FOLIA 215

Annales Universitatis Paedagogicae Cracoviensis

Studia ad Didacticam Biologiae Pertinentia VI (2016)
ISSN 2083-7267

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Responsibility in the process of mediation – in terms of pragmatic and ideological

"You are responsible forever, for what you have tamed"
Antoine de Saint-Exupery

With the passage of time, it is seen how much has changed in Poland from the time of introducing first mediations to Polish law and practice in judicial proceeding. From 1997, when mediations appeared in criminal cases, the possibility of their legal and (what is more important) practical application moved on to the canvas of the civil, family and economic, and many other disputes. From January 2016 the *Act on mediation*[1] is available for Polish mediators. In this Act a legislator not only focused on the most important formal issues, but also on ethical issues concerning leading and organization of mediation process and the requirements (qualifications and some of competences) that the candidate for mediator shall meet. Development of mediation is also noticed in scientific area through the increasing number of publications and surveys in that field.

However, with the increase of knowledge about mediation and also of the expectations of the organizers, the need of understanding of what the responsibility in mediation is, and what the role of all the participants of this process is, also increases. Maciej Bobrowicz – a lawyer and a mediator – commented on that issue synthetically. He wrote, that "the conflicted sides are responsible for the outcome of mediation; a mediator is responsible for effective management of negotiation process. A representative agent is not formally responsible for the course of mediation". But what is the basis of this synthesis? Which conditions, factors and legal and moral premises are hidden by words "responsibility in mediations"? What is the distance between the idea of mediation (its essence, imagined ideal state) and the practice, reality and daily work of court mediator?

The basis for reflection about responsibilities in the occupation of mediator are, of course, *Standards of Leading Mediations and Mediation Proceeding* and *The Code*

[1] *Small Law Mediation* is a government document containing all existing provisions on mediation and mediators in force in Polish *Codex of Laws*. The Act was adopted in 2015, and came into force in January 2016.

of Mediator's Ethics created by The Polish Centre of Mediation with the cooperation of many professional mediators, and also all of the normative acts defining directly and indirectly the role, tasks and obligations of the mediator.

Responsibility in mediations

To talk about responsibility in mediation process we should first ask what this responsibility is, how should it be understood. It is difficult to find in Polish legislation articles directly explaining the range of mediator's responsibility, but it is a mistake to say that there are none.

Mediator's responsibility is the consequence of realization of his/her designed tasks, functions (including his/her competences and qualifications[2]), and also it is directly connected with the rules of mediation. The rules of mediation have two sources: legal (then they are called *codex rules*) and moral, ethical, resulting from the rules of social coexistence and the special needs of mediators and the sides of mediation (they are called *except codex rules*), written as *The Code of Mediator's Ethics*[3]. Therefore responsibility not only is expected, but also – and mainly – inalienable and incontestable value of the whole process.

Mediator's responsibility is seen in some areas:

1. Formal,
2. For the organization of process,
3. For the realization of rules of mediation,
4. Ethical/moral,
5. For the balance of the parties.

1. Formal responsibility

A very important mediator's task is to prepare documentation connected with the process of understanding that is led by him/her. It is radically different from court acts although it is equally important for the court, that after a finished mediation process, independently of the outcome, receives documents. Preparing it, the mediator should remember about a principle of confidentiality, to which

[2] The main reqirements for mediators and their tasks and aims of mediations are presented in *The Civil Code*, but some cases, e.g. family or criminal, can be lead by mediators meeting additional conditions, defined in other acts. It is worth to remember, that "a mediator can be each natural person, who has full legal capacity and enjoys full civil rights. However, a judge (except for a judge at rest) cannot be a mediator. In cases of divorce or separation and family or tutelary (unless the parties agreed on mediator), a court sends to the permanent mediator, who has theoretical knowledge, especially who is educated in psychology, pedagogy, sociology or law, and has practical skills in leading mediation in family cases" (Rękas, 2010, p. 26).

[3] *The Code of Mediator's Ethics*, created by one of the biggest association organizations of mediators – Polish Centre of Mediation (PCM), is a document that is obligatory for all mediators. However, each organization dealing with mediations has the right to create its own additional rules, mediation conditions and criteria for mediators.

he/she is obliged. This rule concerns also further way of collecting[4] and keeping documentation.

Documentation preparing by mediators should be primarily: a written consent to mediation from the parties of proceeding, a consent to the processing of personal data, a mediation contract, a report on the mediation and a final agreement. Moreover, most of mediators prepare additional documents having different roles in mediation. There are: "invitation" for mediation, cards of rules, short personal questionnaires and others. **The consent to mediation** is a basic document, outputting to start the whole process. It is closely related to a principle of voluntariness, because the parties express a wish for participating in meetings with mediator in it, and to a principle of acceptability (and at least one of the elements of its realization), because the parties express the acceptance for this, defined mediator. Essential is also **the consent to the processing of personal data** for the purpose of realization of mediation process according to the provisions in Act on the Protection of Personal Data from 1997 (Dz.U. z 2016 r. poz. 922).

