

Specificity of Some Ethical Duties of Lawyer Mediator and Necessity of Regulation**

Mediation in Georgia is supported by state policy and its successful functioning, as part of the whole system of dispute resolution mechanisms, is the demonstration of public interest. Mediation is a significant mechanism for supporting legal, social stability and dialogue, and apolitical means for implementing state policy.

Mediation has the potential to transform not only an individual, but also society. Therefore, it should be based on public recognition, the confidence of the society at large towards the fairness and ethical integrity of the mediation process.

Institutionalization of mediation necessitates the refinement of legal culture and understanding of dispute resolution. The mentioned understanding is largely formed by the setting of ethical standards and the implementation of effective instrumental infrastructure for their enforcement in the internal state system.

Due to the mobility of lawyers through the involvement in traditional formal and alternative dispute resolution procedures in different capacities, and respectively, ever growing demands of the legal profession, it becomes necessary to set ethical standards for “cross-professional” practice of lawyers and its improvement.

The present article is dedicated to the research of the substance of ethical basis for the involvement of lawyers in the capacity of a third neutral party in alternative dispute resolution procedures, as well as the necessity for setting rules of ethical conduct, considering ever increasing demands of the legal profession, for “cross-professional” practice of lawyers.

The standards of ethical conduct of lawyer mediators may be regulated by means of expanding current rules of professional ethics for lawyers, by determining a functionally different, neutral role in the mediation process, as well as by means of setting norms of proper conduct through an independent code of ethics.

In the course of the formation and application of the norms of ethics, ensuring their uniform application within the bounds of the general framework of state policy in ethics field should be a crucial principle.

Key Words: *mediation, lawyer, mediator, conflict of interests, neutrality, self-determination, confidentiality, diligence and competence, equal treatment, mediation agreement, representation in mediation, ethics policy, rules of ethics, lawyer mediator, client, cross-professional practice.*

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I. Introduction

Ever increasing demands of the legal profession necessitate the relevance of regulations in ethics with modern development trends. The above-mentioned is especially the case with determining ethical grounds for participation of lawyers as neutral third parties in alternative dispute resolution procedures.¹

Regulation of mediation ethics is part of state policy, since it should be based on and factor in national moral values and the culture of social relations of the nation. Therefore, ethics rules cannot be established by means of automatic reception of any universal code in the mentioned field.²

The development of the norms of ethics is unique means to ensure the link between procedural and social fairness and at the same time, it will be a guide for mediators while participating in mediation programs.³ Furthermore, setting ethics standards will facilitate mediation to become professional calling for the specialists.⁴

Legal profession is regulated and implemented at the domestic level.⁵ Georgia Code of Professional Ethics of Lawyers⁶ does not set the grounds for the so-called cross-professional practice⁷, when a lawyer is represented with different statuses in alternative dispute resolution processes. In addition to representing client in dispute resolution procedures, lawyers often participate as a neutral third party. This fact, along with the expansion of mediation practice, will give rise to many ethical dilemmas in terms of the introduction of sound practice in alternative dispute resolution. For the mentioned purposes, institutions operating in the ADR field should be prepared for adoption of ethical standards..

In the USA, the Code of Professional Ethics of Lawyers was first adopted in Alabama State⁸, following which, subsequent to the expansion of the scale of lawyer activity, a number of guiding standards were approved. In this direction, the America Bar Association carried out a three-year research, “the Impact of Globalization and Technologies on the Transformation of Legal Profession and Updating Legal Activity in the Context of the Above-mentioned Development.”⁹ One of key directions of this research was mobility of lawyers that is effected by means of the participation in traditional formal and alternative procedures under different status.¹⁰

¹ About the necessity of the above-mentioned, as well as ethical dilemmas of mediator’s and a lawyer’s role, see: *Moffitt M.*, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-profession Practice*, 1 *Harv. Negot. L. Rev.*, 1996, 204, 211; *Folberg J.*, *Golann D.*, *Mediation, The Roles of Advocate and Neutral*, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 424-427.

² *Rovine A.V.* (ed.), *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2014*, Fordham Law School, Brill – Nijhoff, 2015, 116, With further references.

³ *Alfini J.J.*, *Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators*, *South Texas Law Review*, Vol. 49, 2008, 837.

⁴ *Ibid.*

⁵ *Brand R.A.*, *Professional Responsibility in a Transnational Transactions Practice*, 17, *J.L.& Comm.*, 1998, 301-302.

⁶ Code of Professional Ethics of Lawyers, approved on April 15, 2006, by the General Meeting of the Georgia Bar Association, with additions and amendments effected on December 8, 2012.

⁷ See *Moffitt M.*, *Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice*, 1 *Harv. Negot. L. Rev.*, 1996, 211.

⁸ *Parley L.*, *A Brief History of Legal Ethics*, 33 *Fam. L.Q.*, 1999, 637.

⁹ American Bar Association Commission on Ethics, 20/20, Introduction and Overview, <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf>.

¹⁰ ABA Commission on Ethics 20/20, Resolution 105D (Aug. 6, 2012), <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d.pdf><http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d.authcheckdam.pdf>.

The development of the national model of regulating mediator's ethical standards is dependent on the scope of assigned role and authority, as well as the style of the use of various techniques in the mediation process. Furthermore, it would be inadvisable to grant quasi-judicial immunity to court mediators, since this implies excluding the possibility for the parties to resort to safeguards for their rights in case mediator fails to meet ethical obligations. There are many regulations at the international level that envisage appeal procedure in case the violation of ethical duties of a mediator are detected.¹¹

II. Mediation Activity as Legal or “Cross-Professional” Practice?

There is an issue in the international practice¹²: a mediator, who helps parties to obtain neutral, unbiased, legal information/advice from lawyers, analyze their case resolution alternatives beyond mediation – in judicial or arbitration proceedings, assess strong and weak legal aspects, factual aspects, render decisions¹³ that are informed, consensus based,¹⁴ reflecting free will,¹⁵ develop well-perceived, detailed and implementable and executable mediation agreement, how much can this be considered as the practice of law? In response to the above-mentioned, it has been determined under the ABA Resolution that mediation is not the practice of law.¹⁶

It is recognized the participation of a client in relations is necessary in order to have the practice of law.¹⁷ There are several criteria for such assessment of work, among them, Legal Assessment Test, according to which, an individual must have special legal education and skills to practice law. “This work involves the application of the principles of law, to provide counsel or meet the needs of an individual through other assistance.”¹⁸ This characteristic is also defined as “the skills acquired through legal education, involving the application of the norms of law and philosophical principles in the context of a specific problems of a client, for addressing it.”¹⁹

¹¹ National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 2.6; Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IV, VI, Complaint and Grievance Mechanisms; *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 340; *Kovach K.K.*, *Mediation, Principles and Practice*, 3rd ed., Thomson West, United States of America, 2004, 426-427.

