16.03.2012]; Disputes under medical mediation are defined by paragraph "e" of Article 2 of № 80 statement of the Georgian government about taking

Resolution of disputes by means of mediation is justified, if it is arranged to satisfy the best interests of the parties by this way and the process is not wasting financial and time resources against a client's interests. Accomplishment of this objective greatly depends on the participation of advocates. Persons, who are carefully preparing for mediation, are getting better results than those who don't do it.⁵ Considering this it is surprising why people are starting negotiations without the proper preparation.⁶ At this stage actions done by the advocate properly determines not only fulfillment of a concrete client's interests, but also the establishment of the confidence of the society to mediation, the development of the mediation institute.

"A Georgian legislator has been confided only with episodic regulation so far"⁷ and a discussion connected with the regulation of mediation in Georgia is starting only now"⁸. Accordingly at the preparatory stage of civil legal disputes an issue of advocates' role is left unanswerable, it is a legislation deficiency. It increases the importance of the issue for the purpose of revealing further changes which should be done in Georgian legislation".

The objective of the work is studying the issues connected with representative authority of advocates at the preparation stage of mediation of civil legal disputes in Georgian law, establishment of obligations and requirements to advocates, recommendations will be worked up for the improvement of legislation.

The objective will be reached by using analytical, historic and comparative legal methods and regulations important in relation to the mentioned issue will be analyzed.

After introduction in Chapter two the advisability of advocate's participation in the mediation process is estimated; in Chapter three an issue of initiation of mediation, as an alternative form of dispute resolution by an advocate, is discussed; Chapter four defines advocate's own action strategy and tactics worked up as a result of studying the client's best interests by the advocate; Chapter five concerns the preparation of the case by an advocate; in Chapter six client's preparation for the process is discussed; In conclusion are represented recommendations received as a result of research.

2. Estimation of Advisability of Involvement of an Advocate in the Mediation Process

According to statistics most of civil legal disputes are resolved by mediation.⁹ In standard cases of mediation the course of the process is meant only with participation of parties, though involvement of advocates in the mediation process is foreseen by the Uniform Mediation Act.¹⁰ Particularly according to Article 10 of the mentioned act "an advocate or other individual person, to whom is granted authority, is appointed by the party, can participate in the mediation process together with the party"¹¹. The act gives the parties free choice. The involvement of the representative in the process is not demanded, though it is possible.

In some countries the joint attendance of an advocate and a client at the mediation process is thought to be a norm. In such a case negotiations are basically done by the advocate (for example, in mediation connected with the issue of divorce). Settlement of this issue is considered to be a result of the influence of the

measures of medical mediation. GLH, 29.02.2012; organic law of Georgia of labor code 48¹ envisages handling of collective dispute by mediation, GLH, #4113-rs, 17.12.2010, [Amendment: GLH, № № 729-IIs, 12.06.2013]; tax mediation is defined by № 2742, Article 12¹, 02.06.2011, [Amendment: GLH, № 21623, 20.05.2013] order of the officer in charge of a legal entity of public law – Revenue Service – about structural units.

⁵ *Lewicki & Hiam*, 2006, 41-70, cited: *Craver C.B.*, *Effective Legal Negotiation and Settlement*, 6th ed., 2009, 46.

⁶ *Craver C.B.*, *Effective Legal Negotiation and Settlement*, 6th ed., 2009, 46.

⁷ *Tsertsvadze G.*, *Perspectives of Legal Regulation of Mediation in Georgia*, Ivane Javakhishvili Tbilisi State University, National Center of Alternative Resolution of Disputes, Tbilisi, 2013, 18, <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07.2013].

⁸ *Ibid.*

⁹ *Melnick J.D.*, *Lost Opportunities in Mediation*, *Westlaw Journal Securities Litigation and Regulation*, Vol. 19, Issue 4, 2013, 1, <<http://www.jamsadr.com/files/Uploads/Documents/Articles/Melnick-Opportunities-Mediation-2013-06-25.pdf>>.

¹⁰ This Act was Accepted in 2001.

¹¹ Uniform Mediation Act, Article 1, <<http://www.mediate.com/articles/umafinalstyled.cfm>>.

combination of local culture and alternative dispute resolution means.¹² Though it is a fact that in the mediation process of civil-legal disputes of the XXI century are dominating the advocates, which “are averting” representation in other kinds of processes.¹³

According to the opinion spread in juridical literature the representatives of the parties are advocates with special authority, which serve convincing lawful interests. Today in the theory of civil law is recognized the opinion that dealing is carried out in the representative’s personality, but the results in relation to the representee. The fact that the results of dealing concern the represented person is based on a will of acting persons and a law recognizing these persons’ will.¹⁴

“The Civil Procedure Code of Georgia in the chapter of court mediation does not say anything about te parties’ representatives (advocates), though from the literal point of view the word “party” means as a participator of a dispute directly, as well as the participator’s representative. Accordingly it is not necessary to emphasize the advocate’s participation in the mediation process as an individual legislative norm. So it can be said that advocates can freely participate in the mediation process“.¹⁵

In Georgia questions connected with advocate activities are regulated by the “Law of Georgia on Advocates”. “An advocate has the right to represent and protect a client, his/her rights and freedoms in constitutional, Supreme and general courts, arbitration and investigative bodies, with other physical and juridical persons”.¹⁶ Participation of an advocate directly in the mediation process is not foreseen by this norm either, though it is admitted the client’s representation “with other physical and juridical persons”, it is stated that an advocate has the right to be a representative in the mediation process.

*ABA Model Rules of Professional Conduct*¹⁷ defines cases when an advocate must not represent a client and when the relation already exists to terminate it.¹⁸ Hence it can be stated that an advocate before being appointed as a representative in the case at the preparatory stage is obliged to investigate the reasonability of appointing him as a representative, whether there is a basis of waiving the representation. If the answer is positive there must be taken the roper measures. Not considering the mentioned demand will cause negative results for the client, as he/she will waste time and financial resources without any results.

As it was already mentioned before stating the reasonability of the advocate’s representation it must be defined to what extent it is reasonable. What is implied in the concept of “reasonability”? For an answer to this question concrete factors must be taken into account, namely: those positive and negative results, which generally characterize the involvement of an advocate in the mediation process; circumstances of each concrete case, specifics; personal and job description of the advocate, which is thought to be a representative.

The mentioned factors must be inevitably taken into account, because as a rule, the action of the parties’ representatives substantially defines the results of the process.

¹² Coltri L.S., *Alternative Dispute Resolution a Conflict Diagnosis Approach*, 2nd ed., University of Maryland, University College, 2010, 78.

¹³ Rubin M.A., Spector B.F., *Ethical Conundrums For the 21st Century Lawyer/Mediator* Toto I’ve got a Feeling We’re Not in Kansas Any More, *American Journal of Mediation*, Vol. 2, 2008, 75.

¹⁴ Chanturia L., *General Part of Civil Law, Guideline*, Tbilisi, 2011, 422.

¹⁵ Tsertsvadze G., *Perspectives of Legal Regulation of Mediation in Georgia*, Ivane Javakhishvili Tbilisi State University, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 238, <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07.2013].

¹⁶ The Law of Georgia on Advocates, Article 4, Part I, № 976 20.06.2001.

¹⁷ The ABA Model Rules of Professional Conduct Adopted in 1983. The Mentioned Act is Ethical Rules, which Replaced the Act Adopted in 1969 Model Code of Professional Responsibility.

¹⁸ ABA Model Rules of Professional Conduct, Article 1.16.

2.1. Possible Positive Results of an Advocate's Participation in the Mediation Process

The main role of advocates in the mediation process is giving advice and provision of the parties (representees) with information connected with a question under review.¹⁹ Advocates can explain a client the point of the mediation process and positive sides of this process; can prepare a client for cooperative negotiations; an effective advocate can assist a client to find a reliable mediator, which will be able to deal with a subject of dispute.²⁰ From the ethical point of view a mediator is prohibited to give legal advice during the mediation process.²¹ I.e. the involvement of advocates is necessary to explain the parties their legal status that will help them to comprehend their own interests.²² Besides representatives are obliged to give parties information about the course of the process.²³ Considering this it is stated that for provision of information awareness about the legal protection of the client and the course of the process the involvement of the advocate is desirable.

It should be remarked that one of the best results of the participation of advocates in the mediation process is that by the assistance of the advocate basing on the analysis of interests it is easy and simple to reach the best alternative of the agreement (hereinafter BATNA). A lawyer helps a client to clear up his/her subconscious interest, values, necessities and principles.²⁴

A lawyer can calm the excited and frightened client. In case of using evaluative mediation,²⁵ a representative will work harder with the client in order to regulate his/her unreasonable expectations.²⁶

Another positive result of the involvement of an advocate in the mediation process is that this circumstance is balancing inequality of the parties. "Neutrality"²⁷ is maintained in the process.²⁸

According to the above mentioned considering the emphasized positive factors it is stated that for maximal profit for society from mediation the involvement of representatives in the process, though very carefully, is necessary.²⁹ Persons, which don't use the representation of advocate, presumably will not be prepared and will not be able to show own positions effectively.³⁰

¹⁹ *Tsertsvadze G.*, Perspectives of Legal Regulation of Mediation in Georgia, Ivane Javakhishvili Tbilisi State University, National Center of Alternative Resolution of Disputes, Tbilisi, 2013, 236, <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07.2013].

²⁰ *Coltri L.S.*, Alternative Dispute Resolution a Conflict Diagnosis Approach, 2nd ed., University of Maryland, University College, 2010, 79.

²¹ *Ibid*, 80.

²² *Ibid*, 79.

²³ *Tsertsvadze G.*, Perspectives of Legal Regulation of Mediation in Georgia, Ivane Javakhishvili Tbilisi State University, National Center for Alternative Disputes Resolution, Tbilisi, 2013, 236 <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07.2013].

²⁴ *Coltri L.S.*, Alternative Dispute Resolution a Conflict Diagnosis Approach, 2nd ed., University of Maryland, University College, 2010, 80.

²⁵ In the theory three main kinds of mediation are distinguished: evaluative, facilitative and transformative. In the process of facilitative mediation a mediator simplifies relations between the parties. He/she can ask questions; provide the course of the process. He/she refrains from giving remarks and recommendations and enables the client to take his/her decision himself/herself. The main objective of a mediator is to clear up the parties' interests. By using transformative mediation the parties are oriented not only on taking useful for them decision, but to foresee the demands of the second parties. A mediator enables the parties to find out necessities of the opposed party. As for evaluative mediation a mediator estimates the situation, gives advice to the parties, offers ways for dispute resolution and has active influence on formation of the contents of the final decision.

²⁶ *Coltri L.S.*, Alternative Dispute Resolution a Conflict Diagnosis Approach, 2nd ed., University of Maryland, University College, 2010, 80.

²⁷ Neutrality is one of the fundamental principles of the mediation process.

²⁸ *Helm B., Scott S.*, Advocacy in Mediation, Cited: *Kestner P.B.*(ed.), Education and Mediation: Exploring the Alternatives, American Bar Association, 1988, 382.

²⁹ *Riskin L.L.*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43:29, 1982, 41.

³⁰ *Folberg J., Rosenberg J., Barret R.*, Use of ADR in California Courts: Findings & Proposals, University of San Francisco Law Rev., Vol. 26, 1992, 394.

