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Framework for Regulation of Mediation Ethics and Targets of Ethical Binding**

Following formation of mediation legal framework, timely introduction of ethical rules is essential and inevitable necessity for comprehensive development of the corresponding practice. Representatives of parties to the mediation, third parties, mediation centres, exercising mediation administration – so called “mediation service providers” are also considered as targets of ethical standards in international practice in addition to mediators. Existence of standards of mediation ethics, is indicative of mediation professionalization, since representatives of mediation domain undertake responsibility for their own professional behaviour in accordance with the above mentioned standards.

The paper reviews necessity of ethical regulation of mediation in Georgia and existing challenges, difficulties of enforcement of ethical norms, addresses of ethical limitations and set of issues which is appropriate to be covered by the Code of Mediation Ethics.

Key words: mediation ethic, party self-determination, neutrality, conflict of interest, competence, confidentiality, quality of the process, advertising, solicitation, mediation fees, mediation charges.

*“...mediation requires some formal rules
but I hope they are few.
Too many and we will lose the essence”.¹*

I. Introduction

Heading towards institutionalization of mediation in Georgia, representatives of academic circles and practitioners unanimously agree that timely establishment of ethical rules is an inevitable prerequisite for sound advancement of mediation practice.

Ethics, considering its essence, is difficult to be given precise definition. In general terms it can be determined as a set of rules, recognized for certain professional group.² “Conduct, meeting established professional standards is considered to be ethical”.³ “Study of ethics implies survey of

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¹ Letter from *Jacob A. Stein, Esq., Partner, Stein, Mitchell and Mezines*, Washington, D.C. to *Carrie Menkel-Meadow*, Professor of Law, Georgetown University Law Center, April 29, 1997, cited: *Menkel-Meadow C.*, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, Georgetown University Law Center, 10 *Geo. J. Legal Ethics* 631, 1997, 631.

² *Wilson B.*, *Mediation Ethics: An Exploration of Four Seminal Texts*, 12 *Cardozo J. Conflict Resol.*, 2010-2011, 122.

³ *Merriam Webster's Collegial Dictionary* 398 (10th ed., 1993), cited in: *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 395.

moral decisions, determination of their appropriateness from the perspective of moral commitments”.⁴ “According to traditional legal definitions, “ethical” refers to moral conduct, activity, motive or characteristics of professional conduct standards”.⁵

“Strengthening of ethical norms indicates establishment of relevant field as a profession”,⁶ since “self-regulated professions, as a rule, require their representative to be subject to certain ethical norms”.⁷ Establishment of ethical rules means, that representatives of relevant field are ready to take responsibility for their professional actions.⁸

Mediation ethics requires substantially different conceptual analysis, since here we deal with interlinked professional conduct standards of a lawyer and ethical norms of a mediator. “It is difficult to differentiate between ethical conduct and that complying with standards of mediation activity. E.g. issues related to confidentiality and impartiality of a mediator is are covered under ethics, though, with the development of mediation profession, boundaries between them will be naturally separated”.⁹

“Mediation ethics norms mostly forbid conduct, which serves to obtaining unjustified and inappropriate benefit by a mediator, party, representative or a client,”¹⁰ or getting an advantage at the expense of other persons.¹¹ “Necessity to identify ethical standards equally refers to mediators, as well as parties to the mediation, their representatives and third parties. It is also important to identify ethical liabilities mediation for provider agencies, which exercise administration of mediation services”¹² and thus have significant impact on development of the relevant practice.

The article reviews need for regulation of mediation ethics in Georgia, existing challenges, difficulties of enforcement of ethical norms, entities subject to binding by ethical standards and scope of issues, which would be desirable to be covered by Mediation Ethics Code.

II. Need for Regulation of Mediation Ethics and Existing Challenges

“Existence of standards for ethical conduct is characteristic for many professions, though establishment of mediator conduct rules originally implies conceptual contradiction with essence of mediation, since its substantial feature is voluntariness, non-mandatory nature, and flexibility of the process – is one of the main advantages of mediation.”¹³

“Flexibility of mediation process implies capacity to settle wide range of disputes within mediation confines. Establishment of strict conduct rules will lead to losing this flexibility by a media-

⁴ *Merriam Webster's Collegial Dictionary* 398 (10th ed., 1993), cited in: *Kovach K.K., Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 395.

⁵ *Black's Law Dictionary*, 573, 7th ed., 1999.

⁶ *Shapira O., A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 35; *Schein E.H., Professional Education: Some New Directions*, 1972, 8-9, cited: *Kovach K.K., Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 395.

⁷ *Kovach K.K., Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 395.

⁸ *Pritchard M.S., Professional Integrity: Thinking Ethically*, Univ. Pr. of Kansas, 2006, 87.

⁹ *Kovach K.K., Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 396.

¹⁰ *Riskin L.L., Awareness and Ethics in Dispute Resolution and Law, Why Mindfulness Tends to Foster Ethical Conduct*, *Tex. L. Rev.*, Vol. 50:493, 2009, 496-498.

¹¹ *Shapira O., A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 187.

¹² *Kovach K.K., Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 396.

¹³ *Ibid.*

tor”¹⁴ “In order to ensure development of mediation of different styles and techniques, it is necessary to ensure elasticity of mediation ethical standards. Establishment of certain frames, standards and ensuring their strict enforcement is incompatible with mediation, similarly as excessive flexibility is not compatible with ethical norms.

Since mediation is a category, related with interdisciplinary domain, automatic reception of any related professional ethics standards would be inappropriate. Similarly it would not be right to say that mediators should be bound with professional standards of their initial profession as those could be incompatible within mediation context.¹⁵

Interdisciplinary nature of mediation domain, unacceptability of strict mechanisms and sanctions for ensuring enforcement of rules, complexity of subjecting mediation to regulations and justification of its necessity might be considered as significant obstacles in the process of establishment of mediation ethical standards.¹⁶

Ethical dilemma appears when a mediator, following his/her profession is restricted by ethical standards of other profession, such as: physician, lawyer, psychologist, and issue of applicable conduct rules should be determined. Therefore, “along with competition of conduct rules, it is important to identify a competent institution, which will have capacity to enforce sanctions and measures for responsibility, responding to violation of ethical rules”.¹⁷ Generally speaking this institution might be mediation provider organization, agency, association of mediators, the judiciary, exercising mandatory mediation, etc. Though, when a mediator is concurrently bound by ethical norms of other professions it is impossible to clearly identify the entity, imposing responsibility.

Ethics of any domain have a common goal of preventing inappropriateness, deceit, conflict of interests and dishonesty. Though finally, professional standards of other fields may be not just incompatible with mediation, but often might be directly contradicting to the principles of impartiality of a mediator,¹⁸ which once again proves need for establishing independent ethical standards in mediation domain.¹⁹

Ethics regulation is directly connected with ensuring enforcement of relevant rules. Regarding the issue of enforcement of ethics, as non-binding standards, there is an approach, that approval of code of ethics, as such by large and influential provider organizations,²⁰ acting in the field of dispute resolution²¹ automatically ensures binding of mediators with these standards of conduct²². On the other hand, there is a different opinion that in order for the rules to be complied with, it is necessary to define measures of responsibility, such as: depriving a mediator’s license, restriction of activity,

¹⁴ *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 400.

