



ISSN 1392–6195 (print)  
ISSN 2029–2058 (online)  
JURISPRUDENCIJA  
JURISPRUDENCE  
2010, 1(119), p. 227–242

## THE MAIN FEATURES AND DEVELOPMENT TRENDS OF MEDIATION IN LITHUANIA: THE OPPORTUNITIES FOR LAWYERS

Inga Zaleniene

Mykolas Romeris University, Faculty of Law,  
Department of Civil Procedure  
Ateities 20, LT-08303 Vilnius, Lithuania  
Phone (+370 5) 2714 735  
E-mail izaleniene@mruni.eu

Agne Tvaronavičienė

Mykolas Romeris University  
Ateities 20, LT-08303 Vilnius, Lithuania  
Phone (+370 6) 5538 282  
E-mail agnetv@gmail.com

Received 20 January, 2010; accepted 25 February, 2010

**Abstract.** *In this article the main features and development trends of mediation as an alternative dispute resolution method are analyzed in the legal environment of the Republic of Lithuania. Mediation is analyzed as one of the primary informal alternative dispute resolution processes during which the third neutral, which is not authorized to take a decision during negotiations, helps the parties solve their dispute and the main aim of this process is the peaceful resolution of the dispute and the renewal of social peace between parties.*

*In order to create favourable legal environment for the implementation of mediation process, it is necessary to consolidate the main requirements for the mediation process: requirements for confidentiality, responsibility of mediators, legal power of conciliatory agreements, etc. In this article the legal regulation of mediation in the Republic of Lithuania is described as well.*

*In a mediation process lawyers have an opportunity to perform two roles: as legal representatives of the parties to a dispute and as mediators. In this article a brief analysis of the main trends in the performance of lawyers in a mediation process is presented. According to the duplex character of mediation, probable threats of this ADR method for lawyer's practice are indicated.*

**Keywords:** *mediation, mediator, lawyer, alternative dispute resolution.*

---

## Introduction

Unfortunately, there is no society which avoids conflicts between persons concerning violations of rights or interests protected by laws. However, it is possible to create a friendly social and legal environment for quick and peaceful resolution of such conflicts. Mediation is one of the most neutral ways for resolution of conflicts because during this process the neutral third party assists the opposing parties in reaching a voluntary, negotiated resolution of the dispute. According to the attitude of the renovation of social peace, this method of alternative dispute resolution is the most effective because the third person is not allowed to take an obligatory decision. The first steps of mediation in Lithuania are already being taken, so now it is purposeful to investigate the most polemical issues of mediation and to explore the possibility of lawyers to perform in the field of mediation process.

It should be remarked that until now research into mediation in Lithuania have been rather fragmentary. The main focus of scientists has been on the possibilities of judicial mediation or opportunities to use mediation for the resolution of disputes of certain categories. Non-judicial mediation is the classical consensual mediation where parties are seeking for voluntary resolution of their dispute before making a claim to the court. In this article a brief research of the institution of non-judicial mediation will be presented. During the analysis of the features of non-judicial mediation, some problems of this dispute resolution method in the Lithuanian legal system will be revealed. Due the fact that mediation is very popular and successful in the United States of America (hereinafter referred to as the U.S.), the authors of this article mostly refer to the works of the scientists of this country.

### 1. Mediation: the Beginning, the Definition and the Main Goal

Today, undoubtedly, there are more disputes than the court system is able to resolve. Often society looks for cheaper and quicker ways to settle conflicts. Extrajudicial ways for resolving disputes popular in days of yore, today find places in our legal system and become more and more popular.

Historically, alternative dispute resolution (hereinafter referred to as ADR) methods were formed earlier than judicial methods. Arbitration, mediation, negotiation were already applied for resolving disputes in primary societies. In different cultures different methods were popular but the intention to delegate the resolution of a dispute for a respectable member of society was dominant. An exclusive and well known example of earlier application of ADR methods is the legend of the King Salomon<sup>1</sup>, or, particularly, frequent practicing of mediation in ancient China<sup>2</sup>. Yet, a modern conception of ADR was formed only in the twentieth century in the U.S. ADR has a simpler procedure, cost less money and time resources, enables the parties to avoid publicity and draws to finding the best decision acceptable for both parties. These most important and little in scientific literature discussed advantages of ADR determined the appearance of a variety of ADR methods in the today's world. Riskin suggests a certain classification of the methods of ADR: '[w]e begin with the 'primary processes', i.e. adjunctive and consensual, and then describe 'mixed processes' which combine features of the primary processes'<sup>3</sup>. Non-judicial mediation, according to this classification, is ascribed to primary processes and is referred to as consensual process.