2.2. Possible Negative Results of an Advocate's Participation in the Mediation Process

In the opinion of some people representation of an advocate in the mediation process is estimated negatively.³¹ Such attitude is caused by the following reasons:

Sometimes advocates might abuse of participation in the mediation process and in case of dishonesty for getting a certain material profit might linger the dispute in time on purpose.³² Some lawyers because of self-interest or the standard ideology of lawyers might try to distract attention of the client onto the opposite method of dispute resolving.³³ A lawyer might turn mediation into the opposite situation, which will transfer the negotiation to competitive and acute conflict.³⁴ Also advocates might have difficulty in adapting to a representative's role in the mediation process.³⁵

One of the negative results of the advocate's involvement in the mediation is that a client instead of envisaging the problem might become depended on the advocate, negotiation might be only conducted by the lawyer, not the party.³⁶ Also an advocate might use mediation as a source of getting confidential information of the opposite party.³⁷

Because of the mentioned reasons in some cases some mediators are consciously trying to increase or exclude the participation of lawyers in the process. Such cases are especially frequent in mediation when disputes concern divorce, custody over child and family relations.³⁸

2.3. Estimation by an Advocate of Reasonableness of Dispute Resolution by Means of Mediation as the Necessity Considering Circumstances of All Concrete Cases

Generally in case of a conflict parties have three possible alternatives of dispute resolution: 1. envision of a dispute purposely, ignoring the existence of a conflict, 2. assaulting, which includes legal dispute, physical or verbal arguing and 3. conciliating reaction, which implies conducting negotiations, mediation.³⁹

So negotiations are not always the best choice. In some cases for satisfaction of the parties' interests the best solution might be not conciliation, but the solution of the dispute by the third person (judge or arbiter).⁴⁰

In order to decide whether mediation is a proper means of dispute resolution in a concrete case it is necessary to take into account characteristics of each concrete situation.⁴¹

The probability of success of mediation is increasing in the case of the following circumstances: between the disputing parties there is already other case of cooperation; the dispute was not continuing long; there are external factors of conciliation "compulsion", pressure; a dispute is of low or moderate acuteness;⁴² The parties have been aware of their own objectives;⁴³ There is the possibility that by means of

³¹ Clark B., *Lawyers and Mediation*, United Kingdom, 2012, 105.

³² Tsertsvadze G., *Pespectives of Legal Regulation of Mediation in Georgia*, Ivane Javakhishvili Tbilisi State University, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 240, <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07.2013].

³³ Coltri L.S., *Alternative Dispute Resolution a Conflict Diagnosis Approach*, 2nd ed., University of Maryland, University College, 2010, 80.

³⁴ Ibid, 81.

³⁵ Clark B., *Lawyers and Mediation*, United Kingdom, 2012, 106.

³⁶ Coltri L.S., *Alternative Dispute Resolution a Conflict Diagnosis Approach*, 2nd ed., University of Maryland, University College, 2010, 80.

³⁷ Ibid, 81.

³⁸ Ware S.J., *Principles of Alternative Dispute Resolution*, 2nd ed., Printed in the United States of America, 2003, 274.

³⁹ Jernigan M., Lord R.B., *The Mediator's Role in the Family Business*, *American Journal of Mediation*, Vol. 2, 2008, 53.

⁴⁰ Glick T., *Creative Mediation*, North Charleston, 2012, 99.

⁴¹ Hames D.S., *Negotiation Closing Deals, Settling Disputes, and Making Team Decisions*, Printed in the United States of America, 2012, 11.

⁴² Domenici K., Littlejohn S.W., *Mediation Empowerment in Conflict Management*, Printed in the United States of America, 2nd ed., 2001, 41.

mediation a client will get more valuable results than it will happen if a conflict continues; For the parties it is hard or impossible⁴⁴ to conduct direct negotiations.⁴⁵ Negotiations are reasonable when both parties want to get something from each other.⁴⁶ It is also justified when: between the parties is a communication problem; there is observed the difference between their culture; other way of dispute solution on this case was unsuccessful.⁴⁷

It is important that dispute solution by mediation is not suitable for the client, whose interests can be satisfied only by applying to court.⁴⁸ Mediation can't be successful even in case of a dispute between unequal parties.⁴⁹

As it was mentioned before an advocate after having done consulting service with a client considering specifics and details of each concrete case must have the ability of solving this issue correctly.⁵⁰ In the process of taking decision an advocate must be acting considering the best interest of the client⁵¹.

2.4. The Necessity of Estimation of the Attitude of an Advocate to Mediation, as a Precondition of Appointing him as a Representative

Most lawyers don't understand mediation and don't even want to. There are at least three reasons of it: ideology of lawyers in relation to the universe, economic factors and structure of contemporary law practice, lack of training in mediation sphere.⁵²

Statistically there is about 85% of chance that a dispute will be settled by mediation. Considering this an advocate must perceive this institute as a final instance of dispute resolution and must prepare a client accordingly.⁵³

Article 1.1 of ABA Model Rules of Professional Conduct states that an advocate must have appropriate "skills" in order to become a representative in the mediation process. There arises a question: What does the concept "skills" mean? The answer is the following: For an advocate to carry out properly his own authority of representative character in mediation, it is not enough the knowledge of law, practice and those skills, which are necessary for resolution of disputes by other means. It is not enough either dispute resolution to be meaningfully resolvable by mediation.

An advocate is obliged to know specifics of mediation, to be aware of expected positive or negative results of using it, to have personal and professional characteristics, which are preconditions of representation in the mediation process; to have confidence to the mediation process.

Except the generally stated requirements in case of representation in the mediation process advocates must be charged additional obligations, which is expressed by estimation of their personal attitude to mediation.

⁴³ *Domenici K., Littlejohn S.W.*, Mediation Empowerment in Conflict Management, Printed in the United States of America, 2nd ed., 2001, 42.

⁴⁴ Here it should be mentioned that the main characteristic which differentiates mediation and direct negotiations is the Involvement of Mediator.

⁴⁵ *Folberg G.*, Mediation the Roles of Advocate and Neutral, 2nd ed., Printed in the United States of America, 2011, 242.

⁴⁶ *Hames D.S.*, Negotiation, Closing Deals, Settling Disputes and Making Team Decisions, Printed in the United States of America, 2012, 11.

⁴⁷ *Folberg J., Rosenberg J., Barrett R.*, Use of ADR in California Courts: Findings & Proposals, University of San Francisco Law Rev., Vol. 26, 1992, 410.

⁴⁸ *Ware S.J.*, Principles of Alternative Dispute Resolution, 2nd ed., Printed in the United States of America, 2003, 311.

⁴⁹ *Leviton S.C., Greenstone J.L.*, Elements of Mediation, Printed in the United States of America, 2004, 38.

⁵⁰ *Berman L.J.*, Mediations' Evolution in Social: where it has been and where it is going, Published in Advocate Magazine, 2012, 2, <<http://www.mediationtools.com/articles/EvolutionMediationSoCal.html>>.

⁵¹ *Garner B.* (ed.), Black's Law Dictionary, 8th ed., Thomson West, 2004, 1315.

⁵² *Riskin L.L.*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43:29, 1982, 43.

⁵³ *Mann V. J.*, The Mediation Paradox: Collaborative Combat, 2011, 10, <<http://www.jamsadr.com/files/Uploads/Documents/Articles/Mann-Mediation-Paradox-2011.pdf>>.

It should be noted that new generation of advocates have more knowledge about alternative dispute resolution.⁵⁴ According to researches they are choosing this institute because they believe in it and are not doing it for the purpose of getting financial profit.⁵⁵ Just such must be the advocate's personal attitude to the mediation process in order to combine and perform a representative's function properly in this process.

3. Dispute Resolution by Means of Mediation Initiated by an Advocate

Generally initiation of dispute resolution by mediation is possible by the following ways:

6. By the parties demand;
7. By the advocate's (representative) initiation;
8. On the initiative of other persons, which have business relations with the parties;
9. By court recommendation
10. As a result of the condition foreseen in the contract.⁵⁶

It might be possible that clients themselves have information about alternative means of dispute resolution, in some countries court intervenes in this issue.⁵⁷ Though considering the theme of the present work at this stage a subject of interest is dispute resolution by means of mediation initiated by an advocate. When a client is using advocate service, the proper figure is just an advocate, which must help the client in choosing and estimating methods of dispute resolution. If other person takes this function, it will be considered as intervention in the client and advocate's relations.⁵⁸ It is certain that in conducting a legal consultation advocates can offer the party several alternatives for dispute resolution.⁵⁹ If an advocate admits that dispute by court rule in any case is a single choice, such attitude of the advocate will be estimated as carelessness, inattention.⁶⁰

Here should be mentioned that in relation to the advocate's involvement in the mediation process there is so called Two-track Representation approach. It implies that advocates are able to perform the following actions in parallel regime: to represent a client in the dispute and at the same time to conduct negotiation in the client's name. One advocate will combine one function, the other one – the second function.⁶¹

It is important to establish a proper form of offer: in offering mediation for dispute resolution an advocate must emphasize that by this means the parties will be able to get what they want and need. On initiating it is not necessary to talk generally about the mediation institute.⁶²

3.1. Agreement with a Client on Dispute Resolution by Mediation

The existence of a demand, according to which lawyers are obliged to advise a client to resolve a dispute resolution by mediation is a guarantee that in relation to alternative means of dispute resolution the awareness of population will be increased, the mediation institute will be used frequently. Despite that the existence of this obligation stated in relation to advocates is a subject of dispute and an approach to this issue is not uniform, this obligation is foreseen by Article 1.4 of ABA Model Rule of Professional Conduct.⁶³

⁵⁴ Love L.P., Galton E., Stories Mediators Tell: The Editors' Reflections, *Cardzo Law Rev.*, Vol. 34, 2013, 2412, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351004>.

⁵⁵ Clark B., *Lawyers and Mediation*, United Kingdom, 2012, 81.

⁵⁶ Leviton S.C., Greenstone J.L., *Elements of Mediation*, Printed in the United States of America, 2004, 10.

⁵⁷ Kovach K.K., *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 128.

⁵⁸ Folberg J., Rosenberg J., Barrett R., *Use of AD R and what they need in California Courts: Findings & Proposals*, *University of San Francisco Law Rev.*, Vol. 26, 1992, 382.

⁵⁹ Rosenbaum J.M., *How Lawyers Benefit from Early Neutral Evaluation*, 2013, 1, <<http://www.law360.com/articles/426737/how-lawyers-benefit-from-early-neutral-evaluation>>.

⁶⁰ Ware S.J., *Principles of Alternative Dispute Resolution*, 2nd ed., Printed in the United States of America, 2003, 13.

⁶¹ Kovach K.K., *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 135.

⁶² Beer J.E., Packard C.C., *The Mediator's Handbook*, Printed in Canada, 4th ed., 2012, 19.

⁶³ Kovach K.K., *Mediation in a Nut Shell*, 2nd ed., Thomson west, Printed in the United States of America, 2010, 121.

From this point of view the practice existed in the USA is important. Most American clients before starting a dispute gets consultation from an advocate. Lawyers can assist them in making a choice between a negotiation and a dispute. Most states are obliging advocates to provide a client with information about alternative ways of dispute resolution.⁶⁴ One of them is Minnesota.⁶⁵ In the state of Georgia there is a demand, according to which each member of the advocates association must have education connected with an issue of the alternative dispute resolution.⁶⁶ Generally a number of legislators obliging advocates to offer using alternative means of dispute resolution are growing.⁶⁷

It is natural that offering the dispute resolution by mediation is not done without preconditions. There are several factors to be taken into account by an advocate on initiating the usage of mediation. These are: a conciliation desire from the client; the nature of relation between the parties; time factor; the parties' positions;⁶⁸

Besides on initiating offer an advocate might have a professional obligation to inform a client about positive and negative sides of mediation or any other process of dispute resolution.⁶⁹ The best approach is to start with positive sides.⁷⁰ It will be a guarantee that a client at least will be attentively to the offer and see that the process is directed to satisfy his/her interests.

