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Effectiveness of Mediation – Between Effort and Result

Efektywność w mediacji – pomiędzy działaniem a skutkiem

SUMMARY

This paper presents and analyses the factors that shape and affect the process of mediation and essentially determine its final outcomes. Mediation works as a recognized social institution and a legal measure. Therefore, in order to analyze the effectiveness of mediation, both of these areas need to be addressed. The principal goal of mediation is to reach an agreement on the settlement of a dispute. To arrive at this point of the process, a series of factors should be taken into account, informed decisions need to be taken, and a number of obligations have to be fulfilled.

Keywords: mediation; mediation strategies; responsibilities of mediator

INTRODUCTION

Mediation is understood to be a voluntary and intentional process, the essential result of which is to enable the parties to resolve the dispute by agreement. However, the relevance of mediation-accompanying processes should also be recognized. Namely, mediation is geared to reopening the lines of communication between parties; it inherently involves an analysis of the circumstances of the conflict, it allows the mediating parties to identify and understand their interests, needs, and motivations, it helps them explore the external conditions which determine the nature of the dispute and the possibilities to find a way out of the conflict.

In this paper, it is argued that the effectiveness of mediations and its determinants should be analyzed from two different dimensions – both of which are centered on the working practices of the mediator. As the final outcome of mediation is largely contingent on the quality of work of the mediator, the first dimension concerns the

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working practices of the mediator, which obviously depend on his or her level of professional knowledge, skills, and personality. Although according to the rules of the system, any person may become a mediator, I presume that – in view of the specificities of the process – mediators must be competent and knowledgeable in the process of mediation. One of the essential skills in this profession is the ability to choose an action plan suitable for the type of mediation, the nature of the conflict, and the interaction dynamics between the disputing parties. The other dimension of the effectiveness of mediation is the scope of responsibilities of the mediator, particularly with regard to mediation conducted by court order, and the extent to which the mediator fulfills his or her professional obligations. The obligations and responsibilities of the mediator are stipulated in national law and are promoted by internal regulations and ethical standards adopted by institutions which provide mediation services (e.g. mediation centers). The way these obligations and responsibilities are fulfilled directly determines the mediation process and its main outcome.

MEDIATION STRATEGIES DETERMINED BY THE TYPE OF MEDIATION

The agreed mediation formula is the first criterion for selecting a mediation strategy. Depending on the mediation formula, the mediator may facilitate and assist the disputing parties in reaching a mutually acceptable settlement or intervene in the dispute. Mediators are not authorized to take any key decisions, and therefore – in any mediation – assistance predominates over intervention. However, in some mediation models, a mediator may become actively involved in the dispute. In this case, the behavior and role of the mediator largely depend on the consensus of the parties, as well as his or her knowledge and skills. As a rule, mediation seeks to establish independent standards reflecting the nature of the conflict rather than conforming to the existing standards. This particular quality of the process makes it different from adjudication and makes the introduction of a 'third party neutral' to intercede in the conflict particularly attractive.

Mediation is not intended to subsume the actual situation of a conflict to any existing legal standard; instead, mediation seeks to apply the principles of equity to make the parties as much satisfied as possible with the proposals of the mediator. Mediation is a kind of intermediation in a dispute to make it easier for the parties to reach a consensus and settle the terms of an agreement. It helps to understand the root causes of the conflict and is intended to increase the willingness of the conflicted parties to seek mutual concessions and to rebuild relations between the parties. In mediation, what happened in the past is only relevant if it is directly related to the presence as a means to foresee the future, in order to encourage the parties to explore their future needs, capabilities, and reactions to decisions[1].

[1] J. Folberg, A. Taylor, *Mediation. A Comprehensive Guide to Resolving Conflicts Without Litigation,* San Francisco 1984, p. 31.

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The main determinants which are conducive to involving a 'third party neutral' in a conflict can be divided into the following three categories: nature of the dispute, skills, and abilities, and the nature of the relationship between the disputing parties in objective and subjective terms. The main characteristics of a dispute include the root causes of distributing bargaining with a focus on the indivisibility of goods being the subject of the dispute, conflicting interests or goals, and the lack of consensus about the normative determinants for solving the dispute. The more complex the situation and the greater risk of a conflict it carries, the greater the role of the skills and abilities in reaching a consensus. These two factors counterbalance each other. In practice, the more complex and the more aspects situation it involves, the more interdisciplinary knowledge is needed[2].

The subjective aspect of the relationship between the disputing parties depends much on the willingness of the parties to maintain contact or reach an agreement, and on the degree of their mutual trust and confidence. The objective aspect is made up of the external conditions of disputes between conflicted parties who are in regular contact and maintain constant communication, such as neighbors, peers, family members, or co-workers[3]. The objective factors increase the likelihood that the parties will use mediation to solve the dispute, provided they are willing to reach an agreement and are aware they lack the necessary skills to do so. A dispute can be subject to arbitration or litigation if the parties lack the necessary skills and are unwilling to settle the dispute by agreement.

Mediation can be classified according to the following criteria: the main reason for starting the mediation, the style of conducting mediation chosen by the mediator, focus on a particular outcome, and the venue where mediation is carried out. Mediation is basically divided into conventional mediation and court-mandated mediation. Conventional (or facultative) mediation is initiated by the conflicted parties under a mediation agreement. Court-mandated mediation (or obligatory mediation) is initiated under a court order, by which a competent court refers parties to mediation and the parties are ordered to attend a mediation meeting. According to the principle of autonomy of mediation, the decision to initiate and continue talks, and specifically to reach an agreement, remains at the sole and exclusive discretion of the parties[4].

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[2] M. Pękala, *Dobry mediator – czyli kto? Kwalifikacje zawodowe mediatorów w świetle opinii ekspertów*, [in:] *Mediacja. Teoria, normy, praktyka*, red. K. Płeszka, J. Czapska, M. Araszkiewicz, M. Pękala, Warszawa 2017, p. 489.

[3] Cf. T. Echoff, *The Mediator, the Judge and Administrator in Conflict-Resolution*, „Acta Sociologica" 1966, Vol. 10, pp. 156–157, quoted in: J. Kurczewski, *Spór i sądy*, Warszawa 1982, p. 57.