The other main document is **the mediation contract** (called also a mediation agreement), that determines the object of conflict, conditions and rules of mediation, its participants, points the person of mediator or at least the way of choosing him/her, costs, type of case, other additional conditions[5]. It is an agreement that gives a warranty to the mediator to take action and lead the process. **The request for mediation** is a document created by the mediator (or with the parties) to the court, after the mediation contract. The request usually consists of parties' data, the obcject of conflict and possible claims, signatures of the parties of conflict, nesessary attachments and a copy of the mediation contract.

As Agnieszka Rękas (2010) stresses, the request as a document is not a kind of pleading, so that its form and contents can be different from such papers.

If the parties during the mediation find a rewarding solution and reach an agreement or even become reconciled, **the final agreement** is written. It is a main purpose, a point of pursuance in the process of mediation. The final agreement made in front of the mediator requires confirmation by court "to produce effects such as in case, when parties make an agreement in front of court" (Rękas, 2010, p. 29). The final agreement contains all the parties' resolutions and declarations connected with the way of conflict solution, terms of realization of these resolutions and the other elements important for parties.

One of the last documents is **the report (or the protocol) on the mediation**, that is undoubtedly the element that arouses anxiety among the conflicting parties and young, unexperienced mediators. An experienced mediator knows that this

[4] In practice, mediators do not keep notes nor additional information, because they are unnecessary. Generally, backups of obligatory documents sent to courts and for parties are kept.

[5] In civil cases it is acceptable to make oral agreement and also oral consent to mediation. However, in practice, every professional mediator prefers written form of documents.

document contains nothing more, but only data of parties participating in sessions and the result of mediation proceeding in the form of a message if an agreement was reached or not (when mediation stopped or parties did not agree to mediation). The report contains also an information about where meetings took place and about the number of conducted mediation sessions with terms and duration (from... to...). Such form is a consequence of realization of the principle of confidentiality, but the minimalism of the report functions also as a kind of diminish bureaucracy, and even it is a system of alternative methods of solving conflicts in Poland.

In this case the formal responsibility is connected with some issues. Undoubtedly, very important is to distribute documents to court and parties. Formal defects can also appear, that result in documents not being received by court, and that need to be completed (e.g. lack of signatures, inconsistency of data). Problems can also appear when there is lack of necessary attachments, or wrongly constructed paper, or incorrect form of the final agreement.

It is worth to mention here about "contract responsibility" (*ex contractu*). In accordance with article 471 of *The Civil Code* ("the debtor is obliged to repair the damage resulting from non-performance or improper performance of obligations, unless the non-performance or inadequate performance is the result of circumstances for which the debtor is not responsible"[6]), the mediator is responsible for causing damage to the parties of mediation proceeding. It is a result of using substantive law in relation to mediation. According to article 471 of *The Civil Code*, a damage can be a result of breaking, breaching of a mediation contract signed with parties, whereby they suffered losses.

2. Responsibility for the organization of process

The main organizer of process, it can be said "a stage designer" (but not "a director"), is the mediator. The organization of process consists of some essential elements. One of them is to create documentation. A process is something that lasts in time and place and has a defined purpose. Therefore the mediator is responsible for organizing and adaptation of a place, where mediation will take place in a way, so that conditions will be comfortable, favoring for realization of mediation rules, and not overwhelming. A place should reflect the principle of neutrality, so that the parties can participate in the process without embarrassment and should guarantee the respect for the principle of confidentiality.

Organizing a mediation process, a professional mediator remembers about main stages of the whole process. It starts from individual meetings with each party, when the mediator is obliged to inform parties about the rules of mediation and explain what the process is and what the mediator's role is. He/she should make sure, if parties understand the rules and other issues. Then there are so-called common sessions, when parties verify their positions, regrets, expectations, claims

[6] Dz.U. z 2016 r., poz. 380 z późn. zm.

and, with the help of mediator, try to find solutions (possible, acceptable, satisfying). The model course of mediation (Kalisz, Zienkiewicz, 2014) should consist of those following stages:

- Parties' decision and initiation of the mediation process,
- Preparing the mediation, including preliminary diagnosis of the reasons of conflict and its object,
- Initiation of the mediation sessions,
- Presentation of the parties positions,
- Defining the main problem,
- Exchanging of suggestions of solutions,
- Working out a common solution,
- Writing the final agreement,
- Closing of the mediation sessions,
- Introduction of terms of the settlement into force.

Mediator cannot/should not[7] suggest solutions for parties, nor offer them directly. Solutions should be an initiative of conflicted parties, because of the fact that they are – as a result – responsible for the realization of solutions, not the mediator.