After informing about positive sides it is desirable to explain the process of mediation.⁷¹ It should be also foreseen that offering dispute resolution is never late, even in the period of the court dispute process or the day before the process.⁷²

3.2. Agreement with an Opponent about Dispute Resolution by Mediation

In many cases an attempt of one of the parties to negotiate might be finished with no result, if the other party is not interested in it, cannot see any point in the negotiations.⁷³ The success of the mediation process depends on the will of both parties.⁷⁴

Regardless of this, as a rule, advocates don't wish to offer the opponent's advocate to resolve a dispute by mediation. There is a question: if the party has a strong position, why does it want to avoid court proceeding?⁷⁵ Really offering the opponent party dispute resolution by mediation does not mean revealing of weakness. This action was perceived in such a way 10 years ago, but now it is not so.⁷⁶ I.e. advocates must recognize that dispute resolution by mediation does not mean the confirmation of own position weakness. Recognition of this will become the precondition of the above mentioned problem.

⁶⁴ *Nolan-Haley J.M.*, *Alternative Dispute Resolution in a Nut Shell*, Printed in the United States of America, Thomson West, 3rd ed., 2008, 112-113.

⁶⁵ *Kovac K.K.*, *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 128.

⁶⁶ See Ga. R. ADR rule VIII, 1999, cited: *Kovach K.K.*, *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 128.

⁶⁷ *Folberg G.*, *Mediation the Roles of Advocate and Neutral*, 2nd ed., Printed in the United States of America, 2011, 54.

⁶⁸ *Nolan-Haley J.M.*, *Alternative Dispute Resolution in a Nutshell*, Printed in the United States of America, Thomson West, 3rd ed., 2008, 112-113.

⁶⁹ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 129.

⁷⁰ *Murray O.R.*, *The Mediation Handbook: Effective Strategies For Litigators*, Revised ed., Bradford Publishing Company, Colorado, 2010, 44.

⁷¹ *Ibid*, 46.

⁷² *Berman L.J.*, *The Funnel of Conflict Resolution, Part one: The Stages of Conflict and Opportunities for Resolution*, Published by Mediate. Com, 2011, 2, <<http://www.mediate.com/articles/bermanfunnel.cfm>>.

⁷³ *Luecke R.*, *Harvard Business Essentials Your Mentor and Guide to Doing Business Effectively Negotiation*, Printed in the United States of America, 2003, 46.

⁷⁴ *Pel M.*, *Referral to Mediation a Practical Guide for an Effective Mediation Proposal*, The Hague, 2008, 71.

⁷⁵ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 156.

⁷⁶ *Berman L.J.*, *Mediation's Evolution in Social: Where it has been and where it is going*, Published in Advocate Magazine, 2012, 2, <<http://www.mediationtools.com/articles/EvolutionMediationSoCal.html>>.

In order to reach the agreement of the party to start negotiation process are the following ways: to state the necessity of it; to define results without conducting negotiations; it is also important to promise support to the party.⁷⁷ First of all an advocate must try to understand real needs and interests of the opponent. Understanding its position does not mean agreement on it, though it will facilitate to review own position.⁷⁸ Knowledge of this information will facilitate offering such proposals, which will be profitable for both parties.⁷⁹ Accordingly it is stated it is necessary by all means to clear up the interest of the opposite party: On the basis of the mentioned information the advocate will be able to initiate dispute resolution by mediation in the form admissible to him.

All the above mentioned facts must be foreseen at the preparatory stage of mediation on offering the dispute resolution by mediation to the opponent party.

4. Define by an Advocate the Strategy/Tactics of Own actions in Accordance with a Client's Motive and Best Interests

If in resolving a dispute by mediation an advocate acts using the approach received in the case of using other means of dispute resolution, the process will have no result.

“When “mediation is a relevant way, general approaches are not acceptable. The problem is that in the opinion of lawyers such approaches are right in any cases, where they are participating as lawyers”.⁸⁰ Juridical practice is saturated with competitiveness elements, starting with finding and maintaining clients and ending with competitiveness process itself. Students begin to study it from the very start in a law school.⁸¹

Those actions, which an advocate is carrying out in resolving a dispute, are not admissible in searching for optimal ways of conflicts resolution. It does not mean that not all the ways used in resolving disputes are necessary, though many of them might be necessary.⁸² In the opinion of many practical lawyers should learn different strategies and tactics for using in the mediation process, though it is still a problematic issue. Many practical lawyers will not have any interest to learn new and innovative approaches of the advocate practice, before they have enough motivation, the sense that such a demand exists and the profit increases. Moreover most advocates are often against all kinds of changes.⁸³ A

It should be also noted here that the Advocates Professional Ethics Code of Georgia states the priority principle of client's interests, namely it is stated that: “An advocate must always act based on client's interests and putting them before personal and other persons' interests, though in order to protect the client's interests the advocate's actions must correspond to legislation and the Professional Ethics Code.”⁸⁴ It allows us to conclude that advocates are obliged to define their own strategy according to the best interests of a client. Accordingly it is stated that it is necessary for an advocate to define his/her own strategy/tactics and on defining it must foresee the client's real interest of commencing a dispute and the objective he/she is trying to reach.

⁷⁷ *Luecke R.*, Harvard Business Essentials Your Mentor and Guide to Doing Business Effectively Negotiation, Printed in the United States of America, 2003, 47.

⁷⁸ *Jacobs-May J.*, The Psychology of Mediation, Edition of the Recorder 2011, 1, <<http://www.jamsadr.com/files/Uploads/Documents/Articles/Jacobs-May-Recorder-04-04-11.pdf>>.

⁷⁹ *Craver C.B.*, Effective Legal Negotiation and Settlement, 6th ed., 2009, 52.

⁸⁰ *Riskin L.L.*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43:29, 1982, 45.

⁸¹ *Kovach K.K.*, Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, Alternative Dispute Resolution Yearbook, Tbilisi State University Press, 148, <http://www.library.court.ge/upload/lib_ADR.pdf>.

⁸² *Murray O.R.*, The Mediation Handbook: Effective Strategies for Litigators, Revised ed., Bradford Publishing Company, Colorado, 2010, 41.

⁸³ *Kovach K.K.*, Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, Alternative Dispute Resolution Yearbook, Tbilisi State University Press, 147, <http://www.library.court.ge/upload/lib_ADR.pdf>.

⁸⁴ Code of Ethics for Advocates of Georgia, Article 5.

When defining the best interests of the client it should be foreseen that the difference between a person's positions and interests is decisive.⁸⁵ Just the client's interest⁸⁶ must be a defining factor of the advocate's actions.

For provision of this one of the ways will be working up the united specialized ethic code for those who are clients in mediation. It might be possible that the addition of comments to the existed laws might be thought to be an alternative.⁸⁷

On talking about interests it should be also noted that later in the course of the process a mediator will be trying to define them too.⁸⁸ By this way the mediator will be able to increase a number of possible alternatives of conciliation.⁸⁹ At the preparatory stage the full elucidation of this issue by the advocate will simplify for the client to answer the mediator's relevant questions.

4.1. Questioning of a Client about the Real Motivation of the Commencement of a Dispute and Interests

Before solving a problem it is necessary the point of it,⁹⁰ though practice shows that in many cases advocates do not take into account clients' real interests.⁹¹ Clients often do not show their intentions, when being questioned about it.⁹² It is happening regardless of the fact that really just these interests show in which direction it is necessary to conduct work.⁹³

An advocate is requested to be a good listener.⁹⁴ He must ask a client what is important for him/her and why. This question allows defining different versions of conciliation.⁹⁵ As a rule, the parties' "positions" are mutually exclusive, incompatible, while "interests" are compatible and in some cases identical too.⁹⁶ This is necessary in order to prepare a mediation plan.⁹⁷

Though clearing up the client's interests might be more difficult than a client or an advocate can imagine himself/herself. A concept of "interest" is defined and it is considered to be "what gives people motivation", "what conditioned solution of the issue in this way", whereas "position" is a result of a person's decision.⁹⁸ In other words a position is a result but an interest – motivator, which defines formation of position in a certain form.⁹⁹ In many cases it is impossible to reach the position, while it is possible to

⁸⁵ *Fisher R., Uri W.*, Getting to Yes Negotiating Agreement Without Giving, 2nd ed., Printed in the United States of America, 1991, 23.

⁸⁶ There are often cases when an advocate is not trying to clear up a client's interests, is oriented on getting more profit, and does not admit that the client might have other wish. Resulting from the fact that the mediation process favors communication between the parties, there is more probability that the real interests of the parties must be stated.

⁸⁷ *Kovach K.K.*, Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, Alternative Dispute Resolution Yearbook, Tbilisi University Press, 151, <http://www.library.court.ge/upload/lib_ADR.pdf>.

⁸⁸ *Kovach K.K.*, Mediation Principles and Practice, 3rd ed., Printed in the United States of America, 2004, 188.

⁸⁹ *Ibid*, 189.

⁹⁰ *Jacobs-May J.*, The Psychology of Mediation, Edition of the Recorder 2011, 1, <<http://www.jamsadr.com/files/Uploads/Documents/Articles/Jacobs-May-Recorder-04-04-11.pdf>>.

⁹¹ *Glick T.*, Creative Mediation, North Charleston, 2012, 71.

⁹² *Craver C.B.*, Effective Legal Negotiation and Settlement, 6th ed., 2009, 46.

⁹³ *Golann F.*, Lawyer Negotiation, Theory, Practice and Law, Printed in the United States of America, 2006, 107.

⁹⁴ *Glick T.*, Creative Mediation, North Charleston, 2012, 61.

⁹⁵ *Thorpe R.W.*, Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, American Journal of Mediation, Vol.2, 2008, 14.

⁹⁶ *Pel M.*, Referral to Mediation a Practical Guide for an Effective Mediation Proposal, The Hague, 2008, 103.

⁹⁷ *Murray O.R.*, The Mediation Handbook: Effective Strategies for Litigators, Revised ed., Bradford Publishing Company, Colorado, 2010, 42.

⁹⁸ *Abramson H.I.*, Mediation Representation Advocating as a Problem-Solver in any Country or Culture, 2nd ed, Printed in the United States of America, 2010, 132.

⁹⁹ *Hames D.S.*, Negotiation Closing Deals, Settling Disputes, and Making Team Decisions, Printed in the United States of America, 2012, 31.

satisfy interests.¹⁰⁰ There are two types of interests: essential, substantial interests and procedural interests. Often the difference between them is hard to perceive, because there might be coincidence of them. The reason of this coincidence is that by conducting the relevant process the client's basic interests are satisfied.¹⁰¹ One of the examples of procedural interest is the opportunity for a client to control the dispute result himself/herself, establish a precedent or avoid the influence of the used one.¹⁰²

So to find optimal ways of conciliation it is necessary to search for the information about the client's objectives, motivation, necessities and not only about the loss experienced by them and the lawful rights.¹⁰³ Knowledge of only facts is not enough, in spite of their conformity with reality.

In relation to this issue among the interests of the party might be merely a demand to be listened to him and to get a fair treatment.¹⁰⁴ An advocate must be ready to accept such interests, which are strange or queer to him. Strange interests might be peculiarly characteristic for foreign culture. Accordingly when a client belongs to different culture, an advocate should ask him this issue more attentively.¹⁰⁵ An advocate must avoid dictating the client his own will.

Most of representatives formally or informally divide clients' interests into three categories: compulsory, important and desirable. "Compulsory" interest includes strivings, which a client will get, if the agreement is made successfully. "Important" interest is what a client wants, though which can be refused, if the "compulsory" aims are reached. "Desirable" includes such aims, which a client wants to get, though would concede it instead of the more important condition.¹⁰⁶

It must be emphasized that on defining a client's interest an advocate must carry the following actions: to make sure that the existence of the worked up objectives are justified and strengthened by arguments; it is desirable to imagine what kind of results their real implementation would give. Besides according to psychologists and marketing specialists it is desirable to establish interests, objectives in written form.¹⁰⁷ It will favor to realize them in practice.