Mediation has an old tradition in all over the world. For many years mediation has been successfully developed in the U.S., Great Britain, Australia, New Zealand, Argentina, China and other countries. Actually, because of a specific close relation between mediation and negotiation, the actual extent of practicing mediation in the past and today is and were even wider that it is noticed in historical sources and scientific literature. The fact is that mediators exist and operate in the world even when they are not named or their role is not revealed clearly.<sup>4</sup> Though mediation exists as long as the conflict exists,<sup>5</sup> the modern history of the development of this institution is associated with the beginning of the 1970s. In the countries of Anglo–Saxon tradition, mediation appeared because of necessity. Court procedures in these countries take a lot of time and are very expensive.<sup>6</sup> As it was mentioned before, the U.S. had performed the main role in the development of mediation. In order to reduce the case load, in this country in the middle of the last century a lot of various experiments were carried out. It was found that more than a half of the disputes dealt with through mediation were resolved. Even 85 per cent of disputes of certain categories have been successfully resolved: 'the highest settlement rates were found in cases involving unpaid bills and private sales, where 85% and 83%

- 
- 1 Nosyreva, E. I. *Alternativnoe razreshenie sporov v SSHA* [Alternative Dispute Resolution in USA]. Moskva: Gorodec, 2005, s. 20.
  - 2 Murray, J. S.; Rau, A. S.; Sherman E. F. *Processes of Dispute Resolution: The Role of Lawyers*. Westbury: The Foundation Press, 1996, p. 294.
  - 3 Riskin, L. L.; Westbrook, J. E. *Dispute Resolution and Lawyers*. St.Paul: West publishing Co, 1997, p. 2.
  - 4 Roberts, S.; Palmer, M. *Dispute Processes: ADR and the Primary Forms of Decision-Making*. Cambridge: Cambridge University Press, 2005, p. 153.
  - 5 Shamlíkashvili, C. A. *Mediacija kak metod vnesudebnogo razreshenija sporov* [Mediation as a Method of Alternative Dispute Resolution]. Moskva: Mezhhregionalnyj centr upravlencheskogo i političevskogo konsultirovanija, 2006, p. 14.
  - 6 *Ibid.*, p. 14.

respectively, of the cases were resolved through mediation<sup>7</sup>. The results exceeded the suspense of the initiators of the projects. It encouraged them to pay additional attention to the investigation and application of this method of ADR. After successful attempts to apply mediation, the legislation bodies of the U.S. had adopted more than 2500 laws, which were in 2001 incorporated into federal law known as the Unified Act on Mediation<sup>8</sup>. In some states (for example, Florida) mediation has even gained a title of pre-trial procedure: '[i]n Florida, almost all lawsuits are required to be mediated before they can be scheduled onto a trial calendar. Approximately 75 per cent of all cases are effectively resolved through mediation in Florida, meaning they never reach the courts'<sup>9</sup>. Such a wide usage of non-judicial mediation shows that this method of ADR is really effective and worth to be analyzed as a proper alternative to the court litigation.

At first mediation was practiced in disputes concerning collective labour relationship, while today it is widely used in the processes of resolving disputes of all categories. Such possibilities of the application of this ADR method were determined by the wide interest in mediation. Legal scientists of the U.S. claim that society drew its attention towards mediation in two different attitudes: the attitude of the leaders of society and the officers of legal system, who saw the potential of mediation to solve city conflicts; and organizations of society and lawyers, who wanted reforms and noticed the potential of mediation to create the social system of resolving disputes which may operate alongside with the formal legal system.<sup>10</sup> So, mediation became a possibility to resolve various conflicts combining different interests of society members, reducing the workload of the court system and satisfying the wish of society to control the processes of dispute resolution. Mediation soon became popular not only in the resolution of civil disputes, but also in the process of the resolution of disputes arising from criminal and administrative legal relationships.

Generally, in scientific literature mediation is defined as a process by which the parties assisted by a neutral third person are trying to resolve the dispute. Conversely than a judge or an arbiter, a mediator does not make a decision. Baruch suggests a wider definition of mediation which includes all important features of mediation: mediation commonly is understood as an informal process, during which an impartial third party having no power to take a decision helps the conflicting parties to reach the decision acceptable for both parties<sup>11</sup>. After an analysis of this definition, it is possible to single out the main features of mediation: informality; no power given to the third party to take a decision; acceptability of the decision for both parties. The process of mediation is very close to negotiations. Commonly a conflict determines the appearance of hostility between parties. Communication between parties becomes difficult and even the resolu-

7 Goldberg, S. B.; Sander, F. E. A.; Rogers, N. H. *Dispute Resolution: Negotiations, Mediation and Other Processes*. London: Little, Brown and Company, 1992, p. 150.

8 Shamlikashvili, C. A., *supra* note 5, p. 16.

9 *Mediator's Liability in Dispute Resolution* [interactive]. [accessed 15-01-2010]. <<http://www.arbitration-and-mediation.com/articles/mediator-liabilities/index.php>>.

10 Baruch, R. A.; Folger, J. P. *The Promise of Mediation: Transformative Approach to Conflict*. San Francisco: Jossey-Bass, 2005, p. 7.

11 *Ibid.*, p. 8.

tion of simple questions becomes enormously complicated. In the scientific literature of the Russian Federation, mediation is defined as a developed form of negotiations and is called as a process of settling disputes between parties with the help of a third impartial participant, i.e. a mediator.<sup>12</sup> This position is also shared by the scientists of the U.S. who think that ‘mediation is negotiation carried out with the assistance of a third party’<sup>13</sup>. It must be accepted that mediation is a certain form of negotiation. Mediator, using certain methodology, professional experience, and special knowledge helps the parties to the conflict to negotiate. He directs the negotiation to the positive direction by encouraging the parties to search actively for the proper decision. A mediator, by listening to the parties and proposing formal but not obligatory decisions, takes the parties towards reciprocal understanding. During such communication of the parties positive results may be achieved.