¹² State Bar of Virginia, Guidelines on Mediation and the Unauthorized Practice of Law, 1999.

¹³ American Academy of Matrimonial Lawyers, Rule, 8.4, <<http://www.aaml.org/library/publications/19/bounds-advocacy/3-conflict-interest>>.

¹⁴ *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.

¹⁵ *Shin C.P.*, *Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223*, 89 Wash. L. Rev., 2014, 1042.

¹⁶ *Kovach K.K.*, *Mediation in a Nutshell*, 3rd ed., West Academic Publishing, United States of America, 2014, 311.

¹⁷ *Laffin M.E.*, *Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators*, Notre Dame Journal of Law, Ethics and Public Policy, Vol. 14, Issue 1, Art. 14, 2014, 503; *Kovach K.K.*, *Mediation in a Nutshell*, 3rd ed., West Academic Publishing, United States of America, 2014, 311; *Meyerson B.*, *Lawyers Who Mediate Are Not Practicing Law*, 14 Alternatives 74, 1996, referenced in: *Alfini J.J.*, *Press Sh.B.*, *Stulberg J.B.*, *Mediation, Theory and Practice*, Reporter's Notes, 3rd ed., LexisNexis, 2013, 449.

¹⁸ *Oregon State Bar v. Smith*, 942 p.2 d 793, 799 (Or. App 1997), referenced in: *Abel R.L.*, *Lawyers in the Dock, Learning from Attorney Disciplinary Proceedings*, Oxford University Press, 2010, 68.

¹⁹ *Committee on Prof. Ethics and Conduct of Iowa State Bar Ass'n v. Baker*, 492 N.W.2 d. 695, 701, (Iowa 1992), referenced in: *Meyerson B.E.*, *AAA Handbook on Mediation*, 2nd ed., American Arbitration Association, Juris, 2010, 764; *Washington State Courts General Rule GR 24*, 2002, <https://www.courts.wa.gov/court_rules/>.

Lawyer mediator has to exert extreme caution when using the “Reality Test”²⁰, to ensure that this technique is not evaluative and does not transform into the breach of ethical norms. Standards adopted by the Virginia Supreme Court Dispute Resolution Department on Mediation and Unauthorized Practice of Law²¹ set forth the scope of assessment by a mediator. Specifically, under these guidelines, mediator, through the use of their skills, shall ensure that parties independently assess strengths and weaknesses of the case, as well as alternatives of resolving beyond mediation or possible obstacles. Under the same standards, mediator is prohibited to forecast possible legal solution of the case,²² since in this context, it would mean entering into the area of a lawyer’s activity and such action forms a client and a lawyer relationship.²³

Based on the afore-mentioned, a mediator may not extend legal advice,²⁴ evaluative information, since, following such action, legal advantage of one of the parties will be identified and it will be considered the counsel to a client. This will breach the principle of neutrality of a mediator and transform the powers of a lawyer mediator into the functions of a representative.²⁵

A neutral third party may hold evaluative functions, within the established bounds. Specifically, lawyer-mediator may extend advice or provide information to the extent such service does not reach the bounds of representation (lawyer-client).²⁶ Mediator may not share with the parties personal and professional opinion to persuade them to resolve a dispute; furthermore, mediator may not provide explicit direction for the resolution of issues. In compliance with the principle of self-determination of parties and impartiality,²⁷ mediator shall motivate a party and representative to identify possible outcomes of the case, deliberate on the advantages of a claim or a counter-claim, strengths and weaknesses of the case.²⁸

If a lawyer mediator tries to defend the “positions” of both parties, the above-mentioned will form the source of conflict, since the interests of parties are often conflicting, and such action is considered the breach of ethical obligation under a number of foreign regulations.²⁹ For example, under the EU Code of Conduct of Lawyers,³⁰ it is an imperative that lawyer may not provide counsel or represent two or more clients on the same case, provided: there is conflict between the interests of the mentioned clients, or considerable risk for the emergence of such conflict. Similarly, according to the Code of Professional Ethics of

²⁰ *Esplugues C., Louis M.*, New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Ius Comparatum, Springer International Publishing Switzerland, 2015, 280; *Peyerwold D., Mandelbaum M.(ed.)*, Wage and Hour, Oakland, California, 2016, 13-18.

²¹ Virginia Supreme Court Department of Dispute Resolution, Guidelines on Mediation and Unauthorised Practice of Law (UPL), 1999-2000.

²² *Brooker P.*, Mediation Law, Journey through Institutionalism to Jurisdiction, Routledge Taylor and Francis Group, London and New York, 2013, 251.

²³ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 450-451.

²⁴ *Russel M.O.*, The Mediation Handbook, Effective Strategies for Litigators, Bradford Publishing Company, Denver Colorado, 2011, 195.

²⁵ Washington State Bar Association Advisory Opinion №2223, <<http://www.wsba.org/Resources-and-Services/Ethics>>.

²⁶ Fla. R. Civ. P. 10.370 (c) (2002).

²⁷ *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, 4, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

²⁸ *Ibid*, 7, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

²⁹ State Bar of Texas Professional Ethics Committee, Opinion 583, 2008; Washington Rules of Professional Conduct (RPC), Rule 1.7. *Shin C.P.*, Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1045.

³⁰ Article 3.2.1.

Lawyers of Georgia, a lawyer is not authorized to provide professional advice or represent two or more clients on the same case, provided there is the conflict of interests between the interests of mentioned clients.³¹

There is also the so-called “client’s confidence test” in international practice; according to this test, in order for the practice to be named the practice of law, it is necessary that from a client’s perspective information provided by a professional is perceived to be legal counsel in line with his/her interests.³²

Therefore, mediator involved in the review of legal matters shall explain to the parties that a neutral third party does not exercise a lawyer’s authority,³³ so that participants of mediation do not develop the expectation that such party will defend the interests of one of the parties.³⁴

Despite individual attempts, Arizona State Supreme Court³⁵ excluded the possibility of precise definition of the practice of law, based on the difficulty of the definition of all actions to be implemented under a lawyer’s practice.³⁶

If a mediator’s work is recognized as the practice of law, duties and ethical norms set forth for lawyers would become applicable to mediators, as well as lawyer’s activities would be performed in the course of mediation, which is fundamentally incompatible with the role of a mediator.³⁷ For example, the obligation to defend the interests of a client³⁸ is contrary to the obligation of impartiality and neutrality of a mediator towards the parties of the mediation.

If mediation is treated as the practice of law, thousands of representatives of interdisciplinary field would automatically be included in the circle of the practitioners of law; and this will unreasonably expand its scale.³⁹ Hence, the framework of ethical regulation of mediation should be performed without its recognition as the practice of law.