[4] See for example L. Parkinson, *Family Mediation*, London 1997, pp. 69–70; S. Pieckowski, *Mediacja w sprawach cywilnych*, Warszawa 2006, pp. 14–13; D. Peters, *Wstęp do zasad i teorii mediacji*, Materiały z konferencji Uniwersytetu Warszawskiego pt. „Mediacja – nowa metoda rozwiązywania sporów w sprawach cywilnych", 7 października 2005 r., p. 2.

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Evaluative mediation and facilitative mediation are two models of mediation distinguished by the mediation style and practices adopted by the mediator. In evaluative mediation, the mediator is actively involved in the efforts of the parties to reach an agreement and becomes a co-author of the final settlement. In facilitative mediation, mediator's role is to educate the parties and help them reach a consensus on their own and by their own merit[5]. Another mediation model is used in family mediation and in criminal matters. Depending on the outcome of mediation, the following mediation models can be distinguished: 1) settlement-directed mediation, 2) therapeutic mediation, and 3) transformative mediation[6].

In each of these models, the objective is to find an amicable solution; however, mediation can also serve therapeutic purposes or may encourage the mediating parties to change their attitudes and develop their skills. In civil law cases, therapeutic mediation is not used because of the subject-matter of the dispute. By definition, mediation in civil law cases is settlement-directed. Transformative mediation is recommended if the parties maintain a permanent relationship while exercising parental care.

It is universally recognized that mediators are required to be impartial, neutral, and mutually acceptable for the mediating parties[7]. Mediator's acceptance by the mediating parties is a token of his or her impartiality and a *sine qua non* requirement for a successful mediation. Mediation orchestrated by a competent, neutral, and impartial 'third party neutral' is intended to facilitate and assist the disputing parties to diagnose the root cause of the conflict, and to organize the process by, i.a., establishing clear procedural rules and principles. By definition, this is a voluntary and confidential process.

In mediation, also referred to as 'negotiations with a third party neutral', the mediating parties maintain their autonomy and the right to take substantive and procedural decisions. The mediating parties may withdraw from and terminate the mediation, or may arrive at a consensus but then refuse to formalize the final settlement agreement. The implementation of arrangements concluded through mediation

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[5] Cf. L.L. Fuller, *Mediation – Its Forms and Functions*, "Southern California Law Review" 1970/71, Vol. 44, pp. 308–310, quoted in: A. Korybski, *Alternatywne rozwiązywanie sporów w USA. Studium teoretycznoprawne*, Lublin 1993, pp. 116–117; E. Gumrzyńska, *Mediacje administrowane przez sądy*, Materiały z konferencji Uniwersytetu Warszawskiego pt. „Mediacja – nowa metoda rozwiązywania sporów w sprawach cywilnych", 7 października 2005 r.

[6] See L. Parkinson, *op. cit.*, p. 82–85. Cf. E. Gmurzyńska, *Rodzaje mediacji*, [in:] *Mediacje. Teoria i praktyka*, red. E. Gmurzyńska, R. Morek, Warszawa 2009, pp. 176–187; A.M. Arkuszewska, A. Kościółek, J.M. Łukasiewicz, J. Plis, T. Serafin, *Zarys metodyki pracy mediatora w sprawach cywilnych*, Warszawa 2014, pp. 62–67.

[7] Cf. M. Noone, *Essential Legal Skills. Mediation*, London 1966, p. 5; K. Czayka-Chełmińska, R. Świeżak, M. Tański, *Mediacja rodzinna*, [in:] *Alternatywne metody rozwiązywania sporów. Przegląd zagadnień*, Warszawa 2003, p. 16.

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is at the sole discretion of the conflicted parties[8]. The correlations discussed when interpreting the concept of 'negotiations' also apply to mediations. If mediations are conducted correctly, and the mediator has the necessary professional competence, the responsibility for the mediation process is shifted on the mediator, while the parties are allowed to enjoy the freedom mandated under the contract for mediation.

The professional competence of the mediator and the confidence of the mediating parties are the main prerequisites. Mediator's responsibility is to control the legality and enforceability of settlement proposals, to seek all possible options available and alternative solutions, to extend the sources of information, and to accept responsibility to make the decisions mutually satisfactory and acceptable for the conflicted parties, would imply a loss of face. Mediator should work to make the parties aware that the claims they put forward are correlated with specific values and social standards that apply to the subject-matter of the dispute[9]. During the talks, the mediator orchestrates the solution-seeking process, teaches the mediating parties to communicate and to separate emotions from the subject-matter of the dispute.

The educational function of mediation is widely underscored, in which mediators teach the mediating parties to solve problems cooperatively. The mediator is required to control behaviors and arguments of the disputing parties. There is no doubt that, despite the lack of formal authority over the conflicted parties, the mediator has a major impact on the mediation process, and the role of the mediator involves much more than simply clarifying the matter of the dispute. The role of the mediator differs from that of an arbitrator or a judge in the sense that the mediator does not coerce the parties into agreement or impose any solution on the parties; rather, he or she strives to convince the parties to behave in accordance with the values and principles accepted by the social environment[10]. Mediator's role and responsibility for the process implies that he or she has mastered the basic skills and meta-skills. Unlike arbitrators or judges, mediators do not have any decision-making power, and their actual impact is limited to orchestrating the mediation process and providing assistance to the conflicted parties in integrative negotiations. Mediators are not authorized to resolve the dispute, but they are otherwise involved in the relationship between the stakeholders rather than being an outsider, such as an arbitrator or a judge.

According to this approach, it is understood that the mediator has the obligation to know as much about the process of the conflict and to have as much experience in conflict solving as possible. Obviously, mediation is the preferred means of dispute

[8] Cf. L. Parkinson, *op. cit.*, p. 5; A. Pietrzyk, *Mediacja jako forma interwencji w sporze stron*, „Palestra" 1996, nr 4, p. 43.

[9] Cf. A. Korybski, *op. cit.*, p. 117.

[10] Cf. A. Halpern, *Negotiating Skills*, London 1992, pp. 89–90; L. Parkinson, *op. cit.*, pp. 12–19; M. Bobrowicz, *Mediacje gospodarcze – jak mediować i przekonywać*, Warszawa 2004, pp. 19–33; E. Kowalczuk, *Mediacja i arbitraż jako przykład interwencji trzeciej strony w negocjacjach gospodarczych*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1999, nr 2, pp. 191–192.

