

## Confidentiality of the Mediation Process and Ethical Dilemmas

*Scientific research is dedicated to the protection of the legal foundations of Confidentiality in the process of mediation and ethical dilemmas. The paper discusses the negative and positive aspects of mediation confidentiality, the importance of confidentiality protection.*

*In addition, the purpose of the study is to first determine the specifics of the national model regarding the confidentiality of mediation, and then to define the approaches of international acts on the confidentiality of the mediation process, the legislative regulation of different countries (Germany, Austria, etc.). The study is based on the concept that confidentiality is an integral part and the main principle of mediation that stimulates certain positive aspects (sincerity of the parties, fairness of the agreement, neutrality of the mediator, effectiveness of mediation, etc.). Accordingly, the paper emphasizes that there is a logical chain between these factors. Confidentiality connects these circumstances with one another and plays a central role in mediation.*

*At the same time, protecting Confidentiality increases the risk of damaging the public interest. However, in parallel with the protection of Confidentiality, the principles of legality and fairness should not be violated while ensuring that the public interest is protected. The activity of the mediator also requires the resolution of ethical dilemmas, which involves a thorough study of each case and taking into account specific circumstances. Accordingly, each case should be evaluated on a case-by-case basis, and it must be determined to what extent another value may override the interest of protecting Confidentiality in mediation.*

*Here, the article also deals with the legal grounds for limitation of Confidentiality, in the presence of which the invasion in Confidentiality can be considered legitimate. Determining the legitimacy of violation and restriction of confidentiality is important for distribution of the burden of proof between the parties. Simple, understandable and clearly outlining the grounds for confidentiality restriction is essential to assess this issue correctly. This is even more relevant for the Georgian model, which envisages a fairly wide range of confidentiality restrictions on the one hand, and requires the observance of proportionality, on the other hand. In this reality, the mediator should try to find a golden mean in his activities so that the protection of one value does not lead to an unreasonable encroachment of another value.*

**Keywords:** *Mediation, Confidentiality, Neutrality, Fairness, Ethical dilemmas, Grounds for Restrictions*

### 1. Introduction

Mediation is one of the important ways of resolving disputes, which is characterized by specific features. Among them, it is worth noting that mediation involves a confidential process, although the concept of confidentiality seems so general that its inaccurate or artificially extended interpretation can lead to an incorrect solution of the issue and, therefore, an infringement of the interest of protecting confidentiality. Accordingly, the purpose of the study is to determine, first of all, the content and legal nature of confidentiality in mediation, and then to determine the specific features of confidentiality protection. This, in turn, will help to clarify to what areas and to what kind of information the principle of confidentiality of the mediation process can be applied.

In addition, confidentiality sometimes intersects with the obligation to inform, the prevention of crime, and other public or in some cases private interests, creating an ethical dilemma as to which value should be protected - confidentiality or ethical value against it. The conflict between the rules of professional ethics of the mediator and representatives of other professions deserves special attention. Accordingly, the value conflict between the protection of confidentiality and its opposite (public) interest should be studied. In this way, it thus becomes clear to what extent it is legitimate to invade confidentiality at the expense of protecting

---

\* Doctor of Law, Visiting Lecturer at TSU, Professor at the European University, Chief Research Fellow at Legal Research Institute Expert in accreditation of higher education programs, Chief Research Fellow at Legal Research Institute, Lawyer, Mediator.

another interest. The problem is interesting in the context of determining the relationship between the principles of the mediation process. Within this framework, it is necessary to determine the importance of confidentiality protection for mediation, which cases of restriction of confidentiality can be considered legitimate. This issue is relevant from point of view of the distribution of the burden of proof between the parties and is directly proportional to the imposition or exclusion of liability. Clarifying this has both theoretical and practical significance.

The issue is even more relevant if we take into account that the practice of mediation is still not rich in Georgia and is now being established in society. Therefore, it is very important to scrupulously maintain confidentiality in mediation when taking the first steps.

The research was based on normative-dogmatic methods, since it is necessary, on the one hand, to determine the content of the norms governing the confidentiality of mediation in Georgia, and on the other hand, to define the existing dogmatic approaches to them. In addition, the paper also uses methods of analysis and synthesis to discuss various aspects of the research topic are considered in dept and to draw relevant conclusions by reconciling them. At the same time, with the help of the comparative method, the issue was studied not only at the national level, but also taking into account the approaches of different countries an international acts. This is important in order to explore the depths of the problem and to find a best way to solve it or to improve practice.

## 2. The concept of confidentiality of mediation and protected spheres

### 2.1. General overview of mediation

**Mediation is a consensual way of resolving disputes** between parties, achieved through negotiation and the assistance of a mediator as a neutral third party.<sup>1</sup> Mediation is a process in which a mediator facilitates communication and negotiation between parties to help them in resolving a dispute and in reaching a voluntary agreement.<sup>2</sup>

The **purpose of mediation is to communicate effectively with the opposing party**. The role of the mediator itself is to facilitate direct communications. However, the **mediator should be not a trusted counselor, but merely a neutral person**. Ideally, parties will trust the mediator because of his neutral role, but they can not expect the mediator to act solely in the interests of one of the parties.<sup>3</sup> In fact, mediation is based on the voluntary and confidential meetings of the disputing parties in the presence of a mediator, whose purpose is to reach an agreement acceptable to all parties.<sup>4</sup>

If we compare mediation with a court hearing, it becomes clear that the mediator is looking for a way to reach an agreement between the parties of mediation, and the court issues a verdict. The mediator's tool is to identify the real positions and interests of the parties, and the court is looking for facts. Mediation promotes the principle of confidentiality, while litigation requires all evidence to be made public.<sup>5</sup>

One reason for using mediation is that an skilled neutral person (mediator) can improve the quality and quantity of information exchanged to resolve disputes. This information, in turn, can improve the chances that the parties choose the method to resolve the dispute they want. In mediation parties may disclose information, and an experienced mediator can use this confidential information to advance negotiations, even if he does not

---

<sup>1</sup> *Otis L., Rousseau-Saine C.*, The Mediator and ethical Dilemmas: A proposed Framework for Reflection, Journal of Arbitration and Mediation, Vol. 4, №2, 2014, 46.

<sup>2</sup> *Widman M. S.*, The Protections and Limits of Confidentiality in Mediation, Alternatives, Vol. 24, No. 10, 2006, 167.

<sup>3</sup> *Deason E. E.*, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability? Marquette Law Review, Vol. 85, 2001, 81.

<sup>4</sup> *Perkowski M.*, Implications of Arbitration and Mediation Implementation from the perspective of Bialystok, Optimum Economic Studies, №5 (83), 2016, 153; *Bichia M.*, The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, N3, 2021, 12 (in Georgian).

<sup>5</sup> *Freedman L. R., Prigoff M. L.*, Confidentiality in Mediation: The Need for Protection, Journal of Dispute Resolution, Vol. 2, Iss. 1, 1986, 45.

share this information to the opposing party. **Confidentiality is a main element in encouraging this process of three-way communication.** For this purpose, during the mediation process mediator emphasizes that he will not transfer the statements made during a closed meeting in a confidential setting.<sup>6</sup> **A sense of trust and an informal environment is essential for the mediation process.** If these elements are absent during mediation, then the system will collapse<sup>7</sup> and the goal will not be achieved.

Although mediation isn't **psychotherapy, it can have both therapeutic and counter-therapeutic effects.** In other words, the parties involved in mediation may be seeking such intangible benefits as an apology, forgiveness, or simply more understanding from the other party. However, it is sometimes helpful to identify the root causes of a dispute, or to have a heightened sense of empowerment. While the purpose of any mediations is to reach a written agreement to resolve the dispute, once the parties enter the mediation process, the mediator may see more possibilities of non-monetary benefits.<sup>8</sup>

The **mediator** guides the negotiation of the parties through a structured process, **assisting the parties identify problems and seek possible solutions.**<sup>9</sup> In addition, the mediator encourages each party to explore their own interests and needs, and also tries to encourage the parties to reconcile their positions. The basic principles of the mediation process are that the parties themselves know best how to make decisions that affect their lives. During mediation, options for resolving the dispute are discussed, and the mediator can lead the parties to a situation where both of them can "win".<sup>10</sup>

In fact, the mediator's style of activity **can be facilitative (encouraging) and evaluative.** In facilitative mediation, the mediator takes on the so-called "Maieutical" role,<sup>11</sup> as he tries to act as a midwife in relation to solutions that the parties expressly offer as a way to resolve the dispute. With regard to evaluative mediation, in this case a mediator is ready to offer his own solutions and opinions on the effectiveness or reasonableness of the decisions presented by the parties, or, as a last resort, to offer what the mediator considers the best way to resolve the dispute. Facilitative mediators place mediator's neutrality at the top of the hierarchy of values.<sup>12</sup>

## 2.2. Content of the Confidentiality in Mediation

Traditionally, **mediation has been considered as a consensual and confidential dispute-resolving process.**<sup>13</sup> Therefore, the main principle of mediation is confidentiality,<sup>14</sup> which can create ethical dilemmas for the mediator.<sup>15</sup>

**The term "mediation confidentiality" is used in a broad sense and may include the protection of various information from disclosure.** In this case, confidentiality protection norms include rules that apply to one or more of the following cases. Namely, it has been established that:

- a) it is not allowed to use information obtained through mediation when considering a case in court;
- (b) Mediation communications may not be forcibly disclosed in the legal proceedings;
- (c) Mediation communications must be kept confidential and must not be disclosed to anyone (true confidentiality);

<sup>6</sup> *Deason E. E.*, Predictable Mediation Confidentiality in the U.S. Federal System, *Ohio State Journal on Dispute Resolution*, Vol. 17, №2, 2002, 245.

<sup>7</sup> *Rosenberg P. J.*, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws, *Ohio State Journal on Dispute Resolution*, Vol. 10, Iss. 1, 1994, 181.

<sup>8</sup> *Hoffman A. D., Wolman N. R.*, The Psychology of Mediation, *Cardozo J. of Conflict Resolution*, Vol. 14, 2013, 805-806.

<sup>9</sup> *Irvine M.*, Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation, *RUTGERS Law Journal*, Vol. 26, 1994, 158.

<sup>10</sup> *Furlan F., Blumstein E., Hofstein N. D.*, Ethical Guidelines for Attorney Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators? Vol. 14, 1997, 3.

<sup>11</sup> This is "midwife's art." It is based on a representation that the mediator cannot directly convey important knowledge to the side, but it can highlight this knowledge in the area by asking questions. The mediator must facilitate the birth of already existing truths, it facilitates and identifies the interests of the parties.

<sup>12</sup> *Burns R. P.*, Some Ethical Issues Surrounding Mediation, *Fordham Law Review*, Vol. 70, Issue 3, 2001, 702.

<sup>13</sup> *Nolan-Haley J.*, Mediation: The "New Arbitration", *Harvard Negotiation Law Review*, Vol. 17, 2012, 73.

<sup>14</sup> *Tsertsvadze G.*, Mediation, *Alternative Form of Dispute Resolution (General Review)*, Tb., 2010, 48 (in Georgian).

<sup>15</sup> *Noone M. A., Ojelabi A. L.*, Ethical Challenges for Mediators around the Globe: An Australian Perspective, *Washington University Journal of Law & Policy*, Vol. 45, 2014, 169.

(d) the mediator is prohibited from testifying on the mediation process conducted by him;

(e) A contractual agreement between the participants in the mediation sets out the scope for maintaining the confidentiality of the mediation messages.<sup>16</sup>

Accordingly, the **basis of effective mediation is the confidentiality for mediation communications, according to which the mediator must protect messages from disclosure.** First of all, **confidentiality fosters communication between the parties and the mediator.** With its help, the parties can reach an agreement even when it would be impossible through ordinary negotiations. The the protection of confidentiality by a lawyer, doctor, priest is similar, since in this case the privilege of protection against disclosure and transmission of information (from testimony) also operates (is valid).<sup>17</sup>

**Accordingly, according to the principle of confidentiality, should be protected information that:**

**5. Was shared or created during the mediation, for example, the mediator's notes, as well as prepared documents and visual materials for the purposes of the mediation;**

**6. Given to the mediator during individual meetings, during a telephone conversation with one of the parties or by e-mail;**

**7. Related to the observation of the behavior of the participants in the mediation process;**

**8. Reflecting the reasons for not reaching a mediated agreement.<sup>18</sup>**

An important **focus of the Uniform Mediation Law is to ensure that the protection of confidentiality meets the reasonable expectations of the parties.** The Uniform Mediation Act expanded confidentiality protection. Confidentiality protects communications which includes statements that are made orally, in writing, or other recorded statements. Accordingly, **the Uniform Mediation Law has created a broad privilege of confidentiality that extends to participants and mediators.<sup>19</sup>**

European Directive 2008/52/EC is **based on a broad concept of confidentiality and treats as confidential any information disclosed during mediation.<sup>20</sup>**

Problem-solving discussions during mediation are a key part of the negotiations, which requires the parties to explain the reasons for the dispute, possible settlement options, and expectations. This may include the **exchange of personal, official or other confidential information in order for negotiations between the parties** to be successful.<sup>21</sup> Therefore, it is possible that statements submitted during mediation may concern private or personal data. This is natural if a party has voiced personal or sensitive issues in the mediation process, and the processing of personal data requires strict compliance with the rules established by law.<sup>22</sup>

Thus, mediation is a private process. This allows for more free discussion of potentially sensitive issues in the private sphere. However, **obviously, this is valid as long as the confidentiality clause keeps private nature of the discussions.<sup>23</sup>**

The confidentiality of mediation creates the ability of the parties to keep the contents of mediation communication from being used as evidence in a subsequent litigation. This is important both from a legal and practical point of view. **The sincerity of the parties can be crucial to a successful mediation.** As a neutral

<sup>16</sup> Relationship Between Mediation and Attorney Malpractice and Other Misconduct, 45 Cal. L. Revision Comm'n Reports 19, 2017, 53-54, <http://clrc.ca.gov/pub/Printed-Reports/Pub240-K402.pdf> [05.01.2023].