III. The Substance Content of Ethical Duties of a Lawyer Mediator and the System

In contemporary legal doctrine, the role of a lawyer is construed broadly and involves assistance to clients and other individuals for most effective and least damaging resolution of legal issues.⁴⁰ According to EU Code of Conduct of Lawyers, lawyer shall always strive to achieve the resolution of a client’s dispute at minimal costs and at relevant stages the lawyer shall advise a client about settlement and/or alternative ways of dispute resolution.⁴¹ Practitioners are serving the above-mentioned values under the status of a represen-

³¹ The Code of Professional Ethics of Lawyers, approved by the General Meeting of the Georgia Bar Association on April 15, 2006, with amendments and additions effected on December 8, 2012. Article 6.1.

³² Florida Bar V. Brumbaugh, 355 So. 2d. 1186, (Fa. 1978), referenced in: *Pirsig M.E., Kirwin K.F.*, Cases and Materials on Professional Responsibility, West Pub. Co., 1 Jul 1984, 93.

³³ ABA Model Rules of Professional Conduct, 1983, Rule 2.4. (2); See also, *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 451.

³⁴ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 450.

³⁵ In the case: State Bar of Arizona v. Arizona Land Title and Trust Co., 366, 2, d.1., 8-9, (Ariz. 1961).

³⁶ *Meyerson B.E.*, AAA Handbook on Mediation, 2nd ed., American Arbitration Association, Juris, 2010, 764.

³⁷ *Laflin M.E.*, Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators, Notre Dame Journal of Law, Ethics and Public Policy, Vol. 14, Issue 1, Art. 14, 2014, 501; *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 450.

³⁸ Georgia Law on Lawyers, [29.12.2004 №970], Article 6.

³⁹ *Meyerson B.*, Lawyers Who Mediate are Not Practicing Law, 14 Alternatives 74, 1996, referenced in: *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 450.

⁴⁰ *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, 3, <<http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>>.

⁴¹ Article 3.7.1, EU Code of Conduct of Lawyers, referenced in: *Kvachadze, M., Gasitashvili, E., Bochorishvili, K., Kordzakhia, I.*, Commentary on the Professional Ethics of Lawyers, based on the Practice of the Ethics Commission, EU Project – Supporting the Rule of Law, Tbilisi, 2011, 34, <https://www.tsu.ge/data/file_db/faculty-law-public/lawyers%20book-2.pdf>.

tative and a neutral third party.⁴²

In international practice, in the process of representing a client, the norms of professional ethics basic are applicable to a lawyer, while in mediation, the scope of ethical obligation of a lawyer mediator are determined primarily under the Model Standards of a mediator's conduct.

In 2002, USA Georgetown Commission on Alternative Dispute Resolution Ethics and Standards, adopted a special rule of model behavior of a lawyer, as of a neutral third party (hereinafter – Model Rule)⁴³, as an integral part of the ABA Model Rules for Professional Conduct (hereinafter – Model Rules for Professional Conduct).

Model rule is applicable only to a lawyer involved in the capacity of a neutral third party in alternative dispute resolution procedures (arbitration, mediation, pre-trial neutral assessment, etc.), not to representatives of another profession exercising the same functions, or to lawyers involved in similar processes with representative powers.⁴⁴ Therefore, the analysis of this special model rule, along with other international acts, is especially important, for it sets forth standards of ethics for lawyer-mediators, based on the characteristic specificity of this role (arbitration, mediation, pre-trial neutral assessment, etc.).

1. Explaining Own Role by Lawyer Mediator to Parties

The obligation to inform parties about the role of a mediator, the scope of his/her authority and key principles of the process is stipulated in Mediation Code of Ethics in a number of foreign states.⁴⁵

According to the commentary to the Model Rules of Professional Conduct 2.4 (b)⁴⁶, lawyer mediator is required to explain to parties that his/her powers are distinct from those of a representative and that he/she is not in a capacity to defend the interests of parties in the course of mediation.⁴⁷ The content of the mentioned notice and its format is determined based on factual circumstances of the case⁴⁸ and the scope of this obligation depends on the degree to which the parties are aware of mediation, prior experience with involvement in mediation, etc.⁴⁹ It is desirable that notice is provided in writing and be included in an agreement⁵⁰ of the parties to resort to mediation.⁵¹

⁴² *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, 3, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

⁴³ Model Rule for the Lawyer as Third Party Neutral, Rule 4.5, 2002, (Final edition - 2004). CPR Georgetown Commission on Ethics and Standards in ADR, <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁴⁴ On the mentioned issue, see *Burnett C.G.*, Advising Clients about ADR: A Practical Guide to Having Difficult Conversations about Selecting Options, Ivane Javakhishvili Tbilisi State University National Center for Alternative Dispute Resolution, Alternative Dispute Resolution, Yearbook 2014, TSU Publishing, 2014, 187-199; *Wolski B.*, On Mediation, Legal Representatives and Advocates, 38 U.N.S.W.L.J., 2015, 5-47; *Clark B.*, Lawyers and Mediation, Sprin-Verlag Berlin Heidelberg, Glasgow U.K., 2012, 71-110, 179-181; *Kovach K.K.*, Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, 4 Disp. Resol. Mag., 1997-1998, 9-13; *Hughes P.*, Ethics in Mediation: Which Rules? Whose Rules? 50 U.N.B.L.J., 2001, 251-253; *Douglas K., Batagol B.*, The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal, 40 Monash U. L. Rev., 2014, 758-792; *Sherill J.A.*, Ethics for Lawyers Representing Clients in Mediations, 6 Am. J. Mediation, 2012, 29-40.

⁴⁵ JAMS Mediator Ethic Guidelines, Para. 1, <<http://www.jamsadr.com/mediators-ethics/>>.

⁴⁶ *Folberg J., Golann D.*, Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 426.

⁴⁷ Similar provision is included in the Virginia Rules of Professional Conduct stipulate similar provision, Virginia Rules of Professional Conduct, 2.10. (b) (1), <<http://www.vsb.org/docs/2009-10-pg-rpc.pdf>>.

⁴⁸ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 452.

⁴⁹ Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 288, <abanet.org/cpr>.

⁵⁰ agreement to mediate.

⁵¹ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 452.

USA Minnesota Act on Civil Mediation⁵² prescribes that agreement reached between the parties will be considered valid if it contains a provision according to which process participants have been notified in writing, that mediator does not have powers to defend the interests of any of the parties, or to inform them about their legal rights, about possible effect of mediation agreement on their rights; If they were briefed about the right to review mediation agreement conditions with lawyers and the right to solicit counsel from them concerning legal requirements. Therefore, under the Minnesota Act, informing a party about the role of a mediator is treated as a precondition for the validity of a mediation agreement; and this elevates the importance of the mentioned obligation.