3. Responsibility for the realization of rules of mediation

The rules of mediation are clearly defined in *The Code of Mediator's Ethics*. They are canvas for all the mediators' actions and behaviours in Poland. Each mediator, when initiating the agreement process, is obliged to present the rules of mediation, that are obligatory in the process, to the parties. In some cases the parties generate their own additional rules, important for them during the mediation. Still, the basis are five primary rules[8]:

- Confidentiality,
- Voluntariness,
- Impartiality,
- Neutrality,
- Acceptability.

It is stressed above, that many of Polish associations and other organizations leading mediation actions have also their own, additional rules. It is also necessary to remember that participants of mediations have the right to introduce their own

[7] There are various schools of conduct mediations. In most of them it is considered that the mediator cannot suggest solutions, according to assumption that he/she is not in parties' place. Only parties are able to specify their own needs and expectations. However, it sometimes happens that mediations are conducted in coactive, more facilitative way, where the mediator can provide feedback regarding to solutions and suggest other ideas.

[8] All the rules were described in detail and presented in publications: A. Rękas (2010), *Czy tylko sąd rozstrzygnie w sporze? Mediacja i sądownictwo polubowne*, Warszawa, and A.K. Duda, J.M. Łukasik, *Mediacje jako alternatywna metoda rozwiązywania sporów w szkole*, Debata Edukacyjna, 4/2011, Kraków.

rules that are important for them from the perspective of calm and correctness of mediation proceeding or – what is more important – guarantee of the feeling of safety and confidence for parties.

Because of law, but also of emotional reasons, it is the principle of confidentiality that encumbrances the mediator most. Its breaking by mediator can cause damage in accordance to article 471 od *The Civil Code*. What is more, it is mediator's responsibility from article 72 of *The Civil Code*, where it is written that in case of infringement of the principle of confidentiality[9], mediator should repair the damage caused and give back all the derived benefits to parties or satisfy.

> ***Art. KC 721*** *§1. If the negotiations party has provided information on a confidential basis, the other party is obliged to disclose and not pass on to others and not to use such information for their own purposes, unless the parties agree otherwise.*
>
> *§2. In the event of non-performance or improper performance of duties, referred to in §1, entitled may claim from the other party damages or release of the benefits it received* (Dz. U. 2016 poz. 380).

Confidentiality also includes all the participants who are not the parties of conflict. *Ex lage* confidentiality refers also to the fact, that mediation has no witnesses, it is an implicit process. However, by way of exception, upon a common request (by common consent), experts, chartered, legal protectors can be joined to mediation. It also happens that mediations are conducted with the participation of lawyers, representative agents or (what is very rare) middle agent. All these participants, such as the mediator, are obliged to follow the principle of confidentiality. Responsibility of the third party is mentioned in article 474 of *The Civil Code*.

It is worth to mention, that the principle of confidentiality is so hardly established by law, that even calling the mediator as a witness to court in a case, where he/she had led mediation that had not finished with agreement, is ineffective. Court dismisses *ex officio* such a request.

However, very important is notation functioning in Polish legislation, on which the court can exempt from the principle of confidentiality and implicit of mediation. Such situation concerns having by mediator information connected with terrorist threat and the other threat for the state security. According to article 240 of *The Penal Code*, mediator is obliged to notify the competent authorities of the crime.

> ***Art. 240KK****. §1. Who, having reliable information about punishable preparation or attempt or execution of an offense referred to in* ***art. 118*** *extermination,* ***art. 118a*** *part in a mass assassination – criminal liability,* ***art. 120–124, art. 127*** *coup,* ***art. 128*** *attack on the authority of a constitutional Republic,* ***art. 130*** *espionage,* ***art. 134*** *attempt on the life of the President,* ***art. 140*** *terrorist attack,* ***art. 148*** *murder,* ***art. 163*** *to bring the incident,* ***art. 166*** *piracy,* ***art. 189*** *deprivation of human freedom,* ***art. 252*** *take a hostage*

[9] Although the article 71 of The Civil Code refers to negotiations, it also refers to mediations that can be compared with "supporting negotiations".

or terrorist offenses, does not inform immediately the body responsible for prosecuting criminal offenses, is punishable by imprisonment up to 3 years.

Breaking the principle of confidentiality can also held mediator responsible in tort (*ex deliktu*). It means that mediator can be responsible for this offense as for a prohibited act according to art. 415 of *The Civil Code*.

Art. 415*. Who is the fault of his damage caused to another, is obliged to repair it.*

This regulation refers also to other rules of mediation. According to the principle of voluntariness, the parties have to express an agreement to participate in the process together, but even after joining the mediation they have the right to resign without giving a reason. The mediator also can use the right to refusal to conduct mediation, but only because of important reason. The obstacle in the organization of mediation process can be the fact of affinity or kinship with at least one of the parties or involvement in the conflict (therefore he/she cannot be neutral to the object of conflict). However, if he/she refuses to mediate without giving the important reason or if he/she undertakes on this task despite existing obstacles, and the parties as a result suffer loss (damage), the art. 415 of *The Civil Code* can be used.