<sup>17</sup> *Deason E. E.*, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability? *Marquette Law Review*, Vol. 85, 2001, 80.

<sup>18</sup> *Reichert K.*, Confidentiality in international Mediation, *Dispute Resolution Journal*, Vol. 59, №4, 2004, 62; *Nadja M. A.*, International and Comparative Mediation: Legal Perspectives, "Kluwer Law International", 2009, 248.

<sup>19</sup> *Johnson D. P. Jr.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act? *Florida State University Law Review*, Vol. 30, №3, 2003, 492.

<sup>20</sup> ob. Article 7, directive 2008/52/EC of European Parliament and of the Council, 21 May 2008, <<https://www.legislation.gov.uk/eudr/2008/52/article/7>> [15.12.2022].

<sup>21</sup> *Alfini J. J.*, Mediation Theory and Practice, 2d ed. 2006, 133, 205-206; *Callahan R.*, Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending? Vol. 12, Iss. 1, 2013, 65.

<sup>22</sup> *Bichia M.*, Structural Analyzes of Article 18<sup>1</sup> of Civil Code of Georgia, *Journal "Justice and Law"*, №1, 2020, 52, 58 (in Georgian); *Bichia, M.*, The Problem of Civil Legal Protection of Personal Data in the Internet Universe, In: VIII International Scientific and Practical Conference: "Internet and Society", Kutaisi, 2017, 35-40. (in Georgian).

<sup>23</sup> *Bush Robert A. Baruch*, Study of ethical Dilemmas and Policy Implications, *A, Journal of Dispute Resolution*, Iss. 1, Vol. 1994, 14.

third party, the mediator uses the tool of personal communication with the party, which simplifies dispute resolution. Often the mediator attempt to identify the problem and its causes with the hope that this information will be used to help resolve the dispute. During the discussion, the mediator encourages the parties to discuss facts they would not normally be willing to concede. Confidentiality is paramount to the mediation process; Without it, the parties would not want to participate in the process and make certain confessions, which is an essential prerequisite for the settlement of the dispute. In this form, thanks to confidentiality, the parties effectively and successfully participate in the mediation process.<sup>24</sup>

The mediator will **explain to the parties the importance of confidentiality from the moment of the opening speech**. The mediator introduces the parties to the legal grounds for protecting confidentiality, ensures that they understand this information, and explains that the parties are capable of making a decision based on their own best interests.<sup>25</sup> In addition, the confidentiality of the mediation process does not necessarily end when the parties and other participants leave the mediation room. If the law requires court approval of the settlement agreement, mediation will only be completed with court approval to protect confidentiality. However, the end of the mediation session does not mean the termination of the obligation to protect confidentiality.<sup>26</sup> According to the law on Mediation itself, to maintain the confidentiality should be continued after the end of mediation, unless otherwise provided for by a written agreement concluded between the parties and a mediator.<sup>27</sup>

**The purpose of confidentiality is to reduce the risk of non-disclosure of important information by the parties to the mediator, as they** refrain from discussing about personal weaknesses. However, the parties should disclose confidential information in order to find a solution; There is no other way to follow the principle of honesty and awareness.<sup>28</sup>

The mediation process is **confidential, which means that the specified information must be kept secure and disclosure must be controlled**. It is an ethical obligation to protect transmitted information.<sup>29</sup> In this sense, **confidentiality is considered a privilege of not disclosing information**, which is the basis of a trust-based relationship.<sup>30</sup> Accordingly, the parties to mediation have “the privilege of refusing to testify and not to provide explanations to other persons in a subsequent proceedings relating to messages of mediation.”<sup>31</sup>

States use this privilege as the most effective basis for protecting confidentiality during legal proceedings. This form of protection has also been taken into account by the Uniform Mediation Law. Accordingly, a privilege is an evidentiary construct that allows its holder to refuse to use the information received as evidence, except in cases where the owner waives the privilege or the statements relate to cases of exclusion from the privilege.<sup>32</sup> That is, the Uniform Mediation Law has **created a broad privilege of confidentiality that applies to participants and mediators**.<sup>33</sup>

Thus, **a privilege in law is the right to exclude certain information from being used as evidence**.<sup>34</sup> Privileged communications shall be considered statements made by persons in the mediation process that are

---

<sup>24</sup> *Johnson D. P. Jr.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act? Florida State University Law Review, Vol. 30, №3, 2003, 489.

<sup>25</sup> See *Oberman S.*, Confidentiality in Mediation: An Application of the Right to Privacy, Ohio State Journal on Dispute Resolution, Vol. 27, No. 3, 2012, 548.

<sup>26</sup> *Tetunic L. F.*, Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act, Nova Law Review, Vol. 36, Iss. 1, 2011, 82.

<sup>27</sup> Article 10(7) of the Law of Georgia on Mediation.

<sup>28</sup> *Rabe C. S., Wode M.*, Mediation, Grundlagen, Methoden, rechtlicher Rahmen, 2. Auflage, Berlin, 2020, 25 (in German).

<sup>29</sup> *Pattenden R.*, The Law of Professional – Client confidentiality, Regulating the Disclosure of Confidential Personal Information, Oxford, 2003,12.

<sup>30</sup> *Kalandadze D.*, The principle of the confidentiality in the mediation process and Georgian legislative reality, "Alternative Dispute Resolution - Yearbook", 2018-2019, Special Issue, 2019, 36 (in Georgian).

<sup>31</sup> *Tetunic L. F.*, Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act, Nova Law Review, Vol. 36, Iss. 1, 2011, 82.

<sup>32</sup> *Deason E. E.*, Predictable Mediation Confidentiality in the U.S. Federal System, Ohio State Journal on Dispute Resolution, Vol. 17, №2, 2002, 259.

<sup>33</sup> *Johnson D. P. Jr.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act? Florida State University Law Review, Vol. 30, No. 3, 2003, 492.

<sup>34</sup> *Scheutzwow O. S., Gillis L. S.*, Confidentiality and Privilege of Peer Review Information: More Imagined Than Real, Journal of Law and Health, Vol. 7, 1993, 179.

protected from forced disclosure on the witnesses during the participation of the mediator or party to the proceeding.<sup>35</sup>

The question arises: what is the purpose of privilege?

The main purpose of **mediation privilege is to ensure the protection of the mediation parties against these downside risks of failure**. However, if the protection of confidentiality is illusory, the parties will refrain from participating in the mediation process. Another main purpose of this privilege is to give the **public's perception that the mediators and mediation process are neutral and impartial**.<sup>36</sup> In this sense, the **confidentiality of mediation creates an environment for parties to be open and honest with each other** because they have the opportunity to meet with each other through mediation without fear of public embarrassment or the risk of revealing sensitive information. Individual meetings (sessions) between the mediator and each party in the absence of the other party at these meetings are a unique feature of mediation. They are generally produced because any information provided by a party to the mediator is confidential and the mediator will not disclose these communications to the other party or anyone else without the consent of the party that provided the information.<sup>37</sup>

Mediation offers the parties the opportunity to maintain the confidentiality of the negotiations. Experience also proves that mediation is effective because the mediation process is confidential. **However, negotiations concluded during mediation have no binding force until they take the form of an agreement**.<sup>38</sup>

### 2.3. Internal and external confidentiality in mediation

According to the subject composition, the distinction between internal and external confidentiality is distinguished. During external confidentiality, notes must be protected from third parties. Therefore, the obligation to protect the information disclosed in external confidentiality rests with the mediator, any party, a representative of the party, an expert, an interpreter or a witness. Accordingly, **external confidentiality obliges the participants of the mediation not to disclose the information and not to transfer it to external parties**.<sup>39</sup> At the same time, the parties, advisors, experts, translators, witnesses, mediators and other assisting persons are obliged not to transfer information to persons who are not considered participants of this process. External confidentiality is aimed at ensuring that confidential information is not disclosed to unauthorized parties, the so-called "participants of external relations."<sup>40</sup>

At the same time, it is advisable that during mediation the circle of addressees for the protection of confidential information should be expanded and extended it to any person who may have access to the information disclosed in mediation. Such a person may be an intern, a practitioner,<sup>41</sup> as well as someone who assists a mediator in non-professional matters (for example, a secretary) and has received information about another person. Thus, the duty to protect confidentiality should apply to all those<sup>42</sup> involved in the mediation process.

---

<sup>35</sup> *Rosenberg J. P.*, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws, *Ohio State Journal on Dispute Resolution*, Vol. 10, Iss. 1, 1994, 159.

<sup>36</sup> *Kirtley A.*, Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, The Participants, the Process and the Public Interest, *The Journal of Dispute Resolution*, Vol. 1995, №1, 10.

<sup>37</sup> *Wolski B.*, Confidentiality and Privilege in Mediation: Concepts in need of Better Regulation and Explanation, *UNSW Law Journal*, Vol. 43(4), 2020, 1561.

<sup>38</sup> *Field R., Wood N.*, Marketing Mediation ethically: The case of Confidentiality, *Field & Wood*, 2005, 146.

<sup>39</sup> *Kalandadze D.*, The principle of the confidentiality in the mediation process and Georgian legislative reality, "Alternative Dispute Resolution - Yearbook", 2018-2019, Special Issue, 2019, 36 (in Georgian).

<sup>40</sup> *Nadja M. A.*, International and Comparative Mediation: Legal Perspectives, "Kluwer Law International", 2009, 248.

<sup>41</sup> *Zhorzholiani L.*, The principle of confidentiality in the process of considering and resolving a collective labor dispute through mediation, "Alternative Dispute Resolution - Yearbook", 2018-2019, Tb., 2019, 217 (in Georgian).

<sup>42</sup> For a broader concept of confidentiality protection, see *Meiss Reinhard W. von*, *Die Persönliche Geheimsphäre und deren Schutz im prozessualen Verfahren*, Diessenhofen, 1975, 177-178.

With regard to **internal confidentiality**, we are talking about the **duty of the mediator not to disclose the information received from the parties during individual meetings**.<sup>43</sup> Therefore, the protection of internal confidentiality extends to information disclosed in individual meetings,<sup>44</sup> and the protection of internal confidentiality is the duty of the mediator.<sup>45</sup> A high degree of trust affects the individual (separate) meetings of the mediator and the party, which are most confidential, since the information provided by the party at the request of the party may not be known to the other party as well. Thus, the emergence of trust is directly related to the protection of confidentiality.<sup>46</sup>

The specifics of the mediator's activities should also be taken into account, since the mediator works, mainly with (a) **either open communication or (b) confidentiality**. If the communication is **based on openness**, then the obligation of **confidentiality protection shall not apply to the information disclosed during the meetings until the party expresses** to the mediator a desire to declassify the named factual circumstances secret.<sup>47</sup> It shares the principle that the free exchange of information through mediation is necessary to build trust and understanding, as well as to encourage full and sincere negotiations between the parties.<sup>48</sup> However, when the mediator's **actions are based on a confidentiality protection approach**, then any **information is considered confidential and the mediator will have right to disclose it only if there is an agreement of the parties to this effect**.<sup>49</sup>

### 3. Factors Determining the Importance of Confidentiality in Mediation

Confidentiality is vital to mediation for many reasons such as: Sincerity, fairness, neutrality, an informal and relaxed environment, and the protection of the mediation process.