¹⁵ *Ibid*, 397.

¹⁶ *Ibid*, 400.

¹⁷ *Ibid*, 401.

¹⁸ *Ibid*, 397.

¹⁹ On limitations by Lawyers’ professional ethical rules of a lawyer participating as a mediator in the process see *Furlan F., Blumstein E., Hofstein D.N.*, *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?*, 14 *J. Am. Acad. Matrimonial Law*, 1997, 267-331.

²⁰ As were three associations, ABA, ACR and AAA in USA adopting Model Standards of Conduct for Mediators

²¹ *Young M.*, *Rejoice! Rejoice! Rejoice, Give Thanks and Sing: Adopt Revised*, *Appalachian Journal of Law*, Vol. 5, 2006, 195.

²² *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 10.

imposing disciplinary responsibility by mediators' association, imposing criminal or civil responsibility, if required.²³

Despite the above mentioned challenges, considering the impact, mediation may have on individuals' lives, regulation of mediators conduct seems to be inevitable. Therefore, taking into account protection of two above mentioned important interests, mediators' conduct should be regulated while preserving certain degree of freedom of action of the latter".²⁴

At the same time ethical evaluation of mediators by other entities of mediation and protection of professional authority and reputation would be impossible without existence of certain rules. Therefore, establishment of ethical conduct rules is a mechanism to protect mediators themselves, along with other persons/entities, involved in mediation.

III. Scope of Regulation of Mediator Ethics Code

1. Codes of Ethics of USA and Europe and Common Standards of Regulation

While developing mediation ethics standards, it is important to identify range of common issues, confines, which fall under regulation of majority of Codes of Ethics of foreign countries.²⁵ European Code of Conduct for Mediators acts on the territory of EU.²⁶ Independent codes were enacted by states, such as: Austria, Bulgaria, Greece, Poland, Malta, Rumania.²⁷ Code of civil and commercial mediation practice of legal society (England and Wales),²⁸ Code of domestic mediation practice of legal society (England and Wales)²⁹, Code of Conduct for neutral persons of effective dispute resolution centre (CEDR)³⁰, Code of Mediators' Practice of Mediation College³¹, Code of Mediators' Conduct of Core Solutions Group (Scotland)³², draft Code for mediators' practice of Civil Mediation Council³³, NMI (Holland) Code of Conduct for mediators³⁴, Cepani (Belgium) Rules of ethical conduct for mediators³⁵ and IMI Professional Conduct should be separately mentioned.³⁶

Majority of Codes of Ethics, mentioned above covers regulation of issues, such as: conflict of interest, impartiality, neutrality, mediators' role, self – determination of parties, protection of family

²³ Florida Supreme Court was the first one in USA to justify need for strengthening mechanisms for enforcing ethical rules. On this issue see. *Bernand P., Garth B. (eds.), Kovach K.K., Enforcement of Ethics in Mediation in ABA Section of Dispute Resolution, Dispute Resolution Ethics, A Comprehensive Guide, 2002, See Alfini J.J., Press Sh. B., Stulberg J.B., Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 435.*

²⁴ *Kovach K.K., Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 396.*

²⁵ E.g. for the purpose of their definition, 80 mediators were surveyed in Florida, USA regarding issues which had put them in front of ethical dilemma. see *Kovach K.K., Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402.*

²⁶ European Code of Conduct for Mediators, 2004, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>.

²⁷ *Esplugues C., Louis M., New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Ius Comparatum, Springer International Publishing Switzerland, 2015, 55.*

²⁸ Law Society (England and Wales) Code of Practice For Civil/Commercial Mediation, 2009.

²⁹ Law Society (England and Wales) Code of Practice For Family Mediation, 2009.

³⁰ CEDR Solve Code of Conduct for Neutrals, 2008.

³¹ College of Mediators Code of Practice For Mediators, <www.collegeofmediators.co.uk>.

³² Core Solutions Group Code of Conduct for Mediators, Scotland, <www.core-solutions.com>.

³³ Civil Mediation Council – Draft Code of Good Practice for Mediators, 2009.

³⁴ Code of Conduct for NMI Registered Mediators, <www.nmi-mediation.nl>.

³⁵ Cepani (Belgium) Rules of Good Conduct, <www.cepani.be>.

³⁶ IMI Code of Professional Conduct, <www.IMImediation.org>.

and children's rights, quality of proceedings, grounds for refusing the proceedings by a mediator, qualification, accreditation, confidentiality, mediation charges/service fee, advertising and solicitation of mediation, professional liabilities.³⁷

Colorado Dispute Resolution Centre³⁸ can be considered to be a leader in USA in the field of developing ethics rules. This centre developed mediators' conduct rules as early as 1982. The above act was approved by Colorado Mediation Council³⁹ and the similar organizations. In 1986 a large interdisciplinary association – Society of Professionals In Dispute Resolution (*SPIDR*⁴⁰) – adopted ethics rules and applied them to all neutral persons of dispute resolution process, including a mediator.⁴¹ Since then more than 100 acts regulating ethics issues have been approved in USA specifically for mediation, as well as its various sectors.⁴²

Among Codes of Ethics, approved in USA we need to specially mention Model Standards of Conduct for Mediators⁴³, which is common for mediation of all domains.⁴⁴ The present paper studies confines of regulation of Code of Ethics of mediation, considering its importance, on the basis of this very act.

Model Standards of Conduct for Mediators sets 9 principles: self-determination of parties, impartiality, conflict of interests, competences, confidentiality, quality of proceedings, advertising and solicitation of mediation, service fees/other charges and development of mediation practice.⁴⁵

2. Principles Set by Model Standards of Conduct for Mediators

2.1. Self-determination of Parties

Self-determination of parties is fundamental principle of mediation,⁴⁶ which is reflected in Model Standards of Conduct for Mediators as rule N1. In act of 1994, in accordance with amend-

³⁷ *Riskin L.L.*, Awareness and Ethics in Dispute Resolution and Law, Why Mindfulness Tends to Foster Ethical Conduct, *Tex. L. Rev.*, Vol. 50:493, 2009, 498; *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 402.

³⁸ CDR Associates in Boulder, Colorado.

³⁹ Colorado Mediation Council.

⁴⁰ Society of Professionals in Dispute Resolution was the largest interdisciplinary association, which joined other organizations for the purpose of establishing Association of Conflict Resolution ACR, see: *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 397.

⁴¹ *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 397.

⁴² Standards for Private and Public Mediators in the State of Hawaii, 1986 (revised in 2003); ABA Model Rules of Professional Conduct and ABA Model Code of Professional Responsibility, 1983; A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002; Standards of Practice for Lawyer Mediators in Family Disputes (Adopted by the House of Delegates of the American Bar Association, August 1984); Special Standards of Practice for Postal Service Mediations, 1998; Academy of Family Mediators, Texas Association of Mediators (TAM), National Association of Social Workers and other providers' Ethical Guidelines for Mediatorsetc.