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solving whenever communication barriers between the disputing parties are accompanied by the parties' willingness to reach an agreement. Mediator also acts as a kind of warrant of the settlement agreement, who is committed to make the settlement enforceable and lasting and to make the parties aware of its consequences. This responsibility is all the more relevant given that, apart from the agreed settlement and the parties' consent to accept all of its consequences, there are no direct warranties that the settlement agreement will, in fact, be implemented by the mediating parties.

Mediation can be evaluated either subjectively based on individual party's perception of and satisfaction with the mediation process, or objectively based on the criterion of quality of the settlement agreement[11]. If a settlement-oriented approach is adopted, the mediator is obliged to intervene whenever the communication between the parties becomes dysfunctional. Through better verbal communication, the parties become more prepared and willing to search for solutions, listen attentively, ask important questions, and ultimately to solve the conflict. At this stage of mediation, the main objective of the mediator is to eliminate communication barriers, especially at the psychological level, and to streamline the flow of information. Mediator's role is to eliminate behaviors which are typical for a conflict.

Instead of evaluating the past, the mediator seeks and analyzes solutions setting out the circumstances within which plans may be implemented in the future[12]. Building trust between the parties and streamlining communication are means and measures to these ends. In complex conflicts, it may be helpful to deconstruct the conflict into smaller bite-sized pieces. The mediator suggests how to solve individual aspects of the conflict within separate areas, and determines the sequence in which particular solutions can be adopted. Next, the particular arrangements are combined into a general consensus. Finally, if the suggested solutions on how to reach a constructive agreement are not successful, the mediator may adopt firm tactics. As part of this strategy, the mediator puts pressure on the parties to encourage them to abandon unrealistic expectations and to adopt the proposed solutions.

Due to the similarities between negotiation and mediation, the professional skills and competences of mediators and negotiators largely overlap. However, given these

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[11] The main criteria: durability, enforceability, and the level of acceptance and satisfaction of the parties with the agreement reached, analyzed against and correlated with the previous criteria. The term 'effectiveness of mediation' is also used. The highest effectiveness of mediation is reported in cases which concern crimes against: property (80%), family and custody (77.8%), freedom (75.8%), and property and life (73.3%). See M. Mendelska-Stec, *Wyniki badań. Funkcjonowanie instytucji mediacji w Polsce*, „Mediator" 2005, nr 34(3), pp. 58–63. Cf. A. Gójska, *Przegląd badań w dziedzinach mediacji rodzinnych na świecie*, „Mediator" 2004, nr 29(2), pp. 23–47; E. Dobiejewska, Dobiejewska, *Stan mediacji w Polsce*, „Mediator" 2003, nr 27(4), pp. 45–50; E. Wildner, *Postępowanie mediacyjne w polskim procesie karnym. Teoria i praktyka*, „Mediator" 2004, nr 30(3), pp. 9–16.

[12] A. Pietrzyk, *Mediacja jako forma pomocy psychologicznej w konfliktach małżeńskich*, [in:] *Psychologiczna problematyka wsparcia społecznego i pomocy*, red. Z. Ratajczyk, Katowice 1993, p. 156.

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two functions are distinct and subtly different; the skills of mediators also include the ability to effectively steer the mediation process by exerting an influence on the parties. The parties must agree to enter into talks and must accept the mediator throughout the process, which excludes any bossy and arbitrary behavior on the part of the mediator. On the other hand, the collaboration paradox may emerge[13].

P.J. Carnevale and P.A. Keenan developed a strategic mediation model in which the mediator identifies and sets the goals to pursue in mediation by exercising influence on the parties[14]. The basic strategies include integration, exerting pressure, mitigation, and passive participation. Integration is geared to reaching a constructive solution which can satisfy the basic aspirations of the conflicted parties. By exerting pressure, the mediator seeks to limit the ambitions and desires of one or both of the mediating parties. Mitigation strategy is aimed to produce extra value from making a compromise or from implementing modifications in the final settlement agreement. Passive participation means allowing the parties to control the dispute on their own so that they do not have to be assisted by a mediator in solving any possible disputes in the future.

While selecting a specific mediation strategy, the mediator takes into account the following two factors: mediator's focus on the desires, goals, and aspirations of the negotiating parties, and his or her own impression of the existing possibilities to find common ground through cooperation between the parties. Mediation is not psychotherapy focused on the experiences of the mediating parties. It takes other types of qualifications to orchestrate this process. The results of studies by P.J. Carnevale support this conclusion.

A 'soft' mediation strategy, in which the mediator mitigates and concentrates on the aspirations of the mediating parties, makes room for presenting own arguments and reasoning. If the mediator, having listened to the arguments of the parties, fails to respect them and urges the parties to work on a consensus, the negotiating parties are more ready to make concessions. In conclusion, if the mediator is excessively focused on the arguments of the mediating parties and uses mitigating measures, he or she may be perceived as ineffective, weak and vulnerable. On the other hand, a mediator who has a strong influence on the parties is perceived as professional and effective. These studies prove that mediation is a complex process which involves a multitude of different expectations towards the mediator[15].

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[13] This phenomenon has been examined in the game theory. In a situation of a conflict, where one of the parties adopts a peaceful strategy and acts accordingly despite that the other party pursues a war strategy, war-focused behaviors tend to escalate. See J. Kozielecki, *Strategia psychologiczna*, Warszawa 1975, p. 127.

[14] Quoted in: A. Pietrzyk, *Strategie i taktyki mediacyjne w sprawach rozwodowych*, „Nowiny Psychologiczne" 1991, nr 3–4, p. 36.

[15] See Ch.W. Moore, *The Mediation Process: Practical Strategies for Resolving*, Jossey-Bass 2003, pp. 43–84.

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STRATEGIES DETERMINED BY THE EXTENT OF THE CONFLICT

The canon of knowledge and competences concerning negotiation and mediation recognizes three dimensions of negotiations: factual (substantive), psychological,and procedural (Fig. 1)[16]. In American literature, negotiations are divided into the following areas: psychological/emotional – internal, environmental/social – external, and substantive/economic – rights[17]. From this perspective, the procedural dimension should be understood broadly as all external circumstances, including place, time, space, and procedures, which make up the mediation environment (environmental area).

