Cooperation among Mediators and Lawyers

CODEMAL

JUSTICE PROGRAMME PROJECT "COOPERATION DEVELOPMENT AMONG MEDIATORS AND LAWYERS"

RECOMMENDATIONS

for lawyers and mediators working with cross-border family cases

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INTRODUCTION

1. The aim of these recommendations is to encourage lawyers (advocates) and mediators for closer mutual cooperation, while working with cross-border family cases. Until now each profession mostly has used isolated materials, emphasizing significance of its own profession and professionalism. The current approach of these recommendations is to bring together strengths and resources of both professions, thus inviting former rivals to become partners with the supreme goal to help for those in cross-border family conflicts, especially for the best interests of involved children.

2. The European Commission for the Efficiency of Justice (CEPEJ) elaborated the Mediation development toolkit ensuring implementation of the CEPEJ Guidelines on mediation – CEPEJ(2018)7 (27 June 2018). In this document the Commission underlined a need to establish a Court Mediation Pilot, which requires strong support from the superior judiciary authorities. Also a preliminary and full collaboration of the tribunal, the bar and mediation associations, and mediation services is essential. Therefore broad information should be disseminated to the members of the Bar and mediation organizations with strong recommendation to participate in dispute resolution process in a constructive manner. The Commission has discovered ongoing need to train a sufficient number of justice professional in mediation in order for them to be able to identify cases appropriate for mediation, inform the parties about the main advantages and characteristics of mediation, and finally to encourage the parties to choose mediation.

3. The authors of these recommendations[1] have discovered similar situation in all countries: certain lack of mutual and efficient cooperation between practicing mediators and lawyers and some lack of trust between both groups of professions. In these circumstances there is a high need to merge in the same study units both judicial related professions of advocates and mediators, and to train them in close cooperation for resolution of family law disputes.

4. The pre-project research made by all project partners confirm that both groups of justice professionals – mediators and lawyers – are in need of supportive and informative materials regarding cooperative work between lawyers and mediators in cross-country family law cases.

5. Considering linguistic aspect the authors of these recommendations have discovered that the national practitioners are mostly using training and study materials in their national languages, and only a minority of practitioners are fluent in other languages of

[1] CODEMAL Project partners – Turība University (Latvia), Mykolas Romeris University (Lithuania), Genova University (Italy) and the University of Graz (Austria).

the European Union (EU). Therefore during this project all training materials are elaborated both – in English and in national languages. Such respect to national languages is chosen with the aim to increase professional level of actually working justice professionals, who are fluent in their national language. Before official publication of these recommendations, they were tested in national justice bodies – law and mediation offices. [2]

6. The target groups of these recommendations are justice professionals – lawyers (advocates) and mediators. This choice is intentionally made with the aim to strengthen professional cooperation between both groups. Especially during application of legal instruments in family law matters, namely of Regulation (EC) 2201/2003, Regulations (EU) 2016/1103 and 2016/1104 and Directive 2008/52/EC, both professions closely work to facilitate faster and child friendly solution of family disputes.

7. The authors of these recommendations hope that lawyers and mediators working with cross-border family cases will benefit from this document and will gain inspiration and advice on how to assess each particular situation of dispute, apply correctly the EU legal instruments and cooperate with representatives of other judicial profession – lawyers and mediators. Successful cooperation can encourage disputants to resolve their situation in the fastest and most amicable way, thus minimizing workload of courts and re-establishing peace in society.

[2] These recommendations were tested and references about these recommendations were received from: 1) in Latvia: *Latvijas Zvērinātu advokātu padome* [Latvian Bar Association] and *Latvijas Sertificētu mediatoru padome* [Council of Certified Mediators or Latvia]; in Lithuania: Lietuvos advokatūra [The Lithuanian Bar Association] and Lietuvos mediatorių rūmai [Lithuanian Chamber of Mediators]; 3) in Italy: *Ordine degli Avvocati di Genova* [Genoa Bar Association], *Organismo di Mediazione di Genova* [Genoa Mediation Chamber]; 4) in Austria: *Verband Steirischer Rechtsanwalts-Mediatoren* [Association of Styrian Lawyer-Mediators], *Familienberatung und Mediation der Stadt Graz* [Family Counselling and Mediation of the City of Graz], *Österreichischer Bundesverband für Mediation*, [Austrian Federal Association for Mediation], *Kinder- und Jugendanwaltschaft Steiermark* [Styrian Children's and Youth Ombudsman's Office].

PART A. RECOMMENDATIONS FOR BOTH PROFESSIONS: LAWYERS AND MEDIATORS

1. Role of mediator in dispute settlement

A mediator can help the parties to resolve their dispute in amicable manner thru special cooperative process of mediation. Although also other professionals – lawyers, social workers, judges, etc. – are trained in dispute resolution, only a mediator is completely neutral from the parties and thus can efficiently help to resolve a dispute. Special principles of mediation – confidentiality, neutrality, self-determination – are instruments by which only a mediator can become an irreplaceable person in dispute resolution.

Linguistic and cultural differences constitute two of the significant challenges in international cases. A mediator is faced with responding sensitively to the needs of the mediation parties and, in some cases, even translating them for the other parent. At the same time, the parties might show distrust towards the mediator from the "foreign" country. In order to minimize this risk, the team of mediators should be composed as follows:
1. Preferably mixed-gender,
2. Interdisciplinary mediators,
3. from both countries (Schwartz/Wendenburg 2014, P. 119). In international child custody cases, parents are very entangled in their relationship conflict and are afraid to lose the parent-child bond. Not only decisions at the procedural level but also responsibility at the substantive level need to be considered. The fact that mediators from different countries have to work in co-mediation leads to additional complexity (Schwartz/Wendenburg 2014, P. 121).

2. Role of a lawyer in mediation. What is a lawyers' supported mediation?

A lawyer in mediation is a supporter and adviser of the client, allowing the client to express his or her free will and opinion, at the same time refraining from unnecessary legal aggression towards the opponent. A lawyer can help to explain legal rights, obligations and consequences to the client, as well as draft legal documents if any are prepared during mediation. A lawyer can be present in mediation session, or absent if the client does not need constant presence of the lawyer. Due to the fact not always legal issues are analysed during mediation, lawyers' presence is a subject of discussion. There are mediators who prefer to work with clients without presence of lawyers, especially if personal matters are analysed during mediation and if there is a risk that presence of lawyers can possibly cause only unnecessary aggression.

In family law disputes it is vital that the mediation is equally wanted by both parents and not seen as an unnecessary burden by at least one side/parent. Therefore it is important that the mediation (process) is supported and encouraged by everyone involved, like lawyers and other professionals (e.g., judges, family counselling). From a legal point of view, the only matter decided in the Hague Convention is the return of the child (Kiesewetter/Paul 2014, P. 41). Lawyers rarely take part in mediation, as their main tasks involve mainly the legal framework, but it is still essential that they can be contacted (Paul/Kiesewetter 2014, P. 49). All other questions, like where the child will live, remain open. Transparent and open mediation would therefore be a much better way to work out a socially balanced and legally correct conflict resolution (Kiesewetter/Paul 2014, P. 41).

3. The main differences between classic lawyering and lawyering in mediation

Classic lawyering include advising the client on legal issues mostly with the aim to win the case in adversarial legal proceeding. On the opposite lawyering in mediation is legal assistance to the client in mediation process, where broader, not only legal matters are under discussion. A lawyer in mediation is capable to support the client in mediation and to guide the client thru cooperative process with the aim to resolve a conflict in amicable and mutually beneficial way.

The lawyers of each parent are responsible for the legal framework and legal support for their client during mediation. Anyway, they should keep an overall view of the situation (Kiesewetter/Paul 2014, P. 44). They have to differentiate their role as lawyers in an adversarial process and a consensus-building process (Love/Stulberg 2019, P. 298). Even when they only take part in the mediation personally in specific and exceptional cases. For this reason, the final agreement should not be signed without prior legal consultation. The parents and the mediators should always bear this in mind. It should always be possible to contact the respective lawyers during the mediation (Kiesewetter/Paul 2014, P. 44).

4. Independence and impartiality of the mediator

In mediation, independence and impartiality correspond to the essential attitude of a mediator. A mediator must always be independent of the client. There must be no relationship of dependence between the mediator and the client, either financially, ideally, or personally. A mediator must also have the ability of impartiality, i.e., be equally understanding towards all parties involved. A neutral attitude on the part of the mediator is therefore of particular importance. The impartiality of the mediator is also demonstrated by the fact that he or she has no goals of his or her own or that his or her sole mandate is to clarify the conflict for the benefit of all parties involved (Lindemann/Mayer/Osterfeld 2018, P. 24 ff.).

5. Building of mutual understanding of division of roles in mediation

There are no more or less significant members in mediation. A mediator, lawyers and parties have their own unique and special role in mediation. Only in a way of mutual cooperation a conflict can be resolved in the out-of-court manner. Understanding functions and resources of each member in mediation is a first step to efficient mediation. A mediator manages negotiations using mediation techniques. Lawyers consult their clients and support them both in mediation sessions and remotely. The clients are decision makers and those who know the best the facts of the case.