⁴³ Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005. This act was adopted by three association of USA of AAA, ABA, ACR in 1994. The same act was revised in September, 2005, thus the act being adapted to mediation practice.

⁴⁴ *Alfini J.J.*, *Press Sh. B.*, *Stulberg J.B.*, *Mediation, Theory and Practice*, Reporter's Notes, 3rd ed., LexisNexis, 2013, 612.

⁴⁵ *Sherill J.A.*, Ethics for Lawyers Representing Clients in Mediation, 6 *Am. J. Mediation*, 2012, 29-30; *Ware S.J.*, *Principles of Alternative Dispute Resolution*, 2nd ed., Concise Hornbook Series, Thomson West, 2007, 323.

ments of 2005, right of self – determination of parties is not just confined to freedom of parties to make decision at the end of the mediation, but it also refers to preparatory stage of the mediation process and later to its all important stages.⁴⁷

Achievement of a mediated agreement is a priori focused expectation from court implementing mandatory mediation. Such expectations are also often held by courts in relation to mediators. Such “pressure” naturally bears certain threat in relation of full realization of autonomy of will and right of self-determination of parties⁴⁸ and has negative impact on the primary liability of a mediator – to encourage self- determination of parties in the process.⁴⁹

Self-determination of parties, neutrality of a mediator and restriction of providing professional legal advice by a mediator are interrelated in mutually conditioning manner, which frequently influences confines of role and engagement of a mediator in the mediations process. Namely, in case a party has no adequate knowledge about the matter to be considered during mediation,⁵⁰ is a mediator authorized to provide to him/her relevant legal, financial, or technical information or to give advice? In this case we have collision of obligation of neutrality of a mediator and his/her parallel obligation to support parties for making informed decision.⁵¹

In case a mediator has to encourage the process, based on autonomy of will and self-determination, he/she has to ensure informed decision are made by the parties. Frequently in the mediation process there is need that the party has legal information. If there is expectation that a mediator should provide such information, then “it is possible that his/her role is approximated to professional liability of a representative, advocate; In such case roles of a mediator and that of a representative overlap with each other and such circumstances, from the point of view of ethics, lead to a number of contradictions “. ⁵²

USA Model Standards of Practice for Family and Divorce Mediation⁵³ allows possibility of providing information by a mediator within the confines of knowledge obtained via his/her experi-

⁴⁶ *Bartlett F., Mortensen R., Tranter K.*, Alternative Perspectives on Lawyers and Legal Ethics, Reimagining the Profession, Routledge Research in legal Ethics, London and New-York, 2011, 207; *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 12; Model Standards of Conduct for Mediators, 2005, Standard I (1); *Shin C.P.*, Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, Wash. L. Rev., 2014, 1040.

⁴⁷ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 617, 619.

⁴⁸ *Welsh N.*, The Thinning Vision of Self-determination in Court-Connected mediation: the Inevitable price of Institutionalization, Harvard Negotiation Law Review, Vol. 6, 2001, 1; *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 619; Model Standards of Conduct for Mediators, 2005, Standard I (B).

⁴⁹ *Shapira O.*, A Theory of Mediator’s Ethics, Cambridge University Press, 2016, 161; *Alfini J.J., Press Sh.B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 619-620, 622.

⁵⁰ On participation of uninformed party in mediation, see: *Herring J.*, Legal Ethics, Oxford University Press, Great Britain, 2014, 310.

⁵¹ *Shapira O.*, A Theory of Mediator’s Ethics, Cambridge University Press, 2016, 161; *Kovach K.K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 403.

⁵² *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 13.

⁵³ Adopted in 2000.

ence and training, provided this information is not of legal content.⁵⁴ The above standards allow a mediator to quit the process, in case the parties are going to make an unperceived decision, or if one party attempts to use the mediation process for obtaining unfair advantage over another party. Contrary to this approach, Alabama Code of Ethics' expectations are that "in case of divorce a mediator considers with parties court's possible and tentative decision on partition of property".⁵⁵

According to dominating approach a mediator should only encourage obtaining of independent legal advice from a lawyer or engagement of a representative⁵⁶ for prevention of legal risks. Such approach is set by Model Standards of Conduct for Mediators.⁵⁷ Though adverse impact of it is that involving a lawyer or inviting an independent expert for legal appraisal of the case often leads to significant increase of mediation costs for parties.⁵⁸

There is no set hierarchy between ethical principles of mediation; it is impossible to predetermine acknowledged *prima facie* advantage or universal nature of any standard.⁵⁹ Confines of application of a specific principle should be considered through keeping reasonable balance between fundamental principles of mediation on case to case basis. For example, right for self determination might be dominating in cases, where parties are equally competent and informed on important issues the decision to be made by them does not impact third parties or public interests; whereas, fair proceedings and its quality is considered an important and leading principle, when accord and satisfaction affects well being of persons, who are not present at the negotiation table and are not engaged in the decision making process.⁶⁰

2.2. Impartiality

According to Model Standards of Conduct for Mediators, a mediator should lead the proceedings in unbiased manner⁶¹ and avoid conduct which creates such an impression.⁶²

Bias and advantage, based on personal features, education, values, belief, character or any other factors of a participant of the mediation process, is unacceptable for a mediator. It is important that according to this standard impartiality refers not just to a party, but any participant of mediation.⁶³

⁵⁴ On a mediator's right, in case of existence of adequate grounds, to suspend, terminate or withdraw from the process, see *Riskin L.L.*, Awareness and Ethics in Dispute Resolution and Law, Why Mindfulness Tends to Foster Ethical Conduct, Tex. L. Rev., Vol. 50:493, 2009, 498.

⁵⁵ *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 12.

⁵⁶ *Bush R. A. B.*, Efficiency and Protection or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation, Fla. Law Rev., Vol. 41, 1989, 253, 280.

⁵⁷ Model Standards of Conduct for Mediators, 2005, Standard I (2).

⁵⁸ *Kovach K.K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 403.

⁵⁹ *Shapira O.*, A Theory of Mediator's Ethics, Cambridge University Press, 2016, 118.

⁶⁰ *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 14.

⁶¹ *Alfini J.J.*, *Press Sh. B.*, *Stulberg J.B.*, Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 418.

⁶² *Shapira O.*, A Theory of Mediator's Ethics, Cambridge University Press, 2016, 187.

⁶³ Model Standards of Conduct for Mediators, 2005, Standard II (B) (1); *Alfini J.J.*, *Press Sh. B.*, *Stulberg J.B.*, Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 621.