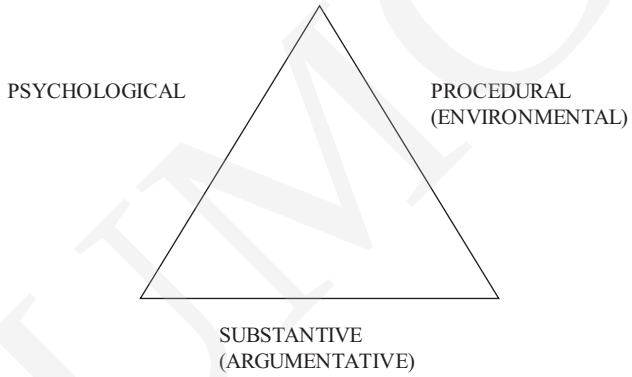

Fig. 1. The triangle of dimensions of situation and satisfaction in negotiations and mediations

The substantive dimension comprises all issues relating to the conflict of interests and the goals of the negotiating parties. It is a common perception that the substantive dimension covers the problems to solve or, in other words, the issues over which the parties cannot seem to agree. This dimension is strongly correlated with the economic, technical, and legal aspects understood as the powers and duties existing within the framework of the negotiated legal relationship.

The psychological (emotional) dimension reflects the fact that negotiations are conducted by people. Said like this, it seems the most banal of statements, but in negotiations, it has wide-scale implications and lies at the core of analyses of interpersonal processes, distortions in the perception and evaluation of the situation, and decision-making. In this area, emotions and personal needs of the negotiating parties are highlighted as the determinants of how the talks proceed.

[16] Cf. J. Kamiński, *Negocjowanie – techniki rozwiązywania konfliktów*, Warszawa 2003, pp. 23–24.

[17] Cf. J. Floberg, D. Golann, *Lawyer Negotiation. Theory, Practice and Law*, New York 2006, p. 7; R.A. Rządca, *Negocjacje w interesach. Jak negocjują organizacje*, Warszawa 2003, pp. 107–112.

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The procedural (environmental) dimension reflects the fact that the final outcome of negotiations is also determined by the background and purely procedural limitations and opportunities for conducting talks. The relevance of external circumstances in disputes largely depends on the characteristics of the conflicted parties. Still, by establishing a clear and fair procedural framework for conducting talks, the negotiating parties are confident that the settlement agreement is achieved fairly. This is the underlying principle followed by the advocates of the American concept of a fair trial[18].

The model of dimensions has two practical implications. On the one hand, it arranges and organizes the areas in which the parties are required to adopt a strategy and to undertake the ensuing actions. On the other hand, it identifies the elements (or the areas) which make the parties of the dispute feel satisfied or successful. It is important to note that the general assessment of the process is constituted by the positive perception of each of the identified areas. In particular, this means that satisfaction with substantial arrangements has no bearing on psychological or procedural satisfaction[19]. Substantial satisfaction is the feeling of having reached your objectives and having your needs satisfied. Psychological satisfaction is the feeling of being important and appreciated, or of being the author of the adopted solutions. Procedural satisfaction translates into an acceptance of the conflict-solving procedures, and the perception that they are fair[20].

Therefore, apart from extreme cases of being satisfied or dissatisfied in all areas, the following examples of how the process and the outcome of mediation can be assessed:

- a party is dissatisfied with the settlement, but is also convinced that the other party has complied with the standards of fairness and honesty, and thinks the party itself has been treated accordingly – substantial dissatisfaction is accompanied by satisfaction with procedural and psychological aspects,
- the party has accomplished all their goals, but has a sense of being neglected and deceived – substantial satisfaction is accompanied by dissatisfaction with psychological and procedural aspects,
- the party is satisfied with the substance of the settlement agreement and thinks the procedures have been honest, but also has a sense of not being in control of the process – substantial and procedural satisfaction is accompanied by psychological dissatisfaction,
- the party is satisfied with the substance of the settlement agreement and the way they were approached during the talks, but has reservations about the

[18] L. Morawski, *Proces sądowy a instytucje alternatywne (na przykładzie sporów cywilnych)*, „Państwo i Prawo" 1993, z. 1, p. 20.

[19] Ch.W. Moore, *op. cit.*, p. 335.

[20] M. Łaguna, B. Markowicz, *Negocjacje i komunikacja w biznesie*, Olsztyn 2003, p. 8.

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fairness of the other party – substantive and psychological satisfaction is accompanied by procedural dissatisfaction.

Such a detailed assessment of the situation requires knowledge and experience. Positive assessment of the outcome of the process and dissatisfaction with the procedure itself is most unlikely. This is understandable because the objective (e.g. lack of time) and subjective (e.g. manipulation) disruptions in the talks are the causes of this negative assessment. They disrupt the overall atmosphere, which negatively influences the sense of trust and impedes the systematic processing of information or rational thinking. In consequence, the parties find it difficult to approach and deal with the dispute in a constructive manner. The effects of these disruptions in the area of psychological satisfaction depend on the negotiator's expectations in terms of the level of satisfaction of his or her personal needs. In this context, respect is the most sensitive need. Task-oriented individuals who attach little importance to the way they are approached by other individuals are more likely to achieve psychological satisfaction. On the other hand, people sometimes tend to treat others the way they would expect to be treated, and they have to make extra effort to correctly approach those with higher expectations. The question of procedural satisfaction requires that the negotiating parties establish clear negotiation procedures since the categories of fairness, honesty, and justice can be perceived differently, in a manner which does not reflect the standards generally accepted in different societies and environments. Psychological satisfaction is most highly dependent on the subjective expectations of the negotiating parties. The sense of satisfaction with the negotiations is often relative, which means the dissatisfaction of one party may be the reason why the other party is satisfied with a proposal or outcome of talks[21]. In inexperienced negotiators, dissatisfaction in one area affects the general assessment of the entire process.

In order to succeed in the substantial dimension, it takes a variety of different skills, including the knowledge of the cultural background of a product, technology, the economic circumstances, and the legal setting. Also, it requires fluency in data management (based on objective criteria) from these areas, as well as familiarity with the correlations between phenomena, qualities, and causes. Here, the expectations towards a negotiator are focused on his or her knowledge, logic, and fluency in drawing conclusions and in formulating correct and accurate arguments.