Effective and time-limited mediation requires a general understanding of all those involved in mediation. Although it is not intended to turn mediators into lawyers or vice versa, mediators should use sound knowledge of the principles of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and their practical application. In the meantime, lawyers should be trained to understand how mediation works (Keshavjee 2014, p. 109). Above all, those who have to accept that the parties in principle have the competence independently to reach an agreement (Mayer 2019, P. 309). The acquisition of cultural sensitivity and cultural education supports the changing understanding of roles in mediation (Keshavjee 2014, p. 109). For example, in order to understand each other at the international level, special attention is paid to issues of overarching principles, methodology, and structure (Keshavjee 2014, p. 107).

6. Overly active lawyers in mediation

The lawyer is able to help or to destroy mediation, further exacerbating the dispute. Disputing parties are the ones who can agree on mutually acceptable solution in mediation. The lawyer's role in mediation is to support the client but not to act in the spirit of adversarial process. If a lawyer in mediation is overly active in the negative sense of this term, emphasising the different positions of the parties and not seeking common interests, there is a high risk that the mediation process will fail. One additional challenge for the mediator is to deal with overly active lawyers. On the one hand, lawyers participating in mediation must receive the same respect as the parties who are directly involved in the dispute. But on the other hand, a mediator must be able to kindly point out to the lawyers that it would be very good to give an opportunity to the parties to speak up in mediation personally.

The errors made by overly active lawyer during mediation are, for example, the following:

1) Does not give the client an opportunity to respond personally to the questions raised by the mediator;

2) Rejects or mocks the techniques and questions chosen by the mediator, particularly regarding feelings and emotions;
3) Takes offensive actions against the opposing party in the dispute, expressing rebukes;
4) Holds to the initial positions, avoiding other solutions;
5) Constantly reminds of legal norms and of the desire to settle the dispute in court.

In these circumstances, a mediator has a possibility to invite the parties to participate in mediation independently, without bringing lawyers to the mediation process. Or the mediator may openly discuss the situation observed and ask the parties whether such conduct of lawyers is useful and helps them in mediation.

7. Initial contacts between a mediator and a lawyer

Initial contact between a mediator and lawyers can be done by initiative of any party of the process and by any mean – in a phone call, e-mail, letter or otherwise. The aim of the initial contact is to ascertain availability of a mediator, an interest in a particular mediation case and technicalities of the process.

It is recommended that the mediator contacts the lawyers in the beginning of the mediation. Practice shows that it has a positive effect on the course of mediation if the concerns not only of the parties, but also of the lawyers are sufficiently heard and appreciated. This helps to dispel reservations about mediation. A mediator informs the lawyers about mediation procedure. The lawyers decide whether or not to participate in the mediation. In the event of participation, the mediation process is explained, questions about the mediation process are clarified, and neutrality is assured. Lawyers may make their assessments or legal basis of the case known. Furthermore, the presence of the participating lawyers at the mediation as well as the information structure must be clarified and agreed upon. It has turned out to be unfavourable if only one lawyer is present at the mediation sessions. In the case of international mediation, an appropriate time window and the technical means to engage the second party must be agreed (Thomsen/Fehr 2013, P. 223 ff.).

8. Duty of lawyers and mediators in managing clients' expectations in the dispute resolution process

At the beginning of the mediation, a mediator's duty is to inform the parties about his tasks:
1. Acting as a neutral respective impartial facilitator,
2. Establishing the framework conditions,
3. Being process-controlling,
4. Refraining from giving suggestions,
5. Supporting the parties in working out their own solutions (Trenczek 2017, P.183ff.).

The lawyer assists a client in all legal matters and provides him with legal expertise. Both – the lawyers and a mediator – shall discuss with their clients their needs, concerns and expectations for to participate in mediation. Mediation clients shall be thoroughly informed about realistic possibilities of mediation.

9. Confidentiality principle. Rule and exceptions

A principle of confidentiality is one of the most important principle of mediation. In the preparatory phase, this principle is discussed and recorded in an agreement (Griese 2005, P. 160). This creates the basis for an honest exchange of information, the associated openness, and constructive development of solutions (Falk/Pruckner 2005, P. 118). This principle of familiarity also ensures trust in the mediation process itself (Hörschinger/Nessmann 2005, P. 250). Furthermore, it must be ensured that the content of the mediation process is not based on the court proceedings (Kiesewetter/Paul 2014, P. 52). There is vertical confidentiality (between the parties and a mediator) and horizontal confidentiality (between the parties and other participants in mediation). A confidentiality principle is efficient if legally protected by normative enactments of the particular country. In countries, where mediation confidentiality principle is incorporated in the law, mediators and parties may not be questioned in court, and all information received during mediation is subject of non-disclosure. There are exceptions to confidentiality principle, according to which information can be disclosed where this is necessary for overriding considerations of public policy of the country concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to person, or where disclosure of the content of the agreement from mediation is necessary in order to enforce that agreement (Mediation Directive, Article 7).

10. Duty of lawyers and mediators in reality check during the mediation

Lawyers and mediators are professionals in dispute resolution. Therefore it is their duty to point out possible unrealistic viewpoints or solutions proposed by their clients. Where lawyers or mediators notice a point, which most probably will not be long-lasting, clear or possible, this point should be discussed and elaborated more. It makes sense to hold an interim meeting between the parties and their lawyers after each or several completed phases of the mediation to evaluate the development steps. In addition, the lawyer assumes the function of legally reviewing the colloquially formulated agreements. When drafting a legal text, questions may arise for lawyers, which the parties should clarify in advance. This approach often has a de-escalating effect (Thomsen/Fehr 2013, P. 225). Reality check shall be practiced with caution, for not to discourage the parties to proceed in their negotiations. At time reality check

sounds like filled with negative approach and critique, because some or many solutions suggested by the parties turn out to be non-accurate. Nevertheless the aim of the reality check is to help the clients to develop long-lasting, correctly formulated and effective solution.

11. Estimation of timing for mediation

Length of mediation differs from process to process, and depend on a number of aspects – parties, topics, complexity, involvement of other persons, presence of actual decision makers, etc. The shortest mediation can take less than one hour, where the longest exceeds dozens of hours. Also each stage of mediation can be measured on a time-scale. Even preparation phase of mediation is time consuming. Calls have to be made, various persons (e.g., the lawyer) have to be informed, sometimes hotels and flights have to be booked. In order to start mediation in a timely manner, successful time management is important. If it is not possible for the process to take longer, several hours over at least two consecutive days is a good solution. The date of mediation has possibly to be coordinated with the court hearing as well (Kiesewetter/Paul 2014, P. 44).

Mostly the shortest phases of mediation are an introduction and the final conclusion of the agreement in the end of mediation. Also the second phase where each party explains the situation is shorter than other phases. The longest phase is discovery of interests and values of the parties (the third phase) and elaboration of possible solutions (the forth phase). Therefore only after the second phase it is approximately possible to estimate how much more time the mediation can possibly take.

12. Mediation contract: contents, what should be included

Normative enactments of each country provides whether or not it is mandatory to sign a mediation contract between a mediator and parties. A mediation contract creates clarity for all parties, regulates the framework conditions and legally protects a mediator. Contents of the mediation contract can be provided by law and by contractors, including:

- requisites of the parties,
- the subject of the mediation,
- duration,
- rights and obligations of the mediator,
- rights and obligations of the parties,
- principles of mediation,
- participation of third parties,

- documentation and final agreement,
- costs.

It is recommended that mediation should not begin until the agreement signed by all parties is available. Above all, it should be clear to all whether the agreement is to be binding (Fischer 2016, P 564 ff).

13. Involvement of third parties in mediation

A term "third party" in mediation is ambiguous and may include the following roles:

1. Mediator as a neutral third party,
2. Third party in the role of mediator,
3. Third party in the role of observer,
4. Third party affected by the conflict,
5. Children as the third party.
6. Third party reinforcing or slowing down the conflict (Rogger 2020, P. 1).

The conscious involvement of the third party in mediation can be constructive, as it can contribute significantly to the success of the mediation (Roethe 2020, P. 9 ff.). The presence of the third party in mediation can substantially influence dynamics of the interaction. Especially the transition from two to three participants has a significant effect on a group or the group interaction (Heck 2020, P. 5 ff.) structurally. Uninvolved or peripherally involved third parties can sometimes bring a decisive turn in mediation. This additional external contribution does not have to be dramatic, but it can be seen as a strong and ultimately powerful opinion (Roethe 2020, P. 9 ff). Although a mediation contract is traditionally signed by the parties and a mediator, for confidentiality protection reasons it is worth considering to sign a contract also with the third persons in mediation.

14. Drafting of a settlement agreement at the end of the mediation

If mediation is successful and parties in mediation reach an amicable agreement, it can be concluded either orally (or by friendly handshake), or in a written form. A settlement agreement is drafted by the very mediator or by lawyers of the parties. It is recommended that both parties in mediation are legally aware and have received prior legal advice from their lawyers before they sign an agreement.