Model Standards of Conduct for Mediators entitles a mediator to refuse participation in the proceedings and in the future to withdraw from attendance at the proceedings, in case he/she finds it impossible to comply with impartiality principle.⁶⁴ The united commission for reforming of model standards has considered if it was appropriate to add the following conditionality to application of right to withdraw from the mediation: “In case refusal to participate in the process is feasible without damaging interests of any party”.⁶⁵ Finally, the commission did not consider it appropriate to specify this condition for applying the right to withdraw from the process of mediation.⁶⁶

2.3. Conflict of Interests

Issue of conflict of interests is directly linked to neutrality⁶⁷ and impartiality⁶⁸ of a mediator. Principle of neutrality is acknowledged as a constitutional basis of mediation ideology. It is a necessary precondition in order to adequately manage the mediation process and generally, even to apply the title “mediation” to the form of dispute resolution. Incompliance with neutrality principle by a mediator undermines the very essence of mediation.⁶⁹

Among regulations under Model Standards of Conduct for Mediators we need to specially mention liability of a mediator to refuse participation in the mediation process at the initial stage, or to refuse it later, as soon as necessity for it arises, in case of existing, active or potential conflict of interests. If both parties, despite the fact that the mediator has revealed the relevant circumstances, express consent for engagement of the latter in the process, a mediator is entitled to continue participation in the proceedings.⁷⁰ In case the conflict of interests of a mediator endangers integrity and honesty of the very process of mediation, a mediator has to withdraw from the process even if the parties have expressed clear consent regarding his/her participation.⁷¹

“It is important to which extent neutrality of a mediator implies restriction to be applied to the right of the mediator to provide different type (namely, legal, financial) advise or other service to the party of mediation in the future; is it acceptable for a mediator to lead the mediation process, where a party to this process is his/her former partner, client, or otherwise related person, in case content of the previous relations has nothing to do with the dispute to be considered by the mediation?”⁷² E.G. in case a mediator is divorced, shall he/she be banned from divorce case for certain period of time or forever? If a mediator has experienced car accident, shall he/she be separated from similar cases? Neutrality implies lack of interest towards specific outcome of a case.⁷³ But if a mediator is inter-

⁶⁴ Model Standards of Conduct for Mediators, 2005, Standard II (A) (C).

⁶⁵ Ibid, Standard II (B) (1).

⁶⁶ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 621.

⁶⁷ *Kovach K.K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402.

⁶⁸ *Shapira O.*, A Theory of Mediator’s Ethics, Cambridge University Press, 2016, 187.

⁶⁹ *Zamir R.*, The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic, 11 Pepp. Disp. Resol. L.J., 2010-2011, 467.

⁷⁰ Model Standards of Conduct for Mediators, 2005, Standard III (C).

⁷¹ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 622; Model Standards of Conduct for Mediators, 2005, Standard III (E).

⁷² *Kovach K.K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402.

⁷³ *Wilson B.*, Mediation Ethics: An Exploration of Four Seminal Texts, 12 Cardozo J. Conflict Resol., 2010-2011, 122.

ested in parties to achieve accord and satisfaction, especially when through achieving the above result a mediator will have additional opportunity to run a business, naturally there is a big question mark in relation to the principle of neutrality.⁷⁴

Model Standards Conduct for Mediators, restriction of conflict of interests implies post mediation period in addition to the mediation process itself. A mediator is forbidden to establish with any party to the mediation relations, which by its content can raise doubts regarding fairness of the mediation process.⁷⁵ In case a mediator establishes personal or professional relations with parties, other persons or organizations, involved in the mediation process, he/she should take into consideration time passed since completion of mediation, nature of relations or professional service, in order to avoid conflict of interests or justified doubts regarding existence of such conflict of interests.⁷⁶

2.4. Competence

According to Model Standards of Conduct for Mediators a mediator can lead the mediation in case he / she has sufficient and necessary competence to meet expectations of parties. Any person may be selected as a mediator if he / she has adequate competence and qualification based on evaluation of parties.⁷⁷ Thanks to such regulations model standards have liberated competence of a mediator from artificial and bureaucratic barriers and have linked selection of a mediator to free will of parties.⁷⁸ Similar approach is developed by National US standards in relation to court mediation programs.⁷⁹

A mediator is obliged to be engaged in educational programs for the purpose of improving skills and increasing knowledge, also to ensure access to the information about his / her qualification for parties. In case it becomes clear during the mediation process that a mediator is no longer capable to lead the process in a competent manner, then he / she should take relevant measures – withdraw from the process or request relevant assistance.⁸⁰

2.5. Confidentiality

Confidentiality is a determining factor and foundation for mediation. Therefore it is regulated by domestic legislation of particular countries,⁸¹ as well as Code of Ethics of mediation. Consequently, meeting confidentiality requirement is a legal, as well as ethical and fiduciary⁸² liability.⁸³

⁷⁴ Kovach K.K., *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 402-403.

⁷⁵ Shapira O., *A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 187.

⁷⁶ Model Standards of Conduct for Mediators, 2005, Standard III (F); *Alfini J.J., Press Sh. B., Stulberg J.B., Mediation, Theory and Practice, Reporter's Notes*, 3rd ed., LexisNexis, 2013, 623.

⁷⁷ Model Standards of Conduct for Mediators, 2005, Standard IV (A) (1).

⁷⁸ *Alfini J.J., Press Sh. B., Stulberg J.B., Mediation, Theory and Practice, Reporter's Notes*, 3rd ed., LexisNexis, 2013, 623.

⁷⁹ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 6.1. Qualifications of Mediators.

⁸⁰ Model Standards of Conduct for Mediators, 2005, Standard IV (A) (2) (3), (B).

⁸¹ *Alfini J.J., Press Sh. B., Stulberg J.B., Mediation, Theory and Practice, Reporter's Notes*, 3rd ed., LexisNexis, 2013, 422.

⁸² *Garner B. (ed.), Black's Law Dictionary*, 8th ed., Thomson West, 2004, 1315.

⁸³ *Wendel B.W., Professional Responsibility, Examples and Explanations*, Aspen Publishers, United States of America, 2007, 138.

According to Unified Act on Mediation,⁸⁴ adopted in 2003, parties have been entitled a privilege to independently define confidentiality conditions, considering imperative stipulations, provided by the law. This opportunity is also reflected in Model Standards of Conduct for Mediators.⁸⁵

Definition of Model Standards of Conduct for Mediators implies, that a mediator is liable to protect confidentiality of the information which becomes available to him / her in the mediation process. Even if parties agree to disclosure of the information, a mediator is not obliged to do so.⁸⁶

A mediator should encourage accurate definition of scope of confidentiality during and beyond mediation process and its proper interpretation by parties. At the same time a mediator, who is involved in teaching, survey or evaluation of the mediation process is obliged to ensure anonymity of person, involved in the mediation. At the same time it is not reasonable to make him / her liable to meet confidentiality requirement while obtaining permission for each particular matter from parties of the mediation regarding teaching, survey and evaluation.⁸⁷

Model Standards of Conduct for Mediators establish two exceptions from confidentiality principle. Namely, a mediator may disclose the information regarding to circumstances: whether parties have appeared to the appointed mediation process and whether they have achieved accord and satisfaction.⁸⁸

2.6. Quality of the Process

According to Rule №1 of Model Standards of Conduct for Mediators a mediator is liable to balance the right of self determination of parties and to correlate it with commitment⁸⁹ of leading high quality mediation process.⁹⁰ Mediation Code of Ethics comprise guidelines regarding mandatory trainings and qualification of mediators in order to ensure high quality and competent mediation service.