The procedural aspect of negotiations includes the dispute-solving scenario, principles of communication which should be established before addressing the crucial issues, and organizational aspects, such as time and place of talks. Procedural aspects also involve decision-making concerning a specific style of work and the ensuing working techniques. The negotiating parties perceive some of the

[21] L. Thompson, J. Nadler, *Tendencyjność sądów w rozwiązywaniu konfliktów. Jak ją pokonać?*, [in:] *Rozwiązywanie konfliktów. Teoria i praktyka*, red. M. Deutsch, P.T. Coleman, Kraków 2005, p. 227.

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discussed issues as natural and matter-of-fact. Nobody could reasonably question the fact that the mediator should introduce himself and greet other parties, or to agree on housekeeping issues or agenda, such as the duration of talks or the dates of next negotiating sessions. However, there are many more procedural arrangements to account for. Mediation is a process which has a specific dynamics which consists of many different factors, and it cannot be implemented without it being orchestrated and controlled.

In the personal dimension, mediators need knowledge and skills which allows them to control and manage emotions. They should also be knowledgeable about the types of motivation, attitudes and their determinants, and the mechanisms of change. In addition, it is vital to become familiar with the principles of social perception and the underlying heuristics. The main condition for achieving effectiveness in this dimension is to be aware of own personal competence and practical abilities. Legal and technical professionals might think this type of competence should be reserved for psychologists and similar professions. This idea is based on the erroneous belief that understanding the causes of behavior of the disputing parties means accepting their individual needs and the resulting demands.

The knowledge and awareness of the relationships between personal motivation and stakeholders' behavior in a dispute help avoid making substantive concessions to compensate for abandoning the personal needs. A correct analysis of these needs will make it easier to satisfy them mainly within the procedural aspect. A stalemate is most often caused by the sense that the other party fails to show due respect to the other stakeholder, or the conviction that there is no way out; it may also be a deliberate manipulation technique.

STRATEGIES BASED ON THE CONCEPT OF CH. MOORE

The dynamics of the conflict and the preference for a specific style of mediation hinge on the level of awareness, motivation, and ability to identify and analyze the characteristics and determinants of the stakeholders and the opposing party. The quality of actions is reflected in the substance of the settlement and how it was reached[22].

Settlements will differ in quality, type, and level of satisfaction. Broadly speaking, reaching a settlement boils down to finding a solution which provides the opportunity to satisfy the needs of the stakeholders to a mutually agreeable extent. In its narrow definition, a settlement means agreeing on the conditions of continued peaceful coexistence (cooperation, distribution of goods) which are acceptance for all stakeholders, seen both as a solution and a resolution. Reaching a settlement

[22] See Ch.W. Moore, *op. cit.*, pp. 138–143.

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which accommodates the vital interests of all stakeholders to the maximum extent possible is only possible at the conflict-solving stage.

Unless the parties undertake actions and adapt their attitudes to meet at the same level, a settlement can only be reached in its narrow definition, or else the dispute can be submitted for resolution. Nevertheless, if the stakeholders opt for the narrow definition of a settlement or a resolution, the conflict will only be reduced or mitigated. Of course, the disputing parties may end a conflict by submitting the dispute to be settled by a court[23]. At the conflict escalation level, the conflict between the parties may be that extensive or multifaceted that the parties may only pursue positional negotiations, or else they may ask a third party for assistance through mediation, arbitration, or adjudication.

Conflict escalation is characterized by the inability to communicate, distorted perception, and often a lack of control of emotions. Therefore both parties are more likely to reach an agreement with the involvement of a third-party neutral. If a dispute is submitted for resolution by a court or an arbitrator, the parties may only hope the dispute will be resolved, but problems will remain unsolved. Here, mediation is the most effective solution. In mediation, a solution to the problem is sought by the involved parties. At the same time, the parties learn how to talk to each other and to address the conflict in the future.

If the process is orchestrated by an impartial, neutral, trusted, and mutually acceptable third party, the stakeholders communicate effectively and stay focused on the problem. Through the involvement of a mediator, the conflict of relations is reduced to a conflict of interests, and the settlement is cleared and approved as complete and enforceable. If, at this level, either party wants to work on solving the conflict by relying on an analysis of interests, this can only be achieved by means of breakthrough negotiations. In breakthrough negotiations, neither party imposes any rules or terms on the opposing party. This type of negotiations is intended to create an environment which is conducive to careful consideration of the problem. This theory is based on five steps of overcoming barriers in cooperation. Usually, problem-focused negotiations are impeded by the barriers of reaction, emotions, entrenched positions, dissatisfaction, and a sense of power. The corresponding step was developed for each of these barriers[24].

The level of conflict mitigation involves cases where the dispute failed to be solved, yet the parties made efforts to avoid escalation of the conflict. Here, the consensus can be reached and conflict escalation can be avoided by negotiations based on rules[25]. Rules-based negotiations are focused on identifying mutual benefits and

[23] If the conflict concerns a matter governed by law.

[24] Quoted in: W. Ury, *Odchodząc od NIE. Negocjowanie od konfrontacji do kooperacji*, Warszawa 2000, pp. 48–149.

[25] See R. Fisher, W. Ury, B. Patton, *Dochodząc do tak*, Warszawa 2009, pp. 47–123.

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problem solving by relying on objective criteria. They involve using a staunch style of negotiations with respect to problems, and a soft style with respect to people. The stakeholders solve problems. The aim is to: arrive at an outcome effectively and by conciliation; separate people from the problem; act independently of trust, focus on interests instead of standpoints; look for opportunities beneficial for both parties; develop multiple solutions; use objective criteria; strive to get as complete a picture as possible of the reasons and arguments; follow the rules. Negotiations based on rules were inspired by the criticism of a simplified schematic perception of the negotiation process which was seen as a tender-like game of positions.

Only at the lowest level of the conflict of interest, it is possible to devise an effective (often creative) solution to a problem or to reach a settlement in the narrow sense of the word. Unless the parties take actions and reshape the conflict to correspond to this particular level, a settlement can only be reached in its broad meaning, or else the dispute can be submitted for resolution. An issue closely related to the agreement are the modes and techniques of working with conflict.