Lawyer mediator is facing great ethical challenges, when parties of mediation do not have representatives involved,⁵³ especially in family disputes, when decision taken by parents has impact on the interests of a child as well. In this case, an issue comes up: how can a lawyer, as a neutral third party, maintain neutrality?⁵⁴

In the above-mentioned case, mediator's duty to inform parties about fundamental difference of a mediator's and a lawyer's role is even more important, to avoid developing wrong expectations.⁵⁵

According to the Procedures and Rules of the Alternative Dispute Resolution Group,⁵⁶ to ensure informed decisions by parties, individuals involved in ADR are asked to encourage obtaining independent legal counsel by those parties who do not have representatives, prior to the commencement of mediation process.⁵⁷

2. Fairness of Process and Equal Treatment

Lawyer-mediator, although he/she does not represent interests of any party in mediation, he/she has the duty of equal treatment to all participants of the process.⁵⁸

According to the Ethical Requirements prescribed by the Geneva Dispute Resolution Council Federation, mediator has the duty towards parties, mediation process and the public. This duty may even involve suggesting free mediation services.⁵⁹ The duty of ethical integrity of the process and defending equality in relation to all parties of mediation is reflected in the definition of the concept of mediator in the legislation of Ireland.⁶⁰ It involves fairness⁶¹ of mediation proceedings, mediation procedures,⁶² its fairness, which is

⁵² 572.35, Effect of Mediated Settlement Agreement, <<https://www.revisor.leg.state.mn.us/statutes/?id=572&view=chapter#stat.572.35>>.

⁵³ Washington Rules for Professional Conduct, Rule 2.4., Washington State Bar Association Advisory Opinion №2223, <<http://www.wsba.org/Resources-and-Services/Ethics>>.

⁵⁴ Taylor A., *The Handbook of Family Dispute Resolution, Mediation Theory and Practice*, Jossey-Bass, United States of America, 2002, 171.

⁵⁵ On informing about a mediator's role, see also: Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 2.

⁵⁶ ADR Group Mediation Procedure and Rules (in Civil and Commercial Cases), Rule 5.2., <www.adrgroup.com>.

⁵⁷ Boulle L., Nesic M., *Mediator Skills and Techniques: Triangle of Influence*, European Code of Conduct for Mediators, Athenaeum Press, Great Britain, 2010, 418.

⁵⁸ 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, 3, <<http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>>.

⁵⁹ Dispute Board Federation Geneva, Ethical Requirements, Canon 1, referenced in: Chern C., *The Commercial Mediator's Handbook*, Informal Law from Routledge, Abindgdon, 2015. See also, Hopt K.J., Steffek F., *Mediation: Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013, 156.

⁶⁰ Draft General Scheme of Mediation Bill, 2012, Head 2, referenced in: Trevor M.B., Palo G., *EU Mediation Law and Practice*, Oxford University Press, 2012, 183.

⁶¹ See also, Roberts M., *Mediation in Family Disputes: Principles of Practice*, 4th ed., Ashgate Publishing, Dorchester, 2014, 253.

⁶² About procedural fairness of mediation, see Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 11.

also a precondition for a fair outcome.

European Code of Conduct of Mediators also reinforces the duty to ensure the fairness of the proceedings.⁶³ EU Directive on Specific Aspects of Mediation in Civil and Commercial Cases Mediation⁶⁴ is also applicable to the judges who are involved in the mediation process under the status of a mediator and do not participate in judicial examination of the same case.⁶⁵ For ensuring the fairness of proceedings, mediator should be separated from a judge's authority.⁶⁶

A lawyer, in the capacity of a neutral third party, shall take all reasonable measures to lead the process through the maintaining the principle of fairness towards parties. Mediator should demonstrate particular due diligence towards the parties who do not have representatives, so that their views are heard and to enable their full-fledged participation in the dispute resolution procedure.⁶⁷

A lawyer may not engage in the capacity of a neutral third party in such proceedings or procedure that is not agreed with the parties (beside the case when the application of a process/procedure is determined by law, court rules or an agreement).⁶⁸ He/she has to apply relevant measures and make sure that parties and their representatives have been briefed about alternative dispute resolution procedure in a clear manner, and that they are providing informed consent for the proceedings, as well as the participation of a specific neutral third party.⁶⁹

Since ethical rules cannot guarantee special procedures and fairness of proceedings, Model Rule sets a requirement for a neutral third party to be cautious towards basic values and the purpose to inform about fair dispute resolution procedure. Basic values in the mediation process involve autonomy of a party, freedom to select process (considering law or contract prescribed limits), right to select a neutral third party and right to provide consent for appointed neutral individual (considering law or contract prescribed limits), fairness of mediator's conduct and the fairness of the proceedings itself⁷⁰, equality of parties.⁷¹

A lawyer, in the capacity of a neutral third party, shall take all reasonable measures and establish that parties have reached agreement based on free will, without duress. Although, according to Model Rules,

⁶³ European Code of Conduct for Mediators, Art. 3.2. On the duty of integrity and fairness of the process, see also, *Roberts M.*, *Mediation in Family Disputes: Principles of Practice*, 4th ed., Ashgate Publishing, Dorchester, 2014, 268-269.

⁶⁴ Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, Adopted by the European Parliament and the Council of the European Union on May 21, 2008, L 136/3, 24.05.2008.

⁶⁵ Art. 12, Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, Adopted by the European Parliament and the Council of the European Union on May 21, 2008, L 136/3, 24.05.2008, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>>

⁶⁶ *Robinson P.*, 2 *Journal of Dispute Resolution*, 335, 379-380, Referenced in: *Hopt K.J., Steffek F.*, *Mediation: Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013, 174.

⁶⁷ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (c), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁶⁸ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (b), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁶⁹ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.4. (a)(3), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁷⁰ See *Alfini J.J.*, *Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators*, *South Texas Law Review*, Vol. 49, 2008, 830; *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, 22, <<http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>>.

⁷¹ *Taylor A.*, *The Handbook of Family Dispute Resolution, Mediation Theory and Practice*, Jossey-Bass, United States of America, 2002, 171.

neutral third party does not have moral responsibility to guarantee fair outcome of the proceedings.⁷² He/she has only to avoid engaging in the behavior that would result in raising doubt about fairness of proceedings that could nullify reached agreement.⁷³

In the practice of a lawyer, his/her role is constantly changing between neutral third party and legal representative authority. Therefore, it is important to monitor adherence to the most general criteria of fairness, in terms of access to process, legitimacy and lawful participation of a lawyer in it.⁷⁴

3. Diligence and Competence

According to Model Rule,⁷⁵ a neutral third party lawyer shall act by complying with the principles of diligence, effectiveness and timeliness, at the degree of the due diligence he/she is required to exert, based on law or an agreement. He/she has to deny participation in such proceedings where he/she cannot be competent.⁷⁶

The degree of due diligence and prudence of a mediator may additionally be stipulated in an agreement between parties, under the standards of ethics prescribed by a provider organization and its policy.⁷⁷

Mediator, for timely and effective resolution of dispute, has to dedicate reasonable time and avoid the impact of possible obstacles in the mentioned direction. If a neutral third party does not meet the expectations of parties in relation to the resolution of a dispute within reasonable timeframe, then he/she is required to deny services. Ethical Standards of Professional Responsibility contain such provision stating that a neutral third party may undertake the duty to lead proceedings only in case of due knowledge of the process and the subject of dispute.⁷⁸

Several factors should be taken into account when determining the competence of a mediator: reasonable expectations of parties from the proceedings and the role of a neutral third party, substance and procedural complexity of the matter of dispute and proceedings, experience and qualification of a neutral third party in the field of alternative dispute resolution and the practice of law, special knowledge of the matter of dispute, preparatory works a neutral person is capable of performing, actual possibility of involving other neutral individuals or experts in the process in the capacity of assistants, etc.⁷⁹

⁷² *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, 22, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

⁷³ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (d), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁷⁴ *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, 23, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

⁷⁵ Model Rule for the Lawyer as Third Party Neutral, Rule 4.5.1 (a), 2002, (Final edition - 2004). CPR Georgetown Commission on Ethics and Standards in ADR, <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁷⁶ *Ibid*, Rule 4.5.1 (b).