A mediator should lead the mediation process in such a manner to ensure prudence, timeliness, safety, attendance of all relevant parties, adequate participation of parties, procedural fairness, competence, awareness of parties and adequate respect among parties.

A mediator should agree to lead the mediation process just in case he/she is able to demonstrate attention relevant for efficiency of the mediation process⁹¹ and meet reasonable expectations of parties regarding duration of the mediation process. A mediator and parties may agree about full

⁸⁴ Uniform Mediation Act, 2003.

⁸⁵ See Model Standards of Conduct for Mediators, 2005, Standard V(D).

⁸⁶ *Ibid*, Standard V (A)(1). This rule naturally does not relate to the information, which the person, issuing the information has asked a mediator at the private meeting to be transferred to other participants of the mediation process (see Standard V (B)).

⁸⁷ *Alfini J.J., Press Sh. B., Stulberg J.B., Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 625.*

⁸⁸ Model Standards of Conduct for Mediators, 2005, Standard V (A)(2); *Alfini J.J., Press Sh. B., Stulberg J.B., Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 620;*

⁸⁹ Model Standards of Conduct for Mediators, 2005, Standard VI (A) (B) (C).

⁹⁰ *Ibid*, Standard I (1).

⁹¹ *Alfini J.J., Press Sh. B., Stulberg J.B., Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 424.*

attendance of other persons at certain stage of the mediation process or about them being banned from the process.

A mediator's role substantially differs from that of representatives of other occupations, therefore competences and functions may not be confused. A mediator is allowed to advise the parties to apply other procedures of dispute resolution. With the agreement of parties a mediator may get engaged in the process with different competence, e.g. with the function of decision makers. In this case rules of ethics of relevant field become effective and parties should be comprehensibly informed about third person's new role.

In case a party experiences problems regarding participation in the process, understanding various matters, making decisions or similar issues, a mediator should assist him/her to overcome the above difficulties, and encourage him/her to realize his/her right of self determination.

If it becomes clear during the mediation that the process is being used for implementing future criminal actions, a mediator is liable to convince a participant to reject realization of the above actions, to postpone or stop the process. Based on Model Standards of Conduct for Mediators he/she is not liable to notify relevant agencies about criminal intentions, revealed within the confines of mediation. The reason for this is that such exception from confidentiality principle may not be provided under the law or agreement of parties and in such case a mediator will be considered to violate the principle of confidentiality.⁹²

The above mentioned exception from confidentiality principle is provided under Mediation Acts of a number of states⁹³ and protection of relevant public interest is achieved through legislative restriction.

2.7. Advertising and Solicitation

According to Model Standards of Conduct for Mediators it is forbidden for a mediator use misleading information in the process of advertising mediation services, as well as during dissemination of information regarding qualification, experience and service charges of a mediator. A mediator shall not issue a guaranty for ending the communication with this or that specific outcome. A mediator may only confirm his/her certain competence, accreditation, acknowledged by state of private agency, assigning qualification. A mediator may not use names of other persons in any form of communication without their consent.

⁹² On this issue see *Shapira O.*, *A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 119.

⁹³ E.g. Maryland Statute, Virginia Code, cited: *Sharp D.*, *The Washington, D.C. Lawyer and Mediation Confidentiality: Navigating the Complex and Confusing Waters*, 7 *Appalachian J. L.*, 2007-2008, 200; Florida and New Jersey States regulations, cited: *Menkel-Meado C.*, *Plapinger E.*, *Model Rule for the Lawyer as Third-Party Neutral*, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 13, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

In EU countries similar exceptions from confidentiality principles are set in the following acts: Bulgaria Mediation Act (Art.7), Estonia Conciliation Act (Section 4 (5)), German Mediation Act (Section 4), Greece, Law on Mediation in Civil and Commercial Disputes (Art. 10), Ireland, Draft General Scheme of Mediation Bill (Head 10) etc. On details about confidentiality in EU legislation see: *Trevor M.B.*, *Palo G.*, *EU Mediation Law and Practice*, Oxford University Press, 2012.

2.8. Fees and Other Charges

Codes of Ethics often strengthen mediators liabilities through offering free mediation processes, increasing public awareness and facilitating advancement of mediation in various ways.⁹⁴ Generally speaking, regulation of the above issues under the Code of Ethics is mostly limited to reasonability of mediation charges. Banning of imposing contingencies is another important direction of regulation. The grounds for the above restriction is also related to neutrality of a mediator, since he/she may not have interest in certain result of the case.⁹⁵

According to Model Standards of Conduct for Mediators, while defining the mediation service fee a mediator shall be guided by factors, such as: type and complexity of case to be considered, qualification of a mediator, time needed for considering a dispute and existing tariffs for mediation services. Service fee shall be determined in such a manner that neutrality and impartiality of a mediator are not infringed.

2.9 Advancement of Mediation Practice

A mediator shall facilitate advancement of mediation practice through encouraging diversity in mediation field, increasing access to mediation, participating in educational processes for increasing public awareness about mediation, supporting young mediators, respecting different opinion, and collaborating with other mediators for the purpose of improving mediation profession.⁹⁶

IV. General Standards of Ethics for Parties and Representatives

Setting standards of mediation ethics implies definition of scope of ethical limitations of a party and his / her representative, in addition to that of a mediator; such limitations ensure their honest participation in the mediation process.⁹⁷ This may be explained by the fact that the role played by the above persons is decisive for the content of the mediation agreement and often this role is more active compared to that of a mediator.⁹⁸

Preamble of Model Standards of Conduct for Mediators emphasizes a lawyer's liability to take care of a client's positions and as a negotiator, to be targeted on achieving outcomes, beneficial for client, while meeting requirement for honest treatment of other participants.⁹⁹ Based on the

⁹⁴ Kovach K.K., *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 404.

⁹⁵ *Ibid*, 404.

⁹⁶ Model Standards of Conduct for Mediators, 2005, Standard IX (A) (B). On the above liabilities of a mediator see *Shapira O.*, *A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 179-180.

⁹⁷ On a liability regarding fair participation of parties and representatives in the mediation process see: *Wolski B.*, *On Mediation, Legal Representatives and Advocates*, 38 U.N.S.W.L.J., 2015, 7; *Sherill J.A.*, *Ethics for Lawyers Representing Clients in Mediation*, 6 Am. J. Mediation, 2012, 37-38; *Alfini J.J.*, *Press Sh. B.*, *Stulberg J.B.*, *Mediation, Theory and Practice, Reporter's Notes*, 3rd ed., LexisNexis, 2013, 305-325; *Kovach K.K.*, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, 4 Disp. Resol. Mag., 1997-1998, 9-13.

⁹⁸ *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 424.