At the highest level of a conflict of relations, the conflict between the parties may be that extensive or multifaceted that the parties may only pursue positional negotiations, or else they may ask a third party for assistance. Positional negotiations are nothing more than a combat against an enemy, a zero-sum game. The conflicted parties strive to destroy the opponent and they become highly competitive, fall into entrenched positions, promote inflexible solutions, and impose demands in an attempt to force the opposing party to give up its interests. Positional negotiations are used in different types of a conflict. This happens when the parties have conflicting interests in the same limited good.

A conflict of relations is characterized by bad communication, distorted perception of the situation, and the inability to control emotions. At this stage, the parties are unable to collaborate. If a dispute is submitted for resolution by a court or an arbitrator, the parties may only hope the dispute will be resolved, but problems will remain unsolved. In a situation like this, mediation is the most effective means for the parties to address the problem as it offers the opportunity to reach an agreement on the settlement of their dispute with the assistance of a third person – a professional mediator. Mediation also offers an added value – the parties learn how to talk to each other and to address the conflict in the future. Through the involvement of a mediator, the conflict of relations is reduced to a conflict of interests, and the settlement is cleared and approved as complete and enforceable. If, at this level, either party wants to work on solving the conflict, or to analyze the conflict of interests, this can only be achieved by means of breakthrough negotiations or involving a third person neutral.

In its essence, litigation does not make any room for the areas of potential or latent conflict. The lengthy litigation has an unintentional side effect of postponement or delay, one of possible pseudo-solutions. In consequence, the conflict may

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deepen over time as the opinions and attitudes of the conflicted parties become more formal[26]. In addition to these considerations about the settlement of conflicts by legal means, theoreticians and practitioners of law also argue that the legal procedure is ill-fitted to the complex, multifaceted, or collective and dynamic nature of conflicts, which has been confirmed in research on the effectiveness of dispute solving by means of litigation[27].

RESPONSIBILITIES OF THE MEDIATOR ARISING FROM LAW AND CONTRACTS

Responsibilities of the mediator prescribed by laws in force can be divided into the responsibilities of a mediator as a person who has certain personal characteristics and behavior patterns, and the responsibilities arising from the legal aspects of the settlement agreement, especially if mediation was ordered by the court. These obligations mainly concern mediation mandated by the court. The majority of them are obvious. According to the overarching principle of the voluntariness of mediation – under Article 183^1 § 1 of the Code of Civil Procedure, a mediator is committed to obtain consents of the parties involved to join mediation and for the mediation to be conducted by a particular mediator. Under Articles 183^6, 183^{11}, and 183^{12} of the Code of Civil Procedure, and Articles 96i, 96k, and 96m of the Code of Administrative Procedure, mediator has the obligation to conduct mediation in a specific manner. Mediator contacts the parties, concludes an agreement for mediation, sets the time and venue of the meeting of the mediation, and draws up a protocol of mediation and files it to the proper court. In terms of the effectiveness of mediation, the substance and form of the settlement agreement between the parties are of essence. In particular, it is important to determine who is responsible for the unenforceability of the settlement agreement, despite the apparently successful completion of the mediation process.

The mediator may be a natural person with full legal capacity, benefiting fully from the public rights (Article 183^2 § 1 of the Code of Civil Procedure). The mediator may not be the judge. This does not apply to judges in the rest. In some legal systems, judges may be mediators on the condition that they are not authorized to give a ruling in any case in which the judge acts as a mediator. In Poland, there are detailed legal regulations imposing additional obligations on mediators in criminal

[26] Quoted in: S. Chełpa, T. Witkowski, *Psychologia konfliktów*, Taszów 2005, pp. 110–111.

[27] Cf. M. Borucka-Arctowa, *Skuteczność rozstrzygania sporów w postępowaniu cywilnym w praktyce i opinii stron*, Wrocław 1989; L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2006, p. 185.

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matters and in criminal juvenile matters[28]. In that regard, additional requirements were introduced, including the requirement of being a person of trust and training according to specific standards. Also, the list of persons not authorized to act as mediator has been extended. New obligations have been imposed by other regulations in civil and administrative law: impartiality – Article 96g of the Code of Administrative Procedure, Article 183^3 of the Code of Civil Procedure, confidentiality – Article 183^4 § 1 of the Code of Civil Procedure, Article 96j of the Code of Administrative Procedure, and information obligations in respect of the parties.

Mediator should maintain impartiality when carrying out mediation and should immediately disclose to the parties circumstances that could raise doubts about his impartiality. The impartiality obligation is equivalent to the impartiality obligation of judges. However, a judge has the obligation of professional independence, which does not apply to mediators.

Impartiality is defined as absence of prejudice or partiality, which meets the definition developed in the European Court of Human Rights case law[29]. Mediator is also obliged: 1) to refuse to conduct mediation if any doubts are raised about his/her impartiality, and to immediately disclose to the parties circumstances that could raise doubts about his impartiality; in mediation conducted as part of administrative proceedings he/she also informs public authority; 2) to immediately inform the parties of any circumstances which might give rise to doubts as to its impartiality in mediation in civil matters. The impartiality obligation also implies the obligation to refrain from any actions that may cast doubts on mediator's impartiality, such as discrimination against any party. Recognizing this also entails an obligation to treat all parties in an even-handed way, and in particular to maintain equality in communication. This obligation may be difficult to fulfill whenever the parties are economically or intellectually imbalanced. That being so, it is unacceptable for the mediator to provide more assistance to the weaker party. The essence of mediation is that the mediator advocates for reaching an agreement and solving a conflict, rather than acting as a representative or advocate of any party.

The word 'impartiality' can define as 'free from bias', what according to the definition adopted by the European Court of Human Rights means that the court is subjectively free of personal prejudice[30]. Case-law defines impartiality in a broad sense, as a feature of behavior which not only applies to the parties, but also to the subject-matter of litigation[31]. In this context, there are two additional conditions

[28] The Regulation of the Minister of Justice of 13 June 2003 concerning mediation in criminal matters (Journal of Laws, 2003, No. 108, Item 1020); the regulation of the Minister of Justice of 18 May 2001 concerning mediation in juvenile matters (Journal of Laws, 2002, No. 193, Item 1621).

[29] R. Reiwer, *Wyłączenie sędziego w postępowaniu cywilnym*, Warszawa 2016, p. 2.