After the analysis of the above mentioned an advocate must ask the client what might be the opponent's interest in his/her opinion.¹⁰⁸ I.e. it is important to define action strategy/tactics, though in the first place it is desirable to define interests, necessities and motivation.¹⁰⁹ If it is possible there should be defined a list of common interests of both parties.¹¹⁰ So the aim of defining of both parties' interests is to find such possible conditions, which would satisfy both of them.¹¹¹

In the course of this process an advocate must put detailed questions and use an attentive and active method of listening.¹¹² Here must be emphasized that questioning of the client must be done not only once,

¹⁰⁰ *Ury W.*, *Getting Past No Negotiating your Way from Confrontation to Cooperation*, Printed in the United States of America, 1991, 19.

¹⁰¹ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 136.

¹⁰² *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 135.

¹⁰³ *Murray O.R.*, *The Mediation Handbook: Effective Strategies for Litigators*, Revised ed., Bradford Publishing Company, Colorado, 2010, 41.

¹⁰⁴ *Epstein J., Hobbs K. S.*, *Individualized Mediation Design*, 2007, 3, <<http://crs-adr.com/articles/EpsteinHobbs.pdf>>.

¹⁰⁵ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 133.

¹⁰⁶ *Craver C.B.*, *Effective Legal Negotiation and Settlement*, 6th ed., 2009, 47.

¹⁰⁷ *Golann F.*, *Lawyer Negotiation, Theory, Practice and Law*, Printed in the United States of America, 2006, 109.

¹⁰⁸ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 312.

¹⁰⁹ *Murray O.R.*, *The Mediation Handbook: Effective Strategies for Litigators*, Revised ed., Bradford Publishing Company, Colorado, 2010, 42.

¹¹⁰ *Kovach K.K.*, *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 153.

¹¹¹ *Ury W.*, *Getting Past No, Negotiating Your Way from Confrontation to cooperation*, Printed in the United States of America, 1991, 19.

¹¹² *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 131.

but after a certain period from the first questioning. In the course of time some new information might be emerged. The method of questioning should be the same as on the first interview.¹¹³

4.2. Defining Advocate's Action Strategy/Tactics

After stating what defines actions of each party in the conflict, an advocate can begin work on finding of problems settling ways and satisfying interests of each party.¹¹⁴ The precondition is negotiations. Any negotiation requires strategy, tactics.¹¹⁵ It is important to define the mentioned concepts: "strategy" is a plan or a process, by means of which parties are trying to implement their own objectives. Tactics is specific, short-time actions, by means of which the strategy is carried out.¹¹⁶ The simultaneous involvement of parties and advocates in mediation might become a reason of strain. Mediators felt fretted, if an advocate behaves as he does in court, does not allow the client to talk.¹¹⁷ In order to avoid such or analogous negative results an advocate's strategy must be the following: he must prepare a client and must get himself/herself prepared for working with a mediator. He must restrain himself from using traditional approaches on being represented in mediation.

Generally there are two styles of negotiations: firm and soft. Most people can't see other choices except these two ones,¹¹⁸ though if a person does not like these two extreme approaches, rules can be changed.¹¹⁹ He can choose a moderate, neutral style, which is best for satisfying the client's interests.

On defining strategy, an advocate must foresee the following recommendations:

1. Persons and problems must be distinguished from each other;
2. Attention must be focused on interests of parties and not on their positions.
3. The solution of the issue must be found such, which will be useful for both parties.
4. On settling the issue objective criteria must be used.¹²⁰

When the priority of the party is the attainment of own objectives competitive strategy might be used, but when it is desirable to get common advantage, cooperative strategy must be used.¹²¹ An advocate must also foresee to use ultimatum only when one or both parties want to finish negotiations.¹²²

It must be foreseen that the action strategy/tactics must be in conformity with a mediator type.¹²³ He must think over how a client and an advocate will distribute introductory speech on simultaneous participating in the process, in general terms.¹²⁴

I.e. on the basis of the developed analysis it is stated that an advocate after having defined the client's interests must work out strategy. The circumstances to be foreseen in working out the strategy have been established above.

¹¹³ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 311.

¹¹⁴ *Murray O.R.*, *The Mediation Handbook: Effective Strategies for Litigators*, Revised edition, Bradford Publishing Company, Colorado, 2010, 43.

¹¹⁵ *Carbone M. P.*, *Mediation Strategies: A Lawyer's Guide to Successful Negotiation*, 2004, 1, <<http://www.mediate.com/articles/carbone7.cfm?nl=56>>.

¹¹⁶ *Hames D.S.*, *Negotiation Closing Deals, Settling Disputes, and Making Team Decisions*, Printed in the United States of America, 2012, 30.

¹¹⁷ *Thorpe R.W.*, *Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality*, *American Journal of Mediation*, Vol.2, 2008.

¹¹⁸ *Fisher R., Uri W.*, *Getting to Yes Negotiating Agreement Without Giving*, 2nd ed., Printed in the United States of America, 1991, 9.

¹¹⁹ *Ibid*, 10.

¹²⁰ *Ibid*, 13.

¹²¹ *Hames D.S.*, *Negotiation, Closing Deals, Settling Disputes, and Making Team Decisions*, Printed in the United States of America, 2012, 30.

¹²² *Sawicki S.C.*, *Mediation: The Dance and the Deal* *American Journal of Mediation*, Vol. 2, 2008, 34.

¹²³ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 194.

¹²⁴ *Ibid*, 194-195.

5. Preparing of the Case for Mediation by an Advocate

The secret of the successful negotiation is simple: making preparation. The more difficult is conducting the negotiation, the more intensive must be this process. In practice if people spent more time on this process, than directly at the meetings, negotiations would be much more effective.¹²⁵ According to Article 1.1 of the ABA Model Rules of Professional Conduct the necessary condition for the representation is “foundation and preparation”. This requirement becomes important at the preparatory stage and factually it is a main demand. On completing this stage an advocate must have lots of actions carried out. These must be performed with relevant foundation. Foundation and preparation imply different kinds of factors and just on realizing them these two most significant standards must be foreseen.

The importance of preparation is confirmed by the following fact: in 2006 by ABA was conducted research of those civil legal processes of disputes, where parties were using representation. The participants identified four main factors defining mediation rate. It was stated that from these four main factors¹²⁶ defining the success of mediation is the preparation rate of mediators, parties and advocates.¹²⁷ It means that if the preparation rate is high, the negotiation will be successful, but without preparation it will be presumably unsuccessful.¹²⁸ This condition is very significant for the preparatory stage of mediation.

Besides for preparing the case for the mediation process an advocate must prepare a written plan.¹²⁹ It is necessary despite this action being practical or not.¹³⁰

5.1. Study of Factual Circumstances and Legal Estimation

According to Article 1.1 of the ABA Model Rules of Professional Conduct an advocate must provide a client with the competent representation. One of the components of competent representation is “knowledge of Law”.¹³¹ At the preparatory stage of mediation an advocate has to estimate his knowledge in relation of this issue. If he is not aware of this issue, he must decline responsibility. Knowledge is significant, as at the preparatory stage of mediation an advocate is preparing the case for the process. It envisages such action as: studying of factual circumstances of the case and their legal estimation. If an advocate does not study circumstances of the case and fails to perform legal estimation of them, it will be considered as gross violation of the advocate’s obligations.

According to this act: “An advocate must inform a client whether he has practice in a concrete sphere of Law”.¹³² This condition is setting an analogous requirement – an advocate must have proper practice in order to provide successful mediation. Practice is directly connected with knowledge. As it was said mediation is a new institute for Georgia and very few advocates have the representation experience. In addition a client must have the right to have a qualified advocate, which is aware of the essence of mediation and will be able to prepare the case perfectly.

¹²⁵ Ury W., *Getting Past No, Negotiating your Way from Confrontation to Cooperation*, Printed in the United States of America, 1991, 16.

¹²⁶ Among other Factors Defining the Success of Mediation are the Following: Fitting of the Mediation Process on a Client’s Demands; Analytical Support from the Mediator; Mediator’s Hardiness, Firmness.

¹²⁷ Thorpe R.W., *Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality*, American Journal of Mediation, Vol.2, 2008, 2.

¹²⁸ Hames D.S., *Negotiation, Closing Deals, Settling Disputes, and Making Team Decisions*, Printed in the United States of America, 2012, 3.

¹²⁹ Murray O. R., *The Mediation Handbook: Effective Strategies for Litigators*, Revised ed., Bradford Publishing Company, Colorado, 2010, 58.

¹³⁰ Abramson H.I., *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 195.

¹³¹ The ABA Model Rules of Professional Conduct Article 1.1.

¹³² *Ibid*, Article 7.4.

The discussion of the above mentioned norms in relation to the preparatory process of mediation is becoming more important by the fact that as the essence of mediation does not envisage profit-loss in the theory, many think that legislation does not play any role in this process or plays a very little role.¹³³ This is a solid argument confirming the advocate's obligation to have adequate knowledge and experience for representation in the mediation process.

An advocate must study current legislation. His/her objective must be to find maximal defensive mechanisms.¹³⁴ Having been completely aware of the case he/she must inform a client about the positive and negative sides of the case.¹³⁵

So it is finally stated that at the preparatory stage the parties must develop legal theories, which provide strengthening their own positions. They must foresee those arguments, on which the opposite party will be presumably based.¹³⁶ The foresight of the opponent's arguments is a precondition for facilitation of their abrogation.

5.2. Finding Evidences for the Mediation Process

One of the actions to be done by an advocate at the preparatory stage is investigate factual issues in order to define strong and weak sides of the client's position.¹³⁷ In many cases a person's claim might be based on his belief or doubts.¹³⁸ If mediation is conducted before court proceeding or some other examination, an advocate must examine all important documents connected with the case and investigate important witnesses.¹³⁹ It should be foreseen that evidences, schemes and witnesses might be useful for mediation, though only if they make legitimate a subject of the dispute or position of the party. Evidences, which confirm only wrongness of one party, must not be used.¹⁴⁰ From this point of view it is necessary to accentuate a time factor: it is desirable for the party to find all necessary documents and transfer them to other participants of the process (to a mediator and the opponent's advocate) 30 days before starting the mediation process.¹⁴¹

According to the ABA Model Rules of Professional Conduct an advocate must not perform consciously the following actions: 1. to produce wrong facts or laws; 2. to submit evidence which by his preliminary information is not right. Even if submission of the wrong evidence is a client's or a witness' idea the advocate must take adequate legal measures.¹⁴² This condition is very actual at the preparatory stage of mediation, because as it was already mentioned at this stage an advocate is making complete preparation of the case. It includes finding evidences which he will use in the mediation process or in case when court proceeding becomes inevitable. Accordingly it is just the stage when an advocate must foresee the above mentioned condition.

¹³³ *Kovach K.K.*, *Mediation in a Nut Shell*, 2nd ed., Thomson West, Printed in the United States of America, 2010, 179.

¹³⁴ *Silverman P.R.*, *The Clients Guide to Mediation and Arbitration, The Strategy for Winning*, ABA Publishing, Chicago, Illinois, 2008, 47.

¹³⁵ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 313.

¹³⁶ *Craver C.B.*, *Effective Legal Negotiation and Settlement*, 6th ed., 2009, 50.

¹³⁷ *Silverman P.R.*, *The Clients Guide to Mediation and Arbitration, The Strategy for Winning*, ABA Publishing, Chicago, Illinois, 2008, 45.

¹³⁸ *Walsh M. C.*, *Whether and When to Mediate Employment Disputes*, 2013, 1, <<http://www.insidecounsel.com/2013/05/27/labor-whether-and-when-to-mediate-employment-dispu>>.