⁷⁷ *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, 9, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

⁷⁸ Similar provision is contained in the Act - Ethical Standards of Professional Responsibility, SPIDR, 1986, Background and Qualifications.

⁷⁹ *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, 10, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

4. Confidentiality

According to the Model Rule, neutral third party has to consider confidentiality terms with parties prior to the commencement of dispute resolution proceedings, and demand preliminary consent on holding private meetings.⁸⁰

Lawyer mediator may not disseminate or use the information obtained over the course of mediation to the detriment of any of the parties. Confidentiality requirement is no longer applicable if information is made public, parties have excluded its confidentiality, disclosing information is necessary to avoid liability for the breach of ethical duty by mediator, or is related to the prevention of future death, serious bodily injury, crime or large financial losses due to fraud.⁸¹ Similar exception from confidentiality principle is stipulated by mediation law⁸² of many countries and the protection of relevant public interest in these countries is primarily achieved through legislative restrictions.

Mediator, who has received confidential information during proceedings,⁸³ may not represent parties who have relation to the conducted process or a case⁸⁴ that is substantially related thereof.⁸⁵ The reason for the above-mentioned restriction, naturally, is that mediator will learn about “facts significant for resolution”⁸⁶ (such as financial status and needs of parties, their business plans, trade secret, etc.),⁸⁷ which, although may not be of legal nature, but be used in favor or against the interests of any of the parties, in the course of representation.⁸⁸

A lawyer may not represent a person in the alternative dispute resolution proceedings against a party who had participated in the process before, and without their consent,⁸⁹ where mediator has received infor-

⁸⁰ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.2. (a) (1), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁸¹ Ibid, Rule 4.5.2. (a) (3).

⁸² For example, Maryland Statute, Virginia Code, referenced in: *Sharp D.*, The Washington, D.C. Lawyer and Mediation Confidentiality: Navigating the Complex and Confusing Waters, 7 *Appalachian J. L.*, 2007-2008, 200; Regulations of States of Florida and New Jersey, referenced in: *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%20netural%20create%20new%20cover%20page%202012.pdf>>. In the EU countries, similar exemptions from the principle of confidentiality are stipulated 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. For more details about the principle of confidentiality see the European Union legislation ix. Trevor M.B., Palo G., *EU Mediation Law and Practice*, Oxford University Press, 2012.

⁸³ *Moffitt M.*, Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 *Harv. Negot. L. Rev.*, 1996, 203.

⁸⁴ *Poly Software International, Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995), < <http://law.justia.com/cases/federal/district-courts/FSupp/880/1487/1408247/>>. See also, Conference on Mediation, March 29, 1996, Geneva, Switzerland, <<http://www.wipo.int/amc/en/events/conferences/1996/gurry.html>>.

⁸⁵ *Moffitt M.*, Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 *Harv. Negot. L. Rev.*, 1996, 203.

⁸⁶ *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, 641.

⁸⁷ *Menkel-Meadow C.*, For and Against Settlement: The Uses and Abuses of Mandatory Settlement Conference, 33 *UCLA Law Review*, 1985, 503-504.

⁸⁸ *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, 19, <<http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>>.

⁸⁹ *Moffitt M.*, Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 *Harv. Negot. L. Rev.*, 1996, 206-207.

mation about circumstances significant for the resolution of the case or learned about the circumstances of confidential information protected under the Model Rules.⁹⁰ The duty of confidentiality shall be effected by bringing down those risks involved in the disclosure of information presented during mediation.

5. Investigation of the Potential Conflict of Interest

In contemporary law practice, mobility of lawyers across law firms and organizations, in conjunction with the cases to be reviewed by them, is a growing trend. Mobility of lawyers is primarily performed by means of changing of representation functions and the status of a neutral third party, as well as the participation in free programs offered by private and public providers.⁹¹ In the mentioned process, creating safeguards for conflict prevention and impartiality are of utmost importance.

Model Rule prescribes the duty of impartiality⁹² for a neutral third party,⁹³ and to ensure impartiality mediator has to preliminarily, prior to the commencement of the proceedings, solicit information about parties and their representatives, insured parties, defence lawyers, witnesses and possible attendees, to be aware of their identities. The mentioned preliminary review of data serves the purpose of determining potential conflict at an early stage.

Mediator has to perform in-depth study of circumstances that may be demonstrating the conflict of interest.⁹⁴ The mentioned factors may emerge not only at the beginning of the process, but over its course.⁹⁵

Uniform Mediation Act also mandates a neutral third party to study circumstances to establish possible or current conflict of interest.⁹⁶

If a lawyer mediator is involved in the dispute resolution proceedings as a volunteer, for public interests, as a neutral third party and discharges mentioned authority at the instruction of court, government agency or other provider organization, then neutral third party will not be able to carry out a full-fledged scrutiny of information for establishing the conflict of interest. In the above-mentioned case, the scope of information to be solicited is limited by reasonable criterion and are dependent on factual circumstances. Nevertheless, if a lawyer mediator is aware at that time of any interest or existing relationship, which has relation to the given case, in terms of conflict of interest, he/she, naturally, has to unconditionally disclose the afore-mentioned.

⁹⁰ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (a), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁹¹ *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, 17, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

⁹² Impartiality, along with the right of self-determination of a party and fair process, is recognized as one of the fundamental principles, and upholding this principle is crucial for establishing sound practice: *Alfini J.J.*, Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, *South Texas Law Review*, Vol. 49, 2008, 831.

⁹³ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.3, <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁹⁴ *Ibid*, Rule 4.5.3. (b) (2).

⁹⁵ Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 11.

⁹⁶ See Uniform Mediation Act, 9 (a), <http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf>, referensed in: *Folberg J., Golann D.*, Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 425.