[30] European Court of Human Rights Case of Švarc and Kavnik v. Slovenia of 8 February 2007, No. 75617/01, quoted in: R. Reiwer, *op. cit.*, p. 3.

[31] M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1971, p. 299.

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invoked: the court is indifferent to the outcome of the proceedings, and the case is decided on the basis of criteria free of any subjective evaluations of the judge, in reliance on law only[32].

The fundamental differences between the impartiality of judge and mediator can be traced back to their different roles; however, a broad definition of the impartiality of the mediator should be adopted, understood as an attitude towards the parties and the subject-matter of the dispute. At the same time, mediator is not allowed to exert pressure on the parties or – as a matter of fact – coerce the parties into reaching an agreement by force, illegal threat or deceit, which is inherent to the voluntary nature of the mediation process and the principle of validity of a legal action. The essence of mediation is to respect the autonomy of the parties. Manipulation is equally unacceptable[33]. Mediator fees are the only permitted benefit of the mediator arising from mediation.

The mediator and the mediating parties are also committed to keep confidentiality, i.e. mediation is covered by the obligation of professional secrecy concerning all facts disclosed in connection with mediation. Under administrative procedure law, the confidentiality obligation does not apply to facts disclosed in the mediation protocol. Under civil law, the parties may release the mediator from the confidentiality obligation. It is assumed that, if the mediator has attended individual meetings, the obligation to observe professional secrecy applies to the facts disclosed during such meetings, unless the attending party relieves the mediator from the confidentiality obligation. In out-of-court mediation, the extent of confidentiality depends on the provisions of the agreement for mediation, and specifically, it may be extended to cover information about the very fact of conducting mediation. Mediators are not allowed to act as witnesses in court proceedings, which is a corollary of the principle of confidentiality. If mediators are committed to observe confidentiality with regard to the facts and circumstances which they become aware of during mediation, then by virtue of Article 259[1] of the Code of Civil Procedure, the mediator may not be a witness, unless the parties exempt it from the obligation to maintain secrecy of mediation. According to the provisions of the Code of Administrative Procedure, Article 96n § 2, documents and other materials that are not in the investigation file but are disclosed in the course of mediation are not liable for inclusion in the litigation files. Exceptions to this rule are documents and materials which are the basis for settlement of the case according to the arrangements stipulated in the mediation protocol. The confidentiality principle restricts the possibility to apply a broader interpretation of the provisions which define the contents of mediation protocols.

[32] R. Reiwer, *op. cit.*, p. 3; J. Mokry, *Osobowość sędziego a niezawisłość sędziowska*, [in:] *Studia z prawa postępowania cywilnego. Księga pamiątkowa ku czci Zbigniewa Resicha*, red. M. Jędrzejewska, T. Ereciński, Warszawa 1985, pp. 217–218.

[33] See M. Bobrowicz, *op. cit.*, pp. 1–37.

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Concurrently, according to Article 240 of the Penal Code, and Article 304 of the Code of Penal Procedure, the confidentiality principle does not apply where, as a result of mediation, facts are disclosed that can be considered a criminal offence.

The confidentiality obligation imposed on the parties is limited to not being allowed to invoke or refer in the course of proceedings before a court or arbitrator to settlement submissions, proposals for mutual concessions or other statements made in mediation proceedings (Article 183^4 § 3 of the Code of Civil Procedure). In addition, the provisions of Article 72^1 § 1 of the Civil Code also apply to mediation: "If during negotiations a party makes information available with a stipulation of confidentiality, the other party cannot disclose or submit the same to other persons or use the same for its own purposes unless the parties agree otherwise".

Specific disclosure obligations are by all means a separate category. They refer to disclosing any circumstances that prevent a person from acting as a mediator, and more specifically, circumstances that prevent the mediator from being maintaining impartiality, as well as information that, under Article 183^{12} of the Code of Civil Procedure, by signing the agreement the parties agree to submit the settlement agreement to the court with a request for its approval. It is not clear as to the extent of the obligations and responsibilities of the mediator arising from the fact that the settlement agreement is subject to approval by court under certain conditions. From the point of view of protection of the interests of the parties, it is relevant whether and to what extent the mediator is responsible for the quality of the settlement agreement.

In out-of-court mediation, the question of consensus in all aspects: the conclusion and substance of the settlement agreement, the formalization of the settlement agreement, and the enforcement of the settlement all depend on the will of the parties. Mediators may perform these steps or refuse to do it, and limit their involvement in mediation to assisting and supporting the parties in communication. In such a case, if the parties are determined to end the dispute and reach agreement in the form legally required or secure its enforcement, they should seek legal assistance. As a rule, mediator has no obligation to have legal training. In addition, the scope, substance, or the essence of the settlement agreement requires this sort of measure. In mediation mandated by court, according to the provisions of Article 183^{12} and Article 183^{13} of the Code of Civil Procedure, the mediator has obligation to provide information to the parties and the obligation to serve on the parties a copy of the protocol[34].

The requirement that the settlement should be 'in writing' is clear from the wording of the provision of Article 183^{12} § 2 of the Code of Civil Procedure ("The parties sign the settlement"), and the provisions concerning the approval of settle-

[34] See A. Włosińska, *Rozwiązywanie sporów cywilnych w drodze mediacji w świetle nowelizacji Kodeksu postępowania cywilnego z 10.09.2015 r.*, „Monitor Prawniczy" 2016, nr 20, pp. 1102–1108.

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ment by the court. This obligation also involves the mediator's obligation to control the correctness of signing the settlement agreement by the mediating parties, which again involves the obligation to confirm the identity of the parties[35]. The law provides that the obligation to review the substance of the settlement agreement rests on the court instead of the mediator. It is the court who decides whether to approve or reject the settlement. Obligation of the mediator determined by legal regulations is limited to stating in the Protocol the inability of the parties to sign the settlement agreement together with the reasons for that decision, observations of the mediator, and arguments put forward by the parties[36].