In cross-border cases since the agreement generally touches several legal systems, the parties need to have particularly careful counselling by lawyers; this often involves the lawyer from the other country as well as the party's own lawyer. The lawyers will add requisite judicial formulations to the memorandum drawn up during the mediation. For their part, the mediators have to clarify with the parties who will pass the

memorandum on to the lawyers, whether the Central Authorities or the court already concerned should be informed and which further steps are necessary to assure that the agreement is binding in both countries. The court that is dealing with the 1980 Hague Convention on the Civil Aspects of International Child Abduction application can record the final agreement and authorize it for family law, which will make it legally binding in that country. For the other country, a court record called a mirror order is recommended and will achieve optimal legal assurance and authority for the parents in both countries (Kiesewetter/Paul 2014, P. 53).

15. Pros and cons for online mediation

The Covid-19 pandemic was a major motivator to use online dispute resolution tools, which earlier was applied, but with some hesitation. Now starting from beginning of Covid-19 restriction time (spring 2020) online mediation is accepted as normal and reasonable type of mediation.

Online mediation is suitable for all types of disputes, family disputes included. Especially when individual family members live far apart geographically, or there is a time mismatch, a face-to-face meeting in real life is complicated. This is where the parties to the conflict benefit from online mediation. Also predestined for online mediation are conflicts that have an online connection or conflicts that have arisen online. Online mediation requires a high degree of media competence (technical as well as social) and the will to find a solution through online mediation. This is also the disadvantage. Online mediation always presupposes media competence from the part of all participants. Another disadvantage is that not all participants want to deal with the problem in virtual space, and therefore online mediation may not be helpful (Pograzebacz 2014, P. 235ff.). And, of course, it is not possible to guarantee confidentiality in online mediation, as there are no tools to guarantee that mediation is not recorded or that there are no other persons listening ongoing online mediation.

16. Language of mediation

Two of the biggest challenges in international disputes are linguistic and cultural differences. The easiest task is to lead a mediation in a language fluent for all parties and a mediator. It is more difficult to have a mediation where one of the parties or a mediator is speaking another language. Choice of language of mediation is one of the topics to be discussed before mediation. Also the parties shall understand each other in mediation process, and for that, if necessary, an interpreter can be invited.

A mediator is faced with the task of responding sensitively to the needs of the mediation parties. For that a high level language skills are required. In cross-border family cases the parties might show distrust towards the mediator from a "foreign"

country. In order to minimize this risk, the (preferably mixed-gender) mediator team should be composed of interdisciplinary mediators from both countries (Schwartz/Wendenburg 2014, P. 119). Especially in cross-border custody and family disputes, it is vital to bridge the language gap. Here, the mediator can contact the parties before the mediation begins and check how to overcome the language barrier, e.g. by using a co-mediator or interpreter to translate the mediation. Therefore it is important that the interpreter is qualified for the task, is not only bilingual but professionally trained in interpreting, and is well-versed in the professional ethics of mediation and the interpreting profession (impartiality, neutrality, confidentiality) (Caroll 2014, P. 125).

17. Co-mediation: when it is appropriate to consider it?

Co-mediation is a mediation involving multiple mediators, who complement each other (by gender, personality, culture, professional background) in a manner that can improve the quality of both the mediation process and its outcome (Foley, *To co-mediate or not to co-mediate, that is the question*. In *Bond Law Rev.*, 2017, 95).

Choosing a solo mediator is in general advisable, less expensive and faster, but there are cases (mostly in international mediation) where co-mediation might be more appropriate, even if it adds costs and complexity to the proceeding. This may be the case when parties come from different cultural or legal systems: two mediators from both countries may, in fact, help to overcome cultural, as well as linguistic barriers, creating more impartial environment for the mediation process. Moreover, in complex family mediation a mixed-gender team of mediators is generally preferable as gender balance, incorporating a range of skills and allocating different roles will bring more equilibrium and insight to the resolution of family-centred conflict. Mediators with varying skills or interdisciplinary backgrounds, such as therapeutic, financial, or legal background, can also facilitate the resolution of complex emotional, economic and legal issues involved in family matters.

As an odd number of mediators is not necessary (in contrast to the rules applying in arbitration), a team of three mediators should be created only in more complex cases where cultural or linguistic barriers are particularly significant or when a third mediator is necessary to overcome the differences between the other two mediators.

In case of co–mediation, it is preferable to choose mediators who share similar trainings or that already worked together; therefore, the support of mediation organizations might be helpful in appointing the mediators and matching the team.

Provided that mediators cooperate during the proceeding, co-mediation offer important advantages also for mediators, as it can help modelling co-operative behaviours, stimulates more ideas and provide a greater potential for perspective taking.

From mediators' point of view, co-mediation might also offer each mediator someone to debrief with, manage potential complaints and assist when impartiality is challenged.

18. With or without you: When lawyers should participate in mediation?

In most jurisdictions parties can participate in mediation without a lawyer (and this can be advantageous as it reduces costs of dispute resolution). Mediators, tough, shall not give legal advice to unassisted parties. Therefore, there are cases in which the assistance of a lawyer (even if it not compulsory) might turn indispensable for the fair resolution of the dispute: in complex mediation cases, for example, parties might need the assistance of a lawyer (or other professionals) to properly deal and negotiate delicate financial and patrimonial issues, especially if they come from different countries and different legal rules might apply in the settlement of the dispute.

The assistance of a lawyer, anyway, may be "flexible". Lawyers can assist parties from the beginning of the process or can intervene only at the final stage, when the settlement agreement shall be drafted and signed, to ensure that it is valid and enforceable in the relevant jurisdictions.

As mediation agreements have binding effects and might imply waivers of fundamental rights, mediators might suggest unassisted parties to seek the advice of a lawyer and they should do so if they deem one or both parties to be not sufficiently aware of the meaning and implications of the agreement. In general, if one of the parties is assisted by a lawyer, the other party should possibly seek legal advice, before signing the agreement.

In international mediation, where mediation agreements circulate in different legal systems, the assistance of lawyers (with specific competence in international law) might also be essential to ensure the validity of the agreement and its effectiveness.

Even if lawyers generally bring into mediation an adversarial attitude and reinforce the legal framework of negotiations, their participation can be a plus not only for the assisted parties but also for the mediator. Namely, cooperation among lawyers and mediators might even enhance the effectiveness of mediation, especially if lawyers have a solid negotiation training. In these cases, participation of lawyers can help mediators deal with unbalance of powers between the parties, avoiding the risk of losing impartiality.

As different regimes of legal fees apply in different legal systems, parties who need or prefer to be assisted by lawyers should check in advance the rules governing costs and fees, and the possibility to benefit of legal aid or pro bono services.

PART B.
RECOMMENDATIONS FOR LAWYERS

1. Pros and cons for mediation

Litigation is an expensive and risky way of solving disputes. There is no certainty that a court decision will be in a favour of the party. As well court ruling rarely means that a conflict between the parties to a dispute is really over and conciliation is achieved. Mediation is different process. This is about identifying the real interests of the parties and about finding mutually acceptable way to resolve all issues related to the dispute. The most popular pros to mediation are the following:

1) There is a high chance that mediation can help to gain more valuable results in comparison to litigation.
2) Parties will have an active role in the process and will be able to control it.
3) Assistance of the lawyers in the mediation is allowed, but not mandatory.
4) Mediator have a specific knowledge and skills, allowing to structure the process and to support the parties in reaching practical and reasonable settlement.
5) Mediation saves money and time in comparison to other means of dispute resolution, and preserves relationships between the parties.
6) This process avoids a "win/lose" outcome or "all or nothing" decisions and helps to save a face in the dispute.
7) The parties have an opportunity to be heard by each other.
8) Preparing for the mediation and participating in it allows lawyers to get acquainted better with clients and their needs.
9) Mediated agreements normally are more individual, creative and better tested for the overcoming of possible risks in its performance.

Despite the listed benefits of mediation some disputes are less appropriate for the mediation. For example:

1) In some disputes it is not allowed for the parties to agree on clauses, which step away from law. This doesn't mean that mediation is impossible, still the zone of possible agreement is narrower and mediation may have more informative character.
2) Mediation may not be helpful if parties are stuck in their positions, do not wish to compromise and / or demands for justice.
3) Suitability of mediation depends on various aspects: subject of the dispute, party's interpersonal relationship, the history of their interaction, conflict issues, stage of conflict escalation, client's ability to take the decision and etc.
4) Sometimes strong emotions creates obstacles to reach the agreements. Professionality of mediator may entitle him/her to manage the emotional outbreak.

2. Ethical and legal obligation of lawyers to inform their clients about the possibility to use amicable dispute resolution methods instead of litigation

The main function of a lawyer is to defend and represent client's interests in order to achieve the most favourable outcome in the dispute. Lawyers have significant influence on the parties, and their advice in regard of alternative dispute resolution methods is very important factor of the client's decision to try it. The lawyers present the strategy of dispute resolution based on the best interest of their clients. Lawyers should encourage their clients to mediate as in most cases amicable process is more beneficial to compare with litigation. Unfortunately in most countries society still have insufficient knowledge of their choices how to resolve disputes. The lawyer's obligation is to inform clients about all possible and most effective ways to solve the dispute and clients' rights is to take informed decision.[3]

In many countries lawyers are obliged to inform their clients about possibilities to use various alternatives to litigation by law. For example, according to the article 10 part 9 of Ethics Code for the Attorneys at Law of the Republic of Lithuania, it is prohibited to the attorney at law to promote the unfounded litigation. The attorney at law must encourage the client to seek an amicable settlement of the dispute, indicating the alternative dispute resolution methods[4].