#### 3.1. Sincerity

**Effective mediation requires sincerity.** The mediator helps the parties to identify the issues under discussion, find possible grounds necessary for the agreement, study their own interests and take into account them, determine the underlying causes of the dispute arising in the depths. Often such negotiations can touch upon the deep inner feelings of the parties on sensitive issues. These negotiations require the recognition of facts that the parties have disputed at other times. Confidentiality ensures, on the one hand, the voluntary participation of the parties in the process, and on the other hand, effective and successful negotiations.<sup>50</sup>

**Mediation is based on the principle that negotiations can only be effectively conducted in a private and confidential sphere.**<sup>51</sup> Confidentiality has become one of the most important topics in mediation; Participants are told that what they say during mediation will not be heard outside of the mediation and therefore people expect the mediation process to be confidential.<sup>52</sup>

**This expectation of confidentiality not only distinguishes mediation from litigation, but also provides the basis for a more honest relationship between the parties and the mediator.** Confidentiality gives the

---

<sup>43</sup> *Tvauri R.*, Standard of Limits of Confidentiality Principle in Mediation, "Alternative Dispute Resolution Yearbook", 2015, 27 (in Georgian).

<sup>44</sup> *Nadja M. A.*, International and Comparative Mediation: Legal Perspectives, "Kluwer Law International", 2009, 249.

<sup>45</sup> *Govori Z.*, Confidentiality under the ICC Mediation Rules compared to the LCIA Mediation Rules, International Hellenic University, 2016, 7.

<sup>46</sup> *Tsertsvadze G.* (ed.), Prospects for legal regulation of mediation in Georgia, Vol. 2013, 25 (in Georgian).

<sup>47</sup> *Govori Z.*, Confidentiality under the ICC Mediation Rules compared to the LCIA Mediation Rules, International Hellenic University, 2016, 7.

<sup>48</sup> *Nadja M. A.*, International and Comparative Mediation: Legal Perspectives, "Kluwer Law International", 2009, 249.

<sup>49</sup> *Govori Z.*, Confidentiality under the ICC Mediation Rules compared to the LCIA Mediation Rules, International Hellenic University, 2016, 7.

<sup>50</sup> *Freedman Lawrence R., Prigoff Michael L.*, Confidentiality in Mediation: The Need for Protection, Journal of Dispute Resolution, Vol. 2, Issue 1, 1986, 37-38.

<sup>51</sup> *Boulle L., Nesic M.*, Mediation. Principles, Process, Practice. London et al.: Butterworths, 2001, 296-297; *Stipanowich T.*, Why Businesses Need Mediation, Legal Studies Research Paper Series, 2004, 14.

<sup>52</sup> *Rausch M.*, The Uniform Mediation Act, Ohio State Journal Dispute Resolution, Vol. 18, №2, 2003, 608.

parties the opportunity for honesty discuss the facts, their positions and options for resolving the dispute. In addition, confidentiality facilitates the exchange of information and the active participation of the parties in the mediation process.<sup>53</sup>

Thus, the **principle of confidentiality leads to the trust of the parties in the mediation process. It is vital to expect confidentiality for the success** of mediation. It promotes open and honest dialogue between the participants in the process,<sup>54</sup> as the parties know that their communication and information disclosed will remain confidential.<sup>55</sup> Thus, this is the most important prerequisite for reaching an agreement between the parties.

### 3.2. Protection of fairness

**The fairness to the parties requires confidentiality.** For example, guarantees in litigation are evaluated by a lawyer, evidence and procedural rules are used, and they are less important for mediation. Unlike the traditional justice system, in mediation, the parties negotiate without the expectation that they will later be bound by them. Subsequent use of the information generated at this time can be detrimental, especially if one party is more sophisticated than the other. Thus, if the use of mediation negotiations is not recognized as unacceptable in legal proceedings, then mediation may be used by the party as a means of obtaining information against an innocent party.<sup>56</sup> In order to ensure fairness, the parties must know in advance what will be open and what will remain confidential.<sup>57</sup>

At the same time, the main thing is to take into account the material (meaningful) meaning of justice. Material (substantial) fairness is understood as the achievement of a mediation settlement that meets the minimum standards of fair balance, legality and, from a reasonable point of view, proportionately meets the interests and expectations of the parties directly to the outcome of mediation. There must be a coherent balance between the values of fairness, legality and proportionality.<sup>58</sup>

Thus, in addition **to the sincerity of the parties, it is the confidentiality of the mediation process that makes the reached agreement fair.** If the party knows that information disclosed during mediation will not be protected and therefore will not be confidential, it is a high probability that he will not disclose the information necessary for a fair mediation agreement.<sup>59</sup>

### 3.3. Neutrality of the Mediator

**The mediator must remain neutral in facts and in their assessment.** If there is a risk that the mediator will use the information received against one of the parties in the trial, it will limit the freedom of the parties to the dispute to be honest in mediation. If the mediator testifies in court, no matter how carefully they are presented, they will certainly be used in favor of one of the parties and this will lose the efficiency of the mediator's activities as an impartial person.<sup>60</sup>

**Hypothetical case:** A party does not know which issues will be discussed during the mediation process. He appealed to the mediator to request the provision and explanation of this information. Does the mediator have an obligation to inform?

---

<sup>53</sup> *Stipanowich T.*, Why Businesses Need Mediation, Legal Studies Research Paper Series, 2004, 14.

<sup>54</sup> *Rausch M.*, The Uniform Mediation Act, Ohio State Journal Dispute Resolution, Vol. 18, No.2, 2003, 603.

<sup>55</sup> See *Kandashvili I.*, Mediation (an effective alternative way to resolve disputes), Tb., 2020, 96 (in Georgian).

<sup>56</sup> *Freedman L. R., Prigoff M. L.*, Confidentiality in Mediation: The Need for Protection, Journal of Dispute Resolution, Vol. 2, Issue 1, 1986, 38.

<sup>57</sup> *Johnson D. P. Jr.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act? Florida State University Law Review, Vol. 30, No. 3, 2003, 490.

<sup>58</sup> *Waldman E.* (editor), Mediation Ethics, Cases and Commentaries, United States of America, 2011, 2-3.

<sup>59</sup> *Maisuradze T.*, Principles of Self-determination and Confidentiality in the Ensuring Process of Mediation Ethics Strength, "Alternative Dispute Resolution - Yearbook", special edition, 2018-2019, 2019, 174 (in Georgian).

<sup>60</sup> *Freedman L. R., Prigoff M. L.*, Confidentiality in Mediation: The Need for Protection, Journal of Dispute Resolution, Vol. 2, Iss. 1, 1986, 38.



The fact is that the mediator must provide a list of issues to be considered clearly. However, a joint meeting between the parties may pass in such a way that the agenda cannot be determined due to increased tension between the parties. In this case, the mediator shall be very careful in providing information to one party in particular, so as not to express his own attitude and to maintain maximum neutrality. In this case, it would be appropriate for the mediator to note that the issues to be discussed are determined directly by the parties, and since the agenda cannot be set, he must clarify which issue(s) he considers important for discussion, in order to reconcile this with the other party. Here, the mediator has the right to indicate to the party that he can use a lawyer's consultation in order to obtain additional advice.

**Confidentiality has a significant impact on the neutrality of the Mediator.** Ideally, a mediator should try to create an atmosphere that will help the participants of the mediation process to convey information to the mediator without hindrance. A participant of mediation may not trust mediation if he knows that the mediator may be the opposing party in court. It also prevents the mediator from establishing a mutual understanding-oriented environment that plays a crucial role in successful mediation.<sup>61</sup>

**Granting the privilege of confidentiality to the mediator seems to guarantee the neutrality of the mediator.** If the mediator is not considered impartial, there is a risk that the parties will refuse to participate in the mediation process and exchange of information. If a mediator cannot create such an environment, then this reduces the effectiveness of its activities.<sup>62</sup>

Thus, confidentiality is crucial to another cornerstone of mediation - mediator's neutrality. It is this neutrality, combined with confidence in a mediator's skills, that gives the parties the basis to have full confidence in the process to use it effectively. Protection of confidentiality contributes the neutrality of a mediator. However, confidentiality serves an institutional purpose by ensuring the neutrality of the adjudication in a court that may hear a dispute arising during mediation.<sup>63</sup>

### 3.4. Incentives for choosing mediation

**Confidentiality is an incentive for many to choose mediation for dispute resolution.** A mediator creates a peaceful and informal atmosphere for resolving disputes, which is a primary motivator for parties choosing the mediation, whether the dispute involves trade secrets or unwanted personal matters.<sup>64</sup>

The informal environment encourages the active participation of the parties in the mediation process. In the event that the parties argue in front of a judge, represented in a robe, during court hearings, the mediation process will be conducted in such a way as to engage the parties in the process as much as possible, to determine the issues necessary for negotiations and to make changes to the current process. This is due to the creation of a friendly environment for the mediation parties, which due to its informal nature, provides the parties with an effective opportunity to protect and realize their interests.<sup>65</sup>

### 3.5. Mediator protection and mediation program

**Mediator and mediation program need protected from various harmful factors, including harassment.** New community programs have limited resources to make cases fully accessible. Frequent subpoenas can encumber staff time and prevent volunteers from participating as mediators in litigation. However, proper program evaluation requires adequate and accurate records keeping. Many programs do not consider whether recordings will be retained in the absence of legal protection, to the extent that the obligation

---

<sup>61</sup> *Johnson D. P. Jr.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act? Florida State University Law Review, Vol. 30, No. 3, 2003, 490.

<sup>62</sup> *Rosenberg P. J.*, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws, Ohio State Journal on Dispute Resolution, Vol. 10, Iss. 1, 1994, 160.

<sup>63</sup> *Deason E. E.*, Predictable Mediation Confidentiality in the U.S. Federal System, Ohio State Journal on Dispute Resolution, Col. 17, No.2, 2002, 246-247.

<sup>64</sup> *Freedman L. R., Prigoff M. L.*, Confidentiality in Mediation: The Need for Protection, Journal of Dispute Resolution, Vol. 2, Iss. 1, 1986, 38.

<sup>65</sup> See *Kandashvili I.*, Mediation (an effective alternative way to resolve disputes), Tb., 2020, 135-136 (in Georgian).

to protect confidentiality will apply to those recordings. Therefore, mediation program providers typically destroy the records on mediation cases as a confidentiality device.<sup>66</sup>

The importance of confidentiality is axiomatic in mediation. To be more precise, the recognition of confidentiality has central meaning. The advantage of confidentiality comes from the fact that each party in the mediation process expects that neither the mediator nor the other party can later disclose what happened. Since confidentiality of mediation process is not absolute, the strength of this expectation depends on the ability to predict, even approximately, the limits on disclosure in a future disputes. However, it is difficult to foresee everything in advance, since there are many uncontrollable factors that the court uses to disclose information.<sup>67</sup>

Thus, confidentiality has the function of stimulating the origin of various positive effects (sincerity, neutrality of the mediator, fairness, protection of the mediator's program, etc.) in mediation. In fact, the confidentiality of mediation provides a logical connection between these factors.

#### 4. Mediator in ethical dilemmas

A Code of Professional Ethics<sup>68</sup> has been established for mediators, which governs the independence and impartiality of the mediator, the promotion of self-determination, the protection of confidentiality, and other issues. While protecting the confidentiality of the mediation process, it can encounter with another values, creating a conflict of values between them.

In general, an ethical dilemma arises when the mediator is limited by the professional ethics of another profession. This may be due to the intersection of the professional ethics of the mediator and the ethical standards of lawyers, psychologists and other professionals.<sup>69</sup>

Taken as a whole, the duties of the mediator may be contrary to the public interest. This is even more obvious if we take into account that the implementation of the profession of the mediator is valued by the society, so it is important to have a public interest in it deserves attention. At the same time, it is **distinguished the mediator's professional duty**, on the one hand, and on the other hand, **the mediator's duty to the society, which carries a much greater burden on the mediator than professional duty**. The professional duty is based on the expected reaction of the public to the outcome of the mediation (on a public perception of outcome unfairness) and requires the mediator to intervene in the process and, in extreme cases, to terminate the proceedings if the outcome is likely to jeopardize the public's confidence in mediation. On the contrary, the connection of the mediator's duty to the public is independent of the public's expected response, requiring the mediator to intervene and prevent an outcome detrimental to the public interest, even if the public cannot lose confidence in mediation. The point is that, as a part of their obligations towards the public, the mediator should not agree to a mediation agreement based on an illegal or immoral grounds, even when there is no real danger that the public will lose confidence in mediation. This was dictated by the fact that, for reasons of confidentiality, the results of the mediation will never be known to the public, or because the violation of morality and law as a result is not very serious. The mediator's obligation towards the public does not stem from the expected reaction of the society to an illegal result achieved, but from the need to protect the interests of the society.<sup>70</sup> This is natural, since reaching an mediation agreement based on confidentiality protection and making decisions behind closed doors increases the risk of damage to the public interest in direct proportion. The point is that in order to protect confidentiality, the risk of encroachment on the public interest may

---

<sup>66</sup> Freedman L. R., Prigoff M. L., Confidentiality in Mediation: The Need for Protection, Journal of Dispute Resolution, Vol. 2, Iss. 1, 1986, 38.