4. Ethical/moral responsibility

Ethical and moral[10] doubts referring to the correct realization of the process, proceeding following the rules of mediation, are extremely common phenomenon in the occupation of mediator. On various social networking sites, world web sites and forums dedicated to mediators there are very common questions asking for help or advice connected with ethical issues. The most common examples (appearing in literature dedicated to mediators and on the Internet sites mentioned above) are problems connected with: suggestions, extreme diversity of beliefs that harm the mediator, confidentiality.

In mediations essential is to initiate all the solutions and suggestions of actions by parties. However, there could be situations, where parties act (in the consequences of realization of following decision in the agreement) on their own against each other or even come into conflict with the law. The mediator has available only his/her own workshop equipped with communication techniques. The mediator cannot be responsible for the final decision of the parties regarded to the form of agreement and the way of its realization that takes place outside the mediation. In case when some points cause clear doubts it is possible that the court rejects the decision of such an agreement or changes its shape.

A difficult situation, especially for young unexperienced mediators, can be extreme diversity of beliefs from those that are represented by parties. However, it is necessary to remember about one of the key rules of mediation – the principle

[10] The rules of mediation, their interpretation and a role of mediator were prepared as *The Code of Mediator's Ethics* by The Polish Centre of Mediation (2003).

of neutrality to the object of conflict, parties and their relationship. The mediator should be focused on supporting the parties in striving for agreement regardless of expressed parties' beliefs, opinions, values and confessions.

A different situation is when the mediator is aware of applicable regulations and knows his/her own competences and qualifications in mediations, but he/she starts to lead mediation despite of lack of permission. This situation can happen for example in criminal mediation, because it requires additional permissions allowing to the matter. These permissions are: age (completed 26 years), knowledge about psychology, pedagogy, resocialization or allied sciences and experience in mediation. In cases of civil mediations, when a mediator can be a person who completed 18 years old, there is an obstacle that makes leading mediations impossible – deprivation of public rights. It is, however, acceptable, that if – despite of lack of formal permissions – parties achieved a solution and made a satisfying agreement, the mediation is considered as valid and not incorrectly conducted. But when the process is considered as incorrect, there is not only mediator, but also the organization (that recommends the mediator and inscribes him/her on the list of permanent mediators) that incur responsibility.

5. Responsibility for the balance of the parties

The balance of the parties is one of the except codex rules of mediation. Its realization has special significance in achieving the parts' common satisfaction of accepted solutions. In situation, when one of the parties is much more dominant in the process than another, the mediator's task is to strive to balance both of the parties. This rule seems to exclude with the principle of impartiality, but the balance of the parties is not on the unilateral strengthening, but a responsible organization of the communication process between the parties. This rule is also realized through choosing the place for mediation that is not linked closely with the parties (for example it is not a place of residence or a workplace for any of the parties). Individual meetings are conducted in the same or similar conditions so that none of the parties feel favoured. Lack of respect for this principle usually results in breaking the mediation by one of the parties. In that case the mediator does not bear legal responsibility, although such experience can affect in a negative way on mediator's morale and self-esteem.

Summary

Mediations in Poland develop, implanting in many fields of law and daily life. With the progress, the level of mediator's responsibility for the mediation process increases. The mediator bears not only law responsibility, but also ethical responsibility, that is the biggest warranty for this occupation allowing to use the word "professional". For not because of regulations, statutory rigors and courts' expectations the high quality and mediator's engagement results, but for the deep belief in the power of agreement, belief in human goodness and the value of which is justice.

Therefore, responsibility imposes on the mediator a number of additional duties, but it also makes that – as internalized value – responsibility can become "propulsion motor" in an effort to make professional the occupation of mediator and an indication on the path to true justice and reconciliation.

Responsibility for the process of all the participants of mediation occurs when the agreement between the mediator and the parties is signed.

Responsibilities of the parties should be:

- Independent from the mediator,
- For the mediation result, outcome,
- For the realization of the provisions of the agreement,
- For the real agreement or reconciliation.

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Responsibility in the process of mediation – in terms of pragmatic and ideological

Abstract

The article is a theoretical synthesis of mediator's tasks and obligations and parties taking part in mediation process in the context of responsibility for the whole process. It is also the analysis of law regulations referring to mediation. Issues of mediator's ethics, responsible realization of mediation rules, and responsibility for not taking actions or resignation by all the participants of mediation process were also raised in this article.

Key words: responsibility, mediation, justice, rules of mediation, ethics, judicial proceeding

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