3. Referral to mediation

Referral to mediation can come from different sources. Besides lawyers, also judges, social institutions, police officers, neighbours, workplace, education institutions, embassies, and other state, municipal and private institutions can refer disputants to mediation. The lawyers after getting acquainted with client's needs, concerns, expectations and circumstances of the dispute, can offer mediation. Mediation is especially recommended if:

1) the client expresses a preference for mediation;
2) the client expresses a wish to avoid litigation and arbitration;
3) the client is contractually (or by legal regulation or court order) bound to mediate before litigating or referring to arbitration;
4) the client cannot afford to litigate;
5) applicable law / jurisdictional issues arise that make mediation more appropriate;
6) none of the issues in dispute is legally complex or novel, requiring judicial or arbitral determination;
7) the parties have common business or personal interests that may be jeopardized by the dispute (e.g. an on-going business or family relationship);

[3] European Commission for the Efficiency ff Justice (CEPEJ) (2018). Mediation Development Toolkit. Available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52

[4] Ministry of Justice of the Republic of Lithuania (2016). Ethics Code for the Attorneys at Law of the Republic of Lithuania. Available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/9d7e2bd008c511e687e0fbad81d55a7c?jfwid=fhhu5mn1q

8) it is important to have a swift resolution to the dispute, in particular, court litigation could have other (internal or external) adverse effects for the client or its business;
9) a court ruling would not adequately deal with the underlying concerns, or, for any other reasons, subjecting the dispute to a decision of an external third party (such as a state or arbitration court) would not be appropriate or desirable;
10) a lawsuit may only resolve part of the dispute;
11) there is a risk that a court judgement would not be effectively enforced;
12) conducting litigation is in conflict with other vital interests of a client;
13) the subject matter of the dispute is predominantly of a managerial nature;
14) the costs of a lawsuit are out of proportion with the interests at stake;
15) the dispute may be due to miscommunications, such as, data discrepancies, personal conflict, or cultural differences; or
16) it is important for the client to keep the dispute strictly confidential.[5]

4. Choice of the mediator. Aspects to consider

The right choice of the mediator increases the likelihood of amicable solution. At the same time it strengthens the client's trust and confidence in his lawyer as a dispute resolution expert.

In selection process mediator's skills, experience, qualification, language proficiency, expertise in particular field should be taken into consideration. One more aspect, which might be crucial, is the style used by the mediator. Depending on the nature of the dispute, characteristics of the parties, etc. it may be important to choose a mediator who applies an evaluative, facilitative or transformative mediation style. Finally, the attention should be paid to the price of the services, location, and flexibility in terms of the appointments time.

5. First contacts with the mediator

Preparation for mediation is as important as preparation for the trial. Pre-mediation meeting between lawyers and mediator is a good opportunity to establish a contact with mediator and discuss all practical matters related to the mediation such as:

1) Setting date, time, deadlines for the mediation, location of the sessions,
2) Discussing fees of services,
3) Deciding who should attend the mediation, as well as making sure that individuals with full settlement authority will be presented,
4) Clarifying the role of mediator and lawyers during mediation,
5) Identifying documents to be exchanged or brought to the mediation, dates for the exchange of position papers (if applied),
6) Discussing the application of the principle of confidentiality and limits of it,

[5] European Commission for the Efficiency ff Justice (CEPEJ) (2018). Mediation Development Toolkit. Available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52

7) Selecting the structure of the process,
8) Discussing needs, expectations and concerns of the parties and their lawyers,

Preliminary meetings or conference is equally useful for establishing the relationship among the parties, their lawyers and a mediator, as well as for setting the tone inviting for polite, respectful and constructive dialog. There are also mediators who prefer not to have preliminary meetings with their clients and lawyers for reasons of keeping themselves neutral and having a possibility to find out about the conflict directly from the clients at the moment of the first mediation session.

6. How much information to give to the mediators during the first contact?

Mediation is not adversarial process oriented to the determination who is right and who is wrong. It should be approached as a problem solving process. Lawyers shall treat mediation as the way to help their clients to resolve a dispute. A lawyer may provide an analysis of the facts, previous proposals that were made to and received from the opponent, related documents, and other factual information that may facilitate a mediation process. A trust into mediator is crucially important. Any confidential information, which is sensitive and for this moment is not planned to share with other party, may be presented to the mediator by clearly stating that it must be held confidential. Lawyers should feel free to consult a mediator about the information, which is necessary to know at this stage. The parties and lawyers are free to choose how much information to share with a mediator. The more information mediator knows, the easier it is to operate in the process and probably help the parties to resolve their dispute.

7. Interview with a client in order to understand needs, concerns and expectations to be dealt with in mediation

Preparation for mediation is crucially important for its success. Getting acquainted with client's situation should always include an explicit discussion about needs, concerns and expectations. Mediation is more successful if lawyers and clients are prepared for it and clearly know their goals. It is important to be open-minded and do not adopt bottom-line approach. Parties are quite sure that they know the facts, but they perceive it in their own way and at times forget different possible perspectives, which often is employed by their opponents. While preparing for mediation, it is important for lawyers to discuss with a client the following aspects:

1) What are needs, concerns, expectations and goals of the client? What can be done to achieve them?
2) What is a range of options for the settlement?
3) On which topics the client could agree or compromise? Which issues are valuable and no compromise is possible?
4) The mediation process, role of the parties, lawyers and a mediator, principles and rules of the process.
5) Concerns and possible ways to neutralize them.
6) Discomfort, which may be expected during the mediation. Feeling uncomfortable is a normal part of the process for all parties involved. Acknowledgment of it helps to move forward.

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7) The need to be specific and objective. It is advisable to avoid violent and accusing language, generalizing statements such as "always," "ever" or "never", negative responses of rejecting other person.
8) The need to focus on the future and outcome. Don't stuck on problems or blame.
9) What positive / negative can happen if the client finds / doesn't find an agreement on all / some topics of the dispute (BATNA / WATNA).

8. Understanding and prioritization of the interest of the client

Clients' needs, concerns and interests are the pivot of the mediation. Lawyers should understand that the interests of the clients may differ from their positions and that often clients need their help in identifying what may satisfy them in that situation best. It is important to devote enough time for the pre-mediation meeting with the client and discuss why the settlement may be advantageous / disadvantageous, review previous offers or open offers (if any) and explore all possible at that stages ideas for the settlement.

At times lawyers appear in the situation where their personal professional ambitions are competing with the interests of their clients. For example, a lawyer gets a chance to achieve a crushing legal victory in a court hall, but his client is oriented towards amicable settlement and is willing to compromise for the quick end of the dispute letting him to move forward. Ethics of the lawyer requires to refrain from imposing an opinion and to serve for the best interests of the client.

9. Preparing a client for mediation: negotiation strategy

The negotiation strategy used in mediation is not "value claiming", but "value creating". It is important for the lawyer to discuss several questions with his client:
1) What are the main differences between the mediation and negotiations? In terms of procedure, principles, confidentiality rules.
2) Consider interests of the other party and ways to overcome any tactics or objections likely to arise.
3) Discuss the specifics of the interaction between the client, mediator and opposing party.
4) Divide the roles between you and your client.
5) Discuss the role you will play in the process. It might be different as may be expected by the client. In mediation lawyers, for instance, can express regrets about the situation, be more empathetic and sensitive to the other party.
6) Client's behaviour in mediation:
a. Advice during mediation speak directly to other party rather than just to the mediator.
b. Advice to avoid threats and offensive remarks, discuss the evidences.
c. Advise to give an effective reply and be encouraged to agree with opponents when they are right.
7) Prepare the client to present his position as well as relative strengths and weaknesses of it, to answer typical mediator's questions.

8) Explain that during mediation private conversation between the lawyer and his client is allowed.
9) A specific body language gesture may be agreed for expressing such a need. It is advised to agree in advance that before making any commitments client will have such a private meeting with a lawyer and will be informed about possible legal consequences of it.
10) Talk about the information and documents which should be shared during the mediation.

10. Preparing a client for mediation: evaluation of BATNA / WATNA

Mediation is a client-centred process. The clients play an active central role in the discussion. A lawyer empowers them to participate actively in a large part in the decision-making process. According to Jessica Notini, in most mediations parties are influenced much by their alternatives to a negotiated agreement. Sometimes parties and their lawyers fail to carry on analysis of their alternatives and this often leads them to impasses driven from the positional negotiation based on unrealistic ideas of what they might obtain in the absence of a negotiated agreement[6].

It is recommended for lawyers before the mediation to discuss with the clients: their best (BATNA) and worst (WATNA) alternative to a negotiated agreements. The most common alternative path in many mediated cases is litigation in which parties hope that court decision will satisfy their interests better than anything they might be able to obtain in mediation. Still predictions on the court decision should be realistic. This is a duty of lawyer to ensure it. Lawyers help their clients to make choices having considered and with full knowledge of these probable alternative outcomes. In addition to best- and worst-case outcomes, it is often helpful to include a mid-case scenario or a "most likely" case scenario.[7] The quality and explicitly of such analysis is crucial for the parties as it will have a great impact on their decisions during the mediation.