<sup>67</sup> Deason E. E., Predictable Mediation Confidentiality in the U.S. Federal System, Ohio State Journal on Dispute Resolution, Col. 17, No.2, 2002, 240.

<sup>68</sup> Code of professional ethics of mediators of the Association of Mediators of Georgia, 24/04/2021.

<sup>69</sup> Chitashvili N., Framework for regulation of Mediation ethics and Targets of of ethical Binding, "Journal of Law", No. 1, 2016, 27 (in Georgian).

<sup>70</sup> Shapira O., Conceptions and Perceptions of Fairness in Mediation, South Texas Law Review, Vol. 54, 2012, 340.

increased, but with this risk the mediator has an increased duty to prevent illegal agreements between the parties by protecting the public interest.<sup>71</sup>

**During facilitation, the mediator is more willing to help the parties in identifying an attractive solution for them,** although this can raise serious doubts about fairness. During facilitation, the mediator faces two problems: (1) an imbalance of information and power between the parties can lead to an unfair agreement, or (2) true or complete neutrality is practically almost impossible to achieve in mediation. By contrast, as part of evaluative mediation, the mediator faces with questions about the sources of his authority to convey his own values for the participants, especially because the parties usually do not give informed consent in evaluative mediation.<sup>72</sup>

**Hypothetical case:** During family mediation, the husband threatened his wife, and the wife became frightened, but denied the seriousness of her husband's threats and wanted to continue the meeting. Let's say the mediator is competent to determine that the threat is realistic, the abuse has occurred in the past and now affects wife's actions. In this case, a dilemma arises not of competence, but of disagreement: Is mediator obliged to terminate mediation due to coercion by one of the parties or not? If he stops the process, he avoids turning the mediation process into an instrument of coercion, but he deprives wife the right to decide whether or not to continue mediation. In fact, no matter how the mediator reacts, the wife loses her freedom of choice not from her husband, but from the mediator. Is there any way to avoid this? Answer is: The mediator must weigh the values in order to "protect" one party from coercion by the other. Even if this party indicates that it does not need protection, an element of paternalism is introduced into the process, which is contrary to the principle of free choice. Free choice is based on the value of consent.<sup>73</sup>

**Hypothetical situation:** in the mediation process, the mediator notices that there is an imbalance between the parties, namely, one party is intellectually and informationally stronger compared to the other party. It is revealed that the lack of information causes to an imbalance between the parties. In this case, does the mediator have the right to give advice to the party?

**The answer is as follows:** In this case, the mediator may use the powers granted by the Mediators' Code of Ethics to encourage the party to the process to seek additional advice as needed. A party may obtain this advice from another independent professional.<sup>74</sup> In this case, the mediator should act so carefully as not to disturb the neutral environment created during the mediation process, and not to express sympathy for any party. However, depending on individual circumstances, the mediator must decide for himself whether the party needs to indicate additional recommendations. This already depends on the specific case and is subject to evaluation.

**Hypothetical situation:** In the process of mediation an imbalance was revealed. The mediator considered it appropriate to instruct the party to seek additional advice. The party did not exercise the right to a lawyer or took the advice of a lawyer, but it appears that the lawyer had given improper advice and had acted dishonestly. As a result, the interests of both parties and the ethical integrity of the process may be compromised. What could be the solution in this case? What should the mediator accept?

**Answer is:** In the legal literature, it is rightly noted that if an imbalance is established, as a result of which the interests of the parties and the integrity of the process may be violated, this may threaten the proportional distribution of powers between the parties. This creates a reasonable assumption that mediation cannot be equal opportunities for the realization of the principle of self-determination of the parties, which cannot be achieved by continuing the process. Therefore, in this case, it is advisable for mediator to terminate the mediation process.<sup>75</sup>

---

<sup>71</sup> Chitashvili N., Fair Settlement as Basis for Ethical Integrity of Mediation, Journal "Alternative Dispute Resolution - Yearbook 2016", TSU publishing, 2017, 22 (in Georgian).

<sup>72</sup> Burns R. P., Some Ethical Issues Surrounding Mediation, Fordham Law Review, Vol. 70, Issue 3, 2001, 702.

<sup>73</sup> Bush Robert A. Baruch, Study of ethical Dilemmas and Policy Implications, A, Journal of Dispute Resolution, Iss. 1, Vol. 1994, 17-18.

<sup>74</sup> Code of professional ethics of mediators of the Association of Mediators of Georgia, Art 5 § 4.

<sup>75</sup> Waldman E. (editor), Mediation Ethics, Cases and Commentaries, Unites States of America, 2011, 87.

During mediation, the mediator often has to make specific procedural decisions, as this affects the legal balance of the parties, the fate of the dispute and the content of the case depend on this.<sup>76</sup> The mediator must take into account that the process must not be corrupted.

While **confidentiality protections promote fair negotiations to resolve disputes**, they also significantly eliminates the possibility of monitoring of mediators who could undue pressure on the parties to sign an agreement. The court should not be declared negative if the dispute between the parties in mediation cannot be resolved. However, it is recognized that some parties may engage in mediation without the intention of reaching an agreement and may be driven by more ulterior motives, such as collecting compromising information about the other party.<sup>77</sup>

Recall the case of *Vitakis-Valchine v. Valchine*, in which the case concerned Kalliope Vitakis and David Valchine divorce proceedings to end their marriage. The final decision to dissolve the marriage included a settlement agreement reached by the parties through mediation. This agreement involved alimony, bank accounts, as well as her husband's military pension. However, the agreement provided for the disposal (use) of embryos that the couple froze during in vitro fertilization attempts prior to the divorce. According to the contract, the wife expressed a desire to have frozen embryos, but without hesitation agreed to provide them for use of her husband. In addition, it was determined that the contract could not be changed, except for the written agreement of the parties. The ex-spouse appealed the final decision, alleging that the mediator had committed misconduct and that she had signed the agreement as a result of the coercion identified by the mediator. The Court of Appeals referred the case back to the Court of first Instance for clarification of these circumstances. The court of review did not see violations and coercion on the part of the mediator, thereby supporting the settlement agreement.<sup>78</sup> In the Valchine case, the plaintiff noted that he signed the mediation agreement as a result of pressure and coercion, which is why he wanted to terminate this agreement. In this case, the court explained that unfair actions, the use of improper tactics by the mediator to ensure the execution of a settlement agreement are unacceptable; The violation of the rules and illegal actions by the mediator were considered as the grounds for termination of the mediation agreement.<sup>79</sup>

Confidentiality restrictions are **allowed to prevent the risk when parties may want to abuse the process**. The party may seek to delay the proceedings. However, since the mediation process is confidential, the party may represent the incorrect facts. **False facts harm the other party, and the other party's bad faith is difficult to prove**. Therefore, if the party is once affected by this process, it is very likely that they will no longer choose mediation to resolve the dispute.<sup>80</sup> This hinders the development of mediation, on the one hand, and on the other hand, it is detrimental to the parties and third parties affected by the results of mediation.<sup>81</sup>

Another case, *Clark v. Bradford County School Board*, Florida, dealt with a similar issue.<sup>82</sup> In the present case, the plaintiff requested the cancellation of the mediation agreement and alleged that he signed a mediation agreement as a result of pressure, threats and coercion applied to him. The mediator stated that he would never give legal advice to a party during mediation, and if the party showed signs of coercion, he would never force the party to sign a mediation agreement. Interestingly, the Plaintiff disregarded the agreement of the parties on confidentiality when he attached the parties' settlement agreement to the revocation of the Agreement. However, it was not filed before the court and therefore was not considered a breach of

---

<sup>76</sup> *Kakoishvili D.*, Ethical obligations of a mediator in the process of mediation, Tb., 2020, 6 (in Georgian).

<sup>77</sup> *Hedeem T.*, Coercion and Self-determination in Court-Connected Mediation: All Mediations are voluntary, but some are more voluntary than others, The Justice System Journal, Vol. 26, N3, 2005, 284.

<sup>78</sup> *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. 4<sup>th</sup> DCA 2001); *Vitakis-Valchine v. Valchine*, 923 So.2d 511 (Fla. 4<sup>th</sup> DCA 2006).

<sup>79</sup> *Tetunic L. F.*, Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act, Nova Law Review, Vol. 36, Iss. 1, 2011, 94.

<sup>80</sup> *Tsertsvadze G.* (ed.), Prospects for legal regulation of mediation in Georgia, vol. 2013, 31 (in Georgian).

<sup>81</sup> *Eloshvili N.*, Importance of Confidentiality Principle in Mediation Process, "Alternative Dispute Resolution – Yearbook", 2013, 15 (in Georgian).

<sup>82</sup> *Clark v. School Board Country, Florida*, No. 3:09-cv-901-J-34TEM, October 13, 2010, WL 4696063.

confidentiality. In addition, no evidence was presented to the court confirming the fact that the plaintiff was coerced into signing the mediation agreement.<sup>83</sup> Accordingly, this action was not regarded as a violation.”

**Hypothetical situation:** The mediator in a divorce case saw that the wife was in desperate need of both emotional and financial support in order to normalize the divorce, but the wife did nothing. The wife's lawyer was not present at the hearing, and it seemed that she never tried to resolve the wife's relationship with her husband, which she will have to do in the future. The mediator advised his wife to consult a lawyer. The wife did not accept the mediator's offer to call a lawyer directly, although she did not categorically refuse, and she thought that the lawyer would not answer her. Should the mediator seek the advice of a lawyer if the wife did not categorically refuse it? The answer is that if he does, it is true that he will help Wife to get the services she needs, but at the same time she will also violate her confidentiality.<sup>84</sup> Also in this case, the mediator acts outside the framework of mediation, thereby acting as a sympathizer. Thus, the protection of the neutrality of the mediator is under threat.

**The mediator must stop the mediation process if he believes that the fairness of the process is at risk.** This is the case of non-disclosure of information, fraud of the party or the existence of a legal obligation to disclose confidential information by the mediator.<sup>85</sup>

In general, mediators are often tempted to disclose confidential information for several reasons. One such circumstance may be reaching an agreement that the other party would not have signed if it had known the confidential information.

**Hypothetical case:** In a business mediation over repayment of loan a creditor agrees with the party to a settlement. One of its clauses refers to the payment by the lender of interest that the borrower has requested from a third party. Borrower tells the mediator confidentially that he would be in a somewhat weak position in court and that he might not have enough funds to go through with the case, although he assumed that he would bring the case to an end. Assuming Borrower says that he did not want the other party to know about it, and opposed any offers of disclosure. Should the mediator disclose it or else discontinue the mediation? If mediation were to be terminated, would that in turn be a form of disclosure? Should the mediator maintain the confidence and continue the work, no matter what? If he had continued the process, confidentiality would have been preserved, but at the expense of the values of consent and fairness.<sup>86</sup>

Of the ethical principles, they mainly single out the dominant value, which is hierarchically subordinate all others in every possible case. The determination of priority between the various principles should vary depending on the particular circumstances of the case. For example, self-determination was considered more important in cases where the parties were fully competent and informed and the dispute resolution options did not pose a threat to third parties or public interests. However, quality and fairness of the process are dominant when the decisions of the parties can affect the well-being of those who did not sit at the negotiating table and did not participate in the decision-making process.<sup>87</sup>

**Hypothetical case:** During a personal injury mediation, a disabled person has made an offer to a party, but victim had a much higher demand. Injurer informed the mediator that he was monitored by the other party under surveillance and he knew that his injuries were not as serious as he claimed. The mediator firmly believes that disclosure of the surveillance would force him to agree Injurer's offer, but violator categorically objected to the disclosure of this information. Is the mediator obliged to maintain confidentiality, even if its violation is in everyone's interests?<sup>88</sup>

---

<sup>83</sup> *Tetunic L. F.*, Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act, *Nova Law Review*, Vol. 36, Iss. 1, 2011, 94-95.

<sup>84</sup> *Bush Robert A. Baruch*, Study of ethical Dilemmas and Policy Implications, A, *Journal of Dispute Resolution*, Iss. 1, Vol. 1994, 16.

<sup>85</sup> *Chitashvili N.*, Fair Settlement as Basis for Ethical Integrity of Mediation, *Journal "Alternative Dispute Resolution - Yearbook 2016"*, TSU publishing, 2017, 21 (in Georgian).

<sup>86</sup> *Bush Robert A. Baruch*, Study of ethical Dilemmas and Policy Implications, A, *Journal of Dispute Resolution*, Iss. 1, Vol. 1994, 16-17.