¹³⁹ *Silverman P.R.*, *The Clients Guide to Mediation and Arbitration, The Strategy for Winning*, ABA Publishing, Chicago, Illinois, 2008, 45.

¹⁴⁰ *Murray O.R.*, *The Mediation Handbook: Effective Strategies for Litigators*, Revised ed., Bradford Publishing company, Colorado, 2010, 59.

¹⁴¹ *Epstein J.*, *Data Dumping and Other Problems in Mediation*, Colorado Trial Lawyers Association, 2013, 1, <http://www.crs-adr.com/articles/Data_Dumping.pdf>.

¹⁴² ABA Model Rules of Professional Conduct, Article 3.3.

Here it is important to note tendencies observed in practice: a lawyer might know that submission of concrete evidence would weaken the opponent's position, though instead of using it in the mediation process he/she is keeping it for court proceeding.¹⁴³

5.3.Choosing a Mediator and Working out a Method for Communication with Him

Most advocates (representatives) are not often able to get from the mediation process the maximum, which a mediator can offer and for which a client pays.¹⁴⁴ For fruitful mediation it is necessary to choose a proper mediator. The success or failure of the mediation process often depends just on this factor.¹⁴⁵ It is often hard for representatives to notice and overcome certain invisible barriers. A qualified mediator can achieve this,¹⁴⁶ though not everybody is able to deal with the case, where relations are strained.¹⁴⁷ Accordingly there is a rule according to which a voluntary mediation will not be made without the agreement of a client and an advocate, about a concrete person being a mediator.¹⁴⁸ A

What creates a good mediator? Answers to this question might be as many, as a number of mediators.¹⁴⁹ And still there are certain criteria. It should be taken into account that in each concrete case it must be decided what kind of mediator the parties want to choose, "evaluative" or "facilitative", whether he will have strict or mild approach.¹⁵⁰ It is also indisputable that an advocate must find information about the mediator's knowledge and qualification, is he an expert or not in the issue under review, whether he will observe such an important principle, as confidentiality and others.¹⁵¹

An advocate can use the participation in the process of a professional mediator for the good. For example, it can be done in the following cases: if an advocate wants to discuss some issue but at the same time does not want to raise it himself. If discussion of a concrete issue caused a negative reaction of a client, it would be possible to ask the mediator to cease this discussion.¹⁵²

A mediator must have certain skills to conduct the mediation process. The knowledge of facts of a concrete case is of minor importance.¹⁵³ By saturating them it is stated that when choosing a mediator there should be paid attention to the following circumstances: 1.His trainings and qualification, including certification; 2. work experience on specific issues; 3. a mediation style, which he uses; 4. amount of payment, which he demands; 5. his availability; 6. culture, proficient in language.¹⁵⁴ For the positive results of mediation is if a mediator can comprehend the dispute "nature".¹⁵⁵

On choosing a mediator it should be taken into account to what extent are his following skills developed: skills of analyzing situations and alternatives; skill of persuading of people, active listening skill; skill of collecting information basing on asking open questions; skill of effective support; the ability of rising issues without haughty tone; the ability of defining different versions of conciliation; to have ability

¹⁴³ Roth B. J., *Litigation Tactics in Mediation: Are They Ethical?* 2005, 3, <<http://rothadr.com/pages/publications/ethics%20reprint.pdf>>.

¹⁴⁴ Berman L.J., *12 Ways to Make Mediator Work Hard*, Published in *Advocate Magazine*, 2009. 1, <<http://www.mediationtools.com/articles/12ways.html>>.

¹⁴⁵ Carbone M.P., *Mediation Strategies: A Lawyer's Guide To Successful Negotiation*, 2004, 1, <<http://www.mediate.com/articles/carbone7.cfm?nl=56>>.

¹⁴⁶ Picker B.C., *Navigating Relationships: The Invisible Barriers to Resolution*, *American Journal of Mediation*, Vol. 2, 2008, 46.

¹⁴⁷ Abramson H.I., *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010,231.

¹⁴⁸ Ware S.J., *Principles of Alternative Dispute Resolution*, 2nd ed., Printed in the United States of America, 2003, 313.

¹⁴⁹ Smith A.L., *Smock D.R.*, *Managing a Mediation Process*, Printed in the United States of America, 2008, 22.

¹⁵⁰ Silverman P.R., *The Clients Guide to Mediation and Arbitration, The Strategy for Winning*, ABA Publishing, Chicago, Illinois, 2008, 44.

¹⁵¹ Ware S.J., *Principles of Alternative Dispute Resolution*, 2nd ed., Printed in the United States of America, 2003, 313.

¹⁵² Folberg G., *Mediation The Roles of Advocate and Neutral*, 2nd ed., Printed in the United States of America, 2011, 271.

¹⁵³ Glick T., *Creative Mediation*, North Charleston, 2012, 107.

¹⁵⁴ Pel M., *Referral to Mediation a Practical Guide for an Effective Mediation Proposal*, The Hague, 2008, 83.

¹⁵⁵ Boule L.J., *Colatrella M.T., Picchioni A.P.*, *Mediation Skills and Techniques*, San Francisco, 2008, 27.

of working out several strategies and tactics simultaneously.¹⁵⁶ It should be noted that an effective communication skill is a precondition of carrying out mediator's functions successfully. By using it a mediator will be able to comprehend the essence of the dispute and at the same time to support exchange the information between the parties.¹⁵⁷ He/she must have the ability to distinguish positions and interests of the parties from each other.¹⁵⁸ Experienced mediators have passed several preparatory courses in negotiations strategy.¹⁵⁹

He/she is desirable to be respected by own colleagues and to be having experience in mediation as well as in conducting the other process of conflict resolution.¹⁶⁰

Lately there has been emerged the tendency of choosing of mediators by provider companies. For example, in South California two main national providers are functioning. They are: AAA and JAMS, also three well known regional providers: ADR Services, ARC and Judicate West.¹⁶¹

In relation to the issue of mediators' certification it should be mentioned that NMI together with Det Norske Veritas Institute worked out a certification system of mediators. The certification conditions are: passing a relevant training course; to take an exam for knowledge estimation; receiving desirable results in the exam; to conduct a certain number of mediation processes every year; to get continuous professional education; activity in discussion with peers;¹⁶²

Finally it is important to note that according to a popular approach spread among advocates the right of choosing a mediator is conceded to the opponent party.¹⁶³ It should be foreseen that if the opponent party names a mediator, a client and an advocate must accept this offer, if basing on other factors it is not necessary to take the other resolution.¹⁶⁴ I. e. if a candidate offered by the opponent, is not incompetent, unqualified and impartial, the party must agree on this choice.¹⁶⁵ The analogous action will favor the accomplishment of mediation objectives and will be corresponding to the main principles of the process.

It must be noted that the information, which will be important for choosing a mediator, can be found by means of asking direct questions to the mediator, as well as by questioning of those parties and advocates, which have used service of this concrete mediator before.¹⁶⁶

5.4. Defining a Circle of Persons Participating in Mediation

A number of processes, which are finished with failure only because at the process are not represented appropriate persons, is very strange.¹⁶⁷ It is because for the party, which has not directly attended the mediation process, it is very simple to decline the offer.

A concept "participant" includes parties, as well as any person, whose presence is necessary for advice, for any kind of contribution or even for psychological support.¹⁶⁸

¹⁵⁶ Beer J.E., Packard C. C., *The Mediator's Handbook*, 4th ed., Printed in Canada, 2012, 35.

¹⁵⁷ Cooley J.W., *The Mediator's Handbook: Advanced Practice Guide for Civil Litigation*, National Institute for Trial Advocacy (U.S.), 2006, 59-61.

¹⁵⁸ Smith A.L., Smock D.R., *Managing a Mediation Process*, Printed in the United States of America, 2008, 11.

¹⁵⁹ Berman L.J., 12 Ways to Make Mediator Work Hard, Published in *Advocate Magazine*, 2009, 1, <[http:// www. mediationtools.com/articles/12ways.html](http://www.mediationtools.com/articles/12ways.html)>.

¹⁶⁰ Jernigan M., Lord R.B., *The Mediators Role In The Family Business*, *American Journal of Mediation*, Vol. 2, 2008, 54.

¹⁶¹ Berman L.J., *Mediations's Evolution in Social: Where It Has Been and Where It Is Going*, Published in *Advocate Magazine*, 2012, 4, <<http://www.mediationtools.com/articles/EvolutionMediationSoCal.html>>.

¹⁶² Pel M., *Referral to Mediation A Practical Guide For An Effective Mediation Proposal*, The Hague, 2008, 133.

¹⁶³ Berman L.J., *Mediators' Opening Statements Offer Insights For Successful Results*, Published in the *Mediation Strategies California's Legal Newspaper*, 2003, 1, <<http://www.americaninstituteofmediation.com/pg66.cfm>>.

¹⁶⁴ Mosten F.S., *Representing Clients in Mediation Effectively Setting up a Mediation*, 3113, <[http:// www. mosten-mediation.com/books/articles/Representing_Your_Clients_In_Mediation.pdf](http://www.mosten-mediation.com/books/articles/Representing_Your_Clients_In_Mediation.pdf)>.

¹⁶⁵ Ibid, 3123.

¹⁶⁶ Ware S.J., *Principles of Alternative Dispute Resolution*, 2nd ed., Printed in the United States of America, 2003, 313.

¹⁶⁷ Claiborne Z.G., *Three Things to Know About Mediating Licensing Disputes*, 2013, 1, <[http://www. mediate. com/ articles/ClaiborneZbl20130503.cfm](http://www.mediate.com/articles/ClaiborneZbl20130503.cfm)>.

Sometimes choosing of participants is more significant than choosing of a mediator.¹⁶⁹ I.e. reaching an agreement greatly depends whether there are corresponding persons in the negotiation room.¹⁷⁰

To define who must not participate in the process is of no less importance than to define those who must participate.¹⁷¹ It must be taken into account that the more people are involved in the negotiation, the more serious hindering factors will be.¹⁷² For defending confidentiality¹⁷³ it is desirable only participation of parties.¹⁷⁴

And yet what kind of criteria should be foreseen in defining participants of the mediation process except the parties and their advocates. The crucial factor will be who can contribute in solving a conflict. It is a strategic and a practical question too.¹⁷⁵ It is possible that a client needs the attendance of some persons at the process, who can give advice. These persons might have some kind of information, can give psychological support or have a resource for reaching agreement.¹⁷⁶

5.5. Defining of Agreement Conditions

At the preparatory stage of mediation it is inevitable to define agreement conditions. First the best alternative to a negotiated agreement (hereinafter BATNA) will be defined. After that other alternatives of the agreement will be developed. In defining them an advocate must take into consideration the expenses, which follow the failure of the mediation process and solution of a dispute by arbitration or court.¹⁷⁷

5.5.1. The Best Alternative to a Negotiated Agreement (BATNA)

QBATNA is a concept created by Roger Fisher and William Ury and is an abbreviation of the following phrase: “the Best Alternative to a Negotiated Agreement”.¹⁷⁸ For understanding BATNA it is necessary to estimate the effectiveness of the event. Defining it on its own is a precondition of effectiveness of the negotiations.¹⁷⁹

Defining BATNA means to know what will happen in case of failure of the negotiation. Working out of it requires carrying out three main actions: 1. to define those actions, which will be carried out, if the

¹⁶⁸ *Boulle L.J., Colatrella M.T., Picchioni A.P.*, Mediation Skills and Techniques, San Francisco, 2008, 27.

¹⁶⁹ *Folberg G.*, Mediation The Roles of Advocate and Neutral, 2nd ed., Printed in the United States of America, 2011, 248.