11. Consideration of the actual barriers to the resolution of the dispute

Conflict resolution can often be an uncomfortable process. In order to agree, parties must hear and understand the arguments and interests of the other party. One cannot persuade another to change his or her mind without knowing what opposing opinion is. Barriers to resolution might be the following:
1) Inadequate planning and preparation for mediation.
2) Prejudices and perceptions.
3) Distrust and disrespect of the other party.
4) Fears to lose the case, to seem weak, to lose face and reputation.
5) Willing to win at any cost and being closed to the other person's perspective.
6) Failure to listen and communicate, defensiveness.
7) Interrupting or responding too quickly.
8) Listening without trying to understand.

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[6] Jessica Notini (2005). Effective Alternatives Analysis In Mediation: "BATNA/WATNA" Analysis Demystified. Available at: https://www.mediate.com/articles/notini1.cfm
[7] Ibid.

9) Being judgmental. Client may think he or she already know the problem and the solution. These attitudes will likely shut down communication.
10) Insufficient focus on underlying interests.
11) Avoiding important unpleasant issues.

For reaching an agreement during mediation is necessary to build, not to demolish bridges between the parties.

12. Opening statement of the party

Opening statement in mediation differs a lot from the same as in litigation. Openings are intended for providing primary information and own perspective to an issue for the mediator and other party. Opening statement is an opportunity to convey the message about the most important aspects of the dispute from the perspective of the parties. Openings set a tone for the further process and show willingness to maintain open minded for seeking the common grounds. It is advised not to discount the value of making a positive impression on other party from the first appearances and initial information exchanges. As it is parties' dispute it is strongly advised for lawyers to refrain from long talking. Parties to a dispute should be active, provide information about facts, their personal attitude and emotions. Lawyers are invited to add the legal perspective. Regarding opening statement lawyers should advise their clients:
1) Do not start opening from the blaming.
2) Avoid making personal attacks and insulting other party.
3) Refer to key points in other party's position statement to show that you have heard, considered and understood other party's concerns.

Delivering a good opening statement in mediation is helpful for mediator to understand a case and make a plan for further negotiations.

13. Effective use of caucus

A caucus is a separate meeting of each party with a mediator outside of the presence of all other parties. Information which is shared with mediator during the caucus is confidential unless it is clearly expressed as non-confidential. During the caucus, a mediator explores privately with the party such matters as impediments to settlement, strengths and weaknesses of their positions and the consequences of various alternatives. A caucus gives a mediator a chance to read the parties and get an ideas what are their real goals, determine if a party has unreasonable expectations or if the lawyer is unlikely to cooperate. During the caucus a mediator seeks to build and maintain parties' trusts and identify any hidden issues.

By using caucus effectively, mediators can greatly increase the likelihood of the settlement. During the caucus:
1) Lawyers are allowed to disclose their perspective regarding raised issues.
2) This is an opportunity to provide for the mediator more information, especially sensitive.

3) Lawyers may acknowledge their clients and other parties' interests. It can be difficult for a client to acknowledge the other party's perspectives, needs or concerns in mediation session without losing the face.
4) Caucus is an ideal time to talk and discuss what the parties are willing to offer and where they are ready to compromise. A mediator should open a discussion explaining meaning of the caucus and differences from common sessions. A party to a dispute should be ready to answer such typical questions as: What are you willing to do in order to address the other person's concerns? What would you prefer to get from the opponent in order to fulfil your needs? What would it take to move beyond this conflict? What solutions can you think? How they go in line with your and the other person's interests? What other approaches are possible?
5) During the caucus parties can talk about possible proposal to other party, the potential consequences of not settling, expected other party reactions to your client suggestions and etc.

14. Evaluation of substantive and procedural laws before mediation

Lawyers' duty is to consult their clients on legal – substantial and procedural law matters regarding dispute resolution. Before mediation it is necessary to explore legal aspects of the dispute and to inform a client about strengths and weaknesses of their position. Lawyers are required to consider mediation as an option with their clients. Lawyers shall not assume that their client will not be interested in mediation or that the case is unsuitable for mediation. Normally lawyers determine the likelihood of a favourable court decision basing their assessment on legal regulation and case-law. This knowledge is necessary during the mediation as it may drive parties to compromise if realistically it is obvious that litigation may be long, difficult and final decision unpredictable.

15. Your client is invited to participate in mediation by the counterparty. What's next?

If your client is invited to participate in mediation by the counterparty do not let him or her refuse it at once. It is normal that such initiative is taken with distrust, rejection and suspicion. Such proposal should be well discussed and deliberated. After such a proposal it is necessary:

1) To explain once more to your client an essence of the mediation, to discuss pros and cons for mediation in a particular dispute.
2) If client agrees to mediate, explain a process of selection of a mediator, present to the client few possible candidates, submit nominations of your proposed mediators to the other party.
3) If the other party has proposed mediators, discuss the nominees and make a decision. If you are proposing other candidates, state the reasons why.

4) If client refuses to mediate, remind him or her the weaknesses of his position and provide other necessary information, which may help your client to make his or her final decision.

16. Shifting the lawyers perspectives during the representation of the client in mediation: from adversarial to collaborative, from win-lose to win-win, from past to the future, from focus on lawyers to focus on parties

Effective performance of a lawyer in the court hall is mostly connected with presenting the legal position and argumentation to a judge. Mediation is very different as a mediator is neutral and has no power to decide the case. Naturally, there is no sense to convince a mediator, but instead it is necessary to focus on persuading the other party, which often is much more complicated. The skills required for a successful mediation are different to those which are necessary in litigation advocacy. A lawyer needs:

1) To adopt persuasive rather the aggressive approach;
2) To acknowledge the concerns of the other side;
3) To be aware that arguments should help to solve but not to escalate conflicts. It should be presented in appropriate time and manner;
4) To remember that language that lawyer use during mediation is especially important. It is highly advised to refrain from blaming, showing disrespect, suspicions and etc. Legal arguments are not always necessary. Mediation is more about the relationship than legal argumentation;
5) To use similar skills that mediator uses. Active listening no doubly will help to reach better results in mediation: listen carefully, even if it seems that material presented by other party is not relevant to the dispute issue; summarize arguments made by your client or opposing party; neutralize language of your client if it is necessary, try to reframe the situation moving from negative approach to the positive.

17. How to split work between mediators and lawyers regarding the final mediation agreement?

The main task of lawyers in mediation is to help their clients to formulate proposals and assist them in drafting settlement agreements. Lawyers can also draft final agreements or analyse a draft agreement prepared by the mediator. Having in mind that frequently both parties to a dispute are participating in mediation with their lawyers, there is a need to agree who will draft the preliminary version of the settlement. Such an agreement will help to escape situations when several lawyers are presenting different drafts of settlements.

During mediation it is advisable to read together and discuss every clause of the draft agreement to make sure that all parties and their lawyers have similar understanding of it. If the agreement is clear and simple, signing the agreement immediately is possible. Still, if the agreement is complicated and involves

performance in different stages or is dependent on certain conditions, drafting and signing the contract immediately may not be the best option.[8]

18. How to act in each mediation phase as lawyer?

Lawyer's activities in mediation depends on agreed role during mediation. If lawyer takes part in all mediation sessions, he or she should use creative problem-solving abilities. Creativity in this context means in effect, "thinking outside the box of conventional legal solutions" thus assisting in broadening the options generated or the "integrative possibilities".

Here are possible roles of a lawyer at each of the stages of mediation:

1) During the preparation stage:

a. Preparation of the client – informing about mediation, its principles, stages, roles of parties participating in mediation (including mediator, lawyers), differences from the litigation; discussion of the terms of the mutual agreement to mediation.

b. Meeting with a mediator and opposing party and lawyer. Discussing mediation process: dates, timing, documents needed to be presented, confidentiality principle and possible clauses.

2) During mediation:

a. Remember that mediator is leading the process. Let him or her do the job.

b. Let the client be the centre of the process. Allow a mediator to speak directly to the client. Do not try to explain every word of your client. Do not try to protect your client from him or herself.[9]

c. Don't win an argument and lose an opportunity. Even if you don't agree, try to listen and wait what is coming next. If you insist on proving your opponent wrong, you risk awakening a fruitless debate and jeopardizing the mediation.[10]

d. If your client has unrealistic expectations, let the mediator deflate them. If your client is absolutely convinced of an outcome, let the mediator undercut that conviction. Be honest and sincerely tell your client and mediator about weaker points of the legal position (a lawyer can talk privately with a client in every stage of mediation).

e. Allow the mediator to probe for real interests by proposing a multi-level contingent resolution, without pointing out every potential problem.[11]

f. Help the client to understand real interests and present them during the mediation, prepare the client to the negotiation stage, discuss BATNA, WATNA, and do not engage in positional negotiations.

3) At the final stage:

a. Prepare a draft agreement and explain its clauses to your client;

b. Support your client during the performance of the settlement.