<sup>87</sup> *Waldman E.* (editor), *Mediation Ethics, Cases and Commentaries*, Unites States of America, 2011, 14.

<sup>88</sup> *Bush Robert A. Baruch*, Study of ethical Dilemmas and Policy Implications, A, *Journal of Dispute Resolution*, Iss. 1, Vol. 1994, 17.

**The answer is:** At first glance, it seems that the violation of confidentiality should not be contrary to the interests of any party. However, the disclosure of confidential information makes it possible to reach the mediation agreement, which is certainly important, but the question is to what extent it is possible to conclude an agreement through a violation of confidentiality. In this case, it is obvious that there is no element of voluntary consent that is inconsistent, with the principle of free choice. At the same time, voluntariness is violated and the moment of coercion is observed. This type of agreement did not meet the expectations and interests of self-determination of the parties. Thus, in such a case, the violation of confidentiality should not lead to a violation of the voluntariness and self-determination of the parties, since it is not allowed to ignore the principles of mediation process.

Based on the above, the three core values of self-determination, mediator neutrality, and confidentiality are interdependent traits that define mediation.<sup>89</sup>

At the same time, it is important to fulfill the obligation to report if there is a threat to someone's life. In the case "*Tarasoff v. UC Regents*" it was established that the mediator may have an independent duty to notify third parties of a threat. In this case, the client told the psychologist that he wanted to kill a third party, but since the treatment was confidential, the psychologist did not inform the third party about it. As a result, the client killed a man, about the desire to kill whom he confided to a psychologist.<sup>90</sup> In the court's view, the existence of a serious physical or death risk to an identifiable person imposes a duty for the professional to warn the alleged victim. The main thing was the fact that both the privilege of the relationship between the psychotherapist and the patient and the norms of professional ethics gave the psychologist the opportunity to disclose the information received. In order to avoid a similar result, it is important to use the arguments set out in the case in mediation. Accordingly, this experience will solve the dilemma for the mediator and potentially save a life.<sup>91</sup>

Mediation confidentiality seems to prevail in certain circumstances, but there are times when another value (such as the public duty to inform) is more worthy of protection than confidential information.

## 5. Legal consequences of a breach of confidentiality

**The business sector applies for a preliminary confidentiality agreement.**<sup>92</sup> This is natural, because in practice an agreement is often signed to create an additional guarantee of confidentiality protection. Accordingly, the conclusion of a confidentiality agreement is one of the ways to ensure confidentiality. In this case, the parties establish an obligation under the contract not to disclose the information disclosed by them. A party maintains confidentiality not because it is required by law, but because it has agreed to protect confidentiality.<sup>93</sup>

Thus, the **basis of confidentiality in mediation can be both an agreement (mediation agreement) and the law.** However, confidentiality may be based on general rules and principles of fairness.<sup>94</sup>

**The mediator should encourage the parties to clearly define the boundaries of confidentiality and to understand the importance of confidentiality during and after mediation.** At the same time, if the mediator is involved in the process of teaching, researching or evaluating mediation, he is obliged to protect the anonymity of the identify of the subjects participating in mediation.<sup>95</sup>

---

<sup>89</sup> *Izumi L. C., La Rue C. H.*, Prohibiting "Good Faith Reports" Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent, *Journal of Dispute Resolution*, No. 1, Vol. 2003, 86.

<sup>90</sup> *Tarasoff v. Regents of University of California*, No. 23042, Supreme court of California, July 1, 1976, at 334, <https://law.justia.com/cases/california/supreme-court/3d/17/425.html> [15.01.2023].

<sup>91</sup> *Kirtley A.*, Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, The Participants, the Process and the Public Interest, *The Journal of Dispute Resolution*, Vol. 1995, No. 1, 48.

<sup>92</sup> *Rabe C. S., Wode M.*, *Mediation, Grundlagen, Methoden, rechtlicher Rahmen*, 2. Auflage, Berlin, 2020, 25.

<sup>93</sup> *Tsertsvadze G.* (ed.), *Prospects for legal regulation of mediation in Georgia*, vol. 2013, 29 (in Georgian)..

<sup>94</sup> *Arthur K. J.*, Confidentiality and privilege in mediation, *Australian Alternative Dispute Resolution Law Bulletin*, November 2015, 91.

<sup>95</sup> *Chitashvili N.*, Framework for regulation of Mediation ethics and Targets of of ethical Binding, "Journal of Law", No. 1, 2016, 35 (in Georgian).

**Breach of confidentiality may result in a claim for damages. For the most part, it is carried out in accordance with the general principles of civil liability, whether it is a contractual or tort claim.**<sup>96</sup> The principle of confidentiality may be violated by the mediator, parties, other participants of the process, employees and interns working with the mediator. Accordingly, they may be assigned the duty for damages resulting under the rules of tort liability, breach of contract and property liability.<sup>97</sup> Legal remedies may include compensatory damages, equitable remedies (reliefs), attorneys' and mediator's fees, as well as costs incurred in the mediation process and in applying for remedies.<sup>98</sup>

In this case, the affected person must prove that the participant of the mediation process (mediator, party, his representative, third party) violated confidentiality. This will lead to the cancellation of the statement, on the basis of which the mediation participant will be burdened with proving that there was a legal reason for restricting confidentiality in this case.

## 6. Legal prerequisites for limiting confidentiality

### 6.1. The relative nature confidentiality

Any communication conducted during the mediation process shall be confidential, except in cases where the information falls under exceptional circumstances provided by law.<sup>99</sup> Although the legislative situation in Georgia until 2020 did not reflect exceptional cases of restriction of confidentiality, but Georgia took into account the requirements of the European Directive and reflected in the law cases of legitimacy of encroaching on confidentiality.<sup>100</sup> Accordingly, the law currently contains such grounds.

**The right to confidentiality is not absolute.** Under certain circumstances, a party or a mediator may disclose confidential information to a person who is not involved in the process, including a litigation, without the consent of the information provider. The justification for limiting exceptions to the duty of confidentiality in mediation is based on state policy - some information disclosed during mediation should be disclosed to the appropriate authorities, such as law enforcement or child welfare agencies. In this case, the parties do not have an unrestricted right to resolve issues in private and on a confidential basis. The exact scope of the duty of confidentiality depends on the source(s) to which the duty can be traced.<sup>101</sup>

**The fact is that the confidentiality of mediation must not be absolute. At the same time, mediation should not become a refuge for the injured (or guilty) party.**<sup>102</sup> If the confidentiality of mediation were absolute, the interests of the victim would remain unprotected in case of bad faith of the other party in the mediation process. However, it should be viewed positively when the mediation is not closed and the public is informed about the mediation, which contributes to the credibility of mediation.<sup>103</sup>

During mediation, confidentiality of communication is protected by mediation privileges. According to his opponents, this may be contrary to the democratic principle of transparency and public participation in the

---

<sup>96</sup> Morek R., *Nihil silentio utilius: Confidentiality in mediation and its legal safeguards in the EU Member States*, *Era Forum*, Vol. 14, no. 3, 2013, 431; Regarding specific requirements, see *Batiashvili I.*, *Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges*, "Law and World", №21, 2022, 109-110.

<sup>97</sup> *Dursun A. L.*, *The Principle of Confidentiality in Mediation and the Role of Confidentiality in Commercial Mediation*, *Afro Eurasian Studies Journal*, Vol. 6, Iss. 1-2, 2017, 23.

<sup>98</sup> *Tetunic L. F.*, *Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act*, *Nova Law Review*, Vol. 36, Iss. 1, 2011, 84.

<sup>99</sup> *Tetunic L. F.*, *Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act*, *Nova Law Review*, Vol. 36, Iss. 1, 2011, 82.

<sup>100</sup> *Bichia M.*, *Legal Regime of Confidentiality Protection in the Mediation Process and Its Meaning*, "Law and World", №15, 2020, 198 (in Georgian).

<sup>101</sup> *Wolski B.*, *Confidentiality and Privilege in Mediation: Concepts in need of Better Regulation and Explanation*, *UNSW Law Journal*, Vol. 43(4), 2020, 1562.

<sup>102</sup> *Morek R.*, *Nihil silentio utilius: Confidentiality in mediation and its legal safeguards in the EU Member States*, *Era Forum*, Vol. 14, no. 3, 2013, 432.

<sup>103</sup> *Tsertsvadze G.* (ed.), *Prospects for legal regulation of mediation in Georgia*, vol. 2013, 32 (in Georgian).

processes.<sup>104</sup> In accordance with article 6 of the Rules of Mediation of the United Nations Commission on International Trade Law, unless the parties agree otherwise, all information related to mediation, including a settlement agreement (if any), must be kept confidential by persons participated in mediation, except in exceptional cases.<sup>105</sup>

If confidential information is disclosed in the cases established by Article 10(4) of the Law of Georgia on Mediation, the person receiving it is responsible for protecting this information from dissemination. Thus, in fact, the legislator considered the recipient of secret information to the bearer of a secret, because the one who receives information about a particular secret is the bearer of a secret. The owner of a secret shall be considered to be the one who has the right to dispose of the secret in the sense of property law. The bearer of the secret must handle the secret information known to him in accordance with the will or interests of the owner of the secret. The will of the owner of the secret, the bearer of the secret is to strictly guard the confidentiality or to transfer the secret only to a certain circle of third parties. In this case, the third party becomes the bearer of the secret. If the bearer of the secret informs another against the will of the owner of the secret, then the interest in protecting the secret is also violated. However, if the will of the owner of the secret is unknown, there is an objective interest considered as a new criterion. The bearer of the secret must act in the way that most corresponds to the will of the sacrament, or as every correct and faithful person would do.<sup>106</sup>

## 6.2. Approaches to confidentiality restrictions in different countries

The German mediation law stipulates that the mediator and the parties participated in the mediation are bound by protection on confidentiality, except as required by law. This obligation applies to all information obtained by the mediator in the course of carrying out activities. However, the performance of this duty may be excluded if:

1. Disclosure of the content of the reached mediation agreement is necessary for the execution or enforcement of this agreement;
2. Disclosure of information is necessary for priority state policy (public order), including in cases where it is necessary to prevent a threat to the well-being of a child, or to prevent serious harm to the physical or mental integrity of a person.
3. The case concerns facts that are public knowledge or not important enough to be kept confidential.<sup>107</sup>

The Uniform Mediation Act lists **statutory exceptions when this privilege is not exercised for reasons of public policy**. These exceptions include threats of human bodily harm or crimes containing violence, communications used for the purpose of planning or committing a crime, evidence of professional misconduct or malpractice, and violence.<sup>108</sup>

Confidentiality is not defined in Australia. The standards provide that a mediator should not voluntarily disclose information received to a person who is not a party to the mediation. Disclosure of information received is permitted if: **(1) the parties agree to such disclosure, (2) the law requires it, (3) the information to be disclosed is not identified, (4) and there is an actual or potential threat to human life or safety**. These exceptions relate to the mediator's legal and public duties to disclose information in certain

---

<sup>104</sup> *Eloshvili N.*, Importance of Confidentiality Principle in Mediation Process, "Alternative Dispute Resolution – Yearbook", 2013, 15 (in Georgian).

<sup>105</sup> Article 6, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) Mediation Rules, 2021, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369\\_mediation\\_rules\\_ebook\\_1.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf) [09.01.2023].

<sup>106</sup> On the owner and bearer of the secret, see Meiss Reynhard W. Von, The Sphere of Personal Secrecy and its protection in Procedural Actions, Georgian Translation, Bichia M. (translator), Tb., 2014, 49-50 (in Georgian); Meiss Reinhard W. von, Die Persönliche Geheimsphäre und deren Schutz im prozessualen Verfahren, Diessenhofen, 1975, 33-34; Bichia M., Structural Analyzes of Article 18<sup>1</sup> of Civil Code of Georgia, Journal "Justice and Law", №1, 2020, 58 (in Georgian).

<sup>107</sup> Mediation Act, 31 August 2015 (Federal Law Gazette I p. 1474, [https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.pdf](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.pdf) [04.01.2023].