The mediator may act as a warrant of the quality of the settlement agreement, and assist the parties to identify contradictions and inadequacies therein, or refuse to provide such assistance[37]. In accordance with the applicable law, the mediator is not obliged to do so. However, if the settlement agreement does not comply with the conditions of lawfulness or the principles of social co-existence, or if it seeks to circumvent law, and if it is incomprehensible or contains contradictions (Article 183^{14} § 3 of the Code of Civil Procedure), it will not be able to become an enforceable title, seeing the effectiveness of both mediation and the court's decision to refer the matter to mediation is an undesirable situation.

By operation of law, the mediator has no legal obligation to prepare a settlement agreement which meets the requirements and conditions necessary for its approval by the court. Therefore, are there are other considerations for such an obligation? First and foremost, it is evident that the mediator may include this commitment in the agreement for mediation. From an ethical viewpoint, it is advisable for the parties to be notified as to what extent and according to what modalities the mediator shall conduct mediation before the mediation begins. In particular, in mediation mandated by the court, and if the legal issues constitute a material part of the conflict and it can reasonably be expected that the parties are interested in having the settlement agreement approved by the court, it should be made clear that the settlement agreement will be signed and formalized as legally required. If the parties are represented by their agents, the mediator should clearly determine the scope of mediator's own actions and expectations towards experts[38]. Otherwise, the parties should be notified of the possible consequences.

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[35] P. Sławecki, *Obowiązki mediatora w zakresie przygotowania ugody przed nim zawartej i złożenia protokołu mediacyjnego w sądzie*, „Kwartalnik ADR" 2017, nr 2(38), pp. 93–94 and the literature cited therein.

[36] *Ibidem*, p. 95.

[37] Cf. E. Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym – zastosowania w Europie i w Polsce*, Warszawa 2007, pp. 381–382.

[38] See *eadem*, *Rola prawników w alternatywnych metodach rozwiązywania sporów*, Warszawa 2014, pp. 368–376.

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RESPONSIBILITIES OF THE MEDIATOR ARISING FROM STANDARDS

Mediation is more than just a legal institution; it is the art of reaching a consensus through intermediation of a mediator acting as a guide and mentor. During the many years of practice, mediators have developed a common set of rules for carrying out mediation. One example is mediator's monologue in which the mediator explains both the principles of mediation and the role of the mediator. The catalogue of fundamental rules of mediation includes the essentially voluntary nature of the mediation process for the parties, the autonomy and equality of the parties, safety, neutrality, and impartiality of the mediator, confidentiality, and professionalism. Professional ethics which originates from social facts reflects behavioral patterns specific for the particular field of social life[39]. The codes of professional conduct are an essential instrument which shapes the ethos and dignity of the particular profession.

The codes of ethics of mediators contain permanent content, directly related to mediation rules, in some extent. For example, they are included in the European Code of Conduct for Mediators published in July 2004, and the Code of Ethics of Polish Mediators drawn up in May 2008 by the Social Council for Alternative Methods of Resolution Conflicts and Disputes under the Minister of Justice[40]. Mediation centers, economic chambers, and occupational self-governments which offer mediation services, as well as associations of professional mediators all, adopt their ethical codes. Codes of conduct have a dual role as an educational and disciplinary measure. In its educational or motivational aspect, a code of conduct seeks to reconstruct the ideal pattern of behavior – the logic of aspirations. It also seeks to define unacceptable behavior subject to disciplinary measures[41]. Responsibilities under law and contracts, and the duties arising out of the codes of conduct largely concern the same matters. The differences are in the level of detail.

Another important function of the codes of professional conduct is to establish best practices which help solve professional dilemmas. In this context, according to the Code of Ethics of Polish Mediators, mediators shall: keep in mind the welfare and interest of the parties; ensure that all parties to mediation know and understand the concepts of mediation, the role of the mediator, and the conditions of the prospective agreement; not attempt to help the parties to resolve their conflict if he/she is not convinced of his/her competence, which will allow him/her to conduct the process fairly; not accept any form of compensation from the parties except the agreed fee; not profit by directing the parties to other experts; give the parties clear and unambiguous information about his/her competency; keep the mediation

[39] P. Skuczyński, *Etyka adwokatów i radców prawnych*, Warszawa 2016, p. 77.

[40] Kodeks Etyczny Mediatorów Polskich, https://ms.gov.pl/Data/Files/_public/mediacje/adr1/kodeksetyczny.pdf [access: 10.09.2018].

[41] Cf. R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 2001, p. 208.

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process transparent in all its aspects; and continuously improve his/her professional abilities in order to serve mediation participants in the best possible way[42]. Codes of conduct and mediation standards also concern the matters of cooperation between the parties who seek to solve a dispute, the effective conduct of mediation, and providing venue for the mediation to take place[43].

CONCLUSIONS

The analysis of the issue of effectiveness in mediation shows that there is no unambiguous model of conduct ensuring effectiveness in mediation. The main reason is, on the one hand, a wide range of matters subject to mediation, and on the other hand – according to the voluntary principle – diversity of expectations. At the same time, under the Polish law, particularly in relation to court mediation, the mediator's proceedings require the fulfillment of a number of obligations. In out-of-court mediation, their source are, in principle, codes of ethics and mediation agreements. An additional aspect that is beyond the scope of this study is the competitiveness of mediation services. The number of mediators is constantly growing, just like the number of mediations. Conducting mediation in accordance with the legal requirements and basic principles of the mediator's ethics is the minimum condition of being a mediator. Other conditions, such as the selection of an appropriate strategy for working with a conflict, an effective impact on its dynamics or the ability to reach an agreement that fully corresponds to the interests of the parties, are factors of competitive advantage on the increasingly demanding mediation market.

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[43] See for example: *Standardy prowadzenia mediacji*, http://smr.org.pl/standardy/standardy-prowadzenia-mediacji [access: 11.09.2018].

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STRESZCZENIE

Celem artykułu jest przedstawienie i analiza czynników, które wpływają na proces mediacji, co w istotnym stopniu przesądza o efekcie mediacji. Mediacja funkcjonuje jako instytucja społeczna i jednocześnie jako instytucja prawna, dlatego analiza efektywności wymaga odniesienia się do obu obszarów. Zasadniczym celem mediacji jest zawarcie porozumienia. Ten jednoznaczny cel wymaga uwzględnienia wielu czynników, podjęcia trafnych decyzji, jak również wypełnienia szeregu obowiązków.

Słowa kluczowe: mediacja; strategie prowadzenia mediacji; obowiązki mediatora