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[8] Ibid.

[9] European Commission for the Efficiency ff Justice (CEPEJ) (2018). Mediation Development Toolkit. Available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52

[10] Ibid.

[11] Ibid.

19. Interaction with lawyer of the other party

The key to successful involvement of lawyers in mediation is a highly collaborative inter-professional relationship between them and mediators. That collaboration can involve sharing expectations of the dispute resolution process, a complementary services approach, and understanding and respect for the different professional roles in mediation and the use of positive advocacy practices by lawyers. Positive collaborative relationships between lawyers begins from understanding and respect of each other and assisting for clients seeking win-win solution.

During mediation, the both lawyers representing their respective clients have the same goal – to help their clients to reach a reasonable agreement. Therefore lawyers shall not compete as in a court, but cooperate in finding opportunities, presenting arguments and information that would help to resolve a current dispute and reach an agreement. In the pre-mediation stage, lawyers should agree to act ethically, ensure compliance with the principle of confidentiality, provide necessary documentation and cooperate in the preparation of the agreement during mediation.

20. Interaction with the other party, who does not have a lawyer

The lawyer's role in mediation is to assist the client in identifying real needs, while constantly assessing likely risks and rewards. To ensure a power balance in mediation, it is suggested that both parties have equal opportunities during mediation. The same is true regarding lawyers – if one party is willing to be accompanied by lawyer in mediation process, the other party shall have the same chance and possibility. However there are times when for different reasons one party is not represented by the lawyer. In these circumstances a mediator shall discuss this situation to ascertain that both parties feel comfortable to proceed with mediation. If one party is not accompanied by a lawyer, there is a risk that due to power imbalance mediation will not be effective or that one party will not feel comfortable. If one party does not have a lawyer, the opposing party and its lawyer is free to contact and interact with that party directly.

21. Supporting the client after mediation

In the end of mediation, if the process has been fully or partially successful, a lawyer can help to draft a final agreement. After signing of the settlement agreement it is advisable for lawyer to discuss with a client in details completed mediation process and its results. It is helpful to receive client's feedback and to evaluate yourself as a mediation attorney. Lawyers shall inform clients about possible risks that agreements are not respected or that another agreement is necessary. Lawyers shall be ready to come back to the mediated issue if a client is facing any difficulties with it. Mediation may be even reopen if the client is not satisfied about outcome. Therefore a lawyer shall be ready to answer client's questions about the dispute and mediated outcome, even if mediation is completed.

22. Taking the proper steps for the enforcement of the agreement reached in mediation

Article 6 of the 2008 Mediation Directive provides that Member States shall ensure the enforceability of agreements resulting from mediation.[12] Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such agreement shall be made enforceable unless, in the case at hand, either the content of that agreement is contrary to the law of the Member State where the request is made, or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made. The way in which the enforcement of mediated agreements may be requested from the court depends on the national law applicable in the state where the enforcement is requested.[13] Mediation advocacy requires expertise in the field of enforcement of the mediated agreements. For example, in Lithuania parties to a dispute are free to choose whether to request the court to confirm their settlement or not. If amicable agreement is not confirmed by the court (on the decision of the parties) it has a legal power of a contract. In case of court confirmation it gains a legal power of court ruling and may be enforced without addition trial. When agreements have to be approved by court, the lawyers not only draft the agreement, but also submit them to the court together with necessary additional documents.

23. Complaints about conduct of mediator

EU Member States have enacted codes of conduct applicable for mediators acting in their own jurisdiction. Countries have different practices regarding complaints about mediator behaviour. The European Code of Conduct for Mediators expresses in simple terms the basic requirements which the European Commission considered were necessary for the proper conduct of mediations[14]. It sets out a number of principles which legally binds the mediators. In summary, they deal with: impartiality, no conflict of interest, competence, confidentiality, quality of the process, advertising and solicitation, transparency over fees and charges, advancement of the mediation practice and self-determination. For example, in Lithuania, individuals may submit complaints (notifications) to the Commission of Mediators' Practice Evaluation regarding the activities of mediators who possibility violated the requirements of the Law on Mediation, the European Code of Conduct for Mediators or other legal acts regulating

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[12] European Parliament and of the Council (2008). Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0052

[13] European Commission for the Efficiency ff Justice (CEPEJ) (2018). Mediation Development Toolkit. Available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52

[14] European Code of Conduct for Mediators (2004). Available at: https://www.euromed-justice.eu/en/document/eu-european-code-conduct-mediators

the provision of mediation services. The structure and members of the commission is approved by the Minister of Justice. If the Commission finds that the mediator has violated the requirements of the legislation governing the provision of mediation services, it has the right to take the following decisions: issue a warning or to issue a public warning, which is published in the list of mediators of the Republic of Lithuania or to remove a mediator from the list of mediators of the Republic of Lithuania.

Similarly in Latvia complaints about conduct of certified mediators are reviewed by the Council of Certified Mediators.[15] Having received a complaint regarding violations of the laws and regulations regulating the activities of certified mediators or the norms of professional ethics of a mediator in activities of certified mediators, the Council of Certified Mediators in case when the indicated violations might be the grounds for terminating the operation of the certificate of the mediator, lodges such complaint to the Commission of Examination of Mediators for provision of an opinion. The Commission evaluates the circumstances indicated in the complaint and provides an opinion to the Council of Certified Mediators. If the Commission has recognised that a certified mediator has significantly violated the laws and regulations regulating the activities of certified mediators or the norms of professional ethics of a mediator, the Council of Certified Mediators takes a decision to terminate the operation of the certificate of the mediator. If the Commission has recognised that there is not violation or the violation detected is insignificant, the Council of Certified Mediators may explain the error of the actions of the certified mediator to him or her.[16]

PART C.
RECOMMENDATIONS FOR MEDIATORS

1. Acceptance and refusal of the appointment: which cases to accept

Mediators, like lawyers, doctors and other professionals, tend to specialize in a particular field. Specialisation safeguards an in-depth knowledge in one area. For example, mediators working in the field of family law learn a lot about the psychological aspects of mediation, the family system, the protection of children's rights and other family-specific issues. Mediators specialising in commercial law mediation will, on the other hand, learn directly business and financial sector issues. Of course, mediators are allowed to practice in all areas, because mediation principles and structure is alike, however it is recommended to start practicing in a new area step by step, even in a model of co-mediation, to acquire new professional trends in the new area of disputes.

When a mediator agrees to lead mediation process, he must assess a number of aspects, including:

1) his experience in resolving the relevant matter;
2) neutral attitude regarding the relevant matter and persons involved in the dispute;

[15] Article 25, part 3, clause 4 of the Latvian Law on Mediation [*Mediācijas likums*]. Adopted on 22.05.2014. Available at: https://likumi.lv/ta/id/266615-mediacijas-likums

[16] Article 26 of the Latvian Law on Mediation [*Mediācijas likums*]. Adopted on 22.05.2014. Available at: https://likumi.lv/ta/id/266615-mediacijas-likums

3) work schedule and capacity to undertake a new case. A mediator is not obliged to undertake more cases than he can do reasonably and qualitatively. So the mediator is free in his choice of how and what mediation cases he can take.

2. Preparing for the mediation: documents, legislation, information

Mediators have different views on how much to familiarise themselves with the mediation case before the process is initiated. While lawyers for the parties sometimes kindly offer mediators to familiarize themselves with the materials of the case, a summary presentation of the dispute, not all mediators take this opportunity. Both options have their pros and cons. If a mediator gets acquainted with the materials before meeting the parties, the positive aspect is that the mediator is prepared for the first mediation session, and needs less time to hear about facts of the case. On the other hand, the negative aspect is that the mediator as a neutral observer loses the possibility to obtain information directly from the parties, especially because not only the dry facts, but the attitude and the way of expression tells much about the case. The mediator risks feeling prematurely in favour of either party, depending on the quality and manner of the material described.

If the mediator is able to maintain his professional neutrality by reading the file materials prior to the first mediation session, such examination of the documents may certainly be used. In particular, in disputes with great prehistory, the mediator will act professionally if learning materials and summaries prepared by the parties or their lawyers, which will save both the parties' time and raise the mediator at the level of knowledge that the parties have with regard to the dispute. However, it should be stressed once again that, despite the information being read, the mediator must maintain absolute neutrality on both sides, and the written information certainly does not replace conversation with the parties during the mediation session.

As regards the investigation of laws, the mediator has neither the right nor the obligation to advise the parties on legal matters. However, the mediator must make sure that the parties are legally informed. If the mediator has doubts as to whether the parties understand the legal importance of their activities and decisions, the mediator should make a proposal to the parties to postpone a mediation session with a view to enabling the parties to consult with their lawyers.

3. Preparing for the mediation setting: proper location, facilities

Mediation should proceed in a place where the parties are comfortable and safe and the mediator can manage mediation under appropriate conditions. This simple truth shall be re-evaluated every time when preparing for the next mediation session with the particular clients. If only it is not an online mediation, the mediation room must be in a place accessible for the clients. A mediator shall mind persons with special needs, elderly clients, clients who need individual sessions, etc. The mediator needs to make sure how many people will participate in the mediation session. Therefore, before the mediation session, the mediator should ask directly whether the parties will come alone or whether they intend to come with their lawyers or support persons. If the mediator's

daily office is too narrow for a larger group of persons, a wider mediation room should be arranged.