<sup>108</sup> *Johnson D. P. Jr.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act? Florida State University Law Review, Vol. 30, No. 3, 2003, 492.



circumstances. However, it is more problematic for the mediator to determine the moment when public duties arise.<sup>109</sup>

As a rule, the confidentiality of the mediator is governed by law and by case law. Statutes exist in most states that have court-ordered mediation. In the absence of such rules, the courts use a balancing test to decide whether the benefits of confidentiality protection outweigh the potential harms of disclosure. This is known as the so-called "Wigmore test" whereby any evidence that violates confidentiality must meet four criteria:

1. Communication should be based on the principle of protecting confidentiality so that the information received will not be shared to others;
2. The protection of confidentiality must be essential to the successful conduct of the relationship between the parties;
3. The relationship between the parties is one which the society ought to protect;
4. The potential harm from disclosure must be greater than the benefit to be gained by the society from non-disclosure.<sup>110</sup>

The Bulgarian mediation law stipulates that dispute negotiations shall be confidential. The Participants of the mediation are obliged to respect the confidentiality of all circumstances, facts and documents submitted during the mediation process. In addition, confidentiality restrictions are allowed if: 1. this is necessary for criminal proceedings or for the protection of public order; 2. It is necessary in order to ensure the protection of the best interests of children or prevent violation to the psychological or physical integrity of a human; or 3. The content of the mediation agreement governs the disclosure of information for the purpose of executing or enforcing that agreement.<sup>111</sup>

### **6.3. Georgian model of permissibility of confidentiality restrictions**

The Law of Georgia on Mediation also provides for the above experience and exceptions to confidentiality restrictions, however, unlike other countries, the Georgian model is based on a wide range of restrictions.

#### **6.3.1. Exceptions to confidentiality restrictions**

##### **6.3.1.1. Protecting the life or health of a person or ensuring the freedom and (or) best interests of a minor**

Article 10 of the Mediation Law allows for the legitimacy of restrictions on confidentiality. In fact, the legislator combines several options in the first ground for restricting confidentiality. First of all, such a basis may be the protection of life or health of a person.

Human life is considered the highest legal good. Obstruction of it is a violation of the law, and the law does not allow harm to someone else's life.<sup>112</sup> In fact, the UN Convention on International Trade Law also recognizes that confidentiality can be violated if it is necessary to preserve human health and save lives.<sup>113</sup> Therefore, it is noted that mediation communications are confidential, but in exceptional cases disclosure of

---

<sup>109</sup> *Noone M. A., Ojelabi A. L.*, Ethical Challenges for Mediators around the Globe: An Australian Perspective, Washington University Journal of Law & Policy, Vol. 45, 2014, 169.

<sup>110</sup> *Gibson K.*, Confidentiality in Mediation: A Moral Reassessment, Journal of Dispute Resolution, Iss.1, Vol. 1992, 34.

<sup>111</sup> Article 7, Mediation Act of Bulgaria, State Gazette No. 110/17.12.2004, <<https://www.uv.es/medarb/observatorio/leyes-mediacion/europa-resto/bulgaria-mediation-act-2004.pdf>> [24.12.2022].

<sup>112</sup> See *Werthwein S.*, Das Persönlichkeitsrecht im Privatrecht der VR China, Berlin, 2009, 65-68, 165.

<sup>113</sup> UNCITRAL Model Law on international Commercial Conciliation with Guide to Enactment and Use 2002. United Nations, New York, 2004, 27; *Batiashvili I.*, Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, "Law and World", №21, 2022, 104.

information that is purposefully used for the goal of planning, committing or attempting to commit a criminal act, concealing an ongoing criminal activity or threatening violence will be allowed.<sup>114</sup>

In addition, European Directive 2008/52/EC is of great importance, which obliges Member States to maintain the confidentiality of a mediation process both during and after its completion. One of the grounds for restricting confidentiality is when the disclosure of confidential information is necessary for the overriding public policy interests of the Member State concerned, including to protect the best interests of the child or to ensure the psychological or physical integrity of a person.<sup>115</sup>

Confidentiality restrictions may be based on the disclosure of confidential information or only for the protection of the freedom and the best interests of a minor. A minor may be considered a person under 18 years of age.<sup>116</sup> This also follows from the Code of the Rights of the Child, since a minor under the age of 18 is called a child by law.<sup>117</sup> To determine the best interests of the child, we should be guided by this code, as it explains that the best interests of the child include the well-being, safety, health, educational, developmental, moral and other interests that are a priority for the parent, in accordance with this law and individual characteristics of the child, with the participation of the child, and giving due account to the opinion of the child.<sup>118</sup> Article 5 of the same code establishes that the child has the right to give preference to his/her own best interests in making any decisions concerning him/her.

Confidentiality and non-stigmatization are principles for the protection of minors, and the program of diversion and mediation for minors is of particular importance. In fact, the individual approach of persons participating in the mediation process to a teenager-criminal should be based on the confidentiality of people's personal data and not allow stigmatization of a teenager as a criminal.<sup>119</sup>

Mediation is usually in the best interests of the child as it relates to self-determination, voluntary agreements and includes the settlement of disputes between parents. For most children, it is useful to continue their relationship with their parents after their divorce, as long as it is safe for both parents and children; Mediation may be the best way to resolve a dispute that helps parents reach an agreement. The Model Family Mediation Standards include specific suggestions for how mediators can help parents make the best use of mediation to protect the best interests of the child. However, they do not support post-divorce parenting plans (such as joint custody). This decision is for the parents make with the support of the mediator and their advisors.<sup>120</sup>

In accordance with this Standards, the mediator encourage parents to seek out child development information and useful community resources. They suggest that parenting plans developed as a result of mediation may include relevant details about the child's residence and decision-making responsibilities. This information encourages parents to consider revising a parenting plan over time as their child's developmental needs change, and to contribute a process to resolve future disputes on the process.<sup>121</sup> In addition, when appointing a representative for a child, it is advisable to involve a lawyer specializing in this field, since he knows the specifics of protecting the interests of the child.

---

<sup>114</sup> *Tetunic F. L.*, Act Deux: Confidentiality After the Florida Mediation Confidentiality and Privacy act, *Nova Law Review*, Vol. 36, Iss. 1, 2011, 83.

<sup>115</sup> Directive 2008/52/EC of European Parliament and of the Council, 21 May 2008, <<https://www.legislation.gov.uk/eudr/2008/52/article/7>> [15.12.2022].

<sup>116</sup> Paragraph 2 of Article 12 of the Civil Code defines an adult.

<sup>117</sup> Code of the Rights of the Child, article 3, paragraph "a", 20.09.2019.

<sup>118</sup> Code of the Rights of the Child, article 3, paragraph "h", 20.09.2019.

<sup>119</sup> *Shalikashvili Sh.*, Criminal, criminological and psychological aspects of the program of divergence and mediation of minors, *Tb.*, 2013, 41.

<sup>120</sup> *Schepard A.*, An Introduction to the Model Standards of Practice for Family and Divorce Mediation, *Family Law Quarterly*, Vol. 35, No.1, 2001, 18-19.

<sup>121</sup> *Ibid*, 19.

### 6.3.1.2. Disputing or denying the fact of a mediated agreement

The Mediation Law allows confidentiality to be limited even if the use of the information is necessary to prove the fact of a mediated settlement when the other party disputes or denies that fact.<sup>122</sup>

In almost all cases, confidentiality can be denied on the basis of the agreement of the parties. However, this is not always straightforward, and questions arise as to who should give consent (bystanders, whistleblowers, or documented individuals) and whether consent should be explicit or implied. It also determines whether this is acceptable or not and how consent can be subsequently revoked. If it comes to refusing confidentiality, it must be reflected in a document-agreement prepared and signed during mediation, that expresses consent that the information received may be used as evidence in certain cases, or both parties want to prove what happened during the mediation process.<sup>123</sup>

The negotiations carried out during mediation are confidential, and therefore it is difficult for a party to present the information as evidence related to the illegal actions (misconduct) of the mediator or lawyer in the mediation process. However, the court may accept such evidence in extreme cases, when it comes to serious crimes. For example, in the case “*Tapoos v. Levenberg*”<sup>124</sup> one of the parties argued that the agreement was not due to the illegal actions of the real and an mediator. One of the parties stated that the agreement is not valid due to the illegal actions of the lawyers and the mediator. The mediator requested the termination of proceedings of reviewing the claim filed against him/her or to make a summary decision. Evidence was presented that described the facts in detail during the mediation process. There was a dispute about the admissibility of this evidence, although it was ultimately acknowledged that the evidence was deemed admissible for the purposes of the truthfulness of the statement only.<sup>125</sup> This makes it clear that the act of mediated settlement is the only one that confirms the fact of the agreement.

### 6.3.1.3. Existence of an obligation to disclose information disclosed in the mediation process prior to mediation

During the mediation process, a party may find out the information, the obligation to disclose which was assigned to it before the mediation began. Accordingly, confidentiality protection rules do not apply when a party is obliged to fulfill its obligation assumed prior to the commencement of the mediation to disclose information that the other party has learned during the mediation process.

Although **the duty of disclose the information arose before the mediation occurred**, but this does not mean that **confidential information must be fully transmitted**. The legislator indicates that such **information may be disclosed under the most limited conditions of disclosure**.

The question arises: what does it mean to disclose information as limited as possible?

The answer is: in this case, this information must be disclosed in such a way that no data is transferred to other persons, the transfer of which is not necessary, does not serve to fulfill the obligation to disclose information undertaken before the mediation and / or relates to personal or other confidential data.

### 6.3.1.4. A court decision or other legally binding decision to disclose information

The law also links the disclosure of information obtained in the mediation process to a legally binding act. Such an act may be a court decision or other binding decision. Another decision of this kind may be, for example, a notarial act, an arbitration decision.

---

<sup>122</sup> Law of Georgia on Mediation, Article 10.

<sup>123</sup> *Hardy S., Rundle O.*, Mediation for Lawyers, Australia, 2010, 192.

<sup>124</sup> *Tapoohi v Lewenberg* (No 2), 21/10/2003, VSC 410.

<sup>125</sup> *Hardy S., Rundle O.*, Mediation for Lawyers, Australia, 2010, 193.

At the same time, information obtained during mediation, on the one hand, **should be disclosed to the maximum extent limited, on the other hand, the relevant party should be informed about this in advance.**

In addition, mediation in its manifestations may involve the processing of data. Accordingly, it is necessary to check and strengthen the legality of the processing of data used in the mediation, as well as to regulate and specify the confidentiality regime. This confirms that the confidentiality and data protection requirements specific of mediation are interdependent areas and sometimes develop in parallel with each other. It is advisable to regulate the mediation process in such a way as to indicate the nature and purpose of the confidentiality of mediation, as well as its possible compatibility or connection with other regulatory norms. In addition, since exceptions to the limitation of confidentiality have been formulated under the data protection regime, imperative requirements or overriding purposes in encroaching on confidentiality should usually be subject to the data protection regime. However, at the same time, it is necessary to weigh the values in order to determine which ones is of higher interest. The rules may also specify this specific authority (weight), as well as what type of authority (administrative, police, prosecutorial or judicial) has the right to claim violations of confidentiality. Mediation is a data processing process that must have legitimacy.<sup>126</sup>

### 6.3.1.5. Investigation of a particularly serious crime

Confidentiality may be violated even if, during the mediation process, information was disclosed indicative of an offense under criminal law.<sup>127</sup> However, the **legislator considered only a particularly serious crimes the investigation** from the categories of crimes **as a legal basis** that makes the disclosure of information legitimate obtained during mediation. Accordingly, it is necessary to determine the existence of a crime provided for by the Criminal Code, that is, a crime for which imprisonment for a term of more than ten years or life imprisonment is imposed (Article 12(4) of the Criminal Code). If the investigation of this type of crime does not require the disclosure of information revealed during mediation, then it is unnecessary to talk about the legitimacy of the confidentiality restrictions.

In addition, in this case, the legislator establishes additional prerequisites for the restriction to be considered legal. Namely, when imposing a restriction, two additional conditions must be met: **(a) the information must be disclosed as limitedly as possible, and (b) the relevant party shall be preliminarily notified thereof.**

### 6.3.1.6. Voluntary execution or forced execution of mediation agreements

International acts provide for exceptions to confidentiality restrictions. For example, under article 10(2) of the UNCITRAL Model Law, confidential information may be disclosed or admitted as evidence if it is required for purpose of fulfilling or enforcing an settlement agreement.<sup>128</sup> The European Directive 2008/52/EC is also one of the grounds for restricting confidentiality when it is necessary to disclose the content of an mediation agreement in order to comply with this agreement or for forced enforcement.<sup>129</sup> Similar provisions are contained in articles 9 and 14 of the United Nations Conciliation Rules in the Field of International Trade

---

<sup>126</sup> *Hueso L. C.*, Confidencialidad y protección de datos en la mediación en la Unión Europea, Revista IUS, Vol. 12, №41, 2018, 336-338.

<sup>127</sup> UNCITRAL Model Law on international Commercial Conciliation with Guide to Enactment and Use 2002. United Nations, New York, 2004, 27.

<sup>128</sup> *Morek R.*, Nihil silentio utilius: Confidentiality in mediation and its legal safeguards in the EU Member States, Era Forum, Vol. 14, №3, 2013, 432; *Battashvili I.*, Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, "Law and World", №21, 2022, 105-106.