Considering the information which was presented above, it is clear that the main goal of mediation is peaceful resolution of disputes and recreation of social peace between parties. If this goal is achieved, the probability exists that the parties to the conflict will not feel hostility towards each other and even may have successful communication in the future. Mediation, an informal private method of dispute resolution, has no goals to protect a person, whose legal rights or interests are violated, as it is expected from the judicial proceedings (The Code of Civil Procedure of the Republic of Lithuania, Article 2<sup>14</sup>). According to Goldberg, Sander and Rogers, the court’s job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.<sup>15</sup> These goals of court procedures differ from the goals of mediation because in the case of mediation the decision should be acceptable for the parties rather than to be in accordance the laws. This ADR process do not seek to apply laws, it’s aim is simply to restore peace.

## 2. The Regulation of Non-Judicial Mediation in the Republic of Lithuania

In order to analyze the institution of non-judicial mediation in the frames of attorneys practice in Lithuania, it is necessary to reveal the main regulations of this ADR method. A short review of the main legal acts concerning mediation will be presented further.

Despite of the facts that in 2002 the Committee of Ministers of the Council of Europe adopted the recommendation to Member States on mediation in civil matters<sup>16</sup> and

12 Nosyreva, E. I., *supra* note 1, p. 70.

13 Goldberg, S. B.; Sander, F. E. A.; Rogers, N. H., *supra* note 7, p. 103.

14 Civil Procedure Code of the Republic of Lithuania. *Official Gazette*. 2002, No. 36-1340.

15 Goldberg, S. B.; Sander, F. E. A.; Rogers, N. H., *op. cit.*, p. 9.

16 Recommendation Rec (2002)10 of the Committee of Ministers to Member States on Mediation in Civil Matters [interactive]. [accessed 18-01-2010]. <<https://wcd.coe.int/ViewDoc.jsp?id=306401&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>>.

the European Commission in 2002 presented the EU Green book on ADR<sup>17</sup>, in Lithuania these legal acts of recommendatory character did not have a response till 2005. The adoption of the new Labour Code<sup>18</sup> in 2005 can be regarded as the first step of mediation in Lithuania. Mediation was embedded as one of the stages of resolving collective labour disputes. According to Article 70, mediation is the last stage of negotiations before referring the claim to the court. There are no obligatory requirements for the parties to appeal for mediation and it is possible to skip this stage of negotiation without any legal outcome. It should be noted that this innovation in the Lithuanian labour law is not applied frequently. Though the mediation procedure is quite attractive because of its voluntary nature, the lack of experience in this field determines the fact that in practice parties have no possibilities to initiate mediation.

Before analyzing the legal regulation of mediation in Lithuania, the Law on Advocacy<sup>19</sup> should be mentioned. Article 4 (4) of this act stipulates the right of an attorney to provide the services of mediation. This possibility given to advocates is not exclusively applicable, thus, it shows that the legislation body in Lithuania recognizes the legal character of the mediation service.

Till July 2008 the Law on Commercial Arbitration<sup>20</sup> of the Republic of Lithuania had special legal norms regulating the process of mediation. Chapter IX of this law, which is now invalid, was designed for the regulation of prior arbitration mediation. The above-mentioned chapter was denounced after passing the Law on Conciliatory Mediation<sup>21</sup> adopted by the Parliament in 15 July 2008.

Despite the fact that the regulation of mediation was not sufficient, the Council of the Courts had passed a decision No. 13P-348 Concerning the Pilot Court Mediation Project (hereinafter referred to as the Project)<sup>22</sup>. The Project was the first real attempt to apply court mediation in the Lithuanian court system. The aims of the Project were to create the conditions for the parties in a civil dispute to reach social peace; to encourage the development of conciliatory justice in Lithuania; to evaluate the acceptability of mediation in the Lithuanian society and to accelerate the process of court hearings, increase the effectiveness of the resolution of disputes.<sup>23</sup> Certainly, by using the experience of other countries, Lithuania took the first steps on the way to wide practicing of mediation during the civil procedures in courts. It should be mentioned that Lithuanian lawyers, being conversant with the situation, admitted the attempt to 'change' the regulations of the Code of Civil Procedure in the field of court conciliation and by the decision of Council of Courts grant for judges a right to propose for the disputing parties to apply

17 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law [interactive]. [accessed 18-01-2010]. <<http://www.civilmediation.org/news.php?nid=15>>.

18 Labour Code of the Republic of Lithuania. *Official Gazette*. 2002, No. 64-2569.

19 Law on Advocacy of the Republic of Lithuania. *Official Gazette*. 2004, No. 50-1632.

20 Law on Commercial Arbitration of the Republic of Lithuania. *Official Gazette*. 1996, No. 39-961.

21 *Ibid.*

22 The Decision of Council of the Courts No. 13P-348, May 20, 2005 "Concerning the pilot court mediation Project" [interactive]. [accessed 28-11-2006]. <[http://www.teismai.lt/teismai/mediacija/del\\_teismines\\_mediacijos.doc](http://www.teismai.lt/teismai/mediacija/del_teismines_mediacijos.doc)>.