Similarly, there shall be additional technical and office materials in the room. Classically, the mediator uses a whiteboard or flip chart, or paper sheets that are placed on the table, the main task of which is to write down information, visualize topics, and focus attention of both sides to topics that are being examined. If the mediator uses creative techniques, images, post-its, coloured highlighters, and other objects shall be available in a mediation room.

In most cases, mediators also offer their clients some water, tea, coffee or treats, so that the environment is more cosy and relaxed. Such mediation related details leave a positive impact on clients, which is important for the parties could reach an agreement.

4. Managing time and duration of mediation process

The mediator shall be responsible for organising and managing the mediation process, including controlling the time for mediation. When planning mediation sessions, the mediator shall approximate with the parties the time of mediation – day and hour, as well as the duration of mediation. A mediation session can take any amount of time – from less than hour up to several hours, but in any case it is necessary to clearly agree on this aspect with the parties, so that all those involved in the mediation process are aware of the time limits to be taken into account. If mediation takes more than one or two hours, then it is more likely to be necessary to organise a break so that the parties can rest a little and then effectively proceed with mediation. In most cases, however, mediation takes place one or two hours, and then the next mediation session is transferred to another day. During the mediation process, the mediator shall remind the parties of the time available for the process shortly before the end of the mediation session and shall take the necessary steps to summarise the progress of the relevant session and agree on the next date.

5. Taking appropriate steps to guarantee confidentiality: checking mediation privileges in different legal systems

Mediation is a confidential process, because only in such circumstances the parties are willing to disclose important information to the mediator and to each other. The mediator shall take several steps to guarantee confidentiality. First, the principle of confidentiality is enclosed in the mediation agreement (in some jurisdictions, for instance, in Latvia, it is a mandatory clause in mediation agreement). Secondly, during the introductory phase of the mediation process, the mediator reminds about confidentiality obligation, which is binding the mediator, the parties and other participants in the mediation process, such as lawyers and supporters. However, in modern technical environment, it is not possible to have absolute guarantees that parties are not recording mediation process. In particular, such risks exist during online mediation.

The principle of confidentiality is not absolute and there are certain exceptions under national laws. The mediator shall inform the parties about these exceptions at the

beginning of the process, thereby fairly declaring that there may be cases where the mediator and the parties will not only have the right but even the obligation to disclose the information obtained during the mediation process.

6. Effective management of the mediation process: Opening remarks; information gathering; identification of issues and interests

The success of mediation depends largely on the professionalism of the mediator. Each phase of the mediation process has its own special role and shall all be conducted at a high quality. Young mediators frequently have sample introductory wording in front of them when leading the first phase of mediation, in which the mediator can have a look to remember what to mention: all the relevant information about the principles, rules and procedures of mediation. In the next stages of mediation there are no single samples. In the second phase, the mediator asks each party to tell about dispute, and while listening to the story the mediator shall notice the most important topics, common interests and differences. There points must be duly noted by the mediator, and they will be analysed in the next phases. If the mediator has not heard topics, interests, needs and values in the second phase, the transition to the third phase becomes very complicated, even impossible. When commencing the third phase, the mediator shall use the noticed topics, interests and needs and shall, as far as possible, write them on flip charts or pages of paper in a visible manner. These topics must be sufficiently comprehensive and neutral, even positively formulated, so that the parties can sufficiently discuss each of these topics. The third phase of mediation is usually the longest of all phases, since the parties need considerable time to discuss each subject in depth. In the fourth phase, the mediator suggests that the parties think about possible solutions. A typical mistake for beginner mediators is to rush to the fourth phase and solutions too early. It should be remembered that the mediation process is like the construction of a substantial house. As long as there are no fundamental grounds for discussing topics, interests and needs in mediation, it is not yet possible to build the house itself, a solution to the dispute. A hasty solution leads to the failure of mediation and the parties being forced to re-enter the negotiations. In the final phase the parties conclude an amicable agreement, if one is reached. An agreement can be drafted by either a mediator, or lawyers of the parties.

7. Dealing with minors in mediation

Minors may participate in the mediation process. For example, in school mediation, children can take part in mediation either personally (when it comes to less important topics) or in the presence of parents (when more important issues of responsibility and consequences are concerned). Children may also be invited to the mediation process in matters of access rights with parents, custody disputes or similar parental disputes. In the latter case, the mediator shall hear children separately from adults and, above all, in a child-friendly manner, seek to clarify the child's attitudes and views on the subject. The mediator working with children must certainly be specifically educated in the field of protecting children's rights in order to treat children properly and in child-friendly manner.

8. Managing with lawyers in mediation

The participation of lawyers in mediation is possible, and the presence of lawyers changes the dynamics of mediation. There are mediators who don't prefer to have the mediation process with lawyers participating. In such a case, mediators call on the parties not to take their lawyers to mediation, leaving legal advice moments for a period before or after the mediation process. Other mediators, on the other hand, welcomes lawyers to mediation sessions and effectively uses the resources that lawyers possess in the form of legal knowledge and client support. The mediator explains to the lawyer a need to allow to the client to speak directly, because at times too much initiative from lawyers can deprive the parties of their motivation to express themselves and think independently about solutions.

9. Use of caucus when necessary

Caucusing is a peculiar phase of the mediation proceeding: during caucuses mediators can meet and confidentially talk with each individual party, switching between joint and separate meetings to give mediation clients individual and specific attention and to talk confidentially with each of them to better understand interests and needs involved in the dispute. It is important for the mediator to properly use caucuses in coherence with her mediation style and theoretical approach: caucusing, indeed, can consist of just one or two short separate meetings during the session or be the equivalent of shuttle diplomacy, where mediators work in a continuous series of caucuses without any joint meeting. Some mediators, on the other hand, prefer not to cause at all, as they deem caucus to interfere with the transparency of the process (L. Israel, *to caucus or not to caucus – that is the question*).

Even if a general rule governing caucusing does not exist, mediators shall carefully consider if, when and how separately meeting with parties. Although rare, some mediators organize pre mediation caucuses, meeting with each individual party prior to the first joint meeting; more often mediators use caucus one or more times along the process to solve specific issues at times of impasse. Depending on the style and approach of each mediator, caucusing might be proper during the exploration stage to better understand hidden interests and needs of the parties (particularly when parties do not trust each other), as well as during the negotiation stage to encourage creativity or to promote reality testing; caucus might also be useful to overcome deadlocks and parties' biases, using more intrusive mediation techniques that should not be used in join sessions. Caucusing too early or too often, anyway, might pose dangers to the process: instead of facilitating communication and negotiation, caucuses might enhance suspects between the parties, interrupting the free flow of communication, blocking creativity, and therefore limiting the efficiency of mediator's intervention.

Caucuses can be useful also when parties are highly upset or emotional to face each other or to stay in the same room; mediator, tough, should keep in mind that parties often need to vent their emotions in front of their counterparty before they can even begin to negotiate a solution: therefore, too much caucusing with emotional parties could be counterproductive in these circumstances.

Whatever strategy or theoretical approach, it is important, for the mediator, to plan the numbers of caucuses as well as their duration and generally avoid too lengthy separate meetings; in general mediators should caucus with both parties, one after the other; but it is possible to caucus with each party on different days, to limit wait times for the parties.

Regardless of the time and number, at the end of each caucus the mediator shall always be careful to understand which information is confidential and which can be revealed to the other party.

10. Interruption of mediation if and when necessary

The length of the mediation process depends on many factors. In general, mediators agree with the parties and their lawyers on the duration as well as the number of meetings, taking into consideration the nature of the dispute and its complexity.

In some jurisdictions, time limits may apply but, in general, parties and mediators may agree on an extension. As a rule, the process will terminate when parties reach an agreement or when they definitively realize that no agreement can be reached.

In some cases, tough the mediator shall interrupt the process before the planned ending: this might be the case if one of the parties is threating the other or the mediator, using verbal or physical violence or otherwise abusing of the process or bargaining in bad faith; in this case interruption generally leads to premature termination of the process.

Interrupting the meeting and adjourning the process might also be a viable solution when parties need to collect information to proceed in the negotiation as well as when they need time before they can make a final decision: in these cases, to prevent the waste of work done and to save parties' commitment to the process, mediators shall consider to set short suspensions and carefully plan the resumption of the activities.

11. The necessity to build a rapport with parties and their lawyers

Many mediators see establishing rapport as an important way to start and efficiently lead the process, intending rapport as the *real connection and trusty relationship* that the mediator should build with parties and their lawyers to help them feel comfortable and confident in mediation.

Setting clear expectations for the mediation process, putting in each party's shoes, mirroring (i.e., matching behaviour by copying the other person's verbal and non-verbal attitude) and reflecting (i.e., use the other person's own words and reflect this back to them), are the main techniques a skilled mediator can use to gain understanding and showing respect for each party's values and beliefs, in order not to judge them, but to help them find a solution to their dispute.