<sup>129</sup> Directive 2008/52/EC of European Parliament and of the Council, 21 May 2008, <<https://www.legislation.gov.uk/eudr/2008/52/article/7>> [15.12.2022].

Law, according to which disregard of the principle of confidentiality may be justified when it is necessary to enforce the mediation decision.<sup>130</sup>

Such experience is provided for by the Law of Georgia “On Mediation”, in particular, the content of a mediated settlement can be disclosed if it is necessary for the mediated agreement to be implemented voluntarily or coerced.

### 6.3.1.7. Legal or disciplinary proceedings against whistleblower

The law establishes that the restriction of confidentiality is permissible even if the following prerequisites are present in the aggregate:

4. A legal or disciplinary dispute arise from the mediation process;
5. This dispute is brought against the information provider;
6. Disclosure of confidential information is necessary to protect the legitimate interests of the information provider.

Thus, the simultaneous existence of these circumstances may serve as a legal basis for restricting confidentiality.

This is also natural, since **interference in a confidential space is justified only when a person is acting in self-help or "close to self-help"**. Accordingly, if a secret recording is the only way to protect one's right, such record be used provided that the interference does not serve to impose civil liability on the other party.<sup>131</sup> The reason presented for limiting the confidentiality of the mediation process should be based on a similar principle.

If the mediation agreement were absolute, the party trying to prove the existence of an agreement would not be able to defend its position. Thus, the court noted in one case<sup>132</sup> that the notices and information contained in the mediation agreement are not considered confidential information if their disclosure is necessary to prove the existence or scope of the settlement agreement<sup>133</sup>

### 6.3.1.8. Knowledge of confidential information prior to mediation

If a party knew information before the mediation that was confidential during the mediation process, such information may be disclosed. A party may obtain such information from other means established by law. This, obviously allows for the use of this information.

The legislator also considers the case when such information got into the public space in a different way, so that the party does not violate the obligation to maintain confidentiality. At the same time, the release of information into the public space deprives this information of its confidential nature, therefore this is also considered as a basis for limiting confidentiality.

In fact, confidentiality protection does not apply to information that is already known to another person or can be obtained in other ways. Also noteworthy is how the parties use the information obtained during mediation. Confidentiality and disclosure obligations play an important role not only for the mediator, but also for the parties.<sup>134</sup>

---

<sup>130</sup> UNCITRAL Model Law on international Commercial Conciliation with Guide to Enactment and Use 2002. United Nations, New York, 2004, 27.

<sup>131</sup> Decision of the Chamber for Civil Cases of the Supreme Court of Georgia, dated May 4, 2015, №as-1155-1101-2014.

<sup>132</sup> *Union Carbide Canada Inc. v. Bombardier Inc.*, 05.08.2014 SCC 35

<sup>133</sup> *Weinberg O., Weinberg B.*, Is there absolute Confidentiality in Mediation? Toronto Law Journal, 2019, 2.

<sup>134</sup> *Rabe C. S., Wode M.*, Mediation, Grundlagen, Methoden, rechtlicher Rahmen, 2. Auflage, Berlin, 2020, 25.

### 6.3.2. Proportionality

According to part 1<sup>1</sup> of article 104 of the Civil Procedure Code of Georgia (hereinafter referred to as CPCG), the court shall not accept information and documents disclosed on a confidential basis during judicial mediation as evidence, unless otherwise provided for by agreement of the parties. According to article 141 of the CPCG, a participant of the mediation cannot be called and questioned as a witness regarding the confidential information that he learned during the mediation process. In addition, the proceedings on the case are terminated at the request of the parties or at the initiative of the court if there was a mediation agreement or an international mediation agreement by which the dispute has already been resolved (Article 272 of CPCG).<sup>135</sup>

The Law on Mediation<sup>136</sup> stipulates that in cases specified by law, the transfer of confidential information to an authorized person or body must meet certain preconditions in a cumulative manner, namely: **a. Disclosure of information shall be adequate for a legitimate purpose; b. The information shall be disclosed to a proportional extent so that the confidentiality of such information is protected** as much as possible from third parties.

In fact, this entry echoes the record of the Constitution concerning the requirements for the restriction of personal rights. The point is that personal space and communication are protected by the constitution<sup>137</sup>, which should be relate to the communication before the mediator. The right to personal space and communication is not absolute and can be limited when exercised in accordance with the law, which is necessary in a democratic society to ensure state or public security or to protect the rights of others. For these restrictions, it is necessary to **comply with formal and material requirements. At the formal level, there must be a court decision or, an urgent necessity in the cases provided** for by law, in which case the restriction shall be allowed even without a court decision. **The material requirement implies that the restriction must serve any of the legitimate aims listed above, as well as be a necessary and proportionate means to achieve the aim.** In accordance with the principle of proportionality, the restrictive regulation of the right must be a useful and necessary means of achieving a valuable significant (legitimate) goal. In addition, a legitimate goal should not be achieved at the expense of an increased restriction of the right.<sup>138</sup> The interest in obtaining data shall not be satisfied if inference in the the right without the consent of the authorized person. There must be a legal basis for legitimizing such interference.<sup>139</sup> This may be the consent of a directly authorized person to transfer personal data. Accordingly, in compliance with these rules, confidential information may be disclosed to others in such a way that, on the one hand, it serves a legitimate purpose, and, on the other hand, it is disclosed in a proportionate amount.

It is advisable to have legal cases of confidentiality restrictions with extreme caution and on a case-by-case basis. This is important to ensure that there are legal grounds for the restriction and that a misinterpretation of the restriction does not jeopardize the mediation process or unduly expand cases of confidentiality restrictions.<sup>140</sup>

However, Article 10, paragraph 4, subparagraphs "c", "d" and "e" of the Law of Georgia "On Mediation" already indicates the dissemination of information to a limited extent, but proportional disclosure of information should include the dissemination of confidential information to a limited extent. Therefore, it shall be determined what specifics are used in the above mentioned tree cases on the dissemination of

---

<sup>135</sup> Civil Procedure Code of Georgia, Legislative Gazette of Georgia, 14.11.1997, №1106-I.

<sup>136</sup> "On Mediation" Law, Legislative Gazette of Georgia, Article 10, Paragraph 5.

<sup>137</sup> Constitution of Georgia, Article 15, Clause 2, Legislative Gazette of Georgia, 31-33, 24/08/1995.

<sup>138</sup> Decision No. 3/1/512 of the Constitutional Court of Georgia, dated June 26, 2012, in the case "Danish citizen Heike Kronqvist against the Parliament of Georgia", II-60; Decision No. 2/2/1276 of the Constitutional Court of Georgia of December 25, 2020, in the case "Giorgi Keburia vs. Parliament of Georgia".

<sup>139</sup> See Gallwas H.-U., *Der allgemeine Konflikt zwischen dem Recht auf informationelle Selbstbestimmung und der Informationsfreiheit*, In: *Neue Juristische Wochenschrift*, 45, Jahrgang, Heft 44, 1992, 2787-2788 (in German); Gallwas H.-U., *General conflict between rights of informational self-determination and freedom of information (Georgian Translation)*, Bichia M. (Translator), "Modern Legal Review", №1(3), 2015, 70-73 (in Georgian).

<sup>140</sup> Bichia M., *Legal Regime of Confidentiality Protection in the Mediation Process and Its Meaning*, "Law and World", №15, 2020, 201 (in Georgian).

additional information to a limited volume, the observance of proportionality on the basis of all restrictions precludes the need to reflect an additional provision in a separate paragraph on the dissemination of a limited amount of information.

## 7. Conclusion

**Mediation is one of the most acceptable and flexible ways of resolving disputes for the parties, based on the interests of the parties.** During mediation, a mediator helps the parties to freely exchange important information for the case, which increases the likelihood of reaching an agreement that matches their interests. This process is aimed at self-determination of the parties, since the purpose of mediation is to help the parties clarify and identify their own interests and reach an agreement. The mediation agreement itself is consensual and based on a contract. Accordingly, its violation may entail contractual liability. Also, damage can be compensated by tort law.

In this case, it is advisable for the mediator to maintain confidentiality so that the parties can trust the mediation process. **The mediator should possess the technique of conducting negotiations in a calm and free environment, which will encourage to three-way communication** in mediation. This obliges a duty to protect confidentiality and at the same time creates an informal environment for the mediation process.

**A central and main part of the mediation process is confidentiality**, which creates ethical dilemmas for the mediator. **Confidentiality leads to the stimulation of positive factors such as: the sincerity of the parties, the fairness of the agreement, the neutrality of the mediator, the effectiveness of mediation, etc..**

**The recipients of confidential information protection are different depending on whether it concerns to external or internal confidentiality.** For example, in the case of external confidentiality, the duty to maintain information lies with the mediator, any party, a representative, an expert, an interpreter or a witness. It is also advisable that this duty should be extended to any participant (intern, practitioner, etc.) who has learned information about the party during the performance of professional duties. With regard to internal confidentiality, the duty to protect it must be respected by a mediator.

However, if a party **discloses personal information during the mediation process**, this in turn leads to the dissemination **of the Personal Data Protection Act. It is also logical that in** this case it is necessary to take into account the rules and regime of data processing in order to make the information public on full compliance with the legal requirements.

It is true that **the protection of confidentiality increases the risk of attacking on the public interest**, but at the same time, the **protection of the public interest should not lead to neglect of the principles of lawfulness and fairness.** Therefore, the mediator should study ethical dilemmas also separately and analyze cases independently. At the same time, **the mediator should evaluate the case individually**, taking into account the specific circumstances.

The mediator should also work in such **a way as to fulfill his duty to society, since it is most important for the society to assess the outcome of mediation in terms of fairness**, and to interfere in the process as needed, and stop the process if there is a threat to public confidence. This is dictated by the need to protect public interests. At the same time, the mediator should ensure that there is no illegal or immoral mediation agreement between the parties. A mediation agreement between the parties reached in confidential negotiations in mediation may increase a risk of harm on the public interest. In Addition, this also instructs the mediator not to allow the illegal agreement between the parties to be concluded in order to protect the public interest.

Here, the affected person shall bear the burden of proof that the participant of the mediation process violated the confidentiality of mediation. This is followed by a reversal of the assertion and in order to avoid liability, the mediator must prove that there was a legitimate basis for encroaching on confidentiality in this case.

**Any information disclosed during mediation, which was not known to the participant of the process prior to mediation, is protected by the principle of confidentiality. Confidential information is protected by privilege.** However, this privilege does not carry an absolute nature and may be limited in certain exceptional cases. Although Georgia has taken into account the experience established by European countries (Germany, Austria, Belgium) and by international acts, but, unlike them, it expanded the range of exceptions to confidentiality restrictions.

At the same time, the legislator rightly noted that in the cases established for by Article 10 (4) of the Law of Georgia on Mediation, confidential information will be allowed only to an adequate and proportionate extent of the legitimate purpose. However, some of the legal grounds for interference in the confidential sphere (points "c", "d" and "e" of Article 10, paragraph 4 of the Law on Mediation) already include the dissemination of information to a limited extent. If proportionality applies to all exceptions to the restriction of confidentiality, then it is not clear what is the purpose of adding a similar rule in the three paragraphs above mentioned that the disclosure of information received during mediation may be disclosed to a limited extent.

It is advisable that **confidentiality restrictions be given a more specific form in the law so as not to create the danger of confusion** and dilution of these grounds. At the same time, the abundance of cases provided for by law creates a threat of unreasonable invasion of confidentiality. This becomes even clearer if we take into account that some of these cases are of a general nature and it becomes difficult to specify their content. Therefore, **the basics for limiting confidentiality should be easily and clearly formulated.** Under these circumstances, the mediator must find a golden intermediate in order not to unreasonably violate the other ethical principle in compliance with one ethical value.