Mediators are required to inform parties about their professional activities, membership or affiliation in law firms or other similar organizations, or any such circumstance that, due to the conflict of interest, forms the basis for disqualifying a mediator from a specific case.⁹⁷

Any financial or personal interest towards the outcome of the case, existing or past financial, business, professional, family or social relationship with a party of mediation, legal representation of any party, their lawyer, witness, or rendering of services in the capacity of a neutral third party, as well as any advantage resulting in bias or leaving the impression of bias is subject to disclosure.⁹⁸ Lawyer mediator is restrained with the duty to disclose if the presence of the above-mentioned grounds is related to his/her current family members, employer, partner or business associate.⁹⁹

Furthermore, it is important that the duty to disclose information about past representation, former clients, financial stake in companies is often in conflict with the duty to confidentiality of past representation and the procedures of the dispute resolution.¹⁰⁰ Hence, the goal of ensuring impartiality should be weighed in against the scope of the principle of confidentiality.

6. Limiting Representation

While participating in a dispute resolution procedure in the capacity of a neutral third party, lawyer mediator may not engage in financial, business, professional, family or social relationship without the consent of parties, or acquire any financial or personal interest with any party, institution or representative, that would impact impartiality or leave such impression.¹⁰¹

Where circumstances may reasonably form the impression that possible future relationship or possible interest has had impact on a neutral third party in the course of alternative dispute resolution, such person shall not demonstrate relevant interest or represent the party even in a substantially different case during one year or other reasonable period, except the case when both parties, based on informed consent, exempt a neutral third party from the mentioned restriction.¹⁰² According to Article 1.12(a) of the Model Rules of Professional Conduct, a lawyer may not represent an individual in relation of whom he/she had “personally and substantially”¹⁰³ been involved in the dispute resolution process, in the capacity of a judge, arbiter, mediator or any other neutral third party, save the case when parties have declared informed consent in writing on his/her participation. According to the mentioned Article, if earlier an individual was involved only in

⁹⁷ *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, 15, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

⁹⁸ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.3. (b) (1), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

⁹⁹ *Ibid*, Rule 4.5.3. (c).

¹⁰⁰ *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, 15, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

¹⁰¹ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.3. (d), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

¹⁰² *Ibid*, Rule 4.5.4 (a) (4).

¹⁰³ See American Bar Association's E2K Report, <http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html>; *Folberg J., Golann D.*, Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 425.

administering the dispute resolution and was not involved in substantive examination of the case, then the restriction of representation stipulated under the Article will not be applicable.¹⁰⁴

Similarly, according to the International Chamber of Commerce Alternative Dispute Resolution Rules¹⁰⁵, mediator is prohibited to engage in court, arbitration or other proceedings in relation to a case reviewed by him/her, in the capacity of a judge, arbiter, expert, party representative or counsel, save the case when all parties provide written consent on the above-mentioned.¹⁰⁶ A lawyer who had been engaged in a case in the capacity of a judge, arbiter, mediator or judicial officer status is prohibited to perform representation in relation to the parties associated with the case, without written consent of parties.¹⁰⁷ The Nebraska Code of Professional Responsibility¹⁰⁸, New York Code on Professional Responsibility of Lawyers,¹⁰⁹ Tennessee Supreme Court Rules¹¹⁰ contain a similar provision.

Protection of neutrality of provider organization is important to make sure that alternative dispute resolution process is not used by them as means for gaining the source of additional and future regular income. Therefore, if a lawyer is disqualified according to the Model Rule, then, none of the lawyers associated thereof in a given law firm is authorized to perform representation in a case subject to review¹¹¹, save exemptions set forth under the same Act.¹¹² Based on the mentioned regulation, disqualifying of a lawyer results in disqualifying his/her firm as well, except for the case when financial stake of a lawyer from the proceeds to be received by a firm from the mentioned case is excluded. While, the right to receive remuneration from services rendered in the past remains valid.¹¹³ Disqualifying of a firm may be necessary especially due to the circumstance that mediator is restricted with the obligation of confidentiality, which precludes the possibility of disclosing information obtained in the course of mediation to employees of the law firm.¹¹⁴

Later, approach has changed under the Model Rule 4.5.4 (b) (1), involving the restriction of a lawyer's law firm to provide representation only in the same case¹¹⁵, in which its lawyer had been involved in the capacity of a neutral third party, even if the latter was removed from the case through the due procedure. It has determined to be admissible for a law firm to perform representation in another case that is substan-

¹⁰⁴ Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 193, <abanet.org/cpr>.

¹⁰⁵ ICC ADR Rules (in Commercial Cases), 1 July, 2001, <www.iccwbo.org>, <www.iccdri.com>.

¹⁰⁶ Article 7, Sec. 3. See also, *Boulle L., Nesic M.*, Mediator Skills and Techniques: Triangle of Influence, European Code of Conduct for Mediators, Athenaem Press, Great Britain, 2010, 426.

¹⁰⁷ New Jersey Disciplinary Rules of Professional Conduct, 2001, RPC 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk, <https://www.law.cornell.edu/ethics/nj/code/>.

¹⁰⁸ The Nebraska Supreme Court Code of Professional Responsibility EC 5-20, (1990, 1995, 2000), 31.21, <https://supreme-court.nebraska.gov/sites/court.cdc.nol.org/files/misc/profresp-31.pdf>

¹⁰⁹ New York Lawyer's Code of Professional Responsibility, EC 5-20, (1999, updated in 2007), 46, <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26638>.

¹¹⁰ Tennessee Supreme Court Rule 8. Rule of Professional Conduct, (Rule replaced in its entirety by order filed September 29, 2010, effective January 1, 2011), <http://www.tsc.state.tn.us/rules/supreme-court/8>.

¹¹¹ The ABA Model Rules of Professional Conduct, 1.12 (a.c). See also, *Folberg J., Golann D.*, Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 425.

¹¹² CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.4 (b) (1), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>.

¹¹³ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 455; Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 194, <abanet.org/cpr>.

¹¹⁴ A litigative History The development of the ABA Model Rules of Professional Conduct, 1983-2005, 2006, 288.

¹¹⁵ Through any other lawyer.

tially related or unrelated case, by leaving the mandatory requirement of removing a lawyer through a due procedure.¹¹⁶

Immediately after the discovery of the conflict of interest, mandatory notification of parties should be performed. The notice shall describe past dealing of a lawyer with the mentioned case and established procedure for removing a lawyer from the case.¹¹⁷

If a lawyer participates in the proceedings in the capacity of a neutral third party, based on the demand from court, government agency or another organization, for public interests, without remuneration and for a minimum period, then legal firm related to a neutral third party may not be disqualified.¹¹⁸

Setting ethical rules for the prevention of the conflict of interest is a particularly delicate and responsible step, since disqualifying a lawyer due to a modest mediation may be followed by the disqualifying of a large and powerful law firm.¹¹⁹ Stringent regulations may cause low interest of qualified lawyers – to participate in mediation, provided in the future this will be the basis for unjustified limitation of their involvement in other proceedings of dispute resolution, representation of clients.