23 The Decision of Council of the Courts No. 13P-348, *supra* note 22.

mediation. However, this Project should be positively evaluated because of the great job in the field of publicizing mediation. During the Project a lot of articles on mediation appeared in mass media, special seminars on mediation were organized for attorneys, bailiffs and others interested in mediation. The scope of the Project was expanded in 2008. Until then, court mediation services were offered only in the Second District Court of Vilnius City. From the beginning of January 2008, the Court of Appeal, County Courts of Kaunas, Šiauliai, the Third District Court of Vilnius City, District Courts of Druskininkai, Šalčininkai, Molėtai, Vilkaviškis and Pasvalys were also involved.<sup>24</sup> According to the promoters of the Project, its implementation was extended because of the successful results of the Second District Court of Vilnius City. As was mentioned before, in this court the Project has been implemented from the beginning of 2006. It is announced that during the first months of the Project the number of peace agreements increased thrice.<sup>25</sup> However, no official statistics was presented to the society and it is still difficult to evaluate the real effectiveness of this Project.

However, non-judicial mediation is still not applied in practice. As a turning point in this situation the adoption of the Law on Conciliatory Mediation in Civil Disputes<sup>26</sup> can be mentioned. This legislation formally establishes and defines mediation (the conciliatory mediation of civil disputes) as a procedure of the resolution of civil disputes in which one or several mediators assist the parties to a civil dispute in reaching a conciliatory agreement.<sup>27</sup> This law received wide interest from the lawyers' community. A number of lawyers in the society began to disseminate information about the benefits of mediation and the opportunities to make use of it in the procedures of resolving civil disputes.

### 3. The Process of Mediation. What Role Can a Lawyer Perform?

After the analyses of the possibilities of lawyers to perform in mediation processes, certain roles of lawyers can be indicated. Firstly, lawyers can perform in the process of mediation as legal representatives of the parties to a dispute. Secondly, lawyers can work as mediators. A brief study of these possible roles is presented further in this article. Some problematic issues of non-judicial mediation, which may be important for using mediation in practice, will also be discussed.

From the definition of mediation, which was discussed at the beginning of the article, it is clear that the process of mediation involves the parties and a neutral third person, a mediator. In addition to these individuals, other persons can take part in the process of the resolution of a certain dispute (for example, the attorneys of the parties

24 *CourtMediation*[interactive]. [accessed 15-01-2010]. <<http://www.infolex.lt/portal/start.asp?act=news&Tema=39&str=20094>>.

25 *Ibid.*

26 Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania. *Official Gazette*. 2008, No. 87-3462.

27 *Ibid.*

or other interested persons). Their performance in pre-mediation processes often can determine the decision to envisage mediation as pre-judicial method of the resolution of possible future conflicts. During mediation, the function of an attorney is to secure the interest of the person he/she is representing.

In particular, lawyers have an opportunity to make a significant contribution to the development of voluntary mediation. In the process of helping their clients to prepare various contracts, attorneys and other law specialists have an opportunity to propose certain provisions relating to the application of mediation in disputes concerning the implementation of contracts. Such a provision should inform the contractors about the possibilities of peaceful resolution of possible disputes. What is more, the guidelines for such a procedure would have already been set. Such provisions are not really new; in other countries they have already become a norm. For example, U.S. lawyers are used to inform their clients about the possibilities of mediation. Some scientists even predict that a failure to inform the client about possible alternatives to litigation in future may be qualified as a breach of lawyers' ethics. According to Land 'the institutionalization of mediation may lead to establishment of an ethical duty to advise clients about mediation and even malpractice liability for failing to do so'<sup>28</sup>.

What regards the status of the participants of a mediation process it should be noted that the most important factor is personal presence of the parties to the conflict. The primary goal of mediation is to reach an amicable agreement between the parties and to restore social peace; therefore, a successful result cannot be expected if the process is only a meeting of skilled lawyers. Lawyers do not have personal interests to reconcile and to continue their cooperation in the future.

Obviously, the key role belongs to the parties to the mediation. But is it safe for a party to decide to mediate without a help of his lawyer? Riskin explains: 'because most Americans wish to understand their legal positions, parties in many mediations want or need legal services. They might, for example, wish to know their legal rights, the likely results if the matter were litigated, and the various legal devices available for accomplishing whatever they want to accomplish, along with the consequences of choosing a particular alternative'<sup>29</sup>. Lawyers participating in the process of mediation with the parties may help the mediator to coordinate the process, to halt the emotional battle of the parties, and to follow the legal direction of the process in order to protect the rights and interests of his defended person. However, the mediation process changes, if the parties entitle their legal representatives to attend the mediation meetings and empower them to take all necessary decisions. Of course, everything depends on the nature of the dispute. In commercial disputes, both parties are businessmen, and the matter of dispute is not related to their personality; therefore, in such cases mediation is more likely to reach its goal. However, it is reasonable to expect contrary results, for example, in divorce mediation. Lawyers in such cases do not have personal interest in peaceful settlement and

---

28 Lande, J. How will lawyering and mediation practices transform each other? *Florida State University Law Review*. 1997, 24: 881.