¹⁷⁰ *Amend J.M.*, Implications for Mediation of Patent Infringement Suits from Investors in Patentees Case, Published by Law.com, 2014, 1, <<http://jamsadrblog.com/2014/03/19/implications-for-mediation-of-patent-infringement-suits-from-investors-in-patentees-case/>>.

¹⁷¹ *McCorkle S., Reese M.J.*, Mediation Theory and Practice, Printed in the United States of America, 2005, 81.

¹⁷² *Fisher R., Uri W.*, Getting to Yes Negotiating Agreement Without Giving, 2nd ed., Printed in the United States of America, 1991, 9.

¹⁷³ Confidentiality is Keeping Information Safely and Controlling over its Disclosure. As an ethical concept it means an obligation of the party to use or disseminate the information only by the agreement with proper persons and protect this information, which is not known publicly. It is also interesting that obligation implies to protect the truth and not the false information, as no objective serves protection of the wrong information. The existence of these principles is precondition of the confidence of the parties to the process and it is one of the means of attracting clients. In relation to this principle it is important to remark that California evidence code provides confidentiality of the mediation process. The parties have possibility of discussing any issue so that this information will not be used against them later in court.

¹⁷⁴ *Glick T.*, Creative Mediation, North Charleston, 2012, 91.

¹⁷⁵ *Boulle L.J., Colatrella M.T., Picchioni A.P.*, Mediation Skills and Techniques, San Francisco, 2008, 27.

¹⁷⁶ *Abramson H.I.*, Mediation Representation Advocating as a Problem-Solver in any Country or Culture, 2nd ed., Printed in the United States of America, 2010, 241.

¹⁷⁷ *Silverman P.R.*, The Clients Guide to Mediation and Arbitration The Strategy for Winning, ABA Publishing, Chicago, Illinois, 2008, 3.

¹⁷⁸ *Luecke R.*, Harvard Business Essentials Your Mentor and Guide to Doing Business Effectively Negotiation, Printed in the United States of America, 2003, 15.

¹⁷⁹ *Coltri L.S.*, Alternative Dispute Resolution a Conflict Diagnosis Approach, 2nd ed., University of Maryland, University College, 2010, 80.

agreement is not reached; 2. refinement of ideas and transforming them into practical alternative and 3. to select the alternative, which will be the most attractive alternative.¹⁸⁰

BATNA consists of two components: public and private components. An advocate is obliged to study a public component on the basis of legal assessment of the case, the collected factual information. As for personal component it can be stated by questioning of the client, because it is inevitable to raise such questions, as personal values and the profit gained as a result of the dispute.¹⁸¹ After summing up personal BATNA and public BATNA a client's whole BATNA will be received.¹⁸²

In defining BATNA three factors must be foreseen: 1. What kind of action can a person perform to realize his own interests? 2. How can a person manage his interests being respected by his opponent? 3. By what way the assistance from the third person (mediator) may be reached?¹⁸³

Time factor is also important: defining of BATNA is necessary before starting a direct process of negotiation. People, who start negotiation without defining it, will be in bad situation.¹⁸⁴

Besides it must be thought of what kind of agreement will be acceptable for the opponent. The more information will be known about the above mentioned, the higher will be the preparation rate. If the opponent's BATNA is opposite to the BATNA worked out by the client, it will be desirable to change their expectations.¹⁸⁵

5.5.2. Defining Other Alternatives of Conciliation

In some cases people are defining possible alternatives of negotiation only when the best results cannot be reached. It is a classical example of mistake. Defining of other possible alternatives might become a precondition of satisfaction of interests.¹⁸⁶ I.e. at the preparatory stage after forming dispute resolution ways there must be started estimation and granting them priorities.¹⁸⁷ In other words one of the issues to be solved at the preparatory stage of mediation is those acceptable alternatives, which are used when the best alternative of conciliation can't be reached.¹⁸⁸

On talking of conciliation alternatives it is necessary to define the essence of such a concept, as: "zone of possible agreement (hereinafter – ZOPA). It implies areal, within the scope of which it will be possible to reach an agreement satisfying both parties. It is an agreement, which potentially will satisfy both parties."¹⁸⁹

Here should be defined such a concept, as "Bottom Line". It is the minimum, which a client must get inevitably before he agrees to sign.¹⁹⁰ It must be emphasized that this opportunity of conciliation must be

¹⁸⁰ Fisher R., Uri W., *Getting to Yes Negotiating Agreement Without Giving*, 2nd ed., Printed in the United States of America, 1991, 53.

¹⁸¹ Abramson H.I., *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 234.

¹⁸² Ibid, 237.

¹⁸³ Ury W., *Getting Past No, Negotiating your Way from Confrontation to Cooperation*, Printed in the United States of America, 1991, 22.

¹⁸⁴ Luecke R., *Negotiation*, Harvard Business School Publishing Corporation, Printed in the United States of America, 2003, 15.

¹⁸⁵ Fisher R., Uri W., *Getting to Yes Negotiating Agreement without Giving*, 2nd ed., Printed in the United States of America, 1991, 53.

¹⁸⁶ Ury W., *Getting Past No, Negotiating your Way from Confrontation to Cooperation*, Printed in the United States of America, 1991, 21.

¹⁸⁷ Murray O.R., *The Mediation Handbook: Effective Strategies for Litigators*, Revised edition, Bradford Publishing Company, Colorado, 2010, 53.

¹⁸⁸ Hames D.S., *Negotiation Closing Deals, Settling Disputes, and Making Team Decisions*, Printed in the United States of America, 2012, 25.

¹⁸⁹ Luecke R., *Negotiation*, Harvard Business School Publishing Corporation, Printed in the United States of America, 2003, 24.

¹⁹⁰ Abramson H.I., *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 338.

defined not at the preparatory stage of mediation but in critical situation, when there is impasse in negotiations.¹⁹¹ Moreover, Bottom line must not be defined before finishing the mediation process.¹⁹² In many cases a client might change his Bottom Line depending on new information.¹⁹³

6. Preparation of a Client for the Mediation Process by an Advocate

Clients, who think that they are thoroughly prepared for the mediation process by an advocate, are content with service but those who think that are not prepared adequately, are not satisfied by the advocate.¹⁹⁴ So at the preparatory stage of mediation one of the mediator's function is preparation of a client for participation in the mediation process.¹⁹⁵

Generally there is an opinion, according to which: "In the course of the process advocates are dominating, when a client is poor, but strong, rich and confident clients are governing an advocate themselves". Despite this opinion at the preparatory stage of mediation it is mandatory to develop similar approach to all clients and prepare them uniformly.¹⁹⁶

In spite of the fact that the preparation of a client by an advocate differs from the preparation for the court process, there is still some partial coincidence.¹⁹⁷

The issue concerning how a client is prepared is considerably defined by the approach of a mediator in relation to a client's participation. If a mediator foresees the active involvement of a client in the process, an advocate will prepare the client so that he will be able to answer to expected questions from a mediator, opponent or from the opponent's advocate. If a mediator is going to confine the client's participation, the preparation of the client is still inevitable by taking into account how the advocate defines the client's involvement.¹⁹⁸

6.1. Explanation of the Essence and Basic Principles of Mediation for a Client

One of the issues to be explained by an advocate to a client is a format, what is the difference between mediation and ordinary negotiation.¹⁹⁹

During the preparatory period an advocate must not create wrong imaginations for a client. He must know that mediation is not really a new institute; it is a new direction of thinking,²⁰⁰ a process of taking decision, when parties are working jointly to take a satisfactory decision for both parties.²⁰¹ The party must

¹⁹¹ Ibid, 139.

¹⁹² Roth B.J., *Litigation Tactics in Mediation: Are they Ethical?* Published by the Boston Bar Association, 2004, 9, <<http://rothadr.com/pages/publications/ethics%20reprint.pdf>>.

¹⁹³ Abramson H.I., *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 340.

¹⁹⁴ Thorpe R.W., *Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality*, American Journal of Mediation, Vol.2, 2008, 2.

¹⁹⁵ Bouille L.J., Colatrella M.T., Picchioni A.P., *Mediation Skills and Techniques*, San Francisco, 2008, 345.

¹⁹⁶ Handler J., 1970, 25. Is Referred in: Clark B., *Lawyers and Mediation*, United Kingdom, 2012, 38.

¹⁹⁷ Thorpe R.W., *Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality*, American Journal of Mediation, Vol.2, 2008, 13.

¹⁹⁸ Abramson H.I., *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 206-207.

¹⁹⁹ Golann D., *Mediating Legal Disputes Effective strategies for Neutrals and Advocates*, Printed in the United States of America, 2009, 267.

²⁰⁰ Erickson S.K., Mcknight M.S., *The Practitioner's Guide to Mediation A Client-Centered Approach*, Printed in the United States of America, 2001, 3.

²⁰¹ In connection with the preparatory stage of mediation it is important to note the act, according to which an advocate is obliged to give consultation to a client about restriction of own behaviors, while client's actions are not permitted by law and rules of professional behavior. The existence of this demand is justified for the following reason: it is possible that a client has the wrong opinion on the advocate's activity or competence. Accordingly on the further stages of mediation in order to avoid misunderstanding it is inevitable to elucidate this issue at the preparatory stage of mediation.

be explained that mediation is some continuation of the negotiation.²⁰² Accordingly they must be ready for listening to the other participators of the process.²⁰³

A client must be explained positive results of mediation, which are mainly expressed by the following: 1. Parties' control over the course of the process and taken decision; 2. More probability of maintenance of relations; 3. Attaining creative and adaptive decisions; 4. Comparatively fast resolution of a problem; 5. Less expenses; 6. Economy of court resources.²⁰⁴ So mediation is not an opposing process, it is necessary for parties to cooperate and find the way out.²⁰⁵ Participation in it is voluntary and any party can terminate the process at any time.²⁰⁶ Besides the parties must know that they are observing the mediator's instructions.²⁰⁷

An advocate must warn a client not to try "to win" the process.²⁰⁸ Such action would be in complete contradiction with the mediation principles. The goal of mediation is to facilitate communication between the parties, to favor mutual understanding; it must be oriented on interests and finding creative ways of settling of problems. One of the main circumstances the information about which must be possessed by a client is who is taking decision in the process.²⁰⁹ It is needed so that the parties will be able to reach agreement themselves.²¹⁰ A client must also know that in this process nobody is going to investigate factually who is right and who is not.²¹¹ The dispute process might be devastating to him but the agreement – fast and painless.²¹²

It is recognized that mediation substantively is a process providing issues, which are important for people: these are relations, establishment of fairness, emotions, mutual respect, involvement, settling of problems. People have opportunity to share their sorrows, to express their opinion, to talk about their needs; they can also touch themes interesting to them. They are not confined from this point of view.²¹³

This all must be explained to a client at the preparatory stage of mediation, otherwise because of the unawareness of the mediation essence and main principles unforeseen problems might be emerged in the course of the process.

6.2. Informing a Client from Legal Point of View

At a preparatory stage of mediation advocates play a significant role for awareness of parties and elucidation of legal issues in order to show just those issues, which are preferentially interesting for parties and don't resist current legislative norms.²¹⁴ This implies that an advocate must give a client the information about what can be reached considering current legislative norms.²¹⁵

²⁰² *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 309.

²⁰³ *Kovach K.K.*, *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 154.

²⁰⁴ *Boulle L.J., Colatrella M.T., Picchioni A.P.*, *Mediation Skills and Yechniques*, San Francisco, 2008, 3.

²⁰⁵ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 310.

²⁰⁶ *Greenwood M.*, *How to Mediate Like a Pro, 42 Rules for Mediating Disputes*, Printed in the United States of America, 2008, 13.

²⁰⁷ *Mosten F.S.*, *Representing Clients in Mediation Effectively Setting up a Mediation*, 3132, <http://www.mosten-mediation.com/books/articles/Representing_Your_Clients_In_Mediation.pdf>.