7. Determination of Fair Fees for Services

A lawyer, before engaging in alternative dispute resolution process, in the capacity of a neutral third party, or during the reasonable period after the parties agree to his participation in the proceedings, has to notify parties in writing about the service fee, save the case when he/she is involved in the proceeding on a voluntary basis, gratuitously.¹²⁰

Austrian Code of Conduct for Mediators¹²¹ prescribes that mediation may commence once agreement is obtained from all of its parties as to criteria and rates of a mediator's compensation.¹²² Supreme Court of Texas Ethical Standards for Mediators stipulate a similar approach.¹²³ Furthermore, the act on compensation of lawyers is not applicable to mediation services and a neutral third party lawyer may determine the rate freely, which has to be in line with the most important criteria of rationality. This criterion is a dominant one in the diversion mediation as well.¹²⁴

If a neutral third party leaves the process, he/she has to pay back compensation that has not been earned or which "has been paid in excess in advance".¹²⁵

¹¹⁶ Model Rule for the Lawyer as Third Party Neutral, Rule 4.5.4 (b) (1), 2002, (Final edition - 2004). CPR Georgetown Commission on Ethics and Standards in ADR, <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

¹¹⁷ Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 194, <abanet.org/cpr>.

¹¹⁸ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.4 (d), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

¹¹⁹ *Folberg J., Golann D.*, Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 425.

¹²⁰ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.5. (a), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

¹²¹ Austrian Code of Conduct for Mediators, Art. 2.2.5.

¹²² *Hopt K.J., Steffek F.*, Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 268.

¹²³ Supreme Court of Texas Ethical Standards for Mediators, 2011, Standard 3 - Mediation Costs, <<http://www.txmca.org/ethics.htm>>.

¹²⁴ *Hopt K.J., Steffek F.*, Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 268-269.

¹²⁵ Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 14.

A lawyer involved in the capacity of a neutral third party, who sets tentative expenses, contingent upon the duration of proceedings, reaching an agreement, or certain outcome of dispute resolution, is required to explain to parties that such determination of costs grants direct financial interest to a neutral party towards the outcome of case settlement, which may be in conflict with the right of parties to cease negotiations without reaching agreement on a case. Neutral third party shall also take into account that he/she may leave the impression of bias by determining such system of service fee.¹²⁶ In case of the conditional compensation system, there is the risk that concluding mediation through agreement becomes a goal for a mediator.¹²⁷ In international practice, some regulations stipulate conditional expenses as unethical¹²⁸ and they are prohibited under the ethical norms.¹²⁹ Model Rule, although does not ban, but imposes duty on a neutral third party to explain to parties about the expected possible results of applying such rule, including the conflict of interest. Respectively, neutral third party has to assess the likelihood of emergence of the conflict of interest or bias¹³⁰ and do their best to prevent it.

Conditional compensation schemes are often used to motivate participation of parties in alternative dispute resolution procedures or settling a dispute. Under legislation and standards of some countries, such system of compensation is prohibited. Model Standards for the Conduct of Mediators¹³¹ stipulate that mediator may not encroach the principle of self-determination of parties, with the purpose of "...gaining increased compensation"¹³² Since, self-determination is the most fundamental and leading principle of mediation and any compromise at the expense of the mentioned principle¹³³ is inadmissible, mediator shall not exert any undue influence, duress¹³⁴ over a party to persuade them to reach settlement and participate in the process against own will¹³⁵ (prohibited duress).¹³⁶

¹²⁶ CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.5. (c), <<http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>>.

¹²⁷ *Shapira O.*, *A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 184.

¹²⁸ Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, art. 11.2, 7-1, 2015, 14.

¹²⁹ California Rules of Court, 3.859 (c), referenced in: *Bullen B.A.*, *Mediation, A Training and Resource Guide for the Mediator*, Trafford Publishing, United states of America, 2012, 573.

¹³⁰ *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, 21, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

¹³¹ Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, *Standard I.B.*, <http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf>.

¹³² See *Shapira O.*, *A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 184; See also, *Shapira O.*, *A Theory of Mediator's Ethics*, Cambridge University Press, 2016, 184; North Carolina Standards, Rule VII.G.

¹³³ *Alfini J.J.*, *Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators*, South Texas Law Review, Vol. 49, 2008, 830-831.

¹³⁴ *Shin C.P.*, *Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223*, 89 Wash. L. Rev., 2014, 1040. See also, *Alfini J.J.*, *Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators*, South Texas Law Review, Vol. 49, 2008, 830.

¹³⁵ In case of mandatory mediation, party is engaged in the process based on court initiative; still, over the course of the process, a party is authorized to reject mediation process, provided agreement may not be reached under mediation. Compulsory mediation involves limiting autonomy of the will of a party only in the part of resorting to mediation and does not involve compulsory nature of an agreement. See *Roper I.*, *Mediation, Good Faith, Bad Faith*, 40 *Alternative L.J.*, 2015, 50. *Comp. Vettori S.*, *Mandatory Mediation: An Obstacle to Access to Justice?* 15 *Afr. Hum. Rts. L.J.*, 2015, 357-359.

¹³⁶ Florida Rules for Certified and Court-Appointed Mediators (ADR Resource Handbook, January, 2015), Rule №10.310 (b), <<http://www.mediate.com/articles/floridarules.cfm>>.

8. Authority to Draw up Mediation Agreement and its Scope

According to Model Rules of Professional Conduct, mediator may provide assistance to parties in dispute resolution and/or designing an agreement. Furthermore, provision of such assistance is allowable to parties who are engaged in the proceedings independently or through representatives.¹³⁷ Court or parties set forth the scope of authority for the participation of a neutral third party in the dispute resolution process.¹³⁸

In various alternative dispute resolution systems, mediator may be granted the right to develop a full mediation agreement¹³⁹ or its general outline, based on which representatives, in agreement with parties, determine detailed conditions of an agreement.¹⁴⁰ Only a non-lawyer mediator may be granted the right to perform the mentioned authority in full.¹⁴¹ Often, special knowledge is required for designing mediation agreement; therefore, involvement of an expert in the mentioned issue is justified.

Lawyer mediator shall “ask questions to specify the conditions of an agreement”¹⁴² and, for avoiding conflict of ethical obligations, he/she may include in an agreement only the wording suggested by the parties.¹⁴³ With this scope of authority, mediator may not be deemed practicing law. Yet, often, even most simple contractual provision cannot be drawn up without legal assessment, which may to some extent grant one party advantage over another, which had not been agreed upon during the mediation process by the parties.¹⁴⁴ Therefore, drawing up a legal document,¹⁴⁵ that has impact on rights and duties of parties, is regarded as one of key characteristics of the practice of law.¹⁴⁶

USA Washington State Supreme Court is the key body in charge of setting the rules of ethics of lawyers, although Bar Association Committee publishes recommendatory opinions¹⁴⁷ and facilitates individuals practicing law with discharging ethical obligations.¹⁴⁸

An opinion significant in this respect, Washington Recommendatory Opinion №2223, was passed in 2012; according to the decision a lawyer mediator is not allowed to draw up an agreement on the distribution of assets under a family dispute, design a parental duty fulfillment plan and child custody documents, since the above-mentioned is not limited to filling out standard forms and involves developing documents

¹³⁷ *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, 3, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

¹³⁸ Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 287, <abanet.org/cpr>.