29 Riskin, L. L. Toward new standards for the neutral lawyer in mediation. *Arizona Law Review*. 1984, 26: 333.

do not experience any problems of psychological discomfort. In the legal literature there is a general perception that the need of the participation of lawyers should be considered taking into account the nature of the dispute. However, it should be concluded that mediation should be based on the principle of personal involvement. Lawyers, as legal representatives of the parties to a dispute, should be involved in the process of mediation only in order to oversee the process and help individuals make proper decisions by providing them with all necessary legal aid.

Characteristics of mediators have changed over centuries, and today mediators are specialists, authoritative professionals who are trained, have certain qualifications or even certificates. Most important for mediators is to gain confidence of the parties:

Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during mediation by the other's aggressiveness or their own perceived inadequacies, and has no interest in conflict with helping to bring about a resolution which is in the parties' best interest.<sup>30</sup>

The relationship between the parties and a mediator with no mutual trust and no authority of the mediator will lead back to the negotiating stage and no tangible results will be achieved. The psychological portrait of mediator consists of his position and status in the society, reflects its skills and experience, but does not define his professional training. A long discussion on this issue is carried on in the scientific literature. Must a mediator be a lawyer?

The services of mediation in the world are being provided by very different people. In some processes of mediation the volunteers are taking part, in other cases the requirements for mediators to be a lawyer exists. According to Riskin '[i]n neighborhood Justice Centers and some Small-claims court mediation programs, the volunteer mediators are drawn from nearly all walks of life and vary greatly in terms of education, socio-economic status, and occupation. In many court-connected mediation programs, however, the mediators must be lawyers, Government and business organizations that sponsor mediation programs have special requirements'.<sup>31</sup> Interestingly, a widespread practice of the U.S. is the work of retired judges as mediators. The possibility of such a work is also provided for in the Civil Procedure Code of Poland (Article 183 (2)).<sup>32</sup>

In literature one may even find an opinion that a mediator cannot be a lawyer. This is confirmed by practical examples: '[i]n the Houston Neighborhood Justice Centre Project, for instance, the involvement of lawyers is not encouraged. People wishing or needing legal advice are referred to lawyers who are not connected with the Center'.<sup>33</sup> In the opinion of the authors, a mediator must have legal education. After all, mediation as

30 Goldberg, S. B.; Sander, F. E. A.; Rogers, N. H., *supra* note 7, p. 105.

31 Riskin, L. L.; Westbrook, J. E., *supra* note 3, p. 379.

32 Kodeks postępowania cywilnego [Civil Procedure Code of the Republic of Poland] [interactive]. [accessed 11-12-2009]. <<http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU19640430296&type=3&name=D19640296Lj.pdf>>.

33 Riskin, L. L. Mediation and lawyers. *Ohio State Law Journal*. 1982, 43: 41.

a preliminary non-judicial method of the resolution of disputes has legal consequences for the parties. Parties to the dispute should not only be informed about the procedures and results of mediation, but also a detailed explanation of the legal importance of the results of mediation for further cooperation between the parties must be presented to them. The arguments for the need of legal qualifications for mediators are also provided by other scientists:

Because he is an expert on law, the lawyer – mediator can help the parties free themselves, when appropriate, from the influence of legal norms so that they can reach for a solution that is appropriate to them. In addition, the experienced lawyer who functions as a mediator can offer a variety of business arrangements to accomplish the objectives of the parties. These options can become part and parcel of the decision process, and the law – trained mediator who is present at all the sessions and thoroughly familiar with the various needs of the parties can propose alternatives finely tuned to such needs.<sup>34</sup>

A lawyer-mediator also has special skills in the field of preparing documents. So ‘such a person can incorporate the results of mediation in a proper final agreement which can be essential paper for the future relationship of the parties’.<sup>35</sup>

The service of mediators is not normally ascribed to licensing activities and, in practice, any person may act as a mediator. However, Riskin claims that ‘there are many devices for controlling mediator practices. Most programs that provide mediators try to maintain control over quality by screening interviews, education and training requirements, or evaluation. In addition, in most programs, mediators are subject to codes of ethics or standards of conduct established by the program, by status or by a Professional organization’<sup>36</sup>. The most commonly discussed purposes of setting the criteria for individuals to practice as neutrals are: (1) to protect the consumer and (2) to protect the integrity of various dispute resolution processes.<sup>37</sup> The process may be damaged if the mediator is incompetent to perform his duties. Therefore, the society may also suffer and will not trust in mediation. Liability of mediators is the issue that must be considered.

One way to achieve national goals relating to the security of the rights of mediation parties is to oblige the mediator to be responsible for the legality of the mediation process and for achieving publicly acceptable results. In the U.S., the mediator’s responsibility is understood very broadly: the state mediator is obliged to control all the legal side of the mediation process. The main thing is to clearly describe the extent of the responsibility of a mediator in legal acts. In this way, a mediator, being aware of his responsibilities, will be able to explain for the parties all the advantages of a mediation procedure, follow the mediation process carefully, notice all the threats to the violation of the rights or interests of each party to a dispute and stop the procedure when it is necessary. What is more, he/she will be able to inform the parties about the legal signifi-

---

34 Riskin, L. L., *supra* note 33, p. 41.

35 *Ibid.*

36 Riskin, L. L.; Westbrook, J. E., *supra* note 3, p. 379.

37 *Ibid.*

cance of the conciliatory agreement, assist in the development such an agreement. Such a mediator is able to ensure the protection of the rights of participants.