²⁰⁸ *Folberg G.*, *Mediation The Roles of Advocate and Neutral*, 2nd ed., Printed in the United States of America, 2011, 262.

²⁰⁹ *Kovach K.K.*, *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 152.

²¹⁰ *Gibbons L.J., Kennedy J.M., Gibbs J.M.*, *Cyber-Mediation: Computer-mediated Communications Medium Messaging the Message*, *New Mexico Law Rev.*, 2002, 9. Referred to: *John Feerich et al.*, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 *J. Disp. Resol.* 95, 123.

²¹¹ *Kovach K.K.*, *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 152.

²¹² *Ware S.J.*, *Principles of Alternative Dispute Resolution*, 2nd ed., Printed in the United States of America, 2003, 158.

²¹³ *Beer J.E., Packard C.C.*, *The Mediator's Handbook*, 4th ed., Printed in Canada, 2012, 5.

²¹⁴ *Tsertsvadze G.*, *Pespectives of Legal Regulation of Mediation in Georgia*, *Ivane Javakhishvili Tbilisi State University, National Center of Alternative Resolution of Disputes*, Tbilisi, 2013, 240, <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07. 2013].

²¹⁵ *Pel M.*, *Referral to Mediation a Practical Guide for an Effective Mediation Proposal*, The Hague, 2008, 126.

So advocates must provide the parties with information and advice about legal aspects of dispute, though it does not mean that parties will use these pieces of advice in the mediation process by all means.²¹⁶ It should be emphasized that an advocate is obliged to give the client the right consultation; his advice must be in conformity with reality, no matter how hard it will be to listen to.²¹⁷ He must not give the client unreal expectations.²¹⁸ No matter how hard a sincere talk might be about concrete issues, an advocate must deal with this obligation. In this way by revealing strong and weak sides of the party advocates will be able to satisfy the client's needs.²¹⁹

6.3. Informing a Client on a Plan of the Mediation Process

“The representatives are obliged to give parties the information about the mediation process”.²²⁰ It must be done by an advocate in advance at an earlier stage.²²¹ So an advocate at the preparatory stage must work out a plan of representation. It is important because a plan defines which actions must be performed by a client and advocate in the course of the process.²²² It must be foreseen that generally advocate's explanations about conducting the process using different means of dispute resolution will be different.²²³

The mediation process, as a rule, is conducted in the following order: 1. first of all people are expressing own opinions and emotions, often loudly; 2. they are sharing and elucidating the information; 3. in case of relaxation of tension the talk is about a stage of dispute resolution. The parties are talking about what they want to change, are discussing conciliation opportunities, are deciding issues; 4. Finally they are signing the received agreement.²²⁴

A client must know what will happen at the first meeting of mediation, must differentiate open and closed meetings, must know main techniques usable by mediators and the information connected with confidentiality principle. An advocate must warn a client to show patience and consciousness in the course of process. He must know that even in case a dispute is not settled completely, certain issues might be settled by mediation and at least a number of disputes will be decreased.²²⁵

A client must be explained that a result of restraining from active involvement might be lost opportunities and this factor might have a negative influence on a final decision of the case.²²⁶

These are just those procedural issues, which must be explained at the preparatory stage of mediation.

²¹⁶ *Tsertsvadze G.*, Perspectives of Legal Regulation of Mediation in Georgia, Ivane Javakhishvili Tbilisi State University, National Center of Alternative Resolution of Disputes, Tbilisi, 2013, 239, <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07.2013].

²¹⁷ *Foster R.V., Kavan J.O., Greebel E.L., Zimmern W. H.*, Strategies for Negotiating Mergers and Acquisitions, Printed in the United States of America, 2011, 13.

²¹⁸ *Thorpe R.W.*, Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, American Journal of Mediation, Vol.2, 2008, 14.

²¹⁹ *Picker B.C.*, Navigating Relationships: The Invisible Barriers to Resolution, American Journal of Mediation, Vol. 2, 2008, 44.

²²⁰ *Riskin L.L., Westbrook J.E., Guthrie C., Reuben R.C., Robbenolt J.K., Welsh N.A.*, Dispute Resolution and Lawyers, Printed in the United States of America, 4th ed., 2009, 446. Cited: *Tsertsvadze G.*, Perspectives of Legal Regulation of Mediation in Georgia, Ivane Javakhishvili Tbilisi State University, National Center for Alternative Dispute Resolution Tbilisi, 2013, 240, <<http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf>>, [05.07.2013].

²²¹ *Duryee L.*, Make the Most of Your Mediation: Early Preparation, 2014, 2, <<http://www.law.com/sites/lynnduryee/2014/04/28/make-the-most-of-your-mediation-early-preparation/>>.

²²² *Abramson H.I.*, Mediation Representation Advocating as a Problem-Solver in any Country or Culture, 2nd ed., Printed in the United States of America, 2010, 194.

²²³ *Thorpe R.W.*, Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, American Journal of Mediation, Vol. 2, 2008, 13.

²²⁴ *Beer J.E., Packard C.C.*, The Mediator's Handbook, Printed in Canada, 5th ed., 2012, 7.

²²⁵ *Abramson H.I.*, Mediation Representation Advocating as a Problem-Solver in any Country or Culture, 2nd ed., Printed in the United States of America, 2010, 310.

²²⁶ *Melnick J.D.*, Lost Opportunities in Mediation, Westlaw Journal Securities Litigation and Regulation, Vol. 13, Issue 4, 2013, 1, <<http://www.jamsadr.com/files/Uploads/Documents/Articles/Melnick-Opportunities-Mediation-2013-06-25.pdf>>.

6.4. Explanation to a Client a Role of Mediation Participants in the Mediation

At preparatory stages an advocate must not only explain a client scopes of own rights, but also give the information about a mediator and his role. It must be thought to be an integral part of the preparatory stage.

6.4.1. A Role of Mediator

An advocate must explain to a client the significance of choosing a mediator.²²⁷ It itself includes definition of a role of mediator.

Mediator²²⁸ is a negotiator. He is a leading figure of the process and is often called “process managers”.²²⁹ His role may be interpreted as a helper of disputing parties.²³⁰ A mediator helps parties in resolving disputes, he does not establish rules, does not give a legal consultation.²³¹

A mediator contributes in deciding who will participate in mediation and how a plan of mediation will be formed.²³² He is a facilitator, providing information awareness of the parties, opens a process, does everything needed for reaching an agreement, comes into contact with the parties, fixes meetings, prepares mediation meetings and defines adjournment time.²³³

A mediator provides information awareness of participants on keeping the confidentiality rule.²³⁴ He opens the process with questioning a client about the point of the dispute, though clarification of this issue might be completed at the meetings at the preparatory stage of mediation.²³⁵ In order to conduct effective negotiation a mediator will study the history and essence of the problem.²³⁶

A mediator’s role is facilitation of the circumstance. He cannot force the parties or have rough influence on the process. A mediator might think that he found a proper solution of the issue, though if he presses this solution on the parties, it will be gross violation of mediator’s ethics.²³⁷ A mediator will not have influence on the party’s decision either even if he wants to terminate the process.²³⁸ A mediator only states the issues, around which an agreement might be reached, which of them will be settled faster.²³⁹ He offers the parties agreements of argumentative, compromised character.²⁴⁰

A mediator must be a kind of model for the parties. He states a tone of talking, how to talk and how to listen to each other.²⁴¹

²²⁷ *Mosten F.S.*, Representing Clients in Mediation Effectively Setting up a Mediation, 3113, <[http:// www. mosten-mediation.com/books/articles/Representing_Your_Clients_In_Mediation.pdf](http://www.mosten-mediation.com/books/articles/Representing_Your_Clients_In_Mediation.pdf)>.

²²⁸ Mediator – is a Latin word and Means Intermediate Party.

²²⁹ *Domenici K., Littlejohn S.W.*, Mediation Empowerment in Conflict Management, Printed in the United States of America, 2nd ed., Illinois, 2001, 33.

²³⁰ *Moffitt M.*, The Four Ways to Assure Mediator Quality, 2008, 17, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117765>.

²³¹ *Greenwood M.*, How to Mediate Like a Pro 42 Rules for Mediating Disputes, Printed in the United States of America, 2008, 11.

²³² *Jernigan M., Lord R.B.*, The Mediator’s Role in the Family Business, American Journal of Mediation, Vol. 2, 2008, 55, [xelmisawvdomia: Heinonline.org](http://xelmisawvdomia:Heinonline.org).

²³³ *Greenwood M.*, How to Mediate Like a Pro 42, Rules for Mediating Disputes, Printed in the United States of America, 2008, 3.

²³⁴ *Rubin M.A., Spector B.F.*, Ethical Conundrums For the 21st Century Lawyer/Mediator Toto I’ve got a Feeling We’re not in Kansas any More, American Journal of Mediation, Vol. 2, 2008, 82.

²³⁵ *Jernigan M., Lord R.B.*, The Mediator’s Role in the Family Business, American Journal of Mediation, Vol. 2, 2008, 55.

²³⁶ *Smith A.L., Smock D.R.*, Managing a Mediation Process, Printed in the United States of America, 2008, 10.

²³⁷ *Greenwood M.*, How to Mediate Like a Pro 42 Rules for Mediating Disputes, Printed in the United States of America, 2008,12.

²³⁸ *Ibid*, 13.

²³⁹ *Stepp J.A.*, How does the Mediation Process Work? 2003, 4, <<http://www.mediate.com/articles/steppj.cfm>>.

²⁴⁰ *Riskin L.L.*, Alternatives to the High Cost of Litigation, Center for Public Resources, Vol. 12, Issue 9, 1994, 112.

²⁴¹ *Domenici K., Littlejohn S.W.*, Mediation Empowerment in Conflict Management, Printed in the United States of America, 2nd ed., 2001, 36.

By summing up this issue it is stated that the definition of a role of mediator in the mediation process can be formulated in the following way: 1. he provides conducting processes in order to solve a problem, to make communication between the parties for solving the problem; 2. he favors mutual understanding of the parties; 3. he gives the parties pieces of advice about increasing the effectiveness of negotiations; 4. he is studying relevancy of the parties' opinions and positions; 5. assists the parties in perceiving distinguished interests, trying to decrease hostility and poignancy and establish confidence; 6. assists the parties to prepare a plan of dispute resolution.²⁴² He must be able to express his opinion in short; must keep a distance with the parties;²⁴³ He must have a good developed patience ability – must be able to wait long. Of course a mediator's role is not confined with possession of certain skills and means. His personality, humanity and life experience are parts of his role as well.²⁴⁴

All the above mentioned information must be given to a client by the advocate at the preparatory stage of mediation.

6.4.2. Definition of a Client's Role

In the mediation process the decision is taken by the parties, not by the mediator.²⁴⁵ The decision is based on their responsibilities; they will not receive advice from the mediator to reach a concrete agreement or not.²⁴⁶ Although traditionally the mediation process is led by a mediator, the agreement is controlled by the parties.²⁴⁷ Here should be noted that the decision taken by the parties themselves has more execution potential and is more stable.²⁴⁸ This is one of the positive sides of the mediation process and heightens itself the importance of the client's involvement.

With the exception of certain concrete cases, which might be directly a personality problem of a client just it must be in the epicenter of the process.²⁴⁹ He might have to have private meetings with the opponent.²⁵⁰ He must decide himself he wants or not to use this or that method of dispute resolution and afterwards to accept or not the conditions of the agreement, the acceptance of which became possible in the course of the process.²⁵¹

6.4.3. Definition of Advocate's Role and Rights

In relation to the preparatory stage of mediation it is important the condition of The ABA Model Rules of Professional Conduct, according to which "An advocate is obliged to give a client consultation about restriction of own behaviors when a client is expecting actions, which are not permitted by law and according to the rules of professional behavior".²⁵² The existence of this demand is justified because of the

²⁴² *Jernigan M., Lord R.B.*, The Mediator's Role in the Family Business, American Journal of mediation, Vol. 2, 2008, 54.