¹³⁹ On this topic see *Kovach K.K.*, Mediation in a Nutshell, 3rd ed., United States of America, 2014, 238-247.

¹⁴⁰ *Shin C.P.*, Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1041.

¹⁴¹ *Boulle L.J., Colatrella M.T., Picchioni A.P.*, Mediator Skills and Techniques, LexisNexis, 2008, 104-105.

¹⁴² *Shin C.P.*, Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1042.

¹⁴³ *Russel M.O.*, The Mediation Handbook, Effective Strategies for Litigators, Bradford Publishing Company, Denver Colorado, 2011, 196.

¹⁴⁴ *Ibid.*

¹⁴⁵ Not technical support to parties in designing it, *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 451; Washington State Bar Association Advisory Opinion №2223, <<http://www.wsba.org/Resources-and-Services/Ethics>>.

¹⁴⁶ See Washington State Bar Association Advisory Opinion №2223, <<http://www.wsba.org/Resources-and-Services/Ethics>>; *Laffin M.E.*, Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators, Notre Dame Journal of Law, Ethics and Public Policy, Vol. 14, Issue 1, Art. 14, 2014, 503; *Boulle L.J., Colatrella M.T., Picchioni A.P.*, Mediator Skills and Techniques, LexisNexis, 2008, 104-105.

¹⁴⁷ Washington State Bar Association Advisory Opinion №2223, <<http://www.wsba.org/Resources-and-Services/Ethics>>.

¹⁴⁸ *Shin C.P.*, Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1043.

involving complex content, having impact on the rights of parties and especially their property claims.

CEDR Model Mediation Procedure¹⁴⁹ rules explicitly stipulate that drawing up mediation agreement is a duty of representatives of parties.¹⁵⁰

Professor *Leonard Ryskin*, several decades ago, wrote that “the philosophical scheme lawyers and professors of law are guided by differs significantly from what should be the calling of a mediator.”¹⁵¹ In case of a lawyer mediator there is a great risk that representatives of parties will be given dominant position during the process, but this has to be prevented by means of determining interests of parties and priorities and bringing it to the forefront.¹⁵² When a lawyer mediator is involved, there may be higher likelihood that the substance of dispute between the parties will be primarily demonstrated in legal and financial matters,¹⁵³ and less focus will be made on identifying creative alternatives for identifying personal interests and reflecting them in an agreement, along with resolving financial and legal issues.

Irrespective of the degree of the involvement of a mediator in the process of designing a mediation agreement, their scope of responsibility includes the duty to ensure that parties reach informed, detailed¹⁵⁴, precise and executable agreement.¹⁵⁵ The mentioned duty shall be implemented by maximal realization of the principle of self-determination of parties, and, at the same time, ethical duties of a mediator at the final and considerably responsible stage of the mediation process should be strictly adhered to.

It is recognized in the doctrine that the right of self-determination of parties is considerably broader than the principle of freedom of contract in civil law. Degree of satisfaction from mediation agreement implies gratitude of parties towards a neutral party for their assistance in the process of achieving decision that reflects free will. Therefore, supporting the realization of self-determination right by mediator implies not only obtaining consent of parties on contract terms,¹⁵⁶ but also ensuring that they identify their true will and that it is detailed in the agreement.

9. Conclusion

Two key goals of the alternative dispute resolution policy is to safeguard parties against damage from the conflict of interests and society – against forming the impression of improper impact on the dispute resolution processes. In the context of alternative dispute resolution, these goals are substantially significant,¹⁵⁷ since, in both cases, ethical integrity of the process, reputation of lawyers, confidence of parties and society in dispute resolution procedures is at stake.¹⁵⁸ Determination of ethical grounds for the participation

¹⁴⁹ CEDR Model Mediation Procedure (used in General Civil and Commercial Cases), <www.cedr.com>.

¹⁵⁰ *Boulle L., Nesic M.*, Mediator Skills and Techniques: Triangle of Influence, European Code of Conduct for Mediators, Athenaeum Press, Great Britain, 2010, 415.

¹⁵¹ *Riskin L.L.*, Mediation and Lawyers, 43 Ohio St. L.J. 29, 1982, 43-44.

¹⁵² *Alfini J.J.*, Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 834.

¹⁵³ *Ibid.*, 835.

¹⁵⁴ *Anderson D. Q.*, Litigating Over Mediation- How Should the Courts Enforce Mediated Settlement Agreements? Sing. J. Legal Stud. 105, 2015, 124.

¹⁵⁵ *Kovach K.K.*, Mediation in a Nutshell, United States of America, 2003, 276.

¹⁵⁶ *Anderson D. Q.*, Litigating Over Mediation- How Should the Courts Enforce Mediated Settlement Agreements? Sing. J. Legal Stud. 105, 2015, 111.

¹⁵⁷ *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, 17, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

¹⁵⁸ *Ibid.*, 18, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

of a lawyer as of a neutral third party in the proceedings will have positive impact on public opinion that is formed in the country, concerning legal processes.¹⁵⁹ The goal of sharing moral responsibility before society is clearly conveyed in the preamble of the Code of Professional Ethics of Lawyers of Georgia. Furthermore, setting and expanding the rules of ethics is especially important, so that potential stipulated under the essence of mediation is utilized in full.¹⁶⁰

The standards of ethical behavior of lawyer mediator may be regulated by expanding professional ethics rules of a lawyer and differentiating the transformed role in various dispute resolution regimes, as well as by means of setting independent rules of conduct.

In Georgia, combining the practice of law and mediation¹⁶¹ is an increasing trend, along with increased use of mediation. This process will be significantly accelerated by the determination of ethical grounds of mediation, which will stimulate public confidence and respectively, the use of democratic processes of dispute resolution based on ethical standards. While this will naturally drive increasing demand for lawyers participation in mediation as representative or in the capacity of a neutral third party. Furthermore, when designing ethical standards, significant standard should be to ensure their uniformity within the bounds of the general framework of ethics policy.

¹⁵⁹ *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, 22, <<http://www.cpradr.org/Portals/0/Third%20Party%20neutral%20create%20new%20cover%20page%202012.pdf>>.

¹⁶⁰ *Alfani J.J.*, Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, *South Texas Law Review*, Vol. 49, 2008, 839.

¹⁶¹ *Folberg J., Golann D.*, Mediation, The Roles of Advocate and Neutral, *Wolters Kluwer Law and Business, Aspen Casebook Series*, Austin, Boston, Chicago, New York, The Netherlands, 2011, 424.