#### **Bibliography:**

1. Constitution of Georgia, Legislative Gazette of Georgia, 31-33, 24/08/1995.
2. Law of Georgia on Mediation, ssm. 18/09/2019, №4954-1b.
3. Civil Procedure Code of Georgia, ssm, 14/11/1997, №1106-1b.
4. Code of the Rights of the Child, paragraph "h" of Article 3, 20/09/2019, №5004-1b.
5. Code of professional ethics of mediators of the Association of Mediators of Georgia, 24/04/2021.
6. *Batiashvili I.*, Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, "Law and World", №21, 2022, 104-106, 109-110 (in Georgian).
7. *Bichia M.*, The Importance of Using Mediation in Business Disputes During a Pandemic, "Herald of Law", №3, 2021, 12 (in Georgian).
8. *Bichia M.*, Legal Regime of Confidentiality Protection in the Mediation Process and Its Meaning, "Law and World", №15, 2020, 198, 201 (in Georgian).
9. *Bichia M.*, Structural Analyzes of Article 18<sup>1</sup> of Civil Code of Georgia, Journal "Justice and Law", №1, 2020, 52, 58 (in Georgian).
10. *Gallwas H.-U.*, The general conflict between rights of informational self-determination and freedom of information, *Bichia, M.*, 2017. The Problem of Civil Legal Protection of Personal Data in the Internet Universe, In: VIII International Scientific and Practical Conference: "Internet and Society", July 7- 8, Kutaisi: pp. 35-40. (in Georgian).
11. *Gallwas H.-U.*, General conflict between rights of informational self-determination and freedom of information (Georgian Translation), *Bichia M.* (Translator), "Modern Legal Review", №1(3), 2015, 70-73 (in Georgian).
12. *Eloshvili N.*, Importance of Confidentiality Principle in Mediation Process, "Alternative Dispute Resolution – Yearbook", 2013, 15 (in Georgian).
13. *Tvauri R.*, Standard of Limits of Confidentiality Principle in Mediation, "Alternative Dispute Resolution Yearbook", 2015, 27 (in Georgian).
14. *Kakoishvili D.*, Ethical obligations of a mediator in the process of mediation, Tb., 2020, 6 (in Georgian).
15. *Kalandadze D.*, The principle of the confidentiality in the mediation process and Georgian legislative reality, "Alternative Dispute Resolution - Yearbook", 2018-2019, Special Issue, 2019, 36 (in Georgian).
16. *Meiss Reinhard W. Von*, The Sphere of Personal Secrecy and its protection in Procedural Actions, Georgian Translation, *Bichia M.* (translator), Tb., 2014, 49-50 (in Georgian).



17. *Maisuradze T.*, Principles of Self-determination and Confidentiality in the Ensuring Process of Mediation Ethics Strength, "Alternative Dispute Resolution - Yearbook", special edition, 2018-2019, 2019, 174 (in Georgian).
18. *Shalikhashvili Sh.*, Criminal, criminological and psychological aspects of the program of divergence and mediation of minors, Tb., 2013, 41 (in Georgian).
19. *Chitashvili N.*, Framework for regulation of Mediation ethics and Targets of of ethical Binding, "Journal of Law", №1, 2016, 27, 35 (in Georgian).
20. *Chitashvili N.*, Fair Settlement as Basis for Ethical Integrity of Mediation, Journal "Alternative Dispute Resolution - Yearbook 2016", TSU publishing, 2017, 21-22 (in Georgian).
21. *Tsertsvadze G.*, Mediation, Alternative Form of Dispute Resolution (General Review), Tb., 2010, 48 (in Georgian).
22. *Tsertsvadze G.* (ed.), Prospects for legal regulation of mediation in Georgia, vol. 2013, 25, 29, 31-32 (in Georgian).
23. *Kandashvili I.*, Mediation (an effective alternative way to resolve disputes), Tb., 2020, 96, 135-136 (in Georgian).
24. *Zhorzholiani L.*, The principle of confidentiality in the process of considering and resolving a collective labor dispute through mediation, "Alternative Dispute Resolution - Yearbook", 2018-2019, Tb., 2019, 217 (in Georgian).
25. Decision of the Constitutional Court of Georgia, dated June 26, 2012, №3/1/512 in the case of Danish Citizen Heike Kronquist v. Parliament of Georgia, II-60 (in Georgian).
26. Decision of the Constitutional Court of Georgia, dated December 25, 2020, №2/2/1276 in the case of Giorgi Keburia vs. the Parliament of Georgia (in Georgian).
27. Decision of the Chamber for Civil Cases of the Supreme Court of Georgia, №as-1155-1101-2014, dated May 4, 2015 (in Georgian).
28. Article 7, directive 2008/52/EC of European Parliament and of the Council, 21 May 2008, <<https://www.legislation.gov.uk/eudr/2008/52/article/7> > [15.12.2022].
29. Article 6, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) Mediation Rules, 2021, <[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369\\_mediation\\_rules\\_ebook\\_1.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf)> [09.01.2023].
30. Directive 2008/52/EC of European Parliament and of the Council, 21 May 2008, <<https://www.legislation.gov.uk/eudr/2008/52/article/7> > [15.12.2022].
31. Mediation Act, 31 August 2015 (Federal Law Gazette I p. 1474, <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.pdf](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.pdf) > [04.01.2023].
32. UNCITRAL Model Law on international Commercial Conciliation with Guide to Enactment and Use 2002. United Nations, New York, 2004, p. 27.
33. Mediation Act of Bulgaria, State Gazette No. 110/17.12.2004, <<https://www.uv.es/medarb/observatorio/leyes-mediacion/europa-resto/bulgaria-mediation-act-2004.pdf>> [24.12.2022].
34. *Alfini J. J.*, Mediation Theory and Practice, 2d ed. 2006, 133, 205-206.
35. *Arthur K. J.*, Confidentiality and privilege in mediation, Australian Alternative Dispute Resolution Law Bulletin, November 2015, 91.
36. *Boulle, L., Nesic, M.*, Mediation. Principles, Process, Practice. London et al.: Butterworths, 2001, 296-297.
37. *Burns R.P.*, Some Ethical Issues Surrounding Mediation, Fordham Law Review, Vol. 70, Issue 3, 2001, 702.
38. *Bush Robert A. Baruch*, Study of ethical Dilemmas and Policy Implications, A, Journal of Dispute Resolution, Iss. 1, Vol. 1994, 14, 16-17, 18.
39. *Callahan R.*, Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending? Vol. 12, Iss. 1, 2013, 65.
40. *Deason E. E.*, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability? Marquette Law Review, Vol. 85, 2001, 80.
41. *Deason E. E.*, Predictable Mediation Confidentiality in the U.S. Federal System, Ohio State Journal on Dispute Resolution, Vol. 17, №2, 2002, 240, 245-246.
42. *Dursun, A. L.*, The Principle of Confidentiality in Mediation and the Role of Confidentiality in Commercial Mediation, Afro Eurasian Studies Journal, Vol. 6, Iss. 1-2, 2017, 23.
43. *Field R, Wood N.*, Marketing Mediation ethically: The case of Confidentiality, Field & Wood, 2005, 146.
44. *Freedman L. R., Prigoff M. L.*, Confidentiality in Mediation: The Need for Protection, Journal of Dispute Resolution, Vol. 2, Iss. 1, 1986, 37-38. 45.

45. *Furlan F., Blumstein E., Hofstein N. D.*, Ethical Guidelines for Attorney Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators? Vol. 14, 1997, 3.
46. *Gallwas H.-U.*, Der allgemeine Konflikt zwischen dem Recht auf informationelle Selbstbestimmung und der Informationsfreiheit, In: Neue Juristische Wochenschrift, 45, Jahrgang, Heft 44, 1992, 2787-2788.
47. *Gibson K.*, Confidentiality in Mediation: A Moral Reassessment, Journal of Dispute Resolution, Iss.1, Vol. 1992, 34.
48. *Govori Z.*, Confidentiality under the ICC Mediation Rules compared to the LCIA Mediation Rules, International Hellenic University, 2016, 7.
49. *Hardy S., Rundle O.*, Mediation for Lawyers, Australia, 2010, 192-193.
50. *Hedeen T.*, Coercion and Self-determination in Court-Connected Mediation: All Mediations are voluntary, but some are more voluntary than others, The Justice System Journal, Vol. 26, No.3, 2005, 284.
51. *Hoffman A. D., Wolman N. R.*, The Psychology of Mediation, Cardozo J. of Conflict Resolution, Vol. 14, 2013, 806.
52. *Hueso L. C.*, Confidencialidad y protección de datos en la mediación en la Unión Europea, Revista IUS, Vol. 12, №41, 2018, 336-338 (in Spanish).
53. *Izumi L. C., La Rue C. H.*, Prohibiting "Good Faith Reports" Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent, Journal of Dispute Resolution, №1, Vol. 2003, 86.
54. *Irvine M.*, Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation, RUTGERS Law Journal, Vol. 26, 1994, 158.
55. *Johnson D. P. Jr.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act? Florida State University Law Review, Vol. 30, №3, 2003, 489, 492.
56. *Kirtley A.*, Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, The Participants, the Process and the Public Interest, The, Journal of Dispute Resolution, Vol. 1995, №1, 9-10, 48.
57. *Meiss Reinhard W. von.*, Die Persönliche Geheimsphäre und deren Schutz im prozessualen Verfahren, Diessenhofen, 1975, 33-34, 177-178 (in German).
58. *Morek R.*, Nihil silentio utilius: Confidentiality in mediation and its legal safeguards in the EU Member States, Era Forum, Vol. 14, №3, 2013, 431-432.
59. *Nadja M. A.*, International and Comparative Mediation: Legal Perspectives, "Kluwer Law International", 2009, 248-249.
60. *Nolan-Haley J.*, Mediation: The "New Arbitration", Harvard Negotiation Law Review, Vol. 17, 2012, 73.
61. *Noone M. A., Ojelabi A. L.*, Ethical Challenges for Mediators around the Globe: An Australian Perspective, Washington University Journal of Law & Policy, Vol. 45, 2014, 169.
62. *Oberman S.*, Confidentiality in Mediation: An Application of the Right to Privacy, Ohio State Journal on Dispute Resolution, Vol. 27, No. 3, 2012, 548.
63. *Otis L., Rousseau-Saine C.*, The Mediator and ethical Dilemmas: A proposed Framework for Reflection, Journal of Arbitration and Mediation, Vol. 4, №2, 2014, 46.
64. *Pattenden R.*, The Law of Professional – Client confidentiality, Regulating the Disclosure of Confidential Personal Information, Oxford, 2003, 12.
65. *Perkowski M.*, Implications of Arbitration and Mediation Implementation from the perspective of Bialystok, Optimum Economic Studies, №5 (83), 2016, 153.
66. *Rabe C. S., Wode M.*, Mediation, Grundlagen, Methoden, rechtlicher Rahmen, 2. Auflage, Berlin, 2020, 25.
67. *Rausch M.*, The Uniform Mediation Act, Ohio State Journal Dispute Resolution, Vol. 18, №2, 2003, 603, 608.
68. *Reichert K.*, Confidentiality in international Mediation, Dispute Resolution Journal, Vol. 59, №4, 2004, 62;
69. Relationship Between Mediation and Attorney Malpractice and Other Misconduct, 45 Cal. L. Revision Comm'n Reports 19, 2017, 53-54, <<http://clrc.ca.gov/pub/Printed-Reports/Pub240-K402.pdf>> [05.01.2023].
70. *Rosenberg P. J.*, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws, Ohio State Journal on Dispute Resolution, Vol. 10, Iss. 1, 1994, 159-160.
71. *Scheutzw O. S., Gillis L. S.*, Confidentiality and Privilege of Peer Review Information: More Imagined Than Real, Journal of Law and Health, Vol. 7, 1993, 179.
72. *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, South Texas Law Review, Vol. 54, 2012, 340.
73. *Schepard A.*, An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Family Law Quarterly, Vol. 35, No.1, 2001, 18-19.

74. *Stipanowich T.*, Why Businesses Need Mediation, Legal Studies Research Paper Series, 2004, 14.
75. *Tetunic L. F.*, Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act, *Nova Law Review*, Vol. 36, Iss. 1, 2011, 82-83, 94-95.
76. *Waldman E.* (editor), *Mediation Ethics, Cases and Commentaries*, Unites States of America, 2011, 2-3, 14, 87.
77. *Weinberg O., Weinberg B.*, Is there absolute Confidentiality in Mediation? *Toronto Law Journal*, 2019, 2.
78. *Werthwein S.*, *Das Persönlichkeitsrecht im Privatrecht der VR China*, Berlin, 2009, 65-68, 165 (in German).
79. *Widman M. S.*, The Protections and Limits of Confidentiality in Mediation, *Alternatives*, Vol. 24, №10, 2006, 167.
80. *Wolski B.*, Confidentiality and Privilege in Mediation: Concepts in need of Better Regulation and Explanation, *UNSW Law Journal*, Vol. 43(4), 2020, 1561-1562.
81. *Clark v. School Board Country, Florida*, No. 3:09-cv-901-J-34TEM, October 13, 2010, WL 4696063.
82. *Tarasoff v. Regents of University of California*, No. 23042, Supreme court of California, July 1, 1976, at 334, <<https://law.justia.com/cases/california/supreme-court/3d/17/425.html>> [15.01.2023].
83. *Union Carbide Canada Inc. v. Bombardier Inc.*, 05.08.2014 SCC 35.
84. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. 4<sup>th</sup> DCA 2001).
85. *Vitakis-Valchine v. Valchine*, 923 So.2d 511 (Fla. 4<sup>th</sup> DCA 2006).
86. *Tapoohi v Lewenberg* (No 2), 21/10/2003, VSC 410.