²⁴³ Centre for Conflict Resolution, Advanced Mediation Skills–Course Book Course C, 2000, 8, <unesdoc.unesco.org/images/0013/001333/133319e.pdf>.

²⁴⁴ *Erickson S.K., Mcknight M.S.*, The Practitioner's Guide to Mediation A Client-Centered Approach, Printed in the United States of America, 2001, 60.

²⁴⁵ *Greenwood M.*, How to Mediate Like a Pro 42, Rules for Mediating Disputes, Printed in the United States of America, 2008, 12.

²⁴⁶ *Domenici K., Littlejohn S.W.*, Mediation Empowerment in Conflict Management, Printed in the United States of America, 2nd ed., 2001, 135,

²⁴⁷ *Thorpe R.W.*, Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, American Journal of Mediation, Vol.2, 2008, 9.

²⁴⁸ *Fel M.*, Referral to Mediation a Practical Guide for an Effective Mediation Proposal, The Hague, 2008, 103.

²⁴⁹ *Folberg G.*, Mediation the Roles of Advocate and Neutral, 2nd ed., Printed in the United States of America, 2011, 237.

²⁵⁰ *Golann D.*, Mediating Legal Disputes Effective Strategies for Neutrals and Advocates, Printed in the United States of America, 2009, 268.

²⁵¹ *Sherrill J. A.*, Ethics for Lawyers Representing Clients in Mediation, 3, <<http://www.americanjournalofmediation.com/docs/JOHN%20SHERRILL%20-Ethics%20for%20Lawyers%20Representing%20Clients%20in%20Mediation.pdf>>.

²⁵² The ABA Model Rules of Professional Conduct, Article 1, 4.

following reasons: often it is possible that a client might have the wrong opinion on the advocate's opinion or competence. Accordingly at the further stages of mediation in order to avoid misunderstanding it is inevitable to clarify this issue at the preparatory stage of mediation.

In practice, as a rule, the talk is about "advocacy" in the mediation process, though mediation itself mainly includes negotiation.²⁵³ In fact an advocate's role in the mediation process is to assist with negotiation, defend a client's position and provision of the final agreement between the parties to be reflected on the result. In order to reach this, it is inevitable to find out a client's objectives and guess the opponent's objectives and to state the main difference between them.²⁵⁴ For the representation in mediation an advocate needs essentially distinguished skills, which is especially reflected in cooperation and constructive talk with the other party.²⁵⁵ The advocate's sensitiveness obligation in case of representation in the mediation process is defined differently from the obligation in the court room.²⁵⁶ A client must know that an advocate instead of a standard role will play a cooperative, problem solving role.²⁵⁷ It is indisputable that the advocate's role in case of representation in the mediation process is different. Instead of "winning" an advocate helps the client to solve the problem and in order to reach it, is clarifying his interests, showing weak sides of the case, searching ways of solving problems.

An advocate must explain to the client that in spite of the fact that the main role of a lawyer is a judicial estimation of the issue, this factor does not diminish taking part in nonjudicial aspects of conflict.²⁵⁸ Finally the main role of an advocate – getting the best possible result is unchanged, though an action plan is different.²⁵⁹

6.5. repairing a Client to Answer Unexpected Questions

One of the actual procedural issues connected with mediation is to decide whether a client has to talk during the process of mediation or not. The form how this issue will be decided is greatly depended on each client's capability. Some mediators don't want to listen to a client, especially when the latter does not talk concisely and convincingly.²⁶⁰

In any case a mediator can talk with the parties separately so that to define their real interests,²⁶¹ put open questions to the party in order to get information about hidden emotions.²⁶² Accordingly an advocate must discuss with a client presumable questions, which might be given to the client by a mediator or other participants of the process.

It enables the client to prepare relevant productive answers.²⁶³ An advocate must assist the client to express his own interests verbally.²⁶⁴

²⁵³ *Golann D.*, *Mediating Legal Disputes Effective Strategies for Neutrals and Advocates*, Printed in the United States of America, 2009, 264.

²⁵⁴ *Foster R.V.*, *Effective Negotiation Strategies and Approaches for MA lawyers and their Clients*, 2011, 8.

²⁵⁵ *Iremashvili K.*, *Integration of Mediation with the Curriculum of Law School*, the National Center of Disputes Resolution, Tbilisi, 2012, 8, <http://www.library.court.ge/upload/lib_ADR.pdf>.

²⁵⁶ *Kovach K.K.*, *Mediation Principles and Practice*, 3rd ed., Printed in the United States of America, 2004, 424.

²⁵⁷ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 311.

²⁵⁸ *Coltri L.S.* *Alternative Dispute Resolution a Conflict Diagnosis Approach*, 2nd ed., University of Maryland, University College, 2010, 80.

²⁵⁹ *Golann D.*, *Mediating Legal Disputes Effective Strategies for Neutrals and Advocates*, Printed in the United States of America, 2009, 268.

²⁶⁰ *Berman L.J.*, *Mediator's Opening Statements Offer Insights for Successful Results*, Published in the *Mediation Strategies*, California's Legal Newspaper, 2003, 2-3, <<http://www.americaninstituteofmediation.com/pg66.cfm>>.

²⁶¹ *Jernigan M., Lord R.B.*, *The Mediator's Role in the Family Business*, *American Journal of mediation*, Vol. 2, 2008, 56.

²⁶² *Stepp J.A.*, *How does the Mediation Process Work?* 2003, 5, <<http://www.mediate.com/articles/steppj.cfm>>.

²⁶³ *Abramson H.I.*, *Mediation Representation Advocating as a Problem-Solver in any Country or Culture*, 2nd ed., Printed in the United States of America, 2010, 315.

²⁶⁴ *Pel M.*, *Referral to Mediation a Practical Guide for an Effective Mediation Proposal*, The Hague, 2008, 126.

Presumable questions, to which a client will have to answer, are the following: What happened? What kind of documents does he have to prove own position? Which witness will confirm his position? What are his objectives and interest? What is the opponent party's interest? What expectation has he from the mediation process? Has he any opinions connected with the resolution of the dispute? What results will be reached in case of applying to court? How long will it take court proceeding to prepare case? How much are approximately court expenses? What kind of actions will he perform, if the agreement can't be reached?²⁶⁵ What barriers hampered him to conduct direct negotiation?²⁶⁶

An advocate must advise a client to answer the opponent party's questions honestly, carefully and correctly. He must also know which questions he must not answer. Some advocates uses mediation as a source of finding information. Accordingly it is not necessary to give the opponent information about all the details.²⁶⁷

6.6. Information Awareness of a Client About the Necessity of Fixing the Agreed Position from Him and an Advocate and Inadmissibility of Expressing Mutual Exclusive Expressions

An advocate and a client must distribute responsibility among each other at the preparatory stage of mediation.²⁶⁸ A concrete resolution of the issue often causes disagreement between the advocate and the client.²⁶⁹ Accordingly there are cases when their interests don't coincide.²⁷⁰ In such cases an advocate considering professional ethics must make concession to the client. It must be solved in this way in spite of the client's decision is against the advocate's interests or not.²⁷¹

7. Conclusion

Considering all the above mentioned it is stated that legislative regulation of issues connected with mediation is inevitable. Accordingly the conclusion received as a result of research will be following:

- Regulation of the mediation process must be done at a legislative level, including the definition of the process. It s a period, which starts with an agreement between parties and representatives on adjudication by means of mediation. The preparatory stage must be considered as an integral part of the mediation process. As a result advocates' obligations at the preparatory stage of mediation would be more reckoned with from the addressees' side.

- At a legislative level must be defined that all the obligations, which are imposed on advocates are also spread during representation in the mediation process (regardless of this demand is stated by state law or internationally recognized). It must be defined concretely that these obligations will be imposed on them from the preparatory stage of the mediation process.

- In addition to the obligations imposed on advocates when they are using other means of dispute resolution it is necessary to define those obligations, which will be imposed on advocates concretely in case of representation in the mediation process.

- At the preparatory stage of mediation an advocate must estimate how much reasonable is using of this means of dispute resolution. In the process of taking decision he must foresee each detail of each concrete case. General approaches are not enough.

²⁶⁵ *Abramson H.I.*, Mediation Representation Advocating as a Problem-Solver in any Country or Culture, 2nd ed., Printed in the United States of America, 2010, 315-316.

²⁶⁶ *Golann D.*, Mediating Legal Disputes Effective strategies for Neutrals and Advocates, Printed in the United States of America, 2009, 266.

²⁶⁷ *Folberg G.*, Mediation The Roles of Advocate and Neutral, 2nd ed., Printed in the United States of America, 2011, 263.

²⁶⁸ *Abramson H.I.*, Mediation Representation Advocating as a Problem-Solver in any Country or Culture, 2nd ed., Printed in the United States of America, 2010, 241.

²⁶⁹ *Ware S.J.*, Principles of Alternative Dispute Resolution, 2nd ed., Printed in the United States of America, 2003, 169.

²⁷⁰ *Glick T.*, Creative Mediation, North Charleston, 2012, 37.

²⁷¹ *Ware S.J.*, Principles of Alternative Dispute Resolution, 2nd ed., Printed in the United States of America, 2003, 174.

- Relevant is an issue concerning which concrete advocate will combine with the role of a representative in the mediation process. Advocate's professionalism and the knowledge of Law cannot be considered to be a sufficient condition. For a person to be a representative in the mediation process it is mandatory that his personal capacity, properties and skills must comply with requirements of standard. Moreover a subject of estimation must be his attitude to mediation institute.

- It is important to define a form of initiation of dispute resolution by means of mediation from the advocate's side. It should be foreseen not only how an offer will be made for a client, but for the opponent party too.

- At the preparatory stage of mediation an advocate must arrange to define own action strategy/ tactics. Concretely in which form the strategy will be formed completely depends on a client's real interests and those preconditions, which caused the dispute. So before defining the strategy an advocate must study these factors in detail.

- At the preparatory stage of mediation an advocate must completely prepare the case, which includes the necessity of performing concrete actions, including studying factual circumstances, legal estimation; finding evidences for the process; choosing of a mediator; defining of a circle of persons participating in mediation.

- Preparation of the case also implies defining agreement conditions. As it is stated on the basis of the conducted research there must be worked out several alternatives of conciliation and define priorities to them.

- At the preparatory stage of mediation it is also important to prepare a client. It implies concrete actions: first of all the essence and basic principles of mediation must be explained to a client. It is a basic requirement. After this it is necessary to inform a client from a legal aspect and a plan of the process.

- An advocate must explain to a client each participant's role in the process in order not to become a base of a client's astonishment or dissatisfaction their approaches, conduct style (which of course will be different from participation in other kinds of process). From this point of view especially actual is the definition of an advocate's role. Such decision is caused by the fact that in the mediation process an advocate's action tactics, strategy or attitude to the participants of the process are radically different from their traditional approaches, from those conducts, which are characteristic for their traditional ideology.

- From the point of view of a client's preparation one of the main obligations of an advocate is the preparation of a client for answering to presumable questions.

- It is important that an advocate's conduct on representation in the mediation process (as well as in other processes) must be conformable to the client's best interests. Taking it into account it is stated that even in the case when in the opinion of the advocate a client's action is not justified, or had an alternative of a better choice, he must recede his own position into the background.

- In order to provide all these it is desirable for the parties and their advocates to compile exhaustive guides of mediation.²⁷²

- Considering of all the above mentioned it is inevitable to make changes in Georgian legislation.

²⁷² *Thorpe R.W.*, Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, *American Journal of Mediation*, Vol.2, 2008, 5.