Often various legal acts in the world establish the consequences of the failure to perform the duties of a mediator. Today there are no legal regulations regarding the special responsibility of mediators in the Lithuanian legal system. Although Article 4 of the Law on Conciliatory Mediation in Civil Disputes is entitled ‘Nomination of Mediator, Impartiality, Professional Conduct and Responsibility’, it includes no information about the responsibility of a mediator. In the event of a dispute, mediators are subject to general civil liability. According to the fact that a mediator may have a significant impact on the parties to the dispute, it is important to establish specific responsibility of the mediator setting out strict rules.

Generalizing the presented information about the requirements for the mediator’s qualification and liability, it should be stated that both, the excessive freedom given to persons wishing to be mediators as well as strict restrictions on them, cannot be considered as an appropriate way of regulating the requirements for the mediator. According to the authors of this article, there must be some fundamental requirements for the practice of mediation. In addition, before starting to mediate, a mediator must disclose for the parties to a dispute all information about his qualifications, training and experience. An example of such a practice is provided in the Uniform Mediation Act of the U.S. This legal act includes a list of actions which should be fulfilled by mediators before taking up their responsibilities in a particular dispute.<sup>38</sup> In the absence of strict limits, many individuals in the market will have possibilities to act as mediators. The obligation to disclose all information about the experience and qualification of mediators may be named as an essential factor for the parties in choosing a certain mediator. The requirement to present information about the achievements for the parties in the conditions of market competition would force a mediator to seek higher qualifications. Such a requirement is established in Article 4 (5) of the Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania: ‘a mediator shall provide parties to a dispute with information on his education and experience’<sup>39</sup>.

To summarize, the Lithuanian legal acts do not require mediators to have special education or to satisfy other requirements. However, the experience of other states shows that the majority of mediators have legal education. For successful meditation it is essential that the mediator is a real authority for the parties to a dispute. Attorneys today are able to provide mediation services as well as their qualifications and work experience in dispute resolution can help them to gain confidence of the parties and create all the preconditions for a peaceful resolution of conflicts.

The following part of this article will consist of an overview of the main threats for lawyers and, especially, attorneys in regard to the decreasing number of court representation of their clients.

---

38 Uniform Mediation Act [interactive]. [accessed 11-12-2006]. <<http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm>>.

39 Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania, *supra* note 26.

#### 4. The Threats of Mediation. Why Do Lawyers Avoid Mediation?

Despite of all benefits gained by using mediation, the biggest part of practicing lawyers do not appreciate this ADR method as a relevant alternative to litigation. The first reason, of course, is the lack of information in the field of processing mediation. According to Riskin, 'professionals tend to do what they know how to do, and they suppose that what they do is to their client's advantage'<sup>40</sup>. Depending on that fact, the first aid in this situation is an additional education of lawyers, especially advocates, in the field of mediation. It is clear that 'many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it, and the creative outcomes which are possible'<sup>41</sup>. Special education programmes, articles in the mass media and publishing of good practices should be the aim of the national Government in developing the usage of mediation in Lithuania. Secondly, it should be mentioned that lawyers are accustomed to certain standards of behaviour. As Riskin states, 'even the lawyer who does recognize the suitability of mediation – consciously or unconsciously – would be subject to powerful forces that would press against referral of the case, or any part of it, to mediation'<sup>42</sup>. It means that frequently lawyers suggest for their clients to prepare a claim instead of searching for innovative ways of dispute resolution. But it must be remarked that certain impersonal and objective threats for legal representatives of the claiming parties in the mediation process still appear. According to Riskin, 'the fear exists that even the suggestion of such referral would destroy the client's trust by shattering his expectations that the lawyer would serve as his eager Champion'<sup>43</sup>. Public opinion regarding attorneys determines that the other part of the society strongly believes that a good advocate can lead them to the winning of the case despite of the factual situation. Only a small part of future litigation parties think about the practical results and moral or financial costs of the litigation.

Another fear of attorneys is of a financial character. In scientific literature is possible to find an opinion that 'referral to mediation would cost the lawyer all or part of his fees'<sup>44</sup>. Everybody would agree that the lower the number of civil litigations the lower the number of their clients. In order to secure the rights of the parties to the mediation process, it is common for all information disclosed during the mediation process to be treated as confidential. The problem of confidentiality in a mediation process must be discussed in a greater detail because this ADR method is quite new in the Lithuanian legal system and it is worth to be analyzed in order to avoid the violation of the fundamental principle of mediation.

---

40 Riskin, L. L., *supra* note 33, p. 42.

41 Nolan-Haley, J. M. Lawyers, clients, and mediation. *Notre Dame Law Review*. 1998, 73: 1373.

42 Riskin, L. L., *op. cit.*, p. 42.

43 *Ibid.*

44 *Ibid.*

For a mediator also working as an attorney, the prohibition to represent the parties to mediation in court and suggestions for the parties to mediate may mean the loss of a profitable case in court (earnings, no doubt, bigger than these for the mediation services).