The ability of the mediator to understand the legal implications of the dispute (and the ability to talk about it) can also help the mediator build rapport with parties' lawyers. It is important, indeed, that lawyers feel themselves as part of the process and commit themselves to the resolution of the dispute and therefore the mediator shall dedicate adequate care to build a good relationship with lawyers, giving space to their professional concerns regarding the dispute.

Building rapport may be more difficult when mediation sessions take place *online*, as videoconferencing doesn't have the richness of in-person interactions: giving parties and their lawyers a guided tour of the online mediation platform being used, taking time to explain its features and encourage parties not to confuse their scepticism about the process with distrust of other participants, are some of the tips that mediator can use to develop rapport on line too, and overcome the inevitable anonymity and detachment of this kind of communication.

12. Self-confidence and ability of mediators to manage the process despite the possible directive style of the lawyers

No matter how directive the lawyers are, the mediator shall always manage to lead the process, striking the right balance between empathy and assertiveness, both with parties and their lawyers. Making competent statements about the dispute from the beginning and throughout the mediation might help the mediator strengthen his legitimacy before lawyers, as well as showing interest toward the legal implications of the dispute.

Leaving aggressive lawyers at the side or even trying to exclude them form the negotiation table, on the contrary, may turn out to be counterproductive, as they will not feel committed to the resolution of the dispute. Clarifying, from the beginning, the role of lawyers in mediation and stressing the importance of their contribution (e.g. in the drafting the agreement; in assisting their client during the process and in taking decision for the resolution of the dispute) might also help the mediator deal with even more directive and competitive lawyers; while planning short caucuses with lawyers to discuss the legal implications of the dispute (possibly, without the clients, whose presence often stimulates competition between lawyers) may also be useful to keep their adversarial attitude under control as well as to manage their professional concerns.

13. How to advise parties about the involvement of lawyers?

Even if parties can participate in mediation without the assistance of a lawyer, the mediator shall properly mention the possibility to seek legal advice during the process and even suggest consulting a lawyer before the party takes important decisions or signs the final agreement; the suggestion becomes mandatory if the mediator deems the party unaware of the implications of the settlement. This advice can be given at the outcome of the process, with the opening statements or even during the process, as soon as the opportunity to seek legal advice becomes clear; sometimes tough, to preserve his impartiality the mediator could also use caucus to discuss with the individual party the opportunity of seeking legal assistance.

With most deprived parties, mediators shall also explore and clarify the possibility to seek legal aid or *pro bono* services.

14. Obligation to clearly define mediator's expectations about the lawyers' role during the process

Lawyers' role in mediation is different from their role in litigation: therefore, it is important for the mediator to clearly define respective roles at the beginning of mediation, stressing the importance of their cooperation both during the process and at the end of it, when the agreement will be draft; indeed, if lawyers have a solid training in mediation and negotiation, they generally know their role and fairly cooperate with mediators, assisting clients in the dispute resolution process. As the role and style of mediators might change according to her theoretical approach, the mediator, however, should clarify at the beginning of the mediation how he is going to lead mediation (e.g.: if he is going to caucus with the parties; evaluative vs facilitative approach, etc.) and how he is going to include the lawyers in the process.

15. What information is needed from lawyers before/during/after mediation?

Mediators do not decide the dispute and therefore they do not need evidence or specific documents to carry out their role. However, mediation can be expedited if the mediator has adequate information about the parties and their story (e.g.: the previous attempts made to solve the dispute; why they failed, relevant information about the economic situation of the parties) before the beginning of mediation. As it is important to negotiate in transparency and good faith it is also valuable that lawyers share with mediators, relevant information regarding specific needs and interests (both economic and personal) of their clients, taking into consideration that there is also the possibility to share information confidentially with the mediator.

16. Integration of lawyers in each mediation phase

It is important that lawyers feel part of the process, committing themselves to the resolution of the dispute. Therefore, the mediator shall dedicate adequate care to build a good relationship with lawyers, giving proper space to their professional role in each phase of mediation since the opening statements. As the assistance of a lawyer, may be "flexible" their integration in the process may vary. Lawyers can assist parties from the beginning of the process or can intervene only at the final stage, when the settlement agreement shall be written and signed, in order to ensure the validity of the agreement. To prevent possible step backwards that might delay the process, tough, integrating lawyers since the early phases of the process might be preferable, even if this might add to the process adversarial elements and costs.

17. How to act if only one party is represented by a lawyer?

As lawyers' assistance is not necessary in mediation, it might happen that only one of the parties wants to or can be assisted by a lawyer. This can create a critical unbalance of powers and knowledge between the parties. Expert mediators can generally manage the situation (helping the unassisted party to participate in the process and using caucus to explain the implications of the dispute). There are cases, though, in which the

unbalance of power and knowledge becomes unmanageable even for expert mediators (threatening their neutrality and impartiality). In these cases while a mediator should never substitute the lawyer nor give legal advice, he could strongly encourage the party to seek legal assistance (using caucus to do so, and verifying with the party the availability of legal aid or pro bono services, if necessary). A mediator can also postpone mediation, in order to allow the party to seek legal advice. Interrupting mediation is obviously an extreme situation that the mediator can adopt only if it is obvious that unassisted party is absolutely unable to understand the meaning and implications of the process and of the agreement.

18. Split of work between mediators and lawyers regarding the final mediation agreement

Mediators generally facilitate the resolution of the dispute, helping parties communicate and negotiate the best solution to their interests and needs. Once the parties get to an agreeable solution, it is generally the task of lawyers to draft the conciliation agreement, translating the substance of the settlement reached by the parties into an enforceable and legally binding agreement. Especially in international mediation, lawyers should not only draft the agreement, but also carefully check its validity, taking into consideration the international dimension of the dispute to ensure that the agreement is enforceable in all relevant jurisdictions.

Even if their role might be essential in this final phase, the involvement of lawyers during the previous phases of the process might be preferable, to facilitate their task and to avoid misunderstanding and dangerous steps backwards at the end of the process. The mediator might also actively intervene during this final phase to encourage cooperation between lawyers, to help them overcome possible impasse and to ensure that they faithfully translate the settlement reached by the parties into the final agreement.

19. How to arrange the mediation setting if lawyers are involved (where to sit etc.)?

In general, when lawyers assist the parties in mediation, they should sit is on the side of their clients. It is preferable, tough, if they do not sit between the mediator (also in caucuses) and the client as mediators should interact directly with the parties. If possible, lawyers should not face each other (as this might encourage their adversarial attitude), but sit side by side at a round table, as this might help their cooperation.

20. Are there caucuses with lawyers only or with the parties only?

Different mediators have different mediation styles and approaches and different methods of caucusing. As no general rules exist, some mediators prefer to organize separate caucuses with lawyers only and/or with parties only, while many others prefer to caucus with each individual party together with her lawyer.

Depending on the nature of the dispute and the character of the parties, the strategy can change but it is important to clarify, at the outset of the process, if and how the mediator will use caucus

21. Proper conclusion of mediation

Mediation ends when parties find, draft (generally lawyers do), and sign a complete agreement (or at least, a partial agreement) or when they mutually recognize that no agreement can be reached and that the dispute shall be resolved otherwise.

When the agreement is properly drafted and completed, a mediator should read it to the parties and be sure that they fully understand its meaning and its implications, before they sign it.

The final phase of mediation might be delicate: even if mediators did a great job, conducting negotiation and helping parties communicate, unforeseen issues can always arise in this phase (especially when the details of the agreement shall be defined), forcing the mediator to go backwards to the previous phases of negotiation and even exploration; mediators, therefore, should not lose their patience until the end of the process, and always be ready to re start negotiation, when necessary, until the agreement is definitively signed.

22. Handling of post-mediation (e.g. debriefings with lawyer)

Once the agreement is signed the mediation process is concluded. Nonetheless properly handling post-mediation phase can also be important to help parties process the agreement and respect their obligations. Debriefing with parties, for example, can be fruitful as it might help them overcome typical behaviours, such as the so called "winner's curse" that may reduce with their satisfaction and their commitment to the agreement. Debriefing with lawyers can also be a useful practice, for mediators and lawyers, as it helps all of them understand the dynamics of the process and the reasons behind the choices made during mediation; and this can be instructive for future processes also.

When a partial agreement is concluded, a mediator shall use post-mediation phase to verify that parties understand and possibly agree further steps they can take to solve the unsettled issues.

If parties did not find an agreement, mediators shall anyway underline the steps forward that the parties have made in their communication and possibly help them agree on future steps they can take to solve the dispute

23. Complaints about conduct of lawyers

A mediator shall always try to directly discuss with lawyers any issue concerning their behaviours during mediation, using caucus when appropriate, to confidentially to talk about specific complaints regarding each individual lawyer's conduct. On many occasions, this is sufficient to redress inappropriate lawyers' conducts often due to their limited training in mediation and negotiation, as well as to their typical adversarial attitude. In other cases, mediators can use post mediation debriefing to discuss with

lawyers about their conducts and to explain why their behaviour might be counterproductive for mediation (in view of future proceedings). In extreme and unmanageable cases, tough, such as in cases of infringement of ethical duties, mediators can take into consideration the possibility to file a complaint with competent bar associations to report the lawyer's misconduct.

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