⁹⁹ See Standards of Conduct for Mediators, Preamble, §2, cited: *Sherill J.A.*, *Ethics for Lawyers Representing Clients in Mediation*, 6 Am. J. Mediation, 2012, 30.

summary a lawyer may be engaged in the mediation process as a neutral third party,¹⁰⁰ without a representative authorization, or the purpose of facilitation of dispute settlement by parties.¹⁰¹

“Parties engaged in mediation process are limited by their own professional ethical norms. The case to be considered in the mediation process may be related to their professional negligence, e.g. with failure to meet ethical liabilities in relations between a physician and a patient. Certainly these standards continue to act within the confines of mediation”.¹⁰² “In case a lawyer is engaged in the mediation process, it is natural that the function of court representation of a client” is covered by lawyer’s profession; ethic code; though his / her as a representative’s role is substantially dissociated from court representation of a client”.¹⁰³

It is important to analyze ethical liabilities of a lawyer – representative party, which act prior to starting mediation process – namely, should a lawyer advise the party about existence of mediation alternative.¹⁰⁴ Frequently this ethical liability of a lawyer is provided for at legislative level¹⁰⁵ and is considered to be an expression of right of self determination of party.¹⁰⁶ The above liability is also confirmed by professional ethics code of lawyers of Georgia.¹⁰⁷ Though in practice we come across the lack of interest of lawyers to provide to a client full information about mediation.¹⁰⁸ It is acknowledged at the doctrinal level that the above liability of lawyer – representative should be given broad and general definition and it should comprise obligation to discuss with a client strategy of negotiations, agreement options and procedures of dispute settlement.¹⁰⁹ According to comment 5 of rule 2.1 of Professional Liabilities of Bar Association of America,¹¹⁰ a lawyer shall advise a party on possible form of alternative dispute settlement, which can be a reasonable alternative to court

¹⁰⁰ *Zaleniene I.*, The Main Features and Development Trends of Mediation in Lithuania: the Opportunities for Lawyers, *Jurisprudence* 2010, 1(119), 233.

¹⁰¹ Regarding ethical liabilities of a representative towards the court, mediation program administration parties and a mediator, see: *Wolski B.*, On Mediation, *Legal Representatives and Advocates*, 38 U.N.S.W.L.J., 2015, 1-47.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Regarding this issue see: *Burnett C.G.*, Advising Clients About ADR: A Practical Guide to Having Difficult Conversations About Selecting Options, *TSU Alternative Dispute Resolution – Yearbook 2014*, Tbilisi State University National Center for Alternative Dispute Resolution, Tb., 2014, 187-198; *Berger M.J.*, Should an Attorney be Required to Advise Client of ADR Options? *Geo J. Legal Ethics*, Vol. 13, 2000, 427; *Sander F.E.A.*, *Prigoff M.L.*, Should there be a Duty to Advise of ADR Options, *A.B.A.J.*, Vol. 76, 1990, 50.

¹⁰⁵ *Burnett C.G.*, Advising Clients About ADR: A Practical Guide to Having Difficult Conversations About Selecting Options, *TSU Alternative Dispute Resolution – Yearbook 2014*, Tbilisi State University National Center for Alternative Dispute Resolution, Tbilisi, 2014, 187.

¹⁰⁶ *Burnett C.G.*, Advising Clients About ADR: A Practical Guide to Having Difficult Conversations About Selecting Options, *TSU Alternative Dispute Resolution – Yearbook 2014*, Tbilisi State University National Center for Alternative Dispute Resolution, Tbilisi, 2014, 187.

¹⁰⁷ Paragraph II of article 8 of the Code of Professional Ethics, approved by General Meeting of Bar Association of Georgia, on April 15, 2006 with amendments and additions, enacted on December 8, 2012.

¹⁰⁸ *Herring J.*, *Legal Ethics*, Oxford University Press, Great Britain, 2014, 313.

¹⁰⁹ *Cochran R.F.*, Legal Representation and Next Steps toward Client Control, *Attorney Malpractice for the Failure to Allow Client to Control Negotiation and Pursue Alternatives to Litigation*, *Wash. and Lee Law Rev.*, Vol. 47, 1990, 819; *Wermbrod M.L.*, Comment, Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for failure to Inform clients of Alternative Dispute Resolution, *Cumb. L. Rev.* Vol. 27, 1996-1997, 791.

¹¹⁰ ABA Model Code of Professional Responsibility, 1983, cited: *Compendium of Professional Responsibility, Rules and Standards*, ABA 2008 ed., American Bar Association, United States of America, 2007, 195.

proceeding.¹¹¹ In additions, since there is no rule set by relevant acts for representatives of other professions, contradicting with the above mentioned liability, consequently, they are also covered by an obligation on advising a client.¹¹²

It is important to note, that New York Bar Association Committee has established responsibility of law firms for violation of ethical liabilities by their lawyers, since these matters are related to the filed, under the control of companies.¹¹³

V. Mediation Ethical Standards in the Context of Court's and Other Provider Organizations' Activities

In addition to parties, participating in the mediation, ethical liabilities imply limitation for mediation provider private companies, state agencies and courts which have to carry out mandatory mediation.¹¹⁴ It is acknowledged at the international level, that likelihood for inappropriate mediation practices is very high in the absence of limitations of ethical standards of activates of competent bodies and state agencies. For example, "while transferring a case by mediation provider for mediation it is important to keep confidentiality, to select competent and unbiased mediator by an appropriate procedure; there should be preventive measures in place for sending majority cases to any one mediator or for a judge to obtain confidential information, in order to avoid grounded suspicion for existence of conflict of interest".¹¹⁵ In addition, there is probability that mediation private providers may practice ethical trade-offs because of interest to get profit.¹¹⁶

"While sending a case to a mediator by mediation providers or private persons it is important to define whether it is acceptable or ethical for a mediator share the mediation fee with an individual or an institution sending the case over".¹¹⁷ In case it is allowed, it becomes doubtful if one can determine the level of impartiality of motivation for selecting the mediator in the process of the mediation case referral.

International standards set responsibility of courts for actions of mediators under court subordination or for those which courts refer mediation cases to for consideration. At the same time, courts are free from such responsibilities if parties have independently selected a person as a mediator without the court involvement.¹¹⁸

Ethical liabilities of mediation providing organizations of USA are determined by Georgetown Ethics and ADR Standards Commission under the act – Draft Principles for ADR providing

¹¹¹ *Zaleniene I.*, The Main Features and Development Trends of Mediation in Lithuania: the Opportunities for Lawyers, *Jurisprudence* 2010, 1(119), 234.

¹¹² *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 425.

¹¹³ *Raske H.J.*, *Promoting Better Supervision*, A.B.A.J., Vol. 79,1993, 32.

¹¹⁴ *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 339.

¹¹⁵ *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 425.

¹¹⁶ *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 339.

¹¹⁷ *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 426.