Thus, due to the fact that the practice of dispute resolution develops and changes in nowadays society, the mentioned reasons should not deter lawyers from participating in mediation processes. We strongly believe that the lawyers' society should treat mediation and other ADR methods as a new challenge rather than as threats for their standing. That is why lawyers should analyze all the possibilities to become the supporters of the wider application of mediation in practice.

## Conclusions

1. Due to the courts being overloaded, the parties to conflicts often remember the possibilities to benefit from ADR methods which were very popular in primary societies.

2. Mediation, an ancient method of alternative dispute resolution, is a process by which the parties to a dispute assisted by a neutral third party are trying to resolve their conflict. For ages, mediation has been frequently used as a dispute resolution method before the litigation process; in the modern approach it is used as an instrument in the process of court conciliation.

3. Lawyers in the mediation process have the opportunity to perform two roles: as legal representatives of the parties to a dispute and as mediators.

4. Due to the fact that personal participation in mediation is essential, mostly in all cases the task of a lawyer as a legal representative is to help the mediator to coordinate the process, to halt the emotional battle of the parties, and to follow the legal direction of the process in order to protect the rights of his defended person, if necessary.

5. Persons of different professions are working as mediators. There are different opinions regarding the requirement for the mediator to have legal education. Still, in most countries mediators are lawyers and such cross-practice raises a problem of impartiality. A general rule is that a mediator cannot act as an arbitrator or a judge in the dispute in respect whereof he conducted or is conducting conciliatory mediation. Also, the mediator cannot be a legal representative of any party to the dispute in respect whereof he conducted or is conducting mediation.

6. Mediation, as an innovation in the Lithuanian legal system, is of a double character. On the one hand, it is a certain threat for the lawyers' status in the society and their financial earnings. On the other hand, it is a new opportunity for the lawyers to provide legal services for a wide circle of clients.

---

## References

---

- Baruch, R. A.; Folger, J. P. *The Promise of Mediation: Transformative Approach to Conflict*. San Francisco: Jossey-Bass, 2005.
- Civil Procedure Code of the Republic of Lithuania. *Official Gazette*. 2002, No. 36-1340.
- Court Mediation [interactive]. [accessed 15-01-2010]. <<http://www.infolex.lt/portal/start.asp?act=news&Tema=39&str=20094>>.
- Goldberg, S. B.; Sander, F. E. A.; Rogers, N. H. *Dispute Resolution: Negotiations, Mediation and Other Processes*. London: Little, Brown and Company, 1992.
- Green Paper on Alternative Dispute Resolution in Civil and Commercial Law [interactive]. [accessed 18-01-2010]. <<http://www.civil-mediation.org/news.php?nid=15>>.
- Kodeks postępowania cywilnego [Civil Procedure Code of the Republic of Poland] [interactive]. [accessed 11-12-2009]. <<http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU19640430296&type=3&name=D19640296Lj.pdf>>.
- Labour Code of the Republic of Lithuania. *Official Gazette*. 2002, No. 64-2569.
- Lande, J. How will lawyering and mediation practices transform each other? *Florida State University Law Review*. 1997, 24.
- Law on Advocacy of the Republic of Lithuania. *Official Gazette*. 2004, No. 50-1632.
- Law on Commercial Arbitration of the Republic of Lithuania. *Official Gazette*. 1996, No. 39-961.
- Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania. *Official Gazette*. 2008, No. 87-3462.
- Mediator's Liability in Dispute Resolution [interactive]. [accessed 15-01-2010]. <<http://www.arbitration-and-mediation.com/articles/mediator-liabilities/index.php>>.
- Murray, J. S.; Rau, A. S.; Sherman E.F. *Processes of Dispute Resolution: The Role of Lawyers*. Westbury: The Foundation Press, 1996.
- Nolan-Haley, J. M. Lawyers, Clients, and Mediation. *Notre Dame Law Review*. 1998, 73.
- Nosyreva, E. I. *Alternativnoe razreshenie sporov v SSHA* [Alternative Dispute Resolution in USA]. Moskva: Gorodec, 2005.
- Recommendation Rec (2002)10 of the Committee of Ministers to Member States on Mediation in Civil Matters [interactive]. [accessed 18-01-2010]. <<https://wcd.coe.int/ViewDoc.jsp?id=306401&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>>.
- Riskin, L. L. Mediation and lawyers. *Ohio State Law Journal*. 1982, 43.
- Riskin, L. L. Toward new standards for the neutral lawyer in mediation. *Arizona Law Review*. 1984, 26.
- Riskin, L. L.; Westbrook, J., E. *Dispute Resolution and Lawyers*. St.Paul: West publishing Co, 1997.
- Roberts, S.; Palmer, M. *Dispute Processes: ADR and the Primary Forms of Decision-Making*. Cambridge: Cambridge University Press, 2005.
- Shamlikashvili, C. A. *Mediacija kak metod vnesudebnogo razreshenija sporov* [Mediation as a Method of Alternative Dispute Resolution]. Moskva: Mezhtsentr regionalnyj centr upravlencheskogo i političeskogo konsultirovanija, 2006.
- The Decision of Council of the Courts No. 13P-348, May 20, 2005 "Concerning the pilot court mediation Project" [interactive]. [accessed 28-11-2006]. <[http://www.teismai.lt/teismai/mediacija/del\\_teismines\\_mediacijos.doc](http://www.teismai.lt/teismai/mediacija/del_teismines_mediacijos.doc)>.
- Uniform Mediation Act [interactive]. [accessed 11-12-2006]. <<http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm>>.
-

## PAGRINDINIAI MEDIACIJOS BRUOŽAI IR VYSTYMO SI KRYPTYS LIETUVOJE: NAUJOS GALIMYBĖS TEISININKAMS

Inga Žalėnienė, Agnė Tvaronavičienė

Mykolo Romerio universitetas, Lietuva

**Santrauka.** Šiame straipsnyje analizuojama mediacijos kaip alternatyvaus civilinių ginčų sprendimo būdo specifika bei nustatomas mediacijos vaidmuo Lietuvos Respublikos teisinėje sistemoje ir ieškoma platesnių šio ginčų sprendimo būdo taikymo perspektyvų.

Mediacija tai vienas iš pirminių neformalių alternatyvių ginčų sprendimo būdų, kurio metu šalims derybų būdu ginčą išspręsti padeda neturintis galios priimti įpareigojančio ginčo šalis sprendimo neutralus trečiasis asmuo ir kurio pagrindinis tikslas yra taikiai išspręsti ginčą bei tarp šalių atkurti socialinę taiką. Dėl mediacijos neformalumo ir lankstumo, mediacijos būdu sprendžiant ginčus pasiekiami ypač gerų beveik visų civilinių teisinių santykių rezultatų.

Iki Taikinamojo tarpininkavimo civiliniuose ginčiuose įstatymo priėmimo Lietuvos Respublikoje mediacijai praktiškai nebuvo skiriama dėmesio. 2008 m. priėmus minėtą įstatymą buvo sudarytas pagrindas sprendžiant civilinius ginčus taikyti mediaciją, kadangi įstatymas įtvirtino mediacijos apibrėžimą, nustatė pagrindinius reikalavimus mediacijos procesui, apibrėžė reikalavimus mediatoriaus nešališkumui, proceso konfidencialumui ir kitus.

Taikinamojo tarpininkavimo procese teisininkai turi galimybę veikti kaip ginčo šalių atstovai arba patys verstis mediatoriaus praktika. Atsižvelgiant į tai, kad mediacijos procese daugeliu atvejų privalo asmeniškai dalyvauti šalys, sprendžiant ginčą mediacijos pagalba, šalių atstovai turi padėti mediatoriui koordinuoti procesą, sekti jo eigą, stebint ar nėra pažeidžiamos ginamojo asmens teisės arba kiti teisėti interesai. Mediacijos procese teisininkai taip pat privalo teikti konsultacijas atstovaujamai šaliai dėl teisinių pasekmių, priėmus abipusiai priimtinius sprendimus. Daugelyje valstybių mediatoriais dirba teisininkai, tačiau yra susiduriama su tokios kryžminės praktikos keliamomis grėsmėmis. Atsižvelgiant į tai Taikinamojo tarpininkavimo civiliniuose ginčiuose įstatyme yra įtvirtinta ir kitų valstybių teisinėse sistemose įprasta nuostata, draudžianti mediatoriams būti arbitrais, teisėjais arba atstovais tuose pačiuose ginčiuose, kuriuose vykde arba vykdo taikinamąjį tarpininkavimą.

Mediacija turi dvejopą galimą poveikį teisininkų praktikai. Viena vertus, plačiai taikant šį alternatyvaus ginčų sprendimo metodą kyla grėsmė teisininkų statusui visuomenėje ir jų finansiniai gerovėi. Kita vertus, mediacija gali būti įvardyta kaip nauja galimybė konkurencingoje teisės paslaugų sferoje teisininkams teikti savo kaip mediatorių paslaugas.

**Reikšminiai žodžiai:** mediacija, taikinamasis tarpininkavimas, neteisinė mediacija, mediatorius, alternatyvus ginčų sprendimas, teisininkai.

---

**Inga Žalėnienė**, Mykolo Romerio universiteto Teisės fakulteto Civilinio proceso katedros docentė. Mokslinių tyrimų kryptys: atstovavimas materialinėje ir procesinėje teisėje, advokatų veiklos formos, teisinės profesijos reglamentavimo Europos Sąjungos valstybėse ypatumai.

**Inga Zalieniene**, Mykolas Romeris University, Faculty of Law, Department of Civil Procedure, associated professor. Research interests: representation in substantial and procedural law, forms of attorneys practice, peculiarities of legal profession regulation in EU member states.

---

**Agnė Tvaronavičienė**, Mykolas Romeris University, Faculty of Law, Department of Civil Procedure, associated professor. Research interests: representation in substantial and procedural law, forms of attorneys practice, peculiarities of legal profession regulation in EU member states.

**Agne Tvaronavičienė**, Mykolas Romeris University, Faculty of Law, Department of Civil Procedure, associated professor. Research interests: representation in substantial and procedural law, forms of attorneys practice, peculiarities of legal profession regulation in EU member states.