¹¹⁸ *National Standards for Court-Connected Mediation Programs*, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 2.1.

organizations (further referred to as Georgetown principles).¹¹⁹ The above act, which covers both private and state mediation providers and individuals was developed in 1999, was promulgated for public hearings in 2000 and was finally adopted in 2002.¹²⁰

US National Standards (further – National Standards) for court mediation programs were adopted in the frame work of collaboration of Dispute Resolution Centre, Court Administration Institution and 18 member Advisory Board in 1991 for the purpose of strengthening ethical liabilities of courts, exercising compulsory mediation.¹²¹

Georgetown Principles emphasize following ethical principles of mediation provider organizations: ensuring quality and competence of service, providing relevant information, fairness and impartiality, guaranteeing affordability of service for low income groups, disclosure of conflict of interest, introduction of litigation mechanisms, subjecting neutral entities of an organization to ethical standards, prohibiting false and misleading communication, developing safeguards for confidentiality.¹²²

Similarly, National Standards have strengthened the following ethical liabilities during court mediation process: providing mediation accessibility and affordability, gaining informed consent, appropriate selection of cases, evaluation of service quality and litigation procedures.¹²³

1. Ensuring Quality of Mediation Process and Free Choice of a Party

Georgetown Principles and National Standards impose on mediation providers liability within confines of their abilities to ensure high quality of implementation of the mediation process registered in their field of control.¹²⁴

“Different risks emerge in case of existence of state providers. In case of voluntary mediation a party is free to chose a mediator, while in case of court mediation it is actually deprived of such opportunity. Therefore liability of a provider to ensure quality of the process, regarding both procedural and on – merit aspects is directly linked with the right of free choice of a party. Lack of choice of a party to independently decide on involvement of desirable provider proportionally increases ethical liability of a provider organization to ensure professional, high quality compulsory mediation for the parties”.¹²⁵

At the same time Georgetown Principles state that a provider organization may exclude the obligation for ensuring quality of the process through public appeal towards parties and society.¹²⁶

¹¹⁹ A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002.

¹²⁰ *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 340.

¹²¹ *National Standards for Court-Connected Mediation Programs*, Center for Dispute Settlement and Institute of Judicial Administration, 1992.

¹²² *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 426-427.

¹²³ *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 340.

¹²⁴ A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle 1 (Quality and Competence of Services).

¹²⁵ *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 339-340.

¹²⁶ A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle 1, Quality and Competence.

1.1. Mediator's Skills and Competences, as Guarantees of Quality of Mediation Process

According to Georgetown Principles and National Standards, it is considered essential to send the case over to a mediator with adequate skills and competences in order to meet the liability of a provider organization – ensuring quality mediation process.

According to Georgian Principles, since mediation is a multidisciplinary field, without special qualification requirements and examination preconditions, competence of a mediator is often related with trainings, education based on obtaining skills, having experience in teaching and its practical context.¹²⁷

Georgetown Principles and National Standards equally deny need for any academic degree as a condition for mediator's qualification. Quite the contrary, the above acts provide, that the court shall not set barriers which may exclude diversity of mediators according to their gender, race or ethnic belonging.¹²⁸

National Standards define 9 skills which are essential for implementation of quality mediation process. These skills are as follows: proper and adequate perception of negotiation process and role of representative, transforming of interests of parties into positions, assisting parties to asses opportunities for possible alternatives for dispute resolution beyond mediation process in case of failure to achieve an agreement, gaining and retaining trust, sieving cases which cannot be settled through mediation, encouraging creative alternatives, assisting parties to define guidelines and criteria in the decision making process, making free and informed decision and assessing feasibility of achieved agreement.¹²⁹

National Standards provide that if interests of legal context are relevant for the case, then the essential component of a mediator 's competence implies preliminary assessment / reconciliation of legal outcomes, which may be predictable for the parties in case of selecting other procedures of dispute resolution.

2. Duty to Inform and Disclosure of Conflict of Interests

National Standards impose on the court the role of an educator, which implies ethical liability of the court to communicate to the parties and their representatives at least 17 types of information, starting from notifying them on mediation costs and procedures, and ending with absence of decision-making power of a mediator, also defining the right to appeal to the court in case of failure by parties to achieve an mediated agreement.¹³⁰

According to Georgetown Principles mediation provider organizations can establish institutional links which may threaten the neutrality of processes administrated by them. Private providers may use their relations with permanent customers as a guaranteed and predictable source of income.

¹²⁷ A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle 1. Ensuring Competence and Quality in Dispute Resolution Practice, Report No. 2, of the SPIDR Commission on Qualifications, April 1995.

¹²⁸ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 6.1. Qualifications of Mediators.

¹²⁹ Ibid.

¹³⁰ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 3.2.

In order to avoid such situation, Georgetown Principles set the principle of transparency and requires preliminary consent to be obtained by an organization from the parties.

Similarly to individual mediators, provider organizations also have liability to inform the parties about any relations they are or have been involved in and which may question their neutrality.¹³¹

3. Ensuring Accessibility of the Process

According to National Standards access to mediation should not be based on criteria like: ability to pay charges for the service (affordability of the process) or ability to have a representative, absence of physical defect or ability to speak English and perceive information in English.¹³²

Georgetown Principles, through strengthening provider's liability to take any reasonable measures in order to ensure access to the process by low income parties,¹³³ oblige neutral affiliated persons to offer dispute resolution procedures at prices lower than market prices or free of charge (pro bono).¹³⁴

4. Developing Safeguards for Fair and Impartial Process

National Principles bind mediation providers to ensure, within the confines of their competence, implementation of fundamentally fair and impartial mediation process.¹³⁵ Fundamental fairness of the process is defined according to the following criteria:

- Availability of free choice for parties of a neutral facilitator;
- Opportunity for parties to be provided by adequate fair representativeness and procedures for fair case hearing;
- Existence of adequate length of sessions and fair distribution of reasonable costs.

National Standards impose liability on courts to use necessary and special measures in order the parties to be able to make an informed and free choice without representatives, about mediation and they are notified about accessibility of possible alternatives of dispute resolution.¹³⁶

5. Setting Conditions for Sending a Case for Mediation and Complex Assessment of Anticipated Outcomes

In the process of sending a case for mediation the court shall consider what can be possible outcomes for the court, parties or other persons.¹³⁷ National Standards set circumstances, which may be hindering transition of cases for mediation. E.g. an activity to be considered through mediation

¹³¹ *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 341.

¹³² National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 1.0.

¹³³ A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IV, Accessibility of Services.

¹³⁴ *Ibid*, Principle IV, Comment.

¹³⁵ *Ibid*, Principle III.

¹³⁶ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 1.4.

¹³⁷ *Ibid*, Standard 4, Selection of Cases and Timing of Referral.

causes public censorship, repeated violation of certain rules requires uniform approach while defining responsibility, parties and / or representatives fail to carry out effective negotiations.¹³⁸

According to National Standards, certain conditions should be set in order to carry out compulsory mediation. Namely, such service should be funded by the state, parties shall be free from any inadequate pressure in decisions making process, they should possess unrestricted ability to participate in the process, they should be informed about anticipated outcomes, should possess ability to involve their representatives in the process.¹³⁹

Even in case when the case was sent over for mediation in accordance with the adequate rules, National Standards request the courts to take special measures for protecting interests of the vulnerable party¹⁴⁰ (e.g. victims of domestic, psychological or physical violence¹⁴¹) and ensure that they are informed about lack of obligation for them to refuse the claim or compromise regardless of being involved in compulsory mediation.¹⁴²

6. Permissible Limits of Monitoring and Supervision of Mediation Process

According to National Standards, court should ensure monitoring and supervision of processes implemented by mediators, it (the court) has sent the case to be considered to, in order to retain continuity of implementation of processes at high quality level.¹⁴³

The above function of monitoring is realized with involvement of an observer, with assessments of a judge and citizens and with analysis of outcome data of disputes considered. In order to increase the quality of mediators' activities the court shall permanently provide opportunities for additional trainings or involvement of co-mediators in the mediation process.¹⁴⁴ Violation of ethical liabilities by mediators automatically results in discrediting of the mediation institution. In order to prevent the above the court shall possess leverages to remove the mediator from the list or to cease sending him/her cases.¹⁴⁵

7. Introduction of Assessment Mechanisms and Appeal Procedures

In order to ensure enforcement of its ethical commitments the court shall collect quantitative and qualitative data, related to assessment of legitimacy and fairness of mediation process by parties, dispute resolution statistics and cost efficiency.¹⁴⁶

¹³⁸ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 4.2.

¹³⁹ Ibid, Standard 5.1, Mandatory Attendance.

¹⁴⁰ On participation of a weak party in mediation process see: *Herring J.*, Legal Ethics, Oxford University Press, Great Britain, 2014, 310.

¹⁴¹ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 11.1.

¹⁴² Ibid, Standard 11.0-11.2, Inappropriate Pressure to Settle.

¹⁴³ Ibid, Standard 6.5.

¹⁴⁴ *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 346.

¹⁴⁵ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 6.6.

¹⁴⁶ Ibid, Standard 16.1.

The court which has sent the case to be considered through mediation shall provide introduction of appeal procedures for parties related to violation of participation in mediation process and other violations.¹⁴⁷ Appeal procedures shall be equally fair for parties to the dispute as well as for unbiased third party – a mediator.¹⁴⁸

Provider organizations shall ensure that the information regarding the above procedures are promulgated in accurate and clear manner. In addition it is very important that opportunity for appeal may be allowed for conduct of a mediator or violation of any rules of a provider organization and it cannot be used by parties as a means for avoiding an agreement achieved.¹⁴⁹

8. Developing Confidentiality Policy

“National Standards and Georgetown Principles assign equal importance to confidentiality, though do not define acceptable scope of meeting confidentiality requirements or grounds for its limitation”.¹⁵⁰ “The above acts strengthen liability of a mediation provider organization to develop policy relevant to their goals and to the requirements of the law regarding confidentiality, provided that the above standards will be clearly formulated and communicated to persons, protected by confidentiality principle.”¹⁵¹

According to Georgetown Principles a provider organization shall take all possible measures in order to meet requirements for confidentiality, set by the law and defined by parties, organizations and mediators.¹⁵²

National Standards set liability of courts to develop policy for ensuring confidentiality in accordance with the law, which will determines in details circle of mediators and cases, protected under the above principles, scope of protection, persons, enjoying privileges and exceptions from the above principle.¹⁵³

In cases, when a court has to balance the aim, ensured by confidentiality against the charge for guaranteeing confidentiality and to identify the priority interest, it has to be guided by the primary task of protection of fairness and integrity of mediation process.¹⁵⁴

In accordance with the National Standards policy of confidentiality of mediation should not imply capacity for ensuring meeting standards less than those defined in agreement procedures concluded between the parties.¹⁵⁵

¹⁴⁷ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 2.6, Complaint Mechanism.

¹⁴⁸ A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IV, Complaint and Grievance Mechanisms.

¹⁴⁹ Ibid, Principle VI.

¹⁵⁰ *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 347.

¹⁵¹ A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IX, Confidentiality, (a)-(c).

¹⁵² Ibid, Principle IX, Confidentiality.

¹⁵³ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 9.1.

¹⁵⁴ Ibid, Standard 9.1.

¹⁵⁵ Ibid, Standard 9.1. (d).

9. Adoption of Mediation Ethics Code

National Standards and Georgetown Principles impose on a provider organization liability to adopt code of ethics for mediation for the purpose of regulating practice of neutral third party affiliated with it. Similarly, European Code of Conduct for Mediators¹⁵⁶ contains an appeal towards organizations implementing mediation to have mediators under their subordinations to be covered by the above code¹⁵⁷ or to develop more detailed ethical norms considering peculiarities and style of the mediation service, they offer on behalf of the company. According to European Code of Conduct for Mediators provider organizations may similarly establish mediation codes in the field of family and consumer disputes.¹⁵⁸ According to Model Standards of Conduct for Mediators provider organizations, mediation program administrators, courts and other agencies in the field are authorized to set a condition to a mediator, implying that they have to be subject to the above rules of mediation ethics in order to become a member of the above organizations or to be registered on their lists.¹⁵⁹

While establishing mediation ethic codes, providers should be guided by basic goals of encouraging unity and integrity, fairness and neutrality of the mediation process.

VI. Conclusion

It may be said based on the research that existence of ethical standards ensure regulation of mediators' activities, as well as well functioning of mediation programs operating on the national level.¹⁶⁰ Preamble of Model Standards for Mediators Conduct clearly reflects three main goals safeguarded by adoption of Mediation Ethics Rules: regulation of mediators' conduct, communicating information to participants and increasing trust of the public towards mediation, as a process focused on dispute settlement.¹⁶¹

Adoption of Mediation Ethical Standards in Georgia will be a step forward towards mediation professionalization. In addition it serves to implementation of public interest and setting accountability of practicing mediators.¹⁶²

Establishing ethical standards for state and private providers of mediation will also be especially important from the perspective of gaining public trust and increasing awareness. It will encourage readiness of citizens to declare voluntary credibility and refer to mediation, as a process, based on ethical standards.

¹⁵⁶ European Code of Conduct for Mediators, 2004, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>.

¹⁵⁷ *Boulle L., Nesic M.*, Mediator Skills and Techniques: Triangle of Influence, European Code of Conduct for Mediators, Athenaeum Press, Great Britain, 2010, 642.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Young M.*, Rejoice! Rejoice! Rejoice, Give Thanks and Sing: ABA, ACR and AAA Adopt Revised Model Standards of Conduct for Mediators, *Appalachian Journal of Law*, Vol. 5, 2006, 199.

¹⁶⁰ *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 347-348.

¹⁶¹ On the above collateral outcomes of regulation of mediation ethics see: *Rozdeiczner L., Campa A.A.*, *Alternative Dispute Resolution Manual: Implementing Commercial Mediation*, The World Bank Group, IFC, 2006, 51.

¹⁶² *Wilson B.*, Mediation Ethics: An Exploration of Four Seminal Texts, *12 Cardozo J. Conflict Resol.*, 2010-2011, 120.